

MASTER IN ANTI-CORRUPTION STUDIES PROGRAMME

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# Reforming the System of Asset Declaration in Malaysia as a Strategy to Combat Corruption

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## **Abstract**

A well-designed and structured asset declaration system can be used as a strong tool to prevent and detect corruption effectively, and eventually lead to successful conviction of corruption related offences. This study was conducted to examine the effectiveness of the existing asset declaration system in Malaysia through critical analysis of the issues and challenges faced under the current system, and to advocate for a redesign of the asset declaration system in Malaysia to fight corruption effectively. The researcher has employed multiple methods to investigate the existing position of the Malaysian asset declaration system by using primary and secondary data obtained from various channels. A comparative analysis of asset declaration systems of India and Thailand, including two case studies, were presented and discussed in detail. Interviews with experts and practitioners related to this topic were conducted to strengthen the hypothesis of this study, and some of the findings from the interviews were incorporated to propose the recommendation at the end of this study. The findings from the research address the issues and challenges faced under the existing Malaysian asset declaration system which weakens its effectiveness. There is no specific and independent body which is responsible for the implementation and the enforcement of asset declarations by public officials. Different sets of administrative rules and codes are applied to different categories of public officials. The codes that govern asset declarations of Members of Parliament and high level judges do not provide for the mechanism of verification, monitoring, etc. Likewise, weak verification and monitoring of the system has caused there to be a low number of cases of failure to declare assets under the existing administrative regulations. This has also resulted in no cases of sanctions for those public officials living beyond their means even on the recommendation of the Public Prosecutor. Most importantly, there have been no convictions for offences of failure to declare assets and unjust enrichment of public officials under the criminal laws in Malaysia. By exploring the issues underlying the existing system, this study concludes with recommendations on redesigning the asset declaration system in Malaysia.

## List of Abbreviations

ACA	Anti-Corruption Agency
ACAB	Anti-Corruption Advisory Board
CBI	Central Bureau of Investigation (formerly Delhi Special Police Establishment)
CCC	Counter Corruption Commission
CPI	Corruption Perceptions Index
HRMIS	Public Service Human Resource Management Information System
IACA	International Anti-Corruption Academy
ICAC	Independent Commission Against Corruption
LLA 2013	The Lokpal and Lokayuktas Act 2013
MACC	Malaysian Anti-Corruption Commission
MACCA	Malaysian Anti-Corruption Commission Act 2009
MP	Member of Parliament
NACC	National Anti-Corruption Commission
NCCC	National Counter Corruption Commission
NEP	New Economic Policy
NGO	Non-Governmental Organisation
OACC 1999	The Organic Act on Counter Corruption, B.E. 2542
OECD	The Organisation for Economic Co-operation and Development
ORP	Operations Review Panel
OSA 1972	Official Secret Act 1972
PEMANDU	Performance Management and Delivery Units
POCA	Prevention of Corruption Act 1947
POCA 1988	Prevention of Corruption Act 1988
SCC	Special Committee on Corruption
StAR	Stolen Asset Recovery Initiative
UNCAC	United Nations Convention Against Corruption

# 1. Introduction

## 1.1 The Background

Transparency International defines corruption as the abuse of entrusted power for private gain. The idea of vesting power into the hands of public officials, *inter alia*, is to have them to decide on contracts, allocate budgets and oversee a variety of decisions that involve the use of taxpayer money. In this connection, the execution of power by the public officials must be transparent and accountable. One way to ensure the integrity of public officials and to make sure that they are acting for the public good and not for personal gain can be achieved through asset declaration.

An asset declaration system is designed to provide a clear mechanism for public officials to report their assets and interests. Some countries require spouses of public officials to declare their assets and interests as well. The system also provides a verification and prosecution mechanism for non-compliance or illicit enrichment of public officials. The system can be used to combat corruption as it is a tool that can prevent a conflict of interest among public officials. Under certain circumstances, asset declaration can assist enforcement agencies to detect and prosecute those public officials who have obtained wealth by misuse of their position and power. The detection and investigation can lead to uncovering bribery and other forms of corruption such as nepotism, extortion, conflicts of interest, and undue advantage.

Significant research has been conducted on different countries' practices of asset declaration and their frameworks, however, there is no single best practice (Burdescu, et. al, 2009, p. xv) which can be applied to any country without taking into consideration the country's legal system and political will. The mere fact of declaring assets cannot by itself reduce corruption. It is essential to develop punishment proportionate to the damage that is caused by the corrupt act.

## 1.2 The Problem in Malaysia

Whereas Malaysia has implemented the asset declaration system in certain ways, it appears that the system is not comprehensive as it does not meet international standards. The call for transparency and full public disclosure of assets of elected and public officials has been repeated for years in Malaysia. One of the major reasons

behind this is that political parties were ranked as the most corrupt bodies among the top six key institutions in Malaysia, ahead of the police and civil servants, based on the Malaysian Corruption Barometer (MCB) 2014 (Transparency International Malaysia, 2014). There are many cases and incidents involving elected and public officials with suspicious wealth causing the need for an effective asset declaration system to be put in place. An effective asset declaration system will improve the confidence of Malaysian citizens and foreign investors in the integrity, accountability and good governance of the government.

The current asset declaration framework in Malaysia is only applied to civil servants by way of government regulations. Rule 10 (1), Regulations of Public Official (Conduct and Disciplinary) 1993, states:

An officer shall, upon his appointment to the public service or at any time thereafter as may be required by the government, declare in writing to the appropriate disciplinary authority or the department heads all property belonging to him, or his or her spouse or child, or held by any person on his behalf or on behalf of his wife or her husband or her child.

All civil servants are required to declare their assets online through the designated public service website known as the Public Service Human Resource Management Information System (HRMIS). The consequence of failure to comply is stated in the same regulation, i.e., the officer can face disciplinary actions such as demotion, reduction of salary or dismissal. As there is no criminal provision provided for non-compliance of civil servants in declaring their assets, it has further weakened the system's effectiveness. On the other hand, cabinet members and members of parliament are required to declare their assets to the Prime Minister only and there is no public disclosure thereof (Freedom House, 2012). Similarly, judges are required to submit their asset declarations to the Chief Justice under the Judges' Code of Ethics 1994. However, the mechanism to verify and sanction for non-compliance remains unclear.

The mechanism of verification is relatively weak as there is no centralised body which oversees the implementation of the asset declaration. The submission of asset declaration to the HRMIS has become mere window dressing. Even in the case where any public official is caught by their respective department for non-compliance or unexplained wealth, the officer will most likely be subjected to administrative action such as being issued a warning letter.

Further, public officials can be punished for unexplained wealth under Malaysian laws. Under section 36(3) of the Malaysian Anti-Corruption Commission Act (MACCA), a public official can be convicted for illicit enrichment and receive up to 20 years imprisonment and a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or MYR10,000, whichever is higher. However, the burden of proof to establish the offence is put on the prosecution, i.e., the prosecution must establish the predicate offence. Merely having unexplained wealth or unjust enrichment is not an offence by itself. This has led to the difficulty of bringing the corrupt public officials to the criminal court as the investigation must be able to prove where the asset comes from and why the asset is given to the public officials. It might be one of the reasons that there has not been a conviction under the above section since 2009.

Table 1.0 shows the number of investigation papers opened and the number of prosecutions under section 36 of MACCA. The number of prosecutions is relatively low compared with the number of investigation papers opened. Only 2 cases (9.5%) have been brought to court out of 21 investigations and none resulted in conviction until 2015.

**Table 1. Data on the number of investigation papers opened and the number of prosecutions under section 36 of MACCA (2009-2015)**

Year	2009	2010	2011	2012	2013	2014	2015
Number of investigations papers	0	2	7	4	3	1	4
Number of prosecutions	0	0	1	0	1	0	0

Source: MACC

The Malaysian mix of codes of conduct and criminal, administrative and civil sanctions is complex and can be used for selective sanctions on certain people. Without a clear asset declaration legal framework, namely, creating an authority responsible for enforcing and monitoring, a corrupt public official might be given an administrative sanction which is simply a slap on the wrist.

### **1.3 Literature Review**

Many countries have implemented asset declaration systems for public officials in order to fight corruption. The universal anti-corruption standard, namely, the United Nations Convention Against Corruption (UNCAC), has also included a set of asset declaration standards in Article 8, paragraph 5. Asset declaration is seemingly a powerful tool in preventing and fighting corruption. However, the issue of how effective public officials' asset declaration can be in fighting corruption and what are the breadth and width of the criteria in the asset declaration system to ensure its effectiveness must be determined. As Burdescu, et al. (2009, p.6) states, there is no single best practice of asset declaration system that can achieve every desired outcome, namely preventing and fighting corruption. He further explains that the asset declaration outcomes will depend on factors that vary in scope and intensity across different countries. To address what is the best design from Malaysia's perspective, this study will examine the literature on different asset declaration frameworks, contexts and case studies. This paper does not attempt to recommend a whole new asset declaration system in Malaysia, but rather to improve the existing system with effective reform measures.

#### **1.3.1 Asset declaration legal framework and regulation**

Bigelow (1989) emphasizes the importance of a clear definition and codification of an asset declaration system with legal enforceability, and that this is essential to its success and effectiveness. A codified and law-based asset declaration system can provide sanctions which include not only administrative penalties but can also lead to criminal charges against the wrongdoer. The greater use of sanctions can have a greater deterrent effect as people will not tend to commit corruption if the costs of corruption (sanctions) are higher than the benefits of corruption (bribery).

However, Gokcekus and Mukherjee's (2006) study found that there is no link between the inclusion of asset declaration laws within the constitution and reduced corruption. They found that the countries which have asset declaration requirements within their constitutions had lower average Corruption Perceptions Index (CPI) scores, implying higher perceived corruption, than those countries that did not have asset declaration requirements within their constitution. The disparity indicates that the formation or legal mandate of asset declaration might not be the essential criterion for an effective asset declaration system.

### **1.3.2 Asset declaration coverage, scope and comprehensiveness**

Article 8, paragraph 5 of UNCAC requires public officials to make declarations to appropriate authorities regarding 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. The definition of a “public official” in UNCAC is very broad, basically covering any person who is holding a position in a legislative, executive, administrative, or judicial office, and also who performs a public function (United Nations, 2012; Messick, 2009, p.11). This definition has its critics as the wide coverage or scope requires far too many lower level personnel to disclose assets. For instance, Malaysia has 1.6 million civil servants, excluding members of parliament, members of the judiciary and elected public officials. It would require tremendous resources to collect declarations, verify the information, and analyse and determine what action (if any) should be taken. In this connection, Mukherjee and Gokcekus (2006) suggest that instead of requiring all public officials to submit declarations, the coverage should be limited to high-level senior positions which is believed to be able to deter administrative corruption.

Some asset declaration systems cover certain persons related to public officials such as spouse, children, other family members, associates, etc. Even if these persons are not required to declare their assets, public officials are required to provide their information. The reason for declaration of assets of persons related to public officials is to detect and prevent the transfer of wealth among them.

The breadth of reporting types of assets depends on the purpose of an asset declaration system (Burdescu, et al., 2009, p.97). For the countries where preventing conflict of interest is the main objective of asset declaration, only those public officials who are in a position to abuse their power will be required to declare their interests. However, it is almost impossible to apply different systems of asset declaration to different categories of public officials. Usually asset declaration refers to the reporting of income, assets, gifts, liabilities and pecuniary and non-pecuniary interests of a public official or his/her spouse. Burdescu, et al. (2009) argue that there is no point to have a detailed and complex asset declaration system if the country has constrained resources.

Perhaps asset declaration should start slowly and build up capacity (Messick, 2006, p.2) to ensure the effectiveness of the system rather than an insufficient system. In Thailand, only high ranking public officials and members of parliament have to declare their assets

to the National Counter Corruption Commission under the Organic Act on Counter Corruption, B.E. 2542, while the assets of the Prime Minister and Ministers are publicly disclosed (Achalaboon, 2009, p.118). Djankov, et al. (2009, p.24) clearly state that the most important content of disclosure is the identification of sources of the assets declared rather than the reporting of values of assets and income. The identification of sources is not only useful for verification purposes, especially for investigation, but also, more importantly, to detect conflict of interest.

### **1.3.3 Verification mechanism of asset declaration and sanctions for non-compliance**

Verification is a very important aspect of asset declaration and at the same time, one of the hardest parameters to implement (Burdescu, et al., 2009, p.42), as it can make the system mere window dressing if it is without an effective monitoring and verification of the declaration. Experts (StAR, 2012) suggest the authority can check the previous asset declarations of the public officials and make a comparison with the same official's lifestyle. This method requires the authority responsible for enforcing asset declaration laws to be vested with investigative powers and empowered to access public or private records of public officials. This leads us to another important issue: who should be responsible for enforcing the asset declaration law in Malaysia?

Muzaffar (2009, p.120) proposed that the then Anti-Corruption Agency (now the Malaysian Anti-Corruption Commission, or MACC) should scrutinise the financial records of members of parliament and the State Assembly and should be given powers to commence legal proceedings against public officials who appear to be living beyond their means. Messick (2007) suggests that the agency in charge of asset declaration should not be the primary enforcer for the reason that the separation of powers must be maintained for a better system of checks and balances. Besides that, given the fact that MACC currently does not have sufficient resources to carry out the verification, the possibility of either restructuring of the current system and allocation of resources or establishment of a specified body to govern this matter should be explored.

Sanctions for non-compliance in asset declaration can be civil, administrative or criminal, depending on the country's asset declaration framework. Susan Rose-Ackerman (2010, p.11) stresses that the high probability of detection and heavy punishment imposed can deter criminal behaviour effectively. In this regard, Chêne (2008, p.2) found that countries that have asset declaration laws which allow for criminal prosecution against public officials have lower perceived levels of corruption.

#### **1.3.4 Public access to asset declaration**

Williams (2006) argues that public disclosure is the key to an effective asset declaration system. Public disclosure allows the public access to the relevant information before making any decision at the ballot box (Aaken & Voigt, 2009). Secondly, since the information is available for public scrutiny, it will lead to the reduction of opportunities for public officials to abuse their entrusted power for private gain. This was found in Djankov, et al. (2009), where the countries' practice of public disclosure was shown to be associated with lower perceived corruption levels even though those countries have low levels of media freedom and democracy.

Djankov, et al.'s (2009) findings might not be universally applicable, as countries like Singapore have no public access to asset declarations but have perceived low levels of corruption. In this regard, the former Prime Minister Lee Kuan Yew defended the prevention of disclosure vigorously, justifying that the disclosures would prevent interested people from becoming ministers if their wealth had to be revealed. In India, the concerns are regarding safety of public officials once their wealth is publicly disclosed. Besides that, the issue whether public disclosure of public officials' assets can be considered violation of the right of privacy is a great debate. The publicly available declarations can be exploited and misused by the sensationalist media or can be used to generate rumours about public officials (Burdescu, et al. 2009, p.104).

However, it is essential to balance the public interest and individuals' rights through careful design of the system. Limited declaration can be made publicly available (Messick, 2009, p.10), such as the rough location of the property owned by the public official and the market price, while the detailed declaration, which is submitted to the monitoring authority, shall be kept confidential, with details such as the exact address of the property, the size of the land, and the identification of the source of the property (self-purchase or inherited, from whom and why).

Reviewing the literature leads back to the research questions: which design of an asset declaration system is the most effective in preventing and fighting corruption? How are those designs to be applied in the Malaysian context? Will the designs be able to serve the purpose of reducing corruption? What are other considerations in order to strengthen the asset declaration system in Malaysia? Analyzing both the best practices of asset declaration from different countries and Malaysian factors, such as capacity building, are essential to redesign an effective asset declaration system.

## **1.4 The Aims and Hypotheses**

The central aim of this study is the investigation of the position of the asset declaration system of the elected and public officials in Malaysia. The position will be further improved after the exploration of the recommendations. The ultimate objective of this study is to advocate for a redesign of the asset declaration system in Malaysia to serve the following purposes:

- a. prevent conflict of interest;
- b. be an investigative tool for detecting and prosecuting illicit enrichment; and
- c. recover stolen assets.

This study sets out the research hypotheses to be tested as follows:

- a. Malaysia's asset declaration system does not meet international standards.
- b. Codifying asset declaration by public officials into Malaysian law would increase the effectiveness of the governance system.
- c. The offence of unjust enrichment without the establishment of a predicate offence could increase the number of successful prosecutions and convictions.
- d. The insertion of whistle blower provisions into the system, whereby a whistle blower will be rewarded for his/her information that leads to the successful forfeiture of ill-gotten assets, would be advisable and could increase the number of successful prosecutions and convictions.

Since the current asset declaration system in Malaysia does not seem to be an effective tool to prevent and fight corruption, the researcher finds it a worthwhile topic to study this system and identify its weaknesses.

## **1.5 The Problem Statement**

Corruption affects everyone. Corruption is a crime against humanity. Its impact is enormous as the economic and social rights of citizens are violated and it hurts the poor the most. According to the World Economic Forum, the cost of corruption equals more than 5% of global GDP or US\$ 2.6 trillion (World Economic Forum, 2012), with over US\$ 1 trillion paid in bribes each year according to the World Bank (Seager, 2007). Malaysia has been facing corruption problems like other developing countries since its independence in 1957. Corruption in Malaysia could cost RM10 billion per year, an amount equivalent to one or two percent of GDP (PEMANDU, 2010, p.128).

Various measures have been proposed and adopted to combat corruption. Perhaps the simplest and most effective way is to put the burden on the shoulders of public officials: requiring them to declare their assets and be subjected to scrutiny can make corruption more difficult. According to a TI-Malaysia survey, elected and public officials are ranked the most corrupt in Malaysia (Transparency International Malaysia, 2014). Developing and enforcing a more effective asset declaration system is needed to fight corruption in the public sector to prevent misuse of the entrusted power for private gain.

## **1.6 Scope and Organization of the Study**

The objective of this study is to examine and critique the position of the asset declaration system and propose ways in which it could be improved in Malaysia. The implementation of the system is only regulated at the federal level of civil servants and administered on members of parliament and members of the judiciary. It follows naturally that an analysis will be made regarding the implementation and effectiveness of the system in fighting corruption in Malaysia. A comparative study of the implementation of asset declaration in India and Thailand is also made so as to enable one to assess the effectiveness or otherwise of the prevailing system in Malaysia. This topic has been chosen as timely and appropriate due to many cases involving unjust enrichment and conflict of interest of public officials in Malaysia.

This study is divided into five chapters:

- a. Chapter 1 is the introduction.
- b. Chapter 2 outlines the research methodology of this study. The methods of data collection and analysis will be discussed in detail together with other related topics.
- c. Chapter 3 focuses on the current Malaysian asset declaration system, in relation to the effectiveness of the implementation as well as in relation to its impact under the current implementation. This chapter will investigate the existing system by referring to relevant regulations and legislation as well as other publications. Besides that, data such as civil, administrative and criminal actions taken against non-compliance and illicit enrichment offences will be discussed.

- d. A comparative analysis is included in Chapter 4 to examine the asset declaration systems of India and Thailand. The comparative analysis will be further discussed with the asset declaration legislation and two case studies. The data analysis will be focused on the effectiveness of the asset declaration system, particularly such as its implementation: how to collect, verify, investigate, sanction, etc. Selective successful cases from these countries will be discussed in depth for the purpose of making recommendations for the Malaysian asset declaration system.
- e. Chapter 5 summarises the findings from the previous chapters including interviews conducted with experts and practitioners, the reaffirmation of research question, and whether the hypotheses are proven. The recommendations in relation to redesigning the existing Malaysian asset declaration system will conclude this chapter.

## **1.7 Contribution to Knowledge / Significance of the Study**

This research is both novel and timely, particularly given the scope for improving the asset declaration system of elected and public officials in Malaysia with the aim of fighting corruption in the public sector. Moreover, this research is believed to provide an independent view after taking into consideration the interviews and findings of different backgrounds and political stands, the opinions and suggestions from various stakeholders, and evaluation of the long-term planning procedure.

A significant contribution to knowledge is made through the study of the insertion of a whistle blower provision into the asset declaration system to empower its effectiveness. This study also contributes to the long debate on the public disclosure of asset declarations and the safety of disclosure in Malaysia. Furthermore, this research provides a comprehensive overview of the asset declaration system of Malaysia from the perspective of an anti-corruption practitioner.

## **2. Research Methodology**

### **2.1 Introduction**

This chapter outlines the research methodology of this study. The research was conducted in two stages to gather primary and secondary data. The data in Stage 1 was collected by employing the qualitative approach. Literature review was conducted on relevant legislation, journals, newspaper articles, and official documents published by the government or internationally. Interviews with experts and practitioners were also conducted. In Stage 2, data was collected through the quantitative approach where relevant statistics were obtained to strengthen the study.

### **2.2 Research Objectives**

This study was conducted to reach the following specific objectives:

- a. To investigate the effectiveness of the asset declaration system of public officials in Malaysia;
- b. Identify the issues and challenges under the existing Malaysian asset declaration system;
- c. Review other countries' asset declaration systems as a comparative study;
- d. Make recommendations for the redesign of the Malaysian asset declaration system to serve as a powerful tool in fighting corruption more effectively.

### **2.3 Research Design**

The research design of this study was focused on how to conduct the study in order to answer the research question and test the provided hypotheses. Both qualitative and quantitative approaches were employed where most of the qualitative research study was highly structured as compared with the quantitative part. Data in Stage 1 was collected by way of identifying the relevant laws and regulations of asset declaration in Malaysia, India and Thailand. This research design enabled the researcher to obtain a better understanding and deeper knowledge before interviews were conducted with the experts and practitioners familiar with this topic. Data in Stage 2, such as statistics of the non-compliance, convictions and types of sanctions, was collected and analysed for the purpose of strengthening the findings of the data in Stage 1.

The literature review was conducted to understand the issues involved in the research study. Relevant journals, newspaper articles and official documents published by the government or internationally were referred to in conducting this research. Due to the research topic being highly specific, the researcher selected a few experts and practitioners and interviewed them. The interview questionnaire was semi-structured so as to encourage new ideas to be brought up during the interviews.

## **2.4 Data Collection and Analysis**

Primary and secondary data sources were obtained for the purpose of reaching the study objectives. Interviews were conducted to obtain primary data. The researcher had selected and invited ten practitioners, public officials, non-governmental organisation (“NGO”) members, and Members of Parliament, to participate in interviews. The main purpose of including different parties and cross border parties of intended interviewees was to explore the different views on the subject matter. Every one of them received an invitation to participate in this study’s interview either through a phone call or an email. The interviewees received the interview questionnaire (see Appendix A) and a consent form to be interviewed upon the acceptance of the invitation. The researcher was able to interview five of the invitees, including three Malaysian practitioners/public officials, one NGO member and one Thai practitioner, in face to face sessions, by email and phone. The interview questions focused on whether the current system of asset declaration is effective, what are the challenges in implementing an improved system and what are the views of the interviewees on improving Malaysia’s asset declaration system.

Secondary data for this study was obtained from a variety of articles, journals, books, websites, annual reports, law reports, government agency papers, etc. The secondary data was employed in order to test the hypotheses of the study and contribute to the objectives. Besides Malaysian sourced secondary data, data from other countries, like India and Thailand, were collected for the purpose of comparative study in Chapter 4.

A thorough literature review was conducted to enable the collection of the relevant information. It was used to give the researcher an overview and understanding of the meaning, issues and concepts of the topic as a whole. The literature search was then narrowed down to the context of Malaysia, India and Thailand which was the scope of the study. The literature was further analysed for the purpose of identifying the research questions and hypotheses to be tested in this study. The analysis of data was focused

on the five perspectives mentioned in Chapter 3.1 (The Background). Quantitative analysis was started as soon as the researcher acquired the statistics on the number of cases with convictions for unjust enrichment and the types of punishment imposed for failure to declare assets, etc., from government agencies. The researcher selected, compiled, simplified, and transformed the original statistical data in order to fit the purpose of the study. The interpretation of statistics was presented along with the statistics to support and strengthen the findings of the study. The interviews with experts and practitioners were recorded and transcribed. These interviews were then analysed. The interview findings were used to form triangulated discussion together with the other data in Chapter 5 (Conclusion) for recommendations in redesigning the Malaysian asset declaration system.

## **2.5 Limitations of Methodology and Ethical Considerations**

The first limitation in conducting this study was to obtain government official statistics and reports where some of the data is classified as official secret under the Official Secret Act 1972 (OSA 1972). Section 2 of OSA 1972 defines “official secret” in very broad terms, i.e., any document which is classified by the Minister, Menteri Besar (Head of State), Chief Minister of State, and any public officer appointed by them. In this relation, the data concerning the types of punishment imposed on public officials for failure to declare assets and living beyond their means could not be accessed. Secondly, there was a problem with the limited amount of time to complete this study where some of the interviewees were too busy to answer the interview questionnaire within the given timeframe. The researcher had to conduct a phone interview with one of the interviewees, the President of Transparency International Malaysia, Dato’ Akhbar Satar, due to his busy schedule. Third, the researcher’s lack of familiarity with the Thai language to review the asset declaration system in Thailand. The researcher was only able to focus on the data which are available in English.

The Master Thesis Guiding Notes MACS 2014 of the International Anti-Corruption Academy (IACA) was followed in this study. Ethical considerations in conducting this study have complied with the requirements listed under paragraphs 3.5, 3.6 and 3.7 of the same guiding notes. The researcher informed the interviewees and the government agency about the purpose of the data collection. The data was employed in this study once permission and consent were given. The interviewees were also explained the purpose, procedures, and their right to privacy in the interviews, including their right to withdraw from the interview if that was their preference.

## **3. Malaysia's Asset Declaration System**

### **3.1 Background**

Tunku comments (2007, p.7):

In 1957 when Malaysia became independent, corruption was hardly an issue. Both British and Malayan officers maintained the highest standards of integrity and the proud traditions of the Malayan Civil Service were, on the whole, incorruptible. They lived well within their means. Ten years on, in 1967, the Government, sensing a gradual shift of attitude towards corrupt practices, an attitude that could be fairly described as ambivalent, felt constrained to create a special bureau to combat corruption, the forerunner of today's Anti-Corruption Agency. As you can see, the ACA has a longer history than, for example, the ICAC of Hong Kong, arguably the most successful corruption busting organization in the world today. It all goes to show that age is not always everything in fighting corruption. Political will is!

The text quoted above had captured the corruption situation in Malaysia in the historical context. Tunku (2007, p.8) was of the view that corruption became a serious issue when the New Economic Policy (NEP) was implemented 30 years ago. This has led to unprecedented heights of corruption and abuse of power which was caused by the creation of dozens of public enterprises (enjoying wide discretionary powers) to implement hundreds of socio-economic measures. According to Klitgaard (1998, p.4), corruption occurs when an organization or a person has monopoly power over a service or good, has the discretion to decide how to distribute it, and at the same time is not accountable for the decision made.

Malaysia has been facing corruption problems like any other developing country since its independence in 1957. Corruption in Malaysia has been estimated to cost up to RM10 billion per year, an amount equivalent to one or two percent of GDP (PEMANDU, 2010, p.128). Malaysia's Corruption Perceptions Index (CPI) score is stagnant or even getting marginally worse where Malaysia is ranked 54th among 168 countries in the CPI 2015, with a score of 50 out of 100. This is a drop from ranking 50th out of 175 countries in CPI 2014 with a score of 52 out of 100 (Lee, 2016). Malaysian Corruption Barometer's 2014 survey showed that 28% of Malaysians believe that the government is serious in fighting corruption, whereas 38% of Malaysians think the government is ineffective in fighting corruption (Transparency International Malaysia, 2014).

In the Malaysian context, one of the main reasons corruption has transformed from being mere isolated and rare indiscretions to being a substantive part of the culture of society is the lack of effort to institute checks and balances procedures in the pursuit of realising political will. In moving forward policies of the state, a wide range of powers and discretion were given to officers with the intent of realising goals but failing abjectly to make sure that such powers and discretion are not abused in the process of realising those goals.

Despite much criticism of the Malaysian government's efforts in fighting corruption, numerous measures have been put in to fight corruption in Malaysia via increasing the funding for law enforcement, law reforms, creating awareness in society, etc. The question is whether the measures taken have made anti-corruption enforcement and prevention in Malaysia effective; if the answer is no, then how can we improve it?

It cannot be denied that the government of Malaysia has implemented many anti-corruption initiatives. Among others, an asset declaration system has been introduced officially as one of the efforts in fighting corruption in 1993, followed by a government circular giving effect to the system. Whether the current system has been effectively implemented or not will be further discussed in this chapter from various perspectives as follows:

- a) Legal framework;
- b) Who will be declaring and the scope of assets declared;
- c) The collecting, monitoring and verification mechanisms;
- d) Enforced sanctions mechanism; and
- e) Public access to assets declarations.

### **3.2 The Legal Framework / Provision**

There are a few legal provisions which address the issue of asset declaration in Malaysia. They are:

- a) Public Officers (Conduct & Discipline) Regulations 1993 (Amendment 2002) and related Government Service Circular;
- b) The Malaysian Anti-Corruption Commission Act 2009 (MACCA);
- c) Judges Code of Ethics 1994; and

d) Code of Ethics for Members of Parliament of Government 2004.

Under the Interpretation Acts 1948 and 1967, “public officer” means a person lawfully holding, acting in or exercising the functions of a public office. A public official in the UNCAC is defined in a similar way. For this research, the terms "public official" and "public officer" are interchangeable. Besides that, all references to the masculine gender shall include the feminine whenever the context of this research requires it.

### **3.2.1 Public Officers (Conduct & Discipline) Regulations 1993 and the related Government Service Circular**

a) Who will be declaring and the scope of assets declared

The legal provision for making declaration of assets/property owned by public officials is provided for under Regulation 10 of the Public Officers (Conduct & Discipline) Regulation 1993:

An officer shall, upon his appointment to the public service or at any time thereafter as may be required by the government, declare in writing to the appropriate disciplinary authority or the department heads all property belonging to him, or his or her spouse or child or held by any person on his behalf or on behalf of his wife or her husband or her child.

The above circular is read in conjunction with Service Circular No.3 of 2002, Ownership and Declaration of Property by Public Officers (hereinafter referred to as “the Circular”) which lays down the procedure in detail. The definition of a public officer in the Circular means a member of the public service of the Federation. According to the Federal Constitution of Malaysia, Article 132(1), the public service of the Federation is composed of the following services:

- a. the armed forces;
- b. the judicial and legal service;
- c. the general public service of the Federation;
- d. the police force;
- e. (repealed);
- f. the joint public services mentioned in Article 133;
- g. the public service of each State; and
- h. the education services.

The above-mentioned services come under five service commissions established under Part X of the Federal Constitution, namely the Armed Forces Council, the Judicial and Legal Service Commission, the Public Services Commission, the Police Force Commission, and the Education Service Commission. It is important to explain the Judicial and Legal Service Commission which is established in accordance with Article 138(1) of the Federal Constitution. The judicial services division comprises magistrates, Sessions Court judges, registrars, special officers, and researchers to judges, including the Chief Registrar, deputy and assistant. The legal services division comprises the Attorney General (AG) officers in the Attorney General's Chambers such as the Solicitor-General, draftsman, advisors, prosecutors, state and ministry legal advisors, and legal assistants (Boo, 2016). In other words, the Commission does not include high level judges.

The Public Services Commission is the biggest among them, and more than half of the total number of public officials comes under its jurisdiction (Gan, 2007, p.3). The terms "public office," "public officer" and "public services" are defined in section 3 of Interpretation Acts 1948 and 1967. A "public office" means an office in any of the public services. A "public officer" refers to a person lawfully holding, acting in or exercising the functions of a public office. And "public services" means the public services mentioned in Article 132(1) of the Federal Constitution.

It is necessary at this juncture to take a look at the above mentioned definitions. Basically, different definitions have been given to define a public official in the Circular. The Circular only regulates those public officials in the public services who have to declare their assets. It does not include members of parliament, members of the cabinet and judges. Nevertheless, the Circular is applied to all categories of public officials, regardless of whether they are permanent, temporary or work on a contract basis, requiring them to declare their property. Spouses and children of public officials are obliged to declare their assets as well.

UNCAC Article 2(d) defined property as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. The Circular has defined the property in a similar way and includes immovable and movable property as follows:

(a) Movable Property

- i. cash deposited or savings;
- ii. stocks, shares, debentures, bonds, or other securities;
- iii. all types of trading, business or commercial licenses or permits;

- iv. others - motor vehicle, jewellery, club membership, household furniture and sports equipment which individually exceeds 6 months emoluments or MYR10,000.00, whichever is the lesser.

(b) Immovable Property

- i. land, including those under temporary occupation license;
- ii. residential property;
- iii. commercial building, including office spaces, stalls.

b) The collecting, monitoring and verification mechanism

The submission of asset declaration is made in electronic form through a designated public service website known as the Public Service Human Resource Management Information System (HRMIS). The underlying objective of HRMIS is to ensure that the developed application will be able to improve the performance of the public sector delivery system. The HRMIS human resource management application consists of 11 core modules comprising 39 sub-modules (HRMIS, 2009). Asset declaration is one of the sub-modules along with service profile and personal record under Personal Record Management.

Paragraph 4 of the Circular requires that all public officials declare their assets under four circumstances: upon being appointed to the service, as required by the government, upon acquisition of additional property, and upon disposal of property. Public officials shall declare their assets every five years. In the event where the public official has not acquired any additional property or disposed of property during the five years' period, he/she shall make an acknowledgement regarding the matter. Every asset declared shall be itemised together with the related legal documents to indicate the legality of the acquired or disposed of asset. For instance, a public official shall upload into HRMIS the sale and purchase agreement of the house that he/she buys.

In order to ensure the HRMIS can be operated efficiently, every agency or department shall establish a HMRIS core team who take charge of system functionalities and technical aspects of the HRMIS. After a public official has declared his assets via HRMIS, the declaration is submitted to the Asset Secretariat of the respective agency whose duties are:

- i. to acknowledge receipt of the declaration;
- ii. examine and endorse the declaration; and
- iii. present the declaration forms to the Head of Department.

The Asset Secretariat will acknowledge the submission of the asset declaration of the public official upon the receipt of the declaration. A verifying officer (“the verifier”) will examine the submission by the public official. The verifier will scrutinise the declaration to assess whether the public official lives beyond his means by comparing their income or assets and liabilities. Besides that, the verifier can request further information from the public official if he thinks that the declaration is not sufficient. A report of the asset declaration of the public official will be generated and presented to the Head of Department for endorsement.

It is important to note that the verification carried out by the verifier merely “confirms” the asset declared and whether it is supported by legal documents rather than verify how much assets are owned or controlled by the public official. For instance, public official Z has declared his three cars and two houses together with relevant documents via HRMIS. The verifier will look at public official Z’s income and liabilities to compare with the assets declared, to assess whether the public official Z has lived beyond his means. This method of verification is questionable, because it cannot detect the actual assets owned by public official Z if Z under-declared his assets to HRMIS. It would be better to verify the declared assets via the relevant authorities, i.e., the Road Transportation Department of Malaysia has every record of ownership of vehicles. The verification with relevant authorities can not only detect the assets that are not declared, but also any forged documentation related thereto.

Paragraph 15 of the Circular provides that the Head of Department shall consider the following when endorsing the asset declaration:

- i. the financial ability of the public officer to own the property declared;
- ii. the way of acquisition of the property declared does not breach any regulation;
- iii. the acquisition of the property is not by way of use of official position, or in conflict with his official and private interest;
- iv. monthly instalment payment is not burdensome; and
- v. other factor in connection to the integrity and efficiency of the public service.

The Head of Department may seek further information, if necessary. In the event the Head of Department is of the view that the value of the property or other assets declared is beyond the public official’s emolument, he can issue the public officer a 30-day notice for explanation. Upon satisfying himself that the properties declared are satisfactorily acquired, the Head of Department shall endorse his decision of approval in the

Declaration Form. The public official shall then be notified of the decision made by the Head of Department.

For the cases that were investigated by the Malaysian Anti-Corruption Commission (MACC) but not prosecuted, MACC is responsible to submit its report to the Heads of Departments and agencies proposing disciplinary action against any public official found to have committed a breach of discipline and can be punished under Public Officers (Conduct & Discipline) Regulations 1993.

Table 3.2.1a shows the number of cases in the MACC Report on Disciplinary Action under Public Officers (Conduct & Discipline) Regulations 1993. The number of cases for failure to declare property or living beyond one's means is relatively low compared with the other types of misconduct, even zero cases in 2014. The low or zero percentage may represent the ineffectiveness of the verification and detection components of the system.

**Table 2. Number of Cases in the MACC Reports on Disciplinary Action under Public Officers (Conduct & Discipline) Regulations 1993 (Years 2010– 2014)**

No	Type of Offence	2010	2011	2012	2013	2014
1.	Fraudulent claim or certification containing false information	72	36	42	59	18
2.	Failure to perform the duties and the abuse of position for self-interest reasons	204	192	164	99	56
3.	Maintaining a lifestyle beyond legitimate emoluments and personal salary and failure to declare assets	3	2	1	7	0
4.	Dishonest, untrustworthy, irresponsible, careless inappropriate behaviour	51	71	91	104	102

5.	Accepting of gifts, entertainment, loan/debts	16	10	14	4	8
6.	Involvement in external businesses and participation in politics	4	4	7	6	4

Source: MACC Annual Report for 2010-2014

### c) Enforced sanctions mechanism

In accordance with paragraph 29 of the Circular, an officer who fails to make a declaration of property can face disciplinary action provided for under Public Officers (Conduct & Discipline) Regulations 1993. Paragraph 38 of the 1993 Regulations specifies the types of disciplinary punishments that may be imposed on the officer if he is found guilty of failure to declare assets as follows:

- i. warning;
- ii. fine;
- iii. forfeiture;
- iv. deferment of salary movement;
- v. reduction of salary;
- vi. reduction in rank; or
- vii. dismissal.

It is important to understand at this juncture that the authority that makes the decision on the type of punishment to be imposed as mentioned above is the Disciplinary Authority. The members of the Disciplinary Authority come from within the respective agency unless the officer is specified to be a senior ranking officer or member of the top management, in which case the members shall be composed of the Chief Secretary to the Government of Malaysia and the Director General of Public Service Department. Gan (2007, p.58) emphasizes that only the relevant Disciplinary Authority and the Disciplinary Authority alone has the absolute jurisdiction to adjudicate over a disciplinary hearing against an errant officer. In other words, if a public official is found not guilty by the relevant Disciplinary Authority, there is no appeal or challenge available against the decision made by the Disciplinary Authority.

Every year, MACC presents reports to heads of departments and agencies recommending disciplinary actions on public officers for breaching various government service codes and regulations. Table 3.2.1b shows the statistics on the type of

disciplinary punishment imposed under Public Officers (Conduct & Discipline) Regulations 1993. A “warning” is the most common punishment for failure to declare assets. Public officials who receive a warning as a sanction for misconduct will have it recorded in their service book where such record might affect their promotion. However, it is at the discretion of the respective Heads of Department to consider whether to promote the public official even if he had been given a warning before. In this connection, a warning may seem an inadequate punishment as it may not serve as a deterrent. Most importantly, seven (50%) cases are still pending for the decision of Heads of Departments and in two cases public officials were found not guilty by the heads of departments and agencies even though the reports were presented with the suggestion of a public prosecutor.

**Table 3. Data on the type of disciplinary punishments imposed under Public Officers (Conduct & Discipline) Regulations 1993 (Years 2010 – 2014)**

No.	Type of Offence and Punishment	2010	2011	2012	2013	2014
1.	Failure to declare asset					
	Warning and fined emolument for 7 days	1	-	-	-	-
	Administrative warning	1	1	-	-	-
	Case discontinued (declared to Head of Department)	-	1	-	-	-
	Not guilty	-	-	-	2	-
2.	Maintaining a lifestyle beyond legitimate emoluments and personal salary	-	-	-	-	-
3.	Pending decision	1	-	1	5	-
	<b>Total</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>7</b>	<b>0</b>

Source: MACC

d) Public access to assets declared

Paragraph 28 of the Circular states that the declaration of assets is classified as “confidential”, and the Head of Department is required to take necessary safety steps to ensure that the asset declaration will be dealt with according to the procedure and rules for handling confidential government documents. An individual can be charged under the Official Secrets Act 1972 if he discloses the declared asset, as the declaration is classified as “confidential”. In other words, asset declarations of public officials are not only inaccessible to the public but also the act of their disclosure by any person will be considered a criminal offence.

The law was passed during the administration of the second Prime Minister of Malaysia, Abdul Razak, “for the purpose of maintaining security and public order” (Ahmad, 2014, p.170). The law basically is intended to protect “official secrets” from unauthorized release. Section 2 of OSA 1972 defines “official secret” in very broad terms, i.e., any document so classified by a Minister, Menteri Besar (Head of a State), Chief Minister of a State, and any public officer appointed by them. A list of “official secrets” is provided under the section 2A schedule where the term includes Cabinet documents, records of decisions and deliberations including those of Cabinet committees, State Executive Council documents, records of decisions and deliberations including those of the State Executive Council committees, and documents concerning national security, defence and international relations.

While the initial intention of enacting the OSA 1972 was to maintain security and public order, its effect may have caused more harm than good. Many law practitioners and scholars have been criticizing the wide definitions and the wide range of documents classified as “official secrets”. It has been argued that the OSA 1972 has curtailed the electorate's right to knowledge, weakened public accountability and profoundly reduced the effect of the right to freedom of information. Masum (2010) emphasised that the law has become a weapon for the government to deny vital information to the public. In this connection, the classification of documents as official secrets cannot be challenged nor reviewed in a court of law. The court is also powerless to order disclosure of documents classified as official secrets. Decisions of politicians or public servants to classify documents as official secrets compromises public scrutiny and transparency of government actions.

Faruqi (1992, p.xxiii) pointed out that even Members of Parliament who supplied classified information to the media are not immune from prosecution. The case of *Lim Kit Siang v. PP* [1979] 2 MLJ 37 illustrates this point. The leader of the opposition in Parliament was alleged to have committed an offence under OSA 1972 when he received information about questionable practices, deemed official secrets, related to

defence purchases and leaked the information. His political publications, the November issue of Rocket, which resulted in a printed article entitled “Expose in Parliament – Hanky Panky in the Royal Malaysian” giving the details of the purchase, the objection of the purchase and the mode of selection, and also reproducing the speeches in the Parliament. He was interviewed by the police and asked for the source of the secret information leaked out to him. Lim refused, on the grounds both of confidentiality and Parliamentary privilege. It was held that “the privilege of a Member of Parliament to raise any matter in Parliament can only be invoked in respect of proceedings in Parliament and not outside the House.” He was convicted and was fined RM1,000.00.

### **3.2.2 The Malaysian Anti-Corruption Commission Act 2009 (MACCA)**

#### **a) Who will be declaring and the scope of assets declared**

Besides the Service Circular No.3 of 2002, Ownership and Declaration of Property by Public Officers, MACC has been granted the power to obtain information pertaining to the assets from any officer of a public body who is under investigation for an offence of bribery under MACCA 2009. The asset disclosure regime under MACCA 2009 is stated under section 36.

Section 36(1)(a) provides that if, based on the investigation carried out by an officer of the Commission, a MACC officer in the rank of Commissioner and above has reasonable grounds to believe that any property is held or acquired by any person as a result of or in connection with an offence under this Act, that officer may, by written notice, require that the person to furnish a statement in writing, on oath or affirmation, setting out:

- i. every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable;
- ii. every piece of property sent out of Malaysia by him;
- iii. the estimated value and location of each of the properties identified under subparagraph (i) and (ii), and if any of such properties cannot be located, the reason therefor;
- iv. the status of the properties identified under subparagraph (i) and (ii) whether the property is held by him or other person, whether it has been transferred, etc.;
- v. all other information relating to his properties, business, travel, or other activities;
- vi. all his sources of income, earnings or assets.

Unlike the definition of a public official stated in the Service Circulars which only includes civil servants in Malaysia, a wide definition of an “officer of a public body” has been given under section 3 of MACCA:

any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such.

The wide definition of the officer of a public body enables MACC to require any public official, including members of parliament, judges, or officials of a government linked company, to disclose their assets to MACC. To ensure the section can be exercised properly, a wide definition of property has been given in section 3 of MACCA, where property means real or personal property of every description, including money, whether situated in Malaysia or elsewhere, whether tangible or intangible, and includes an interest in any such real or personal property.

Further, the officer of a public body is required to declare his/her assets to MACC, and also those of his/her relatives or associates under section 36(1)(b) of MACCA. Under section 3 of the same Act, a “relative” means:

- a) a spouse of the person;
- b) a brother or sister of the person;
- c) a brother or sister of the spouse of the person;
- d) a lineal ascendant or descendant of the person;
- e) a lineal ascendant or descendant of a spouse of the person;
- f) a lineal descendant of a person referred to in paragraph (b);
- g) the uncle, aunt or cousin of the person; or
- h) the son-in-law or daughter-in-law of the person.

Whereas an “associate” means:

- a) any person who is a nominee or an employee of such person;
- b) any person who manages the affairs of such person;
- c) any organisation of which such person, or any nominee of his, is a partner, or a person in charge or in control of, or has a controlling interest in, its business or affairs;
- d) any corporation within the meaning of the Companies Act 1965, of which such person, or any nominee of his, is a director or is in charge or in control of its business or affairs, or in which such person, alone or together with any nominee

- of his, has or have a controlling interest, or shares to the total value of not less than thirty per centum of the total issued capital of the corporation; or
- e) the trustee of any trust, where—
- i. the trust has been created by such person; or
  - ii. the total value of the assets contributed by such person to the trust at any time, whether before or after the creation of the trust, amounts, at any time, to not less than twenty per centum of the total value of the assets of the trust.

The scope of assets required to be declared by a relative or associate of the public official is the same as the scope of a public official under section 36(a)(i) to (vi). Section 36(3) of MACCA provides:

Where the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe that any officer of a public body who has been served with the written notice referred to in subsection (1) owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, such officer of the Commission may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess.

The above provision has granted MACC the power to further probe the asset declaration submitted under section 36(1) where MACC has reasonable grounds to believe that the public official is living beyond his means. The public official who has been served with a written order under section 36(3) of MACCA must explain how he was able to own, possess, control or hold such excess.

b) The collecting, monitoring and verification mechanism

The public official and his/her relative or associate shall submit his/her asset declaration in writing on oath or affirmation upon the receipt of a written notice by MACC under section 36 of MACCA. The declaration can be submitted by hand or by mail as long as it is submitted within the period specified by MACC. The investigating officer of MACC will then carry out the verification of assets declared by examining the contents and the supporting documents of the assets declared and determining whether it is proportionate or in excess of the public official's emolument.

However, there are some pre-conditions to be met before a MACC officer can exercise the power under section 36. First, an investigation must be carried out by a MACC officer in connection with an offence under MACCA. Secondly, based on the investigation that had been carried out, a MACC officer of the rank of Commissioner and above must have reasonable grounds to believe that the public official, i.e., the suspect, has held or acquired any property as a result of or in connection with an offence under this Act. In the case of *PP v Ramli Yusoff* (unreported), the court held that the establishment of a predicate offence for unexplained wealth under section 36 of MACCA is necessary. In other words, merely having unexplained wealth or unjust enrichment is not an offence by itself, MACC must be able to prove the accused has committed an offence under MACCA. This has led to difficulties in bringing the corrupt public officials to the criminal court, as the investigation must be able to prove where the asset comes from and why the asset is given to the public officials. The burden of proof on the prosecution is a heavy one, which might explain why there has been no convicted case under the section since 2009.

Five external oversight bodies were formed for MACC in order to give effect to its independence from the executive branch and aimed at creating an effective anti-corruption commission. There are three committees established under sections 13, 14 and 15 of MACCA, namely Anti-Corruption Advisory Board (ACAB), Special Committee on Corruption (SCC) and Complaints Committee. Two other committees, Operations Review Panel (ORP) and Corruption Prevention and Consultative Council, are set up through an administrative order.

In the case of monitoring asset declarations under section 36 of MACCA, ORP is the oversight body for MACC in terms of investigations. ORP is set up to operate as a check and balance mechanism to monitor the MACC's roles and functions (MACC, 2009). The panel members are appointed by the Prime Minister from experts who represent relevant professions and who can reflect on the quality of integrity and independence of the Commission. ORP is empowered to oversee ongoing cases and the reasons regarding actions upon cases, i.e., whether to refer charges for prosecution or otherwise. However, while the Panel may have the power to monitor the operations of MACC, it has no power to pursue a prosecution.

In Malaysia, article 145(3) of the Federal Constitution gives the Attorney General absolute discretion to institute, conduct or discontinue any proceedings for a criminal offence. In other words, his decision is unchallengeable in the court or by anyone. The independence of the Attorney General is controversial as his appointment is made by the King on the advice of the Prime Minister. The absolute discretion of the Attorney

General and his appointment by Prime Minister has produced undesirable effects on anti-corruption enforcement in Malaysia.

There are cases where the public officials who were investigated by MACC were not prosecuted, despite sufficient evidence of wrongdoing under Public Officers (Conduct & Discipline) Regulations 1993 (Amendment 2002). In 2013, MACC presented 279 reports to heads of departments and agencies recommending disciplinary actions against public officers for breaching various government service codes and regulations as compared to 319 reports in 2012. A total of 243 decisions were made out of 279 reports in 2013; only 7 (2.9%) cases resulted in dismissal, 3 (1.3%) cases in demotion and 93 (38.3%) in administrative caution (MACC, 2013). Most importantly, 26 (31.3%) cases were deemed not guilty by the heads of departments and agencies, even though the reports were presented with the recommendation of the public prosecutor.

#### c) Enforced sanctions mechanism

A public official, his/her relatives and associates can be charged under section 36(2) of MACCA if he/she wilfully neglects or fails to declare assets under section 36(1) and shall on conviction be liable to imprisonment for a term not exceeding five years and to a fine not exceeding MYR 100,000.

A public official can be liable under section 36(3) for unexplained wealth, and upon conviction, shall be liable for imprisonment for a term not exceeding 20 years and a fine which is not less than 5 times the value of the excess, if the excess is capable of being valued, or MYR10,000 whichever is the higher.

If a person wilfully neglects or fails to comply with the terms of direction by MACC, he/she can be liable to imprisonment for a term not exceeding 20 years and a fine which is not less than 5 times the value of the excess, if the excess is capable of being valued, or MYR10,000, whichever is the higher.

#### d) Public access if assets declared

No public access is allowed for asset declaration which is made under section 36 of MACCA. Furthermore, the MACC officer who deals with the document can be charged under OSA if he discloses the document. This is because investigation papers are

classified as secret under OSA 1972 and he can be punished with imprisonment for a term not less than one year but not exceeding seven years if found guilty of disclosing government secrets.

### **3.2.3 Judges Code of Ethics 1994**

#### a) Who will be declaring and the scope of assets declared

All judges of the Federal Court, the Court of Appeal and the High Court, including Judicial Commissioners, shall declare their assets to the Chief Justice under the Judges Code of Ethics 1994 (the Code) as stated in Paragraph 9 of the Code:

A judge shall, on his appointment or any time thereafter as may be required by the Chief Justice of the Federal Court, declare in writing all his assets to the Chief Justice of the Federal Court.

The meaning of asset is provided under Chief Justice's Circular No.1 of 2012 - Judges Asset Declaration where "asset" is referring to movable and immovable property including land, building, cash, share, bond, vehicle, etc.

#### b) The collecting, monitoring and verification mechanism

The Code has not stated specifically any collection, monitoring and verification mechanism for asset declaration by judges. However, paragraph 12 of the Code provides that any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court. The question is that, since every judge is required to submit their asset declaration to the Chief Justice, who else can file a complaint against a judge for non-compliance in this matter besides the Chief Justice? And also, to whom the Chief Justice should declare his assets remains unknown.

#### c) Enforced sanctions mechanism

In the event of wrongdoing being proven against a judge, the Judges' Ethics Committee may impose either of the following sanctions:

- i. the recording of an admonition to the judge or

- ii. the suspension of the judge from his office for a period not exceeding one year.

d) Public access if assets declared

The issue of whether asset declarations of judges are publicly accessible remains unclear as it is not mentioned in the Code or any other legislation.

### **3.2.4 Asset declaration by members of parliament and cabinet members**

In 2004, the former Prime Minister of Malaysia, Abdullah, announced that Members of Parliament would have to declare their assets in full under a new Code of Ethics. However, the Code was administered laxly and no penalty has been provided for non-compliance (Freedom House, 2006). In other words, there is no legal requirement for Members of Parliament (MP) to declare their assets, either to a specified agency or publicly. However, some Members of Parliament have declared their assets on their own initiative. For instance, the opposition member MP Rafizi Ramli has made a statutory declaration of his assets, revealing his net worth totalling about MYR1.6 million and his source of income (The Malay Mail, 2015).

According to the current practice (not under any legislation), the top Malaysian Government officials and Cabinet Ministers are required to confidentially declare their assets to the Prime Minister and their declarations can be accessed by MACC (Free Malaysia Today, 2016). The issues of what assets need to be declared, how to declare, when to declare, and who will verify the information remain unclear. Most importantly, to whom does the Prime Minister declare his assets? These questions have weakened the effectiveness of the asset declaration system in Malaysia.

## **3.3 Comparison with the International Standard Asset Declaration System**

In this thesis, UNCAC is used to evaluate the effectiveness of the asset declaration system in Malaysia. This is because UNCAC is a global, legally binding international anti-corruption instrument to which Malaysia is a signatory. There are two articles of UNCAC which set out the requirements of an asset declaration system, namely, Article 8 paragraph 5 and Article 52 paragraph 5.

Article 8 paragraph 5 requires states parties to consider establishing 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.” Article 52 paragraph 5 requires states parties to consider establishing effective financial disclosure systems for appropriate public officials and provide for appropriate sanctions for non-compliance. The same article also requires states parties to consider their competent authorities sharing information with competent authorities from other states parties for the purpose of investigation and asset recovery.

### **3.3.1 The definition of public official and appropriate authority**

UNCAC in Article 2 (a) requires states parties to establish asset declaration systems for public officials where a public official is defined as follows:

- i. any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;
- ii. any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
- iii. any other person defined as a “public official” in the domestic law of a State Party.

Compared with the above definition, Malaysia’s definition of public official seems complicated, as different meanings of public official are given in codes of conduct, criminal legislation, administrative service circulars, etc. This has led to another challenge. UNCAC requires public officials to make asset declarations to “appropriate authorities”, but the asset declaration system in Malaysia apparently refers to “the authorities” as the head of each branch or agency. A potential conflict of interest may arise when the “appropriate authority” is the superior of the public official who at the same time is acting as the verifier and decision maker, such as in the case of asset declaration by judges and cabinet members. Besides that, the question of resources in carrying out the collection, monitoring and verification of the assets declared still remain unclear.

### **3.3.2 What to declare**

UNCAC requires public officials to make declarations to appropriate authorities regarding, as a minimum:

- i. their outside activities;
- ii. employment;
- iii. investments;
- iv. assets; and
- v. substantial gifts or benefits

from which a conflict of interest may result with respect to their functions as public officials (United Nations, 2012, p.26). The difference between the asset declaration systems in Malaysia and UNCAC is that Malaysia does not focus on the area of conflict of interest as UNCAC does. In Malaysia, public servants may receive gifts upon the approval of the Head of Department as provided in Circular Letter No. 5 of 2008. The system of declaration of gifts is separated from asset declaration where the gift declaration is submitted manually to the Head of Department, not through HRMIS.

There is no requirement for public officials to declare their outside activities in Malaysia. However, their outside activities might be in conflict with their official interest. For instance, the former Chief Justice of Malaysia, Eusoff Chin, was discovered to be on holiday in New Zealand with a lawyer closely connected to government leaders (Siva, 2008). This was followed by damning allegations by a former high court judge who claimed that he had been directed to dismiss certain election petitions brought by the opposition. The apparent conflict of interest has resulted in the disintegration of judicial independence. It would be a better and more effective step to improve the effectiveness of asset declaration system if outside activities of public officials were to be included.

### **3.3.3 Enforced sanctions**

Gross (1979, p.436) emphasizes that it is necessary to have proportionate punishment to the gravity of crime in ensuring a sufficiently strong influence to keep the community on the whole law-abiding and peaceable. Without punishment for violation of law, the law becomes merely window dressing or political propaganda. Under Public Officers (Conduct & Discipline) Regulations 1993 (Amendment 2002), a public official found guilty of either non-compliance in asset declaration or living beyond his/her means can be penalised with administrative sanctions. The type of sanctions will be decided by the respective Head of Department where the public official is working. When mere

administrative warning is one of the sanctions that is imposed on public officials for non-compliance in asset declaration, it obviously contradicts the requirement of Article 52 paragraph 5 of UNCAC that states parties shall provide for appropriate sanctions for non-compliance.

The unclear nature of sanctions is another grey area for those Ministers who do not declare their assets in Malaysia. Will they be sanctioned for not submitting their asset declaration to the Prime Minister? How about the Prime Minister himself? What kind of sanctions will be imposed? These questions are extremely important features for an effective asset declaration system. Otherwise it only becomes political propaganda and will not lead to the desired outcome. The next chapter will discuss and examine the asset declaration systems of India and Thailand together with some successful case studies as a comparative study in this research.

## 4. The Asset Declaration Systems in India and Thailand

### 4.1 Introduction

No country is free from corruption. Every country suffers different levels of corruption. Some countries have been facing the impact of corruption where the economic and social rights of citizens have been violated when, for example, a president pocketed the World Bank's loan for a country's development for his own enrichment (Robertson, 1999, p.158). The impact of corruption, while it hurts everyone, harms the poor the most (Ibrahim and Hamid, 2011, p.14-15). Corruption denies poor people the basic means of survival, forcing them to spend more of their income on bribes. Human rights are denied where corruption is rife, because a fair trial comes with a hefty price tag where courts are corrupted. The rights to education and health care are violated when public officials demand bribes when citizens need those services. Nevertheless, some countries have succeeded in fighting corruption achieving substantial reduction of corruption in the country. The question is, what makes those countries to succeed? Or, what are the most successful anti-corruption strategies?

Significant research has been conducted on different countries' practices of asset declaration frameworks, including by the World Bank and the Organisation for Economic Co-operation and Development (OECD). However, there is still no single best practice (Burdescu et al. 2009, p.xv) which can be applied to any country without taking into consideration the country's legal system, culture or political will. In this connection, Thailand and India have been selected to examine the asset declaration systems for this paper. These two countries are selected for a comparison with Malaysia based on the following reasons:

- a) India and Malaysia are practising the common law system;
- b) Thailand and Malaysia are constitutional monarchy countries;
- c) The criminal law in Malaysia, the Penal Code (first enacted in 1936) was based on the Indian Penal Code of 1860 (Koh, Clarkson and Morgan, 1989, p.6);
- d) India and Thailand require their public officials to declare assets to an independent authority under their legislation; and
- e) India and Thailand have a history of successful conviction for unexplained wealth and also failure to declare asset cases against public officials.

This chapter will be focused on examining the asset declaration systems in India and Thailand. The examination is structured as follows:

- a. Legal framework;
- b. Who will be declaring and the scope of assets declared;
- c. The collecting, monitoring, and verification mechanism;
- d. Enforced sanctions mechanism, and
- e. Public access to asset declarations.

As this paper is concerned with the effectiveness of the asset declaration system, each subtopic will be discussed in detail with relevant supporting legal provisions and information as follows: a brief overview of the system; the relevant legislation that public officials are subjected to regarding asset declaration; the scope of declaration; filing frequency; the method of submission; the method of carrying out verification; the types of sanctions applicable; the mandate and structure of the implementing agency; the resources needed to implement the system; public access to declarations; the monitoring of the system; and other relevant details.

This paper does not seek the best practice approach, as there is no one-size-fits-all solution for all countries in fighting corruption, including an asset declaration system. However, it is important to study other countries' experiences and the approaches taken to address those challenges in different jurisdictions. Therefore, two case studies will be discussed in this chapter, one each from India and Thailand. A comparative analysis will be presented at the end of this chapter between the asset declaration system in Malaysia and those in India and Thailand, since such an analysis can provide practical and constructive recommendations in the next chapter for reforming Malaysia's asset declaration system.

## **4.2 The Asset Declaration System in India**

### **4.2.1 Background**

The insertion of a provision concerning unexplained wealth into anti-corruption law in India was recommended by the Santhanam Committee as long ago as 1962 (Palmier, 1985, p.14). The Santhanam Report recommended the Prevention of Corruption Act, 1947 (POCA) to be amended to include the provision that "the possession by a public servant of assets disproportionate to income, and for which a satisfactory explanation could not be made, was itself criminal misconduct" (Palmier, 1985, p.14). The

recommendation eventually made India one of the first two countries to enact anti-illicit enrichment statutes into law, which it did in 1964, and was followed by many other countries (Boles, 2012, p.837). In the same year, the Central Civil Service Conduct Rules were issued requiring all public servants employed by the central or a state government or any other public authority under their control to submit declarations of movable and immovable assets owned by them and their immediate family (Right2Info, 2012). In spite of that, the submission and verification mechanisms were questionable as these documents were submitted in sealed envelopes and were not accessible under any law except by courts (Right2Info, 2012). In 2014, India's parliament passed the Lokpal and Lokayuktas Act, 2013 which requires all public officials to make a declaration of assets.

#### **4.2.2 The legal framework / provision**

The Lokpal and Lokayuktas Act, 2013 (LLA 2013) is the main legislation governing the declaration of assets by public servants in India. A Lokpal is a proposed ombudsman and the word "lok" (people) and "pala" (protector/caretaker) are derived from Sanskrit (Adi, 2014). And the Lokayukta referred to an anti-corruption authority constituted at the state level (NDTV, 2010). This act provides for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries. The Preamble to the LLA 2013 stated:

Whereas the Constitution of India established a Democratic Republic to ensure justice for all; And whereas India has ratified the United Nations Convention Against Corruption; And whereas the Government's commitment to clean and responsive governance has to be reflected in effective bodies to contain and punish acts of corruption; Now, therefore, it is expedient to enact a law, for more effective implementation of the said Convention and to provide for prompt and fair investigation and prosecution in cases of corruption.

The researcher is aware that it is highly possible that there will be an amendment introduced to section 44 of the LLA 2013 (declaration of assets) as industry lobby groups, bureaucrats and even parliamentarians have been pressuring the government to review the provision. The Prime Minister of India, Narendra Modi, has invoked section 12 of The Government of India (Transaction of Business) Rules which gives him powers to introduce an amendment to the Act (Mathew, 2016). However, as far as this thesis is concerned, there was still no amendment to the LLA 2013 at the time of writing.

### **4.2.3 Who is to declare and the scope of assets declared**

Section 44(1) of LLA 2013 requires every public servant to make a declaration of his assets and liabilities. The definition of public servant has been given in section 14(1)(a) to (h) of the Act as follows (Fogla, et. al., 2016, p.6):

- a. Past or Present Prime Minister;
- b. Past or Present Union Minister;
- c. Past or Present Member of Parliament;
- d. Past or Present Group A or B Officers of Central Government;
- e. Past or Present Group C or D Officers of Central Government;
- f. Chairperson or Member or Official or Employee of a Government Corporation or totally financed by Government;
- g. Director, Manager or Secretary or any other officer of NGOs funded by Government in excess of Rs. 1 crore; and
- h. Director, Manager or Secretary or any other officer of NGOs funded by foreign source in excess of Rs. 10 lakh.

The wide definition of public servant not only includes past and present public servants, but the Act also applies to all public servants in and outside India. Besides the public servant himself, his spouse and his dependent children are also required to declare their assets.

Section 44(2) of the LLA 2013 provides for the declaration that a public servant makes and requires an oath or affirmation within 30 days from the date upon which he enters his office that shall include:

- a. The name of spouse, minor or dependent children and the public position held by them, if any;
- b. Details of the movable assets, such as investment, motor vehicle, jewellery, etc., of himself, spouse and dependent children;
- c. Details of immovable property such as its description, precise location, the size of land, how it was acquired, present value, etc., of himself, spouse and dependent children;
- d. Details of debts and other liabilities such as the creditor's name and address of himself, spouse and dependent children.

#### **4.2.4 The collection, monitoring and verification mechanism**

Every public servant is required to declare their assets and liabilities to the competent authority, on or before the 31<sup>st</sup> July of every year under section 44(4) of the LLA 2013. The definition of competent authority is stated in section 2(c), in brief referring to: the Prime Minister, who receives the ministers' declaration of assets and liabilities; members of parliaments besides ministers, who will submit their declaration to the Speaker and to the chairman of respective houses; central civil servants submit their declarations to the prescribed authority of their Ministry or Department that they are serving, etc.

Public servants must file their information pertaining to their assets and liabilities in the form that is attached to the LLA 2013 (See Appendix B). In other words, there is a standardized form to be used by all public servants to declare their assets and liabilities. However, there are no specific criteria under the Act regarding how verification of the submitted assets declarations is to be carried out. The verification of declaration of assets may be carried out when the Lokpal receives a complaint from the public. Upon receiving the complaint, the Lokpal needs to decide whether to proceed further. Once they have decided to proceed further, the Lokpal can order a preliminary inquiry by its Inquiry Wing or investigation by any agency such as Delhi Special Police Establishment (CBI) (section 20(1) of the LLA 2013). It is noteworthy that every preliminary inquiry shall ordinarily be completed within 90 days, and for written reasons for the action to be pursued to be provided within a further 90 days from the date of receipt of the complaint. If there exists a prima facie case and the Lokpal decides to proceed to investigation into the complaint, it shall direct the Central Bureau of Investigation (CBI) to carry out the investigation as expeditiously as possible and complete the investigation within 6 months from the date of its order (section 20(5) of the LLA 2013).

Any agency which investigates the allegation shall submit the investigation report to the court which has jurisdiction and forward a copy to the Lokpal. Upon receiving the report, a bench consisting of not less than three members of Lokpal shall consider every investigation report received from any agency and after obtaining the comments of the competent authority and the public official may make one of two possible decisions: a) if the public servant is guilty, Lokpal will grant sanction to its Prosecution Wing or the CBI to file charges against him, or b) direct initiation of departmental proceedings.

It is important to look at the composition of Lokpal at this juncture. The Lokpal consists of:

- a. a Chairperson, who is or was formerly Chief Justice of India or is or has been a Judge of the Supreme Court or another eminent person who fulfils the eligibility criteria, and
- b. maximum 8 members, fifty per cent of whom shall be Judicial Members. Judicial Member means he is or has been a judge of the Supreme Court or Chief Justice of a High Court. For a member other than Judicial Member, he is a person of impeccable integrity and outstanding ability having special knowledge and expertise of not less than twenty-five years in matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law, and management (section 3 of LLA, 2013).

The appointment of the Lokpal is by the President following the recommendations of the Selection Committee consisting of the Prime Minister, the Speaker of the House of the People, the Leader of the Opposition in the House of the People, the Chief Justice of India or a Judge of the Supreme Court, and an eminent jurist (section 4(1) of the LLA 2013).

Section 6 of the LLA 2013 provides that the term for the appointment of a Lokpal member including the Chairperson is five years from the date he enters office or until he attains the age of 70 years, whichever is earlier. The appointment to Lokpal is not renewable. Furthermore, members are not allowed to be appointed to any diplomatic assignment, any employment to any other office of profit under the Union Government or a State, and contesting any election of President or Vice-President or Member of either House of Parliament or Member of either House of a State Legislature or Municipality or Panchayat within a period of five years from the date of relinquishing the post (section 8 of the LLA 2013).

How is the system to be monitored? The declaration will be disclosed publicly under section 44(6) of the LLA 2013. Any member of the public can file a complaint to the Lokpal if he thinks the public servant has broken the asset declaration law. The Lokpal is required to act on the received complaint and to initiate a preliminary inquiry or request a relevant authority, such as CBI, to conduct an investigation. Most importantly, the CBI must complete the preliminary inquiry or investigation within the prescribed period and a copy of investigation report shall be given to the court. This has demonstrated the checks and balances mechanism, where the Lokpal monitors the investigation progress, but does not interfere with the investigation findings. Most importantly, the investigating agency in charge will forward a copy of its investigation report to the court to increase the transparency of the investigations.

To summarise, India has the respective head of agency or department collect the asset declaration forms from all public servants and the asset declarations are to be published on the respective agency's or department's website. The Lokpal will act on a complaint received from the public to initiate a preliminary inquiry or investigation of the allegation. The verification of the assets declared will be carried out during the course of inquiry or investigation by the CBI, and at the same time, the progress of investigations will be monitored by the Lokpal.

#### **4.2.5 Enforced sanctions mechanism**

Section 45 of the LLA 2013 provides that in the event of any public servant wilfully, or for reasons which are not justifiable, failing to declare his assets or providing misleading information in such a declaration, such assets shall, unless otherwise proved, be presumed to belong to the public servant and shall be presumed to be assets acquired by corrupt means. The presumption made for failure to declare assets of public servants will be treated as an offence, and the Lokpal shall have the power to initiate inquiry and even confiscate the assets of such officers (Fogla, et al., 2016).

Interestingly, section 2(2) of the LLA 2013 states that for any words and expressions used but not defined in the Act, the provision of the Prevention of Corruption Act 1988 (POCA 1988) shall apply accordingly. This presumption of failure to declare assets and fake declaration allows for an investigation initiated under the POCA 1988 and the public servant can be punished under the same Act if he is found guilty. The relevant provision in the POCA 1988 is stated in section 13(1)(e) as follows:

A public servant is said to commit the offence of criminal misconduct if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

The above-mentioned provision is known as unjust enrichment, and a public servant is deemed to have committed an act of criminal misconduct when he cannot satisfactorily account for pecuniary resources or property disproportionate to his known sources of income. Once the prosecution establishes the disproportion of the assets to his known sources of income, the public servant will be presumed guilty of the offence under this provision. The burden will be shifted to the public servant to prove that the excessive property has been obtained through legal means. Upon an unsatisfactory explanation during the court proceeding, the public servant shall be punished with imprisonment for

a term not less than one year but less than seven years and shall also be liable to a fine (section 13(2) of POCA 1988).

#### **4.2.6 Public access to asset declarations**

Section 44(6) of the LLA 2013 provides that the competent authority of each Ministry or Department shall ensure that all such statements are published on the website of such Ministry or Department by 31<sup>st</sup> August of the respective year.

#### **4.2.7 Case study: Tamil Nadu Chief Minister J. Jayalalithaa**

J. Jayalalithaa is a three-time Chief Minister of the South Indian state of Tamil Nadu (1991 to 1996, 2002 to 2006, and 2011 to 2014). In 1996, she was accused of possessing assets disproportionate to her known sources of income (Deccan Chronicle, 2015). The allegations went back to her term as Chief Minister between 1991 and 1996, during which she had, without being involved in any businesses and while receiving a monthly salary of Rs. 1 (US\$0.015), allegedly collected assets worth Rs. 66 crore (US\$ 9.7 million), including 2,000 acres of land (My Law Blog, 2014). Raids were conducted on her houses and property recovered valued at Rs. 58 crore (US\$ 8.5 million). It included jewellery - 30 kg of gold (400 pairs of bangles) and 500 kg of silver, over 100 wrist watches, more than 150 curios and semi-precious stones, besides a wardrobe of 10,000 saris and 250 pairs of imported footwear (India Today, 1996). During the hearing of the appeal, Jayalalithaa had contended that the then DMK government-led investigation had deliberately overvalued her assets and she had acquired the property through legal means (Deccan Chronicle, 2015).

In 2014, she was convicted and sentenced to four years in prison and a Rs. 100 crore (US\$14 million) fine after being found guilty of corruption by a special court in Bangalore. The conviction disqualified her as Chief Minister and effectively put her out of the electoral arena for 10 years (Mondal and Laskhmana, 2014). The conviction took place under Section 13(1)(e) of the Prevention of Corruption Act, 1988. Under this section, a public servant is deemed to have engaged in criminal misconduct when that person cannot satisfactorily account for pecuniary resources or property disproportionate to his known sources of income. The explanation for sources of income is “income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.” (The Law Blog, 2014). Since the prosecution had established the disproportionate

nature of Jayalalithaa's assets, she was presumed guilty of the offence under this provision. She would be acquitted if she were able to give a satisfactory explanation for the disproportionate assets.

## **4.3 Asset Declaration in Thailand**

### **4.3.1 Background**

Thailand has a long history of their anti-corruption agency being in charge of asset declaration by public officials. The Counter Corruption Commission (CCC) was established in 1975 through the Counter Corruption Act of Thailand. One of the CCC's functions is submitting to the Cabinet for consideration proposals for directing government agencies or public enterprises to order those officials suspected of corruption to declare their assets and liabilities (Amara, 1999, p.228). The CCC was viewed as ineffective as it had no actual power but could only send reports to the Cabinet and notify or recommend the punishment of public officials (Quah, 2011, p.295). Eventually, the ineffectiveness of the CCC in curbing corruption led to its dissolution and replacement by the National Counter Corruption Commission (NCCC) in 1997 (Quah, 2011, p.296). The NCCC has been empowered to investigate complaints of corruption against politicians and civil servants and impeach them for having "unusual wealth" or committing corruption, malfeasance or abuse of power offenses. The new Constitution of Thailand in 2007 provided the NCCC with the power to investigate and prosecute, including cases involving politicians and state officials, and shifted the burden of proof to the defendant (BTI 2010: Thailand Country Report, 2010). In July 2008, the NCCC changed its name to the National Anti-Corruption Commission (NACC).

### **4.3.2 The legal framework**

The Organic Act on Counter Corruption, B.E. 2542 of Thailand (OACC 1999), as subsequently amended, is the principal law for dealing with corruption cases involving "State officials" and "persons holding a political position" (Achalaboon, 2009, p.117). The NACC has been given powers to administer corruption cases under the OACC 1999. Two of its main duties and powers are:

- a. to investigate and decide whether a state official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office;

- b. to inspect the accuracy, actual existence, as well as change of assets and liabilities of persons holding positions under section 259 and section 264 as stated in the account and supporting documents submitted (NACC, 2016).

The procedure and relevant aspects of asset declaration are provided under Chapter III, Inspection of Assets and Liability, of OACC 1999. Chapter III is divided into two parts, namely, Part 1 - Declaration of Accounts Showing Particulars of Assets and Liabilities of Persons Holding Political Positions, and Part 2 - Declaration of Accounts Showing Particulars of Assets and Liabilities of State Officials.

#### **4.3.3 Who is to declare and the scope of assets declared**

There are two categories of persons who are required to submit an account showing their assets and liabilities under OACC 1999. The first category is Persons Holding Political Positions under section 32 of the Act. The definition of Persons Holding Political Positions is given under section 4:

- (1) Prime Minister;
- (2) Minister;
- (3) Member of the House of Representatives;
- (4) Senator;
- (5) political official other than (1) and (2) under the law on political officials;
- (6) political parliamentary official under the law on parliamentary officials;
- (7) local administrator, deputy local administrator and assistant local administrator of a local government organisation as prescribed by the National Counter Corruption Commission by publication in the Government Gazette;
- (8) member of a local assembly or a local government organisation as prescribed by the National Counter Corruption Commission by publication in the Government Gazette.

The second category is State Officials. However, not all State Officials are bound to declare their assets and liabilities. Section 39 of the OACC 1999 prescribes only the following State Officials to declare their assets and liabilities:

- (1) President of the Supreme Court of Justice;
- (2) President of the Constitutional Court;
- (3) President of the Supreme Administrative Court;
- (4) Prosecutor-General;
- (5) Election Commissioner;
- (6) Ombudsman;

- (7) Judge of the Constitutional Court;
- (8) member of the State Audit Commission;
- (9) Vice President of the Supreme Court of Justice;
- (10) Vice President of the Supreme Administrative Court;
- (11) Chief of the Military Judicial Office;
- (12) Judge of the Supreme Court of Justice;
- (13) Judge of the Supreme Administrative Court;
- (14) Deputy Prosecutor-General;
- (15) person holding a high-ranking position.

A “person holding a high-ranking position” means a person holding the position of the head of a Government agency at the level of a Department, Sub-Ministry or Ministry in respect of ordinary government officials, a person holding the position of Permanent-Secretary of the Ministry of Defence, Supreme Commander or Commander-in-Chief of the Armed Forces in respect of military officials, a person holding the position of Commissioner-General of the Royal Thai Police, a person holding the position of Permanent-Secretary of the Bangkok Metropolitan Administration, a member of the Board and the chief executive of a state enterprise, or head of an independent agency under the Constitution which has a juridical person status, and a person holding other positions as prescribed by laws (section 4 of the OACC 1999).

The above mentioned two categories of persons shall declare their assets and liabilities and those of their spouse and children who have not yet become *sui juris*. The account showing particulars of assets and liabilities shall be submitted together with copies of supporting documents as evidence for actual existence of such assets and liabilities as well as a copy of the personal income tax return for the previous fiscal year.

#### **4.3.4 The collecting, monitoring and verification mechanism**

Persons Holding Political Positions and the State Officials listed under section 39 of the OACC 1999 shall submit to the NACC an account showing their assets and liabilities and those of their spouse and children who have not yet become *sui juris*. Persons Holding Political Positions shall submit their declarations to the NACC within 30 days from the date of taking office and within one year of vacating office. In the event that someone who has already submitted an account dies while holding office or before submitting the same after the vacation of office, an heir or an administrator of the estate of such a person shall within ninety days following the date of the death submit an account showing particulars of the assets and liabilities existing on the date of such person's death (section 33(3) of OACC 1999). State Officials listed under section 39 of

the OACC 1999 shall submit an account showing particulars of their assets and liabilities, and those of their spouses and children who have not yet become *sui juris*, upon taking office, every three years while being in office, and upon vacation of office, in accordance with the form prescribed by the NACC.

According to the interview response of Mr. Pongaek Vijitkul, the Assistant Secretary General of NACC, the asset declaration shall be submitted in a hard copy to NACC. He is of the view that it would be better if the declaration was submitted online whereby it would help the inspection staff to examine them more effectively and easily cross-check the asset information with financial institutions. Once the NACC has collected the declaration of assets and liabilities, the President of the NACC shall convene a meeting of the NACC to verify the accuracy and the actual existence of assets and liabilities without delay (section 35(4) of OACC 1999). If the inspection report of a person holding a political position or of the persons other than those holding political position reveals an unusual change in the property owned by that person, the NACC will request him or her, or his or her heirs or the administrator of the estate, to explain the acquisition of such property. If that person(s) cannot explain the source of unusual change, the NACC will pass a resolution that such a person has had an unusual increase in his or her property (Achalaboon, 2009, p.119). In other words, the burden of proof is put on the shoulders of the person who declared his assets to prove himself innocent of the detected unusual increase in his property. Upon an unsatisfactory explanation, the President of the NACC will submit an inspection report to the Prosecutor-General for instituting prosecution in the Supreme Court of Justice's Criminal Division for persons holding political positions, and the Court having jurisdiction to try State Officials (OACC 1999, Section 38).

As the sole agency in collecting and verifying the declarations of assets and liabilities of the person, the NACC has established an Asset Inspection Group (NACC, 2016). The NACC's organizational structure is divided into three branches and one unit. The Operations branch is the biggest among these and has three groups: the Ethics and Integrity Promotion and Corruption Prevention Group, the Asset Inspection Group and the Corruption Suppression Group. The Asset Inspection Group has five sub-groups, namely:

- (1) Bureau of Asset Inspection in the Political Sector 1;
- (2) Bureau of Asset Inspection in the Political Sector 2;
- (3) Bureau of Asset Inspection in the Public Sector;
- (4) Bureau of Asset Inspection in the State Enterprises Sector;
- (5) Bureau of Inspection Procedure Development.

The establishment of the Asset Inspection Group has shown the inspection of assets and liabilities of the persons holding political positions and State Officials to be one of the main tasks or even the principal focus area for the NACC in terms of fighting corruption. It appears that the division of the Asset Inspection Group into five different sectors indicated the professionalism of the investigation role of the NACC, where different sectors' asset inspection might require different approaches to verification and investigation. In order to verify the accuracy, existence and change of assets and liabilities, the NACC has powers to require the disclosure of the information concerning the financial transactions made by the public official who declared his assets, and also of the person(s) connected to the public official (section 37(3) & (4) of OACC 1999).

It is important to examine the independence of the President of the NACC and the other eight members of the Commission. This is because the President has the power to convene a meeting to verify the accuracy and the actual existence of assets and liabilities (section 35(4) of OACC 1999), and all nine of them can decide whether to pass a resolution that such a person has had an unusual increase of assets before a prosecution is instituted against the person. Section 6 of OACC 1999 states that the NACC comprises a President and eight other members appointed by the King on the advice of the Senate. All nine of them are chosen by a Selection Committee of five members consisting of the President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court, President of the House of Representatives, and Leader of the Opposition in the House of Representatives. The qualification for being a member provided in section 9 of the OACC 1999 is as follows:

- (1) having Thai nationality by birth;
- (2) being not less than forty-five years of age;
- (3) having been a Minister, judge of the Constitutional Court, Election Commissioner, Ombudsman, member of the National Human Rights Commission, member of the State Audit Commission, or member of the National Human Rights Commission, or having served in a position not lower than Deputy Prosecutor-General, Director-General or a person holding an administrative position in a government agency having administrative powers equivalent to a Director-General, or a person holding an academic position of not lower than Professor, or having been an attorney, or a representative of a private development organisation or a practitioner of a profession regulated by a professional organisation established by law who has practiced such profession for not less than thirty years up to the date of nomination and having been certified and nominated for selection by the Law Society, private development organisation or professional organisation.

A member shall hold office for a term of nine years and only serve for one term. Section 16 of the OACC provides two steps to remove a member from office. First, a request of not less than one-fourth of the total number of the Members of the House of Representatives or not less than twenty thousand eligible voters shall have the right to lodge with the President of the Senate a petition that the member has acted unjustly, intentionally violated the Constitution or laws, or is in any circumstance which is seriously detrimental to the dignity of the office. Secondly, the resolution of the Senate removing the NACC member from office shall be passed by the votes of not less than three-fourths of the total number of the members of the Senate. The two-fold nature of the procedure is to ensure that a member of the NACC cannot be too easily removed by anyone, including the Prime Minister.

#### **4.3.5 Enforced sanctions mechanism**

If a person holding a political position or a State Official listed in section 39 of the OACC 1999 fails to submit a declaration of assets and liabilities within the time prescribed, or discloses false details in such a declaration or falsifies supporting documents, the person must vacate office as from the date of the decision of the Supreme Court Criminal Division or the Court that has jurisdiction, and such a person shall not hold a political position or take a position as a state official for a period of five years (section 34(1) of OACC 1999). Besides that, if the person is detected having an unusual increase of assets, the NACC can request the person to explain the acquisition of such property. Upon an unsatisfactory explanation, the NACC can submit the inspection report to the Prosecutor-General for instituting prosecution, and the unusual assets shall be devolved to the State (section 38 of OACC 1999).

#### **4.3.6 Public access to asset declarations**

Section 35 of the OACC 1999 prescribes that declarations submitted by the Prime Minister, Ministers, and Members of the House of Representatives and Senate must be disclosed to the public without delay, but not later than thirty days from the date of the expiration of the time limit prescribed for the submission of such accounts. Persons holding other positions shall disclose their declaration only if the disclosure is required for the trial and adjudication of cases, or for the making of a determination, and is requested by the courts, an interested person, the State Audit Commission, or the owner of the account consents to the disclosure.

In the event where the submission of the account is made by reason of the vacation of office or death of any person holding a political position, the NACC shall inspect the change of assets and liabilities of such a person and prepare an inspection report. Such a report shall be published in the Government Gazette (section 36 of OACC 1999).

#### **4.3.7 Case study: Thaksin Shinawatra, Prime Minister of Thailand (2001-2006)**

In 2000, a Thai journalist named Prasong Lertratanawisute became aware that Thaksin had transferred shares in several companies to his wife and children (Coronel, ed., 2006). Thaksin was at the time the Foreign Minister and head of the Thai Rak Thai party and had claimed he was doing so to comply with the 1997 People's Constitution requiring government ministers to avoid conflicts of interest by limiting their shares in companies to just five percent (Nualnoi, 2004, p.185). Under the Constitution, Cabinet ministers must declare their assets, and those declarations have been public records since 1997 (Luh, 2003, p.3). Prasong started to gather information on Thaksin's assets and noticed that there was an unusual change in his declared assets. Prasong discovered that when Thaksin took his oath as foreign minister in 1994, he was worth 58 billion baht (US\$1807.7 million) based on the corporate and stock exchange records (Coronel, ed., 2006). However, he declared his assets to be worth well under half that amount, about 23 billion baht (US\$716.5 million), when he took his oath as Deputy Prime Minister in 1997 (Coronel, ed., 2006). The drastic difference made Prasong further investigate where the balance of assets had gone and eventually he found that Thaksin had hidden his under-declared assets in the names of his maid and driver.

The newspapers that Prasong was working for had published the news and prompted the NACC (back then, the NCCC) to investigate Thaksin. In December 2000, the NCCC ruled that Thaksin had hidden his assets in the name of his driver and maid (BBC, 2001). However, Thaksin was elected prime minister in January 2001. This did not change the fact that the NCCC's decision was appealed in the Constitutional Court (Khampha, 2002). In August 2001, Thaksin was acquitted by the Constitutional Court which issued its verdict in a split 8-7 vote (The Telegraph, 2001). The judgment seems to have represented the triumph of "popularity over the rule of law" (Coronel, ed., 2006).

#### **4.4 Comparison with Malaysia's Asset Declaration System**

Unlike Malaysia, both India and Thailand have codified the asset declaration of public officials into their legislation, namely the LLA 2013 (India) and the OACC 1999 (Thailand). These Acts compel the countries' public officials to declare their assets and liabilities to the relevant authorities. The relevant authorities have also been given sufficient powers to carry out the verification of assets declared. Most importantly, a certain degree of independence has been granted to such agencies to ensure their impartiality. For example, the selection of the members of Lokpal and the NACC is made by committees consisting of the ruling party leader, the opposition leader and the chief justice, etc. Similarly, the members of Lokpal and the NACC only serve for one term and the appointment is not renewable. The term limits can prevent the concentration of power by any party, which in turn helps to prevent the misuse of power.

It is worth noting that these two countries have different coverage of the public officials who are required to submit their asset declarations. The LLA 2013 requires all public officials to make such declarations, whereas the OACC 1999 requires all politicians and certain high-ranking State Officials to declare their assets. The Thai NACC collects the asset declarations within the same agency that carries out verification of the declared assets. This might require a lot of manpower and resources. Nevertheless, the NACC only focuses on those people who have power and who tend to be corrupt, namely, persons holding political positions and high-ranking State Officials. In contrast, India requires all public officials to declare their assets to the respective competent authorities, and the competent authorities shall publish the declared assets on their website. It appears that the Lokpal might rely on complaints filed by the public if they think any public official has not submitted their asset declaration or has provided misleading information about the assets. Even though LLA 2013 provides for sanctions against those who lodge false complaints to the Lokpal, it requires a tremendous amount of resources to verify the complaint in the first place. In the event that the complaint is confirmed false, it requires even more resources to prosecute the complainant in court for lodging a false complaint. On the other hand, such a provision might discourage the public from lodging a complaint to the Lokpal.

India and Thailand both consider that any public official who fails to explain satisfactorily their disproportionate wealth or unusual change in their property has committed an offence. In other words, the burden of proof is put on the shoulders of the public official to show his assets were obtained legally; otherwise he shall be convicted accordingly. Malaysia has taken the reverse position, whereby the prosecution must establish that a predicate offence has been committed by a public official, i.e., that he obtained the

under-declared assets through an offence prescribed under anti-corruption law in Malaysia; only then can the public official be convicted by the court.

The two case studies discussed in this chapter have shown that action can be taken against those who break the asset declaration and unjust enrichment laws - even those who are in power - as long as the independence of the anti-corruption agency is guaranteed. In the case of Thaksin, even though he was not convicted for under-declaring his assets, it appears that the NACC was independent and determined to bring the Prime Minister to court at that time. Moreover, the NACC had charged Deputy Prime Minister Sanan Kachornprasart for fabricating documents to conceal assets worth 45 million baht (US\$ 1.4 million) (Quah, 2011, p.303).

#### **4.4.1 Case study: Ramli Yusoff, Malaysia's former third highest ranking police officer**

On 17 July 2007, the former Commercial Crimes Investigation Department director, Ramli Yusuff, received a notice from the Malaysian Anti-Corruption Agency (now MACC) requiring him to declare his assets. A further notice regarding the same matter followed on 28 August 2007. Ramli had handed over a sworn statement in an envelope about the details of his assets and four boxes of documents as requested by the Anti-Corruption Agency on 17 September 2007 (Bernama, 2008).

On 1 November 2007, Ramli was charged with two counts of failing to disclose his assets under section 32(2) of the Anti-Corruption Act 1997 (same as section 36(2) of MACCA) which carries a jail term of 14 days to 20 years and a maximum fine of RM100,000, if convicted. He also faced a third charge at the Kuala Lumpur Sessions Court of being involved in business despite being a civil servant (Malaysiakini, 2007). He was charged with non-declaration of (The Malaysian Bar, 2008):

- a. two office lots on Megan Avenue II, held by an investment holding company where Ramli's sisters were directors. The two properties were worth RM1.032 million;
- b. owning 154,000 shares in Permaju Industries Bhd, an investment holding company whose subsidiaries were in the manufacturing and sale of plywood; and
- c. owning 20,000 shares of Telekom Malaysia Bhd.

During the course of proceedings, it was revealed that Ramli had declared his assets to the police 35 times since 2002; the declarations concerned 53 assets (Mageswari, 2008).

In March 2009, Ramli was acquitted by the Sessions Court of three counts of failing to disclose information on the ownership of 20,000 Telekom Malaysia Berhad shares, 154,000 Permaisuri Industries Bhd shares and two office lots in the city worth RM1,032,840 (Malaysiakini, 2010). The Judge M. Gunalan ruled that the Malaysian Anti-Corruption Commission (MACC) had failed to prove a *prima facie* case against Ramli (Malaysiakini, 2010a). The court held that:

- a. The complainant to the then ACA was a person of dubious character who has engaged in a string of criminal activities.

“There is the absence of a fair and thorough investigation to ascertain the truth of the related allegation based on the information relied upon by the complainant whom the court cannot consider to be credible and adequate enough ... to suggest the accused had committed the offence.”

- b. Since the two office lots on Megan Avenue II are held by an investment holding company where Ramli's sisters are directors, but not under the name of the accused, the question of the accused having legal interests in the properties can totally be ruled out.
- c. As with the second charge, the remisier's testimony and his credibility are negligible.

The fact that the accused (Ramli) had exhibited his statement could by itself prove that the accused had no intention to conceal the share transactions, including the Pemaju counter undertaken in this account.... To summarise, it could not be concluded from the testimony that it was the accused who has placed the order (for the shares), but it was confirmed that none of the payments was made by the accused. Neither were there any receipts issued to him. The purchase could have been made by a third party by using the accused's account.

- d. With the third charge, the accused had not made a declaration of the purchase of the Telekom shares on September 17, 2007. However, the evidence only

indicated that he became the owner of the shares two days later (Malaysiakini, 2010a).

The case of Ramli Yusuff has demonstrated the ineffectiveness of asset declaration and the difficulties of bringing any public official to court under section 36 of MACCA for failure to declare assets and unjust enrichment in Malaysia. First, the heavy burden of proof has been put on the shoulders of the prosecution. The prosecution must establish that the public official has committed an offence under MACCA as the failure to declare assets and unjust enrichment is not an offence by itself, and the investigation must show the complainant is credible and adequate. In other words, even if a public official under-declared his assets to MACC under section 36, he will not be convicted unless MACC and the prosecution prove that an offence has been committed by him. For instance, a public official under-declared his bungalow under section 36 of MACCA and MACC needs to prove that the public official has used a bribe that he received from a businessman to buy the bungalow. Secondly, the existing asset declaration of public officials is not designed to prevent and detect corruption of public officials. The probability of being caught is low as there is no verification of the submission of asset declaration. Even if, upon the receipt of a complaint by MACC, the public official is detected as having excessive wealth, MACC still needs to prove he has committed an offence. He might be sanctioned under the administrative regulations for unsatisfactory explanation of his wealth as a public official, but the decision on what type of sanction is to be imposed on him is entirely at the discretion of the Head of Department or Chief Secretary of the Government of Malaysia for a high ranking public official.

## **5. Conclusion**

### **5.1 Introduction**

It is difficult to eradicate corruption. As Rose-Ackerman (2010, p.4) emphasized, principal-agent relationships are at the heart of any corrupt transaction. The agent or employee or public official of a government or organization obtains private gain in return for the payee's favour. The bribery takes place when the agent misuses his power or position of authority. As a certain level of discretion is necessary for the agent or public official to make decisions, the challenge of governing the behaviour of public officials to reduce corruption has become the focus of many studies. Asset declaration is one of the many anti-corruption tools that can help in detecting and preventing corruption by way of institutional scrutiny of the public official's declared assets. The OECD (2011, p.13) recognises no particular or best legal solution for public officials' asset declarations. A well-designed and operational asset declaration system can be achieved by taking into account a country's legal traditions, previous experience and current problems (OECD, 2011, p.13-14).

The central aim of this study is the evaluation and assessment of the asset declaration system of public officials in Malaysia. The argument will be further strengthened after the exploration of the recommendations. The ultimate objective of this study is to advocate for a redesign of the asset declaration system in Malaysia in order to fight corruption more effectively. In this final chapter of the thesis, we will (a) present a summary of the findings, (b) re-visit the hypotheses, and (c) make concrete policy recommendations.

### **5.2 Summary of Findings**

The central purpose of this study was to evaluate the effectiveness of the asset declaration system in Malaysia by undertaking the issues and challenges faced under the current system. And this evaluation eventually led to the recommendation of reforming the existing asset declaration system as a strategy to combat corruption in the public sector more effectively. In order to accomplish the purpose of this study, the researcher had gathered data, material and information from primary and secondary sources and analysed it. Literature review was conducted to determine the meaning of an effective asset declaration system, and how the system can help to prevent and detect corruption. In order to identify the level of effectiveness of the system and how

well the Malaysian asset declaration system operated, an in-depth literature review was conducted together with the relevant data analysed and presented in this study. To provide some ideas on how to improve and reform the Malaysian asset declaration system, two other countries were studied from the perspective of their legal frameworks and their experiences through the presentation of case studies. Related to these efforts, interviews were conducted with practitioners and experts in this field to further test the hypotheses of this study; findings from the interviews were incorporated in this chapter to enhance the findings and recommendations.

The thorough analysis of the primary and secondary sources in the previous chapters, namely, the legal framework, relevant statistics, experts' interviews, and international standards, has enabled the researcher to reach the following findings:

- a. There is no single special body or agency in charge of asset declaration in Malaysia. Malaysia has a set of asset declaration systems which apply to civil servants, Members of Parliament and judges. It reflects the inconsistency of the implementation of asset declaration systems when different sets of standards apply to different categories of public officials. The civil service in Malaysia is governed by a set of administrative regulations with clear procedures, whereas Members of Parliament and high level judges declare their assets to the Prime Minister and Chief Justice respectively, where no clear requirement of guidelines exist, such as what types of assets need to be declared, how frequently assets must be declared, what the consequences are of non-compliance, and how and to whom the Prime Minister and Chief Justice should submit their asset declarations, etc.
- b. The Malaysian asset declaration system is implemented via administrative regulations for civil servants, a code of conduct for Members of Parliament and a code of ethics for high level judges. The absence of criminal sanctions for the non-compliance of asset declaration that could serve as a deterrent has greatly diminished the effectiveness of the system.
- c. There is no verification carried out on the assets declared by civil servants, Members of Parliament and high level judges in Malaysia. The low number of cases for failure to declare property or living beyond one's means under the Public Officers (Conduct and Discipline) Regulations 1993 compared with the other types of misconduct reflects the ineffectiveness of the asset declaration system. The verification of asset declaration will only be carried out during the course of investigation by MACC under section 36 of MACCA upon the receipt of a complaint against any public official. Otherwise, the declaration of assets that

are collected will only be deposited with the heads of departments, Prime Minister and Chief Justice with no further action or consequence.

- d. There is no adequate punishment imposed on those public officials who fail to declare assets and who live beyond their means under the administrative regulations in Malaysia. This is because the type of punishment to be imposed is at the absolute discretion of the respective head of department or agency that the public official reports to. In addition, the discretion of a head of department or agency is not reviewable or challengeable by any person including MACC.
- e. One of the reasons Malaysia has no convictions for unjust enrichment under section 36(3) of MACCA is the requirement of the establishment of a predicate offence. This is different from systems in India and Thailand where both countries have criminalised the failure to declare assets and unjust enrichment. In Malaysia, MACC must be able to prove the accused has committed an offence under MACCA in the first place, as unjust enrichment is not an offence by itself.
- f. The lack of deterrent minimum sentence may result in sentences for unjust enrichment under section 36 (3) of MACCA not reflecting the severity of the crime. This is because while the maximum prescribed sentence is 20 years, there is no minimum prescribed sentence, and a convicted public official can be sentenced for one day and a fine not less than 5 times the value of the excess, if the excess is capable of being valued, or MYR 10,000 (US\$2500), whichever is higher.
- g. Five interviews were conducted with experts and practitioners related to this study topic. All four local and a Thailand interviewee were of the view that asset declaration is an effective tool to prevent and detect corruption. However, the Malaysian asset declaration system is not effective because of lack of monitoring and enforcement. In this connection, four interviewees were of the view that codification of asset declaration systems with legal enforceability can overcome the challenge of ineffectiveness of enforcement and monitoring. The implementation of asset declaration systems should be monitored by an independent body or oversight body to ensure its effectiveness. All interviewees agreed that the insertion of a whistle blower provision into the asset declaration system, whereby a whistle blower will be rewarded for his information, provided it leads to the successful seizure of assets, will strengthen the system. Two of them were of the view that it is not easy to detect corruption or unjust enrichment of public officials under the current asset declaration system in Malaysia, and a whistle blower provision will certainly be helpful in providing information to MACC to investigate public officials.

### 5.3 The Hypotheses Revisited

Based on the findings derived from this study and after a thorough analysis of secondary and primary sources, the following hypotheses have been tested and accepted or rejected:

- a. The hypothesis that Malaysia's asset declaration system does not meet international standards is accepted. As discussed in Chapter 3, the Malaysian asset declaration system is not effectively implemented in the absence of a verification mechanism, monitoring and appropriate sanctions for non-compliance which is required under UNCAC.
- b. The hypothesis that codifying the asset declaration system for public officials into Malaysian law would increase the effectiveness of the governance system is accepted. In India and Thailand, both countries have embedded the systems of asset declaration by public officials into their primary law which enables them to implement the system with legal enforceability. In contrast, the Malaysian asset declaration system is embedded in administrative regulations and codes of conduct where absolute discretion is given to the Heads of Departments, Prime Minister and Chief Justice. The codification of asset declaration systems into primary law can ensure the court will be the avenue to review the evidence in cases of the failure to declare assets and unjust enrichment, and the decision of the court can be challenged or appealed.
- c. The hypothesis that the offence of illicit enrichment without establishment of predicate offence could increase the number of successful prosecutions and convictions is accepted. Based on the analysis provided in Chapter 3, the precondition to the offence of unjust enrichment under section 36 of MACCA has caused the prosecution difficulty in establishing that a public official has committed the offence. In contrast, in India and Thailand, the asset declaration system provides that the failure to declare assets and unjust enrichment are in themselves offences. There is no additional burden on the prosecution to establish that an offence has been committed.
- d. The hypothesis that the insertion of whistle blower provisions into the system, whereby a whistle blower will be rewarded for his/her information, provided the information leads to the successful forfeiture of ill-gotten assets, would be advisable and could increase the number of successful prosecutions and convictions is accepted. The interviews conducted with the expert practitioners

have indicated that most of them agreed that the insertion of a whistle blower provision into the asset declaration system will increase the probability of under-declared assets of public officials being detected. The incentive given will encourage more people to be a whistle blower and cooperate with the investigation agencies.

## **5.4 Policy Recommendations**

The study has examined the current position of the asset declaration system and also identified the challenges to have an effective asset declaration system in Malaysia. The following policies are hereby recommended:

### **5.4.1. Codify asset declaration system into Malaysian law**

It is recommended that Malaysia follows the systems like India and Thailand's which have embedded the obligation of asset declaration by public officials into their legislations. The codification will give certainty to the system where an agency or body is given a mandate to carry out the necessary functions under certain safeguards. In addition, such legal framework can ensure legal enforceability which will enable appropriate sanctions to be imposed for non-compliance and unjust enrichment. The researcher suggests two options to embed the asset declaration into Malaysian law: first, amend MACCA by inserting the asset declaration provision into the Act, provided MACC is the agency which is responsible for collection and verification of declared assets similar to Thailand's position; second, make a new asset declaration law where a separate independent body will be established to execute the implementation of the system.

### **5.4.2. Expand the category of persons who are required to declare their assets**

Strictly speaking, the Members of Parliament and high level judges are not required to declare their assets as the procedure for submission, verification, monitoring, and sanction remain unknown under the Code of Ethics and Judges Code of Ethics 1994. Under the existing asset declaration system, all civil servants are required to declare their assets to the respective head of department or agency. In this connection, the researcher suggests the expansion of the category of persons who are required to declare their assets to Members of Parliaments and high level judges and their spouses. The OECD (2011, p.13) recommends that different regulations of asset declaration

should be applied for different categories and branches of public officials. The reason is due to the different categories of public officials with different levels of responsibility and power or potential to be involved in conflicts of interest and corruption. However, it might require a lot of resources to collect and verify the declared assets when different regulations apply to different categories of public officials. Both India and Thailand have one primary asset declaration law whereby India requires all public officials to declare their assets and Thailand requires politicians and State Officials to declare theirs. In relation to this, the researcher proposes that one primary asset declaration law should apply to all Malaysian public officials, including the Members of Parliament and high level judges.

#### **5.4.3. The institutional arrangement - MACC**

As discussed in the earlier chapter, one of the main problems of the existing declaration system in Malaysia is that no actual verification carried out for the assets declared by the public official. In this connection, the researcher suggests that the submitted asset declaration shall be verified with the relevant authorities, i.e., Road Transportation Department of Malaysia has every record of ownership of vehicles. The verification with relevant authorities can not only detect the assets that are not declared, but also any forged documentation related thereto.

MACC has been given the power to obtain any financial accounts, records and documents from any bank or financial institution under section 36 of MACCA. One of the important components for an effective asset declaration system is to have operative verification carried out on the declared assets. Therefore, the researcher suggests that MACC be the agency which is given access to assets declared by heads of departments, high ranking public officials, Members of Parliament, and high level judges, and carry out verification on their asset declaration. For asset declarations submitted by persons other than those previously mentioned, MACC will act on the complaints filed by the public due to limited resources. However, the researcher also proposes that random verification should be carried out for middle and lower ranking public officials' asset declarations to increase the probability of being detected and thus act as a deterrent.

It is important to look at the independence of MACC at this juncture. As per the requirement under Article 36 of UNCAC, every State Party shall, in accordance with the fundamental principles of their legal system: (a) ensure they have a body or persons specializing in combating corruption through law enforcement; (b) grant the body or persons the necessary independence to carry out its or their functions effectively without undue influence; and (c) provide sufficient training and resources to such body or persons. To relate the above mentioned requirements of UNCAC, Malaysia has been

one of the earliest countries to have established a specific agency to control corruption when the Anti-Corruption Agency (ACA) of Malaysia was formed under the specified anti-corruption legislation in 1967 (Quah, 2007, p.74). The ACA subsequently evolved into the Malaysian Anti-Corruption Commission (MACC) by legislation, namely, the Malaysian Anti-Corruption Commission Act 2009 (MACCA). The legal framework of the establishment of MACC was aimed at enhancing the effectiveness and efficiency of anti-corruption efforts, as well as improving the independence and transparency of the ACA (Yusoff, Murniati and Greyzillus, 2012, p.32).

As commented by Yusoff (2010, p.83), although MACC is administratively under the Prime Minister's Department for the purposes of finance and staff, it does not affect the effectiveness of MACC in carrying out their investigations as the Chief Commissioner is not required to report the operations to the Prime Minister's Department. A good system of checks and balances is the fundamental condition for an effective anti-corruption agency (Abu Kassim, 2010, p.34). MACC has adopted the model of Hong Kong's Independent Commission Against Corruption (ICAC) in establishing several advisory committees to monitor the performance of the commission and at the same time to ensure its independence.

Five external oversight bodies were formed for MACC in order to give effect to its independence from the executive and aimed at creating an effective anti-corruption commission. There are three committees established under sections 13, 14 and 15 of MACCA, namely the Anti-Corruption Advisory Board (ACAB), the Special Committee on Corruption (SCC) and the Complaints Committee. The other two committees - the Operations Review Panel and the Corruption Prevention and Consultative Council - are set up through administrative orders. These bodies operate as checks and balances mechanisms to monitor the MACC's roles and functions (MACC, 2009). All members are appointed by the King to ensure impartiality; the diversity and the professional background of the members are also considered. Among the appointees are former judges, opposition politicians, a former bar council president, investigative journalists, academicians, etc.

Despite having a strong legal framework for MACC to carry out its functions to fight corruption effectively, the independence of MACC has been questioned. The fact remains that the Chief Commissioner of MACC is appointed by the King on the advice of the Prime Minister under section 5 (1) of MACCA. In other words, his appointment is at the discretion of the Prime Minister. The King by convention performs a merely formal function in endorsing the nominee of the Prime Minister. Secondly, the appointment of other officers of MACC is under general public service where section 6 of MACCA

provides that all recruitment, promotion, salary, and dismissal are controlled by the centralised public service. The situation is different from the Hong Kong ICAC where the employment contracts for ICAC staff members are independent of civil service rules and made on the basis of mutual consent (Heilbrunn, 2004, p.4). Lim (2014) observes that the impact of power centralisation in the executive branch of the federal government has limited the reinforcement of anti-corruption agency that comes under the jurisdiction of the Prime Minister's department.

Therefore, it is necessary to strengthen the independence of MACC by implementing the following recommendations:

- the position of Chief Commissioner shall be constitutionally appointed and protected;
- there should be an independent body or panel similar to the Lokpal to oversee the investigation and prosecution of the offences committed under asset declaration laws; and
- MACC must be given the power to prosecute the offences for failure to declare assets and unjust enrichment provided the power is overseen by an independent body to avoid misuse of power.

#### **5.4.4. Asset declarations made available to the public online**

The asset declarations that are submitted by the heads of departments, ministers, Members of Parliaments, and high level judges should be publicly available. Despite the long debate concerning privacy rights vs. public disclosure, there are defensible reasons for making asset declarations publicly available. Public disclosure can serve as a preventive measure as the asset declarations of public officials will be under the scrutiny of the public. In addition, it will increase the probability of irregular asset declarations being detected by the investigation agency, investigative journalists or members of the public. The integrity of public officials has a significant impact on the interests of the people, as they have been given power to make decisions for the people. Therefore, the public disclosure of asset declarations is considered defensible, as the public interest overrides personal interest (privacy rights). In the case of Thailand, former Prime Minister Thaksin was discovered to have under-declared his assets by a journalist after his declaration was disclosed publicly.

#### **5.4.5. Insertion of whistle blower provisions**

Corruption can be considered a special crime since it might not involve reporting from a victim, as both bribee and briber are participants in a corrupt transaction. It may be a situation where a corrupt public official receives a bribe from a contractor for granting his company a tender of a government project. This type of public corruption is relatively difficult to investigate and prosecute compared to other illegal acts (Wagner & Jacobs, 2014, p.185). The reason is simply because corruption is often carried out by hidden methods and only among insiders, limited to a network of trusted actors and repeat customers (Lambsdorff, 2007, p.136-163). Thus, the gathering of evidence is the biggest challenge for investigators and prosecutors. In the case of asset declaration, how to detect under-declared assets will be the utmost important issue. It is almost impossible to verify every submission by public officials due to limited resources and the sheer size of the Malaysian civil service.

In order to overcome the challenges mentioned earlier, the researcher suggests the insertion of whistle blower provisions into asset declaration laws where the whistle blower, including anonymous whistle blowers, will be rewarded if information given leads to successful forfeiture of assets. The likely effectiveness of such provisions has been confirmed through the interview conducted with Mr. Pongaek Vjitkul, the Assistant Secretary General of NACC. Thailand has such a provision in their asset declaration law under section 30 of the OACC 1999 as follows:

In conducting a Fact Inquiry in the case of an allegation that a state official has become unusually wealthy or in the inspection of the change of assets and liabilities of a person holding a political position, if any person gives the N.C.C. Commission a trace or clue, information or facts in connection with assets or liabilities of the alleged culprit or the person under inquiry, including the principal, instigator or the aider and abettor, and the giving of such trace or clue, information or facts results in the assets which constitute the unusual wealth or the unusually increased assets devolving to the State by a final order of the Court, such person shall be entitled to the reward in accordance with the regulation prescribed by the N.C.C. Commission.

Mr. Pongaek is of the view that an incentive or reward is essential for securing the cooperation from a whistle blower in providing information which will be helpful in the course of investigation.

## **5.5 The Way Forward**

Every citizen of Malaysia is subject to the laws and regulations made by the legislators, i.e., the representatives elected by them. No one shall act above the law including the Members of Parliament and high level judges, all of whom are legally bound to follow

rules and law. The consequence of breaches of law should be applied against the wrongdoer. The power of regulating within the law is given to the government under the legitimate expectation of the people that the government shall make sure that the social order is well maintained and peaceful. The vital component of a democratic society is a system of the rule of law where the rights of people are protected and the power of government is subject to checks and balances to avoid misuse or abuse (Cordenillo and Sample, 2014). The critical question is how to ensure that the decisions made by the government will not be misused in a way that illegally enriches some of its members.

Public scrutiny can be used as a tool to ensure that the government is always acting in the interest of the people and to avoid misuse or abuse of power. In this connection, asset declarations should be available for public scrutiny to prevent and detect corruption. It is imperative to have a transparent, accountable, and independent asset declaration system in place to ensure its effectiveness and eventually reduce corruption in Malaysia. Despite severe challenges to reform in the asset declaration system in Malaysia, it is noteworthy that the people of Malaysia are getting better at sounding the social conscience for this country. It is essential to have public support for MACC to fight corruption effectively. It is therefore worth noting that public confidence in MACC has increased significantly, from only 39% in 2009 to 68% in 2014 (Malaysiakini, 2015). However, reform of the system is a long road that can only be driven by a strong and visible institutional will that can gain the confidence of the general public and consequently effectively reduce corrupt practices in the society.



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## Appendix A - Interview Questionnaire

1. Do you think asset declaration is an effective approach to prevent and detect corruption? In what way(s)?
2. How do you evaluate the effectiveness of the current asset declaration system in Malaysia? And why?
3. Do you think that the codification of an asset declaration system with legal enforceability is essential for its success and effectiveness? And why?
4. Who do you think should declare their assets? And why?
  - a. Civil Servants: Only high ranking or all?
  - b. Ministers
  - c. Members of parliament
  - d. Electoral candidates
  - e. Judges and members of the judiciary
  - f. Spouses and/or children of the above
5. What should be declared?
  - a. Assets
  - b. Liabilities
  - c. Sources of income
  - d. Gifts (MYR 500 and above?)
  - e. Potential conflicts of interest
  - f. Family business [what is the definition of family?] If you include this category, please indicate what the term 'family' should include:
    - i. Spouse
    - ii. De facto partner
    - iii. Children
    - iv. Stepchildren
    - v. Parents
    - vi. Siblings
    - vii. Grandparents
    - viii. Grandchildren

- ix. Aunts and uncles
  - x. Nieces and nephews
  - xi. Other (please specify)
6. Which agency should be responsible for collecting information? Should the same agency have the power to investigate and prosecute? How should the information be collected and verified? What factors should be considered in deciding the method of collecting?
  7. Should the asset declaration be made publicly available? Why?
  8. Do you think the following suggested punishments are sufficient for the following cases? If not, why?
    - a. Non-compliance – administrative sanction
    - b. Unexplained wealth - criminal proceeding
    - c. Civil sanction for both
    - d. Criminal sanction for both
  9. In your opinion, how should the implementation be effectively monitored?
  10. In your opinion, what are the challenges in implementing an effective asset declaration system in this (your) country?
  11. Do you think the law of unjust enrichment with no predicate offence proven is better than the burden of proof always being on the shoulders of prosecutors in terms of the unexplained wealth of public officials?
  12. Do you agree with the insertion of a whistle blower provision into the asset declaration system whereby a whistle blower will be rewarded for his/her information, provided this leads to the successful seizure of assets? Please explain why.
  13. Is there any other point about asset declaration or official corruption that you would like to mention?

## Appendix B

### APPENDIX-I [ Rule 3(1)]

#### **Return of Assets and Liabilities on First Appointment or as on the 31<sup>st</sup> March, 20.....\***

(Under Sec 44 of the Lokpal and Lokayuktas Act, 2013)

1. Name of the Public servant in full.....(in block letters)

2.(a) Present public position held .....

(Designation, name and address .....

of organisation) .....

(b) Service to which belongs .....

(if applicable)

#### Declaration:

I hereby declare that the return enclosed, namely, Forms I to IV, are complete, true and correct to the best of my knowledge and belief, in respect of information due to be furnished by me under the provisions of section 44 of the Lokpal and Lokayuktas Act, 2013.

Date.....

Signature.....

\* In case of first appointment please indicate date of appointment.

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Note 1. This return shall contain particulars of all assets and liabilities of the public servant either in his/her own name or in the name of any other person. The return should include details in respect of assets/ liabilities of spouse and dependent children as provided in Section 44 (2) of the Lokpal and Lokayuktas Act, 2013.

(Section 44(2): A public servant shall, within a period of thirty days from the date on which he makes and subscribes an oath or affirmation to enter upon his office, furnish to the competent authority the information relating to—

- (a) the assets of which he, his spouse and his dependent children are, jointly or severally, owners or beneficiaries;
- (b) his liabilities and that of his spouse and his dependent children.

Note 2. If a public servant is a member of Hindu Undivided Family with co-parcenary rights in the properties of the family either as a 'Karta' or as a member, he should indicate in the return in Form No. III the value of his share in such property and where it is not possible to indicate the exact value of such share, its approximate value. Suitable explanatory notes may be added wherever necessary.

Note 3: "Dependent children" means sons and daughters who have no separate means of earning and are wholly dependent on the public servant for their livelihood.  
(Explanation below Section 44(3) of Lokpal and Lokayuktas Act, 2013)

**FORM No. I**

**Details of Public Servant, his/her spouse and dependent children**

SL No.		Name	Public Position held, if any	Whether return being filed by him/her, separately
1	Self			
2	Spouse			
3	Dependent-1			
4	Dependent-2			
5.*	Dependent-3			

\* Add more rows, if necessary.

Date.....

Signature.....

## FORM No. II

### Statement of movable property on first appointment or as on the 31<sup>st</sup> March, 20...

(Use separate sheets for self, spouse and each dependent child.)

Name of public servant/spouse/dependent child: \_\_\_\_\_

S.No	Description	Remarks, if any
(i) *	Cash and bank balance:	
(ii)**	Insurance (premia paid):	
	Fixed /Recurring Deposit(s):	
	Shares/Bonds:	
	Mutual Fund(s):	
	Pension Scheme/Provident Fund	
	Other investments, if any:	
(iii)	Personal loans/advance given to any person or entity including firm, company, trust, etc., and other receivables from debtors and the amount (exceeding two months basic pay or Rupees one lakh, as the case may be):	
(iv)	Motor Vehicles (Details of Make, registration number, year of purchase	

	and amount paid):	
(v)	<p>Jewellery</p> <p>[Give details of approximate weight (plus or minus 10 gms. in respect of gold and precious stones; plus or minus 100 gms. in respect of silver).]</p>	
	Gold:	
	Silver:	
	Precious metals and precious stones:	
	<p>Composite items:</p> <p>(indicate approximate value)***</p>	
(vi)	<p>Any other assets [Give details of movable assets not covered in (i) to (v) above]</p> <p>(a) Furniture</p> <p>(b) Fixtures</p> <p>(c) Antiques</p> <p>(d) Paintings</p> <p>(e) Electronic equipment</p> <p>(f) Others</p> <p>[Indicate the details of an asset, only if the total current value of any particular asset in any particular category (e.g. furniture, fixtures, electronic equipment, etc.) exceeds two months' basic pay or Rs. 1.00 lakh, as the case may be.]</p>	

Date .....

Signature.....

\* Details of deposits in the foreign Bank(s) to be given separately.

\*\* Investments above Rs. 2 lakhs to be reported individually. Investments below Rs.2 lakhs may be reported together.

\*\*\* Value indicated in the first return need not be revised in subsequent returns as long as no new composite item had been acquired or no existing items had been disposed of, during the relevant year.”

## FORM No. III

Statement of immovable property on first appointment or as on the 31<sup>st</sup> March, 20.... (e.g. Lands, House, Shops, Other Buildings, etc.)

[Held by Public Servant, his/her spouse and dependent children]

Sl. No.	Description of property (Land/ House/ Flat/ Shop/ Industrial etc.)	Precise location (Name of District, Division, Taluk and Village in which the property is situated and also its distinctive number, etc.)	Area of land (in case of land and buildings)	Nature of land in case of landed property	Extent of interest	If not in name of public servant, state in whose name held and his/her relationship, if any to the public servant	Date of acquisition	How acquired (whether by purchase, mortgage, lease, inheritance, gift or otherwise) and name with details of person/persons from whom acquired (address and connection of the Government servant, if any, with the person/persons concerned) (Please see	Present value of the property (If exact value not known, approx value may be indicated)	Total annual income from the property	Remarks

								Note 1 below) and cost of acquisition.			
1	2	3	4	5	6	7	8	9	10	11	12

Date.....

Signature.....

**Note (1)** For purpose of Column 9, the term "lease" would mean a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent. Where, however, the lease of immovable property is obtained from a person having official dealings with the Government servant, such a lease should be shown in this Column irrespective of the term of the lease, whether it is short term or long term, and the periodicity of the payment of rent.

## FORM No. IV

Statement of Debts and Other Liabilities on first appointment or as on 31<sup>st</sup> March, 20.....

Sl. No.	Debtor (Self/ Spouse or dependent children)	Name and address of Creditor	Nature of debt/ liability and amount	Remarks
1	2	3	4	5

Date .....

Signature.....

Note 1: Individual items of loans not exceeding two months basic pay (where applicable) and Rs. 1.00 lakh in other cases need not be included.

Note 2. The statement should include various loans and advances (exceeding the value in Note 1) taken from banks, companies, financial institutions, Central/State Government and from individuals.”

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