

Patrycja Joanna Suwaj

University of Białystok

**TRANSPARENCY AS VALUE AND PRINCIPLE
OF THE PUBLIC AFFAIR MANAGEMENT IN A STATE
UNDER THE RULE OF LAW VERSUS
PUBLIC OFFICIALS' DUTY TO PRESENT FINANCIAL
DECLARATIONS**

Introductory remarks

In a legal dimension, values which are appreciated, desired and finally accepted and adopted in societies are usually translated into a more or less formalized set of general principles of either individual branches of law or common branches of the whole democratic system in a state under the rule of law. Nonetheless, as M. Sajfan notices, in a democratic state a sphere of public life is strongly determined not only by “a certain democratic standard conditioned by the legal system axiology – the basic principles of the obligatory law or a legal tradition and civilization, shaped by customs”, but also by something which could be defined as “principles of decency and customs in a public life”.¹

Observations regarding the universalism of law and democratic values in the European administration area result from the review of the normative principles of the public administration in a state under the rule of law, present in the European as well as in the Polish legal order on the ground that these values as well as their reflections in the normative principles are mutual: legality, equality, proportionality, fairness, protection of legitimate trust and expectations, openness and transparency, etc.

In the Polish legal administrative scholarship a series of general principle classifications has been introduced being a certain system of values for the public administration. Considering different criteria, they have given

¹ M. Sajfan, *Wyzwania dla państwa prawa*, Warszawa 2007, p. 24.

certain norms a fundamental character. In the doctrine of the administrative law the principles of the administration organization² and the principles of its functioning³ have been emphasized. The principles of the administrative law and administration, the principles of the financial law⁴ as well as the principles of the administrative procedure⁵ have been pointed out. In the study of the administrative law there is a view according to which its principles are not the norms of the administrative law, having a character of “specific praxiologic directives”.⁶ There have been several attempts to work out a law regarding general regulations of the administrative law.⁷ The last attempt took place in 2008 and resulted in the project prepared by the team appointed by the Ombudsman.⁸

In the European area a canon of the principles supporting the public administration in their strive to operate on the one hand, and to protect citizens’ rights from an excessive interference of the public administration on the other hand, constitute the principles worked out by the Legal Co-operation of the Council of Europe (CDCJ) as well as the the Court of Justice of the European Union. These principles (distinguished by the Legal Co-operation of the Council of Europe as *substantive principles* and *procedural principles*,⁹ and recognized by the Court of Justice of the EU generally as *principles*) are largely common for the majority of the orders of the contemporary democratic states although their realization as well as the degree of protection in the sphere of legal instruments of guaranty may be different in different countries. Essential principles, emphasized in the practice of the Court of Justice, are as follows: rule of law (legality) of

² See also J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990.

³ See also J. Filipek, *Prawo administracyjne. Instytucje ogólne, Part I*, Kraków 1995.

⁴ See E. Ura, ed. Ura, *Prawo administracyjne*, Warszawa 1999.

⁵ See Z. Kmieciak, *Ogólne zasady prawa i postępowania administracyjnego*, Warszawa 2000, p. 43 and following.

⁶ Z. Cieślak, Chapter III, in: Z. Cieślak, I. Lipowicz, Z. Niewiadomski, *Prawo administracyjne. Część ogólna*, Warszawa 2000.

⁷ See Z. Leoński, *Projekt ustawy o przepisach ogólnych prawa administracyjnego*, OMT 1988, Nr 2 and following.; J. Świątkiewicz, *Koncepcja projektu ustawy – przepisy ogólne prawa administracyjnego*, PiP 1988, Nr 8, p. 18 and following.; J. Borkowski, *Przepisy ogólne prawa administracyjnego a porządkowanie legislacji administracyjnej*, in: *Legislacja administracyjna*, Gdańsk 1993, p. 7 and following.

⁸ The project of the law: www.brpo.gov.pl.

⁹ Project Group on Administrative Law (CJ-DA), Legal Co-operation of the Council of Europe (CDCJ), *The Administration and You. A Handbook. Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons*, Council of Europe Publishing 1996, pp. 13–27.

the public administration, the principle of proportionality, the principle of the certainty of law, prohibition of discrimination, protection of the right expectations, and the right to be heard in the administrative process.¹⁰ This catalog can be completed by the principles comprised by the European Code of Good Administrative Behaviour whose source is the right to good administration as present in the article 41 of the Charter of Fundamental Rights of the European Union established in December, 2000 in Nicea,¹¹ embracing the principle of administrative transparency.

This paper aims at presenting the principle of transparency of the public administration acting which undoubtedly corresponds with the canon of the principles of the democratic state under the rule of law and constitutes the principle of governance basic for the public administration functioning.

This principle fulfills the postulate of openness and transparency of the public administration and constitutes the component of the principles ensuring the ability to foresee and confide in the law on the one hand, and the ability of the public administration to act on the other hand. It also formulates the standard of an ideal functioning of the public administration. In the context of public officials' duty to reveal different types of declarations and statements it is opposed by their right to privacy.

On the other hand, the very presence of the above-mentioned principles, including the transparency, in certain legal systems does not guarantee their application and effectiveness. As M. Safjan rightly notices: "it is not enough to put a formal decree on some state of affairs; a normative petrification of principles and values is not enough because it is their realization on the level of real state acts, functioning of their structures, that may lead towards the transformation of the reality".¹²

The principle of transparency

Openness and transparency (also called publicity¹³) as regarding the performance of administration constitutes one of the canons of the administra-

¹⁰ Compare J. Schwarze, *European Administrative Law*, Luxembourg 1992.

¹¹ www.europa.eu.int.

¹² M. Safjan, op. cit., p. 25.

¹³ See also Z. Kmiecik, op. cit. p. 32, E. Olejniczak-Szałowska, in: Z. Duniewska, B. Jaworska-Dębska, R. Michalska-Badziak, E. Olejniczak-Szałowska, M. Stahl, *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warszawa 2000, p. 107, T. Górczyńska, *Prawo do informacji i zasada jawności administracyjnej*, Kraków 1999, J. Lang, *Zasada jawności w prawie administracyjnym*, "Studia Iuridica" 1996, Vol. XXXII.

tive process.¹⁴ It would be difficult to mention all the aspects of openness and transparency as respected by administration; they can all be exemplified within the boundaries of a specific case. This principle is usually linked to the right to information access¹⁵ or the right to know¹⁶ in its broad sense, as well as corresponding duties imposed on administration: a duty to give information and a duty to justify a decision taken.

Openness and transparency are necessary tools to achieve the principles of legality, equality regarding the law, protection of trust and impartiality of the administration. Openness of administration may be defined as their accessibility or the ability to “examine” administration “from outside” as a whole. Thus, transparency should be referred directly to the way that administration acts. On the one hand, the openness of administration and the ability to act in a clear way allow anybody “involved” in the performance of administration to recognize the basis of their acting. On the other hand, it allows for an easier control taken by supervising institutions.

As a rule, the performance of public administration should be clear and open. Only in case of emergency and within the boundaries of the law should information confidentiality take place (usually it involves personal data or exceptional information which endangers safety or public order).¹⁷

In the process of the performance of public administration specific examples illustrating the use of the principle of openness and transparency can be found (e.g. an administrative act should be issued by the administrative authority competent to undertake such actions; information confidentiality, justification of the the administrative decision against the will of the party involved; a duty to reveal financial declarations by certain categories of the officials).

¹⁴ See T. Gorzyńska, *Zasada jawności w administracji*, PiP 1988, z. 6, p. 14 and following, T. Górzyńska, *Prawo do...*, op. cit., p. 19, J. Lang, op. cit., p. 159 and following.

¹⁵ J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990, p. 144.

¹⁶ H. Barnett, *Constitutional and Administrative Law*, Cavendish Publishing Limited, London 1998, p. 421, H. B. Jacobini, *An Introduction to Comparative Administrative Law*, New York 1991, p. 37.

¹⁷ Compare F. Cardona, *European Principles for Public Administration*, SIGMA Papers No. 27, 1999, www.oecd.org/puma/sigmaweb, p. 12, who claims that in reality just few cases (information) demand protection although public authorities tend to exaggerate and overuse the term “confidential information”. The author also mentions the fact that starting from the end of XVIII Century there has been a tradition of practising discreet and confidential administration (Sweden being an exception). It was not until the sixties of the XX Century that the principle of frankness of administration in Western democracies started developing. Nowadays this principle has gained the status of the highest standards of administration.

The professional literature pays attention to the important aspect of the principle of openness and transparency of the administration which is information access.¹⁸ The term “information” has not been legally defined yet.¹⁹ In the Polish doctrine the definition of information was proposed by W. Taras who captured information as a form of performance conducted by the administrative authorities: “information transmitted to citizens by administration is a declaration of knowledge by the official of the administrative authority or else another administrative subject which deals with certain factual state, legal state or their resulting legal consequences. Such a declaration of knowledge does not directly cause any legal effects; however, it may affect the realization of certain competences or duties of the information receiver or the third party”.²⁰ T. Górzyńska claims that it can be accepted that publicity means a state where citizens have a relatively free access to information possessed by the organs of public authority and those subjects who perform the functions of public authority, a state which enables the ability to have an insight into private and, therefore, individual and social cases, or, in other words, state, local and regional cases.²¹

The principle of openness and transparency as a principle of public access to information as practised by the administration was given a legal basis in the Constitution of the Republic of Poland (art. 61 item 1). In this context the principle of openness and transparency as practised by the administration constitutes a tool enabling the realization of the citizens’ right to information access on the one hand, and, on the other hand, it results in the duty imposed on the administration to inform citizens about their performance. In accordance with the content of the art. 61 item 1 of the Constitution of the Republic of Poland, this right also embraces receiving information regarding charring self-governments and professional bodies as well as other people and organizational units on the scale in which they perform the tasks of the public authority and manage the municipal estates or the State estate. A performance of the public authority should be

¹⁸ In the Polish doctrine the principle of openness (publicity) has been emphasized especially in the aspect of information access. Compare for example Z. Kmiecik, op. cit., p. 32, E. Olejniczak-Szałowska, op. cit., p. 107.

¹⁹ The statement regarding the access to public information from art. 1 item 1 from the Act accepted in September 6, 2001 cannot serve as a definition of the information (Of. G. 2001., Nr 112, Item. 1198), according to which “any information regarding public affairs constitutes public information as understood by the Act (...)”.

²⁰ W. Taras, *Informowanie obywateli przez administrację*, Wrocław – Warszawa – Kraków, Ossolineum 1992, p. 50 and following, see also W. Taras, *Informacja w postępowaniu administracyjnym*, (in:) G. Szpor (ed.), *Informacja i informatyka w administracji publicznej*, Katowice 1993.

²¹ T. Górzyńska, *Prawo do...*, op. cit., p. 19.

understood as all kinds of activities undertaken to realize legal competences of their organs. The concept of public authority is wide and encompasses legislative, executive and judicatory powers. Within their executive power, this concept envelopes central and local administration: governmental and self-governmental. Individuals who perform public functions do not have to be elected. They can also be appointed or promoted to their post. The actions should be connected with public performance. As I. Lipowicz highlights, the aim of the regulation is not to satisfy the interest of the citizens but to ensure the society's control over the representatives of the authority.

Extended informative rights concern those organs of public authority which, being council, are elected in general elections: Sejm, Senate, commune councils, administrative districts, and province councils. The significance of the decisions taken by these organs justifies direct and rather intense control undertaken by citizens. In comparison to the previous legal state, this is a new regulation when it comes to the organs of the administrative districts.

In accordance with art. 61 item 3 of the Constitution of the Republic of Poland, limited rights to information access may occur exclusively in cases regulated by law and dealing with the protection of freedom and rights of individuals and economic subjects as well as the protection of public order, safety or a significant economic interest of the State. According to B. Banaszak and M. Jabłoński, the issue of the protection of freedom and economic subjects cannot be questioned bearing in mind its specific and objective character, which also applies to cases involving the order and safety of the state. On the other hand, the notion of significant economic interests of the state may lead towards some misinterpretation and may consequently result in the inability to ensure the information access.²²

In the Constitution of the Republic of Poland there is a base for imposing a duty on the administrative organs to give information to citizens. The principles of direct application of the general law along with a high degree of the jurisdiction of the decisions as accepted in art. 8 of the Constitution constitute a turning point in the process of making an effective mechanism in the field of the protection of the right to information and the realization of the principle of openness and transparency as practised by the administration.

The introduction of regulations regarding the access to public information dated 1 January, 2002 aimed primarily at the specification of the right

²² B. Banaszak, M. Jabłoński, in: J. Boć (ed.) *Konstytucje Rzeczypospolitej oraz Komentarz*, Wrocław 1998, p. 115.

of an individual to public information access formulated in art. 61 of the Constitution of the Republic of Poland and was conducted by defining the rights making the law. The regulations accepted that the right to public information was to be conducted through the access to information which should be ensured by the organs of the public authority and other subjects performing public tasks. By developing and specifying the principle that public information should be open (and, therefore, accessible when not limited by legal regulations or by the protection of privacy (art. 5), the regulations mark the scope of the information publicity as well as the right to access to such information on a legal basis in the Republic of Poland.²³ The scope of public information as marked by the regulations does not only clarify the structure, organization and competence of the public administration organs, their performance, manners of receiving and dealing with cases, the state of the reception of cases, the order of dealing with cases and taking decisions. Such legal regulations lead towards the assumption that, provided the organs of the public administration have to reveal the principles and rules of receiving and dealing with cases, it would result in a smaller risk of their dealing with cases using different criteria (considering the priority of cases applying criteria which are not necessarily legal, for example, friendship).

The problem of the flow of information handled by the organs of public authority along with the access to public information as a principle are closely connected with the issue of protection of personal data. In the European countries it became the subject of legislative measure on the turn of the 1960s in connection with a rapid development of computers. The Convention of the Council of Europe NR 108 taken in January 28, 1981 regarding the protection of individuals with the account of automatic data processing of personal character was a legal act which marked universal standards, fore-judging the direction of the development of national legislation. Those regulations were developed and clearly defined in September 24,

²³ The decision dated 11 January, 1996 (III ARN 57/95). Considering the matter of revealing the information regarding the district self-governments to the media, the Highest Court decided that the regulation did not exclude the insight into the acts of the organ if the law allowed for that; especially on the ground of the protection of the state secrets and other secrets regulated by law as well as individual well-being remaining in the sphere of privacy and not connected with public performance. The Highest Court stated that the ban placed on the employer to reveal a salary on the ground of the interference into the individual well-being would only be justified when such information was to be called private. Additionally, in accordance with the art. 14 item 6 of the press law, it is possible to publish information and data regarding personal sphere of one's life without the acceptance of this person if it corresponds with the public performance of that person. (OSNIAPiUS 1996/13/179).

1995 in the European directive NR 95/46/EC regarding the protection of individuals considering automatic data processing of personal character and a free data flow by the European Parliament and the European Council.²⁴ The above-mentioned norms are not self-executive norms. They are directed to nations whereas their resolutions formulate duties for local legislators.²⁵ In Poland the regulations regarding the personal data protection were defined in the regulations regarding the personal data protection accepted in August 29, 1997.²⁶ In accordance with the European standards, the regulations regularized the following issues: the principles of personal data processing, the rights of individuals whose data is under consideration, the protection of data collection as well as its registration and passing abroad. The organ responsible for the personal data cases – the Inspector General of Poland for the Protection of Personal Data – was nominated.

The principle of transparency of administration is further supported by regulations allowing control of activities of the individuals holding public functions by reducing the scope of the law protection to privacy. Such a solution involves introducing a duty to provide a financial declaration²⁷ (providing a financial declaration applies to the public administration officials) and reporting information to the Register for Benefits, which is open,²⁸ or a possibility to publish the information or data concerning private spheres of life if connected directly with the public performance of this person.²⁹

²⁴ Text: Journal officiel des communautés Européennes, nr L281 dated 23 November, 1995.

²⁵ For more information see Z. Kmiecik, op. cit., pp. 91–97.

²⁶ Journal of Laws of the Republic of Poland 1997, Nr 133, item 883, later changes provided.

²⁷ For example, art. 10 of the Journal, August 21, 1997 regarding the limitation of the organization of economic enterprise undertaken by individuals with public functions (Journal of Laws 1997, Nr 106, item 679, later changes provided).

²⁸ Art. 12 of the Law of August 21, 1997 regarding the limitation of undertaking economic enterprise by the people holding public offices (Journal of Laws, 1997 r., Nr 106, item 679; later changes provided).

²⁹ Art. 14 reg. 6 accepted in January 26, 1984. The press law (Journal of Laws of the Republic of Poland 1984, Nr 5, item 24, later changes provided). A verdict brought in May 6, 1997. The Supreme Administrative stated that the salary of the members of the board of the commune councils (voyt, mayor and their assistants) do not belong to the private sphere of the individuals with those functions since it is connected with performing their public function. Basing on art. 4 reg. 2 and in connection with 14 reg. 6 of the law accepted in January 26, 1984 – the press law (...) commune councils' organs cannot escape revealing information to journalists as to the money they charge for their functions. A duty foreseen art. 4 reg. 1 of the law – the press law to reveal information to the press regarding any enterprise is bound from May 27, 1990 and also involves organs of the commune councils (...). According to art. 61 of the law of district administration (now commune administration – footnote by P.J.S.), the economy of the commune is open and applies to different types of the commune's profits and expenses (II S.A./Wr 929/96, ONSA 1998/2/54).

The principle of openness and transparency of administration serves the protection of public interest through the reduction of the probability of *maladministration* and corruption as well as the realization of the civil right to information and freedom and their corresponding rights. Although it may be legally limited, it does constitute a kind of opening of the mechanism of public performance, being simultaneously a measure of democracy and law and order.

Transparency in financial declarations and statements

Here it is necessary to give some remarks regarding a general approach of the EU nations to revealing the interests and statements conducted by public officials. Revealing of any types of declarations and statements as applied to all groups of public officials is characteristic, for instance, for the British, Spanish, Portuguese, Bulgarian, Romanian and Latvian regulations whereas in Poland, for example, only statements provided in the district administration are to be revealed. In Sweden, for example, revealing has an optional character and is dependent on the will of a public official. A lack of regulations in this field is characteristic for France and Hungary.³⁰

As it has been pointed out by the authors of the report regarding the research on the regulations of the conflict of interests in the countries which are members of the EU, “recent observations show that the policy in the field of revealing private interests of the officials has become one of the significant tools of the policy applied to the conflict of interests”.³¹ As it was mentioned above, almost every European nation has been introducing a duty of private declaration (including financial) of their officials’ interests into their order. Here it is necessary to observe different approaches taken by legislators to reveal (or not) different types of statements as well as placing them (or not) in respective registers. Whereas in some countries public officials are imposed with a duty to provide a statement regarding their financial interest, the majority of the countries impose an “assisting” duty referring to their additional activities (such as employment, honor membership in different types of institutions, performances, etc.) which should be put in the registers publicly available.

³⁰ Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, *Regulating Conflicts of Interest for Holders of Public Office in the European Union*, European Institute of Public Administration, 2007, Annex III, p. 157 and following.

³¹ Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, *op. cit.*, p. 67.

As G. Carney shows, the popularity of public revealing of such information “seems to be the right way to make the introduction of the protection easier as well as clear for the environment that there is a common approval from the governors for their public authority to be open”.³² Additionally, the formulation of the duty to provide statements and declarations of private interests in public results in creating an opener public sector, which is a key to the society’s growing trust in public institutions.

Apart from the popularity of the introduction of these tools, in the European countries and their institutions numerous debates have taken place which aim at presenting the advantages and disadvantages of such duties. Similar debates apply to registering financial interests. Among the arguments *pro* there appears the following: public officials (including members of parliament and judges) are to serve the public interest, not private – this makes the core argument. It has been pointed out that contemporary public officials have a full-time job, which implies a defined, rather a high level of income of a public official. It has been highlighted that public officials’ salaries should satisfy their needs so that they do not have to be involved in additional activities which always influence (to some degree) the function of a public official and, sooner or later, result in the conflict of interests. The consequence of this situation is the fact that private interests change the approach of an official to the realization of public interests. Another argument supporting the design of registers as well as public statements and financial declarations is to appeal to the electorate. It has been emphasized that electors have the right to know what the people they have chosen do, how much they earn, who and why brings benefits to them and finally, whether their political decisions are influenced by their private interests. The need for being open and clear as a basic and key element of democracy has been highlighted. The summary of the arguments in favor of the idea of revealing private interests is the recommendation that it constitutes the best form of control and testing of public officials. Additionally, it is the means to monitor the way how a given mandate has been used since self-determination (establishing self-limiting rules) tends to fail in many cases. The role and necessity of external control have been emphasized.

On the other hand, arguments against revealing private interests have a different character and refer both to specific problems and general remarks. For instance, it has been emphasized that such limits cannot be applied to

³² G. Carney, Working Paper: *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International, Berlin, 1998, the Internet source: http://ww1.transparency.org/working_papers/carney/index.html.

the members of parliament since they are not officials. A well-granted belief that a too detailed duty to reveal private interests interferes with the basic rights (e.g. one's right to privacy) has often been mentioned. Moreover, as experience shows, the registers do not fulfill their functions fully. Indeed, media show their interest in registers. Nonetheless, it does not affect public opinion who does not show much interest in politics, politicians and the media themselves. Among the *contra* arguments there appear observations that the introduction and monitoring of the register of benefits results in additional bureaucracy; extra activities do not have to lead to the conflict of interests. Finally, revealing public statements does not cause a decrease in the conflict of interests. It has even been pointed out that additional activities allow public officials to have a contact with "reality" and activities previously done. In this light, a duty to reveal interests may have a negative influence on the types of the activities which demand confidentiality (e.g. a situation when a public official used to be a barrister in the past). When these limits are applied to members of parliament and councilors, it is often argued that they do not need a full-time engagement to perform their tasks. To summarize this group of arguments, one may refer to the statement that too much openness may affect civil rights. What is more, elected people should be evaluated by their electors and not by registers.³³

The main criticism of the declaration of interests in registers refers to the manner, much too often simplified and generalized, in which these interests are informed about. An interesting illustration is a comparison of the financial declarations revealed by the members of the European Commission and the European Parliament. Whereas commissars are obliged to provide a rather detailed declaration, almost every member of the European Parliament does it in a general manner (or just providing information "Nothing to declare").³⁴ A similar shortcoming can be observed in the statements provided by public officials in accordance with the requirements of the Polish law regarding the limits of economic enterprises as practised by individuals holding public functions. Apart from a few attempts to amend the regulations, the above-mentioned law still reveals serious errors which have been pointed as the lack of information which organ should take a financial dec-

³³ Compare Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, *op. cit.*, p. 68

³⁴ Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, *op. cit.*, Annex IV, Conflict of Interest profiles of EU Institutions, p. 325 and following.

laration of the president of RIO (Regional Chamber of Auditing) or misinformation as to the person obliged to provide a statement (instead of the president of SKO (Local-Government Chamber of Appeal) the law obliges the leader of SKO – art. 10 reg. 6 item 1) and a false addressee of this statement (according to this law the SKO chairperson provides a statement to the chairperson of the province municipal seymik – nota bene such a body was canceled in January 1, 1999).³⁵

Thus, it is obvious that the tools in the form of the statements and their register are efficient as long as the requirements regarding what should be declared are clear and comprehensive. Secondly, there should exist a mechanism of control over such registers which are effective and able to guarantee freedom. Thirdly and finally, effective sanctions regarding the abuse of the above-mentioned duties seem to be necessary. The lack of these necessary conditions results in the difficulties to reveal and authorize wrong behavior, misunderstanding or only partial fulfillment of one's duties. On the other hand, the politics of revealing private interests of public officials and registers of benefits should anticipate such collection, storage and management of the gathered data so that it does not result in new conflicts of interests.³⁶ The requirement to provide and reveal statements, information and declarations of the public officials should be treated as one of the most significant conditions of the fair administrating and fair public service. As it was mentioned above, such a requirement, also in the light of the Polish regulations, may be in opposition to the constitutional right to privacy according to art. 47 of the Constitution of the Republic of Poland as well as freedom not to reveal information concerning private affairs of an individual according to art. 51 reg. 1 of the same Constitution. Nonetheless, the author of this paper argues that this conflict should be solved in favor of declarations since the status of public people is closely connected with their “depart” from privacy.

These difficulties affect the way how detailed different countries and their legislation choose the statements to be and how they address the duty to different addressees to provide such statements (including the families

³⁵ The author of this work discussed this problem in *Gwarancje bezstronności organów administracji publicznej*, Wrocław, 2004.

³⁶ Considerations regarding evaluation of the effectiveness of financial declaration in the Polish legal system was undertaken by the author of this paper together with P. A. Borowska i P. Sitniewski, Compare P. A. Borowska, P. Sitniewski, P. J. Suwaj, *Declarations of Income and Assets: an Assessment of Polish Initiatives*, in: *Post-Communist Public Administration: Restoring Professionalism and Accountability*, D. Coombes, L. Vass (ed.), Bratislava, NISPAcee, 2007.

of the public officials). It is easy to observe that in some countries detailed requirements to be published in registers are not accepted on the ground of the conviction that registers lead towards a conflict with the basic civil rights.

Summary

Identifying the vision of the state and its principles regulated by the normative acts with the practice of the state functioning should be acknowledged as wrong in its assumption. The reality may be fundamentally different from the postulated state or, the idealized state, which is consequently unreal. It is necessary to bear in mind that there are types of behavior and actions which are not and do not have to be regulated by law but they may constitute the code of behavior and evaluation of the officials and state institutions.³⁷ This applies to the behavior and activities which are ethically dubious on the one hand, or those, which may rise doubts when it comes to the requirement to regulate them normatively, on the other hand.

Nonetheless, the way of thinking about the state, its institutions and values as captured by normative regulations and legal mechanisms only in strict categories of law, its semantic content and from a formal point of view drives our attention away from something what is often forgotten in the contemporary state under the rule of law: a way of looking at the institutions in the democratic state should grasp a wider semantic context, the intention of authors, good faith, the aim and sense of the institution – in other words, the axiology of the state under the rule of law, the values which constitute the foundation of the democratic system.³⁸

The principle of transparency, being one of the fundamental principles of the contemporary state under the rule of law, is a special principle. On the one hand, it gives citizens a guarantee that all the actions of the public administration and its officials are fundamentally open and there is an access to information about them. On the other hand, the same principle becomes a burden for public officials and provides serious limits as to their right to privacy. Just because of this burden, some legislators decide not to reveal any information, statements and declaration of their public officials arguing that the right to privacy has the priority over the right of citizens to know.

³⁷ Compare M. Safjan, op. cit., p. 23.

³⁸ Ibidem, p. 20.

However, it seems that such solutions, accepted by some countries and based on the assumption that public officials should be trusted and protected in a special way by rejecting a duty to present declarations and statements (e.g. Financial declarations), are only possible when accompanied by high ethical standards as reflected by public officials' behavior and not only expressed by high expectations of the normative regulations. This is to be accompanied by a high level of civil awareness in the sphere of rights and social habits, the way of thinking about the state and dependencies between the choices of individuals and those taken at a public level. If these two elements go together, it is possible to resign from legal regulations of certain official duties and embrace this issue by the solutions offered by the so-called "soft law".