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IMODEV
49 rue Brancion 75015 Paris – France
www.imodev.org
ojs.imodev.org

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À PROPOS DE NOUS

La **Revue Internationale des Gouvernements ouverts (RIGO)/ the International Journal of Open Governments** est une revue universitaire créée et dirigée par Irène Bouhadana et William Gilles au sein de l'IMODEV, l'Institut du Monde et du Développement pour la Bonne Gouvernance publique.

Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV. Enfin, elle est avocate au barreau de Paris, associée de BeRecht Avocats.

William Gilles, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV. Fondateur et associé de BeRecht Avocats, il aussi avocat au barreau de Paris et médiateur professionnel agréé par le CNMA.

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

Irène Bouhadana, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV. She is an attorney at law at the Paris Bar and a partner of BeRecht Avocats.

William Gilles, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV. Founder and partner at BeRecht Avocats, he is an attorney at law at the Paris Bar and a professional mediator accredited by the CNMA.

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THE OBLIGATION TO SUBMIT INCOME AND ASSETS DECLARATION FOR PERSONS HOLDING PUBLIC FUNCTIONS IN POLAND

by **Aneta SZYMCZAK**, Faculty of Law and Administration University of Lodz (Poland) - ORCID 0000-0002-5229-945X.

The obligation to submit asset declarations in Poland was introduced in 1997. This requirement applies, inter alia, to the President of the Republic of Poland, deputies and senators, presidents of cities, civil servants, judges, prosecutors, police and special services.

The scope of information disclosed in the declarations of individual categories of persons varies. There is no uniform declarations pattern for all categories of persons.

For example, the President of the Republic of Poland, Marshal of the Sejm, Marshal of the Senate, First President of the Supreme Court, the President of the Supreme Administrative Court disclose information on separate and joint marital property, in particular (1) cash, real estate, participation in private or commercial partnerships, stocks and shares held in commercial companies, property purchased from the State Treasury, from other state legal persons, local government entities, their associations or a communal legal person – that has been sold by way of tender – as well as economic activity conducted/positions held in commercial companies; (2) income from employment or other gainful activity or occupation, (3) movables of a value exceeding PLN 10,000 /approximately EUR 2,400; (4) cash liabilities of value exceeding PLN 10,000/approximately EUR 2,400, including credits and loans.

The content of the declarations of the judges of the Constitutional Tribunal covering individual assets of a judge as well as joint assets of spouses (1), cash, real estate, participation in private or commercial partnerships, stocks and shares held in commercial companies, property purchased from the State Treasury, from other state legal persons, local government entities, their associations or a communal legal person –sold by way of tender – as well as economic activity conducted/positions held in commercial companies. They are not obliged to disclose information about movables of a value exceeding PLN 10,000 /approximately EUR 2,400; (4) cash liabilities of value exceeding PLN 10,000/approximately EUR 2,400, including credits and loans taken.

The asset declarations are submitted (1) prior to taking up office; (2) periodically – each year; and (3) on the day of leaving office. But the deadlines for submitting declarations are different for different persons performing public functions.

The information contained in the asset declarations are public. In practice, they are published on the website of the relevant offices. The residential address of a person obliged to submit a declaration and the location of real estate owned by them is not included. Moreover, a copy of the asset declaration is sent to the tax office of the place of residence. Asset declarations are kept for 6 years. In addition, upon written request a copy of the asset declaration is sent to authorised bodies such as law enforcement agencies for verification. In particular, the Central Anti-Corruption Bureau (CAB) is authorised to verify the accuracy and veracity of the asset declarations of persons performing public functions.

Failure to submit an asset declaration results in the loss of the right to receive a salary until the declaration is submitted like in the case of parliamentarians. Such a failure by the judge of the Tribunal is tantamount to the resignation of the office.

In most cases, providing false information or concealing the truth in asset declarations results in criminal liability. Everyone who gives false testimony or conceals the truth shall be subject to the penalty of deprivation of liberty for up to 3 years. But in the case of the judges of the Tribunal false testimony in the declaration is connected with a penalty of imprisonment of up to 5 years.

§ 1 – PROPOSED REGULATION

In Poland in 2017, a new draft law on transparency of public life was prepared. The proposed legislation was drafted by the office of the Minister for Special Services. The act shall constitute a key regulation on anti-corruption practices in Poland. Its aim is to increase the transparency of management and control over publicly financed institutions, and to reinforce social control over persons holding public functions.

The draft bill regulates in a uniform manner the principles of submitting asset declarations by persons obliged to do so and the liability regime for breach of the obligation to submit a statement. It has enlarged the group of people expected to declare their assets. This requirement is to apply not only to people who perform the most exposed functions in the country like members of parliament or local government officials but also driving licence examiners, municipal police officers, employees of the State Labour Inspection, members of the civil service and even firefighters and staff of the State Fire Service. It comprises 151 categories of job positions subject to the asset disclosure requirement.

All such declarations will be published online with the exception of declarations submitted by special force officers. Furthermore, the Chief of the Anti-Corruption Bureau would be allowed to call any person performing public functions to submit a declaration, even if they are not specified in the Act, or obliged to do so regularly. No individual summoned to file his asset declaration can appeal and must make the submission within 14 days. This submission must include precise information on income, property,

shares, loans. CAB has full discretion to summon without any connection to a specific case. No legal means are available to challenge the decision.
Secret services and enforcement agencies will gain more citizen data and new powers to interfere in their privacy and exert pressure arbitrarily and without any safeguards.
Due to social protests, the law has not yet been passed. In addition, the parliamentary elections in October 2019 postponed the work on the draft bill. It has not yet been debated by the Parliament.
The obligation to submit asset declarations nowadays has become an indispensable element of the functioning of democratic systems in which representative authorities come from elections. There is no doubt that openness and access to public information are supposed to enforce transparency, honesty and legitimacy of public authority and ensure social control over the activities of public administration bodies and entities managing public property. They are also to strengthen the trust in the integrity and impartiality of these people.
The necessity to introduce instruments aimed at ensuring transparency in public life is not questioned. However, the introduction of such regulations requires the legislator to be extremely diligent in determining the scope of this obligation. It touches on the most important and sensitive rights and principles of a democratic state ruled by the law. Therefore, it is important not only to clearly indicate the situation, groups of entities obliged to submit asset declarations and the scope of information disclosed, but also to consider which of the declarations should be published. Each of these issues should be examined in the light of the constitutional principle of proportionality of restrictions on rights and freedoms. In the case of the obligation to submit asset declarations and their publication, there is a conflict of two values. On the one hand, we are dealing with the important value of openness and transparency of public life, as well as counteracting corruption (Article 61 of the Constitution), on the other, with the protection of privacy (Article 47 of the Constitution) and information autonomy (Article 51 (2) of the Constitution). Due to competition of such significant values, the legislator, imposing the obligation to submit asset declarations on so many groups of persons, should justify in each case the necessity and indispensability of its introduction in the light of the principle of proportionality. Restricting the sphere of private life cannot be accidental and arbitrary, nor can it be used to collect information that is useful or convenient for a public authority. The legislator should duly balance conflicting interests.
Pursuant to the provision of art. 61 section 1 of the Polish Constitution, a citizen has the right to obtain information on the activities of public authorities and persons performing public functions. These principles are to guarantee reliable and impartial performance of duties, as well as the integrity and legality of the

actions of persons who perform public functions. Publication of statements is therefore intended to strengthen their social control. On the other hand, however, information on a person's property and economic sphere is undoubtedly covered by privacy and information autonomy. Pursuant to art. 47 of the Constitution, "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life". A consequence of this right is the guarantee laid down in Article 51 section 2 of the Constitution: "Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law". The provisions of the Constitution guarantee the individual the ability to decide on the scope and extent of sharing information about his life with others[1]. The Constitutional Tribunal in its previous jurisprudence emphasised that the right to privacy also protects the individual in terms of information regarding his financial situation[2].

The rights indicated are not absolute and may be subject to restrictions. In addition, as indicated by the Constitutional Tribunal, the criteria for limiting these rights in the economic sphere in the case of persons performing public functions are milder than in the case of a purely personal sphere[3]. Therefore, on the basis of the principle of proportionality, it should be examined which of these values should be given priority in a particular case.

In the Constitution of the Republic of Poland this principle was expressed in art. 31 section 3 and provides that "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

This rule means the need to maintain an appropriate balance between limiting a specific constitutional law and the purpose served by a given regulation. Therefore, it is necessary to balance two goods (values) which cannot be fully realised at the same time, that is goods infringed by the measures taken and goods to be protected by these measures and actions[4].

Any restriction of rights and freedoms can only be introduced by law. It should be considered whether the introduced regulation is able to lead to the intended effects, whether this regulation is necessary (indispensable) to protect the public interest with which it is connected, and therefore whether the same goal could not be

[1] Judgments of the Constitutional Tribunal: Ref. No. U 3/01 (19.02.2002) OTK ZU 2002 No. 1A, item 3, Ref. No. K 41/02 (20.11.2002) OTK ZU 2002 No 6A, item 83.

[2] Judgments of the Constitutional Tribunal: Ref. No. K 21/96 (24.06.1997) OTK ZU 1997 No. 2, item 23.

[3] Judgments of the Constitutional Tribunal Ref. No. K 41/02.

[4] Judgments of the Constitutional Tribunal: Ref. No. K 33/08 (13.12.2011) OTK ZU 2011 No. 10A, item 116.

achieved by other means, less burdensome for the citizen and less interfering with the sphere of his freedoms and rights, and whether the effects of the introduced regulation are in proportion to the burdens it imposes on the citizen[5].

In the current jurisprudence, the Constitutional Tribunal has repeatedly emphasised the need for the legislator to take actions aimed at limiting the phenomenon of corruption and using public positions for its own private purposes. The *ratio legis* of such actions is obvious and cannot be questioned in a democratic state[6]. However, the new proposed regulations raise a lot of controversy as to the scope of people covered by the obligation to submit property declarations, the type of information disclosed and the need to publish these statements.

§ 2 – A Public Person vs. a Person Performing Public Functions

The right to obtain information from art. 61 section 1 of the Constitution refers to the activities of public authorities and persons performing public functions. This right also includes obtaining information on the activities of economic and professional self-government bodies, as well as other persons and organisational units to the extent that they perform public authority tasks and manage municipal property or State Treasury property. This provision indicates, therefore, entities that may be required to disclose the information specified therein.

In the draft bill, the obligation to submit asset declarations and their publication covers many groups of persons. However, not all the persons mentioned therein fall within the subjective scope of Art. 61 section 1 of the Constitution.

The explanatory memorandum to the draft law did not clarify according to which criterion the selection of those obliged was made. In the case of competition of such significant values is not enough to include in the Act an enumerative catalogue of persons obliged to submit property declarations. It is necessary to link this obligation with the essence of public functions performed by specific groups, as well as to demonstrate that the restriction of their rights is justified in other constitutional values. The mere calculation of individual groups in the Act does not make them persons performing public functions. This is determined by the nature and essence of the function performed.

The Constitutional Tribunal indicated that a distinction should be made between the concept of a "public person" and "a person performing public functions". A person performing public functions in the light of art. 61 section 1 of the Constitution, is a

[5] Judgments of the Constitutional Tribunal Ref. No. P 11/98 (12.01.2000) OTK ZU 2000 No. 1, item 3.

[6] Judgments of the Constitutional Tribunal: Ref. No. SK 7/05 (06.12.2005) OTK ZU 2005 No. 11 A, item 129, Ref. No. K 54/07 (23.06.2009) OTK ZU 2009 No. 6 A, item 86.

person who performs the tasks of public authority and manages municipal property or property of the Treasury[7]. These are persons who are connected with formal ties with a public authority. On the other hand, the concept of "public person" is much broader and also includes people who occupy an important position in public life from the point of view of shaping people's attitudes and opinions, causing widespread interest due to various achievements, for example artistic, scientific or sports[8].

Also, not every person associated with a public institution will perform public functions. As indicated by the Tribunal, exercising a public function involves the implementation of specific tasks in an office, within the framework of public authority structures or in another decision-making position in the structure of public administration, as well as in other public institutions. This means that such a person within a public institution carries out to a certain extent the public task imposed on that institution. This person has at least a narrow scope of decision-making competence within this institution. These are positions and functions whose exercise is tantamount to taking actions that directly affect the legal situation of other people or involve at least preparing decisions about other persons. These persons exercise their competence resulting from a clear indication by law. Therefore, if the competence of a given person does not include such a function, even if he works in a unit performing public functions, he is not a person performing public functions. The concept of persons discharging public functions does not include functions, positions and professions that have no connection with public authority (*imperium*) or with the management of municipal property or property of the Treasury (*dominium*)[9].

Therefore, including in the catalogue of persons obliged to submit assets declarations and their publication to other persons is not justified and raises doubts as to the criterion of necessity and indispensity in the light of the principle of admissibility to limit constitutional freedoms and rights. It is also not related to the anti-corruption purpose of such regulation. The enumeration of groups of entities, of which not all persons perform public functions and the imposition of obligations to submit asset declarations on them raises serious reservations from the point of view of compliance with the Constitution.

The extension of this obligation to persons who are not elected, do not bear real responsibility for the public property entrusted to them, do not issue decisions related to administrative authority, is too far-reaching and interferes with the privacy of citizens.

[7] Judgments of the Constitutional Tribunal Ref. No. P 17/05 (20.03.2006) OTK ZU 2006 No. 3A, item 30.
[8] *Ibidem.*
[9] Judgments of the Constitutional Tribunal Ref. No. K 2/07 (11.05.2007) OTK ZU 2007 No. 5A, item 48.

§ 3 – PUBLICATION OF ASSET DECLARATIONS

Another important issue, which the legislator did not devote sufficient attention to, is the obligatory publication of asset declarations for all groups of persons, with the exception of employees of special services. Even for persons performing public functions, it is not always necessary to publish asset declarations. Allowing limitation of privacy by making statements by persons performing public functions is not in every case tantamount to the admissibility of their publication. The nature of the statement about the assets owned means that it simultaneously becomes a declaration of truthfulness and transparency, decency also in private life, which is to guarantee honesty in exercising power. The point is not only that such a person does not take possession of the property in a fraudulent way by using the function entrusted to them through decisions that are not in the public interest, but about guarantees of good repute, decency, and so on. In this aspect, the publication of statements performs social functions and may inspire trust in people making important decisions in the state who manage assets and public affairs. It strengthens the conviction that such a person does not harm the Nation by using public functions for his purposes and does not compromise the idea of a democratic state of law and the legitimacy entrusted to them by the sovereign. Publishing asset declarations of persons discharging public functions from general elections or holding key positions in the state is not questioned. This is dictated by the special mode of selection of these people. They must be aware of the fact that the subject of interest are circumstances from the sphere of private life that are significant for the performance of the assumed public function.

The publication of asset declarations is therefore a control tool exercised by voters[10]. The interest of voters in the behaviour of members of representative authorities in the exercise of their mandate and their property situation is related to democratic political processes. The submission and publication of asset declarations gives the public the opportunity to verify that political processes are not subject to undue pressure or improper lobbying or corruption[11]. However, not in all cases will the publication of asset declarations play their role equally. Disclosure of the financial situation, including loans taken out, may paradoxically increase the risk of corruption, because on the basis of the current financial situation there will be the possibility of selecting persons in the worst financial situation.

Information on property status is used in political games, even if they do not raise suspicions as to the origin of individual assets. Sometimes they become a tool of harassment in the media and stimulating unhealthy emotions in society. The publication of asset

[10] Judgments of the Constitutional Tribunal Ref. No. SK 7/05.
[11] Decision ECHR Wypych v. Poland (dec.), no. 2428/05, ECHR 2005.

declarations may also lead to denunciations, which will also contain other information about certain persons. Therefore, it can be used by the authorities not only for anti-corruption purposes, but to obtain, collect and process various information by the state authorities, which will come from denunciations.

It was therefore the duty of the legislator to justify to which persons performing public functions the obligation to publish asset declarations is necessary. It is not in every case always indispensable to achieve the anti-corruption goal. Such a deep interference with the right to privacy is permissible only when it concerns information clearly related to the tasks and competences of persons performed as part of public activities and when there is an important public interest. The obligation to publish should therefore be limited only to the necessary extent. In the remaining scope, a non-public verification is sufficient.

Particularly controversial is the obligation for judges to submit asset declarations, in particular their publication. None of the European Union countries have introduced such an obligation to such an extent as in Poland. The legal systems of other countries, except Italy, have not introduced a general obligation for judges to submit asset declarations. The legal systems of Germany, Austria, Switzerland and England did not provide for the obligation to submit asset declarations by common court judges at all. The Italian legal system regulates the issue of property declarations by common court judges, except that this obligation is limited to cases where the judge takes office and the judge terminates his office. In Spain, the obligation to submit asset declarations was introduced in 2015, but it does not apply to common court judges in general. Judges make such a declaration if they are the president of the General Council of the Judiciary, or members of the Council (vocales) or its Secretary General (Secretario General)[12].

Thus, none of these countries uses the publication of judicial property declarations to influence public confidence in the justice system. This is due to the fact that building trust in the judiciary is not based on knowledge of the judges' assets, but on the introduction of appropriate procedures that guarantee the impartiality and independence of judges, including a clear preservation of separation of powers, speed of consideration of cases, and a sense of justice. Knowledge of the asset status of judges is not an element of building trust in judges. Information from the asset declaration is not key to building public confidence in the judiciary. It's enough that superiors and special services have access to this information. Building trust through the publication of asset declarations is pointless if other elements of the justice system do not work well. The politicisation of judges, too much influence of the executive on judicial appointments, too much

[12] "Disciplinary liability and property declarations of judges", JUSTICE INSTITUTE, Warsaw 2016 https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Feliga-P.-i-wsp%C3%B3%C5%82autorzy_Odpowiedzialno%C5%9B%C4%87-dyscyplinarna-i-oswiadczenia-maj%C4%85tkowe-s%C4%99dzi%C3%B3w-1.pdf

interference by the executive in particular on the part of the Minister of Justice will arouse public reluctance towards judges. The publication of statements can also be used in a political game to escalate hatred, as was the case in Poland. Some judges who had larger property were harassed in the media. Disclosure of data that is not necessary should be considered unconstitutional.

§ 4 – The Scope of Information Disclosed in the Statement

The legislator is also constitutionally limited as to the scope of information that he orders to disclose in an asset declaration. The connection between the subject of information and the performance of a public function must be clear and real, but it does not have to be direct[13]. The information included in asset declarations should make it possible to determine whether the actions of persons performing public functions do not result from their material dependence on persons or institutions whose interests are influenced by their decisions.

A separate regulation in art. 51 section 2 of the Constitution information autonomy, which after all falls within the scope of the right to privacy, demonstrates the special importance of protecting the individual against the acquisition, processing and use of collected information by the authorities. Additional guarantees in this respect are included in art. 61 of the Constitution, which stipulates that the right to public information is subject to restrictions due to the privacy of a natural person or the secret of the entrepreneur. This restriction, however, does not apply to information about persons performing public functions who are associated with performing these functions. Authorities cannot, therefore, collect information that is convenient or useful or that is unrelated to their function.

Limiting information autonomy is therefore only possible if it is "necessary in a democratic state ruled by law" and at the same time leads to the achievement of the assumed goal, that is transparency in public life and counteracting corruption. At the same time, such a goal cannot be achieved by other means, namely by using the instruments available in evidence proceedings.

§ 5 – The Effect of Unpredictability and Surprise for Many Groups of Persons

The last issue that raises doubts is the extension of the obligation to submit asset declarations to many new groups of persons. For many of them, the new regulations are a surprise that they could not have foreseen when choosing a profession, position or function.

In many of its rulings, the Tribunal has indicated that no citizen is obliged to apply or to perform public functions, and knowing the consequences of this fact in the form of publishing a certain range

[13] see W. Sokolewicz, [in:] *Constitution of the Republic of Poland. Commentary*, Warsaw 2005, *commentary on Article 61*.

of information belonging to the sphere of privacy, they make an informed and independent decision based on the bill, positive and negative consequences, calculating certain limitations, and discomfort associated with interference in private life. It follows that when deciding to run for election, a given person accepts the conditions that limit his right to private and family life[14]. Persons occupying more prominent public positions must then accept the limitations of their right to privacy to the extent that information about their private life is important for the functioning of public institutions and the assessment of their work.

The Polish Constitutional Tribunal has stressed that the legislator is free to determine the scope of restrictions on persons performing public functions, which may be shaped at different times in a different way, due to the intensification of corruption phenomena and a negative social reaction. They should remain in a rational relationship with the public interest they are to serve, and their scope should be commensurate with the rank of this interest. Transparency of public life cannot lead to a complete strikeout and negation of protection related to private life[15].

In this context, however, the situation of people who have taken up their positions before the entry into force of the proposed regulations should be assessed differently. Particularly difficult choices would be made for people whose positions are related to the chosen, learned and performed profession, for example some university teachers and academic staff. In their case, it is difficult to talk about knowing the consequences in the form of limiting the privacy law in connection with their obligation to submit asset declarations.

§ 5 – The Need to Limit the Scope of the Proposed Regulation

The introduction of new regulations will certainly harmonise the rules for submitting asset declarations. However, the identification of the persons obliged to submit them requires verification. Not all persons covered by this obligation are subject to constitutional restrictions on their freedom and rights, including in particular the right to privacy. Furthermore, it is not always necessary to publish their asset declarations.

Extending the list of persons obliged to submit asset declarations and introducing the obligation to publish these declarations on the internet constitutes a far-reaching interference with everyone's constitutional right to privacy. For this reason, imposing the obligation to submit asset declarations on new groups of persons requires precise justification for each of these groups. The legislator should demonstrate the relationship between the

[14] Judgments of the Constitutional Tribunal: Ref. No. K 24/98 (21.10.1998) OTK ZU 1998 No. 6, item 97.

[15] Judgments of the Constitutional Tribunal: Ref. No. K 11/01 (08.10.2001) OTK ZU 2001 No. 7, item 210.

disclosed information and the public function it performs, as well as their necessity for achieving the assumed goals.

The obligation of so many groups indicates that the secret services will collect and use data for political purposes. They will collect data in an easy and convenient way but they are not able to verify the content of such a large number of statements. The goal of preventing corruption will not be achieved in this way.

The obligation to publish information about the assets of several thousand people who are not elected or make major decisions that have an impact on citizens seems an excessive, non-proportional and unnecessary strain on privacy. It is likely to undermine public trust given the very broad scope of information that will have to be disclosed, including private loans, property and income of the party at hand and of the spouse.

The draft bill violates not only the right to privacy, but also the constitutional ban on public authorities to provide other information on citizens than is necessary in a democratic state of law.