

Issue | July 2015
No.2 | Special Issue: Privacy

Montesquieu Law Review

Transparency in public life and respect for private life

Messaoud Saoudi, Associate Professor, Université Lumière Lyon II



Program supported by the ANR
n°ANR-10-IDEX-03-02



Transparency in public life and respect for private life

Messaoud Saoudi, Associate Professor, Université Lumière Lyon II

Suggested citation: Messaoud Saoudi, Transparency in public life and respect for private life, 1 Montesquieu Law Review (2015), issue 2, available at <http://www.montesquieulawreview.eu/review.htm>

“Virtue is a self-renunciation, which is ever arduous and painful” (1)
Montesquieu, *The Spirit of Laws*

Reconciling transparency in public life and respect for private life appears to be the objective pursued by the Laws of 11 October 2013 on transparency in public life, at the very least in their provisions relating to the duty to declare interests and assets imposed on individuals in public office or in charge of a public service mission.

The distinction between public and private life is the result of a liberal conception of political society: the Declaration of the Rights of Man and of the Citizen of 26 August 1789 (DRMC) establishes the separation of person (private life) and function (public life). In that sense, the French Revolution, which was intended to be democratic and liberal, was set against a monarchical *Ancien Régime* in which “private” and “public” matters were, in a “court society”, intimately linked and both symbolised in the person of the King, who was both a public and a private figure. Political liberalism in the French information society reaffirms the distinction by strengthening it. Furthermore, the Proclamation of the Republic in 1792 was based on an initiative to bring transparency to the management of public affairs, which contrasted with the often opaque nature of the financial management of the “King’s Household” under the *Ancien Régime*. It is, moreover, financial issues that appear to be at the root of European democratic revolutions. In that sense, in the words of one author, “*democracy is a lie if it does not tackle the issue of money head-on*” (2). We can therefore understand the heightened tension that may be found within democratic societies between transparency in public life (public money calls for transparency) and respect for private life (public officials’ private funds may not be kept completely secret).

The issue of transparency in public life recently re-emerged following the “political shockwaves” of the Cahuzac affair, named after the deputy minister in charge of the Budget charged by an examining magistrate on 2 April 2013 with laundering the proceeds of tax evasion. The Organic and Ordinary Laws of 11 October 2013 on transparency in political life, known as the *lois Cahuzac* (Cahuzac laws) (3) appear to result, in addition to the report submitted by the Parliamentary committee that investigated the matter (4), from earlier work done by both the *Commission de réflexion pour la prévention des conflits d’intérêts dans la vie publique* (Commission for the Prevention of Conflicts of Interest in Public Life), chaired in 2010 by the Vice-President of the *Conseil d’Etat*, Jean Marc Sauvé; and by the *Commission de renouveau et de déontologie de la vie publique* (Commission for Renewal and Ethics in Public Life), chaired in 2012 by the former Prime Minister, Lionel Jospin. Faced with the “crisis of confidence” currently experienced by French democracy, the former commission seeks to prevent or regulate conflicts of interest, in particular between public and private interests (5); while the latter seeks to start working on “a renewal of

public life”, in particular by publishing the asset declarations made by elected representatives (6). Both commissions thus affirm the need for a set of ethics governing the responsibility of political staff through the duty to declare interests and assets, particularly for Members of Parliament and ministers. A comparative approach shows that these democratic requirements for the prevention of conflicts of interest and the declaration of assets are framed by laws that vary in terms of their scope in order to protect the right to respect for private life; thus, common law, which so often serves as a model in instituting such measures, enshrines a scheme established on the basis of laws (Canada’s Conflict of Interest Act 2006) or simple codes of ethics (in the United Kingdom, the Ministerial Code issued in 2012 by the Prime Minister, and the Civil Service management code issued on the basis of a 1995 ministerial decision) (7).

The aim of the “*lois Cahuzac*” is above all to re-establish ties between political power and citizens and thus strengthen the legitimacy of governors in the eyes of the governed; the Cahuzac laws have been heavily criticised particularly by the current Speaker of the French National Assembly, who decried the creation by those laws of a “paparazzi democracy” (8); they appear, in any event, to mark a new era in French democracy. Taxpaying citizens do indeed demand transparency in public life and greater responsibility on the part of political figures and their associates. These laws thus appear to incorporate the common-law concept of accountability, in the sense here of transparency in activities and the responsibility of public players. The Organic and Ordinary Laws of 11 October 2013 thus render more than eight thousand elected and unelected officials subject to a duty to declare assets and interests. While the content of the provisions under those Laws is quite ambitious, their scope does however appear to be quite limited.

I – Ambitious provisions

The provisions under the Cahuzac laws relative to declarations of assets and interests attract attention as they are likely to infringe the right to respect for private life.

A – The declaration of assets

The Organic Law defines the duties incumbent on Members of Parliament in this area, and is supported by an Ordinary Law which stipulates the duties falling to members of the Government, local elected officials and any other person entrusted with a public service mission.

The following are thus subject to a duty to declare assets: members of ministerial offices; associates of the President of the Republic; the Speakers of the National Assembly and the Senate; Members of Parliament, Senators and French Members of the European Parliament; presidents of the *conseils départementaux et régionaux* (departmental and regional Councils); local mayors and presidents of *Etablissements Publics de Coopération Intercommunale* (EPCIs) with their own taxation of more than 20,000 inhabitants; the president of the Metropolis of Lyon; members of independent administrative and public authorities (known as AAls and APIs); the chief executive officers of companies, the share capital of which is held by a majority of public persons. The declaration concerns only the assets and property (9) of the office holder and not those of their spouse, civil partner or cohabitee (the professional or business activity of these persons must, however, also be declared); community property is also included. This declaration, which must be exhaustive, honest and certified on the office holder’s honour, is made within two months following their entry into service or from the date of their appointment, and filed with the *Haute autorité de transparence de la vie publique* (HATVP – High Authority for transparency in public

life). The latter organisation publishes the asset declarations made by members of the Government. The declarations submitted by Members of Parliament may only be consulted at prefectures and only by registered voters. The disclosure of information contained in such asset declarations, which may only be consulted (Members of Parliament) and those not made public by the HATPV (members of the Government), constitutes a criminal offence punishable by a year's imprisonment and a fine of up to €45,000 unless the declarant has himself made the details of his declaration public. In order to protect privacy of an elected representative or a member of the Government, certain details are not made public (e.g. personal address, names of spouse/partner/cohabitee and other members of the family, the exact location of properties, etc.) (10). Such criminal provisions are used to sanction any invasion of privacy, within the meaning of Article 226-1 of the *Code pénal* (Penal Code).

B – The declaration of interests

When they were tabled before Parliament, the draft Organic and Ordinary Laws on transparency in public life, having identified the limits of the existing law on declarations of interests, envisioned a complete overhaul of the scheme “*with the aim of placing our country amongst the most advanced democracies in matters of preventing conflicts of interest, and using the principle of transparency in the service of that objective*” (11). Under the terms of Article 1 of the Ordinary Law, “*shall constitute a conflict of interest any situation of interference between a public interest and public or private interests which is of such a nature as to influence or appear to influence the independent, impartial and objective exercise of a function*”. This objective definition of conflicts of interest has the merit of going beyond the concept in criminal law of “*prise illégale d'intérêt*” (illegal acquisitions of interest) under Article 432-12 of the Penal Code. Thus a conflict of interest may be established on the basis of an apparently legitimate situation in the sense of the due process of law; the person concerned is then subject to a duty to abstain (“system of deposit”), which duty must consequently be supplemented in accordance with the rules of the body in question (12). The person (be they elected or unelected) facing a conflict of interest then abstains from being a member of the body and/or using their delegation of signing authority. This concerns national and European parliamentarians, members of the Government and local elected representatives, as well as members of ministerial offices, associates of the State's highest authorities (President of the Republic, Speakers of the National Assembly and the Senate), and members of AAIs and APIs. The HATVP only makes public those declarations of interests submitted by persons in elected and ministerial office. The declarations may only be consulted at prefectures and only by registered voters.

In matters of the prevention of conflicts of interest, Members of Parliament and Senators are forbidden from exercising an advisory role or roles within companies that maintain close ties with the Administration (Article 2 of the Organic Law). The Law also provides for a reduction in the duration of indemnity payments to be made to ministers in the event that they do not resume any paid activity (which indemnity is not paid in the event of a failure on the part of the interested part to fulfil their duty to submit declarations of interests to the HATVP, as provided under Article 3). In order to prevent certain conflicts of interest, the laws have toughened the incompatibility rules applicable to Members of Parliament and of the *Conseil constitutionnel* (Constitutional Council). In two decisions, the latter stated, even slightly amended, the effective scope of the provisions of the two Laws discussed above.

II. Provisions limited in scope

The decisions of the Constitutional Council stipulate the scope of the Cahuzac laws and thus establish the field of competence of the body responsible for monitoring the observance thereof: the HATVP.

A – Normative scope

In two decisions (13), the Council approved the two Laws, with the exception of several provisions which were declared unconstitutional and certain interpretative reservations.

On the basis of the right to respect for private life guaranteed by Article 2 of the 1789 DRMC (14) and enshrined in its earlier case law (15), the Council recalled that “*the freedom proclaimed under that Article implies the right to respect for private life; that the submission of declarations of interest and asset declarations containing data of a personal nature pertaining to private life, together with the publicity to which such declarations may be subject infringe the right to privacy; that, in order to be constitutional, such infringements must be justified on ground of public interest and adequately implemented in proportion to that objective*” (16). Thus, by an interpretative reservation, the Council restricted the scope of the duties to declare the professional or business activities of “*parents and children*” or of “*other members of the family*” of a parliamentarian (17) and the holders of certain functions or public posts (18). Furthermore, it struck down a large section of Article 12 II of the Ordinary Law which provided the possibility for registered voters to consult, at prefectures, those asset declarations submitted by their local elected representatives, taking the view that there lay a disproportionate infringement of the right to respect for private life in light of the transparency objective pursued by the legislature (19). Moreover, the declarations of interests submitted by officials who do not hold political office but rather an administrative role cannot be made public (20).

These reservations as to the interpretation or striking down of legislation ultimately have the effect of providing a stronger framework for the status and powers of the institution established to monitor the observance of the Cahuzac laws, the HATVP. The latter body had been granted a power of injunction by the legislature, the scope of which was restricted by the Council with regard to parliamentarians (21) and associates of the Speakers of the National Assembly and the Senate (22), and this on the basis of the principle of the separation of powers. The Council’s decisions thus have a not inconsiderable institutional scope.

B – Institutional scope

The Law of 11 October 2013 abolished the *Commission pour la transparence financière de la vie politique* (Commission for financial transparency in political life), formerly established by the Law of 11 March 1988 on financial transparency in political life, replacing it with the High Authority for Transparency in Public Life (HATVP), which has greater powers relating to supervision and sanctions). As an *autorité administrative indépendante* or AAI (independent administrative authority), on which basis its members are subject to the duty to declare assets and interests (23), the HATVP is composed of nine members, the chairman being appointed by the Head of State while the remaining eight are nominated by the courts (*Conseil d’Etat*, *Cour de cassation* (Court of Cassation) and the *Cour des comptes* (Court of Auditors)) and parliamentarians (Speakers of the Senate of National Assembly) (24). Its budget, however, remains part of the “*Direction de l’action*

du gouvernement” (Government Action Directorate), which qualifies its financial independence and, consequently, its true independence with regard to the executive branch.

The HATVP is responsible for receiving declarations of assets and interests, particularly in electronic format (25), at the beginning and end of the term of office of a number of public figures, particularly members of the Government, national and European parliamentarians, local elected representatives, members of ministerial offices and associates of the President of the Republic (26). Any change in assets during the term of office or while exercising a function must be declared within two months for Members of Parliament or one month for other relevant persons. An incomplete or dishonest declaration is punishable by a prison sentence of three months and up to €45,000 in fines (27) (five years’ imprisonment and a €75,000 fine for members of the Government). Failure to fulfil the obligation to provide such information carries with it the same criminal sanctions and also disqualification. The HATVP may rule on matters referred to it by the Prime Minister, the Speakers of the National Assembly and the Senate, and by accredited anti-corruption groups (“Regards citoyens”, “Anticor”, “Transparency International France”); it may also investigate on its own initiative where it finds failures and inform the relevant authorities of the same. It publishes an annual report, which is submitted to the President, the Prime Minister and Parliament, and may formulate recommendations for the application of legislations, particularly in matters of relations with interest representatives (28).

The HATVP’s activity can be seen in a number of recent cases handed over to the *parquet national financier* (PNF – Financial State Prosecutor), established in 2013 and specialising in combatting major financial crime (for cases of failure or omission to declare assets in relation to parliamentarians and members of the Government), cases that are often expedited with the help and support of the tax authorities, with which the HATVP has very close ties.

In 2013, taking inspiration from the common-law concept of accountability, the legislature appeared to assume that, in the absence of effective liability, it was more a question of promoting a simple code of ethics for those in power (29), thus reflecting the law’s limitations where it is a matter of providing a framework for and sanctioning the status and role of government representatives and their associates (30). It is also to be noted that it is in the name of the right to respect for private life that the decisions handed down by the Constitutional Council restrict the scope of the 2013 Laws – and, consequently, the effectiveness of the HATVP’s activities. The right to respect for private life is precisely defined by legislation and case law, unlike the concept of transparency in public life. Only practice and the implementation of oversight and sanction procedures will reflect the effectiveness – and, therefore, the substantive value – of having established the HATVP.

Notes:

- (1) Charles de Secondat, Baron de Montesquieu, *Œuvres de Montesquieu contenant l’Esprit des Loïs*, Livre IV, Chapitre V, A. Belin Imprimeur Libraire, Paris, édition 1817, p. 28.
- (2) A. Etchegoyen, *La démocratie malade du mensonge*, éd. François Bourin, 1993, p. 161
- (3) *Loi organique n° 2013-906 du 11 octobre 2013 relative à la transparence de la vie publique* (Organic Law n° 2013-906 of 11 October 2013 on transparency in public life), *JORF* n°0238 of 12 October 2013 p. 16824; and *Loi n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique* (Law n° 2013-906 of 11 October 2013 on transparency in public life), *JORF*

n°0238 of 12 October 2013 p. 16829.

- (4) *Rapport n°1408 des députés M. Ch. de Courson (Président) et M. A. Claeys (Rapporteur) fait au nom de la commission d'enquête relative aux éventuels dysfonctionnements dans l'action du Gouvernement et des services de l'État, notamment ceux des ministères de l'économie et des finances, de l'intérieur et de la justice, entre le 4 décembre 2012 et le 2 avril 2013, dans la gestion d'une affaire qui a conduit à la démission d'un membre du Gouvernement*, Assemblée nationale, 8 octobre 2013, p.96.
- (5) Commission de réflexion pour la prévention des conflits d'intérêts dans la vie publique (Commission for the Prevention of Conflicts of Interest in Public Life), *Pour une nouvelle déontologie de la vie publique*, LDF, Paris, 121 p.
- (6) *Commission de rénovation et de déontologie de la vie publique* (Commission for Renewal and Ethics in Public Life), *Pour un renouveau démocratique*, LDF, Paris, 130p.
- (7) Ministerial code, Cabinet Office, 21 May 2010, 30 p; Civil service management code, 88 p.
- (8) Note from the Speaker of the National Assembly to the Prime Minister and published by *Le Monde* on 11 April 2013.
- (9) Particularly, property (built or not built), securities, bank accounts, life insurance, land vehicles, boats, aeroplanes, etc; *Décret du 23 décembre 2013 relatif aux déclarations de situation patrimoniale et déclarations d'intérêts adressées à la Haute Autorité pour la transparence de la vie publique* (Decree of 23 December 2013 on asset declarations and declarations of interest submitted to the High Authority for Transparency in Public Life), *JORF* of 27 December 2013.
- (10) Article LO. 135–2 III of the *Code électoral* (Electoral Code) and Article 5 III of the Ordinary Law of 11 October 2013.
- (11) *Projet de loi organique n°1004 relatif à la transparence de la vie publique présenté au nom de M.J.M. Ayrault, Premier ministre par M. A. Vidalies, ministre délégué auprès du Premier ministre, chargé des relations avec le Parlement*, (Draft Organic Law n°1004 on transparency in public life, presented on behalf of the Prime Minister, J.M. Ayrault, by A. Vidalies, Deputy Minister for Relations with Parliament) National Assembly, 24 April 2013 ; and *Projet de loi n°1005 relatif à la transparence de la vie publique présenté au nom de M. J.M. Ayrault, Premier ministre par M. A. Vidalies, ministre délégué auprès du Premier ministre, chargé des relations avec le Parlement* (Draft Law n°1005 on transparency in public life, presented on behalf of the Prime Minister, J.M. Ayrault, by A. Vidalies, Deputy Minister for Relations with Parliament), National Assembly, 24 April 2013.
- (12) *Décret du 16 janvier 2014 relatif à la prévention des conflits d'intérêts dans l'exercice des fonctions ministérielles*, *JORF* du 17 janvier 2014.
- (13) Decision n°2013–675 DC and Decision n°2013–676 DC of 9 October 2013.
- (14) Which provides "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression".
- (15) Decision n° 94–352 DC of 18 January 1995 and n°99–416 DC of 23 July 1999.
- (16) Recital 13 of Decision n° 2013–676 DC
- (17) Recital 29 of Decision n° 2013–675 DC
- (18) Recital 16 of Decision n° 2013–676 DC
- (19) Recital 20 of Decision n° 2013–676 DC
- (20) Recital 22 of Decision n° 2013–676 DC
- (21) Recital 39 of Decision n° 2013–675 DC
- (22) Recital 45 of Decision n° 2013–676 DC

- (23) Article 3 of the High Authority's general regulations, declarations addressed to the President of the HATVP.
- (24) *Décret n° 2013-1204 du 23 décembre 2013 relatif à l'organisation et au fonctionnement de la Haute Autorité pour la transparence de la vie publique* (Decree n° 2013-1204 of 23 December 2013 on the organisation and operation of the High Authority for Transparency in Public Life), *JORF* n°0298 of 24 December 2013 page 21094
- (25) *Décret n° 2015-246 du 3 mars 2015 permettant la transmission des déclarations par voie électronique et modifiant le décret n° 2013-1212 du 23 décembre 2013 relatif aux déclarations de situation patrimoniale et déclarations d'intérêts adressées à la Haute Autorité pour la transparence de la vie publique* (Decree n° 2015-246 of 3 March 2015 allowing the submission of declarations in electronic format and amending Decree n° 2013-1212 of 23 December 2013 on asset declarations and declarations of interest submitted to the High Authority for Transparency in Public Life), *JORF* n°0054 of 5 March 2015 page 4153.
- (26) *Décret n° 2013-1212 du 23 décembre 2013 relatif aux déclarations de situation patrimoniale et déclarations d'intérêts adressées à la Haute Autorité pour la transparence de la vie publique* (Decree n° 2013-1212 of 23 December 2013 on asset declarations and declarations of interest submitted to the High Authority for Transparency in Public Life), *JORF* n°0300 of 27 December 2013 page 21445
- (27) Article LO 135-1 of the Electoral Code (parliamentarians), Article 26 I of the Ordinary law of 11 October 2013 (members of the government and local elected representatives).
- (28) HATVP website
- (29) Hence the *Charte de l'élu local* (Charter for local elected representatives), enacted by Law n° 2015-366 of 31 March 2015 *visant à faciliter l'exercice, par les élus locaux, de leur mandat* (on facilitating the fulfilment of mandates by local elected representatives), *JORF* n°0077 of 1 April 2015 page 5921; and *Charte de déontologie des collaborateurs du Président de la République* (Ethical Charter for Associates of the President of the Republic), 19 December 2014.
- (30) In this sense, see J. L Nadal (President of the HATVP), *Renouer la confiance publique, Rapport au Président de la République sur l'exemplarité des responsables publics*, LDF, Paris, January 2015, 192p.