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FINAL REPORT

The topic of the grant:

„Ethical Obligations of Government Officials in a Democracy”

1. THE DESCRIPTION OF RESEARCH CONDUCTED IN THE FIRST AND SECOND YEAR OF THE GRANT

I devoted the first year to acquire the knowledge, theory and information pertaining to the topic of the grant. I collected the data both in Poland and in England.

In England I have conducted research from 1996.04.29 to 1996.05.19. Research material was gathered at:

- The Main Library of the University of Birmingham, Birmingham, Edgbaston
- Library of the Law School, University of Birmingham, Birmingham, Edgbaston
- Main Library of the London School of Economics
- Library of the Law School at Oxford University

During my stay in England I have actively participated in a seminar organised by the School of Public Policy, University of Birmingham, during which a lecture was delivered by Prof. E. King, Essex University. Prof. E. King is a permanent member of the Nolan Committee which investigates the standards of conduct of public officials in England. He talked about the activities of the Committee.

In 1966 my University in Białystok gained access to Internet and this created the opportunity for me to look for the data in other countries and to order books from foreign

countries. Although the price of the books ordered this way was almost two times higher, it was the surest way to get the latest books on this subject.

In 1997 I completed the research material, and prepared several manuscripts dealing with the main topic of my investigations as well as preparing the final product of my research.

While in England I consulted the results of my research with the following English scholars:

- Dr John Stewart, Professor of Public Administration, the School of Public Policy, University of Birmingham, GB
- Dr Peter Watt, Professor of Public Administration, the School of Public Policy, University of Birmingham, GB
- Dr Adrian Campbell, Professor of Public Administration, the School of Public Policy, University of Birmingham, GB

The topic of the grant I have consulted by E-mail with the following persons:

- Dr Robert Lowry, Professor of Law, Centre for Professional Ethics, School of Law, Case Western Reserve University, USA
- Dr Jonathan Entin, Professor of Law, School of Law, Case Western Reserve University, USA
- Dr Burt Hessel, Professor of Law, School of Law, Utrecht University, Netherlands
- Dr Philip Langbroeck, Associate Professor of Law, School of Law, Utrecht University, Netherlands
- Dr Allan Riddell, Secretary of the Committee on Standards in Public Life, London, GB
- Dr Donald H. Oliver, member of the Canadian Senate, member of the Committee on the Liability of the Members of the Parliament

and many other experts in Poland; Prof. Mirosław Wyrzykowski, Maria Gintoft Jankowicz, Ewa Łętowska, Marek Dembski.

2. THE FINAL EFFECTS

As the final results of my research several papers have been published. The following papers are the most important in my opinion:

- 1. The Art of Making Ethical Decisions by Public Officials**, published in „*Samorząd Terytorialny*” , No 9, 1995, pp. 3-18

2. Counteraction against Corruption, published in „*Kontrola Państwowa*”, No 1, (252), 1997, pp. 78-89

3. Foundations of the Codes of Ethics Applicable to the Civil Service in Poland (a comparative study), published in „*Państwo i Prawo*”, No 2 (612), 1997, pp. 24 - 37

Copies of these papers are enclosed with the report.

After publishing the topic of my research in Polish Republic I was invited as a guest speaker to several meetings devoted to the problem of ethics in public life. Among others I lectured on the following topics:

- „Codes of Ethics and the Responsibilities of Members of Parliament” presented at an international conference „Do members of parliament need an ethical code?” organised by the Polish Parliament on 1996.06.22,
- „Various Models Counteraction against Corruption” presented at the conference „Public Interest, Power, Corruption” organised by Institute for Public Affairs and Batory Foundation on 1996.17.11,
- „Ethics in Public Life” during the seminar organised by the Batory Foundation on 1997.03.16

Finally I was invited as an expert to the group working out the Ethical Code for Members of the Polish Parliament, and to take part in the Council of „Ethics in Public Life” Program of the Batory Foundation.

The ethics of administration has become one of the essential parts of my lectures on the Public Administration Science, which I give to students at the School of Law, Warsaw University, Bia³ystok Branch and the Collage of Public Administration in Bia³ystok. These lectures are given also during extra-mural courses and as part of the continuing education of lawyers.

3. THE END PRODUCT

The collected data, consultations I have made and my own studies were the basis for analysis of statutory duties of government officials relating to their desired conduct.

I have analysed the following categories which are essential for ethical administration, in the legal systems of France, Germany, England and USA:

1. Obligations relating to the upholding of the Constitution.
2. Obligations of honest, objective and impartial administrative procedures.
3. Obligations of the best professional performance and continuous improvement in professional skills.
4. Obligations of the political neutrality of government officials.

I have described the categorisation of duties and their statutory regulations in the above mentioned countries in a paper entitled „Foundations of the Codes of Ethics Applicable to the Civil Service in Poland” published in *Państwo i Prawo* 1997, No 2.

I have come to the conclusion that the category which has the strongest connection to the other three, and which reflects the ethics of government officials, is the obligation for political neutrality. The subject of political neutrality of government officials, although very difficult, has interested me so much that I have decided to write a book on this topic.

This was the way the book entitled „**Political Neutrality of Civil Servants**” originated, which comprises 200 pages, including some parts an English translations. One of the most prestigious publishers in Poland *Wydawnictwo Sejmowe*, has accepted it print¹. As of March 1, 1997 this book has had favourable reviews. The *Wydawnictwo Sejmowe* publisher has pledged to publish it at the end of September as the end product of NATO research 1997. As a NATO fellow I do hope that this deadline will be met. This book will be published with the annotation: „Supported by the grant IP/ D16/ 95/ 72 from the Office of Information and Press North Atlantic Treaty Organisation”.

4. SUMMARY OF THE BOOK „POLITICAL NEUTRALITY OF CIVIL SERVANTS”

In Poland during the period of socialism the instruments of the law protecting the unconditional loyalty of government workers to political orders of government lead to the point that the law institutions which guarantee the protection of the functioning mechanisms of democracy, for many years were not a subject of scientific interest. This historical

¹ I enclosed the certificate and the contract with the publisher „*Wydawnictwo Sejmowe*”

experience in Poland determined the fact, that at present after the reforms of the 90ties there is an urgent need to catch up. In the book entitled: "The Political Neutrality of Civil Servants" in which can be found a theoretical analysis on the neutral line of civil servants will fill in that gap.

Before making an appraisal of the laws in force at the moment in Poland which guarantee the political neutrality of civil servants at the beginning of the book some rules of law which have proven to be efficient in other countries are presented. In order to portray the problem, four countries with different systems of law and civil service but with fixed democratic mechanisms: France, Germany, Great Britain and the USA have been chosen. The institutions which we shall analyse serve not only to explain the phenomenon of political neutrality of civil servants but also the counteraction of violating it.

In the first chapter of the present paper is presented the place of the civil service in the public administration system in the above mentioned countries as well as the evolution of scientific views on the subject of the necessity separating the politics sphere from the administration. In that chapter it is pointed out that in a modern country it is difficult to divide the political sphere from the administration and treat them as separate. Such distinction is only necessary for theoretical purposes. The theoretical division of these two spheres would however serve for a better understanding of the separate functions and rules to be carried out by both politicians and civil servants - who both in the end undertake the realisation of a common task - the governing of the country. A detailed analysis of these different rules can be found in chapter two. In that chapter the differences in the dischargement of rules which are the result of the character of the realisation of administrative duties, their legal form as well as acceptance of responsibility are emphasised. While politicians under the pressure of being responsible to parliament and the electorate realise tasks of a general character, the role of civil servants is to assist them in political elections, preparing resolutions for projects, as well as later putting them into effect. In that section of the paper are also presented the legal solutions which preserve the separation of political posts and administrative posts in the government as well as an analysis of the changes which were made in the legal status of those in the highest level of government. Changes such as limiting the length of time in the public service, a simple procedure of removing high level state clerks from their posts arising from a lack of confidence on the part of politicians to the civil service.

In the next chapter is documented the sources of political neutrality of civil servants which are stated in the constitution and first of all the principles of representation of the form of government as well as equality of citizens under the law. Alongside the political neutrality of the constitutional principles of conduct for civil servants, the author includes loyalty to the constitution and government policy, impartiality and professionalism in their duties. In that chapter for the purpose of comprehension of political neutrality are cited a few examples of court rulings clarifying such legal obligations connected with political neutrality as the obligation of refraining from expressing ones opinions on the subject of government work, the law on engaging in political activities or also the prohibiting of manifesting ones political views.

In chapter four the changes which have occurred in recent years are characterised those relative to politics and the administration. In pointing out the effects of reforms on decentralisation and deconcentration as well as the effects of managerial methods of procedures, the author shows that in this day and age the influence of politics on the administration has increased. This is reflected not only in the changes in the status of high level state clerks but also in the intensification of influence of political clerks, first of all lobbying in the activities of politicians and civil servants in government administration. These changes would lead one to the conclusion that the political neutrality of civil servants should be understood in a broader sense, not only as an interdiction against being guided by ones own political convictions, but also as an interdiction against submitting to the pressure of the private interest of political parties of lobbying, and to carrying out official orders which are determined by the private interests of a political party. Each and every action which violates such an understanding of political neutrality will be an action of political partiality.

In the fifth chapter taking for granted that political neutrality of civil servants in their duties is protected by the principles of the constitution, therefore violating these principles in any way whatsoever is socially pathological and reprehensible. This is why further on in the paper an analysis of civil servants being held liable for partiality in the line of duty is presented. To accentuate here the limited role of penal liability and administrative the author has come to the conclusion that in order to solve this problem one ought to look to other institutional - administrative laws of a preventative nature.

Among the legal means available for preventing political partiality by civil servants the author sees the necessity of out in the open functioning of political parties and

first and foremost how and by whom they are financed and an account of the money spent on election companies. To other institutions prohibiting partiality can also be added clear open actions by the administration and frankness and candidness on the part of administrative organs preparing projects of normative acts. By operating out in the open the author has in mind not only openness, but also that all procedures be accessible to all parties concerned. The remaining methods which would have an influence in prohibiting political partiality the author adds legal regulations on the functioning of lobbying and at least the legalisation of the participation of representatives of interest groups in the process of creating normative. This could be done by keeping an open public parliamentary register. Very meaningful in the prohibiting of partiality would be also a register with the declarations of personal property and wealth of parliamentarians and civil servants, too a code of ethics with detailed regulations on the principles of proper behaviour for public officials. In that chapter the author points out which of these institutions of the law had the greatest significance in government strategy in the above mentioned countries.

Chapter six is dedicated to a scientific analysis of the legal institutions which serve to counteract political partiality of civil servants in being the result of carrying out official orders. The author indicates here the inadequate role played inside the agency by the recipient of complaints from clerks concerning the unethical activities and orders from supervisors. This situation has led to a number of press leaks on partiality inside the administration. In describing 4 examples of press leaks which took place in Great Britain at the end of the 80 ties. the author criticises the way in which the law was to the disadvantage of the civil servants for their conduct. In this chapter the author concludes that political loyalty of clerks at the disposal of the government is limited by constitutional rules and conflicts of loyalty (loyalty to government policy or loyalty to the principles of the constitution) should always be to the advantage of the constitution. In this way professional training of civil servants may be helpful in protecting the public interest from the conflict of interest and civil servants by themselves become watchdog of public interest.

That understanding of loyalty of course, does not exclude loyalty to government policy realised in the public interest. In this way the mutual curtailment of trust by politicians and civil servants will be compensated by the mechanism of mutual control.

In the seventh and last chapter are characterised the changes in the legal regulations in the functioning of public service which were made in the 90 ties. in Poland and the underlining of the lack of effective legal solutions which would protect the neutrality of the civil servants. In such situation the whole range of instruments of the law presented by the author which are in use in other countries is not only a reason for discussion on this subject, but also a collection of alternative solutions which should be taken into consideration in the search for legal means which would be more effective in insuring the political neutrality of civil servants in the Democracy.

I have used an English translation of some parts of the book „Political Neutrality of Civil Servants” to prepare the scientific report on my research.

Białystok, 1996.06. 23

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SCIENTIFIC REPORT
„POLITICAL NEUTRALITY OF CIVIL SERVANTS”

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1. INTRODUCTION

A definition of political neutrality must be preceded by a solution of a conflict involving basic principles of the system prevailing in a democratic state. All democratic states abide by the principle of the realisation by the administration of the will of the majority (with the protection of the rights of the minority), expressed in free democratic elections. In other words, the administration serves political authorities up to the time when their composition is changed by social will expressed in successive elections. The second principle, which was won during the French Revolution and which remains binding in all Western democracies, pertains to universal equality before the law. Indubitably, it obligates the administration to pursue politically neutral and impartial activity. The above mentioned principles remain in distinct mutual contradiction - how can the political programmes of a certain party be implemented without facing the charge of political bias?

Various democratic countries propose assorted ways of solving the above presented conflict of principles. Their suggestions are dominated in particular by the historical determinants and social-political-legal structures of particular states. In each state, the submitted and implemented solutions are the outcome of its own national conceptions of civil service, public administration, system of governance, etc. Nonetheless, the specific features of each system become less visible due to the expansion or outright "explosion" of the administration which take place not only in the West but also in other European countries and Asia.

The introduction at the beginning of the 1990s of system reforms in Poland meant that changes within the political situation altered the nature of public administration. Prior to 1990, the situation was clear. Civil servants were committed to realise the sole political line of the Party which ruled uninterruptedly for almost half a century. Following the implementation of the system reform at the beginning of 1990, the task of administrating public issues became much more difficult. Suddenly, public servants found themselves in a world of a competitive political game whose rules are extremely complicated and unclear. The civil servant, who sometimes does not know how to act, finds himself at the very centre of a new situation when all transformations in administrating state issues and thus, for instance, in the territorial division of the country, social welfare, the health service, the school system, or the administration of justice, assumed a political nature, while various parties advocate their own conceptions of solutions.

Owing to the breakthrough which occurred at the beginning of the 1990s, Polish civil servants discovered that they are in an alien world of differentiated political pressure and the impacts of contradictory interest groups, public opinion as well as their own political sympathies and views. The turmoil of daily work made it increasingly difficult to distinguish between such impact and their own role, even more so considering that a comprehension of the problem no longer calls only for familiarity with the law and administrative competence.

The intention of this book is to bring closer the question of the boundaries of the political loyalty of public servants, and to explain the phenomenon of the political neutrality of the civil service. I hope to answer the question concerning the scope of the political loyalty of civil servants. In what situations can they refuse to perform political orders, and in what situations are they obliged to abide by them? Incessant controversies on this theme, and the ever different interpretations of the political neutrality of civil servants, both in theory and practice, encouraged me to embark upon an attempt at explaining to the Polish reader general tendencies concerning the definition and practical conception of this phenomenon in developed democratic countries.

For the purposes of describing the topic in question, I selected four of the best developed democratic countries: France, Great Britain, Germany and the United States of America. This choice was determined not only by the close proximity of some of these countries to Poland but by their theoretical accomplishments as regards the issue under examination. Obviously, each of these states represents a specific political-legal system, as well as a different structure and legal position of the civil service, which were shaped for centuries by diverse historical tradition and trends of development.

I omit a detailed analysis of the enormous variety of system-legal institutions, characteristic for particular countries, and concentrate on a search for mechanisms shared by all democracies or new ideas for the solution of the problem of interest to us. Organizational-legal diversity and national specificity reveal certain discernible rules of functioning, common for all those countries. This feature is indicated if only by constitutive principles and legislation which, in a more or less direct manner, regulate the principle of the political neutrality of civil servants. Thanks to them, the praxis of the administration of public issues is subjected to similar mechanisms of the mutual impact of the administration and politics. In my study, I undertook a comparative approach to this theme primarily in order to bring the

reader closer to Western conceptions and manners of solution, which appear to be interesting from the Polish point of view.

2. THE ROLE OF POLITICIANS AND CIVIL SERVANTS IN THE ADMINISTRATION OF STATE ISSUES

One of the fundamental goals of reforms conducted in industrialised democratic countries was a striving towards a change of relations between public functionaries and society. Earlier, the activity of public administration served chiefly the levying of taxes and their redistribution according to the control-based methods of the application of the law and government policy; now, reforms have changed them into mediative forms of co-operation between the administration and society for the sake of implementing the principles for the good of the state and its growth and prosperity of its citizens². This process resulted in a reconstruction of methods of activity (from imperious to mediative) in making structural and strategic selections concerning differentiated social groups³. The reorganisation of agencies, their decentralisation, and dispersing actually transformed methods of activity pursued by public functionaries from the point of view of the expansion of direct relations and contacts between state bodies and society. On the one hand, financial reforms pertaining to new methods of managing finance, expenditure discipline, and the connection between the duties of assorted agencies and marketing laws increased the importance of a professional and rational personnel policy in relation to civil servants. The outcome was the rising significance of specialized and professional work performance in offices and other agencies with public funds at their disposal.

On the other hand, marketing laws and the corporate nature of society altered the character of relations between public servants and politicians. The consequences assumed the form of the participation of a third party, namely, representatives of interest groups and lobbies. The resultant growing political nature of the activity of the state executive apparatus obliterated inner relations, making it increasingly difficult to define the practical role of both politicians and civil servants in the administration of the state. In this chapter, I shall concentrate mainly on demonstrating the prime differences between those roles.

² D. S. Racine, *The Welfare State, Citizens, and Immersed Civil Servants*, w „*Administration & Society*”, 1995, Vol. 26, Nr 4, p. 150-156

It must be noted that the simultaneously occurring various forms of connections between the administration and politics endow the former with a political character, on the one hand, but can restrict informal political impact exerted in the name of particular interests, on the other hand. In that book, I listed among those relations, direct relations between civil servants and their political superiors within the state executive apparatus, the co-operation of the administration with interest groups - so-called lobbying, as well as the parliamentary liability of the administration, and the liability of the administration vis a vis society, linked with the implementation of constitutional values. Social and parliamentary control are certainly capable of restraining political superiors from issuing orders and directives addressed to civil servants, whose party-oriented, particular interest would be obvious to all. In turn, political and administrative superiors, acting in the course of surveillance, utilise legal measures which guarantee that the activity of the public servant would not be undertaken in the particular interests of definite groups, lobbies or personal preferences contrary to public interest. Ultimately, the impact of lobbying consists of constant control, analysis and verification of especially those types of administrative activity which satisfy only certain, sometimes contradictory, groups of interests.

The mutual impact of differentiated relations, which disclose connections between the administration and politics, can exert a self-regulating influence. By way of example, civil servants can seek public opinion and parliamentary control protection against the party-determined injunctions of their political superiors. On the other hand, changes in the contents of solutions undertaken in the name of the particular personal interests of a civil servant or interest group with which he identifies himself, are served by measures of internal supervision. Nonetheless, it must be said with full conviction that in a situation when self-regulating mechanisms prove to be insufficient, and a conflict arises stemming from a different comprehension of what is in the public interest by politicians and civil servants, then a considerable role in the solution of these conflicts is played by independent, apolitical assessments. In order to restrict the number of such disputes, it seems that one should, at least theoretically, distinguish between the role of politicians and public servants in the administration of the state.

Decentralisation reforms, the implementation of managerial methods, and the increasingly corporate nature of societies led to a growing number of politicians (from the

³ H. M. Schwartz, *Public Choice Theory and Public Choices Bureaucrats and State. Reorganization in Australia*,

formal-legal point of view) at all levels of public, state, and self-government administration. Theoretically, thus, one can distinguish the role of politicians in public bodies only by means of a general criteria which very widely render precise the type of their activity. The latter comes down to making politically and socially controversial choices (on assorted levels and in different domains of the administration) concerning assorted groups of citizens as well as opting for structural and strategic solutions in all those situations when some have to be awarded at the cost of others.

The tasks of politicians in the administration include, therefore, the making of controversial general choices, which cannot satisfy all the social needs and wishes. Such choices performed by politicians are strategic, and their social importance is considerable since they pertain to whole groups of citizens. Frequently, they are particularly delicate since they resolve the assignment of financial support, special privileges, rights and benefits, or the restriction of the rights and privileges of certain groups of citizens (often defined only in general terms). Mechanisms of parliamentary and constitutional liability as well as political responsibility are applied to politicians involved in all those strategic solutions. Nonetheless, the greatest importance is attached to liability applied by means of general elections. It is thanks to the mechanisms of democratic liability: parliamentary, political and elective, that certain persons, parties and coalitions are temporarily permitted to make political choices decisive for the legal and actual status of entire groups of citizens. The purpose of all these means is to implement changes in the life of societies and civic groups in order to improve their existential situation and superior spiritual needs. The constant meeting of those social requirements places increasingly higher demands before governments and the administration⁴. One could cite Norman D. Lewis who argues that wherever the outcome of elections entails, directly or indirectly, the financial support, special rights, or exemptions from obligations towards the state, to whole groups of citizens - it remains of a thoroughly political nature and involves politicians⁵.

The main endeavour of politicians engaged in the realization of state tasks under the pressure of political and elective liability, is the introduction into social life of such changes which would satisfy the majority of society to an extent sufficient to entrust them with a

Denmark, New Zealand, and Sweden in the 1980s w: „*Administration & Society*” 1994, Vol.26, Nr 1, p. 49

⁴ B.H. Miward, H.G. Rainey, Don't Blame the Bureaucracy!, w: „*Points of View. readings in American Government and Politics*”, Random House, New York, 1989, p. 272

⁵ N. D. Lewis, Choice and the Legal Order. Rising above Politics, Butterworths, London, Dublin, Edinburgh, 1996, p. 78

moral mandate for governance and strategic choices during the next term of office. Politicians are compelled, therefore, to strive for marketing themselves in order to gain enough popularity to win general elections for the next term. In this manner, the differentiated system of liability determines the parts played both by politicians and public servants.

On the other hand, the role of civil servants is to assist politicians in making strategic choices, and their subsequent implementation. In their capacities as professionals, civil servants, well prepared for carrying out their tasks, embark upon administrative solutions of lesser social weight or more individualised in character, such as administrative decisions. Applying themselves to legally formalised political choices, they treat them as a base for individual decisions or act in other legal forms (contracts, negotiations, organizational efforts), ensuring the realisation of political choices in the life of individual citizens and their organisation. The task of the civil service, therefore, consists not only in the implementation into political life of choices made by political superiors, but also in aiding in the making of those choices. With this purpose in mind, civil servants collect and verify all information and data deemed necessary for such political choices. By using their professional training and experience, they propose to the politicians alternative projects of solutions from the point of view of their short- and long-range effects. Nonetheless, faced with strategic political choices, civil servants only provide services, by offering advice, opinions, and suggestions of different variants of resolving assorted issues. Ultimate answers and choices, which meet with the interests of whole groups of citizens, depend on the competence and will of politicians. The contents of such choices made by politicians determine the legal and actual situation of whole groups of citizens; hence the importance of the quality of the professional preparation of alternative projects by the civil service. This is also the reason why political posts are assumed increasingly frequently by persons who earlier pursued a career in the civil service in order to be capable of assessing the quality of projects from a professional point of view. This could also explain why in recent years the professionalisation of political posts has become so distinct in France, Great Britain, and Germany.

After strategic decisions have been made by politicians, methods for their most effective, optimal and rational implementation should be sought by public servants in the most creative manner possible, regardless of their personal appraisal. The impact of market mechanisms and managerial methods of activity upon the functioning of the public administration concentrates the attention of civil servants not on the assessment of already

made political choices, but on the merits of their economic, effective and rational application. This is why the fundamental role of public servants is to provide professional advice and assistance in the preparation of political solutions, and then to seek the most suitable, from the professional point of view, methods and manners of their implementation. Despite various views on these subjects held in the theory of public administration, the role of civil servants in the administration still consists of providing services to their political superiors⁶. In accordance with well-grounded democratic mechanisms, politicians answer to society and parliament for the contents of their choices. On the other hand, public servants are held liable for their activity predominantly from the professional and merit point of view. The work performed by the civil service is commended primarily by the quality of the professional execution of tasks, and not by their social popularity.

It is equally important not to burden civil servants with political choices, since this practice could lead to conflicts between various administrative offices, which base their conduct on variegated values and political goals. The politically differentiated choices made by civil servants within separate organs and offices could lead to government crises and have a negative impact upon society. The absence of uniformity in the system of governance and political conceptions of choices could even result in a calamity. It suffices to recall the events which took place in the Heysel stadium in 1989 or the 1990 Hillsborough tragedy. In both cases, the absence of an effective co-ordination of the activity of assorted administrative agencies involved in the protection of the health and safety of citizens made it impossible to effectively counteract the dangerous development of events⁷.

The joint endeavours of civil servants and politicians in the realm of governance is directed towards the public good by a system of responsibility and law binding in a given country. Politicians bear parliamentary and constitutional liability for legitimate activity for the sake of the public good. Nonetheless, additionally applied political liability (for the non-observance of inner-party rules) is of a special nature since it motivates them to work for the political goals of the party which they represent. Such a situation denotes that, at times, their decisions on domestic issues faces them with a dilemma: public interest or party interest?.

⁶ R.S. Montoy, D.J. Watson, A Case for Reinterpreted Dichotomy of Politics and Administration as a Professional Standard in Council - Manager Government, w: „*Public Administration Review*”, 1995, Vol 55, Nr 3, p. 67-68 and I.M. Rucci, Execucrats, Politics, and Public Policy: What Are the Ingredients or Successful Performance in the Federal Government?, w: „*Public Administration Review*”, 1995, Vol 55, Nr 3, p. 220 -223

⁷ U. Rosenthal, Paul ‘t Hart, Alexander Kouzmin, The Bureau - Politics of Crisis Management, w: „*Public Administration*”, 1991, Nr 69, p. 46

Obviously, from the viewpoint of the long-term goals of the administration, the pursuit of public interests will ultimately produce political profit. On the other hand, in a short-term perspective, activity undertaken in the name of particular party interests is sometimes assessed favourably. The size of the scale of difficulties in making these choices depends on the perspective of the appearance in social reality of their effects (sometimes very difficult to estimate). After all, in a world of constant political competition and games, the most objective evaluations concerning politicians can be made only with suitably long historical hindsight.

The system of the liability of both civil servants and politicians is multi-strata and composite. Its inner difference lies in the fact that in contrast to politicians, public servants do not shoulder political liability (they are bound by the principle of political neutrality) and elective liability (they do not have to concern themselves with social popularity). For all practical purposes, the liability of civil servants comes down to administrative (service and disciplinary) and professional responsibility. The above mentioned types of liability incline a member of the civil service personnel to perform his profession in a manner that would serve the protection of public interest.

Just as significant as the above listed varieties of the liability of politicians and civil servants is the model of legal liability applied in their cases and decisive for the more or less imperious relations between them. In the United States, for example, the democratisation of relations between political superiors and civil servants is attained by:

1. the legal regulation not only of rights but also of forms of encouragement so that the civil servants would perform the accepted tasks and bear personal responsibility for them. Such a personalization of responsibility for the execution of duties shaped a new quality of relations between the superior and the subordinate,
2. the legal regulation of the principle of responsibility both by the civil servant and his superior. This process leads to the mutual arrival at such forms and measures of administrative supervision, applied a priori, which come down to a joint establishment of the principles and manners of implementing policies within administrative activity by both parties⁸.

The differentiated and multi-aspect systems of liability borne by ruling politicians (social liability to the elector and political liability to bodies and members of the party represented by them) and by civil servants (administrative and professional liability), together

with differentiated models of legal liability, affect the shape of the democratic culture of administration. They also determine the diverse character of relations between political superiors and civil servants. These relations can be of a more or less imperious nature, with a larger or smaller scope of civil freedom due to public servants. This is the reason why only in a situation when public servants harbour justified doubts as to whether their political superiors, motivated by political responsibility, observe particular party interests and do not act for the sake of the public good, can they make use of the range of civil liberty to which they are legally entitled and seek instruments that would hamper or restrict such activity.

3. THE NEW MEANING OF THE POLITICAL NEUTRALITY AND LOYALTY OF CIVIL SERVANTS

The politicisation of the administration of industrialised democratic countries, particularly visible in recent years, is the outcome not only of the growing number of politicians in the administration or the establishment of new political opinion-supplying and advisory bodies, but also due to a greater dependence of higher-ranking civil servants upon their political superiors, the decentralisation of the administration, the dispersing of offices, the increasingly corporate character of societies, and the rising political activity of assorted interest groups. All these factors produced the threat that political parties in power will, while performing state duties, have a sufficient number of legal instruments, organizational measures, and practical opportunities for the realisation of, above all, party interests in order to retain power rather than to act in the name of undefined the public interest. This situation denotes a true hazard, namely that political leaders wielding state power will conduct a state policy in the interests of their party, compete for the votes of the electorate, falsify or withhold true data, conceal information about the errors and mishaps of the government and its representatives, convey public funds for party purposes, and utilise state organs and offices for publicising their own activities and accomplishments or creating a fictional image of their own usefulness in government.

In this situation, the role of the civil service must change from unquestioning subordination to political superiors, to public servants who thanks to the possession of information, access to data and documents, as well as professional administrative skills, can

⁸ J.A. Gilboy, Regulatory and Administrative Agency Behavior: Accommodation, Amplification, and

comprise one of the basic barriers for the protection of the public interest. Thanks to their position, information and professionalism, it is sometimes only the civil servants who are capable of saying with all responsibility when and why a given state task is realised not in the public interest but in the political interest of the ruling party. The function of the civil service should be thus transformed from that of a servant, subjected to political superiors, to that of a guardian - defender of the public interest. In the United States, a civil service discharging this function is described as the “watchdog of public interest”⁹.

The growing politicisation of the administration is accompanied by changes in the political neutrality of public servants. At times, the politically conditioned solutions, arranged by advisory political organs, go hand in hand with the neutral projects of those answers prepared by civil servants. Not always is it easy to distinguish the sources and types of motivations for the undertaken solutions. Since, as a rule, the ultimate choice depends on the politicians, who base it on many different premises and ascertainments, the claim that they did not act in the public interest forms an extremely difficult and highly responsible duty. What can civil servants do in situations of this type? Are they to stay by helplessly and tolerate them and even co-operate in an eventual political campaign of winning votes, or are they to embark upon attempts at opposing such a practice, sometimes at the risk of losing their posts or work?

It is my opinion that at present the political neutrality of the civil service cannot be comprehended merely as abstention from active political efforts in order not to succumb to one’s own political views while resolving official issues. Political neutrality should be conceived predominantly as the right and ability to oppose informal political impact exerted in the name of particular political interests not only by civil servants themselves and by parliamentarians or other persons but also by political superiors. It is thus a constant process of seeking better methods of balancing public interest in the face of particular party interests represented by the civil servant, his superiors and other politicians. Hence the essence of

Assimilation, w: „*Law & Policy*”, 1995, Nr 1, Vol. 17, p. 29

⁹ p. Jay, Pontius or Ponting: Public Duty and Public Interest in Secrecy and Disclosure. A Suggested Framework of Ethics and Law for Public Servants, in: „*Politics, Ethics and Public Service*” Royal Institute of Public Administration, London 1985, p. 71 and D.S. Racine, The Welfare State, Citizens and Immersed Civil Servants, in: „*Administration & Society*”, 1995, Vol. 26, p. 293

political neutrality is often sought in transformations of organizational structures and relations between the political superior and the public servant¹⁰.

These relations between the superior and subordinate are associated with the inner running of various organizational systems in which we encounter, on the one hand, a superior oriented to a certain type of activity and, on the other hand, a subordinate oriented towards another type of activity. An analysis of such relations mirrors faithfully their counterparts between politics and administration, which take place in practice.

The traditional mode of hierarchic relations, proposed by M. Weber, postulates the elimination of the civil liberty of subordinated civil servants. The latter are perceived that within the organisation individuals deprived of will, power, and the ability to independent reflection within the bureaucratic mechanism. Post-Weberian theories also reduced the role and range of the ability to pursue independent activity on the part of public servants. By differentiating the political and administrative sphere, Judith Gruber argued that civil servants in the administrative apparatus create a problem for the policy of a democratic state when they embark upon political solutions and decisions which reduce the possibility and ways for the realisation of representative public control¹¹. New theories of rationalism in administration, however, assume a broader alternative comprehension of relations between administration and politics. Attention is drawn to the need to raise oneself above the traditional comprehension of organizational relations so as to re-evaluate the relations between the superior and the subordinate. This process entails changes in motivations, encouragement, and choices characteristic for modern organizational structures¹². At the moment, Terry Moe conceives politics widely as all types of choices endowed with a general meaning. Consequently, social transformations take place not only in accordance with the constitutional will of the majority but rather via the activity of all types of institutions (legislative, judicial, administrative) which decree and define limits for the differentiation of ways for implementing the will of the majority in social life. Attention is paid to the nature, course, and authors of the choices made¹³ [14]. In the face of such a comprehension of politics, greater space in the

¹⁰ H.S. Chan, D.H. Rosenbloom, Legal Control of Public Administration: A Principal - Agent Perspective, in: „*International Review of Administrative Sciences*”, 1994, London, Thousand Oaks, New Delhi, Vol. 60, p. 559 - 574

¹¹ J.E. Gruber, Controlling Bureaucracies, Berkeley University of California Press, 1987, p. 56

¹² J.M. Ferris, Shui-yan Tang, The New Institutionalism and Public Administration: An Overview, in: „*Journal of Public Administration research and Theory*”, 1993, Nr 3 (1), p. 7

¹³ T. M. Moe, Political Institutions: The Neglected Side of the Story, in: „*Journal of Economics and Organization*”, 1990, Nr 6, p. 259

administration of public issues is assigned to undertakings leading to joint choices negotiated between politicians, civil servants, and representatives of various interest groups. In this situation, the relation between politicians and civil servants must be taken into consideration the individuality of the political superiors as well as that of subordinate public servants. New theories prove that changes affect the role of both institutionalised partners of this relation¹⁴.

At the moment, the greatest challenge connected with new principles of outer and inner steering is the development of the common, bilateral trust and good will of politicians and civil servants in their activity conducted for the sake of the public good. In this situation, attempts are made for political superiors to arrive at mutually satisfactory results by basing themselves, together with civil servants, on the same constitutional values. Hence, modern theories of management claim that administrative work should not be “handed down in the old manner”. This critique encompasses also the possibilities of applying administrative coercion towards those subordinate civil servants who harbour doubts as regards undisputed implementation. It is argued that each organisation, including that of public administration, will attain its aims better if the latter are concurrent with changes planned by the leaders of that organisation, and if its participants comply and accept them. This trend creates a new type of inner relations based on the so-called “democratic hierarchy” within the organisation¹⁵. The new model of relations between superiors and subordinates assumes mutuality in “dialogue” between public servants and superiors, based on a willingness to realise duties in the name of a jointly comprehended public good.

Amitae Etzioni maintains that administrative organizations can be classified according to the character of the binding inner relations between superiors and subordinates. These relations are defined by:

- a/ the variety of authority exercised in relation to members of that organisation,
- b/ the type of subordination of the members of the organisation to its superiors.

Upon this basis, one distinguishes authority: imposed, paid and founded on values, as well as subordination which is disinclined, calculated or ethical. Although a great number of organizations disclose mixed relations of subordination, we can discriminate basically between three prime models: imposed-disinclined, calculated -paid and valuable-ethical¹⁶.

¹⁴ D.F. Thompson, *Political Ethics and Public Office*, Cambridge, MA: Harvard University Press, 1987, p. 144

¹⁵ D. S. Warwick, *A Theory of Public Bureaucracy: Politics, Personality, and Organization in the State Department*, Cambridge, MA: Harvard University Press., p. 133-135

¹⁶ A. Etzioni, *A Comparative Analysis of Complex Organizations*, New York; Free Press, 1961, p. 7-18

Obviously, the model of inner valuable-ethical organizational relations is an ideal model which is easiest to achieve in religious organizations and those whose members are convincingly motivated towards ethical activity. A model of such inner relations is favoured by a simple organizational structure, individualised rules of conduct, functionally understandable principles of activity, endeavours clearcut for all members, as well as personal responsibility for the performed tasks. On the one hand, such an organisation adjusts itself less flexibly to changing requirements and experiences, and experiences greater difficulties with the modification of its purposes and personnel changes than the organisation with paid-calculated relations¹⁷.

In the majority of democratic countries, administrative organizations are still far from being classified a part of a category of those organizations whose relations correspond to the valuable-ethical model. Many recently revealed corruption cases and scandals testify that inner relations within those organizations are based rather on the model of paid-calculated or imposed-disinclined relations. True, reforms connected with the decentralisation of the administration, managerialism, and consumerism transform imposed-disinclined relations (which, as a rule, appear in multi-level, hierarchically organized organizational systems) into paid-calculated relations (which appear in autonomous or quasi-autonomous agencies). Developing the theory of the ethic of administration, one strives at basing inner relations on a valuable-ethical model. The transference of the centre of gravity from imposed-disinclined relations, founded on the principles of the undisputed subordination of civil servants to the authority of their superiors, to paid-calculated and valuable-ethical relations, corresponds to the new role of public servants, envisaged as defenders of the public interest who try to perform their duties professionally, honestly, in a politically neutral manner, and in accordance with constitutional values. Civil servants-protectors of public interest are thus entitled to the right to draw the attention of the political superior in situations when he, for example, violates binding regulations for the sake of political interest. In the discussed democratic states, the right to enjoy so-called civic liberty denotes the possibility of resorting to the hierarchic recourse, which consists of making the superior aware of the fact that his injunction is contrary to the law and the constitution, based on errors, non-ethical, and could signify a threat to public security or the well-being of the citizens (U.S.A.) or cause serious conscience qualms (Great Britain).

¹⁷ A. Etzoni, *os.cit.*, p. 21-23

In theory, it is postulated to limit all recognised rights of civil servants and to hand them over to political superiors¹⁸. In practice, the utilisation of all imperious competence by politicians is impossible, since there are too many increasingly complicated tasks to be fulfilled. Hence the need to employ thousands of civil servants who make use of administrative authority and recognition. The replacement of public servants by politicians would promote a political system of liability at the cost of other types of liability and thus motivation to work. This would, in turn, lead to a thoughtless and uncritical submission of civil servants towards their political superiors. In a system in which civil service personnel were to be deprived of administrative authority and civic liberty, its role would be reduced to an automatic, unthinking enforcement of the better or worse directives of political superiors, either intent on protecting public interests or party interests, in accordance with the law or contrary to the law, ethical or unethical. The obscurity and variability of purposes and public tasks, as well as difficulties with assessing their outcome, do not favour the monopolisation of political power which, by its very nature, assumes a uniformity of applied programmes, methods, and appraisals. Unconditional politicisation of the activity pursued by the administration carries the danger of a transformation of democratic systems into totalitarian ones.

In the opinion of Robert Kravchuk, politics cannot dominate the work of the administration and govern it endlessly since, apart from other reasons, members of parliament can hold diverse opinions about the way in which the administration applies the law. In an analysis of three forms of American liberalism (minimalism, anarchism, and real liberalism), the author concludes that despite the growing influence of politics on the administration, a trend which could be justified by the principles of the liberal state, there is, at the same time, foreseen a special role for the administration vis a vis politics. This new role, tantamount to democratic administration conducted in the name of public interest, signifies the necessity of supplementing knowledge about contemporary relations between politics and the administration by introducing two new aspects:

1. making civil servants aware of the fact that external and internal political impacts do not determine a totally rational and ethical administration,
2. the rejection of the hierarchic model of administrative organisation which obliterates the identification of civil servants who, within the framework of their competence, actually

¹⁸ J.D. Aberbach, R.D. Putnam, B.A. Rockma, *Bureaucrats and Politicians in Western Nations*, Cambridge, MA;

realise tasks, while such competence is not dispersed within a multi-level system but lucidly defined in simple organizational task-functional formulae¹⁹.

Although in theory the distinction between the political and administrative sphere is not all that difficult, in practice, when civil servants are compelled to define to themselves in which of the spheres they are realising current tasks, and what they are permitted or barred from doing, it remains an exceptionally demanding and complicated feat. This is to a lesser degree a question of the range of nominations upon the basis of political criteria, and to a greater extent - the problem of daily manoeuvring between “reefs to the right and left”, in a direction concurrent with public interest. Finally, this is a task entailing specifically comprehended civil servant loyalty.

In the culture of democratic administration, such loyalty is tantamount to consent to a dual subordination of civil servants: to the state and to the constitution (regardless of their personal political views). The loyalty of a public servant towards the state signifies the subordination of the administration to each democratically elected government and its political choices. Loyalty towards the constitution means that civil servants should be loyal towards all the political commands of each government which are not contrary to constitutional values. The retention of an equilibrium between those two forms of loyalty is the fundamental task of the professional administration. When the contents of government directives and injunctions contradict constitutional values, then public servants remain bound, primarily by loyalty, to the constitution. The latter is such a supreme source of law that, in accordance with the principle of the hierarchy of sources of law, no lower ranking norms can contradict it. This concurrence is controlled by administrative and constitutional courts.

Although the achievement of a balance in the maintenance of the discussed two forms of loyalism can be extremely difficult, it must be stressed that it was introduced into the essence of the administration of democratic countries and nations by a political consensus reached after the second world war²⁰. This is not surprising, considering that the events of World War II, including the excessive submission of the civil servants of the German Reich to the directives of their political superiors led to activity aimed against basic human rights and

Harvard University Press, 1981, p. 28

¹⁹ R. Kravchuk, Public Administration and the Rule of Law, in: „*Internationa Journal of Public Administration*”, 1991, Nr 14 (3), p. 270-275

²⁰ Y. Meny, A. Knapp, Government and Politics in Western Europe, Britain, France, Italy, Germany, Oxford Universty Press, 1993, p. 171

liberties and, in effect, to the crime of genocide. Examples of crimes or misdemeanours which were the outcome of unconditional loyalty towards political superiors can be found also in more recent history, especially in communist countries. In order to counteract such undesirable phenomena, the essence and core of democratic administration are the organizational-legal possibilities for the protection of public interest and other constitutional values by civil servants, and their capability of opposing informal political impact exerted in the name of particular party interests.

4. THE COURT PROTECTION OF THE POLITICAL NEUTRALITY OF CIVIL SERVANTS

In industrialised democratic countries, civil servants involved in relations between the political superior and the public servant can, after the ineffective employment of the route of hierarchic recourse, refuse to carry out a directive which they regard as contrary to the law or unethical. In those cases, however, they face the risk of administrative or even penal liability. Thus, the initiation of a more or less open conflict with a political superior, concerning the definition of the contents of public interest, remains a very delicate and ambiguous issue. As a rule, both sides can be accused of political corruption, which signifies a threat of penal sanctions. This is the reason why civil servants must be aware of the consequences and hazards produced by such conduct.

An example of a different comprehension of is in the public interest by the civil servant and his political superiors is the case of Anthony Chua, tried in 1991 by the Supreme Court of Hong Kong. In his capacity as a civil servant at the Ministry of Health, Anthony Chua allowed a certain firm to import, supply, and sell to Hong Kong hospitals a drug manufactured under the name of Ripofentine, despite the fact that at the time trade in neurological drugs was illegal and even public officials could not obtain a license. Chua was meted out disciplinary punishment by the Ministry, and his penalty was justified by the violation of the reputation of the civil service by means of inappropriate deeds. The defendant claimed that he was concerned with the public interest, conceived widely as humanitarian aid for the patients of Hong Kong hospitals. The violation of inside regulations and the law about the civil service was dictated by a willingness to render help and introduce desirable changes into the practical activity of the administration.

A change in the legal regulation concerning mutual relations between civil servants and politicians is not a simple matter. This is so because frequently decisions are made by politicians more interested in consolidating their role in the state administration than in weakening it. Consequently, an enormous part in the relations between the politician and the civil servant is played by court adjudication. It is precisely the latter which creates legal foundations for understanding, for instance, the scope and limits of the political neutrality of officials. This fact is testified if only by the ruling passed by a French administrative court which declared that a civil servant holding the post of a secondary school teacher transgressed boundaries of political neutrality when he conducted lessons while wearing a jacket with buttons bearing political slogans. On the other hand, a sentence passed by a German administrative court proclaimed that a conversation on political topics held by two colleagues is not tantamount to crossing the borders of political neutrality as long as the two men do not wish to change the political views of the third employee working in their office.

An analysis of European court adjudication shows that frequently the boundaries of political neutrality are infringed when civil servants publish newspaper articles criticising government actions or policy, or make statements on the subject in the mass media. This is not to say, however, that public servants have no right to their own political, religious, philosophical, or world-outlook opinions. No legal ban on membership in political parties will affect the practical restriction of the freedom of conscience and the contents of those views. Members of the civil service personnel may also benefit from the freedom of speech, guaranteed by the constitution and international conventions, keeping in mind the fact that different countries have different interpretations of that freedom as regards civil servants. Freedom of speech also denotes the freedom of expressing opinions about government policies and work. This is why the duty of so-called moderation, reserve or restraint in making assessments of government policy, known in French and German legislation, restrains legitimate possibilities of enjoying freedom of speech by civil servants, who are forbidden to criticise the government publicly.

Let us pause at the legal formulation of the duty to observe moderation. The latter, in accordance with pertinent regulations, signifies reserve which must be observed by a civil servant in expressing political views and making any sort of declarations about the state and current government. In France, this obligation stems from the constitutional principle of the neutrality of the civil service by applying the law of the French Republic. In other words, the

administration of public issues should be actualised in the general interest of the state (public interest) and not in the interests of particular political parties (even those who are in power). This is not to say, however, that public servants cannot have their own political, philosophical or religious opinions. In accordance with the French Declaration of Rights of Man and Citizen, all citizens of France, and thus also civil servants, are free to express their opinions. This freedom is pronounced in the regulations of a law concerning civil service passed in 1993, which forbids the personal files of public servants to include information about their political or religious convictions. The obligation of moderation modifies, therefore, the principle of the freedom of expressing opinions and the principles of the neutrality of the administration. Thus, French civil servants enjoy the freedom to think and believe as they wish. They can express their private opinions but must do so sufficiently discreetly (with reserve and moderation) not to undermine social trust in the neutrality of the administration. In such a situation, more importance is often ascribed to the circumstances in which a given opinion was expressed (time, place, manner) than to its content.

An example of the violation of the obligation to maintain moderation is the case of M. Planel, a school inspector who in a private interview broadcast abroad criticised the French foreign policy. The important factors included the time of the interview - 1963, immediately after the commencement of the war against Algeria, the place - the interview was given and broadcast in Algeria, and the manner in which the civil servant acted - he allowed his critical remarks to be recorded although he did not give special permission for their publication. The French government felt "offended" by the publication of the interview and, as a consequence, meted out disciplinary punishment. In the wake of a complaint filed by the civil servant, an administrative court ruled that although he had not violated his official duties as a school inspector, he crossed the boundaries of "taste" by giving the interview imprudently, and that, as a result, he violated the legal duty of moderation, thus committing a breach of loyalty towards the government²¹.

The problem of the political neutrality of civil servants was also the subject of a court adjudication in the U.S.A., similarly as in other countries. In the *Elvod versus Burns* case (1976), the Supreme Court ruled on the principle of political neutrality by ruling that lower ranking civil servants cannot be dismissed from work for political reasons. The prohibition of involvement in political activity by civil servants was also accepted by the

American court adjudication in the Hallifield versus Mithahan case (1977) when the District Court of the State of Tennessee recommended the discharge of a sheriff from his post for active involvement in an election campaign conducted in support of his political superior. This example demonstrated that the political loyalty of civil servants towards their superiors has its limits, whose transgression infringes upon the political neutrality of civil servants. As a result, law-abiding political superiors should not issue injunctions and recommendations obligating public servants to engage in political activity.

This legal principle was subsequently expanded by the District Court of Illinois which in the Shakman versus Damontic Organisations of Cook County prohibited following political criteria while awarding, promoting, and punishing civil servants. This means that political neutrality is also obligatory in tackling the personal issues of civil servants. The observance of political criteria in the promotion or awarding civil servants denotes crossing the limits of thus the comprehended neutrality. This principle was supported by a ruling in the Branti versus Finkel case of 1980 when the Supreme Court declared that the head of an office cannot dismiss his assistants because of their party affiliation. In the Rutan versus the Republican Party of Illinois (1990), the Supreme Court introduced a legal principle proclaiming that the employment, promotion or transference to other posts of public servants due to their party membership or political sympathies is contrary to the First Amendment to the Constitution. This ruling shows that the political neutrality of civil servants is enrooted in the constitutional norms of the countries under examination, and that the violation of the boundaries of the political neutrality of the civil service signifies the simultaneous infringement of constitutional values.

Adjudication not only plays a major role in interpreting the significance of the political neutrality of civil service personnel but also paves the way for the democratisation of relations between superiors and subordinate civil servants, and assists in determining the limits of the loyalty of public servants towards their superiors.

In the U.S.A., court adjudication confined the liability of superiors only to the unintentionally committed official activity of civil servants (Owen versus City of Independence, 1980)²². The personal liability of the civil servant for deeds perpetrated intentionally comprises a barrier against the violation of the law by public servants. In

²¹ J.A. Rohr, Ethical Issues in French Public Administration: A Comparative Study, in: „*Public Administration Review*”, 1991, Vol. 51, Nr 4, p. 289 -293

doubtful situations, when the latter experience the dilemma of how to act, such a solution recommends greater caution in official activity so that civil servants keep in mind especially the constitutional rights of other subjects, and protect those rights on a par with public interest.

In accordance with the American adjudication, the political superior can be made liable for the behaviour of his subordinate in those cases when there is a direct link with the implementation of a policy and not with ways of acting. In the *City of Conton versus Herris* case (1989), the Supreme Court ruled that in certain instances a superior overlooking the activity of a civil servant could be held responsible if due to him the civil servant was unsuitably or insufficiently prepared and trained for the performance of official duties, especially from the point of view of the protection of the subjective, constitutional rights of other persons²³.

The nature of relations between the superior and the subordinate, shaped by law and court adjudication, influences the rights and interests of third parties as well as the way in which the users of administration activity are treated. All these factors jointly affect the precise delineation of the limits of the official loyalty of public servants towards the official directives of their political superiors. An analysis of the *Parrish versus Civil Service Commission* case of 1967 and the *Harley versus Shuyllwill County* case of 1979 led to the formulation of a legal principle that civil servants can refuse to heed the official injunctions of their superiors if their execution presents a threat to the constitutional, subjective rights of other persons²⁴ [36]. A similar solution to this problem was proposed by British court adjudication when the *Leech versus Deputy Governor of Parkhurst Prison* (1988) led to the recognition that it is inadmissible to carry out directives which would end in the violation of rules stemming from the principles of natural justice against bias²⁵.

In France and Germany, laws concerning the civil service are regulated by the principle that public servants can refuse to perform official orders if the latter could result in the commitment of a felony. As a result, it is precisely in administrative courts that civil servants can seek legal protection against acts compelling them to carry out directives leading

²² D.H. Bliesener, *Fairness and Choice of Law: A Critique of the Political Rights - Based Approach to the Conflict of Laws*, in: „*The Americam Journal of Comparative Law*”, 1994, Vol. 42, Nr 4, p. 691

²³ H.S Chan, *The Rise and Decline of the Respondeat Superior in American Public Service Law*, Syracuse University, New York, 1992, p. 78

²⁴ H.S. Chan, *The Rise ...*, os.cit., p. 82

²⁵ G. Richardson, H. Genn, *Administrative Law & Government Action. The Courts and Alternative Machanisms of Review*, Clarendon Press, Oxford 1994, p.171

to a crime (France, Germany, Great Britain, U.S.A.), or to the violation of constitutional principles and values, and, above all, the subjective rights of third parties (U.S.A., Great Britain). Does civil service personnel enjoy legal protection in those instances when it opposes political injunctions made in the name of the particular interests of the ruling political party, and not in the public interest? It seems that in the United States and in Europe this problem has been solved differently.

If a civil servant in the United States proves that the official recommendations of his superiors do not correspond to constitutional values and, in particular, to the protection of public interests, then he is entitled to legal protection against official or disciplinary consequences employed by his superiors as a form of revenge. If the legal protection applied in an administrative-legal course by the Office of the Special Consul proves insufficient, then it could be sought in court. Should the Special Consul find that the official directives of the superiors infringe upon the law or public interest, then he himself can refer the case to a court. In Europe, only in unambiguously defined instances does court adjudication protect the civil servant against discharge, transference to another post or other consequences altering his employment status as a result of his not carrying out an official recommendation which is contrary to public interests or other constitutional values such as the principle of equal opportunities. On the other hand, general court protection in those countries is enjoyed by those civil servants who do not heed official directives that lead to a crime²⁶ [38].

5. LEAKS OR „WHISTLEBLOWING”

In what sort of situations can a civil servant enjoy civic liberty and not submit to politically controversial injunctions associated with the particular interests of political parties? What can he do in such a situation? What sanctions does he face for his insubordinated conduct?

²⁶ S. De Cruz, *Comparative Law in a Changing World*, Cavendish Publishing Limited, 1995, p. 446

Basically, the principle observed in Europe maintains that civil service personnel are obligated to understand the content of public interest in the same manner as it is comprehended by its superiors. It is difficult to justify the thesis about the supremacy of the reference made by civil servants to the protection of public interests when they harbour doubts as regards the motivation of the directives issued by their superiors. The values and priorities of public interest are defined predominantly by laws and government policy. In the U.S.A., legal principles make more frequent references to “service in the name of society”, and distinctly emphasise liability to society among all other types of responsibility²⁷ [39]. This attitude is the result, among others, of the fact that Anglo-Saxon societies attach greater importance to the creative role of the administration in the establishment of binding rules and norms; on the Continent, legal regulations set up by parliaments are “binding”, and confine the acknowledgement sphere of the administration to a greater degree. Nonetheless, modern European theories of civil service liability demonstrate more and more often the existence of a certain degree of responsibility on the part of the civil servants for differently defined public interests, a trend that could be extremely desirable in the name of rational administration²⁸. Not always, however, are public servants, who find themselves in situations giving rise to doubt, capable of proving the party particularism observed by their political superiors.

An analysis of normative material in the U.S.A., France, Great Britain, and Germany shows, in my estimation, that we can distinguish basically two situations in which the civil servant can omit the execution of an official directive by referring to the public good: when such an execution could lead to crime, or when it contradicts constitutional values and thus the system of law. In a detailed analysis of the situation of British civil servants, Robert Paper distinguished the following three situations:

- *when the execution of the injunction is contrary to the law,
- * when the injunction is issued upon the basis of unconstitutional inside acts,
- * when the official injunction is politically controversial²⁹.

Apparently, the omission of politically controversial injunctions is always connected with the risk of being subjected to administrative liability, since it becomes more difficult to ensure the legal protection of the civil servant against the charge of insubordination than in

²⁷ H. Kufman, *The Administrative Behaviour of Federal Bureau Chiefs*, Washington D.C., The Brookings Institute 1981, p. 79

²⁸ S. Jos, *Administration Responsibility Revisited; Moral Consensus nad Moral Autonomy*”, in: *„Administration & Society”*, 1990, Vol 22, Nr 2, p. 354

²⁹ R. Paper, *The British Civil Service*, Prentice Hall, Harvester Wheatsheaf, 1995, p.79

the first two instances. It is easier to defend public servants who do not submit to directives leading to corruption and other crimes, than civil servants who become engaged in political controversies (even more so considering that the law about the civil service obligates them to maintain political neutrality in the place of work). In the real world of the administration and politics, however, cases whose outcome assumes the form of legal or constitutional violation are often associated with political controversies. It is even possible that politically delicate issues lead to corruption or the crime of abusing a public function, the misuse of public funds, the disclosure of a state secret, etc.

Public servants who have doubts as regards the character of the political injunctions of their superiors can reveal these doubts publicly. Up to now, however, such conduct, known as “whistleblowing”, has been accepted only in American law. In accordance with the United States Whistleblowers Act of 1989, “whistleblowing” takes place in those situations when a current or former civil servant discloses information when he has convincing proof that there has taken place some sort of a violation of the law or normative acts, serious errors in management, the misuse of public funds, the abuse of authority or a threat to the health of citizens or public security. The institution of the whistleblowers means that civil servants are entitled to comment on the conduct of their superiors, a right which originated in the freedom of speech and freedom of information acts, formulated in the First and Fourteenth Amendment to the Constitution of the United States of America³⁰.

In Europe, civil servants are not entitled to a legally protected right to make public comments about the conduct of their superiors. The obstacles encountered by them are constitutionally defined principles of loyalty towards the government, identified with the principle of moderation, reserve or restraint in expressing opinions about official topics. By rejecting the legally formulated duty of political neutrality, which obligates a civil servant not to undermine the reputation of the government vis a vis public opinion, and imposes the duty of protecting state and official secrets, civil servants who disclose information are faced with administrative and/or penal liability. This is not to say, however, that European civil servants do not take the risk of criticising government activity or making available government information.

Generally speaking, we may say that in industrialised democratic countries civil servants venture disclosing information about the unethical conduct of superiors in the form

³⁰ „Whistleblowing and the Federal Employee”, Washington, D.C., Government Printing Office 1981.

of “whistleblowing” (U.S.A.), or do so anonymously by “leaking” official information or documents. Penal and administrative liability for such disclosure, applied in heretofore praxis, leads to a situation in which in Europe the phenomenon in question assumes the form of anonymous “leaks” and not “whistleblowing”, as is the case in the United States. Notwithstanding, however, the type and course of information disclosure, it remains clear that the same sort of liability is not employed in each case of a “leak”. Civil servants are subjected to differentiated motivations and assessments. Heretofore used sanctions for disclosures of this type indicate the employment of three basic types of responsibility:

- * disciplinary liability. Inner disciplinary sanctions are established by legislation about the civil service or particular pragmatic sanctions (from a reprimand to discharge or relegation to a lower post). Most frequently, they are adjudicated by disciplinary commissions (France, Germany) or depend on the decision made by the so-called Permanent Secretary of a given branch (Great Britain);

- * penal liability for the violation of a state secret. The application of this type of liability depends on the legal regulation defining in a given country the range of official documentation encompassed by official secrets. The general principle in Western legislation is to specify types of documents regarded as a state secret, i.e. documents dealing with the defence of the country, the protection of internal and external security, etc. In Great Britain, on the other hand, the accepted principle maintains that all documents which have not been classified for public insight are considered a state secret. Consequently, lists of documents intended for public dissemination are set up. The disclosure of documents absent on the lists denotes the disclosure of a state or official secret, and the ensuing resort to penal sanctions. The Official Secrets Act speaks of a penalty of up to two year imprisonment for the disclosure of secret official documents, both by civil servants and persons no longer holding their posts³¹.

Rarely does court adjudication defend civil servants who disclosed information. In European culture in particular, the institution of “leaks” or “information” is not regarded very highly. This attitude is the result not only of the preventive impact of assorted forms of legal liability applied in cases of civil service personnel revealing official information, but due to a traditional comprehension of the principles of honour and dignity. Let us, therefore, take a closer look at the history of four “leaks” which took place in Great Britain.

The most frequently cited case of the disclosure of politically controversial information occurred in the 1930s. Desmond Morton, Chief of the Government Industrial Information Centre of Great Britain, passed on to Winston Churchill information, claiming that he was requested to organize a parliamentary attack against the defence policy conducted by that government. Despite the fact that in his later statements W. Churchill defended Morton, maintaining that the latter had official permission to inform about activity of this sort, there is no proof supporting this stand. The biographer of W. Churchill argues that the official who disclosed such information had nothing to lose and much to gain³². The political motivation of D. Morton's conduct is obvious. Evaluating this event from a perspective of time, when we know that the defence policy advocated by W. Churchill proved to be effective, one must assent that in this particular instance acting in the name of the public good was justified³³.

Since leaks can be used in political struggle, their number grows during election campaigns. At the time of a parliamentary election campaign held in 1983, Sarah Tisdall, a civil servant of the Ministry of Foreign Affairs, anonymously sent to "The Guardian" two documents prepared by the Ministry. Based on the information obtained from one of the documents, the newspaper published an article about the readers about the expected term of a supply of nuclear arms to a certain country, and described the way in which the Minister of Defence planned to present this news to the Parliament and the mass media. In the aftermath of an inquiry, "The Guardian" returned the documents to the government, and Sarah Tisdall admitted to having committed the crime of disclosing a state secret. In court, she defended herself by claiming that she had made the documents available because she disagreed with the way in which the Minister of Defence wished to inform the public by manipulating the facts. The High Court pronounced her guilty, and issued a sentence of 6 months imprisonment³⁴.

In November 1983, John Willmore, lecturer at the Department of Labour, read a report from a meeting held by the Minister of Labour with the Head of State Archives. In it, the latter suggested an introduction in the legislation of harsher sanctions for civil servants participating in strikes. J. Willmore sent a copy of this report to "Time Out", which

³¹ J. A. Taylor, H. Williams, Public Administration and the Information Policy, in: „*Public Administration*”, RIPA, 1991, Vol. 69, p. 287

³² M. Gilbert, Winston S. Churchill, 1922-39, London, Heineman, quoted in: R. Pape, The British Civil Service, ...os.cit., p. 78-79

³³ *ibidem*, p. 82

³⁴ *ibidem*, p.150 - 156

subsequently published it. When an inner inquiry was conducted in his place of work, Willmore resigned. Since proof testifying to his guilt was insufficient, he came to an agreement with his employer that made it possible for him to resign at his own request³⁵ The motivation given by Willmore was similar to that of Tisdall. In the opinion of the two defendants, the conduct of public functionaries was unethical from the social point of view. Nonetheless, when the documents were “leaked” and the “leak” revealed, penal and administrative liability was applied in both cases.

In turn, Clive Ponting, assistant to the Minister of Defence, was extremely upset with the way in which two ministers misinformed a parliamentary commission conducting an inquiry concerning the part played by the Argentinean cruiser “General Belgrano” during the Falklands War. In July 1984, he became convinced that his political superior gave wrong or evasive answers to questions posed by the commission. In this situation, Ponting decided to send a copy of the documents containing the true information to a member of a parliamentary commission of the opposition. The latter, however, presented the documents to the proper commission. The Minister of Defence set up an inquest in the Ministry in order to identify the “informer”. Ultimately, C. Ponting was accused of disclosing a state secret and tried. The High Court of Justice took into consideration arguments presented by the defence counsel, ruled that Ponting acted in “the real interest of the state”, and found him innocent of the charge of betraying a state secret³⁶.

Political scandals, the disclosure of unethical or illegal acts committed by public functionaries, together with breaches of trust by the civil service towards politicians and vice versa, forced democratic governments to seek such methods and forms of conduct which would permit the solution of similar conflicts in a more rational and less painful manner. Basically, however, civil servants are not allowed to treat their conception of public interest as a superior value, or a priority in relation to the directives and injunctions of their political superiors. This is why once they face such dilemmas they are advised to resort chiefly to hierarchic recourse. They can also seek consultation with a person responsible for the solution of such conflicts or for civil service personnel. If, however, these methods are not successful in solving the given dilemma, public servants have the option of either subjecting themselves to the directives or forgetting about the whole issue. They can also leave their post. But even the latter decision does not free them from the duty of keeping the state secret.

³⁵ *ibidem*, p.156 - 157

Choosing the path of hierarchic recourse or consulting doubts with persons responsible for civil service staff does not always help to dispell the dilemmas faced by public servants. On certain occasions, political superiors are disinclined to change their recommendations, and the persons consulted shy away from all responsibility or are unavailable. Political-ethical dilemmas are a constant feature of democratic systems, especially when politicians are interested in winning greater support, i.e. at the time of election campaigns. In this situation, it seems that the American institution of “whistleblowers”, and thus the practice of drawing public attention to unethical directives made in the name of particular party interests, can be regarded as justified.

Recently, even certain European countries are planning to introduce the institution of “whistleblowers” as a binding legal regulation; a normative foundation is sought in article 10 of the European Convention for the Protection of Human Rights which regulates freedom of speech ³⁷.

An interpretation of the right to freedom of speech, interesting from the viewpoint of our reflections, was presented in an opinion issued by the Human Rights Commission in the case of William Goodwin (1994). The issue at stake concerned the publication in a newspaper owned by W. Goodwin of information obtained upon the basis of a “leak” from an informer working in Tetra Ltd. - a company utilising public funds. Tetra Ltd. charged the newspaper with the violation of an official secret and took the case to court and the prosecutor’s office. A High Court ruling ordered W. Goodwin to disclose the name of the informer and, upon his refusal to do so, fined him ₪ 500 for ignoring the court order. The European Human Rights Commission in Strasbourg pronounced the court ruling to be a violation of article 10 of the Convention, and justified its opinion by declaring that the procedure of forcing journalists to reveal the source of their information would create for them an obstacle in getting information and, as a consequence, hamper the process of informing the public about matters realised in the “public interest”. The adjudication of the European Human Rights Tribunal intends to offer wider protection for journalists and the sources of their information. Obviously, this problem is not evaluated identically by all concerned, and has just as many supporters as opponents.

³⁶ Ibidem, p. 158

³⁷ M. Bowens, Whistleblowing on Fraud in the Netherlands, Final Report Submitted to the European Commission, 1994, and M. Bovens, Are Private Virtues Public Vices? An Inquiry into Integrity of the Managerial State, March 1995, L.W.I.C. Huberts, Public corruption and fraud in the Netherlands: research and results, in: *“Crime. Law & Social Change”* 1994/1995, Nr. 4., Vol. 22, p. 311

In the U.S.A., public disclosure of information concerning the unethical activity of superiors does not pertain to such state offices as the GAO, FBI, CIA, DIA, NASA and all whose prime task is the defence of the state and the security of its citizens. Civil servants employed in other offices can criticise and reveal to the mass media directives of superiors which they regard as unethical, but they must take into account the risk that if they are incapable of proving their charges, then they face penal or official sanctions (for false information). In this way, American public servants offering information about the unethical activity of their superiors are not legally protected if the evidence presented by them is rejected and unrecognised by the Office of the Special Consul and a special commission dealing with professional ethics. Basically, all people throughout the world who disclose the erroneous or unethical activity of their superiors are treated as so-called problem makers.

In the last years, increasing numerous opinions expressed in European literature on the subject argue that the institution of “whistleblowers” is needed also in Europe³⁸. The British scholar David Lewis writes that preference for public “whistleblowing” among civil servants is due primarily to problems with inner communication. In those organizational structures where civil servants are encouraged to express their ethical, professional, and political doubts, and where they enjoy access to channels making it possible to report their dilemmas and the errors committed by superiors - “whistleblowers” are not as necessary and used. If, however, there are no guaranteed internal mechanisms for the disclosure of doubts harboured by civil servants, then the latter could be inclined to make public both their doubts and information³⁹. Frequently, civil servants who are totally aware of the risk involved and the official and even penal consequences connected with the public disclosure of information and official documents, decided to press on when inner channels of reporting proved to be ineffective or could not be trusted.

6. BODIES PROTECTING THE POLITICAL NEUTRALITY OF CIVIL SERVANTS

Bodies established for the purpose of protecting the political neutrality of civil servants are primarily those agencies whose basic task is the protection and development of the art of the profession and a corresponding supervision of problems concerning civil

³⁸ ibidem

service personnel. In France, this is a system of agencies subject to the General Directorship of Public Administration and Service (which is formally subordinated to the Prime Minister and actually to the Minister of Administration). In Germany, the Civil Service Office is subordinate to the Minister of the Interior. In Great Britain, the Head of the Civil Service is the Prime Minister but all duties are carried out by the Minister for the Civil Service, who is a member of the Cabinet. Offices and departments steering civil service staff in various branches are actually also subject to this Minister, who in 1985 replaced the Civil Service Commission, functioning from 1855. In the United States, civil service personnel is managed by the Federal Personnel Council, which in 1978 took over from the Civil Service Commission, active since 1883.

The role of those agencies is surveillance of civil service personnel in accordance with legal regulations concerning the civil service and other laws, pragmatic sanctions, and internal rules. By overseeing staff issues in state administration offices, they act alongside heads of offices (ministers, directors of departments, heads of sections) who, in accordance with their legal competence (defined in material and constitutional law) manage given branches or domains of the administration, e.g. those concerned with the protection of health, social welfare, education, the protection of the natural environment, etc. The purpose of the functioning of special agencies for the surveillance of civil service personnel is both to reduce the number of problems entrusted to ministers, directors of departments, etc., and to formally distinguish political stands from tasks connected with the management of staff issues in such a manner as to ensure the application of the merit criteria of this management in the most professional way possible.

This is the reason why the task of the above mentioned agencies is the development of a thoroughly professional execution of activity, by developing a system of vocational education, courses, and special training. Personnel management also entails recruitment on the basis of examinations and competitions as well as employment, promotion, re-classification, transference, change of posts, etc., based on definite criteria. Estimations of the potential possibilities of the most optimal pursuit of a profession by the candidate take into consideration such criteria as: type of education, pertinent knowledge, professional experience, mental predisposition for group work, and, additionally, knowledge of foreign

³⁹ D. Lewis, Whistleblowers and Job Security, in: „*The Modern Law Review*”, 1995, Vol. 58, Nr 2, p. 265 and L.M. Seagull, Whistleblowing and Corruption Control: The GE Case, in: „*Crime, Law & Social Change*” 1995, Nr 22, p. 385-390

languages, extra-professional interests, and the ability of a practical application of knowledge in civil service work. These requirements are served by a system of competitions and examinations held not only during the hiring of candidates but also classifications for given civil service categories or appointments to certain posts (not reserved for political posts). A characteristic feature of the American system is the total openness of the competitions and applied criteria and assessments, while in European countries, open competitive examinations are held for candidates to the lowest ranking positions.

The duty of a professional pursuit of a career is legally secured by a system of regulations which minutely control the course of the professional career of a civil servant, based on definite criteria. Importance is attached to the detailed nature of legal regulations defining the rights of civil servants to the realization of a professional career, since in cases of a violation of those regulations, public servants are entitled to resort to the courts. In this manner, the legal regulations of the duty to professionally perform one's work plays a foremost role in the protection of the political neutrality of civil service personnel, as long as legal regulations are respected in practice and their application is executed by control organs and courts.

On the margin, I would like to draw attention to the fact that in the Republic of Italy, the professional career of civil servants is regulated more specifically by means of ordinary legislation than the constitution, and requires a special recruitment procedure during the employment of civil servants. This procedure foresees open competitions and examinations, which use definite criteria for the acceptance of candidates applying for work. Studies conducted by Sabino Cassese, a well-known Italian expert on administration, indicate that in the period between 1973-1990 as many as 350 000 persons were signed on for state administration outside the required procedure and only 250 000 - by means of competitive examinations. As a result, about 80-90% of higher ranking civil servants come from the South⁴⁰. The non-observance by the administration and politicians of constitutional principles and legal duties produces an increase in legal solutions which, in turn, are the reason why in Italy public servants, who remain politically loyal to their employers, cross the limits of political neutrality; consequently, corrupt and informal activity, which infringes upon the public interest, tends to spread.

⁴⁰ S. Cassese, Hypotheses on the Italian Administrative System, in: „*West European Politics*”, July 1993, p. 67-71

The distinction in developed democratic states of a system of agencies dealing with civil service personnel also intends to ensure that these organs will safeguard the political neutrality of the civil service. The protection of the political neutrality of public servants is guaranteed by the development by those agencies of the increasingly professional aspects of pursuing the profession, and by concern for the quality of the politically neutral solution of assorted problems. In effect, heads of such agencies can intervene in those cases when public servants face political and ethical dilemmas. Civil servants can thus seek counsel and protection against particular party impact among persons responsible for personnel management. It is exactly this system of agencies dealing with the professional questions of the civil service that should create suitable channels of the flow of information flow, enabling public servants to report their dilemmas and problems.

To cite David Lewis, if channels of the information flow between civil servants and persons responsible for the professionalism of the civil service are sufficiently patent and effective, then one could assume that civil servants will not seek other ways for expressing their professional doubts or for winning the support of public opinion by disclosing their suspicions to the mass media⁴¹. To solve their political and ethical doubts and dilemmas, they will rather opt for official channels, as long as such channels can be trusted.

In that book, I mentioned that persons responsible for staff problems are not always capable of rendering help to civil servants in situations of political controversies and dilemmas. Fearing the burden of such responsibility, they sometimes transfer the case to higher instances. A system that has superior bodies within the central state administration apparatus does not have to secure the avoidance of political determinants in the course and manner of solving such conflicts and controversies.

Does a system of this sort really guarantee the practical avoidance of informal political impact in supervising civil service personnel? After all, ultimately, central organs at the pinnacle of agencies surveilling civil service personnel are subordinate to the classical political bodies (president, prime minister, minister of administration or internal affairs). It would be difficult to exclude the possibility that delicate or conflict-ridden staff issues will be coordinated by central agencies overseeing civil service personnel and its direct political superiors. Apparently, the avoidance of such consultations is rather improbable. The trend towards a joint expression of political and merit aspects by politicians and persons responsible

⁴¹ D. Lewis, Whistleblowers and Job Security, ...os.cit., p. 265

for professional civil service at the highest rungs of authority, is decisive for the character of the “politicised” or “professional” administration. This current trend depends primarily on accepted government strategies as regards the administration. It is implemented, however, not solely via changes and reforms in the administration of public issues but also by a practical solution of daily conflicts and disputes between civil servants and politicians. On occasions, only from a perspective of time, when a greater number of issues, documents and facts are revealed, does it become possible to assess whether the administration, realised by a given government, was relatively professional or political. At times, a new government appoints certain politically trusted persons to central bodies entrusted with the management of the civil service personnel.

In my opinion, the political neutrality of the entire civil service could be guaranteed if members of those bodies would have the status of apolitical civil servants and not that of persons nominated on the basis of political criteria.

The still encountered practice of infringing upon the political neutrality of civil servants is opposed by the creation of additional organs or procedures enabling public servants to present their grievances concerning political superiors. In the U.S.A., this was the purpose of establishing Inspectors General in particular departments and the Office of the Special Consul, liable for the realization of his duties only to Congress and not to the President. On the one hand, the procedure of the course of action before the Office of the Special Consul guarantees that civil servant dilemmas are resolved in an unbiased, politically neutral, and autonomous manner; on the other hand, it leads to the avoidance of an overly extensive publication of such dilemmas in the mass media.

All federal civil servants (including those of the CIA, FBI, DIA, NASA, and GAO) can present the Special Consul with their ethical and political suspicions without fearing that they will be subjected to official or disciplinary repression by their political superiors. The Office of the Special Consul guarantees federal civil servants anonymity, if that is their wish, unless they agree to the disclosure of their personal data or if the Consul considers such a procedure necessary for some other reasons. In a situation when the Special Consul finds that official or disciplinary repercussions were taken as regards the plaintiff, he notifies the Commission for the Protection of Merit Systems and the Personnel Management Office so that they could arrange suitable steps for the protection of the civil servant against revenge by his superiors. Due to its location among state organs (subordination to the Senate), the

political character of its stand, and the special contradictory course of solving disputes, the Office of the Special Consul is effective because it compels the superior to present arguments justifying the activity which was charged with violating public interest⁴². Thus protected equality in the solution of conflicts between superiors and public servants creates equal legal opportunities for proving the way in which both parties comprehended the contents of public interest while embarking upon their activity. The guaranteed equal rights of both parties involved in the dispute permit civil servants to play their role as a “watchdog” guarding public interest.

Evidently, a method suitable for restricting the political dilemmas of European civil servants would be to create an organ similar to the Office of the Special Consul, independent of government administration. Already at the beginning of the 1980s, Sir Douglas Wass proposed the regulation of a special appeal procedure, intended for British civil servants in situations of ethical doubt and dilemmas which, as a rule, are produced by a lack of trust in political superiors. Sir Wass also suggested the establishment of a so-called Inspector General for solving cases of this sort. In 1996, members of the Nolan Commission, who examined the actual and legal situation of the British civil service, suggested the creation of an office of a Civil Service Commissioner who would examine complaints concerning the erroneous, contrary to public interest or otherwise unethical activity of superiors. In order to guarantee the effectiveness of appeals made by civil servants to the Commissioner, the Nolan Commission suggested the introduction into the Ethical Code of paragraph 11 which would enable civil servants to appeal once they believe that they were ordered by their superiors to act in an illicit, improper, and unethical manner, contrary to constitutional principles, which could lead to faulty administration, or in any other way contrary to the Ethical Code, or generates essential qualms of conscience. The above recommendations were presented only a few months ago, and we should not expect that they have been already implemented. Nonetheless, European countries have become the scene of activity on the part of such groups as the British “Public Concern at Work”, which is composed of lawyers and management specialists offering free-of-charge legal and professional advice, as well as moral support, to civil servants claiming that a breach of public interest was committed in their agency. Presumably, opposition parties and various interest groups would be interested in the creation of this type of an organisation. This is why stress must be placed on the fact that trust, and

⁴² B. Kudrycka, *Dilemmas of Public Officials*, Temida 2, Bialystok 1995, p. 168-176

thus the range of the utilisation of inner-organisational channels of information flow, depend on the quality of the protection of the professionalism and political neutrality of civil servants.

In conclusion, I would like to emphasize that the political neutrality of public servants is not a permanent legal institution which shields them against all sorts of political impact. Political neutrality is rather an endless striving at seeking new institutions and organizational-legal instruments which will limit informal political impact upon the administration. It is simultaneously a process which safeguards the protection of public interest against particular party interests. No organizational-legal solution, even the best possible, will guarantee that particular political influence will no longer take place in the future. The true art consists in the ability of reacting flexibly so as to counteract increasingly sophisticated ways of utilising public interest for the purpose of particular aims.

7. POLITICAL LOYALTY AND THE PROFESSIONALISM OF THE CIVIL SERVANT

The theoretical-organizational aspects of the model of superior- subordinate relations, in which it is difficult to take into account the diversity of organizational structures and the variety of the psychological determinants of the behaviour of the subordinate and the superior, are, of necessity, considered in an institutional vacuum. Hence the law plays an exceptionally essential role in defining the boundaries and contents of those relations. Basically, legal norms in countries under examination reduce relations between political superiors and civil servants to four situations:

1. the subordinate public servant should pass on all necessary information and official data to political superiors in the name of best performed professionalism,
2. in accordance with the art of his profession, the subordinate should render help by advising political superiors making political choices closest to the optimum,
3. the subordinate should carry out official directives loyally as long as they do not lead to the commitment of a crime,
4. the subordinate should draw the attention of the superior to an injunction contrary to the law or public interest, causing considerable harm, creating a threat to life and health, or unethical in any other manner. In such a situation, the subordinate should resort to hierarchic recourse.

In assorted legal systems, the legal duty of a loyal execution of official commands by civil servants is restricted to different extents. The principle is to regulate, by means of the law, the path of hierarchic recourse according to which if an injunction is illicit, bears the marks of an error, presents a hazard to public safety or the well-being of citizens, or is unethical for other reasons (e. g. political), then the public servant can, prior to carrying it out, draw the attention of the superior to all gaps or mistakes. This procedure will provide the superior with time and opportunity for verifying his stand and eventually setting it right, if it was based on erroneous data or particular political interests. If, however, the political superior does not alter his original position, and passes it on to the civil servant in writing, then the subordinate is obligated to perform it, but direct responsibility for the execution of the injunction will be borne by the superior. Such a generally regulated path of hierarchic recourse provides an opportunity for a conciliatory solution of a conflict between the subordinate and the superior, on the condition, of course, that both parties show good will. If, on the other hand, as is often the case, the political superior insists on upholding his original stand and repeats his commands in the privacy of his office, not in writing but as an “oral directive” (threatening that he will react to its non-execution by resorting to measures of discretionary authority invested in him, such as professional or disciplinary steps), then the attitude and conduct of the public servant are decisive for the further configuration of mutual relations.

Within the political context, the model of relations between the superior and the subordinate assumes a specific colour and differentiated hues. One can imagine that in various political systems, with more or less well-grounded mechanisms of democratic administration, civil servants who face unethical official injunctions will behave in equally different ways. There where they can count on legal protection while defending public interest, they shall seek measures allowing them to counteract unethical directives. On the other hand, there where they cannot find such protection, they shall be more inclined to silently submit themselves to unethical directives, and to risk conscience qualms.

A system of democratic administration, where the role of public servants conceived as guardians of public interests is becoming increasingly stable, is involved in a search for such legal possibilities of counteracting unethical directives, which would coax political superiors to carry out a voluntary verification of their contents and introduce eventual changes. Earlier, I showed that the official injunctions of political superiors can be made in the interest of the

ruling party by indicating the growing politicisation of the administration. Such commands can serve the manipulation of public opinion, the concealment of certain information, the financing of party activity by public funds, the conducting of a camouflaged election campaign, the use of public means in order to improve one's own position in the eyes of society, etc. They do not have to be contrary to legal norms or based on mistaken technical, normative, or strategic calculations. Legal regulations often contain flexible, so-called rubber definitions, which enable the creation of legal opportunities for different interpretations, which render feasible extremely varied, constantly changed, and conceived anew behaviour, strongly motivated by the protection of one's own interests. It is impossible to foresee by means of legal regulations all the ways of utilising the ambiguity of formulations and gaps which will appear in the near or more distant future. Such ambiguity can be exploited later for the sake of the particular goals of political parties, social groups or individual citizens.

Once the path of hierarchic recourse has proved to be ineffective, does a civil servant have a chance to oppose a situation when the contents of an official directive, albeit basically concurrent with the law, promote party interest? In a situation of this sort, he is left with three options of further conduct:

1. to carry out the directive, forget his own reservations, and be content that disciplinary steps have not been taken, and that his relations with the political superior remain correct. This variant, however, cannot prevent eventual conscience qualms;
2. to shift the burden of responsibility for the execution of this injunction onto other civil servants in order to prevent conscience qualms by avoiding direct involvement. This can be achieved both in a formal manner - by handing over the task to another civil servant, or informally - by choosing this particular period of time to take an overdue vacation or go on medical leave, or use other possibilities for hindering a personal execution of the directive. In this variant, although the civil servant does not lose self-esteem and retains relatively correct relations with the superior, his egoistic conduct could affect adversely relations with co-workers and colleagues;
3. to disclose publicly the contents of the official directive by indicating its political or other unethical conditioning or divulging it to bodies specially established for this purpose, and in this way to expose oneself to the threat of official, disciplinary, and even penal repercussions. In the U.S.A., public disclosure of information about the unethical conduct of superiors, known as whistleblowing, is connected with the legal protection of a civil

servant against the official reciprocal action instigated by his avenging superiors. In Europe, this institution is only at the study stage or legislative projects, and the public revelation of official information still goes under the contemptuous name of “leaks”; if it concerns information encompassed by a state secret - it is treated as a crime.

The still most typical manner of conduct is the execution by the civil servant of the official directive after an eventual resort to the path of hierarchic recourse. Why are public servants to place their own eventual conscience qualms and the uncertain value of public interests higher than the retention of a permanent and relatively secure post? Erich Fromm proved that people frequently fear making choices, and resign from freedom in return for security⁴³.

Research shows that in industrialised countries with a considerable fragmentation of administrative organizations, a large fluctuation of civil servants, low unemployment, a low rank of the civil service as a profession, and the presence of more attractive employment offers in the private sector, civil servants use the opportunities of civic freedom to reject the commands of their superiors in a more determined manner. On the other hand, in those countries where the administrative system is based on hierarchic subordination, accompanied by high unemployment and a high rank ascribed to work in the civil service, public servants are more inclined to perform an unquestioning execution of directives, and to unlimited political loyalty towards the government⁴⁴.

Some scholars claim that this fact is associated with the professionalism of civil service activity. In those system where public servants are well trained professionally, especially as regards the law, they are capable of understanding better the complicated aspects of the political game, and it is more probable that they will be able to verify properly the motivations, premises, and conditions of the official injunctions addressed to them. Familiar with legal regulations and the principles of interpreting the law, they will be adept at making correct evaluations of the illicit conditions of political solutions and, as a result, find it easier to assess whether such solutions are formulated in the public interest and in accordance with constitutional values, or whether they serve the particular interests of a political party. The more civil servants act as highly regarded professionals, the more frequently are they willing to oppose politically conditioned commands. In the opinion of H. U. Derlien, economists in

⁴³ E. Fromm, *Escape from Freedom*, New York, 1965, p. 87

⁴⁴ H.S. Chan, D.H. Rosenbloom, *Legal Control...*, os.cit., p.564

the administration reveal higher involvement and political loyalty towards their superiors than is the case with lawyers.

Studies conducted in Germany at the end of the 1980s demonstrate that when a civil servant acknowledged that an official injunction is based on incorrect or mistaken premises, in 82 cases out of 100 he tried to convince his superior to change it; only if this effort failed, did he carry out the directive. Nonetheless, almost one-third (27%) of German public servants is of the opinion that they would rather leave their posts than adjust themselves to a directive which they reject from a professional point of view (15%), or request a change of their duties or range of activity (12%)⁴⁵.

The fact that almost one-third of German civil servants would not carry out a directive with which they disagree from the professional point of view is also the result of the greater importance attached by them to their role as professional advisers, initiators of new programmes, or executors of definite political aims, than to instructions issued by politicians or the pressure exerted by organised interest groups.

German public servants thus have a high regard for their own role as professionals familiar with the administration of certain domains of the law. At the same time, and in accordance with legal requirements, they conceive political loyalty as loyalty to constitutional values and not to their own political convictions or the political injunctions of their superiors. This stance is not tantamount, however, to the rejection of the political milieu of the administration, the use of the possibility of insubordination to official directives, or the restriction of political loyalty towards the activity of the federal government if that activity remains concurrent with constitutional values.

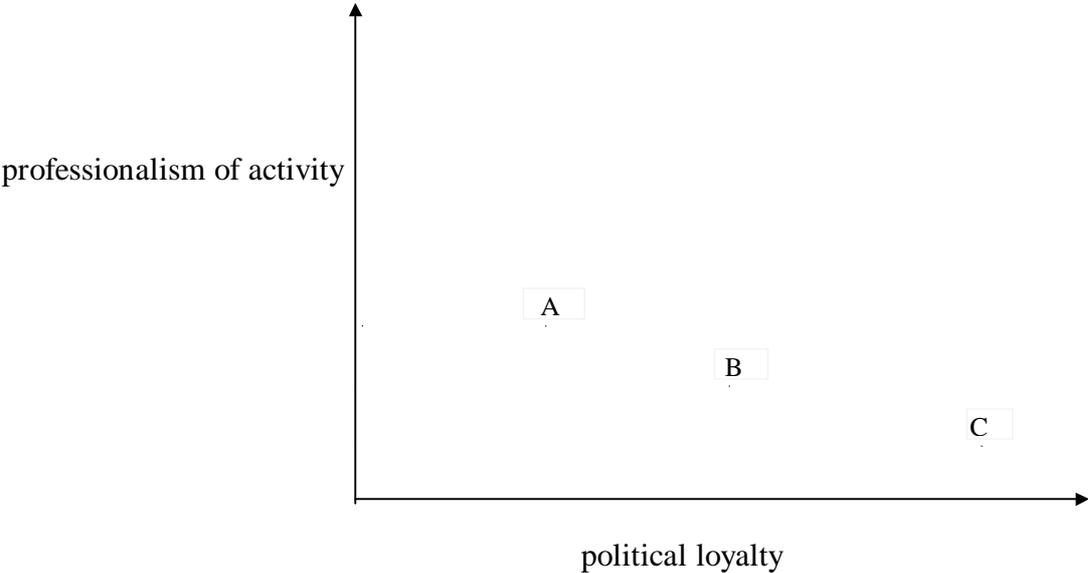
In my estimation, the scope of the civic freedom of civil servants, which is different in various countries and even in assorted branches and sectors of the administration, can be measured if we understand professionalism in the administration as conduct concurrent with the best comprehended art of pursuing a profession, in the name of which civil servants are capable of counteracting non-professional activity stemming from official directives; the same holds true, if we conceive political loyalty as the unconditional submission to all, without exception, injunctions of the superiors (obviously, if the former do not lead to the perpetration of a crime). Needless to say, we are concerned here with a practical exploitation by the civil servants of the range of the civil liberties to which they are entitled. By comparing the results

of research concerning various countries, we can determine the degree to which civil servants remain at political disposal.

In order to achieve this, one could, by resorting to sociological instruments, examine a sample of 10 000 civil servants involved in the performance of the same type of administrative tasks in various countries, sectors or branches, by asking them about alternative conduct in response to the unethical directives of superiors. The results of the research placed on a diagram of coordinates would illustrate the number of civil servants who carried out the unethical official order and those who refused to do so. The intersection point of those numerical data marked on the axes of the coordinates would denote the degree of the civic liberty of civil servants in a given country, branch or sector as compared with other examined countries, branches and sectors. The degree of enjoying **freedom for insubordination** to unethical official injunctions, in my opinion, can be illustrated in the following example:

Diagram no. 1.

Proposed illustration of the degree of using **freedom for insubordination** by civil servants



The diagram demonstrates that in state A the degree of putting civic liberty to use is extremely high, since about 50% of the persons under examination would not carry out unethical official orders; in states B and C the degree of enjoying civic liberty is much

⁴⁵ H.-U. Derlien, Historical Legacy and Recent Developments in the German Higher Civil Service, in:

smaller, since the degree of political loyalty in relation to the professionalism of activity is larger. Obviously, in practice this is not a simple, outright proportionate dependence.

The scheme, by its very nature, is simplified owing to the fact that the issue at stake is complicated and determined by psychological, organizational, economic and social conditioning. Nonetheless, presumably due to well planned sociological research, the outcome of such investigations could be utilised for the implementation of new government strategies undertaken for the purpose of intensifying the degree of subordinating the administration and civil service to the government policies or, on the contrary, to values of the constitution. This seems indispensable especially in those countries, branches or sectors in which political loyalty towards government policies dominates excessively in relation to professional activity, which serves the protection of constitutional values. Clearly, this problem does not occur in those countries or sectors where the interest of ruling parties is identified with public interest. It seems, however, that such a phenomenon appears more frequently in the dogmatic slogans of politicians and more rarely in the practice of the functioning of administrative agencies, especially considering that in democratic states conflicts of interests form a constant and more or less universal phenomenon, which to different degrees remains open.

The organizational reforms and managerial methods of administration recently implemented in the democratic countries under examination show that a change of hierarchic relations within public administration to relations based on dialogue, and the arrival at a joint stand, are accompanied by transformations in the conduct of political superiors and subordinate public servants. Dialogues and negotiations mean that superiors become increasingly inclined to alter their attitude as a result of professionally convincing argumentation. In response to a tendency on the part of their superiors towards an open and factual negotiation of stands, civil servants are more disposed to less aggressive, amicable conduct. It is easier to resolve each conflict between the civil servant and his political superior not by an escalation of convictions, demands, and proclaimed theses, but by an inclination toward open negotiation and the eventual verification of a stand. If political superiors have higher regard for the professional comments and aspects of administration prepared by civil servants, and become open to various forms of dialogue and negotiations, then their stand will certainly reduce the number of dilemmas experienced by civil servants and involving political loyalty versus professionalism of activity.

Once again it must be stressed that the contradiction between professionalism and political loyalty towards government policy will disappear among civil servants if professional and political values will serve, mutually and coherently, an identically assessed protection of public interest and other constitutional values. On the other hand, in a situation when values of the ruling political party change from values serving society as a whole to those serving only members of that party, then the task of public servants, supported and safeguarded by courts of law, should be the protection of public interest even at the cost of risking an open conflict with the political superior. As long as the recommendations and directives of politicians from the state executive apparatus are issued in accord with public interest and other constitutional values, civil servants should submit their entire conviction and energy to them. No arguments stemming from their personal opinions, political sympathies or the activity of third parties can restrict their official loyalty towards the activity of the government and its political representatives.

How are we to judge, therefore, whether the activity, injunctions, and directives of politicians in public administration are still made in the public interest or already in the political interest of the party in power? Are civil servants, whose role is to protect the public interest, capable of verifying properly the activity of their political superiors? Let us keep in mind how difficult it is to conduct an appropriate evaluation of the activity pursued by the government and administration owing to the problems posed by the verification of the criteria of assessment and the long-term nature of the effects of this activity. In what does the possibility of a proper verification, conducted by public servants, of the activity of political superiors reveal itself? In my opinion, a positive answer to those questions stems from three premises:

1. The supremacy of civil servants is the fact that they are professionals and specialists in a given domain of the administration, while the same is not always true of politicians. In recent years, we noticed a distinct growth in the number of former high ranking civil servants holding political posts (for instance, in Germany or France). This process is supposed to ensure a professional comprehension and a convincing, from the professional viewpoint, justification of issues also by politicians.
2. Civil servants have frequent access to documents, data, and information, which form a foundation for making politically differentiated choices. It is easy to convince society that the basis for solutions was limited information, but it is much more difficult to persuade

civil servants, who are familiar with the number and contents of such information. It is not surprising, therefore, that some countries seek ways of restricting the access to essential information enjoyed by civil servants.

3. Experience obtained during years of work in the civil service under the supervision of politicians, who change together with changing governments, enables public servants to appraise comparatively the activity of those politicians and, upon this foundation, to verify its motivations.

Doubts harboured by civil servants as regards such motivations are justified in those instances when, in their opinion, politicians make professionally unpredictable and unjustified choices, albeit based on information, data, opinions, expert assessments, alternative variants of projects of solutions, and practical experience. At the same time, the politicians are not inclined to negotiate a joint stand based on the good will of both parties. The professional doubts of civil servants will become intensified when they resort to the path of hierarchic recourse, and indicate the erroneous, in their estimation, interpretation of regulations, data, and information, while the politicians will refrain from a written confirmation of their directives or injunctions. Although the problem of so-called “oral directives” has a long history, the frequency of its occurrence is not diminished in the interiors of central offices.

The theory which treats civil servants as a professional category created for the protection of public interest has its weak points. Public servants do not have an exclusive monopoly on defining what is and what is not in the public interest. Certainly, their education, professionalism, experience, and lengthy practice permit them to identify their proper role in the constantly enacted political game. Professional legal training is a great aid. It is easier for civil servants who are lawyers to determine whether constitutional values are still, or no longer observed by politicians, than it is for representatives of other professions. Familiar with the mechanisms of the interpretation of the law, and enriching their knowledge with court adjudication, they are able to answer the question whether the official activity of politicians is concurrent with the universal comprehension of the contents of constitutional values, binding in a given country. Nonetheless, even the most suitably professionally prepared civil servants can make mistaken interpretations of public interest. David Rosenbloom suggests four reasons⁴⁶:

⁴⁶ D.H. Rosenbloom, *Public Administration. Understanding Management, politics, and Law in the Public Sector*, Random House, New York, 1986, p.382-385

- * civil servants succumb, even unconsciously, to impacts characteristic for values cherished by that particular social, linguistic, professional, and religious group to which they belong;
- * the effects of specialized work in the administration lead to a situation when civil servants are concerned only with the short-term goals of their activity. By way of example, in the name of economic values they can decide that pharmacies should be closed at night ;
- * constant socialisation of work performed in an office or the routine of official duties could rob public servants of sensitivity to the proper identification of social needs;
- * corporateness and consumerism are the reason why civil servants might identify public interest with the interests of the consumer group to which they belong.

Since social origin, professionalism, specialization, routine activity, and relations produced by consumerism could affect an understanding of the contents of public interest, public servants themselves should be particularly responsive to whether they do not motivate the contents of their activity.

8. LEGAL RESOURCES PROTECTING OF CIVIL SERVANTS POLITICAL NEUTRALITY IN POLAND

The process of transformation of the system in Polish Republic is connected with a severe moral crisis in the public sector. At the same time people are beginning to understand that democracy carries with it very important principles and among them is limited trust in politicians. The role of politicians is also changing in the Republic. Those whose mission till 1993 was to be the builders of a great system of democracy, at present they are required by the electorate to be responsible public officials. In spite of this, in Poland public life especially political influence to the bureaucracy sphere remains very complicated and frequently their conduct leaves a lot to be desired. Seven years of reforms in Poland has not helped in creating clear rules of the game and what principles to follow. In developed democratic societies there is also a crisis in ethics of governing and not all public officials are ideal, however those politicians feeling the public breathing down these necks know that their work performance depends on the ability to have the voters firmly behind them, earn its respect and trust. because in the longer perspective only suitable behaviour can gain the respect of the voters and get their votes.

In E. Łętowska's opinion „In Poland during the revolutionary changes of the system and connected with it axiomatic revaluation it is clear, that what makes a stabilised system strong are clear rules of the game and procedures, knowledge of social rules and behaviour what is allowed and what is not allowed public officials in power - is not a matter of universal consciousness”⁴⁷. Many people simply do not know what role the politicians should play and which by civil servants. But not only do ordinary citizens not know how those „at the top of central government” and senior civil servants should behave but quite often those „at the top” do not know themselves. This was obvious in the 1995 Presidential election when people occupying the highest offices in the public sector decide to be candidates and support given them by the voters. One thing is certain that considering a political rival as a foe and not a partner who may have a tendency to make political negotiation is a Polish peculiarity. The clan system of public life is becoming more and more obvious when the political objective is frequently only a camouflage for private interest battling without honour, taking advantage of desinformation and even political lies. These politicians frequently follow one's advantage of the sympathy to political party, religious beliefs and a ignorance of the public whose voice is heard only at the time of referendums and elections. That is why it is high time that society, politicians and civil servants find answers to the questions; what role should those in government play, who are those in bureaucracy and whom precisely do they serve? Since an understanding of the roles they fulfil would help in carrying it out according to the rules and to the law, but also how society expects them to carry them out.

In order to understand this role one would have to accept the argument that even though everyone in state power is obliged to ethical behaviour politicians come under different requirements of the law than civil servants. In how much politicians are answerable for realising the political program in parliament to the electorate or their own political party, the characteristic feature of civil servants is to follow a professional administrative line for which they bear responsibility and disciplinary action. In upholding this differences the law plays an enormous role. It is not yet known what will be the direction taken for practical realisation of political neutrality of civil servants by the present legal solutions, will the courts in practice treat this seriously, these are the questions to which we have at present no answers in Poland.

⁴⁷ E. Łętowska, Public goods, Power and Corruption, speech performed at the conference organised by the Institute of Public Affairs and Stefan Batory Foundation, Warsaw 1996

In Poland as in the mentioned countries in this book, the political neutrality of the civil servants is provided for in the constitution and explicit legislation and statutes concerning the civil service. Violating political neutrality means political partiality and if it is not always a deed with all the usual features of a crime it is definitely against the law.

Article 153.1 of the Polish Constitution states that „In insuring that professionalism, honesty, unprejudiced and politically neutral fulfilment of duties in the state agencies of administration is the civil service corps”. Almost an identical formulation is included in the first statute from 6.04.1996 concerning the legal position of civil service⁴⁸.

The neutral line followed by members of state bureaucracy in their official duties include the excluding of privileges for individuals or social groups is also underlined in art. 32.1 of the constitution which states that „all are equal under the law”. All have the right to equal treatment by public officials and art. 32.2 states that ”Nobody may be discriminated against in political, social or economic life for any reason whatsoever”⁴⁹.

With the aim of understanding the role of public officials in the executive branch of government in Poland a separation of organisational duties of government posts of a political character and the civil service is foreseen. The posts which came under resignation with a change of government according to art. 38 statute from 8.08.96 concerning organisation and work procedures of the Cabinet of Ministers as well as the scope of activities of the ministers⁵⁰ are included: The Secretary of State, the Under-secretary of State, Governors, Governors deputies. On the basis of this these posts may be qualified as political posts (of course together with government posts).

Clearly the statute of separation of political posts which are subject to change together with a change of government and which are filled mainly on the basis of political criteria which limits the number of political posts in the administration at the disposal of the newly elected government to the above mentioned. „Of course it is clear that the political elite need to reward party activists”⁵¹ That multitude of activists who work in the election campaign and between elections. Parties have limited financial resources and therefore a post in the public service was and is always an attractive trophy for the winners. However it is important that the parties should know what the political game is all about and what they may legally have at their command and disposal after winning an election. In the interest of

⁴⁸ Dz.U. Nr 89, poz. 402

⁴⁹ The Constitution of the Polish Republic passed 6.04.1997 by the Polish Parliament

⁵⁰ Dz.U. Nr 106, poz. 492

counteracting conflicting roles which may arise in the merging of offices of the executive branch with those with mandates the Constitution of the Republic will introduce the principle of not combining a political function in parliament with a government post (with the exception of the Council of Ministers). Art. 103.1 of the Constitution states that members of parliament or senators with mandates cannot combine these duties with employment in government administration, and according to art. 103.2 civil servants cannot be members of parliament. The principle of not combining posts allows parliamentarians and clerks, without having any doubts to identify their duties with the aims of the government policy in which they perform public functions.

The regulatory statutes in the Republic specify the legal obligations which are the result of the constitutional principles of neutral political activities. In Poland at present we have a two way regulation of the law which establishes the status of a clerk employed in government administration. This status is defined in the nomination act according to the enactment from 5.7.96 pertaining to the civil service or a work agreement or work contract on the basis of the act from 16.9.82 for state office workers⁵². This two way regulation is the result of the necessity of a ten year process of initiation a statute for the civil service. Not until the year 2008 will it be fully implemented, that is why till that time working side by side we will be the ever increasing number of nominated clerks who on the basis of having improved their qualifications and clerks whose rights and duties were regulated in the statute from 1982.

The statute laws which insure that the clerks' activities are neutral are at first of all from art.49 concerning the civil service. According to the regulations in force at present a clerk cannot be guided by his or her own political or religious convictions or by any individual or interest groups. Civil servants are also forbidden to publicly manifest their political views. High ranking clerks category A (so called R-Ka) are forbidden to create or participate political parties or trade unions. On the day a clerk is classified as category A his membership in a political party ceases by virtue of the law. For the political neutrality of civil servants equally important is art. 51 which regulates the prohibiting of performing any deeds or work contrary to his duties or discredit the trust in the civil service in any way, shape or form.

The right to refuse to carry out official orders by the civil servant is covered by the law provisions on the civil service (and also in the statute for state office workers). According

⁵¹ M. Debicki, The Bill is Only the First Step, in: „*Rzeczpospolita*”, 1996, Nr 240, p. 4

to art. 48.2 a civil servant is obligated to call to the attention of his supervisor in writing when his order bears the marking of an error or is against the law. In the case of a written confirmation of the order from his supervisor the clerk is obliged to carry it out. Refusal by clerks to carry out official orders should be allowed if carrying out the order would be crime or a petty offence.

The political neutrality of civil servants as formulated by the legislature in regard to counteracting partiality or bias on the part of the civil servant himself or on his initiative or on the initiative of others. It would seem however that the statute ban on favouritism if interest groups in the course of the clerks duties as formulated in art. 49.1 creates the possibility of legal recourse for the civil servant to counteract partiality also within the administrative agency though he himself has done no wrong only to carry out official orders. If the clerk states or knows that the order he has received serves interest groups such as a political party he may inform his supervisor that the order is illegal, because according to art. 49.1 on the civil service statute he may not under any circumstances during the course of his duties act in the interest of any group whatsoever. Confirmation of an order in writing by the supervisor must be carried out by the subordinate clerk.

At present there is the necessity to conduct a survey in the Poland to discover to what extent the civil servants have had recourse to the law for refusing to carry out an official order. It could be supposed that 50 year tradition of complying with orders has blunted the clerks sensitivity and need to analyse if the orders conform to the law or not. It is true that it could be presumed that in modern day in Poland ethical clerks could find in (art. 153 of the constitution) and statute (art. 49 statute o.s.c) the legal basis to justify their refusal to carry out an order biased on party political influence, on the other hand would they risk refusing to carry out a biased order coming from their supervisor? In getting an answer to this question the administrative court (NSA) with certainly could play a very important role by deciding in cases when the clerks are being loyal to government policies, and when they are realising the private interest of a particular party. An important issue in insuring the political neutrality of civil servants is specified in civil service statute which is the strict injunction that senior civil servants cannot belong to any political party. This injunction however cannot prevent civil servants from having their own political views or liking one political party or another, but it may prevent them from being actively involved in any party activities. It should be mentioned

⁵² Dz.U. Nr 31, poz. 214

here that individuals who are members of a party which advocates totalitarianism, nazism, fascism and communism, or a political party whose program is the spreading of racial and national hatred the use of force to gain power secret organisation membership are not allowed to work in the civil service because of their unconstitutional activities. According to art. 13 of the constitution from 6.04.1997 the functioning of such parties on the territory of the Polish Republic is illegal. This solution may be substantiated by the decision of a German Court of Administration whereby it was stated that members of such parties because of their orthodox convictions which in the performance of their official duties do not accept arguments which are contrary to their convictions one views this in turn does not guarantee impartiality and neutrality in the performance of their official duties.

The above mentioned institutions of the law are only the beginning of the way to insuring the political neutrality of civil servants in Poland. They merely create a general constitutional and legal frame for putting into effect to political neutrality of the civil service. Only just recently a well defined strategy has been put into effect which really shapes the activities of civil servants in some countries. With each new government depends the number of newly created political posts and consultative-advisory offices of political nature. A new government also oversees the salaries of the civil servants and the Prime Minister makes all decisions pertaining to this bureaucracy. It is also dependent on the government the methods of insuring that civil servants carry out government policy and ways of securing their loyalty. Every government of a democratic country demand political loyalty from civil servants however , it may not permit partiality which could violate the political neutrality of civil servants because in the end these members of the government will and should be held responsible (by parliament, society and the electorate) for their actions.

The legal solutions in force et the moment which help in stamping out political partiality are not in my opinion perfect. The reasons and consequences of this fact is that it is still to qualify the interactions between politics and bureaucracy. As in the past it still cannot be said that the administration operates in a transparent manner as is also the case with political parties, politicians and civil servants who do not worry and do not care about public opinion, not only concerning official activities or the results of their action or even if the public is interested in their bank accounts. Since in Poland involvement of the state in the economy sphere is still enormous and there are no appropriate statutory regulations concerning the use of public funds in joint stock company with private persons, that is

frequently why those with political connections may influence how state funds shall be used. In such a situation informal connection might be formed at the expansiveness of the effectiveness, quality and production output. There arises the supposition that those who have state power at their disposal take advantage of not serving society but insuring financial security for themselves and their peers. However such a nineteenth century manner of the use of power is totally unacceptable in a modern democracy. Therefore, what instruments of the law serve to limit such situations in Poland?

In analysing the law statutes in force at present in the Polish Republic it should be emphasised that there is lack of formalised legislative procedures for interactions between politicians - parliamentarians and civil servants. There is a need for more explicit law regulations in formulating a prohibition on members of parliament acting in their own private interest by means of proposals, questions or opinions. Also, a statute should be formed on prohibiting the use of any and all partisan influence of politicians on the clerks in the carrying out of their duties.

In Polish Republic, there are also no clear rules on the joint action of lobbying for parliamentarians and other state officials. A register of lobbyists is not kept in parliament. So politicians and civil servants act under influence of different and appropriately selected information, not always knowing when their are leading to political corruption. In fighting political corruption and also with the aim of identifying and verifying the sources of information, opinions and analysis reaching the state decision - taking organs, there is a need for law which would regulate the rules qualifying the relationship between lobbying, politician and civil servants. The probability of partiality in the area of interference of politics, bureaucracy and business may be on a large scale. First of all, that is way it is important to regulate not only procedures on passing executive acts, but also normative act (preferably in the form of statutes) in order to create formal and legal possibilities of getting opinions on them from persons or groups concerned. This is possible, for example, by sending a draft of the bill to government representatives throughout the country and demand that the governors collect and relay all opinions and conclusions to the authors of the bill.

In my opinion, the legislation pertaining to the functioning of political parties in Poland is too ineffective in opposing the taking advantage politics for ones own personal gains. In spite of the fact that the constitution states in art. 11 freedom to create political parties as well as to make public who is financing them and art.6.8 statutes from 28.07.1990

pertaining to political parties⁵³ reiterates this, however the scale of these disclosures is minimal. The legislature concerning political parties does not define what activities of political parties must be disclosed. We only know that the financing of election campaigns and financial reports should be public knowledge. They should contain information on the sources of funds, credit or contributions exceeding 10 times the average monthly salary and expenses should also be listed. The election committee organises the collection of funds at public rallies. It would seem that the French solution which limits the top limit of election expenses and explicit legal restraints on the financing of political parties by companies and private enterprises and regulations on the large tax deductions claimed by contributors are very interesting examples in the search for a solution to these problems in that the donors and the recipients would disclose their collaboration.

The filing of a declaration of property and financial status by civil servants and parliamentarians helps in limiting political partiality for persons gains. In our country workers in state agencies must file a declaration of their assets to their supervisors according to art. 6.4 statute from 25.07.1992 pertaining to limiting the activities in the economy of persons performing public functions⁵⁴, however deputies and senators file their declaration of assets to the speaker of the house of parliament and the upper house of the senate according to art. 35 statute from 9.05.1996⁵⁵. These declarations are not made public and are considered official secrets unless of course the parliamentarians agree to their being made public. The declarations must include information which would account for the accumulated money, property, stocks and bonds, the acquisition of property sold at auction by State or local administration. The matter of filing declarations is an excellent illustration of disordered system of values and the lack of their hierarchy. The declaration of assets is supposed to prevent corruption or accumulating wealth during their time in office. The declarations at present serve in fact as a means of evidence to protect the position of the politician. „It is very doubtful if in a democratic country parliamentarians involved in criminal acts not connected with their political functions should be protected by their parliamentary immunity” to quote J. Ciemniowski⁵⁶. Seemingly public control of the assets of public officials as is the case in Great Britain would be more effective in bringing to light to source of the assets not included in the declarations and in consequence limit partiality in their official duties.

⁵³ Dz.U. Nr 54, poz.312

⁵⁴ Dz.U. Nr 56, poz. 274

⁵⁵ Dz.U. Nr 73, poz. 350

A new unknown until recently institution which limits the possibility of conflict of interest in public officials who have very good access to inside information on the economy. This institution is so called „the blind wallet” which is on offer at the Polish Pioneer Stockbrokers Agency (PPDM). Thanks to this agency politicians, parliamentarians and civil servants may transfer their assets (stocks bonds, property etc.) to the anonymous management by PPM. After setting a fixed time for the management of his assets, the public official relinquishes his influence on what will happen to them he only specifies the level of risk which may be taken in investing his maney. There is the probability that in this way he will have less possibility of increasing his assets by taking advantage of government information unavailable to others.

The above mentioned legal solutions restricting the influence of different interest groups some of a political nature are not enough to restrict the possibility of exposing objectionable behaviour. In achieving this perhaps first of all reform of state administration on a broad basis should be introduced which would embrace not only structure of state administration but equally it’s methods and stale of functioning so as to conform to the demands of a modern world. An endeavour should be made to regulate clear lines of procedures for the administrative agencies of state government, especially in the domain with a high risk of practising partiality, that is to say in the sphere of privatisation, public assignments, setting up and functioning of joint ventures, the participation of the state treasury assisted by funds in public foundations and non profit organisations, investments in large cities, in dealing out privileges and special rights, imposing duties or reducing them. Because of the unlimited freedom in the sphere of activities of government agencies it could be acknowledged as a factor in destabilising and breaking the rules of the market economy. If the regulations which limit risks to the economy do nor result from mechanisms of the economy market and are the result of undefined laws and therefore are unseen activities of the bureaucracy then there is the risk, that these actions serve personal and private interest of the party in power.

Political partiality may also be prevented by large scale decentralisation in the process of administering of public affairs, as well as the development of managerial methods and rational administration. Ethics in public life would also helps. In Poland we have no codes of ethics for the civil servants or for parliamentarians. Even though discussions on this subject

⁵⁶ J. Sadecki, Ethical politicians, in: „*Rzeczpospolita*” Nr 110, 1996

has decidedly intensified in recent years, it is also known that initiatives to form a commission to create a code of ethics for members of parliament - today it is difficult to say when it will be ready. However, after becoming familiar with the codes of ethics in force in European countries it could be concluded as wishful thinking or trivial abstractive standards on proper behaviour. If however, we do get a code of ethics we shall be more substantial it will be a standard of reference to real life situations in office, conflict of roles, as a pragmatic assemblage of concrete situations and cases, helping to dispel doubts, and at the same time eliminating political partiality. In J. Uczkiewicz's, (vice - director of the State Control Agency (NIK)) opinion the supplementation of formal legal regulations which would regulate our community life with laws with a character of a code of honour is ethically beneficial for a law abiding country. This concerns first off all ethical groups especially responsible for the present and future of Poland - and to these groups for sure belong politicians and the civil service corps⁵⁷. The statutory legislation which defines the duties of public officials and a code of ethics which would regulate the manner in which these duties should be carried out and an education in ethics should help in that members of parliament and civil servants would know what society expects of them. Learning has a large role to play in this.

It is also important that civil servants would have the possibility of voicing their suspicions concerning partiality to independent of the administration structure commission and that in reporting their suspicions they would be preserving the trust in the agency. The commission on appeals, qualifications and discipline set up in the civil service statute does not fulfil these conditions simply because these commissions function inside government administration apparatus. There is a need for an agency directly subordinate to parliament which would take action in matters of unethical practice on the civil servants or MPs as does the Special Consul in the USA and the Commissioner of the Civil Service in the Great Britain. The best legal solutions are not enough if there will be no strong determination on the part of society to prevent political partiality by the administrators. In creating this determination it is necessary to inform the public not only of signs of partiality but also the penalties imposed and disciplinary sanctions taken for breaking political neutrality, and the court's decisions on a case. The role of the press and massmedia is priceless here, in uncovering every sign of political partiality in the civil service, even when the breaking of political neutrality will not come under the heading of a crime. The lack of unlocked channels

⁵⁷ I. Uczkiewicz, Honest Politicians, in: „*Politic*” 27.04.1997

of information making it possible to lodge a complaint outside the department of the unethical practices may lead to courageous civil servants with the purpose of protecting public interest will disclose to massmedia information on political partiality being practised by their supervisors or colleges from the office. This may cause a vivid reaction of public opinion. The proposed changes to art. 180 of the criminal code foresees wider protection for press sources of information, than has been hitherto, this will be the first step in paring the way for the right of society to information concerning government practises, according to the proposed amendments on protecting the freedom of information the court will not be able to force a journalist to disclose the name of his informant if the case does not concern crimes such as spying, murder or a traitor to ones country. In this way public officials who decide to reveal information to the massmedia the risk smaller that his name will be revealed.

In protecting the political neutrality practice in government administration civil servants should be given a new distinction, who from passively carrying out orders should transform into people protecting the public interest from the attempts of camouflaged private party interests. A modern civil servants is not a Jack in the office who arbitrary decides on matters concerning the lives of citizens or clerk who is at his supervisor unconditional disposal fawning and bowing to him. L.Saidler remind us of the view taken by our fellow philosopher Mr Olszewski who at the beginning of the century formulated demands which should be made on civil servants. In T. Olszewski's opinion a civil servant should have a clear cut personality fully developed not only intellectually but also emotionally and sensitive to other peoples problems. In order to be civil servants in the real meaning of the word, one must be actively engaged in solving problems. Such a competent individual and capable of further development when confronted with problems in his workplace should he go by the letter of the law or his own feelings of what is right, according to his outlook on life or the hierarchy of values he has set for himself. If each and every civil servant would follow these guidelines that will be ethos of the civil service.

In concluding it should be emphasised that in the Polish Republic a modern up-to-date civil servant must be ethically sensitive, well educated, professional in his work. Politicians need experts, who can relay the political vision into operational language, a language of solid fulfilment of their duties. What dimension will these activities be accepted, to what extent will it serve society, this will depend on how the civil servants will carry out their duties. We are only at the beginning of the road in forming a new image of government officials (as a

watchdog of public interest) in our country. The law is not the best and many of the old habits remain. I would like today to have an answer to the question if the civil service will take advantage of the chance given it by the mechanism of functioning in a democratic administration.