Upholding Standards; Unsettling Conventions

The Constitution and the Regulation of Political Standards

Dr Yuan Yi Zhu

Foreword by Lord Faulks KC

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Foreword

Lord Faulks KC
Former Minister of State for Justice and Chair of the Independent Review of Administrative Law

Accountability in politics is not only desirable but is of fundamental importance. In its November 2021 report, Committee on Standards in Public Life (CSPL) made a major contribution to the debate about the form that such accountability should take. But in deliberating about the Committee's recommendations, in the rush to improve standards in public life, it is vital not to overlook the serious constitutional difficulties that radical reform of the current arrangements would entail.

In this new paper, Policy Exchange's Judicial Power Project explores these difficulties, making a powerful case that standards are best upheld by way of political processes. The author, Dr Yuan Yi Zhu, points out that the political salience of recent departures from appropriate standards does not entail that the political constitution is not working. Indeed, there is much to be said for the contrary conclusion. It was after all a form of political accountability that proved to be decisive in bringing about the downfall of a Prime Minister and a deputy Prime Minister. These examples do of course postdate the CSPL's report, which one can now see, with the benefit of time, was overly pessimistic about the robustness of our constitutional conventions and of the political process.

Replacing the current arrangements with statutory regulation of ministers' conduct would not improve matters. On the contrary, it would be likely to weaken political accountability, not least since it would inevitability extend the role of judges into the political sphere. The expansion of judicial review and the enactment of the Human Rights Act have already involved an encroachment of the courts into areas which were once considered to be purely political. Putting the regulation of standards on a statutory footing would be a further move away from the fundamental principle that ministers and other parliamentarians are accountable to Parliament and the electorate.

Many people are attracted to the idea of empowering the Independent Adviser on Ministerial Interests and the Ministerial Code to initiate and determine enquiries into possible breaches – and to have power to recommend sanctions. However, one should be in no doubt that this would be a major alteration in the delicate infrastructure which currently obtains.

A new government may well be tempted to "clean up" government and to distance itself from all that has gone before. But in doing so, as this paper makes clear, it should be aware that the consequences of so doing

would be a diminution of robust parliamentary political accountability and a marked increase in litigation.

Some of the changes suggested by the CPSL can be welcomed and indeed have been welcomed across the political divide. But before embarking on any of the more radical changes the Committee has recommended, the Government and Parliament should have firmly in mind the pitfalls that this paper so ably identifies.

Executive Summary

The Committee on Standards in Public Life has called for a statutory role for the Independent Adviser on Ministers' Interests and for the Ministerial Code to be put on a legal footing. Under the Committee's proposals, the Independent Adviser would have the power to initiate and determine breaches of the Ministerial Code.[1] The Committee's recommendations in relation to the Independent Adviser was rejected by the Government, but have been endorsed by the House of Commons Public Administration and Constitutional Affairs Committee, former prime minister Sir John Major, and every living former Cabinet Secretary.

The maintenance of high standards in public life is highly desirable. However, some of the Committee's specific recommendations give rise to serious constitutional questions and carry substantial risks of undermining effective political accountability. There are particular risks around the extent to which the recommendations provide for judicial intervention in relation to the highly political matter of the appointment and dismissal of Ministers (including even the Prime Minister). There are other risks relating to the expansion of the functions of appointed regulators in ways that may not actually enhance their independence, and instead expose those who are given a statutory role as political regulators to a greater risk of legal challenge.

It is crucial that Parliament and government (which are democratically accountable) must retain ultimate and ongoing responsibility for the quality and integrity of our public life and of the conduct of public affairs. That responsibility cannot and should not be delegated or outsourced. It is to the public and the House of Commons that our elected politicians should be accountable, not unelected regulators. As recent events have demonstrated, that sort of political accountability is in practice a much more effective and powerful mechanism than the Committee seems to have assumed. It carries many fewer risks than the delegation of responsibility for maintaining high standards to those whose only authority derives from appointment.

1. The recommendations were made in the Committee's Standards Matter 2 Review, November 2021, link, which also called for the Business Appointments Rules and the Advisory Committee on Business Appointments to be overhauled and for transparency around lobbying to be improved.

Introduction

Political standards and the processes by which they are upheld have been the focus of considerable public discussion. In recent years, a series of high-profile controversies about the conduct of parliamentarians, civil servants, and government advisers have led to a renewed and intense public focus on the subject, both in relation to substantive standards of conduct and in relation to the way in which such standards should be enforced.

The Context

In 2018, the House of Lords voted to reject a recommendation to suspend Lord Lester of Herne Hill QC from the House of Lords on the grounds that the Commissioner for Standards had allegedly failed to act in accordance with the principles of natural justice and fairness. That vote generated significant controversy which ended with Lord Lester's resignation. In 2021, the House of Commons similarly voted to delay the acceptance of a recommendation to suspend Owen Paterson MP from the service of the House, pending the setting up of a new committee to study the disciplinary process for MPs. The ensuing controversy led to Paterson's resignation from Parliament before it could vote on his suspension.

But perhaps the most high-profile controversy surrounding standards in public life concerned the former prime minister, Boris Johnson, and the staff at No 10 Downing Street. In December 2021, allegations first publicly surfaced about staff gatherings in No 10 Downing Street and the Department of Education during the COVID-19 lockdown in England, which provoked an intense national controversy and played an important part in Johnson's resignation as Prime Minister. The long-running controversy involved police investigations as well as a Cabinet Office inquiry. Adding to the chaos, Lord Geidt, the Independent Adviser on Ministers' Interests, resigned in June 2022 over an over an issue related to the Ministerial Code and compliance with international law.

The after-effects of the so-called Partygate scandal were still being felt in 2023 when the Commons Select Committee of Privileges recommended the suspension of Mr Johnson from Parliament, leading to his resignation from the House of Commons. Allegations that the Committee was conducting a "political assassination" led to further controversy. In parallel, the Deputy Prime Minister and Lord Chancellor, Dominic Raab MP, resigned following an investigation into allegations that he had bullied civil servants, investigative conclusions which were also subject to controversy. In a further controversy, Sue Gray, the civil servant who had conducted the Cabinet Office inquiry into Partygate, subsequently became

the target of a Cabinet Office inquiry herself over her decision to join the office of the Leader of Opposition, Sir Keir Starmer, directly from the Civil Service.

Standards Matter 2 Review

Partly as a result of the significant volume of press discussion about these issues, the Government has come under considerable pressure to strengthen the standards regime. Of the various proposals to change the UK's standards regime, the most serious proposals are those set out by the Committee on Standards in Public Life (CSPL) in its Standards Matter 2 Review, which culminated in a final report in November 2021. Among those supporting the CSPL's proposals are the former prime minister Sir John Major, five former cabinet secretaries, as well as former leader of the Conservative Party Lord Hague of Richmond, all of whom have urged the Prime Minister to adopt the Committee's proposals in their entirety.[2]

The House of Commons Public Administration and Constitutional Affairs Committee (PACAC) has also endorsed the Committee's proposals. In its report on the Lex Greensill affair, PACAC recommended that "Primary legislation should be introduced at the earliest opportunity to establish the Independent Adviser as a statutory position to end the uncertainty about whether future appointments will be made at all."[3]

The Government subsequently published its response to the CSPL report (as well as to two reports on the Greensill affair[4]) in July 2023.[5] In its response, the Government accepted a number of recommendations made by the CSPL, notably in relation to (a) the Business Appointment Rules (ACOBA), (b) transparency in the public appointment process, and (c) transparency standards around lobbying.

However, the Government rejected the CSPL's recommendations to put the Independent Adviser on Ministers' Interests, the Commissioner for Public Appointments, and the Advisory Committee on Business Appointments, as well as the various ethics codes they administer, on a statutory footing, reasoning that such a move risks inviting judicial interference into matters which are inherently political.[6] Lord Evans of Weardale, the chair of the CSPL, described the government's rejection of these proposals as regrettable and urged it to "keep the remainder of our recommendations under review."[7]

2. The Times, *Letters to the Editor*, 15 November 2021, link; The Times, 17 January 2022, link
3. House of Commons Public Administration and Constitutional Affairs Committee, *Propriety of Governance in Light of Greensill, 29 November 2022*, link
4. One by the Public Administration and Constitutional Affairs Committee and one by Nigel Boardman at the request of the Prime Minister.
5. UK Government, *Strengthening Ethics and Integrity in Central Government*, 20th July 2023, link
6. UK Government, *Strengthening Ethics and Integrity in Central Government*, 20th July 2023, link
7. Lord Evans of Weardale, "Reforming standards in central government - a step forward", *Committee on Standards in Public Life*, 20 July 2023, link

The Standards Matter 2 Review

On 1 November 2021, the Committee on Standards in Public Life (CSPL) published *Upholding Standards in Public Life*, the final report and recommendations of the Standards Matter 2 review.[8] The report contained 34 recommendations about how to improve the regulation of ethical standards. These recommendations related to a range of institutions, processes and structures, including:

- The Ministerial Code and the Independent Adviser on Ministers' Interests;
- The Business Appointment Rules and the Advisory Committee on Business Appointments (ACOBA);
- The Regulation of Public Appointments;
- Transparency around Lobbying.

Meanwhile, others have proposed even more radical overhaul of the UK's system of regulation for political standards. In 2021, the Labour Party announced a proposal to create an Integrity and Ethics Commission to "clean up politics", with extensive powers to investigate alleged breaches of the Ministerial Code without the approval of the Prime Minister, as well as issue sanctions against ministers. The new commission would also enforce other ethics standards, such as a ban on lobbying work by former ministers. Labour's current proposal is that the commission would be statutory and subsume the CSPL.[9]

About this paper

Like the CSPL and others concerned with the regulation of political standards, this paper starts from the position that great importance must be attached to the adherence to the highest possible ethical standards in public life. Every elected politician, special adviser, regular civil servant, and public appointee should subscribe wholeheartedly to the Nolan Principles of Public Life. They must be held to account when they fail to comply with those principles.

Some of the proposals put forward by the Committee on Standards in Public Life and other would-be reformers are entirely sensible. For example, the CSPL correctly highlights that there is "a need for significant reform" to the Business Appointment Rules and ACOBA. Business Appointment Rules must be enforced and applied consistently across all government departments, to ministers, political appointees and to civil servants, an incremental measure whose adoption by the Government is to be welcomed.

However, any reform must be carefully designed so that it does not undermine political accountability and the political constitution, involve the judiciary in quintessentially political matters, or unsettle the British constitutional settlement. While well-intentioned, many of the reforms proposed by the CSPL and others may well have perverse consequences from a constitutional point of view, and risk weakening the United Kingdom's system of governance instead of strengthening it.

9. Institute for Government, "Keynote speech: Angela Rayner MP, Labour's Deputy Leader", 13 July 2023, link
8. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link

On the flip side, some of the proposed reforms may also reduce the effectiveness of the existing standards regime. In particular, the push toward greater formalisation of disciplinary procedures that currently form part of the political process risks turning what has hitherto been a flexible and efficient system into a bureaucratic and litigious one. The greater involvement of courts, which some of the reforms necessarily invite, may in fact protect wrongdoers in a way that a mainly political process does not.

Finally, while intense media coverage of recent controversies in the area of standards in political life has created a widespread impression that the current regime is in desperate need of reform, the truth is that they have instead demonstrated the continued effectiveness of the existing system. Democracy and political accountability to the electorate are the core British constraints on bad behaviour by elected officials in public life[10], and the fact that a Prime Minister with a large majority was recently forced to resign from that position in response to perceived lapses in conduct – and before any formal procedure had reached any conclusion in his case – is a salutary reminder that these constraints are stronger than many of the critics of the current standards regime believe them to be.

This paper is divided into three sections.

1. Constitutional Convention and the Role of Courts

To what extent would a rule-based system of regulation of standards in public life that is founded on statute diminish effective political accountability in a constitutionally significant way?

2. Changes to the Status and Role of the Ministerial Code and the Independent Adviser on Ministers' Interests

To what extent does it enhance or diminish the independence of the Independent Adviser on Minster's Interests to combine, in one unelected official, the five separate functions of (1) proposing the content of the Ministerial Code, (2) initiating investigations into alleged breaches of the Code in individual cases, (3) conducting those investigations, (4) determining the seriousness of their findings and (5) recommending the sanctions to be imposed?

3. Political Accountability and the Political Constitution: Case Studies

The existing regime for the enforcement of political standards is often portrayed as toothless and failing to hold ministers to account. Yet events in recent years—notably the resignation of both the Prime Minister and the Deputy Prime Minister as a result of adverse findings made against them through the existing process—illustrates powerfully the power of the existing system, which moreover avoids the veto points which a codified regime of the sort the CSPL proposes would involve, notably in relation to judicial review.

10. Though politicians, rightly, remain subject to the ordinary law for legal wrongs.

It may be tempting for a future government, seeking to distance itself from its predecessors, to implement proposals calling for statutory regulation of ministers by unelected officials, as the CSPL and others recommend. But no government, of whichever persuasion, should succumb to the temptation to make changes that will undermine effective political and democratic accountability for adherence to proper standards in public life. Parliament and government, which are democratically accountable through political processes, must retain ultimate and ongoing responsibility for the quality and integrity of our public life and of the conduct of public affairs. That responsibility cannot and should not be delegated or outsourced to other actors, particularly ones which lack democratic accountability.

1. Constitutional Conventions and the Role of Courts

Introduction

One of the most regrettable features of recent British politics has been the increasing involvement of courts in what are quintessentially political matters, a trend which has been chronicled by Policy Exchange's Judicial Power Project. While some matters which properly come before courts inevitably have a political dimension, particularly in public law, past years have witnessed a pronounced trend whereby the judicial process has been used to conduct politics by other means. Any move to increase the judicialization of British politics would be extremely undesirable, both for the courts and for the political system as a whole.

Unfortunately, the CSPL's recommendations would have precisely this effect, which would diminish effective political accountability. Under the Committee's proposals, the standards regime would shift in emphasis away from requiring office-holders to take responsibility for sound judgement about the application of the fundamental principles of ethical standards. Instead, those in public life would be accountable to unelected regulators for compliance with detailed rules. Furthermore, under the Committee's proposals, disputes about which standards should be recognised, and about how they should come to bear in particular controversies, would almost inevitably be transferred from the political realm (where they should be worked out) to the courtroom, where a judge, or a panel of judges on appeal, would give victory to one party or the other. Any increase in accountability to the courts, or indeed to an appointed regulator established by statute, necessarily displaces or reduces political accountability to Parliament and the electorate in a democratically harmful way.

The Role of Convention and Political Norms

The Committee begins from the assumption that "a number of long and short-term social and political trends have created a more challenging environment today for those seeking to uphold high ethical standards."[11] The central premise of the Committee on Standards in Public Life's report is that standards cannot be effectively regulated by convention and norms. The report baldly asserts that:

11. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 7

> *A regulatory system so dependent on conventions and norms provides little protection against individuals who intentionally undermine or ignore codes of conduct and the principles they are designed to uphold. Conventions, once undermined, are often difficult to restore, and once the vulnerability of the regulatory system is exposed it is harder to convince rulebreakers that there are long-lasting consequences for noncompliance.*[12]

Specifically, the Committee calls for the government to pass primary legislation to place the Independent Adviser on Ministers' Interests, the Public Appointments Commissioner, and the Advisory Committee on Business Appointments (ACOBA) on a statutory basis and for a greater statutory basis for codes of conduct:

> *The Committee believes that the regulatory system would benefit from codes of conduct having some basis in statute too. Though codes themselves are not intended to be legally binding, a legal obligation on the government to produce each code would better reflect the constitutional importance such codes have in regulating ethical standards. While defining the specific content of each code in law would be unnecessary (and inhibit the regular process of amendment codes often require), enshrining the guiding principles and purpose of each code in legislation would ensure that codes stay true to their original purpose.*[13]

The Committee then proceeds to list six aspects of the regulatory framework which should be enshrined in statute, including not only the obligation on the government to produce a code of conduct, but also the enshrining of "each code's guiding principles and/or purpose" in statute, a statutory amendment process for the codes, and statutory entrenchment of the relevant regulators.

It is welcome that the Committee recognised the important role by political conventions and "the benefits that conventions can provide". However, its linkage of declining standards, or at least a perception of declining standards, to what it described as an "overdependence on convention"[14] is much more questionable. For instance, the CSPL does not seem to have taken into account the fact that, by their very nature, political safeguard mechanisms operate through public processes, and therefore involve a degree of public contestation, which may be mistaken as evidence of declining standards when they in fact demonstrated a vigorous public culture around the enforcement of standards in public life, expressed through more zealous political enforcement of standards. Moreover, a perceived decline in standards could well, and perhaps more plausibly, be seen as the result of shifts that have already taken place away from a principle-led and convention-based system (requiring the exercise of judgement and subject to political accountability) towards a rule-based one relying instead on technical compliance alone.[15] In addition, the declining trust in politicians may also be caused in part by the long-term impact of other scandals, in particular the scandal over MP's expenses (2009), which saw a major decline in public trust in politicians which never fully recovered[16].

The Committee also appears to operate from the starting presumption

12. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 40 (2.16)
13. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp 45 (2.28)
14. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 40 (2.18)
15. The Committee on Standards in Public Life used to complete a Biennial Survey of public attitudes towards conduct in public life. These surveys maintained many core questions from earlier surveys. The continuation of core questions and common polling methodologies allowed the Committee to observe continuing trends in attitudes towards public standards. Unfortunately, the last of these surveys took place in 2012 (CSPL, *Public Attitudes Survey 2012*, 23 September 2013, link). Whilst polling was conducted as part of the Standards Matter 2 Review which asked the public whether they believe ethical standards have got better or worse in recent years, this survey is unfortunately less helpful to those seeking to determine a shift in public attitudes over time. The CSPL's biannual survey should be reinstated.
16. Trust in MPs poll, Ipsos Mori, 2013, link

that conventions are by definition weaker than codified rules of conduct. But many of the most fundamental aspects of the UK constitution are secured by convention alone. For instance, the requirement that the King acts on the advice of his ministers (except in a very few areas) is purely based on convention; yet it commands universal acceptance and respect. The conventions surrounding the appointment and resignation of governments, fundamental to any democratic system, is another such example. It should not be assumed lightly that, in a country like the United Kingdom, where compliance with conventions has been at the basis of its constitution for centuries, conventions alone cannot provide an effective safeguard against misconduct.

Conversely, codification, partial or wholesale, is certainly not a failsafe guarantee that standards will be upheld. It is certainly possible to overestimate the weakness of an ethics system based on convention due to the fact that it is reliant on political imperatives to secure adherence to ethical standards. It is equally possible to overestimate the strength of a statutory system of regulation, the existence and supposed immutability of which itself ultimately depends on the very same political imperatives that produce and secure conventions. What the great Victorian jurist Albert Venn Dicey called "the spirit of legality" which, above formal constraints, guarantees the rule of law, applies with equal force in the context of standards[17].

Finally, as will be articulated in a later section of this report, there is a powerful case to be made that recent events have, in the end, demonstrated the effectiveness and success of convention and political imperatives for vindicating and developing the operation of the Nolan principles. Evidence that a system has been tested is not evidence that it has failed. As will be argued in a later section of this report, the end of Boris Johnson's premiership, often used as compelling evidence of the weakness of the current standards regime, is in fact evidence of the effectiveness of the existing political regime.

But there is perhaps more common ground among the various viewpoints than the CSPL's recommendations may suggest. As the Committee itself recognises, it is to the public and to Parliament that elected politicians are accountable for adherence to high standards:

> *Ethics regulation in government must be balanced with the democratic mandate granted to elected representatives, and so any system of investigation and sanction must be balanced and proportionate. The Prime Minister, ultimately, is accountable to Parliament for ethical standards in government.*

This is an important statement of principle, but is in some tension with the balance of the Committee's report.

17. A. V. Dicey, Introduction to the Study of the Law of the Constitution, 8th ed. (London: Macmillan, 1915) 164.

Codification and the Threat of Judicial Review

It is trite law that the courts have no role to play in policing conventions. The Supreme Court set this out in categorical terms in *Miller (No 1)*: "Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers… they cannot give legal rulings on a political convention's operation or scope, because those matters are determined within the political world."[18]

Despite this, the Committee's report claims that underpinning standards regulation in statute instead of conventions will not lead to judicialisation. Indeed, it argues that the current situation may lead to more judicial involvement than a statutory regime:

> *The Committee recognises fears that a statutory underpinning of standards regulation could lead to a greater incidence of judicial review. However, we heard that recent cases of judicial review on decisions relating to ethical standards have occurred in areas where standards processes remain uncodified, where interest groups have taken the government to court to reverse breaches of convention. Legislation that properly defines the relevant responsibilities of the government and each regulator may, therefore, help prevent such cases. A lack of legislation, rather than new legislation, may be the greater catalyst of judicial involvement in standards processes.*[19]

With respect, this approach is incorrect. It is true that reliance on conventions does not entirely prevent litigation in relation to conventions. For instance, in the recent case of *FDA v Prime Minister*,[20] a Divisional Court of the High Court held that some—but not all—parts of the Ministerial Code were justiciable in principle, though it dismissed the challenge against the Prime Minister's decision in the instant case, which related to allegations about the behaviour of the-then Home Secretary, Priti Patel. It is worth noting that the FDA's challenge, as well as the reasoning of the Divisional Court has since been criticized by a number of legal commentators, including Policy Exchange's Richard Ekins.[21]

However, there can be very little doubt that codification of the standards regime will significantly increase the incidence of litigation on matters relating to standards in public life. It is axiomatic that the statutory incorporation of any part of a regulatory system into law invites intervention in that part of the system by the courts because it is specifically the constitutional role of courts to resolve disputes about matters governed by law. It is also worth noting that even in *FDA*, which represents something of a departure from previous lines of decisions, the High Court nevertheless recognised that many parts of the Ministerial Code were not justiciable. Codification, by contrast, would make the entire Ministerial Code prima facie justiciable.

This is not merely a hypothetical point. As Professor Michael Gordon has observed, in Northern Ireland, where there is a statutory ministerial code, there has been a spate of litigation in relation to it, some of which has had significant political consequences for Northern Irish politics. Most recently, in 2021, the High Court of Northern Ireland ruled that a political

18. *R (Miller) v Secretary of State for Exiting the European Union*, 2017, UKSC 5, link, pp. 47 (146)
19. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 46 (2.31)
20. [2021] EWHC 3279 (Admin) link
21. Michael Gordon, *FDA v Prime Minister: The Ministerial Code, Justiciability, and the Limits of Judicial Review*, 5th May 2023, link ; The Telegraph, 19th July 2021, link

boycott of the North South Ministerial Council was unlawful.[22] While differences of opinion can and will exist as to whether the boycott was normatively desirable, the fact that a court has declared a political decision of the highest political importance made by ministers to be unlawful on the basis of a ministerial code represents a worrying development.

In a similar vein, as Policy Exchange has argued, the Fixed-term Parliaments Act 2011, now repealed, provides a cautionary tale about how the intervention of statute into an area previously governed by convention can trigger legal controversy, and potentially litigation, over aspects of an issue in the same area that were never intended by Parliament to be the subject of litigation.[23]

Risks of more involvement of the courts in matters previously not covered by statute existed, of course, when the Civil Service Code was put on a statutory basis in 2010. However, the risks associated were nothing like as significant in that context and at that time because the possibility of the system being subjected to politically motivated litigation was very substantially smaller.[24] It is also worth pointing out that the disciplinary arrangements for enforcing standards on members of each House of Parliament are of course protected from challenge by judicial review, and are taken entirely outside the jurisdiction of the courts, by the rules of Parliamentary privilege (including Article IX of the Bill of Rights 1689 and the Parliamentary doctrine of exclusive cognisance).

There are two key areas where the Committee's proposals create a particularly obvious and significant additional risk of litigation. The first arises from the Committee's claim that "enshrining the guiding principles and purpose of each code in legislation would ensure that codes stay true to their original purpose."[25] A statutory requirement that a code made under an Act gives effect to the Nolan principles would enable the code (and its practical operation and enforcement) to be challenged in the courts on the basis that the code may fail to capture extremely general principles in its detailed rules. The challenge with this is that the Nolan Principles are just that – principles. They comprise broad concepts and are not, and were never intended or designed to be, literal rules – not least because much political discourse is contested (this is the nature of political debate), and decisions are often balanced by competing public interest considerations. This would be lost if the Nolan principles became legalistic rules, with courts able to second-guess both the making of the code and its application in practice.

Second, setting out the role of a regulator in legislation would establish a legal framework that would make it much easier to challenge whether a regulator's decisions conformed to a proper understanding of their legally prescribed role. Putting the system on a statutory footing would mean that legal challenges could more easily be mounted by those who thought that the regulator, or the person to whom the regulator made recommendations, had not performed their role adequately. Specific decisions to open or to not open an investigation will be subject to judicial review in the ordinary manner, with all of its undesirable implications.

22. UK Constitutional Law Association, *Mike Gordon: A Statutory Basis for the Ministerial Code* – the Challenges, 16th November 2021, link
23. Policy Exchange, *The Fixed-term Parliaments Act and the Next Election*, 24 October 2019, link
24. Policy Exchange, *Open, Meritocratic and Transparent*, 8 November 2021, link
25. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link

Court challenges could also, more easily, come from those subject to the system who thought they had been unfairly treated by it. It has been long established that ministers, who are not employees but office-holders who serve at pleasure under the Crown, can be appointed or dismissed for any reason or none at all. Courts have expressly recognised that the appointment of ministers (which must include their dismissal as well) belong to one of the categories of the Royal prerogative which cannot be judicially reviewed "because their nature and subject matter are such as not to be amenable to the judicial process".[26] The choice and therefore dismissal of ministers is inherently a political one, involving factors which are entirely beyond those involved in normal relationships of employment. To take an extremely basic example, ministers are appointed based on party affiliation, a criterion which would be unacceptable in almost any ordinary employment context but which is essential to the constitution of the United Kingdom. Courts have long recognised the special nature of ministerial office, and categorically refused to interfere with the Crown's prerogative to appoint and dismiss ministers.

If ministers were to be sanctioned as a result of a statutory process for their conduct, those who feel aggrieved by the decision and sanction may well choose to challenge the adverse findings and/or the sanction via judicial review. For example, allegations that the process has been unfair—which, as discussed later, has been a feature of several of the recent controversies around the issue of standards in public life—will inevitably come before the courts, risking in turn dragging judges into matters of acute political controversy involving fundamentally political judgments. Lest the scenario be thought far-fetched, such challenges have already been mounted in Canada by dismissed ministers by way of action for tort.[27] In the recent UK context, it would not have been difficult to imagine dissatisfied ministers such as Dominic Raab doing the same after being ousted by a process that they and their defenders viewed as unfair.

Finally, codification of ministerial standards would not only be injurious to the United Kingdom's political constitution, but would render the standards regime less effective by displacing political accountability. Personal ethical conduct is but one of the many facets of ministerial accountability: a minister must not only ensure that his or her conduct is beyond reproach, but has responsibilities for the performance of the department, the conduct of its civil servants, and so on.

But as Professor Gordon has noted, the CSPL's report, through its emphasis on the first dimension at the expense of the systemic- and performance- related dimensions (notably by transforming the Ministerial Code into a purely ethical standards-based code), risks "creating] a hierarchy of accountabilities which diminishes concerns about governmental performance", in a context where "ministerial accountability for policy failures is already a second tier issue, and the majority of resignations which do occur in the context of individual responsibility are for bad individual conduct rather than being an inadequate minister".[28] An example he cites is the resignation of the then-Home Secretary Amber Rudd, who

26. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

27. Guergis v Novak et al, 2012 ONSC 4579 (CanLII), former minister Helena Guergis' claims against her dismissal were struck out by the court, link

28. UK Constitutional Law Association, *Mike Gordon: A Statutory Basis for the Ministerial Code – the Challenges*, 16th November 2021, link

resigned on a point of personal conduct (inadvertently misleading a select committee), which obscured the much more important question of the Home Office's conduct. In other words, personal probity is necessary, but not sufficient for a minister. By its implicit elevation of the former over the latter, the CSPL's proposals risk upsetting the balance between the two elements of the equation.

2. Changes to the Status and Role of the Ministerial Code and the Independent Adviser on Ministers' Interests

Introduction

One of the Committee's central recommendations is that the Independent Adviser on Ministers' Interests – duly placed on a statutory basis – should have the ability to initiate his or her own investigations and have the authority to declare a breach of the Ministerial Code. The Ministerial Code brings together various constitutional conventions and each Prime Minister's articulation of the standards that will be upheld by the Government they lead. As this chapter shows, the Committee's proposals will change the nature of the Ministerial Code and its place in our constitution. They may also lead to a range of unintended consequences that would undermine trust in the ethics system. Formalising the Code and transmuting its enforcement from a matter of convention and political dynamics into a pseudo-legal arrangement risks undermining ministerial accountability to Parliament.

The principles which should inform delegation of decision-making to "independent" officials must be given greater thought. The delegation of decision-making may be appropriate when an "independent" official is operating on the basis of a simple remit (such as an inflation target) or if an "independent" official is performing a highly technical function (such as the regulation of financial services or the regulation of Civil Service recruitment competitions). Under those circumstances, it is reasonable for the Executive to be held to account for the framework they have established and for "independent" officials to be held to account for their success in meeting their remit. This does not apply to the proposed changes to the Independent Adviser on Ministers' Interests, who would operate according to a multiplicity of objectives, many of which are highly contested politically.

The Context: The Ministerial Code and the Independent Adviser on Ministers' Interests

The History of the Ministerial Code and the Independent Adviser on Ministers' Interests

- The Ministerial Code sets out the standards of conduct expected of ministers and how they discharge their duties. It has become customary for a revised Code to be published at the beginning of a new government.
- Whilst a form of the code has existed since World War Two, it was first published in 1992 as *Questions of Procedure for Ministers* and later renamed *The Ministerial Code* in 1997.
- In 2006, then Prime Minister Tony Blair appointed Sir John Bourn, then Comptroller and Auditor General as the first Independent Adviser on Ministers' Interests.
- At present, the Prime Minister can decide how and whether to investigate an alleged breach of the ministerial code. In November 2020 the then-adviser, Sir Alex Allan, resigned his post after the prime minister disagreed with his finding that the home secretary, Priti Patel, had broken the code.
- In April 2021 the Prime Minister appointed Lord Geidt, the former private secretary to the Queen, as the new Independent Adviser on Ministers' Interests. In doing so, he updated the terms of reference for the incoming adviser. Lord Geidt resigned in 2022 and was replaced by Sir Laurie Magnus, Bt.

At present, the Independent Adviser on Ministers' Interests is not able to initiate their own investigations into alleged breaches of the Ministerial Code. Instead, as the current Ministerial Code makes clear, "if there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary, feels that it warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the Independent Adviser on Ministers' Interests."[29]

Following the resignation of Sir Alex Allan, the terms of reference for the Independent Adviser on Ministers' Interests were updated. First, the Independent Adviser now has the authority to advise the Prime Minister on whether an investigation should be undertaken. Second, although over time the expectation had developed that all breaches of the Ministerial Code must lead to resignation, Prime Minister Boris Johnson accepted, following recommendations by CSPL, that automatic resignation is "disproportionate". He, instead, stated that the Independent Adviser should have "a specific role in providing recommendations about the appropriate sanctions in the circumstances where it is determined that a Minister has failed to adhere to the standards set out in the ministerial code".[30] Further changes have since been made, including to the resources available to the Independent Adviser.[31]

29. Cabinet Office, *Ministerial Code, Last updated 23 August 2019*, link
30. 10 Downing Street, *Letter from the Prime Minister to Lord Evans*, 28 April 2021, link
31. Lord Geidt, *Annual Report of the Independent Adviser on Ministers' Interests*: May 2022, 31st May 2022, link

Investigation into the events surrounding the refurbishment of the Downing Street flat

- On appointment as Independent Adviser on Ministers' Interests, Lord Geidt agreed that he would ascertain the facts surrounding the refurbishment of the Downing Street flat and would advise the Prime Minister on any further registration of interests that may be needed.
- Lord Geidt concluded that whilst an interest arose from the Prime Minister's capacity as a Minister of the Crown, "no conflict (or reasonably perceived conflict) arises as a result of these interests."[32]
- On Thursday 9 December, the Conservative Party was fined £17,800 by the Electoral Commission after failing to accurately report a donation and keep a proper accounting record in relation to transactions relating to works at 11 Downing Street.[33]
- The Electoral Commission's investigation revealed the existence of WhatsApp messages between the Prime Minister and Lord Brownlow of Shurlock Row on 29 November 2020. These messages had not been disclosed to Lord Geidt, the Independent Adviser on Ministers' Interests, during an earlier investigation that he had undertaken into the refurbishment of the Downing Street flat.
- Upon examination of the exchange, Lord Geidt reopened his investigation and concluded that the revelation of the exchange did not change "the fundamental assessment that no conflict (or reasonably perceived conflict) arose as a result of the interests created by the payment". However, Lord Geidt did state that "a number of my original conclusions may have required further examination or qualification had the Missing Exchange been known to me".[34]

Proposed Changes to The Ministerial Code and the Independent Adviser on Ministers' Interests

The Committee on Standards in Public Life has made a number of recommendations in relation to the Ministerial Code and the Independent Adviser on Ministers' Interests. As noted above, the Committee believes that the Adviser should have a basis in primary legislation. Other proposed changes include:

- The Ministerial Code should be reconstituted solely as a code of conduct on ethical standards.
- A requirement for the Prime Minister to issue the Ministerial Code should be enshrined in primary legislation.
- The Independent Adviser should be consulted in any process of revision to the Ministerial Code.
- The Ministerial Code should detail a range of sanctions the Prime Minister may issue, including, but not limited to, apologies, fines, and asking for a minister's resignation.
- The Independent Adviser should be appointed through an enhanced version of the current process for significant public appointments.

32. Cabinet Office, *Annual Report By The Independent Adviser On Ministers' Interests*, May 2021, link
33. Electoral Commission, *Conservative Party fined for inaccurate donation report*, 9 December 2021, link
34. Independent Adviser on Ministers' Interests The Rt Hon Lord Geidt, *Refurbishment Works At 11 Downing Street*, 23 December 2021, link

- The Independent Adviser should be able to initiate investigations into breaches of the Ministerial Code.
- The Independent Adviser should have the authority to determine breaches of the Ministerial Code.
- The Independent Adviser's findings should be published no more than eight weeks after a report has been submitted to the Prime Minister.

Following the publication of the CSPL's report, the Labour Party has outlined plans to establish an Integrity and Ethics Commission. As Angela Rayner MP, the Shadow Chancellor of the Duchy of Lancaster, Shadow Minister for the Cabinet Office, Shadow Secretary of State for the Future of Work, Shadow First Secretary of State, Deputy Leader of the Opposition and Deputy Leader of the Labour Party made clear:

> *The Independent Integrity and Ethics Commission will have the power to open investigations into Ministers' conduct… without the approval of the Prime Minister.*[35]

She also made it clear that a future Labour Government would "put the Independent Commission on a statutory footing enshrined in legislation".[36] Furthermore, Labour's Commission on the UK's Future, chaired by former Prime Minister Rt Hon Gordon Brown, has stated that:

> *Instead of the impossible position of the Prime Ministers' advisor, an Independent Integrity and Ethics Commission should take on the role of investigating alleged breaches of the code - as already advocated by the Labour Party. It should be able to do so whether the Prime Minister of the day agrees or not, and the Cabinet Secretary and other permanent civil servants who work for the government should be under a legal obligation to cooperate with it.*[37]

These are proposals for far-reaching change. The CSPL itself has been critical of these changes, saying:

> *The concentration of such power to a body without an elected mandate, and without the checks, balances and accountabilities of elected politicians, seems disproportionate and does not sit well in our democratic system…. Each code of conduct exists for a specific purpose, serving a role or process where potential conflicts of interest pose a significant risk. These codes are specific to their context and cannot be easily merged or amalgamated, so a single commission would still have to operate multiple codes, potentially creating as much confusion as it may solve.*[38]

35. Labour Party, *Angela Rayner's speech setting out Labour's plans to clean up politics*, Monday 29 November 2021, link
36. Labour Party, *Angela Rayner's speech setting out Labour's plans to clean up politics*, Monday 29 November 2021, link
37. Labour Party, *New Britain: Renewing our Democracy and Rebuilding our Economy, Report of the Commission on the UK's Future*, 5 December 2022, link
38. CSPL, Standards Matter 2, November 2021, para 2.46 – 2.47, link

Limitations to the CSPL's proposed changes to the role of the Independent Adviser on Ministers' Interests

The Committee's proposals may have a number of potentially adverse unintended consequences. First, if the next Prime Minister were to give the Independent Adviser initiative powers, he would be abrogating one of his key responsibilities as Prime Minister: the responsibility to manage and to be politically accountable for the conduct and effectiveness of his ministerial team. As the former Prime Minister noted in recent correspondence with Lord Evans:

> *The constitutional position of the Prime Minister, as having sole responsibility for the overall organisation of the Executive and recommending the appointment of Ministers, means that I cannot and would not wish to abrogate the ultimate responsibility for deciding on an investigation into allegations concerning Ministerial conduct. That vital responsibility is quite properly mine alone and, as an elected politician, one for which I am ultimately responsible to the electorate.*[39]

The Prime Minister should be subject to the political process in their discipline of ministers. Parliament can – and should – demand an explanation about allegations relating to the conduct of ministers. If dissatisfied, it can also, as the Paterson affair shows, bring pressure to bear in a suitably forceful and effective fashion. Although Paterson resigned, had he not done so his 30 day suspension would have triggered recall provisions under the Recall of MPs Act 2015, demonstrating that there is an effective democratic mechanism to challenge MPs. The subsequent result of the North Shropshire by-election, in which the Conservatives lost one of their safest seats to the Liberal Democrats, shows the power of the political process and the crucial role of the electorate in disciplining political conduct. Likewise, ministers should not be able to deflect criticism by relying on a third party. It is perfectly reasonable for the Opposition or other parliamentarians to continue to object to a minister's behaviour, or the Prime Minister's actions in relation to that minister, even if the Independent Adviser has given them a clean bill of health. Yet, turning the Independent Adviser into the *de facto* sole political adjudicator of ministerial behaviour will necessarily inhibit legitimate political criticism of ministerial conduct.

Second, if the Independent Adviser is given initiative powers, it would transform the role into a highly political one. Under the Committee's proposals an unelected adviser would have the power to decide to investigate a Cabinet Minister and to advise a sanction against them. Even though the Prime Minister may formally retain the power to determine whether or not to accept an adviser's proposals, in practice the decision of the Independent Adviser is likely to be binding, as any decision to overrule the Independent Adviser is likely to provoke significant political controversy by virtue of the air of authority vested in the office. The CSPL proposals acknowledge that "a situation where any independent regulator

39. 10 Downing Street, *Letter from the Prime Minister to Lord Evans*, 28 April 2021, link

of the Ministerial Code would effectively have the power to fire a minister would be unconstitutional",[40] but it is not clear how such a situation could be avoided in tandem with the overhaul of the Independent Adviser's role.

Third, now that the Ministerial Code is explicitly subject to a system of graduated sanctions, the bar for investigation would be much lower. As noted above, the Government has agreed that resignation should not be the only sanction for a breach of the Ministerial Code. However, the consequence would be that an Independent Adviser whose role had been enshrined in statute might well feel that there was an inherent obligation on them to investigate every minor complaint that might plausibly require an apology. Giving the Independent Adviser the initiative in those circumstances risks giving them an impression of their role as one of providing a service to complainants, rather than as assisting the Prime Minister in discharging what must remain a Prime Ministerial political obligation to ensure that ministers adhere to proper standards. Certainly, the designation "adviser" would no longer be appropriate.

The Committee's proposal would appear to turn an Adviser into a regulator of one of the most fundamentally politically processes in the constitution – the appointment and dismissal of Ministers of the Crown. Enshrining the Adviser's role in statute would also clearly expose a decision by the Adviser not to investigate an alleged breach of the Ministerial Code to judicial review. A further risk is that repeated minor investigations might create an entirely false impression of a governance system riddled with unethical behaviour or, more seriously, that it might desensitise public opinion to the significance of the need for adherence to the fundamental principles. Far from improving standards in public life and public trust in the political system, the proposals risk achieving the exact opposite.

Recommended Sanctions Regime

The Committee on Standards in Public Life recommended to the Prime Minister in April 2021 that the Ministerial Code should be subject to graduated sanctions, as the prior expectation that any breach of the code should always lead to a resignation was disproportionate.

In their latest report, they outlined what a graduated sanctions regime might look like:

> Inadvertent or minor breaches may only require remedial action, such as a correction of the record or a resolution of a potential conflict of interest (for example, the returning of a gift or the delegation of a decision to another minister). Minor breaches, where a minister has made an error of judgement, should also be rectified with a written apology.
>
> More significant or serious breaches, such as cases where ministers have allowed a substantial conflict of interest to arise, should necessitate more severe sanction. In some cases, an apology by means of a personal statement to Parliament may suffice. In others, ministers should be fined a proportion of their ministerial salary. Resignation remains the appropriate sanction for the most serious breaches of the Ministerial Code.[41]

40. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 56-57
41. Committee on Standards in Public Life, *Upholding Standards in Public Life*, 1 November 2021, link, pp. 56 (3.25)

Fourth, the CSPL's proposals may create tensions that would undermine the independence of the Independent Adviser, not enhance them. The Committee's proposal would combine in one person three separate roles: the role of initiator of investigations, the role of investigator and the role of adviser on sanctions. There are good reasons why these separate functions are kept in separate hands in many other areas of legally regulated activity. It will be difficult for a regulator in a legally formalised system to avoid at least the appearance that their decisions on the outcome of an investigation might have been influenced by the need to vindicate the decision to investigate in the first place.

When the decision whether to look into an alleged breach of the Ministerial Code is separate from the investigation of that complaint itself, an independent adviser is able to look at the matter without being under any pressure to justify the political damage that will inevitably have been done to an individual by the decision to launch the investigation. The apparent conflicts are exacerbated by the proposal that the Adviser should also be given a statutory role in the formulation of the code it will be their job to enforce.

Fifth, giving the Independent Adviser the power to initiate their own investigations into the Ministerial Code risks creating an avalanche of vexatious complaints. If one takes an issue to court, the courts can award costs against you, meaning there is a genuine price to doing so with any complaints that are not well-founded. This creates a guard against vexatious complaints. But in the standards world there is no cost to making complaints against one's political opponents – indeed, due to the way the media frequently report matters, the opponent may be, de facto, considered "guilty until proved innocent".[42] There is, however, a wider negative cost, with repeated unfounded complaints serving to undermine confidence in standards in public life. Rather than strengthening integrity in public life, the net effect of statutory regimes is actually to lower it.

The Standards Board for England (which was abolished by the Coalition Government) provides an extreme example of how this can go wrong. The Standards Board for England was a highly cumbersome and expensive body set up to monitor the ethics of elected councillors in England. In practice, however, councillors with political differences frequently referred one another to the Board in the rough and tumble of local politics as a tactic to undermine their rivals. It was also used to target whistleblowers and to censor legitimate political speech by councillors.[43] The Adjudication Panel for England, a similar body, was beset by similar problems: in the words of Lord Rees-Mogg, it was used to "inflate trivial disputes of the late evening into matters of state".[44]

It is salutary to consider the case of Ken Livingstone to demonstrate the flaws in such statutory system. After Livingstone made remarks that compared a Jewish journalist to a Nazi concentration camp guard, the Board of Deputies of British Jews made a complaint to the Standards Board for England. The Standards Board subsequently referred the matter to the Adjudication Panel for England, which suspended Livingstone for

42. Under the Commons Code of Conduct, if a Parliamentary Standards Commissioner opens a case, MPs are banned from commenting to the media about it, meaning that they cannot rebut it publicly.

43. UK Parliament, 16th January 2023, link

44. The Times, *Livingstone wins High Court challenge over Nazi outburst*, 6th October 2006, link

one month on full pay. In a subsequent appeal to the High Court, the Judge ruled that as Livingstone was not acting in his official capacity when he had made the remarks in question, he had not broken the Code of Conduct; the suspension was quashed. This is despite the fact that the judge also observed that his behaviour had clearly not been appropriate.[45] The whole affair cost the taxpayer almost £200,000[46] – and demonstrates both the cost and weakness of such systems, turning as they do on points of procedure. Far more satisfactory would have been to simply allow the voters of London to take such behaviour into account at the ballot box.

The revamped Independent Adviser, operating with limited accountability (by design) and tasked with enforcing principles necessarily framed at a high level of generality, risks bringing the entire political system into disrepute. The repeated attempts by the Labour Party to get the CSPL (which cannot investigate individual cases) to reopen bullying allegations against the Home Secretary show that the holder of such an office is likely to come under constant calls from opposition MPs (of whichever party) to initiate investigations.[47]

It is not hard to imagine situations in which the Independent Adviser might come under considerable political pressure to start an investigation, coupled with the fact that conferring a statutory role on them to initiate investigations is likely to result in the assumption that there is a legal duty to exercise their discretion to do so in circumstances the law will define in due course. This could too easily undermine public trust in the standards system and in the Adviser, either because the Adviser refused to investigate allegations about potential breaches or from the Adviser's perceived duty to collaborate in what might appear to be blatantly no more than a campaign of political harassment.

At present, it is the Prime Minister – a political figure accountable to Parliament and the electorate – who would come under criticism in such circumstances. It is right that the Prime Minister – and not officials – is the focus of such criticisms. It is undesirable for a regulator to take on the ultimate responsibility of the Prime Minister for securing compliance with standards or to be able to make rulings. The more authoritative and independent the Adviser, the more they acquire the "final word" in disputes that would be likely, very often, to contain elements on which there will be different views dependent on different political perspectives.

Sixth, whilst the CSPL is clear about how the Adviser should be appointed, it is less clear about how they might be removed before the end of their five-year term. The Committee recommends appointments through an enhanced version of the current process for significant public appointments. Whilst the Committee emphasises the need for the Adviser to be independent, it does not explain how the Nolan principle of accountability is to be achieved in the Adviser's case in the light of their independence. Clearly, there may be situations in which it is inappropriate for an adviser to continue. What is to happen if confidence in the judgement or the impartiality of the Adviser is lost by the Prime Minister, Parliament or by others expected to accept the Adviser's decisions? The

45. Livingstone v Adjudication Panel for England [2006] EWHC 2533 (Admin); [2006] H.R.L.R. 45, link
46. https://pressgazette.co.uk/news/ken-livingstone-victory-in-standard-nazi-row-cost-200k/
47. *"Lord Evans' correspondence with Anneliese Dodds MP"*, *Committee for Standards in Public Life*, 6 August 2021, link

need to answer these questions becomes an essential part of developing a legislative scheme, once it is decided to put the Adviser's position on a statutory basis.

Seventh, it is unclear whether the Committee envisages that the Independent Adviser on Ministers' Interests, or the staff who will support the Adviser, will have a role in providing pre-clearance advice. At present, the Proprietary and Ethics Team at the Cabinet Office support the Prime Minister and Cabinet Secretary when they need to take decisions about complaints or other concerns about an individual's behaviour under the Ministerial or Civil Service codes. Another large part of their role, however, is to provide advice in advance about what would be appropriate and to pre-clear ministers and officials to pursue certain courses of action. It is unclear from the CSPL's recommendations whether the Independent Adviser will have any comparable role or how that function will be accommodated in the statutory regulatory regime that they envisage.

It is a common feature of regulatory systems that the more detailed and formal the rules and enforcement mechanisms, the more the scope for pre-clearance and consultation on the application of fundamental principles is displaced in favour of an emphasis on strict compliance with the letter of the rules and the retrospective determination of breaches, and on a misplaced assumption that that is sufficient. The Committee appears to have given insufficient consideration to how this aspect of the regulatory regime, (viz. the day-to-day advice and guidance within government about what is required by the Code and more generally by the principles) should work in practice.

Eighth, this aspect of the matter may create a potential tension between the Proprietary and Ethics Team and the Independent Adviser. As noted above, the Prime Minister can currently ask either the Cabinet Secretary or the Independent Adviser to investigate allegations about code breaches. What would happen if the Prime Minister instructed the Cabinet Secretary to investigate concerns about a breach of the Ministerial Code and the Independent Adviser, having initiative powers, also decided, having regard to their statutory role, that it was their duty to investigate? Does the CSPL envisage that the Independent Adviser should have an exclusive jurisdiction?

Furthermore, what is envisaged would happen if the Proprietary and Ethics Team in the Cabinet Office had pre-cleared a course of action that was later found to be a breach of the Ministerial Code by the Independent Adviser? To what extent would a pre-clearance decision by someone other than the Adviser, or the failure to seek one, become part of the Adviser's decision-making process when deciding the outcome of an investigation into an alleged breach of the code? Would this have the practical effect that those who provide pre-clearance advice would in practice feel themselves to have ceased to be accountable to Ministers and instead become accountable to the Adviser?

Finally, the CSPL also recommends that the Ministerial Code be confined to matters relating questions involving ethical standards and that procedural

matters should be set out separately. That may well be helpful. However, it is not straight-forward, given that many of the procedural provisions may be considered the detail of how the Prime Minister intends the Nolan principle of accountability to be implemented in practice. And as has been discussed in the previous section, reducing the Ministerial Code into a code of conduct alone would elevate standards-related accountability over competence and delivery-based accountability, which are already being overshadowed in the current system.

3. Political Accountability and the Political Constitution: Case Studies

Introduction

The previous two sections have focused on the substantial problems which are associated with the CSPL's proposals for reform. The CSPL's proposals, as well as those emanating from the Labour Party and other bodies, are largely premised on the assumption that there is something wrong with the current standards enforcement regime, that it is not doing what it should do, namely uphold high ethical standards in public life and to punish those who flout them. Yet, while there have been many high-profile controversies involving the enforcement of standards in recent years, few commentators have questioned whether this premise is correct. In particular, within the current debate, there seems be an assumption that controversy should be equated with dysfunction (though, as previously argued, the CSPL's proposed system would not avoid public controversy, and in fact risks creating new areas of contestation). That premise and this assumption should both be rejected.

A number of high-profile cases in recent years demonstrate the system is working effectively to hold politicians accountable. For example, there have been a number of recent by-elections triggered by the standards process including in Rutherglen and Hamilton West, Tamworth and the forthcoming by-election in Wellingborough:

- Following a Committee on Standards investigation into Chris Pincher MP, and a consequent unsuccessful appeal[48] by Chris Pincher to the Independent Expert Panel, Chris Pincher resigned from his seat, triggering a by-election in Tamworth.
- Earlier this year the Standards Committee recommended that the sitting SNP MP, Margaret Ferrier be suspended from the House for 30 days, thus triggering a recall petition and subsequent by-election, which was held on the 5th October 2023. Margaret Ferrier did not stand, and the Labour party won the seat.[49]
- In October of this year, Peter Bone MP was investigated by the Parliamentary Commissioner for Standards, the investigation upheld a series of bullying allegations and one of sexual misconduct. Peter Bone then appealed to the Independent Expert Panel, which concluded he should be suspended for six weeks. This was approved by the House of Commons, triggering a recall petition and consequent soon-to-be-held by-election.[50]

48. UK Parliament Independent Expert Panel, *Appeal by Christopher Pincher MP*, 4th September 2023, link
49. House of Commons Research Briefings, *Recall Elections*, p.6-7, 20th December 2023, link
50. House of Commons Research Briefings, *Recall Elections*, p.7, 20th December 2023, link

There have also been controversies which have brought down politicians of even greater seniority – including — those involving Dominic Raab, and Boris Johnson and his No 10 staff.

Without taking a position in relation to the underlying merits of the events involved, this section will examine two recent controversies over ministerial standards—the first involving Dominic Raab, and the second Boris Johnson and his No 10 staff. It will argue that, far from demonstrating dysfunction or weakness, these two case studies illustrate the enduring strength and efficiency of the existing system, which largely relies on political enforcement. It will also consider the potential veto points that a codified norms enforcement regime would have created. That the two most senior ministers in the Government should have lost office so swiftly, in a parliamentary system where the governing party commands a large majority, speaks for itself.

Case study one: Dominic Raab

In November 2022, following complaints from civil servants about the behaviour of Rt Hon Dominic Raab MP, then Deputy Prime Minister and Lord Chancellor, the Prime Minister commissioned Adam Tolley KC to conduct a review into the allegations. Mr Raab subsequently told Sky News in February 2023 that he would resign if the review found that he had bullied civil servants.[51]

In April 2023, Mr Tolley released his report, in which he concluded that Raab's behaviour had crossed the line separating the abrasive from bullying, though he rejected a number of allegations as well. Under the existing framework, it was for the Prime Minister to decide whether Raab had breached the Ministerial Code. However, pursuant to his earlier promise, Mr Raab resigned on his own initiative after the report's release. In his letter of resignation and subsequently, he criticised the review, notably on the question of the appropriate threshold for what constitutes bullying. He also criticised media leaks during the inquiry. A number of commentators subsequently took the same view as well, viewing the actions of Mr Raab as those of a minister intent on upholding high standards within his department.[52]

The resignation of Mr Raab illustrates the way in which the enforcement of ministerial norms continues to function in the United Kingdom. The Prime Minister, the final decision-maker, had a range of options available to him and chose to commission an external inquiry, as the facts of the case were by no means clear—something acknowledged in the Tolley report. Raab made a promise—a political promise—to resign if any adverse finding was made against him, and made good on the promise when the report was published, even though there were legitimate concerns with the way the Trolley report was framed. Throughout the process, the normal means of political accountability—parliamentary and political contestation, media scrutiny, and public pressure—acted to police the process.

Had there been a statutory process of the sort envisaged by the CSPL's

51. Sky News, *Dominic Raab: Justice secretary vows to resign if bullying claims upheld*, 26th February 2023, link

52. The Spectator, Brendan O'Neill, *Is Dominic Raab really a 'bully'?*, 21st April 2023, link; The Telegraph, Allison Pearson, *If being demanding makes Dominic Raab a 'bully', our society is in trouble*, 7th February 2023, link

reforms, the sequence of events might well have been different. It is reasonable to suppose that, given the complaints, the Independent Adviser would have initiated an investigation along lines similar to the Tolley review. But whereas the decision to call the Tolley review, as well as the acceptance or otherwise of its conclusions, was entirely discretionary—the ultimate power to make a finding of breach of the Ministerial Code and to impose sanctions still rested entirely with the Prime Minister—the Independent Adviser's investigation would have had a statutory basis.

This would have made it much more vulnerable to judicial review, either from Raab or from the complainants, particularly over vexed and difficult questions such as the threshold at which conduct constitutes bullying. Given the existence of a graduated sanctions regime, if the Independent Adviser made a specific recommendation as to the appropriate sanction (which the Tolley review did not do), the recommendation could also have been the subject of litigation as well, especially given the rather equivocal nature of some of the findings against Raab.

Dominic Raab was clearly dissatisfied by the findings of the Tolley review; but under the existing system, both his recourse and his constraints were political rather than legal. He made his pledge to resign in the event of an adverse finding, and kept it, because of what are essentially extra-legal political and personal considerations, which are based on the traditional system of political accountability. He would also have been mindful of the political consequences of his choices, both in relation to his initial promise as well as the political cost that would have been imposed on the Prime Minister had he challenged Tolley's conclusions. Such considerations would have played out very differently had the Independent Adviser been the decision-maker, particularly since the possibility of judicial review would have been realistically available.

Case study two: Boris Johnson and the staff at No 10 Downing Street

The events which led to the resignation of Boris Johnson as Prime Minister and later as an MP, within three years of winning a decisive victory in the general elections of 2019, are well-known, such that a brief summary will suffice. In 2021 and 2022, newspapers reported that the staff at No 10 Downing Street held a number of social gatherings during the coronavirus lockdowns in England in 2020 and 2021, in violation of legal restrictions in force at the time. Police investigations followed, which resulted in fixed penalty notices being issued against a number of senior politicians, including Mr Johnson and then-Chancellor of the Exchequer Rishi Sunak, as well as No 10 staff, including political advisors and civil servants.

In addition to the Metropolitan Police inquiries, the-then Prime Minister commissioned a report on the events at No 10 from Sue Gray, Second Permanent Secretary at the Cabinet Office. The report documented numerous instances of law-breaking at Downing Street and was critical of the leadership of Downing Street. Gray's report later came under extensive

criticism, when it emerged that she had held talks with the Labour Party in order to depart the Civil Service and take up a senior position as Sir Keir Starmer's chief of staff. Another Cabinet Office inquiry later found that she had broken the Civil Service code in holding such talks with Labour.

Meanwhile, the Parliamentary Privileges Committee launched its own investigation into Mr Johnson's conduct and, the best part of a year after Mr Johnson's resignation as Prime Minister, eventually concluded that he had misled Parliament on numerous occasions in relation to Partygate. It recommended that Mr Johnson be suspended from the House of Commons for 90 days, which would have initiated a recall petition against him under the Recall of MPs Act 2015. Mr Johnson, however, chose to resign before the report was published. The report was later approved by the House of Commons 354 to 7, with a large number of abstentions, while allies of Mr Johnson attacked the report, pointing to remarks critical of Mr Johnson made by members of the Committee.

Discussions of the British constitutional set-up often lazily repeat Lord Hailsham's aphorism that the United Kingdom is an elective dictatorship where a Prime Minister with a majority in the House of Commons has almost unrestricted freedom of action.[53] But Mr Johnson's downfall, even though the Conservative Party commanded a 70-odd majority during most of Partygate, reflects the essentially dynamic and responsive nature of the British parliamentary system and of its traditional safeguards.

In the case of Partygate, they have included notably resignations (that of five special advisers and of Lord Wolfson of Tredegar KC, parliamentary under-secretary of state at the Ministry of Justice), disapproval by the electorate (the loss of a safe Conservative seat at a by-election with a swing of 34%, as well as an anti-Conservative swing in the 2022 local elections), constant public and media pressure, and public withdrawal of support from Mr Johnson by Conservative backbenchers, some of whom also submitted letters of no confidence against him. While none of these reactions was determinative in its own right, their cumulative effect was decisive.

How would Partygate have played out under a statutory regime? The CSPL report does not appear to propose that the Prime Minister's conduct should come under its purview, which is sensible since to do otherwise would be to intrude on the Sovereign's constitutional prerogative. But given the involvement of then then-Chancellor, under a statutory regime of the sort proposed by the CSPL, the Independent Adviser could have launched an investigation into the conduct of Mr Sunak on the Adviser's own initiative, which would necessarily have involved an examination of the Prime Minister's conduct, directly or indirectly, thus necessarily blurring the constitutional lines of accountability.

This, in turn, would have led to a situation whereby the Independent Adviser would be seen as deciding the fate of the Government, which is exactly the sort of situation the CSPL acknowledges would be unconstitutional. The Independent Adviser would therefore be dragged to the centre of the political contest, raising the spectre of a framing of the

53. "Elective dictatorship". *The Listener*: 496–500. 21 October 1976.

issue as that of an unelected bureaucrat versus a prime minister with a large democratic and parliamentary mandate. The fact that the appointment process, under the CSPL proposals, would be overhauled to reduce the degree of prime ministerial discretion, would have encouraged such a framing as well. By contrast, since the Prime Minister personally chose Sue Gray as investigator, it was much harder for him convincingly to adopt such a framing, since by choosing her he implicitly gave her conclusions his imprimatur.

Also noteworthy is the role of the Parliamentary Privileges Committee, which was concerned with Mr Johnson's status as MP. As its membership is drawn from serving politicians in the House of Commons, its members, notably chairman Harriet Harman, had previously made public remarks about Mr Johnson, which were used by some to argue that the Committee's findings were tainted by bias. Mr Johnson also retained leading counsel who challenged the Privileges Committee's procedures and definition of contempt under parliamentary practice.[54]

But the Committee's proceedings are immune from judicial review under the Bill of Rights, as acknowledged by Mr Johnson's legal advisers. This meant that the debate over its report was focused, in the main, on the substance of its findings instead of the procedure it followed. It is worth considering the fact that many of the recent controversies over the conduct of ministers and parliamentarians have involved extensive wrangles over issues of procedural fairness and the like, which are important but which can distract from the underlying issue and can certainly delay a speedy resolution of matters, particularly if vulnerable to litigation. Given the inherent vulnerability of a statutory process to judicial review, the UK could have been faced with the prospect of extensive litigation over the conclusions of the Independent Adviser, which could have easily been invoked as an argument against ministerial (and prime ministerial) resignations until appeals through the court system have been exhausted.

54. UK Government, *Joint Opinion of Lord Pannick QC and Jason Pobjoy to Rt Hon Boris Johnson MP*, 1st September 2022, link

Conclusion

The maintenance and enhancement of adherence to standards in public life are highly desirable objectives. However, some of the CSPL's specific recommendations give rise to serious constitutional questions and carry substantial risks of undermining effective political accountability (itself one of the Nolan principles). There are particular risks around the scope the recommendations provide for judicial intervention in the highly political matter of the appointment and dismissal of Ministers (including even the Prime Minister). There are other risks relating to the expansion of the functions of appointed regulators in ways that may not actually enhance their independence, and instead expose those who are given a statutory role as political regulators to a greater risk of legal challenge.

The essence of this paper's criticisms, however, boil down to what the relationship between elected politicians and unelected officials should be. It is to the public and the House of Commons that our elected politicians should be accountable, not unelected regulators. As recent events have demonstrated, that sort of political accountability is in practice a much more effective and powerful mechanism than the Committee seems to have assumed. It carries many fewer risks than the delegation of responsibility for maintaining high standards to those whose only authority derives from appointment.

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