**“Loans, Leaks and Lobbying: regulating Ministerial conduct:**

**do we need a better system?”**

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*This is an amended version of my remarks to the Administrative Law Bar Association on 11 May 2021*

***The Ministerial Code – and its limitations***

Most people seem to agree that we should expect high standards of probity from government Ministers. The Prime Minister must think so, because on taking office he issued a revised edition of the Ministerial Code with a foreword saying:

*“we must uphold the very highest standards of propriety … there must be no bullying and no harassment; no leaking; … no misuse of taxpayer money and no actual or perceived conflicts of interest”*.[[1]](#footnote-1)

The Ministerial Code contains provisions dealing with these things – standards of conduct in general, compliance with the law, accountability to Parliament, collective responsibility, security of government business, use of public resources, and avoidance of conflict between private interests and public responsibilities.

But the Ministerial Code is not law – although the First Division Association has been given permission to bring a judicial review challenging the Prime Minister’s failure to take action on the report into Priti Patel’s conduct by the then independent adviser on Ministerial standards, Sir Alex Allan[[2]](#footnote-2). So perhaps we will find that the Code is capable of having legal consequences in some circumstances. But it has no statutory force, unlike the Civil Service Code and the Special Advisers Code, which have a statutory basis in the Constitutional Reform and Governance Act 2010 and form part of the terms and conditions of service of civil servants and SpAds, respectively[[3]](#footnote-3). And as the Priti Patel case shows, decisions on the enforcement of the Ministerial Code are entirely a matter for the Prime Minister. The role of the independent adviser – which for some time was vacant following Alex Allan’s resignation, but has recently been filled by Lord Geidt – is indeed only advisory and essentially confidential in nature. I will consider later how the Ministerial Code might be strengthened.

What are the other rules governing Ministerial conduct? Perhaps unsurprisingly they are something of a mish-mash.

***The criminal law***

First, Ministers are of course bound by the ordinary criminal law, including for example the law on bribery or theft and the Official Secrets Acts.

One particular category of criminal law which might be relevant to the holding of Ministerial office is that relating to the conduct of elections and the funding of political parties. The relevant law is contained in the Political Parties, Elections and Referendums Act 2000 (PPERA). The Electoral Commission has the role of enforcing it. The 2000 Act creates a number of criminal offences, including that of evading the restrictions on donations to political parties[[4]](#footnote-4), failure to keep proper accounting records[[5]](#footnote-5) and so on. The Commission has power to impose civil sanctions for certain offences[[6]](#footnote-6). Where civil sanctions are not available, or the Commission thinks they may not be sufficient, they will liaise and share information with the relevant police force or prosecuting authority so that it can consider investigating or prosecuting[[7]](#footnote-7). The Electoral Commission has said it has reasonable grounds to suspect that an offence or offences may have been committed in relation to the funding of works on the Downing Street flat and has opened an investigation[[8]](#footnote-8).

There is no specific legal rule which stipulates that a Minister must cease to hold office when, for example, he or she comes under investigation or is arrested for, or charged with, an offence. A Minister is entitled to the presumption of innocence like anyone else, and the judgment about whether and when it becomes impossible for him or her to continue in office will ultimately be a personal and political one for the Minister, and of course for the Prime Minister.

Indeed there is no automatic legal rule which bars someone from being a Minister even if they are *convicted* of a criminal offence. (As noted below there are laws relating to MPs, but not Ministers as such.) In practice it is perhaps unthinkable that a Minister who had been convicted of a criminal offence could remain in office, and it is difficult to imagine a Minister holding down the job from prison. But that is strictly a matter of politics, practice and convention (with a small “c”), rather than law.

This reflects the wider point that there are in general no *legal* rules setting out the eligibility criteria for being a Minister, or the grounds on which someone might be disqualified from holding that office.[[9]](#footnote-9) For most jobs, including public appointments, there are detailed criteria which must be met for appointment, and grounds for removal. Not so for Ministerial appointments (and dismissals), which are simply decisions for the Prime Minister. As the Cabinet Manual puts it: *“Ministers hold office as long as they have the confidence of the Prime Minister”*[[10]](#footnote-10). The Manual has nothing to say about the reasons why a Minister might cease to have the PM’s confidence – whether criminality or any other form of misconduct.

And if the conduct in question were to be that of the Prime Minister him/herself – well again we are in the realms of politics and convention, not law. The Cabinet Manual simply says: *“Prime Ministers hold office unless and until they resign”*[[11]](#footnote-11). While there is reference to the Sovereign’s “reserve powers” to dismiss a Prime Minister, it is surely inconceivable that the Sovereign could be put in the position of having to decide whether to dismiss a Prime Minister for misconduct. One assumes that by that stage the Prime Minister’s conscience, or the forces of party or Parliament, would kick in. (But who knows?)

***Rules applying to MPs and Peers***

There *are* legal rules applying to Members of both Houses of Parliament. Under the Representation of the People Act 1981, any MP who is sentenced to more than a year’s imprisonment for a criminal offence is automatically disqualified and their seat is vacated.[[12]](#footnote-12)

Historically there was no equivalent power to exclude errant peers from the House of Lords. But the House of Lords (Expulsion and Suspension) Act 2015 provided for the House of Lords to make provision in its standing orders for the expulsion or suspension of members, and the House has adopted such standing orders.

In addition, Parliament has its own internal rules governing Members’ conduct. In the case of the House of Commons, these are contained in the Code of Conduct for Members of Parliament[[13]](#footnote-13). This is supplemented by more detailed guidance, including rules on the registration of interests. The Code is overseen by the Parliamentary Commissioner for Standards (currently Kathryn Stone OBE), who can investigate complaints about alleged breaches. If the Commissioner finds there has a breach, she reports the matter to the Committee on Standards, and if the Committee agrees it can recommend a range of sanctions, including an apology, suspension (with loss of pay)[[14]](#footnote-14), and even expulsion. The House itself takes the final decision.

Margaret Hodge MP has submitted a complaint to the Parliamentary Commissioner about the Downing Street flat but the Commissioner has not (at the date of writing) confirmed whether she has opened investigation about that. However, apparently she is investigating whether Mr Johnson broke the rules over a trip to Mustique with his fiancée Carrie Symonds.

There are similar (but inevitably different) arrangements governing the conduct and registration of interests of members of the House of Lords, overseen by the House of Lords Commissioner for Standards and the Conduct Committee.

***Parliamentary accountability***

Ministers’ accountability to Parliament, in theory one of the cornerstones of the constitution, is in practice a weak, if not illusory, constraint on individual conduct. If it were ever true that lying to (or “deliberately misleading”) Parliament was an automatic ground for resignation, today that is a fanciful notion. Select committees do valuable work, but they are not courts and lack the forensic tools and procedures necessary to settle disputes of fact. That can be said even of the Committee on Standards, but at least there (as noted) there is an independent investigatory element in the form of the Parliamentary Commissioner for Standards, with her own resources[[15]](#footnote-15).

But more generally, aside from the specific remit of the Parliamentary Commissioner, if Ministers persist in denying or justifying wrongdoing even if the face of clear contrary facts, there is in practice nothing that Parliament as a whole or select committees can do about it. That is of course particularly true when the government has a large majority in the House of Commons and an in-build majority in its committees.

***Other forms of oversight***

Other forms of oversight include the following:

* The Independent Parliamentary Standards Authority (IPSA), a statutory body established by the Parliamentary Standards Act 2009, has the role of regulating MPs’ staffing and business costs, and determining their pay and pension arrangements.
* The Advisory Committee on Business Appointments (ACOBA)[[16]](#footnote-16) is a non-statutory body with the role of advising on the appointments of *former* Ministers and senior officials. It has no powers of compulsion.
* The Independent Committee on Standards in Public Life, chaired by Lord Evans[[17]](#footnote-17), is a non-statutory body whose role is to advise the Prime Minister on “arrangements for upholding ethical standards of conduct across public life in England”. It is not a regulator and cannot investigate individual complaints. Lord Evans has corresponded with the Prime Minister about the Ministerial Code and the powers of the independent adviser on the Code – expressing concerns that the new adviser, Lord Geidt will not have the power to initiate investigations[[18]](#footnote-18).

***Some conclusions***

So we see there is a whole range of rules governing Ministerial conduct, ranging from the criminal law, to parliamentary rules, to various advisory bodies and the non-statutory Ministerial Code. Recent events have raised the question whether this system is strong enough to command public confidence, and whether it achieves the aim set out in the Prime Minister’s foreword to the Ministerial Code of “upholding the very highest standards of propriety” and ensuring that the “precious principles of public life … [are] … honoured at all times”.

My own view is that the current arrangements are not adequate. They do not command public confidence and are too easy to side-step or ignore. The law itself is a far from complete solution: as noted the Ministerial Code has no legal status, and many categories of misconduct – lying to Parliament, bullying and harassment – will generally not be caught by the criminal law or will in practice be difficult to tackle by that route. The other constraints on conduct are essentially personal or political – personal standards of moral probity; respect for the Code and for convention; personal embarrassment; criticism by Parliament; Prime Ministerial censure or sanction, including ultimately dismissal from Ministerial office.

But those constraints are not working. It is time to look at putting the Ministerial Code on to a statutory footing, like the Civil Service and Special Adviser Codes. A statutory code could include tighter rules on conflicts of interests, declaration of donations, use of public assets, and leaking. It should be overseen by an independent and properly resourced commissioner, with legal powers to initiate investigations, call for evidence, require the cooperation of witnesses, and publish findings and recommendations. I would stop short of giving such a commissioner power to *require* the dismissal of errant Ministers. Decisions on the appointment and removal of Ministers should, constitutionally and democratically, ultimately remain with the Prime Minister. However, under a statutory scheme the independent commissioner would have the power publicly to *recommend* dismissal, and the Prime Minister would be required to publish an explanation for any departure from the commissioner’s recommendations. Such measures would introduce far greater independence, weight and transparency into the arrangements.

The Advisory Committee on Business Appointments needs an overhaul too. If we care (as we should) about preventing conflicts of interest or improper influence, let alone outright corruption, on the part of serving and former Ministers and officials, we need an oversight system with the necessary resources and legal tools. That would include the ability to reach judgments which are independent, reasoned and proportionate to the risk in any given case, and to enforce them. The system should be capable of making consistent decisions as between serving and former Ministers/officials in order to close the “Crothers loophole” (where apparently a private sector role approved for a serving civil servant was considered to be out of scope for ACOBA when he left).

Plainly none of this – in particularly legislation – can happen without political will and leadership. At present there is not much sign of that. Perhaps it will take some combination of a new scandal, and really serious parliamentary, public and media pressure, for that to change.

JGJ

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1. [Microsoft Word - August 2019 MINISTERIAL CODE - FINAL FORMATTED 2.docx (publishing.service.gov.uk)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf) [↑](#footnote-ref-1)
2. [FDA welcomes decision to grant a full hearing for Ministerial Code judicial review | The FDA Trade Union](https://www.fda.org.uk/home/Newsandmedia/News/FDA-welcomes-decision-to-grant-a-full-hearing-for-Ministerial-Code-judicial-review.aspx). The argument is that the Prime Minister erred in law by applying the wrong definition of “bullying”. [↑](#footnote-ref-2)
3. See sections 5 and 8. [↑](#footnote-ref-3)
4. PPERA section 61. [↑](#footnote-ref-4)
5. PPERA section 47. [↑](#footnote-ref-5)
6. PPERA, section 147 and Schedule 19C. [↑](#footnote-ref-6)
7. Electoral Commission Enforcement Policy, paragraph 6.14. [April-2016-Enforcement-Policy.pdf (electoralcommission.org.uk)](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/April-2016-Enforcement-Policy.pdf) [↑](#footnote-ref-7)
8. [Electoral Commission to investigate Boris Johnson's Downing Street flat renovations - BBC News](https://www.bbc.co.uk/news/uk-politics-56915307) [↑](#footnote-ref-8)
9. As an aside, there is not even any legal requirement for the Law Officers to have particular legal qualifications or experience. (By contrast, the Director of Public Prosecutions, who is superintended by the Attorney General, must hold a ten year legal qualification: section 2(2) of the Prosecution of Offences Act 1985.) The Lord Chancellor, exceptionally, must be “qualified by experience” to hold that office: section 2 of the Constitutional Reform Act 2005, although in deciding whether that test is met the Prime Minister can take into account any experience he considers relevant (section 2(2)(e)). [↑](#footnote-ref-9)
10. Cabinet Manual, 1st edition October 2011, Introduction, paragraph 15. [The Cabinet Manual (publishing.service.gov.uk)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf) [↑](#footnote-ref-10)
11. Paragraph 2.8. [↑](#footnote-ref-11)
12. The Recall of MPs Act 2015 provides for the recall of MPs in certain circumstances, including the imposition of a custodial sentence of *a year or less*. From these provisions and the discussion above, it follows that a Minister who is an MP could be convicted of a criminal offence and, if sentenced to imprisonment for a year or less and not recalled, remain a sitting MP – and would not thereby *automatically* be disqualified from remaining a Minister. [↑](#footnote-ref-12)
13. [House of Commons Code of Conduct and Guide to Rules - UK Parliament](https://www.parliament.uk/business/publications/commons/hoc-code-of-conduct/) [↑](#footnote-ref-13)
14. Suspension for 10 days or more triggers the recall procedure under the Recall of MPs Act 2015. [↑](#footnote-ref-14)
15. In 2019-20 the cost of running the Commissioner’s office was £709,990 according to its annual report. [↑](#footnote-ref-15)
16. [Advisory Committee on Business Appointments - GOV.UK (www.gov.uk)](https://www.gov.uk/government/organisations/advisory-committee-on-business-appointments) [↑](#footnote-ref-16)
17. [Committee on Standards in Public Life - GOV.UK (www.gov.uk)](https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life) [↑](#footnote-ref-17)
18. Correspondence between the Prime Minister and Lord Evans on the Independent Adviser on Ministers' Interests - GOV.UK (www.gov.uk) [↑](#footnote-ref-18)