14. Combating Scandal, Codes of Practice and the Implementation of Ethical Standards in Public Life in the United Kingdom

by *Peter Leyland*

1. Introduction

In recent times the governments' of John Major, Tony Blair and Gordon Brown have all been rocked by scandal concerning the conduct of MPs. The torrent of revelations over the widespread abuse of expense claims which erupted in May 2009 has, once again, highlighted not only the role of the press and broadcasting media in exposing abuse, but the strength of public condemnation and the degree of disillusionment such conduct causes. In part, this essay seeks to demonstrate that transparency in public life allied to a free press are the most potent weapons in controlling the abuses of power by politicians, civil servants and entrepreneurial interests. There has been a direct correlation between trends towards greater openness culminating in the enactment of the Freedom of Information Act 2000 and the changes in practice under review here. A principle concern, however, will be to consider how the rules that apply to MPs, ministers, and officials at central and local government level have been drafted and revised in response to increased transparency and in reaction to a succession of scandals. The first port of call is to review the position regarding MPs and Parliament. Under the Conservatives the determination to address the issue of sleaze[1] resulted in significant change to institutional practice and the introduction of a Parliamentary Commissioner for Standards. Despite this important development attention has been drawn again to the dubious conduct of a substantial minority of MPs by the controversy over expenses. Turning next to the executive branch, the recommendations contained in the Scott Report which investigated another scandal at the heart of govern-

[1] This term was coined to convey the impression of dubious conduct by politicians, including taking cash for parliamentary questions and failing to declare conflicts of interest. See M. Parris *Great Parliamentary Scandals*, London, Robson Books, 1997 at p. 350 ff.

ment, the Matrix Churchill Affair, resulted in the revision of the code of practice which seeks to determine the conduct of ministers and civil servants. The implications of these codes will be assessed in terms of the respective constitutional accountability of ministers and civil servants under the doctrine of individual ministerial responsibility.[2] A related issue has been defining the constitutional and legal status of the increasing numbers of 'special advisors' appointed from outside the civil service by the Prime Minister and other senior Cabinet ministers. To rectify these problems a Civil Service Act has been proposed which would give legal force to current codes of practice and at the same time place legal limits on the role of any special advisors. Finally, we will see that recent local government legislation has extended Nolan Principles associated with parliamentary standards to the domain of local government.

2. The Committee on Standards in Public Life

The ancient privileges of Parliament mean that it has enjoyed the right to control not only its own proceedings but also its internal affairs, including matters of discipline, without the interference by the courts.[3] Although the House of Commons Committee of Privileges exercised an investigatory and disciplinary role when issues of malpractice arose, the degree of concern in the 1990's was sufficient to require a more radical overhaul of the mechanisms for overseeing the conduct of members. The Committee on Standards in Public Life was set up in 1994 in response to damaging allegations concerning the conduct of some MPs and in regard to patronage over public appointments. For example, ministers and civil servants leaving office to take up jobs in the private sector. A highly topical issue which arose in the 1990's concerned the capacity of MPs and Ministers to subvert or abuse their position. There have been numerous examples of figures in public life acting in way which might be regarded as incompatible with the highest standards of probity. For example, the *cash for questions* scandal might be cited as one example of political sleaze. A method of keeping check on the executive is through parliamentary questions. Although questions may be used politically to embarrass the government, matters are routinely raised on behalf of constituents relating to government departments concerning the process of administration. Unless the matter raised is in a restricted category or outside the remit of the department, there is an expectation that responses will genuinely address the issues raised and civil servants in the department work behind the scenes on providing answers to parliamentary questions by undertaking investigation and/or research. Allegations were made in 1994 that some MPs were operating through consultants, offering their services as MPs, including asking such questions for financial advantage.[4] It should be pointed out that it is no secret that a significant number of Conservative MPs, and some Labour and Liberal Democrats have links with business. Equally, the Parliamentary Labour party was formed to further the aims of the trade union movement and other affiliated bodies on the left of politics. The problem was that a number of MPs were presenting themselves as consultants, and were acting through agents without declaring this role. In return for payments they promised to raise issues in Parliament. The concern was not only that there had been no declaration of interest, but also that this had the potential to interfere with an MPs main job, namely, to represent the interests of their constituents. Following Lord Nolan's report it has been established as a matter of principle that MPs declare any personal interest in a matter brought before Parliament. This was regarded as an important issue, not only because it was an abuse of their position, but also because it raised the whole question of undeclared interests.

Lord Nolan, a senior judge from the judicial panel in the House of Lords, was given the task of investigating this issue and other matters relating to the role of MPs which included reformulating guidelines in respect to the regulation of the conduct of MPs. Also, he was responsible for setting up 'The Committee on Standards in Public Life'. Lord Nolan identified public duty, selflessness, integrity, objectivity, accountability and openness, honesty and leadership as forming the principles which should underpin the codes of practice that should be applied to MPs. Members of Parliament were explicitly required not to bring their office as elected representatives into disrepute. For this purpose a register of members' interests is published and there are strict rules governing the financial interests that have to be declared. Failure to fully disclose such interests is regarded as a serious matter which will lead to disciplinary action.[5]

[2] For the constitutional context and the discussion of the ministerial responsibility, see: P. Leyland *The Constitution of the United Kingdom: A Contextual Analysis*, Oxford, Hart Publishing, 2007, particularly chapters 5 and 6.

[3] A. Bradley and K. Ewing *Constitutional and Administrative Law*, 14th edn, Harlow, Pearson, p. 229ff.

[4] A handful of Conservative MPs had received cash for asking questions in Parliament on behalf of private individuals, including Mohammed Al Fayed the owner of Harrods.

[5] See 'First Report of the Committee on Standards in Public Life' Cm 2850, 1995.

The Parliamentary Commissioner for Standards has an investigatory role and MPs are required to cooperate with any investigation that is undertaken.[6] The Standards Commissioner performs the functions previously carried out by separate Select Committees on Members' Interests and on Privileges. These committees were combined in 1995, with the formation of a new House of Commons Select Committee on Standards and Privileges. It is chaired by a respected member of the opposition (11 Members, quorum 5, with the power to appoint *sub*-committees). In July 1996 the House adopted the Committee's proposals for a Code of Conduct for Members which was accompanied by a Guide to the Rules relating to the conduct of Members. This Committee oversees the work of a new officer of the House of Commons, the Parliamentary Commissioner for Standards. He or she is responsible for the maintenance of the Register of Members' Interests[7] and advises MPs on the registration requirements, but Standards Commissioner also has the task investigating specific complaints about the conduct of MPs.[8] In particular, the Committee has power to order the attendance of any Member of Parliament before the committee, and to require that specific documents or records in the possession of a Member relating to its inquiries, or to the inquiries of the Commissioner, be laid before the Committee. In recent years under Labour a steady stream of cases have been referred for investigation. Many of these case have concerned the failure to register interests. Members have been disciplined for not doing so. For example, in 2006 the failure of the then Deputy Prime Minister, John Prescott, to declare a stay on the ranch of an American tycoon (who had previously expressed a business interest in a government sponsored project) attracted much attention in the press. The investigation and report by the Commissioner demonstrate that these procedures are strictly enforced, but also reveals the complexity and ambiguity of some of the rules governing what ministers are expected to enter on the register.[9] The publication of the proceedings/hearings of the committee and its reports which are also routinely available on the internet acts as a deterrent. In regard to the declaration of interests there has been a high level of compliance with the published guidelines.

[6] See P. Leopold *Standards of Conduct in Public Life*, in J. Jowell and D. Oliver (eds.) 6th edn. *The Changing Constitution*, Oxford, Oxford University Press, 2007 at p. 413ff.

[7] The House of Commons adopted a compulsory register of interest in 1975: HC 102 (1974-75).

[8] Income from employment wholly unrelated to public affairs does not have to be registered.

[9] Select Committee on Standards and Privileges, thirteenth report, 20 July, 2006.

3. The 2009 Parliamentary Expenses Scandal

It will soon be apparent that the 2009 scandal concerning MPs expenses can be directly related to a strong trends towards greater transparency which has followed in the wake of the Freedom of Information Act 2000 (FOI). But first it is helpful to mention something about the payment of MPs and their expenses. Against a background of the steady introduction of private sector disciplines throughout the public sector with the incentivisation of pay at executive level now widely taken for granted, Westminster MPs are paid a relatively modest annual salary of £65,000. On top of this, however, they are allowed to claim for office expenses which includes the payment of secretarial staff of up to £100,000.[10] Also, MPs with constituencies outside London are entitled to certain expenses related to a secondary home. The House of Commons publishes a Green Book with a preface from the Speaker which is intended to provide detailed guidelines about the rules concerning the financial allowances available to MPs. The Department of Resources, formerly the Fees Office, is responsible for administering the rules and ensuring compliance. The principles set out in this Green Book leave little doubt that elected politicians are expected to set an example of probity and honesty. Claims should be above reproach and reflect actual usage and therefore they should be based on proper records. They must be expenses necessary for a member to incur to ensure that he or she could properly perform their parliamentary duties. On the other hand, they must not be for party purposes, nor must they give rise to any improper financial benefit to themselves or anyone else. Further, the need to obtain 'value for money' is made central in claims for accommodation, goods or services. Purchases that could be seen as extravagant or luxurious are to be avoided. In fact before submitting a claim members are expected to consider whether that claim could in any way damage the reputation of Parliament or its members.[11]

The objective of the FOI legislation was to challenge a previous culture of secrecy that pervaded central and local government and public institutions more widely and, of course, this opacity applied to the reimbursement

[10] MPs have generous pension schems and other allowances, including a resettlement grant to help adjust to "non parliamentary" life. See: 'Members' pay, pensions and allowances', House of Commons Information Office, Factsheet M5, Members series, revised October 2008. The Review Body on Senior Salaries conducts a review every three years on parliamentary pay, allowances and pensions.

[11] *The Green Book: A Guide to Members' Allowances*, House of Commons, March 2009.

of MPs. The idea was to put in its place for the first time a general 'right to know'.[12] From January 2005 when the legislation came fully into force public bodies were placed under a general obligation to disclose information, although this is made subject to certain exceptions recognised under the act.[13] The new regime is policed by an Information Commissioner with appeals to an Information Tribunal, and then finally to the courts. Although Parliament has a long history of bringing in its own rules to regulate members, it was inevitable that the expenses of politicians would become a subject of closer public scrutiny. To prevent detailed disclosure from taking place the case for no disclosure was taken up in the courts by the Speaker of the House of Commons[14] and some MPs had been keen to pass a private members bill that would have made them exempt, or partially exempt, from the provisions of the Freedom of Information Act.[15]

To avoid the protracted procedure of individual information requests the Freedom of Information Act makes provision for public bodies to be committed to publication schemes encompassing categories of information considered to be of relevance by the Information Commissioner.[16] Such a publication scheme was introduced by the House of Commons covering MPs expenses, including the amounts paid annually for residential expenses, but it provided only a limited breakdown of the sums involved.[17] Three journalists (Brooke, Leapman and Ungoed-Thomas) had requested further information on the expenses, including the disclosure of claim forms and supporting documents. These applications had been refused. Using the procedure under s. 50 of the 2000 FOI Act they complained to the Information Commissioner, who decided that they should be provided with a fuller breakdown of the expenses. On appeal, in upholding the Commissioner's decision, the Information Tribunal also found that disclosure was warranted. Not withstanding the entitlement of MP's to privacy, it held that the additional costs allowance system was deeply unsatisfactory and that it had shortcomings, both in terms of transparency and accountability. Finally, the High Court confirmed the Tribunal's decision.[18] In a robust statement of principle Sir Igor Judge in the leading judgment stated: 'MPs could not conduct their affairs on the basis that recently enacted legislation did not apply to them nor could they expect that the House was permitted to dispense with such legislation.' It was further recognised that: '... once it had emerged that the system was deeply flawed, public scrutiny of the details of individual claims was inevitable.' In addition, the court also agreed that the correct balance had been reached between the privacy of MPs and the public interest in disclosure of their addresses under paragraph 6(1) of Schedule 2 to the 1998 Act. In his Lordship's words: '... there was a legitimate public interest capable of providing justification for the disclosure given the deep flaws in the additional costs allowance system identified by the tribunal which had so convincingly established the necessity of full disclosure.'

This FOI ruling can be regarded as the prelude to an extraordinary catalogue of revelations concerning MPs expenses which have shaken the foundations of the entire political establishment. The first tremor occurred in February 2009 with accusations that Jacqui Smith, the Home Secretary, had allegedly claimed £116,000 in second home expenses for her constituency house.[19] This matter was duly referred to the Parliamentary Commissioner for Standards to see if there had been any serious wrong doing. From 8 May 2009 the Daily Telegraph newspaper followed this up with an unprecedented flood of individual allegations directed at MPs from all political parties. 88 Labour MPs, 71 Conservative MPs, 10 Liberal Democrats MPs and 4 MPs from other parties, out of a total of 645 MPs, had been named by the end of the month. It was apparent that this extremely detailed information had been deliberately leaked by an individual working within Parliament. The itemised breakdown in some cases unearthed allegations of serious dishonesty. For example claims for interest payments on mortgages that had already been paid off[20] or for mortgage interest payments where the property had been purchased outright and there was no mortgage to pay back.[21] It became ap-

[12] The White Paper *Your Right to Know*, Cm 3818, 1997 was enacted in substantially modified form as The Freedom of Information Act 2000. See Flinders M., *The Politics of Accountability: A Case Study of Freedom of Information Legislation in the United Kingdom*, Vol. 71, No. 4 *Political Quarterly*, 2000 p. 422-435.

[13] Freedom of Information Act 2000 s. 1. It was argued unsuccessfully that exemption under section 40 should apply in relation to MPs expenses.

[14] See 'Speaker "leaned on" over expenses' BBC News, 28 May 2009. The government have admitted to being in favour of seeking a court ruling but not to pressurising the Speaker to pursue the case as some MPs have claimed.

[15] The Freedom of Information (amendment) Bill was introduced in 2006 but failed to complete its parliamentary stages in 2007.

[16] A publication scheme under the Act describes the information a public authority publishes, or intends to publish i. e. to make this information routinely available.

[17] http://www. parliament. uk/mpslordsandoffices/finances. cfm.

[18] *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin); [2008] WLR (D) 155.

[19] 'Smith "has questions to answer"' BBC, 9 February 2009.

[20] 'Labour MP Elliot Morley quits over expenses scandal' *The Guardian*, 29 May, 2009.

[21] 'MPs expenses: Bill Wiggin claimed £11,000 on phantom mortgage payments' *The Telegraph*, 21 May, 2009.

parent from these disclosures that many MPs whose constituencies are outside London have maximised financial gain by regularly changing the designation of their second home, a practice referred to as "flipping". They were able to sell off the original property at a profit while claiming back the full cost of renovation. Some MPs, including one Cabinet minister, sold these secondary properties at a profit after having received repayments and mortgage relief, but avoided payment of capital gains tax on the sale. The payment of family members as staff is another practice which has been called into question. The publication of details has also revealed what might be termed 'creative abuse of the rules' with inappropriate claims, some of which appear almost comical in the light of the principles set out in the Green Book for Members referred to above. These included: clearing the moat around a country mansion, maintaining a duck island, and fitting mock Tudor beams.

The abuse of at least the spirit if not the letter of these rules by dozens of MPs from all parties has prompted an unprecedented wave of public anger and hostility against the political class.[22] Some MPs were prepared to deflect blame on the Speaker who has a central role in maintaining the dignity of the House of Commons. The confidence of some members had already been shaken when in 2008 he appeared to ignore parliamentary privilege and failed to prevent the search by the police without a warrant of the office inside Parliament of opposition spokesman Damien Green. By the time this scandal broke in May 2009 not only were some of the Speaker's own expenses called into question, but also the decision to strongly support moves to exempt MPs expenses from public scrutiny under the FOI was highlighted as a serious misjudgement of the public mood. As the scandal deepened, he became the first office holder for 300 years to be forced to resign early. With the prospect of losing a vote of confidence looming he announced his premature departure.[23] These revelations have also created many problems for the main political parties. For example, there was the difficulty of investigating and adjudicating fairly on the very large number of cases. Further, they have had to decide whether alleged miscreants who include Cabinet and Shadow Cabinet members, as well as back benchers, should be able to continue in post while the investigations proceed.[24] In their approach to adjudicating the political parties to achieve

[22] A. Rawnsley 'A climate of loathing towards all MPs is bad for democracy', *The Observer*, 24 May, 2009.

[23] 'A speaker speechless: the speaker resigns after scandal engulfs Britain's Parliament' *The Economist*, May 19, 2009.

[24] There has been lack of consistency on these issues. For example, Shahid Malik resigned as Minister for Justice over the second home allowances of £60,000 claimed on his

consistency in treatment had to develop guidelines to differentiate between minor infringements and more serious misconduct. They have had also to decide whether disciplinary action would be taken only in cases where there has been technical breach of the rules. Faced with accusations of abuse some MPs have attempted to defend their position by arguing that they had consulted the fees office and received advice that the disputed claim fell within the rules. Many MPs apparently felt they were entitled to maximise such claims. The fact that so many individuals were merely continuing an established practice suggests that there was at least laxity and possibly connivance by the officials administering the scheme. A number of MPs have expressed their willingness to repay, or have actually repaid, the money received as part of these contestable claims. However, prosecutions may still follow since the law of theft clearly provides that 'a person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property'.[25]

The extent of the fallout is difficult to assess at the time of writing but the degree of public hostility against MPs and the political class more broadly[26] suggests that many of the offending MPs will be prevented from contesting their seats at the next election, others face the prospect of losing because of their conduct.[27] Prime Minister Gordon Brown stated that Parliament would no longer regulate itself like a gentlemen's club.[28] The leaders of all the major parties have accepted that these rules need to be

London house. 'Shahid Malik stands down as minister as expenses scandal deepens' *The Guardian*, 15 May 2009, while cabinet minister, Hazel Blears, who avoided paying capital gains tax remained in office until the ministerial reshuffle on 5 June 2009. However, Malik was given another ministerial role after being cleared by the standards adviser, Sir Philip Mawer. See 'Minister Cleared in Expenses Row', BBC 9 June 2009.

[25] Theft Act 1968 s. 2(2). As Professor Ormerod explains: 'The mere fact of payment does not negative dishonesty but the jury are entitled to take into account all the circumstances and these may be such that even an intention to pay for the property, let alone actual payment may negative dishonesty'. D. Omerod *Smith & Hogan Criminal Law*, 11th edn, 2005, Oxford, Oxford University Press, p. 695.

[26] With under 16% of the popular vote Labour polled their lowest vote for over a hundered years in European Elections held on the 4th June while the UK Independence Party (UKIP) moved into second place and the Greens and British National Party also benefitted from the turn away from the main political parties.

[27] A. Rawnsley 'A climate of loathing towards all MPs is bad for democracy', *The Observer*, 24 May, 2009.

[28] 'Brown sets out political reform and refuse to quit' *Sunday Times*, May 31, 2009. A Constitutional Reform Bill and a new code of conduct for MPs are among the proposals mooted so far.

radically modified. Moreover, although there is no consensus over what wider changes to make, there is a growing mood that other constitutional reforms are necessary to increase the authority of Parliament. The rules for MPs expenses are currently being reviewed by Sir Christopher Kelly and the Committee on Standards in Public Life. All parties have indicated that they will accept whatever changes to the expenses rules that are recommended by this independent commission.[29] In order to tackle this problem at its roots there needs to be wider rejection of an endemic bonus culture. The economic slump has highlighted the prevalence of disproportionate and unjustified rewards in both the private sector (particularly banking) and the public sector in the higher echelons of management. Of course, MPs are entitled to a reasonable salary and they should expect reimbursement for genuine expenses which are necessary for them to operate effectively. The bottom line now should be that the main political parties need to prioritise a commitment to the values of public service with only the prospect of limited financial gain when in the future they recruit candidates to represent them.

4. Cash for Peerages

In March 2006 during the so called 'cash for honours affair' it was alleged that certain names were put forward for the award of life peerages i. e. membership of the House of Lords (the Upper House) by Lord Levy in exchange for having made substantial loans to the Labour party for its election campaigns.[30] A similar scandal had arisen after the First World War when it was shown that the Liberal Party under Prime Minister, Lloyd George, had accepted cash in exchange for knighthoods and peerages.[31] The law was subsequently changed to stamp out the practice.[32] Many politicians and officials, including the then Prime Minister, Tony Blair, were interviewed as part of the investigation by the Metropolitan Police. No prosecutions resulted from the investigation. The problem could have been much worse for the government, but criticism from opposition parties was extremely muted as it has emerged that the Conservative Party and Liberal

[29] See 'Ordered out of office' *The Economist*, May 21, 2009.

[30] G. Wheatcroft 'So, You Want To Be a Lord...', Slate, March 22, 2006. http://www.slate. com/id/2138469/.

[31] Knighthoods came at £30,000 and Peerages from £50,000.

[32] The Honours (Prevention of Abuses) Act 1925 makes the sale of peerages or other honours unlawful.

Democrats have resorted to similar practices in order to secure adequate funding for recent general elections.[33]

5. Appointment Procedures for Non-Departmental Public Bodies in the UK

In contrast to the system applying to judicial appointments which is designed to minimise political involvement, ministers are more active in the process for appointments to other publicly funded bodies in the UK. However, in making such appointments there is a strong public interest in ensuring that suitably qualified candidates are selected. The Commissioner for Public Appointments who is an official independent of the government, together with the Office of the Commissioner for Public Appointments oversees the process of public appointments to Non-Departmental Public Bodies (NDPBs) made by ministers.[34] These bodies are often referred to as "Quangos", and include nationalised industries, public corporations, NHS bodies and utility regulators. In most cases these bodies act to a greater or lesser extent at arms length from ministers, although ministers may be accountable for their performance. The Commissioner regulates, monitors, reports on and advises on such appointments. The final decision rests with the minister, but since the introduction of the Commissioner for Public Appointments in 1995 following the report by Lord Nolan a code of practice introduces a regulatory framework to determine procedures for making such appointments.[35] The guiding principles specify that public appointments should be governed by the overriding principle of selection based on merit. There will be general commitment to equal opportunities in making such appointments. An appointment's panel should be set up which makes

[33] Tony Blair was accused of selling peerages after four businessmen who gave Labour £4. 5m in unpublicised loans were subsequently nominated for peerages. Labour went on to reveal it had been secretly loaned nearly £14m ahead of the last election. The Conservatives borrowed £16m from 13 wealthy backers. The Liberal Democrats have said they owe £850,000 to three backers.

[34] http://www. ocpa. gov. uk/the_code_of_practice. aspx.

[35] See the reports of the *Committee on Standards in Public Life* and in particular the first report of this committee CM 2840 (1995) which set out general principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership. These principles have since been widely embedded in parliamentary codes of practice and the processes adopted for the appointment and management of public bodies. Also for an overview see P. Leopold 'Standards of Conduct in Public Life' in J. Jowell and D. Oliver (eds.) *The Changing Constitution*, 6th edn, Oxford, Oxford University Press, 2007.

well-informed choices on the basis of ability and experience matching the requirements of the public body in question. The process of appointment should be scrutinised by an independent panel. It is assumed that board members of public bodies will be committed to principles and values of public service. The appointment process for such posts must be transparent.

In sum the situation regarding domestic politics has been transformed in the following ways:

(1) The conduct of MPs is overseen by an independent regulator (the Parliamentary Standards Commissioner) adjudicating a Code of Conduct for MPs drawn from the Seven Principles of Public Life.
(2) Non-civil service appointments made by ministers to public bodies are regulated by an independent Commissioner for Public Appointments on the basis of a widely adopted Code of Practice.
(3) There is an independent electoral commission to regulate campaign contributions and oversee elections and referenda.

6. The Scott Report and the Codes of Practice for Ministers and Civil Servants

In the early 1990s the Matrix Churchill Affair was a matter of extreme discomfort for the government of Prime Minister John Major (1990-97) and criticisms and recommendations in the Scott Report[36] were responsible for a drastic revision in the way ministers and civil servants interact with one another in undertaking the routine work of responding to parliamentary questions and preparing information for debate. The Report, chaired by Lord Justice Scott, was set up by Prime Minister John Major after it emerged that arms had been supplied to Iraq with the covert support of the government during the Gulf War. The action of some ministers was clearly in contravention to published government policy at the time. Some of Lord Justice Scott's criticisms related to their conduct as ministers. They had acted in a way that was inconsistent with their own policy, including the suggestion that the House of Commons had been deliberately misled and that guidelines for the signing of Public Interest Immunity Certificates had been wrongly applied.[37] Civil servants were also criticised for apparently colluding with the government in deliberately misleading Parliament. Under the important constitutional convention of individual ministerial responsibility ministers are ultimately responsible for what goes on in their departments, despite the criticism in the Scott Report no ministers felt the need to resign and no minister was asked to submit their resignation by the Prime Minister.[38] The report published by Lord Justice Scott resulted in a revision of the codes of practice which comprise the ethical rules of the game that is played by ministers and civil servants.

7. Ministerial Code

There was no legislative response by government to the Scott Report and its important recommendations[39] but the previous Conservative administration and current Labour administration[40] have developed codes for ministers and civil servants which recognises the basic constitutional relationship between them.[41] The codes provide clear guidance which seeks to eliminate the practices that were strongly criticised in the Scott Report.[42] The latest version was published by the Cabinet Office in July 2005.[43] For example, para 1.5 (d) states that: 'Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest... and para 1.5 (c) states that 'It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent er-

[36] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HC (1995-96) 115 chaired by Sir Richard Scott, VC and referred to as the Scott Inquiry.

[37] Public Interest Immunity certificates can be signed by ministers to prevent the disclosure of official information to a court supposedly to protect the public interest. In this case the holding back of information relating to the association of some of the directors of Matrix Churchill with the government intelligence service MI5 might have led to their conviction for a serious criminal offence of illegally supplying Iraq with a supergun.

[38] A. Tomkins *The Constitution after Scott: Government Unwrapped*, Oxford, Oxford University Press, 1998, p. 58; Scott Sir R 'Ministerial Accountability' (1996) *Public Law* 410; Lewis N. & Longley D., *Ministerial Responsibility: The Next Steps*, [1996] *Public Law* 490;.

[39] *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* 1995-96, HC 115 herein after referred to as the *Scott Report*.

[40] See Lewis N., *A Civil Service Act for the United Kingdom*, 1998 *Public Law* 463 at p. 469 where it is suggested that one important reason for introducing a Civil Service Act is to require civil servant to taken account of a wider public interest beyond that owed to the minister.

[41] *A Code of Conduct and Guidance on Procedures for Ministers*, Second Edition, July 1997; http://www. cabinetoffice. gov. uk/central/1997/mcode/ index. htm.

[42] See Tomkins 1998 above at p. 51.

[43] http://www. cabinetoffice. gov. uk/media/cabinetoffice/propriety_and_ethics/assets/ministerial_code. pdf. Annex of the 2005 code includes the 'Seven Principles of Public Life'.

ror at the earliest opportunity. Moreover, such conduct is regarded with so much gravity that 'Ministers who *knowingly* mislead Parliament will be expected to offer their resignation to the Prime Minister'. The inclusion of the word 'knowingly' to qualify accountability creates a problem by not placing the onus on the minister to perform a supervisory role and this opens up an accountability gap.[44] Thus, under the Scott interpretation that was later defended by ministers, as Bogdanor puts it: 'Ministers are able to discharge the duty of accountability by statements which turn out to have been incomplete and misleading, but not *knowingly* so, while officials are accountable only to ministers and so can not give Parliament their own version of what occurred, even where the ministerial version is in fact misleading'.[45] This effectively means that no-one is responsible when the minister does not know.[46]

The recent Ministerial Codes have encouraged ministers to be as open as possible with Parliament and the public, refusing only to provide information when it would not be in the public interest. We shall see that a transparency model is important as this revolves around a new type of accountability that arises from a more general commitment to place information in the public domain (see Scott/Freedland). In fact, the clean credentials of the New Labour government have fallen short of expectations.[47]

This discussion demonstrates that the unwritten UK constitution relies entirely on conventions and codes of practice to determine ministerial conduct. The Ministerial Code of Practice requires Ministers to behave according to the highest standards of constitutional and personal conduct in the performance of their duties. 'Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct in Parliament. It is clear that this: "Code is not a rulebook, and it is not the role of the Secretary of the Cabinet or other officials to enforce it or to investigate Ministers although they may provide Ministers with private advice on matters which it covers.'[48]

[44] G. Drewry, '*The Civil Service*, in Blackburn R and Plant R (eds) *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, Harlow, Longman 1999 at p. 165.

[45] V. Bogdanor, *Ministerial Accountability*, [1997], *Parliamentary Affairs*, Vol. 50 No. 1 71-84 at p. 77.

[46] A. Tomkins, *Government Information and Parliament: Misleading by Design or by Default*, [1996] PL 472-490 at p. 486.

[47] Birkinshaw P., '*Freedom of Information*, in Blackburn R and Plant R (eds) *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, Harlow, Longman, 1999 at p. 201.

[48] http://www. cabinetoffice. gov. uk/propriety_and_ethics/ministers/ministerial_code/1. asp.

Under para 5.1 ministers must ensure that no conflict of interest arises, or appears to arise, between their public duties and their private interests, financial or otherwise. To avoid any such problems from arising on appointment to office a Minister is expected to provide the departmental Permanent Secretary (senior civil servant) with a full list in writing of all interests, including family interests, which might be thought to give rise to conflict. The minister will receive advice which may include a requirement to dispose of a financial interest which might give rise to any actual or apparent conflict. Any such conflicting interests which are retained must be declared if they have any bearing on matters under consideration.[49] Ministers hold office subject to retaining the confidence of the Prime Minister, but if substantial wrongdoing emerges, the position of a minister may rapidly become untenable and a resignation will often follow. David Blunkett who was one of Prime Mimister Blair's senior ministers serves as an excellent example. He resigned twice over a period of two years. On the first occasion in December 2004 it was confirmed following an independent report by a senior academic that as Home Secretary he had improperly intervened to speed up the passport application of his lover's maid. This became a resignation matter not simply because his intervention was an inappropriate use of his ministerial position, but also because he had made categorical denials in respect of any impropriety. On the second occasion in 2005, he had failed to reveal a directorship and investment interest. It was alleged that as the minister responsible for Works and Pensions which included the Child Support Agency his directorship DNA Bioscience created a possible conflict of interest. He should have taken advice from a body called the Advisory Committee of Business Appointments and made this interest known on a register of interests. The matter was investigated by the Cabinet Secretary (Head of the Civil Service) who confirmed the oversight and a resignation, once again followed. Given the concerns with compliance raised in relation to other constitutions (e.g. Thailand), an interesting contrast can be made relating to what might be called constitutionalism in action. UK ministers overstep the mark at times. If they do and their conduct is discovered a process of investigation follows. Should this reveal wrongdoing (especially where personal integrity is concerned) a resignation follows. Indeed, a distinction should be drawn here between personal integrity, where resignation will be precipitated, and matters of political judgment (as the issues raised by the Scott report were interpreted to be) because under the convention of individual ministerial responsibility, although the minis-

[49] 2005 Ministerial Code, para 5 'Ministers' Private Interests'.

ter is accountable and answerable to Parliament for the shortcoming of her department resignations rarely take place in response to policy failure or departmental incompetence.

8. Civil Service Code

The UK civil service was established in its modern form following the Northcote/Trevellyan report in the mid nineteenth century. It has the characteristics of being a hierarchal meritocratic organisation. In addition it is mainly permanent in the sense that officials of all ranks serve the government in power whatever its political complexion happens to be. Further, the service has a generally high reputation for probity. Civil servants formally owe their allegiance to the Crown. One commentator has stated that: 'The Committee on Standards in Public Life has largely been responsible for creating the conditions in which the recent burgeoning of the bureaucracy of ethical compliance throughout the public sector has taken place'.[50] It is remarkable that the ethical standards of the UK civil service are not governed by any statutory rules but rather they comprise only of a code of practice which is not, in itself, legally enforceable.[51] Although of course a breach of the code might well constitute a breach of the contract of employment of a civil servant.

Under paragraph (2) it is specified that civil servants are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality.

In this Code:

- 'integrity' is putting the obligations of public service above your own personal interests;
- 'honesty' is being truthful and open;
- 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence; and
- 'impartiality' is acting solely according to the merits of the case and serving equally well Governments of different political persuasions.

The expectations in relation to each of these values are set out in more detail e.g., objectivity is explained under para (9) as requiring that a CS must: provide information and advice, including advice to Ministers, on the basis of the evidence, and accurately present the options and facts; take decisions on the merits of the case; and take due account of expert and professional advice. On the other hand, para. (10) warns against ignoring inconvenient facts or relevant considerations when providing advice or making decisions; or frustrating the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions.

The code informs civil servants under (3) that 'These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of Ministers, Parliament, the public and its customers.'

The possibility for Whistle Blowing is established under the heading of Rights and Responsibilities.[52] This part of the code concerns what a civil servant should do if she feels that she is being required to act in a way that is inconsistent with the code. A civil servant is expected to register their concern without suffering any penalty. However, there is provision for raising the matter with a line manager at a higher level or with a nominated officer in the department. If raising the issue does not bear fruit the last available option is to raise the matter directly with the Civil Service Commissioners. If a civil servant is still not satisfied her only remaining option is to resign from the service.

The Civil Service is overseen by an independent Civil Service Commission. The Commissioners exercise a general oversight function and they are also expected to encourage innovation and good practice as well as ensuring that the Civil Service is both effective and impartial by supporting the core values of the service. In particular, they are responsible for ensuring that the code is enforced. They also hear any appeals arising under the Civil Service Code. Another important function is to make sure that appointments to the service are made on merit. The Commissioners are appointed directly by the Crown under the Royal Prerogative. They are not civil servants and are independent of Ministers. They report annually on their work to the Queen and their report is published.[53]

Another important aspect in conveying the impression of neutrality is that civil servants are severely restricted from participating in political ac-

[50] B. O'Toole, *The Emergence of a "New" Ethical Framework for Civil Servants, Public Money and Management*, January 2006 39-46 at p. 43.

[51] The latest edition of the Civil Service Code was published 6 June 2006. http://www.civilservice. gov. uk/Assets/cs_code_tcm6-2444. pdf.

[52] See paras 15-18.

[53] See http://www. civilservicecommissioners. gov. uk/about_us. aspx.

tivities. For example senior civil servants are prohibited from any candidature in any European, national or local elections. They are not allowed to participate in canvassing for any candidate in such elections or to hold office in any political party and they are not permitted to get involved in any form of political controversy by making statements or appearing on the media.[54] More junior civil servants wishing to stand for office are required to resign their posts. The theory is that ministers make policy which is implemented by officials, but, of course, senior civil servants are heavily involved in the policy process. They provide policy advice, draft ministerial speeches and write answers to parliamentary questions. Also they appear before departmental select committees to defend policy and they may have to consult and liaise with pressure groups.[55] How far back civil servants have been able to stand from political debate has, at times, arisen as a matter of controversy. One aspect in the 1980's was the strong resistance to the market based and strongly ideological policies introduced by Margaret Thatcher which led to perceived resistance from within the service (She was reported to remark in deciding whether to approve a senior appointment. 'Is he one of us'.) Some civil servants were prepared to deliberately leak information to undermine certain policies.[56]

9. Special Advisers: evolving towards a 'spoils' system?

Since the 1980's there have been other innovations to help overcome resistance to change by senior officials. In particular, there has been an increase in the appointment from outside the civil service of political advisers and special advisers by ministers, who exercise a growing influence on policy making and also these 'outsiders' can be involved lower down the administrative hierarchy to monitor progress with policy initiatives.[57] An

[54] Following the recommendations of the Masterman Committee 1949 and Armitage Report 1978.

[55] J. Tonge *The New Civil Service*, Baseline Books, 1999 p. 10.

[56] Clive Ponting disclosed intelligence information after the Falklands War which suggested that Prime Minister Margaret Thatcher had misled Parliament as to the threat posed by the Argentinean warship General Belgrano which was sunk by a British submarine. Sarah Tisdall a relatively junior official at the Foreign Office was prosecuted in 1983 for leaking information about the siting of Cruise missiles.

[57] See D Oliver *Constitutional Reform in the UK*, Oxford, Oxford University Press, 2003 at p234ff; Press secretaries often referred to as 'Spin doctors' are political appointments. Their function is to assist the minister with media management and opinion forming. A role that has changed from putting the best possible interpretation on issues that come up,

underlying issue concerns whether this trend towards introducing 'outsiders' represents a significant step towards adopting a kind of 'spoils' system. The role of advisors may be to represent matters from a party political standpoint often with release to the media in mind, and so it is crucial that factual veracity of information released is checked in advance. Special advisers are currently appointed by Ministers to the Civil Service under powers conferred by the Civil Service Order in Council 1995, as amended. The number of special advisers was more or less constant during the Premierships of Harold Wilson (1964-70 and 1974-76), Edward Heath (1970-74) and James Callaghan (1976-79). There was a limited increase in their use under Mrs. Thatcher (1979-1990) and John Major (1990-1997) to a total of 38 by 1997 when the Conservatives left office. This number has doubled under Prime Minister Blair. The present government has 78 special advisers, 24 of whom are assigned to the Prime Minister.[58] A matter of some controversy is that some special advisers have assumed the capacity to exercise executive powers over career civil servants in senior positions. In June 2005 the Government amended the Civil Service Order in Council under its prerogative powers changing the position of special advisors without making any Statement in Parliament or public announcement. An obvious advantage of a Civil Service Act would be in the future to prevent the surreptitious use of the prerogative power to extend the numbers, role or powers of special advisers.

Moreover, it is worth considering why there has been some disquiet over the extent to which it is possible to introduce outsiders and over the powers wielded by these appointed officials. For example, in regard to news management, ministers appoint a press secretary, and they may also appoint personal advisors from outside the civil service which injects a partisan element around the minister. Indeed, the pejorative term 'Spin doctor' has been applied by critics to suggest that in recent years the function of the press secretary and the press office has gone beyond assisting the Prime Minister (and other ministers) with media management and opinion forming. The task has in fact changed from putting the best possi-

to actually taking the initiative in setting the political agenda for a particular area of government policy. Some have been sharply criticised in the media for wielding a great deal of power without being directly accountable for their activities e.g., Alistair Campbell, press secretary and director of communication to PM Balir (1997-2003). See T. Daintith 'A very good day to get out anything we want to bury' [2001] *Public Law* 13.

[58] Since 2001 there has been a Code of Conduct for Special Advisors. Under this code civil servants who believe that a special advisor has overstepped their anthority or breach the Civil Service Code are encouraged to bring the matter before a Civil Service Commissioner or the Cabinet Secretary.

ble interpretation on issues that come up,[59] to actually taking the initiative in setting a political agenda for a particular area of government policy.[60] Alistair Campbell, who was press secretary, and later director of communications at Number 10 Downing Street (until 2003) was widely criticised in the media for wielding a great deal of power behind the scenes but without being subject to any direct control. Furthermore, Tony Blair decided when he became PM that any policy announcement across the entire government had to be cleared through the Downing Street press office. This change in practice was introduced to avoid an impression of disunity conveyed by the previous government led by John Major which resulted from inconsistent and contradictory messages being released by individual departments. However, the requirement that policy announcements had to be approved at the centre has meant that Downing Street and the press office has been able to control the political agenda across the entire spectrum of government activity and, at the same time, it allowed centralised manipulation of the media. As a result, enormous power has been placed in the hands of politically appointed officials who are not directly accountable under the constitution for their activities. They are introduced by the minister and therefore fall outside normal civil service rules and codes. A Civil Service Act would set out clear limits on the number of advisers and set out the rules under which they would operate in the future.

10. A Civil Service Act for the United Kingdom?

In preference to the use of prerogative powers there have been proposals to put the regulation of the civil service under parliamentary legislation through the introduction of a Civil Service Act.[61] Such legislation would set out the relationship between ministers and civil servants and result in the codes of practice for ministers and civil servants being reconstituted and supported by law. In addition, the constitutional position of the Civil Service Commission and special advisers would be defined in a wider constitutional context. Advocates of a Civil Service Act believe that such a measure would make it much more difficult than is currently the case under prerogative powers for any government to politicise the civil service or erode its core principles. In view of the speed of recent changes there are obvious advantages in having general principles set out more clearly and for the culture of a permanent and impartial civil service to be established in a much more secure form.

The Wicks Committee[62] which was set up specially to look into codification of principles relating to the civil service had recommended that, the Civil Service Commissioners should continue to be responsible for ensuring that the merit principle is properly applied and second, that the Civil Service Commissioners should be granted powers and facilities to investigate on their own initiative and to report on the operation of the Civil Service recruitment system as it concerns the application of the principle of selection on merit. The Bill would recognise the position of Civil Service Commission and outline its powers and duties[63] setting out matters it would be able to investigate and report on[64].

In summary it is proposed:

- Definition of the Civil Service would include (through a list) the current Home Civil Service (including devolved administrations), Forestry Commission and Diplomatic Service. The Secret Intelligence Service and the Security Services (which have their own statutes) are excluded;
- Core values of the Civil Service would be set out;
- Civil Service Commissioners established by statute and their role and functions set out;
- The First Civil Service Commissioner appointed after consultation with leaders of the main opposition parties and leaders of the devolved administrations;
- Provision for the Civil Service Code and Special Advisers Code to be made by Order and the key elements that should be included in such codes are set out in the legislation;
- Provision for an annual report to be made by the Government to Parliament with details about the number, roles and salaries of Special Advisers.

[59] A departmental e-mail from Jo Moore, special advisor to Stephen Byers, Secretary of State for Transport, was strongly criticised and contributed to the eventual resignation of both the advisor and the minister. The message had encouraged the release of unfavourable information to coincide with the bombing of the World Trade Centre in New York on September 11 2001 because of the calculation public attention would be distracted by this shocking event.

[60] See T. Daintith, *Spin a Constitutional and Legal Analysis, in European Public Law*, [2001] Vol. 7, Issue 4 593-625.

[61] N. Lewis, *A Civil Service Act for the United Kingdom*, [1998] PL 463; D. Oliver *Constitutional Reform in the UK*, Oxford, Oxford University Press, 2003, chapter 3.

[62] PASC First Report 2003-04, A draft Civil Service Bill: Completing the Reform, HC 128 I & II, January 2003.

[63] See Clause 7 and 8.

[64] Clauses 15 and 16 and Schedule 3.

The select committee usefully summarised the position in the following way: 'The Executive, that is the Government, should have the right to organise and manage the Civil Service in a way it sees fit so as to best formulate and deliver its programme. However the Committee believes that this should be a constrained right because the Civil Service is a property of government, not *the* Government i. e. an institution of the State whose "transferable human technology" must be maintained for successive administrations'.[65] On the other hand, it has been suggested that a drawback in introducing a Civil Service Act might be to excessively formalise the process of running the service and open up managerial matters within the service to challenge by way of judicial review.[66]

The government is conducting a process of consultation before it decides whether to go ahead with introducing a Civil Service bill. In the meantime, Lord Lester has introduced his own Civil Service bill[67] in 2006 which anticipates any government attempt to set out a framework for the Civil Service structure in England, Wales and Scotland[68]. In light of the Public Service Committee's criticisms of the government's draft bill, Lord Lester's Bill takes up the call for: proper parliamentary scrutiny of codes made under the Act; the conference of investigatory powers on the Civil Service Commissioners; more detail on the role and number of special advisers;[69] and an explicit duty on Ministers to uphold the core values of the Civil Service. This bill, if enacted, would ensure that selection to the Civil Service would continue to be based on merit through a system of fair and open competition.[70] The legislation would outline the values that civil servants are expected to uphold.[71] It would introduce a statutory duty applying to ministers who would be required to uphold the integrity and impartiality of the service.[72] The bill would allow the Minister for the Civil Service (currently the Prime Minister) to issue codes of conduct for civil servants and for special advisers, and to set out the constitutional framework within which they work. However, before being introduced a draft code would have to be published and representations sought from the Civil Service Commission. The draft code would then be laid before both Houses of Parliament for final approval.

In addition, the Cabinet Secretary and the First Civil Service Commissioner launched (2005-2006) a consultation on a new Civil Service Code. While the draft code which is discussed in some detail above, contained some improvements, the adoption of the new one does not, in itself, alter the constitutional basis of the Civil Service under the exercise of prerogative power. It is worth pointing out once again, that the code apart from regulating the general conduct of civil servants encourages 'whistle blowing' by civil servants in circumstances where they come across improper conduct by ministers or other civil servants.[73]

Some critics believe that a Civil Service Act would help alleviate some of the problems discussed in this paper relating to civil service ethics by setting out more clearly the obligations of ministers and civil servants, especially by putting the present codes of practice on a more secure statutory footing and setting limits on the number and role of 'special advisers'.[74] Constitutional legislation has been a prominent feature of the Labour Government's programme since it was first elected to office in 1997. The latest measure, the Constitutional Reform Act 2005, seeks to confirm the independence of the judiciary by transforming the system of judicial appointments and by creating a Supreme Court to replace the Judicial Committee of the House of Lords. Would a Civil Service Act have a desirable impact

[65] See letter from Sir Alistair Graham to Niki Daniels, Cabinet Office, 25 February 2005.

[66] See Oliver 2003 p. 239 who points out that such a path towards judicialisation could be avoided by the introduction of some alternative mechanism for dispute resolution relating to the service e.g. an ombudsman scheme.

[67] The Government's draft bill included the core elements recommended by the Select Committee and most of these elements are included in Lord Lester's bill.

[68] A Private Member's Bill was given its second reading in the House of Lords on 3 March 2006.

[69] The Parliamentary Select Committee has also recommended that 'a clear statement of what special advisers cannot do should be set out in primary legislation. Special advisers should not: (i) ask civil servants to do anything improper or illegal, or anything which might undermine the role and duties of permanent civil servants; (ii) undermine the political impartiality of civil servants or the duty of civil servants to give honest and impartial advice to Ministers; (iii) have any role in the appraisal, reward, discipline or promotion of permanent civil servants. See: *Ninth Report of the Committee on Standards in Public Life: Defining the Boundaries of the Executive: Ministers, Special Advisers and the permanent Civil Service*, April 2003, Cm 5775.

[70] See Clause 6.

[71] Clause 13.

[72] Clause 10 makes it the duty of each Minister of the Crown to uphold the integrity and impartiality of the Civil Service.

[73] For example, section 11 provides: 'Where a civil servant believes he or she is being required to act in a way which: is illegal, improper, or unethical; is in breach of constitutional convention or a professional code; may involve possible maladministration; or is otherwise inconsistent with this Code; he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration.

[74] A draft Civil Service Bill was published in the 2003-2004 session and the introduction of legislation depends on the government finding sufficient parliamentary time. See generally Lewis [1998] n. 73 above.

by securing the impartiality of the civil service? The Public Service Select Committee and the Government (para 20 of the consultation document) have stressed that any such government backed Civil Service Bill should command cross party support before being introduced in Parliament. Certainly, cross party support would help to ensure that that any new legislation had much less chance of being swept aside by a future government. Indeed, it is highly desirable that the civil service remains, at its core, an impartial tool at the disposal of what ever government is elected to office, and that it retains its current high reputation for integrity. An obvious drawback in placing too much emphasis on the predominance of a permanent civil service is that it runs the risk of creating a culture within the service which favours the continuation of existing methods of administration and a culture that also tends to stifle innovation and change. In certain respects the introduction of outsiders, including special advisers, provides stimulus to the civil service by providing impetus towards reaching policy objectives. At the same time, these outsiders expose an established system to a questioning that would be unlikely to be generated from within. A Civil Service Act might have the advantage of setting out the limits of any executive authority conferred on non-permanent civil servants and it should explain in a constitutional sense how these appointed officials are to be made accountable for their actions.

11. Limiting transparency in the 'contract state'

Another important factor is that the interface between the public sector and the private sector has increased significantly as a result of what we might term the contracting state.[75] In particular, civil servants and local government officers are frequently required to draw up contracts with private sector and voluntary sector organisations. The probity of any such dealings has clearly been of ever increasing importance. Government has attempted to conceal the precise terms of many contracts with private sector organisations on the grounds that the negotiations are commercially sensitive and therefore a confidential matter. Further, it is a matter of considerable concern that the terms of private law contracting is placed in an excluded category under the Freedom of Information 2000[76] and that limits

[75] See e.g. I. Harden *The Contracting State*, Milton Keenes, Open University Press, 1992.

[76] See P. Leyland, *Freedom of Information in the United Kingdom: Principles and Practice*, in P. Leyland, D. Donati and G. Gardini *Freedom of Information in the United*

placed upon the jurisdiction of the parliamentary ombudsman prevents her from investigating contractual matters of this kind. The most important oversight in this area is provided by the Public Accounts Committee of the House of Commons and National Audit Office which perform the task of auditing the accounts of central government and reporting back to Parliament on their findings.

12. Ethical Conduct and Local Government

The public image of local government has been tarnished by widely reported scandals which have involved corruption and conflicts of interest.[77] Some local politicians are motivated by self interest rather than the interests of the community they are expected to serve. Moreover, it is worth remembering that heightened emphasis on public private partnerships and market based solutions has more than ever exposed local government to dangers of corruption. It is also true that a very similar mood of scepticism over politicians has surrounded the Westminster Parliament since sleaze allegations, and in particular the cash for questions controversy which was centre stage during the 1990's.[78] The response at both national and local level has been to set out much stricter rules which apply to MPs and now also to local authorities[79]. In order to improve the public perception of local government and local councillors Part III of the Local Government Act 2000 establishes a new ethical framework which includes the introduction of statutory codes of conduct. This includes a requirement for every council to adopt a code covering the behaviour of elected members and of officers, and the creation of a standards commit-

Kingdom and Italy, Libreria, Bonomo Editrice, Bologna, 2003 p. 111ff; R. Austin, *The Freedom of Information Act 2000 - A Sheep in Wolf's Clothing?*, in J. Jowell and D. Oliver (eds) *The Changing Constitution*, 6th edn. Oxford, Oxford University Press, 2007 p. 397.

[77] The 'homes for votes affair' in Westminster which continued through the courts for nearly a decade has been the most high profile local government scandal of recent times. But a number of local administrations have been associated with impropriety and corruption. For example, most recently in Hull an investigationwas underway concerning a joint venture between the council's Labour administration and a development company, Keepmoat concerning a missing £6 million. Other councils associated with corruption and sleaze include Doncaster and Watford.

[78] This involved some back bench Conservative MPs accepting cash to perform tasks that are a normal part of their paliamentary duties.

[79] See Committee on Standards in Public Life chaired first by Lord Nolan and then Sir Patrick Neill.

tee for each authority. This approach has many characteristics in common with the Westminster regime for parliamentary standards. Each council in England and Wales has been forced to set up a Standards Committee, which has at least one independent member. The Council must adopt a Code of Conduct for its members, and the Standards Committee is able to investigate possible breaches of the Code. Serious problems can be passed to the National Standards Board for England or Wales. In addition, the Freedom of Information Act 2000 will contribute to greater transparency in local government, particularly in regard to decision making[80], when it comes fully into force in 2005 but this new legislation has been heavily criticised for including too many exemptions.[81]

An equally important safeguard of the probity of local government has been provided by statutory auditing requirements and this is 'part of a more general process that renders modern government possible and judgeable through quantitive information in the form of rates, tables, graphs, trends, and numerical comparisons...'.[82] Currently, the Audit Commission Act 1998 provides not only that all accounts of local authorities have to be audited annually[83] but that these accounts must be open to inspection by the local electorate. In addition, there is provision for the Secretary of State to direct an extraordinary audit. The auditor has formidable powers. For example, if she considers that an item is contrary to the law she can apply to the court for a declaration which could result in councillors who vote for improper expenditure being ordered to repay the money out of their own pocket and/or being disqualified as councillors[84]. This is subject to the proviso that an order should not be made if they were acting reasonably, or believed they were acting lawfully. Similarly, failure to bring in any sum, or any loss or deficiency caused by wilful misconduct is recoverable directly from the person responsible.[85] The most notorious case in recent years concerned the 'homes for votes' policy of Westminster Council in the mid 1980's and resulted in the auditor imposing massive surcharges against a number of councillors, including the leader of the council at the time of the scandal.[86] However, the more general function of auditors has evolved from being primarily concerned to ensure that local government has acted lawfully and without fraud to ensuring that value for money is being obtained for the delivery of services. This task is approached with reference to a complex range of performance indicators and targets.[87]

[80] See Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000/3272.

[81] P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal*, 3rd edn., London, Butterworths, 2001 at 149ff an p. 229ff. See Local Government Act 1972 schedule 12A for a list of exempted categories of information. For example, it is pointed out at p. 236 that the privatisation of many activities of local government allows a commercial confidentiality escape route to be invoked.

[82] P. Vincent-Jones, *Values and Purpose in Government: Central-local Relations in Regulatory Perspective'*, *Journal of Law and Society*, Vol. 29, No. 1, March 2002, pp. 27-55 at p. 45.

[83] See Audit Commission Act 1998 s. 2 and sched. 2.

[84] Audit Commission Act 1998 s. 17.

[85] Audit Commission Act 1998 s. 18.

13. Conclusion

The ethical principles[88] which should underpin public service since being identified by Lord Nolan have been widely incorporated in Parliament and in government. In particular they have been embodied in the informal codes of practice which apply to ministers and civil servants. Equally, the codes in their revised form have been an effective response to the problems identified in the Scott Report. Recent experience indicates that any exposure of financial indiscretions or conflict of interest by ministers will result in resignation, and, at the same time, the British civil service has retained its high reputation for integrity and neutrality. Apart from putting these codes on a statutory footing, the introduction of a Civil Service Act might offer the advantage of more precisely defining the status of special advisers and controlling their numbers.

Many commentators believe there is a crisis at the very heart of British politics. There is growing evidence of voter apathy reflected in falling electoral turnouts and this disillusionment is linked to the fact that politicians are held in very low public esteem. The exposure of multiple cases of abuse relating to expenses from all parties, even if this malpractice is for the most part on a relatively minor scale, conveys an impression that all politicians can be tarred with the same brush. There is no doubt that

[86] The litigation generated by the auditors investigation continued for many years. In *Porter v Magill* [2001] UKHL 67; [2002] 1 All ER 465 the House of Lords upheld the original decision of the auditor and the Divisional Court which had found that Lady Porter, David Weeks and Westminster Council had disposed of land in the form of council properties in marginal wards to gain electoral advantage and therfore unlawfully. A surcharge of £31 million had been imposed on Lady Porter.

[87] Vincent Jones, 2002 above p. 45.

[88] They were: selflessness, integrity, objectivity, accountability and openness, honesty and leadership.

the political establishment in the form of the major parties are faced with the challenge of putting their respective houses in order. However, these events can be viewed in a positive light. First, the Freedom of Information Act 2000 has done just the job envisaged by its exponents. The expenses case pursued before the Information Commissioner, the Tribunal and the Courts has allowed a legitimate public interest, in revealing such details, to prevail over the attempted claims to privacy of MPs. Second, this recent parliamentary expenses scandal has exposed a woefully deficient system for granting expenses to MPs, and it should result in the system being radically overhauled to prevent such abuse in the future.[89] The difficulty here is to produce a system which reaches an appropriate balance between an expectation of public service and one of providing sufficient remuneration in order to ensure that suitably talented individuals enter politics. Further, in order to reform the system effectively without partisan considerations coming into play, Parliament must confer sufficient authority on an independent body to implement the new scheme.

[89] 'MPs Expenses: Gordon Brown pledges "code of conduct" for MPs' *Sunday Telegraph* 31 May 2009.

15. L'etica pubblica in Francia

di *Barbara Gagliardi*

1. Lo *status* del funzionario pubblico in Francia

Lo *status* del funzionario pubblico nell'ordinamento giuridico francese si caratterizza per la tradizionale affermazione secondo la quale "le fonctionnaire n'est pas un citoyen comme les autres"[1], in ragione dei diritti e obblighi peculiari che ne differenziano la condizione rispetto non soltanto ai "salariés" dell'impresa privata, ma più generalmente a qualsiasi cittadino.

Se ne sostiene così la posizione deteriore, che ne fa un "citoyen diminué" o "di seconda classe", in conseguenza delle limitazioni sinanco dei diritti costituzionalmente tutelati che si impongono ineluttabilmente a chi sceglie di servire l'interesse pubblico[2].

Il funzionario pubblico, ovvero la persona "nominata in un impiego permanente a tempo pieno e titolare di un grado nella gerarchia di un'amministrazione" statale, locale o ospedaliera[3], si vede così limitare il diritto alla manifestazione del proprio pensiero in ragione della cosiddetta "obligation de réserve" e, sul versante della libertà di culto, in forza del *principe de neutralité du service public* e del dovere di imparzialità nei confronti

[1] Da ultimo vedi "Conclusions du Commissaire du gouvernement E. Glaser, sous CE, Assemblée, 11 décembre 2006 n. 271029, Mme A. c. Commune de Cagnes sur mer": "Vous avez toujours considéré que les fonctionnaires n'étaient pas des citoyens comme les autres, mais avaient des devoirs et des charges spécifiques et pouvaient être assujettis à des obligations plus lourdes que ceux qui n'ont pas choisi le service public".

[2] *Ex multis*: F. Melleray, *Droit de la fonction publique*, Paris, 2005, 11.

[3] Loi n. 84-16 du 11 janvier 1984, "portant dispositions statutaires relatives à la fonction publique de l'État", art. 2; Loi n. 84-53 du 26 janvier 1984, n. 84-53, "portant dispositions statutaires relatives à la fonction publique territoriale", art. 2; Loi n. 86-33 du 9 janvier 1986, "portant dispositions statutaires relatives à la fonction publique hospitalière", art. 2. L'unica differenza nelle tre definizioni è l'assenza di riferimento al tempo pieno per la *fonction publique hospitalière*.