

# Political ethics, a body of rules at the crossroads of law and morality:

## An endless pursuit of citizen trust?<sup>1</sup>

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### INTRODUCTION

1. A common observation can be made in a lot of contemporary representative democracies: political institutions are experiencing a decay of citizen trust<sup>2</sup>. To deal with this phenomenon, lawmakers have adopted various remedies. Among these we can point out “political ethics rules”.
2. Political ethics rules have been developed in the United States<sup>3</sup> (and then in the United Kingdom) since the late 1950s and have gradually reached continental Europe since the beginning of the 21st century. It embraces a body of rules that tend to reflect "good political morals" and try to influence the behaviour of politicians to moralise them and to increase thereby their trustworthiness. The French scholar Éric Buge defines these rules as “norms of behaviour and control reinforced in relation to common law to make sure that the politicians govern for the common good”<sup>4</sup>.

Political ethics rules are supposed to avoid the strict application of political responsibility and criminal law norms. They are of various types (rules about money, conflict of interests,

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<sup>1</sup> This paper is the result of very preliminary research which should lead to a publication.

<sup>2</sup> P. ROSANVALLON, *La légitimité démocratique. Impartialité, réflexivité, proximité*, Paris, Seuil, 2008, p. 384 ; P. ROSANVALLON, *Le siècle du populisme. Histoire, théorie et critique*, Paris, Seuil, 2020, p. 288 ; J. WERNER MÜLLER, *Qu'est-ce que le populisme ? Définir enfin la menace*, Paris, Premier parallèle, 2016, p. 183 ; R. SIMONE, *Si la démocratie fait faillite*, Gallimard, 2016 ; D. VAN REYBROUCK, *Contre les élections*, Arles, Actes Sud, 2014, 224 p. ; A. FROST, « Restoring Faith in Government: Transparency Reform in the United States and the European Union », *European Public Law*, 2003, pp. 87-104 and H. PÜNDER, « More Government with the People: The Crisis of Representative Democracy and Options for Reform in Germany », *German Law Journal*, 2015, pp. 714-739.

<sup>3</sup> The Federal American Congress is the first national parliament to adopt ethical tools. See: Richard BAKER, « The History of Congressional Ethics », in Bruce JENNINGS et Daniel CALLAHAN (dir.), *Representation and Responsibility: Exploring Legislative Ethics*, New York, Plenum Press, 1985, p. 4.

<sup>4</sup> E. BUGE, « Exemplarité et démocratie. Réflexions à partir du cas des institutions athéniennes », *Revue française de droit constitutionnel*, 2021, p. 3.

transparency, *etc.*) and do not have their own normative content. Moreover, they vary according to time and space. Therefore, it is impossible to provide an exhaustive list of these norms.

3. Our analysis on political ethics rules is structured as follows: we start by explaining the reasons for the emergence of this phenomenon and give some illustrations of legal and non-legal instruments that reflect these rules (I), then we offer to put this concept into perspective with the private lives of political leaders (II). Finally, we will question the effectiveness of this potential remedy to the decay of trust in parliament (III).

## I. ORIGINS AND ILLUSTRATIONS OF POLITICAL ETHICS RULES

4. Elections do not seem to be sufficient anymore to create trust between political leaders and citizens. Originally, citizen trust in governance could be defined as trust that electors place in the politicians via their vote, based on the hope that the politicians will act in the common interest rather than in their personal interest during their mandate. With their vote, citizens become vulnerable because they take the risk that their expectations – the conformity of the politicians ‘action to the common interest – can be deceived. Today to address this vulnerability and to renew trust, it would seem at first sight that citizens need guarantees from elected officials. There would be a claim for accountability: politicians should give evidence before, during and after their election that they behave trustworthy.

In addition, there is a growing trend among citizens to define themselves more as individuals than as members of a community (party, trade union, *etc.*). It results in a tendency to personalise politics<sup>5</sup> and in an increased will to put politicians under scrutiny from the way they exercise their duties to their personal behaviour.

In view of the above, most of the time, lawmakers justify the adoption of political ethics rules by the desire to restore the bond of trust.

5. As we explained in the introduction, political ethics rules are of various type: “bad behaviours of politicians can refer to breaking legal, social or political standards”<sup>6</sup> (n° 6) and consequently the sanctions that apply to violations of these standards are also unclear (n° 7).

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<sup>5</sup> Bernard Manin speaks about an « image dictatorship » : B. MANIN, *Principes du gouvernement représentatif*, 3e édition, Paris, Flammarion, 2019, p. 279.

<sup>6</sup> R. ROSE and B. WESSELS, “Money, Sex and Broken Promises: Politicians’ Bad Behaviour Reduces Trust”, *Parliamentary Affairs*, 2019, p. 415.

6. At first sight, States' constitutions could appear to be a classic way for enshrining these rules, which aim to restore political trust. Indeed, they are supposed to contain the most fundamental norms of a legal order and we can therefore think that rules that have an impact on the citizen trust – essential to the proper functioning of institutions<sup>7</sup> - should be written down in these supreme texts. This should however be further discussed. In most States, the rigidity of the constitution is difficult to combine with the evolving nature of political ethics. It is impossible to anticipate controversial behaviour and so these norms often express an *ad hoc* response to previous political scandals. Therefore, it must be noted that regulation is primarily embodied in legislative texts or in “unwritten moral rules”.

Concerning legislative texts, they can be specifically and exclusively aimed at politicians. They are often moralisation rules adopted because of political scandals (for example, rules to prevent conflict of interests such as the obligation to file a declaration of assets, prohibition on holding several public offices or rules which concern limitation and publication of remuneration). They can also be general rules, but which have more significant consequences for politicians (for example, the violation of tax or covid rules can lead to criminal and political sanctions such as resignation).

Concerning “unwritten moral rules”, they relate to norms that every good politician should respect. In other words, there are behaviours in the politician's public or private life that, even if they have no direct link with their function, would not be acceptable for a politician by at least a part of the public opinion. Indeed, these rules often arise because of public opinion reactions. For example, we can think of the recent scandal concerning the Finnish Prime Minister Sana Marin. Because of videos of a private party, where we see the Prime Minister dancing with friends, she was criticized for not living up to the dignity of the office of Prime Minister. Moreover, some people insinuated that she had taken drugs and that she had therefore failed to fulfil her obligation to be available for work. The Prime Minister had to publicly apologise and explain herself.

7. In the same way, the punishments in case of violation of public ethics rules are variable and potentially unclear. If there is a specific legal norm, the sanction is often provided by the text. For instance, in France the absence or false declaration of assets is an offence punishable by 3 years imprisonment and a fine of €45.000<sup>8</sup>. In case of violation of a general norm, the sanction is also provided by the general text but can have other consequences which are most of the time political.

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<sup>7</sup> R. INGLEHART, « Trust, well-being and democracy », in M. Warren (ed.), *Democracy & Trust*, Cambridge University Press, 1999, p. 105.

<sup>8</sup> Article L122-20 of the French General Code of the civil service, March 1<sup>st</sup>, 2022 (N.B.: this rule was already in force in the article 25<sup>sexies</sup> of the Law n°83-634 of the 13<sup>th</sup> July 1983 which was abrogated by the Order n°2021-1574 of November 24, 2021).

For example, Matt Hancock, the former English minister of health had to resign, the 26th of June 2021, after the media revealed that he had violated Covid-rules.

## II. POLITICAL ETHICS AND THE RIGHT TO PRIVACY OF THE POLITICIANS

8. The rules of political ethics do not only concern the exercise of the functions by the political leaders but can also apply to their private life. In other words, these rules can imply the disclosure of personal information about politicians' private life (assets, private behaviours, *etc.*). Consequently, these revelations can have a high impact on their private life. The balance between the extension of the exemplarity requirement and the right to privacy of officials is difficult to find and can be questioned in the light of the European Court of Human Rights (hereafter "ECtHR") case-law.
9. First, it should be kept in mind that in *Lingens v. Austria* the Court ruled that the limits of allowed criticism are wider for a politician than for a private individual<sup>9</sup>. Indeed, politicians inevitably and knowingly lay themselves open to scrutiny of their every word and deed by both journalists and the public. The ECtHR has thus considered that the conviction of a journalist for defamation for criticizing a politician violated his right to freedom of expression. The journalist had denounced the complacent attitude of a politician towards a former Nazi, the chairman of the liberal party, who continued to take part in political life in Austria.
10. Then, following the ECtHR case-law, « the concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" »<sup>10</sup>. Politicians – who are public figures - have at first sight the same right to privacy than other individuals. However, there is nothing in the Court's established case-law which implies that the scope of private life extends to activities "which are of an essentially public nature"<sup>11</sup>. So, the important issue at stake is which information are or are not of essentially public nature in the case of a politician.
11. To answer this question, the decisions related to the tension between the freedom of expression and the right to privacy of politicians are very relevant. This case-law helps us to get a better

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<sup>9</sup> E.Ct.H.R., 8 July 1986, *Lingens v. Austria*, § 42.

<sup>10</sup> E.Ct.H.R., 7 February 2012, *Von Hannover v. Germany (NO.2)*, § 95.

<sup>11</sup> E.Ct.H.R (G.C.), 25 June 2019, *Nicolae Virgiliu Tănase v. Romania*, § 128.

understanding of the degree of “disclosure” that a politician must bear due to her/his public status in a democratic society.

An interference in a politician private’s life may be justified by “the protection of the rights and freedoms of others” under the §2 of article 8 of the European Convention of Human Rights (hereafter “ECHR”) which enshrines the right to privacy:

ARTICLE 8 ECHR: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

In relation with article 8 ECHR, “the protection of the rights and freedoms of others” can be based on the right for citizens to receive enough information about a candidate or an elected official under Article 10, § 1, ECHR which enshrine the right to freedom of expression:

ARTICLE 10 ECHR: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

12. In 2012, the second *Von Hannover v. Germany* judgment<sup>12</sup> marked a major turning point in the case law of the Court. In reaching its ruling the Court set out the criteria which domestic courts should follow when balancing the freedom of expression and the right to privacy. Among these criteria, the *reputation of the person* complaining of a violation of his privacy and the *contribution to a debate of general interest* of the disclosure are very relevant in the case of politicians<sup>13</sup>. In its *Axel Springer* judgment of the same day, the Court also stated that “[...] in certain special circumstances the public’s right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned [...]”<sup>14</sup>.

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<sup>12</sup> E.Ct.H.R. 7 February 2012, *Von Hannover v. Germany* (NO.2).

<sup>13</sup> C. BIGOT, “La protection de la vie privée des hommes politiques dans la jurisprudence de la Cour européenne des droits de l’homme”, *LEGICOM*, 2015, p. 114.

<sup>14</sup> E.Ct.H.R. (G.C.), 7 February 2012, *Case of Axel Springer AG v. Germany*, § 91.

13. However, the Court does not consider that every act of a politician is in the public interest. For instance, in *Ruusunen v. Finland*<sup>15</sup>, the Court has made a clear distinction between the existence of a relationship between a Prime Minister and a young woman, which may be a matter of public interest because it could give indications of his honesty and capacity for judgment, and the details of the couple's intimate moments which are a violation of privacy. In a similar way, in *Drakšas v. Lithuania* the Court concluded that there was a violation. The case was about the leaks to the media and the broadcasting of a private conversation recorded, with the authorities' approval, on a telephone line belonging to a politician who was under investigation by the prosecuting authorities<sup>16</sup>. However, the lawful publication, in the context of constitutional proceedings, of recordings of conversations that were not private but professional and political was not found to have breached Article 8<sup>17</sup>.
14. Recently, it should be noted that in *Centre for Democracy and the Rule of Law v. Ukraine* the ECtHR unanimously ruled that a refusal by the Ukrainian authorities to give a non-governmental organisation (NGO) access to information about the education and work history of top politicians running for parliament, as contained in their official CVs, violated the NGO's right of access to public documents under Article 10 ECHR<sup>18</sup>.

### III. THE EFFECTIVENESS OF POLITICAL ETHICS RULES: AN ENDLESS PURSUIT OF CITIZEN TRUST?

15. In the first part of this paper, we exposed that political ethics rules seem to be closely related to the purpose of restoring trust (see n<sup>o</sup>5). But are these rules a potential remedy against citizen distrust in parliamentary institutions?
16. Several scholars have been critical of the idea that stricter regulatory constraints could re-establish trust in those public officials no longer considered trustworthy. Studies about some states have shown that increased levels of parliament accessibility, transparency, visibility, and communication have not coincided with increasing levels of trust. For example, in Germany, the decline in trust has happened even though the Bundestag has become a more professional, open, transparent, and

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<sup>15</sup> E.Ct.H.R. (G.C.), 14 January 2014, *Case of Ruusunen v. Finland*.

<sup>16</sup> E.Ct.H.R., 31 July 2012, *Drakšas v. Lithuania*, §60.

<sup>17</sup> E.Ct.H.R., 31 July 2012, *Drakšas v. Lithuania*, §61.

<sup>18</sup> E.Ct.H.R., 26 March 2020, *Centre for Democracy and the Rule of Law v. Ukraine*, §§ 114-116.

active parliament since the 1960s – and despite the fact that German citizens are much better informed<sup>19</sup>.

Political ethics rules actually seem to have a counterproductive effect in terms of trust. Expanding citizens' information on parliamentarians' unethical behaviour is more likely to decrease trust in parliamentarians or in parliament as an institution. As we have written (see n°6), ethics regimes are preventive,

“[t]hus, [political ethics rules] are likely to foster trust only once parliamentarians comply and if no rule violations occur. If – at least initially – tougher regulation sheds light on more rule violations [...] rather than preventing them, having proof about widespread unethical behaviour might make matters worse than distrust predominantly fostered by rumours and suspicions or revelations about individual cases (van Aaken and Voigt 2011: 307). Consequently, intense monitoring can weaken or undermine trust (Olsen 2013: 454). Second, [political ethics] regulation itself might – unintentionally – raise citizens' expectations about what behaviour is acceptable and what is not, as ethics rules ought to be increasingly detailed to minimise misunderstandings (NDI 1999: 6). Specifying the formerly rather blurred boundary between what is acceptable and what is not, [political ethics] regulation itself can become a catalyst enhancing public concerns about ethics (Rosenthal 2005: 175) and thereby raise the bar of what ethics regulation ought to achieve (Saint-Martin 2008: 48)”<sup>20</sup>

In addition to this tendency of tougher regulation to initially reveal more rule violations rather than preventing them<sup>21</sup>, we can also think to another perverse effect to these control standards and media exposure: this system could discourage political engagement by the citizen which are interest by the function but fear this exposure and control<sup>22</sup>.

17. Finally, we believe - at this stage of our research - that trust depends most of the time on other factors that are often *outside* the law such as the level of education of people (who are more likely to trust political institutions if they are better educated<sup>23</sup>), a low predisposition for citizen

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<sup>19</sup> N. BOLLEYER and V. SMIRNOVA, “Parliamentary ethics regulation and trust in European democracies”, *West European Politics*, vol. 40, n°6, 2017, p. 1229.

<sup>20</sup> N. BOLLEYER and V. SMIRNOVA, “Parliamentary ethics regulation and trust in European democracies”, *West European Politics*, vol. 40, n°6, 2017, p. 1230.

<sup>21</sup> N. BOLLEYER and V. SMIRNOVA, “Parliamentary ethics regulation and trust in European democracies”, *West European Politics*, vol. 40, n°6, 2017, p. 1234.

<sup>22</sup> On this topic see C. MORIN, “On a les politiques qu'on mérite”, Paris, Fayard, 2022.

<sup>23</sup> S. HOLMBERG, S. LINDBERG and R. SVENSSON, “Trust in Parliament”, *Journal of Public Affairs*, 2017, p. 5.

engagement<sup>24</sup>, an interest in politics<sup>25</sup>, the level of corruption<sup>26</sup>, *etc.* Consequently, it would seem “[t]hat implies that attempts to improve trust in politicians by adopting formal laws will be inadequate, since major informal influences on distrust are within the law”<sup>27</sup>. In other words, “there is not much that Parliament can do to gain trust, from investing in ‘symbolic’ representation to keep the confidence of those who already trust the Parliament, by ensuring a sense of identification, e.g. by strengthening public engagement or by giving room for the representation of different groups in society”<sup>28</sup>.

### CONCLUSION: ARE THESE RULES OF POLITICAL ETHICS WORTH IT?

18. First, the analysis of the political ethics rules concept that we have carried allow us to explain that this blurred body of rules (see n<sup>os</sup> 6 and 7), supposed to address the decline of trust (see n<sup>o</sup>4), could have impact on the private life of a politician (see n<sup>o</sup>8). About this topic, we examined the ECtHR case-law which shows that the Court is tougher on politicians when considering a potential violation of their privacy (article 8 ECHR) balanced against the right to freedom of expression of others under Article 10 ECHR. Then, in the third part, we found that political ethics rules were not really effective in achieving their primary objective of restoring public trust. They could even be counterproductive and fuel mistrust (see n<sup>o</sup> 16).

Consequently, we wonder if these rules are worth it: do not they imply too much inconvenience for politicians compared to the almost non-existent benefits in terms of citizen trust? Indeed, beyond the interference with their right to privacy, the *ad hoc* nature of ethics rules can also be used to damage the image of politicians even before she/he is tried for the acts she/he allegedly committed.

19. We think that it is maybe in the nature of a parliamentary institution to be the focus of criticism and dislike<sup>29</sup> and so the quest for trust through political ethics may be unsuccessful. In addition,

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<sup>24</sup> C. LESTON-BANDEIRA, “Parliaments’ Endless Pursuit of Trust: Re-focusing on Symbolic Representation”, *The Journal of Legislative Studies*, 2012, p. 521.

<sup>25</sup> N. BOLLEYER et V. SMIRNOVA, « Parliamentary ethics regulation and trust in European democracies », 2017, *West European Politics*, vol. 40, n<sup>o</sup>6, p. 1234.

<sup>26</sup> C. LESTON-BANDEIRA, “Parliaments’ Endless Pursuit of Trust: Re-focusing on Symbolic Representation”, *The Journal of Legislative Studies*, 2012, p. 522.

<sup>27</sup> R. ROSE and B. WESSELS, “Money, Sex and Broken Promises: Politicians’ Bad Behaviour Reduces Trust”, *Parliamentary Affairs*, 2019, p. 495.

<sup>28</sup> P. POPELIER, “The Duty of Parliament to Adopt Reliable Legislation: Linking Trust in Parliament with Legitimate Expectations”, in M. DE BENEDETTO, N. LUPO and N. RANGONE (eds.), 2020, p. 248. See also: C. LESTON-BANDEIRA, “Parliaments’ Endless Pursuit of Trust: Re-focusing on Symbolic Representation”, *The Journal of Legislative Studies*, 2012, p. 522.

<sup>29</sup> C. LESTON-Bakndeira, “Parliaments’ Endless Pursuit of Trust: Re-focusing on Symbolic Representation”, *The Journal of Legislative Studies*, 2012, p. 525.



highlighting all potential deviant behaviours through legislation or media is giving rise to a “democracy of the moment” and to sensationalism and thus it removes substantial political debates.

20. However, we also do not believe that all political ethics rules should be forgotten. Instead, they should be read independently of a citizen trust-building objective. For instance, they can be used to prevent conflicts of interest often seen as the antechamber to corruption<sup>30</sup> which is – as we seen (see n° 14) - a factor that can potentially influence the level of trust.

But these rules will not *per se* restore the bond of trust. Indeed, it seems that they hardly prevent citizens from being suspicious and can create themselves suspicion (see n° 13) about the elected officials. Nevertheless, this is not always a bad thing. An absolute trust should not be an ultimate goal to be achieved. Trust is “neither good in itself nor good for everything”<sup>31</sup>. Although most studies on political trust focus on the positive aspects of it and see its decline as a danger, too much trust can also have negative effect. It has a “dark side”: excessive citizen trust can lead to atrophied criticism and control of institutions<sup>32</sup>, or to complacency towards political action that is unsatisfactory<sup>33</sup>.

Eventually, as Ronald Inghelart noted<sup>34</sup>, democratic transitions are accompanied by an increase in distrust that keeps voters on their toes and in control of their rulers. The desire to restore citizen trust - frequently invoked by legislators as the basis for various reforms - is more akin to the institutionalisation of mechanisms of distrust than of trust.

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<sup>30</sup> J. MORET-BAILLY, *Les conflits d'intérêts, Définir, gérer, sanctionner*, Paris, LGDJ, 2014, p. 42.

<sup>31</sup> E. LAURENT, *Économie de la confiance*, Paris, La Découverte, 2012, p. 14.

<sup>32</sup> T. M.S. NEAL, E. SHOCKLEY and O. SCHILKE, « The “Dark Side” of Institutional Trust » », in E. SHOCKLEY, and others (ed.), *Interdisciplinary Perspectives on Trust*, Berlin, Springer, 2016, p. 179.

<sup>33</sup> M. GARGIULO et G. ERTUF, « The Dark Side of Trust », in R. Bachmann et A. Zaheer (ed.), *Handbook of trust Research*, Cheltenham, Edward Elgar Publishing, 2006, p. 165.

<sup>34</sup> R. INGLEHART, « Trust, well-being and democracy », in M. Warren (ed.), *Democracy & Trust*, Cambridge University Press, 1999, pp. 110 et 111.