Regulation v Real Independence and Impartiality

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Regulation is an instrument through which the State governs. It can determine who may practise a profession, impose standards, restrict activity and bring disciplinary proceedings with consequences for a person's livelihood.

Calling that machinery a public safeguard describes its intended justification. It does not establish whose interests the machinery serves when it is used.

The question examined here is whether regulation protects the public when their interests conflict with the Government's priorities.

A regulator may operate at a formal distance from ministers yet act in ways which protect a government programme from challenge.

If professional sanctions discourage lawful scrutiny whilst the conduct being scrutinised escapes equivalent examination,

regulation has begun to serve governmental protection at the public's expense.

The connections between regulation and government are not imaginary. Parliament creates statutory powers; ministers may have powers over appointments, policy frameworks or guidance, depending upon the particular regime.

The Legislative and Regulatory Reform Act 2006 expressly provides for ministerial codes relating to specified regulatory functions. The Deregulation Act 2015 places a growth duty on those exercising specified functions.

Regulation is part of public governance, not an institution existing outside it.

Those arrangements are not inherently improper. Democratic government must be able to legislate for legitimate public purposes, but statutory objectives must be distinguished from an executive preference about the outcome of an individual case.

A power conferred for public protection cannot safely be treated as an available means of defending government reputation or discouraging an inconvenient legal challenge.

The growth duty illustrates the distinction. Its statutory guidance explains that promoting growth does not legitimise non-compliance with other duties or the sacrifice of necessary protections. The stated policy objective is not permission to disregard the safeguards which qualify it.

The same discipline is needed whenever a regulator is asked to support the delivery of a government programme.

The central concern is therefore the conversion of public-interest powers into instruments of policy protection. That conversion need not involve a minister ordering a sanction. It can occur through the adoption of governmental assumptions, selective attention to evidence, deference to official complainants or a reluctance to revisit an account which institutions have already endorsed. Independence must therefore be tested at those points.

References

- Legislative and Regulatory Reform Act 2006, ss 21 - 24
- Deregulation Act 2015, ss 108 - 110

When public protection becomes policy protection

Consider a professional who challenges the legality or evidential basis of government action.

A government official complains to that professional's regulator.

The regulator must be free to assess the complaint.

Public employment does not disqualify a complainant and challenging government does not exempt a professional from proper standards.

The decisive issue is whether the regulator establishes misconduct independently, rather than treating opposition to policy as evidence of it.

A concern about professional competence must identify the standard allegedly breached and the conduct said to breach it.

A charge of misinformation must identify the disputed factual proposition, the evidence bearing upon it and any material competing evidence.

Concern about confidence in a programme cannot itself settle the truth of a statement or the propriety of lawful representation.

This is especially important for lawyers.

Section 1 of the Legal Services Act 2007 places the public interest, the rule of law, access to justice and an independent legal profession among its regulatory objectives.

Its professional principles require independence and integrity. Those provisions make independence part of the purpose which regulation must serve.

Protecting the Government from an unwelcome legal challenge is no substitute for that purpose.

The public consequences reach beyond the person facing proceedings.

A sanction imposed for established misconduct can protect clients and professional standards. Action which instead penalises legitimate challenge may discourage other practitioners from accepting difficult cases, obtaining competing expert evidence or testing official accounts.

The resulting silence could be mistaken for professional agreement when it actually reflects fear of regulatory consequences.

Real impartiality also requires examination of the decision-makers.

In *Porter v Magill [2001] UKHL 67*, paragraph 103, the House of Lords formulated the objective test for apparent bias:

Whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.

Actual dishonesty need not be established before a properly evidenced concern about impartiality requires attention.

The test requires facts. Shared professional circles, a former appointment or an institutional association do not automatically establish disqualification.

Their relevance depends upon their nature, timing and connection with the matter being decided.

A credible concern should lead to a documented assessment, appropriate disclosure and a reasoned decision about participation.

An assurance of personal integrity cannot perform that examination.

Independence is therefore demonstrated when an institution can reject an unsupported governmental complaint, correct an official factual error and protect lawful professional activity despite political inconvenience.

A regulator which is vigorous towards an individual but incurious about the governmental material used against that individual invites an unavoidable question:

Whose interests is its vigilance serving?

References

- Legal Services Act 2007, s 1. This is the legal-services framework for England and Wales, not a statement of identical regulatory law throughout the UK
- Porter v Magill [2001] UKHL 67, paras 103 - 105

The records by which independence can be tested

The answer requires records. Where government-related material contributes to regulatory action, the chronology should establish who initiated contact, in what capacity, what was supplied, its provenance, how it was assessed and what use was made of it.

Relevant correspondence, attachments, referral records and decision logs should be preserved.

Associated metadata and audit histories may help establish when documents were created, revised, received and circulated.

Disclosure matters because the institution's final account may omit the influences which shaped its decision.

A complaint presented as an individual concern may have a wider official context.

A factual assertion may have changed between an early briefing and the final proceedings.

An apparent inconsistency may have an entirely proper explanation.

Independent examination must be able to test those possibilities rather than simply receive the institution's preferred narrative.

The affected professional should have a fair opportunity to understand and answer material relied upon, subject to lawful procedural limits.

Public accountability also calls for sufficient disclosure to explain how governmental interests were separated from regulatory judgment.

These are related but distinct purposes. Neither requires indiscriminate publication of personal data, privileged advice or material whose release would legitimately prejudice proceedings.

Fair procedure improves the quality of the answer.

In *Osborn v Parole Board [2013] UKSC 61*, paragraphs 67 - 68, the Supreme Court explained that fairness helps bring relevant information before the decision-maker and enables it to be tested; it also has value beyond whether the eventual result would have changed.

That reasoning exposes the weakness of defending an opaque process solely by asserting that the outcome was correct.

Reform should therefore address the points at which governmental influence can enter.

Official referrals should retain their provenance. Relevant conflicts should be identified before decisions are taken.

Regulatory allegations should remain tied to demonstrable standards and evidence. Challenges to institutional accounts should receive reasoned answers, and review arrangements should permit effective examination of the substantive concern.

These are practical means of testing independence.

The public should also resist the assumption that regulatory approval settles every question about the underlying policy or that disciplinary action proves the falsity of every proposition advanced by the person sanctioned.

The findings must be read for what they actually decide, as regulatory status cannot replace examination of the evidence.

Regulation is a tool of government in the broad sense that it exercises powers through which society is governed.

The danger arises when that tool is used to protect the executive from scrutiny whilst continuing to claim the authority of public protection.

Real independence becomes visible when a regulator insists upon the same evidential discipline for an official allegation as for any other.

Until that can be demonstrated, the description ‘public safeguard’ remains a claim which the public is entitled to test.

Reference

Osborn v Parole Board [2013] UKSC 61, paras 67 - 68