WHEN REGULATION IS A TOOL OF GOVERNMENT AND THE LAWYER IS CHALLENGING GOVERNMENT

The Constitutional Tension at the Heart of Legal Regulation

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Introduction

There is a simple constitutional question which deserves a simple answer.

What happens when regulation is expressly understood as a “tool of Government”, but the person being regulated is a lawyer acting in circumstances adverse to Government itself?

The question is not rhetorical. It arises from the juxtaposition of two propositions found within the United Kingdom's own regulatory and statutory architecture.

Government guidance titled Core competencies for regulators identifies, as its very first competency under the heading *“Context”*:

“Understanding of the role of regulation as a tool of Government.”

The same guidance expects regulators to understand the wider regulatory framework, work towards their organisation's regulatory objectives, work with relevant legislation and operate within regulatory policies and procedures.

There is nothing inherently constitutionally improper about describing regulation in those terms, in the main.

A difficulty arises however, when the regulator concerned regulates lawyers.

It becomes more acute still when those lawyers are engaged in activity which challenges Government, scrutinises Government, brings proceedings against Government, or seeks the application of the criminal law to alleged conduct involving Government.

At that point another body of law becomes critically important.

It is an Act of Parliament.

The Legal Services Act 2007

Section 1 of the Legal Services Act 2007 establishes the regulatory objectives applicable to legal services regulation.

Those objectives include:

“supporting the constitutional principle of the rule of law”;

and:

“encouraging an independent, strong, diverse and effective legal profession”.

The professional principles identified by Parliament additionally encompass the proposition that authorised persons should act with independence and integrity.

These are not decorative aspirations. They form part of the statutory architecture governing legal-services regulation.

The significance should therefore be readily apparent.

Government may legitimately regard regulation as an instrument through which public policy and statutory standards are implemented. But, Parliament has simultaneously required the regulatory architecture governing lawyers to protect something capable of operating directly against Governmental interests: The independence of the legal profession and the constitutional principle of the rule of law.

The distinction is fundamental.

When the Two Principles Meet

Ordinarily, there need be no conflict whatsoever.

A regulator can perform a public regulatory function whilst remaining operationally independent in individual regulatory decisions. Indeed, that distinction is essential.

Consider though, the position when a lawyer becomes involved in litigation against Government, challenges governmental decision-making, represents individuals alleging wrongdoing by public authorities, or participates in reporting suspected criminal conduct said to involve Government or its institutions.

The lawyer may then be performing precisely the constitutional function which an independent legal profession exists to perform.

The regulator nevertheless retains substantial power over that lawyer.

That produces an unavoidable constitutional question:

How does a regulator which exists within a wider system in which regulation is recognised as a "tool of Government" demonstrate that its regulatory power remains completely *independent when exercised against lawyers whose activities are themselves adverse to Government?*

That question becomes particularly important where the regulatory activity occurs in temporal or factual proximity to those lawyers' activities concerning Government.

It does not, without further evidence, establish governmental interference.

It does not, without appropriate evidence establish regulatory misconduct.

And it does not, again without necessary evidence, establish that any particular regulatory decision was improperly motivated.

The position cannot however be properly dismissed merely by asserting that a regulator is independent.

Independence must be capable of being demonstrated where the circumstances legitimately place it in issue.

The Constitutional Safeguard

The independence of lawyers from Government is not an inconvenience within a constitutional democracy.

It is one of its safeguards.

There will inevitably be occasions when lawyers must act against Government.

- They may challenge Ministers.
- They may seek judicial review of Executive decisions.
- They may represent individuals alleging unlawful conduct by State institutions.
- They may expose evidence embarrassing to Government.
- And, in the most serious circumstances, they may participate in reporting allegations that persons exercising governmental or public functions have committed criminal offences.

On precisely those occasions, the lawyer must be able to act without apprehension that professional regulation could become, or even reasonably appear to become, an indirect means of governmental restraint.

That is why Parliament's language matters.

The statutory objective is not just the maintenance of a competent legal profession - It also expressly encompasses an independent legal profession. What is more, it expressly encompasses the constitutional principle of the rule of law.

Those concepts acquire their greatest importance not when lawyer and State agree, but when they do not.

The Question Which Must Be Answered

The Government's description of regulation as a *“tool of Government”* should therefore not be treated as proof of governmental control of an individual regulator and certainly not in instances where regulation relates to regulated legal professionals.

The Government guidance itself is a general regulatory competency framework and cannot purport to establish control in priority to the position established by Parliament. Indeed, when the Government asserted proposition is placed alongside Parliament's statutory protection of the rule of law and an independent legal profession, an important constitutional boundary becomes plainly visible.

Regulation may serve legitimate governmental purposes. Nonetheless, legal regulation must remain sufficiently independent that it cannot become an instrument for suppressing, discouraging or penalising lawful professional activity directed against Government itself.

Where circumstances raise a legitimate question about that boundary, the proper response is not institutional reassurance. It is evidence.

- What communications occurred?
- What information was exchanged?

- Who initiated regulatory consideration?
- What decisions were taken?
- Upon what evidence?
- Were external governmental or policing interests involved?
- And can the resulting chronology demonstrate that regulatory judgment remained genuinely independent?

These are legitimate questions of institutional governance.

To Summarise

The issue can ultimately be reduced to one proposition.

Government may regard regulation as a tool of Government. Parliament nevertheless requires legal regulation to support the rule of law and an independent legal profession.

Those principles can coexist, but their coexistence depends upon an impermeable constitutional boundary.

When lawyers challenge Government, scrutinise Government or seek the application of law against Government, the regulator must stand on the rule-of-law side of that boundary.

Otherwise the very mechanism entrusted with regulating the legal profession risks undermining the independence which Parliament required it to protect and that would transform the issue from one concerning professional regulation into something considerably more serious: A question about whether the constitutional machinery intended to protect the rule of law can itself remain independent when the Government becomes the subject of the law's scrutiny.

That is the important point and it deserves clarity not supported not by assurances, but by evidence.

Sources utilised

- Legal Services Act 2007, section 1
- Government - Core competencies for regulators