“Club government” and independence in media regulation

Thomas Gibbons

Introduction

Independence is a major theme in the contemporary discussion of regulation in general. Indeed, the presence of independent regulators is a defining characteristic of the modern regulatory state. For the media, independent regulation has long been associated with the value attributed to media independence itself and, because that is strongly associated with the democratic process, there has been heightened sensitivity to attempts to manipulate regulation for partisan purposes. This chapter examines the current developments in independent regulation of the media, and its purpose and rationale. In describing the history of media regulation in the United Kingdom, what has been called “club government” becomes significant: a mode of describing the culture of appointment and consensus, and its relationship to independence. Drawing on the UK experience of media regulation, the chapter discusses the tension between independence and accountability in the democratic process. In the light of developments in new media and the general trend towards decentered regulation, it asks whether there is a continued role for independent regulation, and concludes that there is, but not necessarily in its traditional guise. Instead, independent regulation should be considered as a set of principles that should be applied to all media sectors.

Regulation and independence: The current context

Regulatory independence entails a degree of separation between the enactment of policy and its implementation, by means of institutions that have exclusive responsibility for certain decisions, in the absence of bias on their part, and in the absence of threats or incentives to act differently. The standard rationale for independent regulation, for what is essentially a delegation of power by government, is that the execution of the relevant policy requires expertise, and that it is more efficient to create a special scheme to allow a specialist body, the regulator, to carry it out (Baldwin, Cave and Lodge 2011; Shapiro 2002). In addition, the rise of the so-called “regulatory state” in the 1980s and 1990s, including in Europe and the United Kingdom (Majone 2000; Moran 2003; Baldwin, Cave and Lodge 2011), has been partly characterized by concern with the process of regulation itself; that has included an emphasis
on the presence of an independent regulator as a symbol and a reflection of even-handed application of policy. Independent regulatory agencies may be regarded as a demonstration of a credible commitment to a policy, by showing that it will not be vulnerable to short-term changes of political direction (Majone 2000; Thatcher and Stone 2002; Magetti 2007; Harker 2011; Rittberger and Wonka 2011). Regulatory independence provides transparency, professionalism and accountability, which encourages investment and stability.

Independence in regulation is not synonymous with complete autonomy, however, because it has to be understood in terms of the relevant regulatory policy or mandate; these depend on political choices. No regulatory scheme is policy-neutral; its purpose is to shape behavior to achieve public interest goals. Of course, an administrative arrangement for implementing a legislative program may be described in similar terms and the distinction between the two is not always easy to draw. The differences seem to be based on levels of policy detail, the time frame for political change, the range of interests to be balanced and the extent of objectivity in applying the policy. For example, a media policy to promote, say, regional production might be considered to be part of a regulatory scheme if: the relevant legislation reflected the general principle without specifying exactly what was to count as regional production; decisions to allocate resources to such production did not reflect short-term political advantage; action was tailored to particular circumstances; and decision-making was evidence-based and fair. The very use of regulation can be seen, therefore, as the outcome of a “mega-level,” virtually constitutional undertaking by politicians to exercise restraint over involvement in policy implementation.

To secure legitimacy and political acceptance for its independent elements, an ideal regulatory scheme has to have a number of attributes: the mandate has to be clear; the regulator’s expertise, whether it is technical proficiency in economics and competition (antitrust) or knowledge and experience of an industry, must be evident; appropriate procedures need to be followed; the outcome must be successful; and, importantly, all of those factors must be rendered accountable (Baldwin, Cave and Lodge 2011). As will be seen, whichever methods are adopted to balance these qualities, they often appear to turn on distinguishing the formulation of policy or strategy, which may be regarded as general and political, from day-to-day operational practice, which may be regarded as particular and regulatory. However, the distinction is not clear-cut, and may not even be desirable (see Prosser 2010b). Politicians may set a policy agenda and enshrine it in a legislative mandate, but the success of the policy may well depend on the way in which the mandate is interpreted and applied by the regulator. Politicians will want sufficient scrutiny of the regulator’s activities to enable them to retain control over the broad direction of policy. All of these points suggest that the central values of an independent regulatory scheme emphasize process rather than substance. Independence indicates that policy will take effect according to the fair application of established rules by specialists in the field. It does not mean that the rules cannot be reviewed and amended. This, in turn, means that regulatory independence is ultimately precarious and vulnerable to radical political revision.

**Independent media**

In addition to the rationales based on expertise and detachment from short-term political influences, independent regulation has been considered to be important because it supports the idea of the independence of the media themselves from government control. Such independence is widely regarded as essential to the well-being of democratic culture: although the media are largely concerned with providing entertainment in the pursuit of commercial
success, they also provide a significant channel for disseminating information, conveying opinion and enabling exchanges between individuals and groups. Their potential influence on opinion forming and behavior—whether real or perceived—goes to the core of policy formation, and has a potential impact far beyond the media sector itself. From a democratic perspective, these capacities—to circulate information and to influence opinion—suggest that government should not be able to control media content and should acknowledge that the media have a valuable function in calling government to account.

These ideas are related to two sets of constitutional features associated with Western liberal democracies (see Gibbons 1998). One is the doctrine of freedom of speech (Barendt 2007; Schauer 1982), which holds that, even if speech causes harm, special justification is required for interfering with the exercise of expression. To a greater or lesser extent, the doctrine is incorporated into institutional arrangements, such as the US Constitution's First Amendment or the European Convention on Human Rights, which is enforced in the UK under the Human Rights Act 1998 (Nicol, Millar and Sharland 2009). While the media do not have a privileged status as such—while acknowledging the debate about the meaning of the “free press” clause in the First Amendment (see Schauer 1982)—journalists' contributions are typically given great weight in legislation and adjudication about free speech issues, often resulting in preferential treatment.

The other relevant constitutional dimension is the separation of powers. Under that familiar doctrine, it is held that the principal organs of the state—the legislature, the executive and the judiciary—should be institutionally separated so that they can check and balance each other's exercise of power. However, the doctrine applies to the media only by analogy, on the premise that the media can then be regarded as the “Fourth Estate” of the constitution. That role was asserted for the press only in the nineteenth century (Hampton 2010) and arguably came to fruition in the early twentieth century, in an era of “press barons” who were economically independent of the political parties that had previously dominated the newspaper industry (Curran and Seaton 2009). While it has no institutional basis, the idea of the press as the Fourth Estate has a strong rhetorical appeal, conjuring an image of journalists who are critical “watchdogs” on behalf of society, scrutinizing the exercise of public power and exposing abuse.

This rhetoric has provided a significant political defence against attempts to intervene in press behavior and publishing that go beyond the basic requirements of the general law. For the press, independence has traditionally been associated with the absence of formal regulation. Its existence as financially and corporately separate from government means that it cannot be an unwilling mouthpiece of government. Where special public interests in press activity have been conceded (for example, in relation to accuracy or respect for privacy) a scheme of self-regulation has been regarded as the very badge of separation. Media independence is also highly valued in broadcasting, yet the necessity of total separation from state involvement has not been recognized, because broadcasting serves so many public purposes in which there is a strong democratic interest. As a result, elaborate structures of regulation are required to prevent the government from exerting undue political control over content.

In many ways, the arguments for independent media regulation are little different from those for independent regulation in any sector. In addition to having specialist knowledge of the sector—in this case, the technicalities of communications and the peculiarities of communications markets—the media regulator must have an additional level of expertise: an acute awareness of the democratic significance of media independence and the constitutional implications of regulating the media. Precisely because the media are both a tool of communication and such an inherent part of our cultural and political life (Silverstone 2007), there is a
reflexive dimension to media policy: its very shaping can alter the terms of debate about its substance. The dilemma is to know whether a media regulator can be trusted to promote media policies while maintaining a sufficient degree of media independence.

The evolution of independent media regulation in the UK

The difficulties in achieving an appropriate balance between independence and accountability are well illustrated in the early regulation of public service broadcasting in the United Kingdom and its gradual development into the system of (almost, but not fully) independent regulation that now exists. When the British Broadcasting Corporation (BBC) was established in 1926, it was based on the standard institutional mechanism of the time: the public board—what might be considered an early twentieth-century precursor to the modern regulatory agency. The public board represented public ownership of what was considered public property—namely, the airwaves—which were to be managed in the national interest (see Gibbons 1998). Such boards were not so much regulatory as administrative, reflecting a civil service culture, but they were independent in day-to-day decisions and subject to little formal political supervision. Earlier, the Sykes Committee was concerned that the BBC (at that time a private company) should be completely independent from politics and the Crawford Committee had recommended that its establishment as a public corporation should take place under statute to reflect that. In fact, the government decided to incorporate the BBC under a royal charter, to signal that it was not a “creature of Parliament and connected with political activity” (Briggs 1961: 352–3). Although the government retained control of the underlying policy, by licensing the BBC through a formal agreement to transmit only public service broadcasting, it did not directly interfere with editorial policy.

These arrangements should be interpreted as illustrations of the “club government” approach that characterized much British public administration until the 1980s (see, generally, Moran 2003). Rather like members of a club, politicians and administrators tended to share similar backgrounds and outlooks that were reflected in common understandings about appropriate action—here, how to run a public broadcasting service. As it happened, one person had a major role in shaping those understandings: John Reith, the first Director-General of the BBC. During the General Strike in 1926, he persuaded the government not to use the BBC as a propaganda machine (which it was technically empowered to do), but to allow it to act as a conciliatory force by means of even-handed reporting of both sides to the dispute (Curran and Seaton 2009). That neutral stance developed into undertakings to deal with controversial matters only on an impartial basis and not to editorialize on current affairs or matters of public policy (Gibbons 1998). While it is true that editorial independence was one of the BBC’s founding principles, with its journalism based on impartiality and objectivity (Born 2004), that impartiality represented a constraint that it imposed on itself as a defence against political interference.

Nevertheless, Reith was able to consolidate the BBC’s practical independence in other ways. The charter placed formal responsibility for programming in the hands of the BBC’s board of governors, who were supposed to represent the public interest in the BBC’s activities. However, Reith secured an agreement in 1932 (the “Whitley agreement”) that the governors’ remit would be general and not particular; the execution of policy and general administration of the broadcasting service was to reside with him and his executive (Burns 1977). As a result, although some chairmen of the governors did try to assert a supervisory role, much of the BBC’s day-to-day operations were immune to effective internal accountability up to the 1970s.
At the same time, the BBC was frequently subject to political pressure from governments and politicians, who often expected the corporation to behave “responsibly” in representing official interpretations of the public interest (Scannell and Cardiff 1991). Although the BBC successfully defended its position at the time of the Suez crisis (Briggs 1979), the club government style of public administration, in the absence of a full regulatory framework, created uncertainty about its role and obligations, even if that lack of external regulation was also a mark of its independence. During the 1980s, there were a number of disagreements between the government and the BBC over the organization’s impartial treatment of sensitive issues such as the Falklands war, the civil unrest in Northern Ireland, and the US air raid on Tripoli in 1986 (Gibbons 1998). In these cases, what protected the BBC’s stance was a broad political consensus that the independence of broadcasting should be respected. Where such a consensus does not exist, public service broadcasters are obviously vulnerable to political pressure, recent examples being found in both France and New Zealand (Benson and Powers 2011; Gibbons and Humphreys 2012).

The BBC’s institutional independence was, and still is, regarded as an essential element of its editorial autonomy. But that independence had the effect of deflecting scrutiny of its delivery of its public policy goal, public service broadcasting. As indicated, independence may be accepted as legitimate only if adequate systems of accountability are in place. The BBC governors’ ability to hold the executive to account was increasingly questioned in the 1990s, a period during which the raison d’être for public service broadcasting was challenged by commercial rivals and competition regulators. Following the 2004 Hutton Inquiry, which sharply criticized the BBC’s internal supervision and accountability process, the Charter and Agreement of 2006 (Department of Culture, Media and Sport 2006a, 2006b) introduced substantial reform. The governors were replaced with a board of trustees, which sets the overall strategic direction and resources, and an executive board, which has responsibility for delivery of services and operational management. Through the agreement with the government, the BBC Trust issues “service licenses” for programming, establishing the criteria against which the BBC can be judged. The agreement also makes provision for the BBC to submit to Ofcom’s jurisdiction in respect of broadcasting standards, except in relation to its editorial independence and impartiality (Gibbons 2012). The result of these changes is that, although the BBC formally retains its institutional independence and, substantively, its editorial independence, it is now effectively regulated by Ofcom. Its board of trustees duplicate many of Ofcom’s duties and their role is more symbolic than essential to the BBC’s remit. That symbolism should not be underestimated, since it emphasizes the importance of the BBC’s editorial values and its public service obligations. But, in terms of this discussion, the point is that the presence of an independent regulator does not compromise the BBC’s public purposes, reflecting as they do the media policy commitment to public service broadcasting.

Independent regulation in the UK’s commercial sector (known as “independent” television and radio) came much earlier. Initially, a hybrid broadcaster–regulator model was adopted, with the Independent Television Authority (ITA), subsequently the Independent Broadcasting Authority (IBA), being modeled on the BBC, and technically being the broadcaster responsible for programming commissioned from a set of regional production companies. The ITA has been described as the first UK agency based on the US experience with independent regulatory commissions (Baldwin, Cave and Lodge 2011; Prosser 1997), with elements of independence from government in adjudication and in regulation, as well as policy development. But the idea of the ITA as broadcaster really had more features of club government, enabling control over program content (hence taking on an editorial role and enhancing editorial independence) and depicting the supply of programming as a matter of
administration (through contracts with the production companies). It was a public corporation, charged with implementing public service broadcasting policy through commercial funding by advertising.

The statutory basis for the ITA underpinned its independence from government. But the novel aspect of commercial television was precisely the presence of the industry in the regulatory landscape and the ITA’s independence from that was less clear. At first, the public law implications—that the ITA and IBA were actually allocating public resources as a regulator—were not appreciated (see Lewis 1975). The agency understood its mandate as extending the public service approach of the BBC to the private sector, and that explains the relationship between it and the production companies. In times of financial crisis in the industry, the agency was sometimes depicted as being unwilling to regulate, preferring instead to accommodate companies’ demands for concessions (Gibbons 1998). But, rather than seeing itself as being captured by the industry, the agency’s emphasis was on doing whatever was necessary to keep the program schedules filled for the benefit of the audiences. From the industry’s perspective, this was achieved through the exercise of a very wide discretion to choose (although without sufficient transparency) who would make programs (Prosser 1997; Lewis 1975).

During the mid-1980s through to the early 1990s, the utilities industries in the UK were privatized, with considerable reform of regulation. Because the perceived legalism of the US “commission-style” agency was not wanted (Prosser 1997), individuals were appointed as directors of regulatory agencies (Graham 2000). However, this model was not extended to the media, and the IBA was replaced in 1990 with two similar committee-style agencies, the Independent Television Commission (ITC) and the Radio Authority (RA). Although they appeared similar and had some continuity of approach, regulation of the media changed to more closely reflect the characteristics of a modern regulatory state. The ITC and the RA were quite different in being independent regulators, with the responsibility for delivering programming being placed on the broadcasting companies; the regulators ceased to be their editors and had a more “hands-off” relationship with them in administering the regulatory scheme. The policy mandate for that scheme was much more fully articulated in the relevant statutes, moving away from the club government approach to public service broadcasting policy and reflecting the erosion of a commonality of interest between commercial rivals.

The regulators continued to issue codes of practice, as the IBA had done, but they were more detailed and less discretionary. In addition, the regulators were much more clearly amenable to judicial review, and indeed successfully defended a number of challenges to their early licensing decisions, demonstrating their more formal, even legalistic, approach to regulation (Gibbons 1998).

Nevertheless, change was gradual: the early ITC and RA continued the informal and supportive contact with program companies that characterized traditional public service broadcasting, although, by the end of the 1990s, it had become much more formal. The establishment of Ofcom in 2002, with a remit to be a “super-regulator” for all communications industries, under the Communications Act 2003 (Gibbons 2012) consolidated the incremental shift to independent media regulation in the UK. Subsuming the previous regulators for broadcasting, telecommunications and spectrum, Ofcom’s statutory basis insulates it from political criticism. The legislation enjoins it to follow what are now accepted to be principles of good regulation: namely, proportionality, consistency, transparency, targeting and accountability (Better Regulation Task Force 2005: Annex B). Ofcom consults widely, and provides generally clear and comprehensive policy direction. Anecdotally, it is widely respected within the industry as an exemplar of good practice. From a commercial perspective, it appears to
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support the “credible commitment” rationale for independence, but its parallel commitment to freedom of expression in the application of its Broadcasting Code also seems to demonstrate that it values media independence. The latter point is important because, given its apparent success in independent regulation, it might be asked why its remit should not fully extend to the BBC and why a similar model of regulation should not be contemplated for other areas of media activity currently outside its jurisdiction—namely, the press and the Internet. In relation to the BBC, its relationship with Ofcom is exceptional and not exactly logical: It has been able to secure significant institutional autonomy from the standard regulatory scheme by convincing politicians that oversight by a regulator could compromise its editorial independence. Before dealing with possible extensions of the regulator’s role, however, a number of pressures against maintaining regulatory independence need to be examined.

**Indicators of independence**

Independent regulation is desirable because it enables a measured, long-term approach to policy to be developed and it enables specialist expertise to be applied in implementing policy. In the media industries in the UK, the principal areas of policy encompass, broadly, the promotion of: public service broadcasting; media pluralism; the UK content production industry; an effective digital infrastructure; and consumer protection. The regulator’s expertise covers the technical aspects of these areas, but, importantly, it also includes a legacy of experience in dealing with problems over a number of decades. In many ways, Ofcom is the sum of its predecessors and that gives it considerable authority. At the same time, that legacy exposes it to charges of institutional inertia and unwillingness to challenge path-dependent evolution of policy. There will naturally be pressure to resist an independent regulator’s direction of travel and the important issue to assess is whether attempts to introduce change are effected in a proper way. As already indicated, that requires some balancing of independence against proper accountability. Only in one field of regulatory action is independence generally accepted to be overriding—in the impartial and objective awarding of licenses and adjudication of complaints, grievances and disputes.

Gilardi and Maggetti (2011) have summarized a set of widely recognized indicators that can be used to quantify the degree of independence enjoyed by regulators. Criteria of formal independence include matters such as: the terms of office of the chair and management boards, and the procedures for appointing, renewing and dismissing them; their formal relationship with politicians, including the latter’s powers to overturn the regulator’s decision; the regulator’s organization and finances, including the source of its budgets; and the regulator’s formal powers to make rules and to apply sanctions. Observers of regulatory activity have long recognized that the formal position may not reflect the reality of the relationships between regulators, politicians and other stakeholders. As a set of informal indicators of independence from both politicians and “regulatees,” Gilardin and Maggetti suggest criteria that include: influence on the size of budgets and the regulator’s organization; the frequency of contact between the regulator and politicians or regulatees; the incidence of the “revolving door” (the movement of individuals between the regulatory institution and activity in politics or positions in the industry, and vice versa); and the partisanship of nominations to the chair or management board.

These criteria can assist with empirical quantification of practical understandings and intuitions about the conditions for regulatory independence. However, they must be seen in the context of the regulator’s mandate and the amount of discretion which that allows. In
addition, and perhaps just as significant—albeit much more difficult to measure—the regulator’s freedom of thought and judgement may determine the working relationship with key stakeholders. Whether the regulatory style exhibits features of “club government” (Moran 2003) or of an “epistemic community” (Braithwaite and Drahos 2000), the regulator’s ability and willingness to maintain a critical distance from demands about the scope and purposes of regulation—derived respectively from cultural background and education, or from informed consensus in policy circles about preferred solutions—may determine whether independence is enhanced or undermined. Those considerations may suggest why some research finds that a formal structure of independence is likely to be a prerequisite for de facto independence (Hanretty 2011), whereas other work indicates that it is not as important as factors such as the age and maturity of agencies, the presence of many “veto” players in markets (so that no single interest can dominate policy), and the relationship between domestic agencies and international networks of regulators (who may provide external validation of policy) (see Maggetti 2007). In the UK, the factors of particular interest in assessing independence are the exercise of patronage in appointing regulators and their financing, relationships with the industry, interpretation of the regulatory mandate and political influence.

**Patronage and finance**

The attitudes and values of a regulator are likely to have a significant influence on the way in which a regulatory scheme is implemented in practice. Ultimate responsibility for the appointment of individuals to a regulatory body usually rests with government ministers and that might well be thought appropriate in a democracy. The problem with such a power of patronage is the suspicion that the appointment to office carries with it a set of understandings about the way in which the job will be carried out and that those understandings will favor particular interests. While terms of office may be limited, typically to five years, they may be renewed, so the opportunity for longer-term influence is not diminished. Although the appointment of BBC Governors, and now trustees, has tended to reflect a balance of prominent persons in public life, the political connections of the chairman with the government that appointed him has been of interest and has sometimes been controversial (see Gibbons 1998). Currently, public appointments of this kind in the UK are made through an independent appointments process. There are similar procedures in, for example, Germany and the Scandinavian countries (Bensen and Powers 2011); by contrast, in France, power to appoint the director of the main public service broadcaster has recently been transferred back from the regulator to the president of the republic (Kuhn 2011), signalling a reassertion of political control over the scope of public service in media policy. Politicization of the media continues to exist in Central and Eastern Europe, as much through appointments to regulatory posts as by direct interference in decisions (Martin, Scheuer and Bron 2011).

An independent process has the effect of removing direct political favor from the appointment decision. However, it may be difficult to exclude basic predispositions concerning policy directions: An economically liberalizing government is likely to select regulators who are broadly sympathetic to that approach, other personal attributes and expertise being equal; an interventionist government might do the opposite. Given the highly structured nature of decision-making in an independent regulator, the influence of such predispositions might be difficult to detect. When Ofcom was being established, it appeared to have a high proportion of members with a background in economics and competition regulation (see Smith 2006). Its early pronouncements often reflected a “consumer” rather than “citizen” perspective (Livingstone, Lunt and Miller 2007; Gibbons 2005), leading to concerns that it was not
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sufficiently committed to the public interest goals within its remit. Arguably, it now has a more balanced approach, but it is difficult to judge whether that is attributable to subsequent changes in personnel or its own self-awareness of the requirements of its mandate. Here, one factor that should be borne in mind is the working culture of the regulator and the influence of its traditional values and procedures: it may not be easy for a new appointment to introduce change.

However they are appointed, regulators’ scope for independent action is constrained by their budget. The size of the budget will determine the priorities and extent of regulatory activity. At one end of a spectrum, a regulator may be confined to “firefighting” and reacting only to major complaints. At the other end, a regulator may be able to conduct research, plan strategically and operate a sophisticated enforcement process. In the UK, although it is a system of self-regulation, the underfunding of the Press Complaints Commission by the industry is cited as a major reason for its ineffectiveness; in contrast, Ofcom has the resources to maintain a comprehensive oversight of the communications sector. The predictability of funding is also very important: to be independent, a regulator cannot be vulnerable to frequent changes to allocated budgets, especially if these are in response to critical reviews by politicians or stakeholders. Analogous, although it is not directly a matter of regulation, the predictability of the license fee as a stable source of the BBC’s funding has long been regarded as being critical to the longevity of public service broadcasting as a policy. The license fee is not a tax (even if it is perceived to be so by many), so is distanced from direct political determination, and is typically settled over a period of five years or more. As a regulator, Ofcom’s position is safeguarded through a statutory requirement to ensure that its revenue fully covers the costs of regulation, and to raise from each of the television, radio and networks and services sectors its best estimate of the cost of regulating each sector for the year ahead. It is therefore self-financing, with its level of finances being directly related to the scope of the activity that it wishes to pursue, constrained only by its policy to administer its tariffs fairly and equitably and with the minimum burden on stakeholders.

Independence from industry

The principal rationale for having a separate regulatory agency is its expertise and knowledge of the industry. But that very closeness to the industry makes the agency vulnerable to “capture” (Baldwin, Cave and Lodge 2011; Magetti 2007), whereby it aligns itself with those it is supposed to regulate (Stigler 1971). While there is much speculation about this possibility, the evidence for capture is equivocal, both generally (Carrigan and Coglianese 2011) and in relation to media regulation (on the FCC, see Napoli 1998). Apart from the existence of formal oversight and accountability mechanisms, the political salience of media policy and the varied nature of the media landscape, with so many different firms and institutions pressing for their own agendas, mean that it is unlikely that any one interest could dominate policy. Although there may be no evidence of systematic capture, however, the possibility of a regulator being influenced by a particular industry concern remains (Magetti 2007).

Still, that is more likely to be explained by a coincidence of viewpoint rather than capture. As indicated above, the early presence in Ofcom of individuals sympathetic to liberalizing economic theory (see Redding 2006) was thought to have made the regulator more amenable to “lighter touch” approaches from the industry. That appeared to manifest itself in its early analysis of the public service broadcasting brief (Gibbons 2005). Under a different chief executive, Ofcom has appeared more sensitive to public service arguments (Ofcom 2009). However, in both circumstances, any tendency to an ideological stance could only have an
impact on the tone of policy, because the sustainability of public service content is built into
the Ofcom mandate. Anticipation of the possible conflicts within the organization between
the liberalizing trend in telecommunications and spectrum regulation, on the one hand, and
interventionism in public service and standards regulation, on the other, led to a structural
mechanism (the content board) to be created as part of Ofcom’s constitution. More generally,
“viewpoint” capture may be a greater risk than industry capture. A regulator such as Ofcom
inevitably has close connections with the “policy community” both in the UK and at
European level. There is indeed an “epistemic” community (Braithwaite and Drahos 2000)
of lobbyists, policymakers and academics, who regularly meet at conferences and consultation
events. Ofcom is more likely to be a leader than a follower in contemporary policy direction,
but the risk is that a consensus of received wisdom may become dominant in that community
and thereby influence the regulator.

Prior to Ofcom, the ITC and the RA were sometimes accused of having been captured by
the industry when they made decisions that appeared to be weak (for example, when compa-
nies experienced financial difficulties, the ITC and the RA often were willing to alter license
conditions to reduce public service commitments rather than to enforce the original terms). It
is also possible to see this as an example of pragmatism rather than capture: Regulators have
paid genuine attention to structural problems in the industry and have decided to prioritize the
continued provision of a slightly reduced service rather than force a company to cease trading.

In the UK, the best evidence of capture is not found in the formal system of communica-
tions regulation, but in the self-regulated scheme operated by the press. Indeed, as will be
discussed below, the lack of independence of the self-regulator has been a significant factor in
the failure of the scheme to be effective in dealing with serious breaches of law and ethics.

Interpreting the mandate

Independent regulation implies that the regulator has the discretion to determine how policy
is implemented. The breadth of that discretion depends on the policy mandate in the relevant
legal framework. In the UK, as indicated, the institutional responsibility of the BBC to define
public service broadcasting was transferred to the early broadcasting regulators. Their interpr-
etation of that mandate was articulated a little more explicitly for the ITC and RA, and was
much more comprehensively laid out in Ofcom’s remit, coinciding with a much sharper
description of the BBC’s duties in its current charter and agreement. Essentially, what legisla-
tors have done is to incorporate the practice and experience of earlier regulation into the
current scheme: they have ratified the original discretion into a set of precepts and criteria from
which the regulator would be unlikely to dissent. For Ofcom, the legacy broadcasting mandate
has been supplemented by requirements for telecommunications and spectrum allocation
(largely derived from the EU’s Communications Framework), together with various principles
of good regulation. The effect has been to increase Ofcom’s discretion because its remit includes
a wide range of duties, some of which are in tension, and it has to prioritize and resolve that
conflict. They all flow from Ofcom’s principal duty: “to further the interests of citizens in rela-
tion to communications matters” and “to further the interests of consumers in relevant markets,
where appropriate by promoting competition.” Thus, in carrying out its functions under the
Communications Act 2003, Ofcom is required to secure the following general objectives:

i. the optimal use of wireless spectrum;
ii. the availability throughout the UK of a wide range of electronic communications
   services;
iii. the availability throughout the UK of a wide range of television and radio services of high
quality and appealing to a variety of tastes and interests;
iv. the maintenance of a sufficient plurality of providers of different services;
v. the application of standards to protect the public from offensive and harmful material and
from unfair treatment or intrusions into privacy; and
vi. the best regulatory practice.

These substantive criteria are supplemented by a duty to “have regard in all cases” to the
desirability of having public service broadcasting, competition in relevant markets, facilitat-
ing self-regulation, encouraging investment and innovation, guaranteeing freedom of
expression, protecting the vulnerable and preventing crime (see Gibbons 2012). In imple-
menting these duties, Ofcom has adopted the practice, in some cases enjoined by the statute,
to consult stakeholders and to publish the principles under which it will operate. Discretion
is tempered, therefore, with the assurances about reasonable expectations.

Ofcom’s function is to act both as an external constraint on industry activities and to
promote particular social policies. This follows the longstanding tradition of UK media regu-
lation (Gibbons 1998). Prosser has recently described these functions as, respectively,
“control” and “enterprise” roles, and as actually being characteristic of regulation more
generally (Prosser 2010a). To take up a point made earlier, it may not be appropriate for a
regulator to be independent, in the sense of being completely detached from policy; a regu-
lator must be enterprising, in Prosser’s sense, to carry out its mandate. The problem is deciding
how to do that without crossing the line into what politicians consider to be their responsi-
blility for original policy creation.

The difficulty was illustrated by reactions to Ofcom’s Public Service Broadcasting Review
in 2009, mentioned earlier. Taking a broad view, Ofcom realized that media convergence and
digital switchover would lead to major changes in the public service broadcasting market
with important implications for the way in which it would have to be funded in the future. It
therefore suggested options for reform in addition to analyzing the contemporary situation.
This was apparently not well received at the Department of Culture, Media and Sport, which
set up a convergence think tank to explore broadly similar issues, albeit without the prospect
of discovering anything new about an already well-explored topic. The episode was consid-
ered by many to be a warning to Ofcom that it was exceeding its remit. In fact, it showed that
Ofcom was indeed the expert and that political initiative was lacking. However, it also illus-
trated the delicate nature of the independent regulator’s position, underscoring the politi-
cians’ view that the regulator’s proper role, when thinking creatively, is only to give advice
(on this point, see also Hanretty 2010). Yet it would be inappropriate for a regulator to with-
hold its expert judgement out of undue deference to politicians’ sensitivities. Ofcom may well
agree because, in some of its more recent interventions, it has finessed the dilemma by
analyzing the problem and the need for policy change, but then explicitly and publicly refer-
ing it to the minister (for example the need to revisit media pluralism rules, in the course of
an assessment of News Corporation’s proposed complete purchase of BSkyB: Ofcom 2010).

By contrast, a clear mandate to exercise discretion can have the effect of undermining
politicians’ desired outcomes. When the ITC implemented a then-radical scheme to award
commercial broadcasting licenses by competitive tendering in the early 1990s, it adopted a
broad interpretation of the minimum qualification threshold, to secure that public service
would not be compromised. As a result, a number of companies that had hoped to take advan-
tage of the newly liberalized regulatory regime did not obtain franchises. This caused much
discontent amongst politicians, including the prime minister, but the ITC’s methodology and
decisions proved to be robust when challenged for judicial review (see Gibbons 1998). On one view, this could be seen as non-democratic, but there was no attempt by politicians to alter the outcomes by retrospective legislation.

**Political involvement in decisions**

There has been relative freedom from interference in the regulator’s activities in UK regulation. At a briefing to the Leveson Inquiry, which was established in 2011 to examine the culture, practice and ethics of the press in the UK, the chief executive of Ofcom emphasized that the regulator’s statutory independence is supported by political acceptance of its status. “That independence in my experience is guarded jealously by everybody at the top of Ofcom. Indeed, the entire senior management cohort regard it as something that is a matter of absolute integrity... My experience has been... that both current government and the previous government have studiously honoured our independence on all matters. And in fact it has only ever required me to mention independence and the Government will say, ‘Yes, you are absolutely right.’” (Leveson 2012). For all that, both formally and informally, some anomalies remain. Politicians cannot bring themselves to withdraw all means of control over the media, most likely because they continue to believe strongly that the media have the power to shape their destinies.

One of the most remarkable residual measures is a direct power of censorship. Under the Communications Act 2003 (s. 336) and the BBC’s agreement (BBC 2006b, clause 81), a minister may impose a direction to include an announcement in a service or to refrain from including specified material. The broadcaster’s only form of resistance is that it may include an announcement that material has been included or excluded at the minister’s insistence. While such a provision, which dates back to early broadcasting regulation, would now be very controversial, and is justified as being only in situations of emergency, it clearly has considerable symbolic significance.

Less surprising, because it does not directly affect editorial responsibility, but also contentious, because it seems to be inconsistent with independent regulation, is a series of provisions, under the Communications Act 2003 (and also in the BBC’s agreement), which require ministers to be consulted or to approve decisions about regulatory matters. To provide a flavor, the range of powers includes appointments to Ofcom committees, intervention in spectrum allocation for national security or public health reasons, oversight of compliance with international obligations, designation of universal service obligations and what counts as significant market power, certain appointments to Channel 4, European programming and independent production quotas, the extension of Channel 3 licenses in connection with the digital switchover, the scope of regulation of the BBC by Ofcom, aspects of advertising regulation, and approval of media mergers. Of course, there may be arguments in favor of ministerial oversight. The interests of democracy and government may extend beyond the core issues in the particular sector (for example, the survival of an industry embodies issues of industrial and regional policy as well as cultural policy (see Dabbah 2011)). But the list of retained powers in the UK seems rather long and may be interpreted not so much an indication of the need for accountability, as a political lack of trust in the regulator.

In practice, the existence of such powers may create a more insidious risk. This is because they imply that the regulator should consult with the minister in the course of regulating in the relevant area (see also Graham 2000). There is the opportunity, therefore, for informal pressure to be exerted. Arguably, this reflects only the tradition of club government in the UK, for there have long been informal liaison meetings that bring together regulators and government departments. Despite the creation of Ofcom, old habits linger on, but the
difference is that the regulator is sufficiently independent to be a much more equal partner in such dialog. Indeed such channels of communication may favor the regulator. During the passage of the Broadcasting Act 1990, the IBA and the ITC (in “shadow” form, whereby the organization had been set up in advance, in anticipation of legislative ratification) had an important role in shaping the legislation. The same was true of the “shadow” Ofcom when the Communications Act 2003 was being discussed. Politicians may be content to defer to expert views about the feasibility of their ideas.

The most controversial role for politicians in the UK in recent years has concerned the approval of media mergers. This has historically been a politician’s reserved power (Gibbons 1998) and similar provision was made in a scheme introduced by Part V of the Communications Act 2003. Although that assimilated media mergers to the general mergers regime, under which the competition regulators determine relevant competition issues, it also made provision for discretionary ministerial intervention if it is believed that a merger raises public interest matters relating to pluralism. Following such a public interest intervention, Ofcom is asked to report on the circumstances, but it has only an advisory role. The minister has a further discretion whether to refer the case to the Competition Commission and, if so, whether to accept its recommendations. Given the formalizing of the competition rules and the general trend towards independence in regulation, it was widely considered that ministers would routinely refer such cases to the regulators. That is what happened when BSkyB was required to reduce the size of its significant interest in the main commercial terrestrial broadcaster ITV (see Craufurd Smith 2009). However, in another case involving News Corporation’s wish to take full ownership of BSkyB, Ofcom reported that the proposed acquisition could operate against the public interest. Controversially, the minister did not refer the matter to the Competition Commission and allowed an informal process of negotiation to take place to accommodate pluralism concerns. It seems certain that the takeover would have been approved, but for the revelation that the News of the World newspaper, owned by News International and in turn controlled by News Corporation, had been involved in systematic telephone hacking to obtain stories. In the wake of that revelation, and the establishment of the Leveson Inquiry into press standards, News Corporation withdrew its bid.

As the Leveson Inquiry proceeded, details of connections between politicians and News Corporation emerged. They included a link between the company and the minister who had declined to make the BSkyB public interest referral. Ironically, he had earlier mused whether “it is appropriate for politicians to have the final say” (Hunt 2011). Not all politicians disagree: A parliamentary report recommended that ministers should be removed from the process (House of Lords Select Committee on Communications 2008). Yet it seems likely that the government will resist such a move, arguing that the problem is not that a politician is involved in media pluralism decisions, but that the process should be transparently free from bias.

A subsequent development suggests that, even if politicians were to remove themselves from media merger decisions, there will continue to be political pressure on such issues and the regulator will have to take the brunt of that. As a consequence of the News of the World telephone-hacking scandal, Ofcom decided under the Broadcasting Act 1990 to investigate whether BSkyB is a “fit and proper person” to own a broadcasting license, given that News Corporation has a 39 percent stake in it. Keen to make political capital, two political parties expressed the hope that the investigation would be expedited. But Ofcom indicated that its review, which has now decided in BSkyB’s favour, would take “as long as it takes” (BBC 2012; Ofcom 2012).

While the removal of most political oversight may be desirable, one side effect may be to pass supervision on to the courts. As already indicated, recent reform of the UK competition
law regime removed the minister’s role in competition enforcement. It has been suggested that this may serve as an invitation to the courts to impose a high level of scrutiny on the regulator to ensure that it is fulfilling its mandate (see Harker, Peyer and Wright 2011). In the broadcasting field in the UK, however, judicial review has tended to be deferential to the regulator’s expertise (Gibbons 1998). At the same time, regulators have been keen to ensure that they comply with administrative law procedures. Judicial review may be a mixed blessing: it may substitute process values for substantive expertise, but it may also prevent abuse of power (Shapiro 2002) and may help to rein in agencies with political appointees, such as in the litigation following the Federal Communication Commission’s attempts to reform ownership regulation in the United States (Gibbons and Humphreys 2012)).

New media and new forms of regulation

Even as the value of independence has become accepted as a key characteristic of media regulation, developments in the industry have challenged the continued relevance of the traditional model. Convergence between media platforms, transnational distribution of content and a shift in relationships with content producers, from audience to “user” behavior, have led to a greater emphasis on choice and interactivity in media engagement. The presence of a regulatory agency, exercising “command and control” regulation, no longer seems appropriate to such developments. There has been a strong trend towards experimenting with “hybrid” models of regulation (Murray and Scott 2002) that draw on self-regulation, education and the architecture of content distribution. This trend is a reflection of a much wider movement towards “decentered regulation” (Black 2001) or “new governance” (Carrigan and Coglianese 2011). The implications of this movement are not necessarily deregulatory; rather, that new ways of protecting public policy concerns about industry activity must be found.

From the perspective of independent regulation, the difficulty with this tendency towards less structured regulation is that it invariably requires greater trust to be placed on the relevant industry to fulfill public purposes. For the media, it appears to reinforce the unregulated position of the press, and it counsels against extending regulation to new areas of activity such as the Internet or mobile applications. In the UK at least, experience of press self-regulation has not proven to be entirely effective. One of the principal reasons for the failure is the lack of independence in the current scheme operated by the Press Complaints Commission (PCC). The PCC is financed by the publishing industry, and consists of a panel of editors and members of the public who apply a code of practice drawn up by a committee of editors. It does not have any powers of sanction, but can request a newspaper to publish an adverse adjudication, and it generally attempts to resolve complaints through mediation. Rather than being a regulator, the PCC is little more than a presentational arrangement to forestall statutory intervention.

The PCC’s lack of independence has been heavily criticized (Media Standards Trust 2009). In the light of the telephone-hacking scandal and the review of the press by the Leveson Inquiry, it seems desirable and likely that it will be replaced by a new scheme. If that is a self-regulatory scheme, whether it will be properly independent will depend on whether the industry is willing to submit itself to a set of principles that are largely opposed to its own interests; given the decline in newspaper circulation, expenditure on good journalism may not be a priority. The success of a self-regulatory scheme is closely related to the coincidence of interest between industry goals and public purposes. That is one reason why the UK advertising industry’s approach, implemented by the Advertising Standards Authority, which
celebrated its fiftieth anniversary in 2012, is highly respected: Both advertisers and the public have an interest in advertising being “legal, decent, honest and truthful” (Advertising Standards Authority 2012). In the case of the press, introducing a strong measure of independence in its regulation would go some way towards rebuilding public trust in it.

Having industry involvement in regulation does have advantages: The industry has information and experience; its processes can be more flexible; it can legitimize regulatory constraints on firms’ behavior; and it can identify effective sanctions and ensure compliance. One way of securing those benefits, whilst guarding against unwillingness or inability to secure public policy objectives, is to adopt a scheme of co-regulation, whereby an independent regulator oversees the sector’s participation (see Hans-Bredow-Institut 2006). In the UK media, there are two main examples in which Ofcom has delegated its powers, but retained the ability to intervene: broadcast advertising regulation, which is operated by the Advertising Standards Authority; and video-on-demand regulation, which is operated by the Authority; for Television On-Demand (ATVOD). In both areas, however, co-regulation represents a modification of the traditional model, a gradual relinquishing of control. To extend it to new areas of media would entail a level of intervention that may be politically unacceptable and practically difficult. In that case, the outcome is likely to be a relatively uncoordinated set of piecemeal measures. An example, albeit relating to child protection, would be the EU’s Safer Internet Programme, which attempts to combine national criminal laws with industry codes of practice, technical initiatives such as content filtering and media literacy.

Independence as a regulatory value

Before the development of highly structured independent media regulation in the UK, the club government approach to broadcasting regulation reflected a broad consensus about regulatory objectives. The rise of the regulatory state, with its characteristic presence of independent regulators, was connected to a breakdown in that consensus and the need formally to mediate between competing interests. But one value that has endured is the importance of independence in regulating media. In the past, that value has been associated with particular institutional frameworks for particular sectors of the media, a trait that is less apposite for the more fragmented setting of new forms of media. However, if it is acknowledged that there are public interests in new media activity, perhaps coinciding with a new recognition of such interests in traditional media, is there scope for securing them independently in ways that do not require traditional formal arrangements, but which are not defined by the industry?

As an idea and a practice, independent regulation is now sufficiently well established to be able to draw a number of principles from it. It should provide expert consideration, in a measured way, of the best way in which to implement politically agreed policies, free from self-serving pressures from both politicians and the industry. One way of thinking about independent regulation in any media context is to focus on such underlying principles and not their institutional manifestation. While they apply to any form of regulation, those principles are especially important for the media because of their close association with policy formation. The importance of an independent assessment of issues and policy options does not entail that a regulator such as Ofcom should take direct responsibility for them, but a focus on independent media regulation suggests that the system has to have the attributes of a good regulator.

One can envisage different areas of decentered regulation, perhaps with different combinations of media industry groups responding to users’ concerns. However, some form of coordination would be desirable, to ensure common practice and to share experience, and,
ultimately, to ensure the independence of different schemes. Indeed, one of the implications of accepting that good regulation is independent regulation is that the decentralization of regulation cannot go too far. It hardly seems appropriate to leave coordination to the political process; equally, some control over self-regulatory initiatives seems necessary. Ofcom’s chief executive has recently suggested a set of core features that should be part of any regulatory system that is effective and has public trust in the new media environment. They include clearly defined regulatory objectives, independence from political influence and those regulated, independent budgetary control, genuine powers of investigation, clear and transparent processes, effective powers of enforcement and sanction, clear public accountability and accessibility to the public (Richards 2012). Few might quarrel with these features, but the difficulty is to enforce those precepts while recognizing the value of hybrid solutions to substantive problems. For them to be recognized as legitimate, and to be effective, they require at least a framework in law. To implement that, analogous to the idea of enforced self-regulation (Ayres and Braithwaite 1992), an approach of “enforced independent regulation” might be an appropriate way of enabling legal intervention in all areas of media activity, but only for the purpose of requiring the establishment of independent schemes to protect relevant public interests (as accepted in articulation of policy through the political process). In such an approach, an overarching regulator would be needed, but its role would evolve to one that is different from, say, Ofcom’s in the UK, with a greater emphasis on stipulating good practice and a greater concern with independence in good governance and process. At the same time, there would still be a role for an independent body that could identify the substance of the public interest in media, whether it be the promotion of free speech, pluralism of content, protection of the vulnerable, cultural experience, connectivity, access to services, or media literacy.

The idea of independent media regulation has matured to the stage at which it can now provide considerable confidence that regulation itself need not be a threat to the media’s editorial independence. That does not mean that interference in media activity should become any easier. But where there are public aspirations for that activity, whether in the traditional media or in the new, the principles of independent regulation can provide some assurance that they will be respected.

References


“Club government” and independence in media regulation


Department for Culture, Media and Sport (2006a) *Copy of Royal Charter for the continuance of the British Broadcasting Corporation*, Cm. 6925, London: HMSO.

—— (2006b) *An Agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, Cm. 6872, London: HMSO.


