

REGULATING THE BBC AS A PUBLIC SERVICE

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The context

2016 will present a fork in the road for the BBC's future. Down one path lies continuation of its traditional public service, which we fund as citizens through a tax, with a remit to serve the nation as a whole. Down the other lies a slow evolution towards a subscription-financed BBC carving out its own place in the market and applying, in competition with others, for limited public funding for types of programming which the market cannot support.

The vision of the BBC as a public service designed to serve the whole of the UK impartially and inclusively, and to broadcast as an independent public service across the world, has been with us for some 90 years. It is rooted in the idea of citizenship, rather than private consumption, and funded accordingly by the licence fee as a tax. It has adapted to the birth of television, to the advent of commercial competition and to the digital technology of media abundance, but retains the core idea of a cultural force serving the whole of society which can be traced back to Reith.

A challenging alternative vision of the BBC, however, has also been with us for some 30 years – stemming from the long-term strategy for privatising the BBC which the Peacock Commission offered Mrs Thatcher in 1986. The plan here was that 'subscription should replace the licence fee' and cover the majority of the BBC's output. The commercialised BBC would then favour those sections of the population most willing to pay for it as consumers. However, since this would lead to a loss of public service, a Public Service Broadcasting Council should be set up to support Radios 3 and 4 and to allocate funds to competing television broadcasters bidding to make 'programmes of merit'.

This is indeed a plausible vision. Something like it, though based on advertising, was introduced in New Zealand when TVNZ was commercialised in 1989. In the UK it was set aside in the 1980s and 90s,

overshadowed by independent production quotas and licence fee funding restraints and then by the advent of digital television. This commercial model resurfaced, however, in a 2004 report by a Broadcasting Policy Group, commissioned by the Conservative Party and led by David Elstein, which advocated:

- moving the new BBC digital services to subscription in 2007
- moving BBC1 and BBC 2 to subscription after analogue switch-off, with all set-top boxes to be equipped with conditional access
- abolition of the licence fee after analogue switch-off
- the creation of a new Public Broadcasting Authority to administer contestable public funding
- abolition of the Board of Governors and governance of the BBC by an executive and non-executive board appointed by Ofcom.

Although that report too was set aside, it would be a mistake to assume that advocates of a long-term commercial future for the BBC have given up, though the aim may now be to proceed in a series of evolutionary steps. If you wanted to convert the BBC into a subscription-based broadcaster by stealth, you'd probably start by

- putting the BBC under Ofcom regulation together with all the commercial broadcasters, and then
- restricting, and top-slicing, the licence fee revenue, making the BBC share it with other bodies and incentivising it to consider other sources of revenue and to encrypt some of its services.

There's nothing wrong with having a debate about the rival visions of the BBC's long-term destiny. The public consultation over the BBC's next Charter is the proper time and place to have it. But the choice does need to be articulated: in the more specific debate about the best forms of governance and regulation for the BBC, it is important to be aware of this context.

Governance and regulation

The BBC Trust, at any rate in its present form, has been widely judged to have failed over the period of the last Charter: the humiliating joint

appearance of the Trust and the management before the Commons Public Accounts Committee in 2013 revealed muddled responsibilities.

The Trust shares a governance role with BBC management, symbolised by the Chairman of the Trust also being the Chairman of the BBC. The Trust also shares a regulatory role with Ofcom: the Trust has responsibility for the BBC's editorial standards and compliance in matters of accuracy and impartiality, while Ofcom is an external regulator on other BBC content matters, such as harm and offence, fairness and privacy, but this arrangement excludes the World Service. These divided responsibilities are unsatisfactory. The Trust in its present guise should be replaced.

Governance is essentially about the strategic job of running the BBC at the highest level. It should be ethical and public service-focused, as well as business-like, and should reside at the top of, but within, the BBC. This role should belong to a unitary BBC board, with non-executive directors and, crucially, with its own non-executive Chairman.

Regulation is about ensuring public accountability, setting standards of high quality, ensuring compliance with those standards and responding to complaints, representing the interests of the licence fee payers, assessing value for money, and setting the wider public and commercial framework within which the BBC operates, with due regard to the interests of other organisations in the media market.

It is now an established principle of good practice – across professions as diverse as the police, doctors and solicitors – that regulators should be independent of the people they are regulating. This safeguards the consumer and the wider public against the risks associated with 'marking one's own homework'. In commercial broadcasting independent regulation is long-standing. After the phone-hacking scandal, even the press has embraced this principle, albeit with much argument. The present BBC pattern is anomalous. In principle, as elsewhere, regulation of the BBC should in future be fully external.

The Ofcom option

The February 2015 report on the *Future of the BBC* by the Commons Select Committee on Culture, Media and Sport recommended transferring the Trust's responsibility for matters of accuracy and impartiality to Ofcom. Interviewed for the *Radio Times* (18-24 April) in the run-up to the recent election George Osborne said

“The Trust arrangement has never really worked. I've never understood why the BBC is so frightened of regulation by Ofcom”.

The idea of putting the BBC under Ofcom risks becoming conventional wisdom. It rests on the assumption that the more fully media service technologies converge, the more sensible it is to place them under the same 'converged regulator'. In this context, Ofcom has been a major success story. When it was formed in 2003 it integrated the previously separate regulatory responsibilities of the Independent Television Commission, the Radio Authority, the Broadcasting Standards Commission, Oftel, and the Radio Communications Agency. With broadcasting and telecommunications converging, it facilitated an overview of spectrum allocation in the run-up to digital switchover.

However, the next phase of convergence will bring broadcasting closer to the press as the latter shifts from print to digital distribution. Broadband infrastructure is increasingly capable of seamlessly delivering what have historically been separately regulated media. The distinction between the online services offered by broadcasters and the electronic versions of newspapers is already pretty slim: both consist of text and videos; both can be received on lap-tops, tablets, smart-phones and smart TVs. Over the next decade convergence will bring a need for greater regulatory consistency – but, crucially, *this does not have to mean a single regulatory body* and Lord Justice Leveson's suggestion that Ofcom might become a backstop regulator of the press was quickly rejected on all sides.

Ofcom had in fact made it very clear to Leveson at the outset that it had no desire to regulate the press, whether in print or electronic form. Thus the long-term future for regulation is likely to involve a small plurality of regulators capable of following a common set of high-level principles and

collaborating where appropriate to ensure consistency across similar services. This outlook makes the notion putting the BBC under Ofcom far more debatable. The BBC is big enough, important enough and different enough to have its own regulator.

Ofcom's roots go back to the Independent Television Authority (later the Independent Broadcasting Authority) set up to ensure that commercial broadcasting pursued public purposes because commercial companies could not be trusted to do it of their own accord. It has evolved and changed shape greatly since then but, in respect of content regulation, it remains primarily a body which oversees commercially funded broadcasters. In some respects it operates a sliding-scale of standards. For originality and innovation the public service bar is set higher for ITV than for Channel Five, while the 'due impartiality' obligation is interpreted rather more strictly for mainstream domestic channels than for the USA's Fox News and other foreign services, where allowance is made for context and for viewer expectations.

The BBC has a quite separate history and culture. It still has some of Lord Reith's genes in its make-up. It sets itself very high standards of due impartiality in news, not just programme by programme but also by periodically reviewing its total coverage of e.g. American, European or Middle Eastern affairs.

A Public Service Broadcasting Commission

It would, of course, be possible for Ofcom to adapt and grow a new group of people and skills to regulate the BBC. There would then be a unitary BBC Board responsible for governance with Ofcom responsible for regulation, as for Channel Four. However, the advocates of putting the BBC under Ofcom seem to want to add a third, potentially confusing, element – a Public Service Broadcasting Commission, to carry out reviews of the BBC's services and assess value for money.

This idea features in the February 2015 Commons Select Committee report and has a history stretching back, for example, to the advice Lord Burns' Independent Panel gave the government in 2005 at the time of the last BBC Charter Review. It can also be traced further to the 2004

report commissioned by the Conservative Party and to the ideas aired in the 1986 Peacock report.

Why should anyone want such a third body? One answer is that Ofcom is not equipped to perform the wider role played by the Trust today -- that of representing licence fee payers' interest and trying to ensure that the BBC provides value for money. The second is that such a body could decide, or advise on, the allocation of licence fee funding to bodies other than the BBC: it is thus a key part of the post-Peacock commercial vision.

However, for those of us who favour the citizenship vision of the BBC's future, there is a simpler and better answer: a BBC-specific external regulator which would build on the work of the current Trust.

A BBC-specific external regulator

This body should uphold and defend the BBC's independence, which requires greater vigilance, given the political decisions that shape its constitution and funding, than defending the independence of commercial media.

It should regulate all BBC content, thus removing from Ofcom its current regulatory role over matters of offence, privacy etc.. This would avoid the kind of confusion which prevailed over whose job it was to condemn the infamous Ross-Brand Radio 2 broadcast in 2008.

It should represent licence fee payers' interest in ensuring that the BBC provides value for money and play a central role in a transparent process for setting the licence fee level. While the final decision may rest with the government, the regulator's recommendation for the level of the licence fee should be as public and as influential as, for example, that of the Low Pay Commission on the minimum and living wage levels.

The regulator should also review the scope, focus and quality of the BBC's output. This role is fundamental to ensuring that the BBC adheres to its Charter purposes and does not engage in 'mission creep' for purely competitive reasons. Equally, it should ensure that quality is maintained

and not undermined by inadequate funding for its job. Policing scope and focus, on the one hand, and upholding quality, on the other, are integrally connected to the role of advising the government on the appropriate level of the licence fee.

A separate BBC external regulator would, of course, need to collaborate with Ofcom over codes and guidance, and Ofcom should retain its present role in evaluating the market implications of proposed new BBC services.

Creating a new BBC external regulator, and repatriating some content regulation duties from Ofcom, need not involve a huge upheaval. The Trust, shorn of its governance role and shifted wholly outside the BBC, would provide the starting-point for building the new external regulator. This would provide continuity and ensure that the Trust's achievements and skills were not lost. However, the new regulator would need to be more authoritative, capable of withstanding any risk of 'management capture' and willing to stand up to the government when necessary.

This is surely the least disruptive way of clarifying the present muddled roles. Two bodies -- an internal board for governance and an external body for regulation -- it's clean and simple.

Making the public voice heard

This autumn, during the public consultation on the BBC's future and in the political debates to follow, it is important that the voice of the public is heard.

At this fork in the road there is a vital choice. If you want the BBC, in the long-term, to be changed into a subscription service in a competitive market, albeit with some of its activity drawing on contestable public funding, then:

- abolish the BBC Trust
- put the BBC under Ofcom
- carry on top-slicing the licence fee
- and invent a new Public Service Broadcasting Commission.

If you want the BBC to continue as a universal public service financed by a compulsory citizen tax, then keep it simple:

- turn the BBC Trust into an external BBC regulator
- modernise the licence fee and ensure that its level is transparently set to fund the agreed scale and scope of the BBC's public services.

Those closest to the issues have already entered the debate. What we need to hear now is the voice of the viewer and listener.

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