

Independent agencies

No fixed boundaries

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Introduction and summary

Independent expert and regulatory agencies are widely perceived to constitute the hallmark of modern systems of regulation. Their ‘independence’ and positioning in systems of governance varies according to different traditions of public administration and law. But, in one way or another, they are set at a distance from central government. For example, in the UK, the ‘Littlechild’ model of economic regulation aimed both to provide a surrogate for market processes and to insulate regulated industries from day to day interference by ministries.

The pivotal role of the independent agency has however come under challenge – particularly in the case of economic regulation. In recent years governments seem to have become re-involved in core regulatory functions, re-inserting their own views on, for example, investment objectives and pricing policies (in the energy sector) and industry structure (in the case of banking).

Against this background this paper first describes the basic rationale for the independent agency. It later cites its underpinnings, that of organisational theory. The decision taking setting for complex issues of public policy is typically badly structured. Independent agencies promise to structure this setting in ways that are better suited to problem solving. They segment, specialise and disaggregate. Organisational theorists received support from the application of doctrines associated with the so-called New Public Management (NPM).

The paper turns secondly to look at the practical challenges to models of independence. In practice the institutional arrangements informed by NPM have major weaknesses. In addition, the role of the economic regulator has broadened radically in ways that have brought regulators closer to the traditional concerns of governments.

Thirdly, the paper offers a perspective on this apparent conflict between theory and practice – particularly as it applies to economic regulation. It suggests that the fundamental issues are about distinguishing between the different rationalities involved in public policy and how they are best organised. The case for an arm’s

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length relationship between government and expert bodies remains. But we need to accept shifting boundaries in a ‘loose coupling’ between central government and agencies.

The examples given in this analysis refer mainly to UK experience and in particular to the ‘Littlechild model’ of regulation. However, UK experience has a wider relevance to other settings.

Theory: giving structure to the decision setting

Many decisions that have to be taken on matters of public policy are routine, repetitive, incremental and boring. However, important decisions are often anything but. In these cases the setting for the choices and decisions to be made is complex. It is generally regarded as badly structured, albeit in different ways. Herbert Simon (1977: 241) regarded ‘virtually all’ interesting issues in public policy as ill-structured.

The badly structured

Views on what exactly it is that makes the setting for important public policy decisions badly structured are summarised in the table below (along with the authors associated with them). Each of the leading categories, such as the contestability of relevant concepts and the uniqueness of settings, refer to a different aspect. The different characterisations are not at all mutually exclusive. They are additive.

Table 1 Characterising the decision setting: the badly structured.

The essentially contested: key concepts are contested (Gallie 1956: 167–9).

The wicked: each situation has unique features (Rittel and Webber 1973: 155–69).

The ill structured: information is missing and incomplete (Simon 1977: 241).

The ambiguous

Context: the situation is open to multiple interpretations (March 1994).

Meaning: different actors attribute different meanings to the same concepts (Abbot 2001).

The indeterminate: policy effects are often conjectural (Elster 1989).

There are two ways of reacting to this diagnosis. The first is to accept that policy making is a highly imperfect business because decision making takes place in conditions of ambiguity and uncertainty. This lies behind well known descriptions of the policy process as a ‘garbage can’ (Cohen et al. 1988), or as revolving around the intelligence of ‘continual adjustment’ (Lindblom 1965). The second is to think about how policy makers and decision takers go about trying to introduce a better structuring for otherwise ambiguous and uncertain settings. For example, they can attempt to reduce complexities through an ordered and sequential search for information and chase missing information by using specialised bodies.

Approaches to better structuring

The table below summarises suggestions that have been made for achieving a better structuring of decision making settings (Simon 1977).

Table 2 Structuring the policy setting

Content prioritising

Priority fixing:

Procedures for identifying what is the most important.

Ordering/sequencing:

Reducing complexity and indeterminacy by investigating in steps or an order or sequence.

Hierarchy:

Ensuring error detection at the highest level.

Content specialisation

Segmentation or streaming:

Channeling particular types of problem to specialist and expert bodies offering continuity of attention.

Disaggregation:

Breaking up large problems into subsets of smaller problems.

Loose coupling.

Non hierarchical ways for improving diagnostics, reducing ambiguities and indeterminacies.

Other

Attention directing:

Mechanisms (normative and procedural) that draw attention to when to address a problem, and what, where and how to address.

The case for independent agencies fits fairly neatly into the logic of specialisation shown in table 2 above. Decision taking is entrusted to expert bodies with segmented responsibilities. They are able to draw on specialised knowledge from the natural and social sciences, to disaggregate large problems into smaller, to approach difficult issues in an ordered sequence of investigation and to give the areas of difficulty their continuous attention.

There are a variety of more specific reasons that can be (and are) offered for the growth in numbers and ubiquity of independent agencies. They help politicians avoid blame in complex areas of policy; they enhance the credibility of policy; they provide (relative to politicians) more trustworthy information to the public; they mitigate ‘role strain’, they help correct for bias in democratic politics. Each has its own logic in its own context. They are perhaps best considered in relation to each other, across the different contexts, in the idea of the regulatory ‘space’ (Vibert 2014). At the same

time, each can be seen as symptomatic of the basic organisational advantages that flow from the segmentation and specialisation shown in table 2 above.

NPM

The so-called New Public Management (NPM) utilised many of the claims derived from the theoretical case for specialised bodies. As Hood says, it was all about disaggregation and ‘hands on management’ (Hood and Jackson 1991). Independent agencies seemed to fit into the category of those organisations that would ‘row’ rather than ‘steer’ (Osborne and Gaebler 1992). Central government departments and ministers could steer and agencies could be free to manage. In particular, in the case of the UK, the Littlechild model of economic regulation puts forward the idea of an economic regulator free from central government interference with a tightly defined remit to promote competition that conveniently overlapped with NPM distinctions (Littlechild 1983). Part of the attraction of NPM was precisely that it gave a rationale for independent agencies from a public administration perspective.

Practice

Alas, the real world has intruded. Firstly, the prescriptions of NPM oversimplified the theoretical arguments. Secondly, the specialist and segmented role of independent agencies has proven difficult to circumscribe amid the many demands for policy consistency and co-ordination between actors (Koop and Lodge 2014).

The credibility loss of NPM

The distinctions between steering and rowing, and between policy and administration made by NPM have not proven robust in practice.

Policy

Firstly, the policy making process is much more diffuse than allowed for by NPM. Policy cannot simply be assumed to reside with Ministers and central government departments who steer. There is no simple way of ‘hard wiring’ their policy objectives into the terms of reference of agencies as continuing debates about the monetary and growth goals of independent central banks amply demonstrate. In practice, Independent agencies have themselves a significant role in policy making and sometimes the lead role. They carry their own epistemic authority (Haas 2007). This means that when ‘truth speaks to power’ those with power must listen to those with expert knowledge and take their views into account.

Other actors are involved as well – such as NGOs. Policy making is an iterative process between many actors. For example, currently in the UK energy sector there is a debate about whether or not the UK has a secure margin to prevent interruptions in supply at times of peak demand. The regulator has its expert view, NGOs may have their views based on the need to phase out fossil fuels and politicians will have their

views based on their assessment of electoral retribution if interruptions were to occur. The industry, which has most at stake, has its own view as well. None of these voices can be ignored. A government faces electoral punishment if it loses any reputation it may have for ‘competence’, the advocacy of NGOs cannot be suppressed in the days of social media and, even if its views are self-serving, the industry itself remains the key stakeholder.

Resources

Secondly, the distinctions of NPM obfuscated an important debate about the nature of public service in a post-Weberian world where the ability of public servants to stand above partisan fray and discern the general public interest is lost in a decentred maze (Black 2001). Is it the case that government departments and decentred agencies remain tied together by an attenuated, but shared sense of public ‘service’ and the ‘public good’? Or possibly, it is more congruent with the facts to point to the different professionalisms that characterise both the agency world and central government departments, the rivalries and sharing that takes place between them (Abbott 1988), and their search for their own professional entrepreneurial opportunities (Burt 2010).

In practice there are two factors that cut across public administration and provide for a varying degree of coherence. The first is the observance of shared epistemic standards by professionals in the same field. For example, economists talk to other economists across government and agencies, and share certain important tools of analysis such as cost benefit assessments and simulation tests. Other professional fields share their own special brands of expertise and speak their own language.

The second cross cutting factor is the need for financial resources. Independent agencies can avoid direct financial dependence on governments where they are self-funded through levies. However, their decisions have financial consequences that may involve the public purse or have other consequences for the public realm.

The connection between the regulator and public finance is explicit in the case of a body such as NICE (National Institute for Health and Care Excellence) charged with weighing the costs of medical interventions against the benefits. But it exists over many other fields. For example, the decision of an air safety regulator that allows for runways to be used more intensively for take-offs and landings will have consequences for the adequacy of the surrounding public infrastructure.

In today’s world the need for public and private finance is often the glue that holds together public administration. Sometimes expressed in the form of performance targets, finance ties together those who steer, those who row and those who are the targets of agency attention (Vibert 2011).

Agency failure

Thirdly, agencies (both domestic and international) can, and do, fail in their task – from child care to finance. For example, the IMF failed to identify and forewarn of the 2008 international financial crisis. ‘Failure’ can be defined or interpreted in many ways. The root issue, however, is that experts are prone to certain types of cognitive error associated with the world of professionals. They are sensitive to ‘context’ – to the institutional objectives of their own agency and to the role they play within that agency. They can misdiagnose situations and what is a suitable response (Vibert 2014). They are subject to intellectual fashions and to the influence of ‘thought leaders’. They are uncritical about their own processes and come under pressure to arrive at convergent views, or a common diagnosis, at the expense of the dissenting voice. The institutional processes by which agencies encourage convergence and handle dissenting views remains an under-researched area. When agencies fall down, governments come under pressure to intervene. They hope to achieve credit from intervention that will outweigh any blame if they too get it wrong.

In short, agencies are not just free to manage or governments free to steer. There is a much greater degree of hand-in-hand working between the world of agencies and the world of central government than NPM allowed (Thatcher 2005). A leading example is provided by the Financial Stability Oversight Council (FSOC) in the US established by the Dodd-Frank Act in 2010 in order to reduce systemic risks in the financial sector. It is chaired by the Secretary of the Treasury, brings together the key regulatory agencies, such as the SEC (Securities and Exchange Commission) and FDIC (Federal Deposit Insurance Corporation), as well as the chair of the Board of Governors of the Federal Reserve Bank and it reports to Congress.

The broadening role of the economic regulator

The interdependence of the world of the agency with the world of central government has been underscored by other real world developments. In particular, in the world of UK economic regulation, the clarity and restraint of the original Littlechild model has been lost. It has gone for three main reasons.

From competition to the constitutive

Firstly, organisational objectives for economic regulators have been extended well beyond the promotion of competition. Market organisation objectives (the ‘constitutive’ role) include such goals as security of supply, the resilience of ‘critical’ infrastructure, stability and ‘sustainability’ (Shearing 1993: 67–79). They have all risen in salience. Although the wider set of goals are sector specific, there is perhaps a common concern around sector vulnerabilities to external shocks – including those arising from the interconnections between financial markets, rapid changes in energy prices and the energy mix, and concerns about cyber security.

Defining the consumer

Secondly, regulatory attitudes towards representing the consumer have also changed (Dewatripont and Tirole 1994). Competition by itself does not ensure that consumers bother to obtain and sort through the information they need to make sensible choices for themselves. Consumer representation attached to Independent agencies has also proved to be problematic. As a result regulators have increasingly stepped in to make informed decisions on behalf of the consumer, to simplify choice and to help conceptualise issues (such as obesity or the carbon footprint) on behalf of consumers. Regulators have moved from creating conditions ‘sufficient’ for consumers to be able to make choices (a ‘satisficing’ role) to a trustee role, or, to acting in the ‘best interest’ of the consumer (a role that tries to ‘optimise’ conditions for consumers). The many different conceptions of the ‘representation’ role familiar from political science apply also to the representation role in markets (Shapiro et al. 2010). The role of the regulator in representing missing voices – whether they be the voice of consumers, shareholders, or vulnerable social groups has become generally a much more activist one.

From micro to macro – the systemic

Thirdly, the Littlechild model took a micro-economic view of the role of the regulator. The focus was on the individual firm and consumer. The 2008 financial crisis has made abundantly clear that a micro focus can miss the big picture. Many systems are ‘complex’ in the sense that one cannot draw conclusions about the whole on the basis of the behaviour of individual units within the whole. The same need for a systemic approach applies to other important sectors of economic activity from telecoms to energy and to the regulatory world itself.

What each of these extensions of the role of the agency mean is that the permeability of boundaries between an independent agency and the central government world of Ministerial oversight has become much more visible. Politicians feel that they have their own legitimate view of system roles, of market organisational objectives and what is best for the consumer. Central government, Ministers and politics are back in.

Politics back in: in what role?

The fact that the decision making role of independent agencies is proving to be more closely linked to the world of politics than some organisational theorists inferred, should not come as too great a surprise. The ancient doctrine of the separation of powers never involved complete separation between the different branches of government. Systems of social coordination are ‘interdependent’. The term distinguishes between dependence in the sense of subordination and dependence in the sense of mutual reliance (Baldwin 1980: 471–506). The key question is whether there is a way of characterising the interdependence, or mutual reliance, between politics and agencies that illuminates relationships at the boundary. Boundary

relationships have two aspects – a horizontal relationship and a vertical or hierarchical.

The hierarchical: error correction

The suggestion from organisational theory shown in table 2 above is that a hierarchical form of organisation is better suited to error detection while ‘loose coupling’ is better suited to diagnosis (March 1999: 194). What this means within an organisation is that specialised departments, or subsidiaries, may be better able to understand the unique features of their own part of the external world, but that they may lack an appreciation of the broader operating environment where Board direction may be required. This suggestion can be applied outside a single organisation to the organisation of government.

If politics is seen as ‘hierarchy’ then this would suggest that boundaries should be drawn in a way that leaves Ministers out of the business of diagnosis and involved only when they detect ‘error’. This is also consistent with the view that, in cases of dispute between systems, the role of politics is to provide for ‘authoritative resolution’. It is consistent too with a principal/agent view of relationships, with the Minister the principal and the regulator, or expert body, the agent.

The difficulty with thinking about boundaries in this way is that Ministers will detect alleged ‘errors’ by agencies at breakfast, lunch and tea. They will be intervening whenever political points can be scored.

The horizontal: loose coupling

Table 2 above suggests that we should think about horizontal relationships in terms of what James March (1999) calls ‘loose coupling’. The term can be interpreted to imply three features about horizontal boundary relationships. These would cover firstly, connections that are designed to be consistent with a substantial, but not complete, degree of separation and with a particular focus on the diagnostic advantages of agencies; secondly, boundary shifts from either side since the agency may be involved in redrawing boundaries as much as politicians; and thirdly, relationships that can respond to outside developments beyond the control of either politics or the agency (for example, from technology or consumer behaviour).

Perspectives

The picture given in this brief sketch of the theoretical advantages of independence can be viewed as one version of an often repeated clash between the world of rationalist theory and the world of practice. However, the arguments made by Herbert Simon (1977) and James March (1999) do not fit into such a dialectic. The questions

raised by fluctuating boundaries between the two worlds of the expert and the politician raise critical questions about both theory and practice.

Dual processing and cognition

Simon (1977) offers a particular account of ‘dual processing’ that distinguishes between an exhaustive search for evidence and our use of heuristics, or short cuts, such as favouring the familiar. Short cuts save on time and effort and, according to Simon, are what we often rely on in everyday decision taking.

The world of expert bodies is consistent with this type of dualism. Regulators are involved in an exhaustive search for information relevant to the continuous attention they give to their tasks. Politicians, on the other hand, can rely on the short cut methods of politics for decision taking. For example they may just look at what is pertinent at a particular moment to party debate (Page 2012).

Dual processing, however, remains a challenge. It is a challenge both to political scientists still attracted to the search for an ‘ideal type’ of unified rationality implicit in theories of ‘reflective equilibrium’ or ‘deliberative’ democracy, as well as to social scientists looking for a unity through concepts of the ‘social construction’ of framing and investigation.

Key questions remain, both about the characterisation of dual process and about how to bring together the heuristics of politics with the rationality of exhaustive search (Chaiken and Trope 1999).

The cognitive and context

It was mentioned above that a key and possibly *the* key source of regulatory failure stems from cognitive failures of various kinds. Simon’s dualism leads in the direction of looking for the sources of cognitive error in the use of heuristics. However, the advantages of segmentation and specialisation included in the account of the ‘better structured’ underestimate the importance of cognitive failure associated with organisation and context. For example, as referred to above, many regulatory and expert organisations provide settings that are designed to encourage a convergence of views among experts. This has its own dangers.

The difficulty in diagnosing the sources of cognitive failure lies in part in the transition from the world of lab experiments to the situations in which experts actually work in their professional settings and the roles they are expected to play in those settings (Snyder and Stukas 2007: 363–88). For example, it is not clear how far some well established cognitive biases, such as loss aversion, apply in different professional settings. Thus, loss aversion may apply to an individual investing his or her own money. It is not clear that it applies to the same person in a regulatory setting making decisions that have implications for other peoples’ money.

Differentiation and the regulatory space

The advantages of specialisation shown in table 2 on better structuring do not necessarily justify treating the world of expert and regulatory bodies as one world. Rather, the inference might be that we are moving to many different specialised and segmented worlds, with their competing professionalisms. Possibly we need to distinguish more clearly between a central bank and a child care agency. On the other hand, concepts such as ‘confidence’ (confidence in the credibility of central banks and confidence in the professional expertise of child care agencies) are possibly symptomatic of an over-arching unity to an expert, professionalised space. In analysing the reasons for the growth in the number and variety of intermediaries, perhaps an analogy might be made between the growth of intermediaries in systems of social coordination and the growth of intermediaries in financial markets.

Hierarchy again

Table 2 on better structuring offered a place both for loose coupling, including networked relationships, and hierarchy (taking the most important decisions at the highest level of decision taking). The connection between loose coupling and hierarchy referred to above, involved a theoretical distinction between error correction (the role of hierarchy) and the processes of diagnosis where loose couplings are best. This, does not seem an entirely satisfactory way of characterising the relationship. Hierarchical relationships are not there simply for error correction. They connect ideas about what is most important in public policy to bodies that are the most important in terms of overarching public authority.

From a more practical perspective, the connection between the horizontal and the hierarchical has been traditionally expressed in public administration terms by associating the world of regulators with the world of networks and fellow expertise, while hierarchy is associated with the terms of reference of the regulator set by politicians. However, this manner of distinguishing between and connecting the two worlds also seems unsatisfactory. It underestimates the extent to which matters that are of the highest importance will sometimes emerge, not as a result of being identified through terms of reference, but as a result of the processes of diagnosis and investigation themselves. It also underestimates the importance of some of the shortcomings of hierarchy, such as distance from those affected by a policy, that expert and regulatory bodies may in part overcome by being closer to those affected by policy.

What this means is that we need a much more clearly elaborated model of the relationship between diagnostic processes and hierarchical decision taking. In particular the connection cannot just depend on prior designations by politicians of what is important. In this context, one area that has to combine both diagnostic processes and ideas about ‘importance’ is the appeals procedures of the law (Perry

1991). The law follows a sequential process of investigation in order to determine what is important in a case. It also uses a rather more vague criterion of ‘ripe timing’ to decide when interventions need to be made at the top. Possibly there are analogies to be drawn. For example, what has to be decided at the top in politics could perhaps be more explicitly related to a sequential process of investigation and to more developed criteria for ‘ripe timing’ or the ‘essential juncture’ (Abbot 2001).

Conclusion

Independent agencies in the form of specialised bodies that are substantially separate from central government and ministers have a basic advantage in ‘better structuring’ the decision taking setting. Thus, from a problem management perspective, both politicians and agencies have a continuing interest in an arm’s length relationship. However, at the same time, the worlds of agencies and central government are interdependent. Boundaries between agencies and politics are permeable and will undergo constant adjustments. Regulation is all about boundary adjustments between systems. Characterising those boundaries remains a challenge both to the world of research and to the world of practice.

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