

Come off it, Ofcom

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The media regulator's failure to police political balance at GB News threatens the security of our democracy

Warnings about the insidious dangers of Fox News for the future of America come from, among others, the Murdoch family itself. According to Gabriel Sherman, in a piece on the Murdochs for *Vanity Fair* in May this year, “James is horrified by Fox News and tells people the network’s embrace of climate denialism, white nationalism, and stolen election conspiracies is a menace to American democracy”. He is not alone. Many others have drawn a direct line from the infatuations of Fox talk show hosts with Donald Trump and his America First cult to the storming of the US Capitol on January 6, 2021, and the attempt to prevent Joe Biden taking power.

Yes, the unfiltered and ubiquitous nature of social media helps to unite the fanatics and fantasists in their conviction that the 2020 presidential election was stolen. And yes, some of the astonishing evidence that emerged from the \$1.6 billion defamation suit (settled for \$787 million) brought by Dominion Voting Systems against Fox News demonstrates not just the contempt that some of those talk show hosts have for their audience, but their own cynicism about the baseless propaganda they were spewing on their own shows (one email showed Murdoch himself calling Trump’s fraud claims “really crazy stuff”). And yes, Fox News has successfully monetised a gap in the news market for those happy to be trapped in a filter bubble of far-right conspiracy theorists and QAnon devotees. It is simply offering a significant segment of the population a news channel they wanted.

However, all three issues are beside the point. Social media accounts are fragmented, and very few have the kinds of following that will help to incite

an insurrection without the enormous power of a well-funded news network to unite a nation behind TV personalities happy to spread the conspiracy gospel. Fox News's daily two million prime time viewers are the catalyst for those Facebook and Twitter posts, not vice versa.

That those gospel choirs are sniggering behind the backs of their adoring fanbase makes them all the more culpable for the angry resentment they deliberately foment. And the fact that democracies have inbuilt markets for the dangerous propaganda that feeds authoritarian populism – and potentially democracy's own self-destruction – does not justify the drumbeat of partisan disinformation that now dominates the evening airwaves of Fox News. We do not, as a civilised society, support public flogging or hanging just because a significant minority would be willing to pay to watch.

How is this relevant to the UK? Because the advent of two new avowedly right-wing news channels – Legatum-funded GB News and Rupert Murdoch's Talk TV – have started to introduce partisan (and in some cases conspiracist) programming to the UK. For all the reasons given above, there is threat to democracy if these continue unabated. Traditionally, we have a bulwark in the UK against this kind of unbridled, unfiltered propagandist approach to broadcast news and information: an impartiality regime passed by Parliament and policed by Ofcom. But Ofcom is failing us – and by failing us, it is failing democracy.

From the very beginning of commercial television in 1955, the UK has legislated for an impartiality regime in broadcasting that covers every TV and radio station licensed by the regulator. The current regulator is Ofcom, and the statutory impartiality obligations it is obliged to enforce are contained in sections 319 and 320 of the Communications Act 2003. S319 requires that “news included in television and radio services is presented with due impartiality”, while S320 lays down “special impartiality requirements” for programmes dealing with “matters of political or industrial controversy” and “matters relating to current public policy”. Two crucial points should be emphasised here: first, nowhere does the statute refer specifically to “news programmes”; and second, these requirements include the exclusion of “all expressions of the views or opinions of the person providing the service” (in this context, “person” refers simply to the Ofcom licensee).

Ever since cable and satellite technology in the 1980s heralded the arrival of new TV channels to challenge the UK's four terrestrial channels, there have been calls to abandon those rules from the left and the right. On the left, one of the UK's great television documentary-makers, John Pilger, convinced

that the impartiality regime upholds a comfortable establishment or “consensus” perspective which silences serious dissent, once described the word itself as “almost Orwellian in the perversity of its opposite meaning”.

On the right, libertarian free marketeers have long argued that the rise in TV and radio channels renders any regulatory imposition superfluous. Indeed, in 2007, Ofcom itself produced the report *New News, Future News*, which asked whether, in a digital environment, “for channels other than the main PSBs, is impartiality still important, or is it a barrier to diversity in an era with a wide range of services available to viewers?” It also inquired whether other channels should “be allowed to offer partial news in the same way that newspapers and some websites do at present”.

Those ideas received a hostile reception (apart from the Murdoch-owned newspapers) and were abandoned, although Ofcom did license Fox News for re-broadcasting in the UK for 15 years until 2017, when the Murdochs pulled it from Sky as part of their attempted takeover of the whole of BSkyB (subsequently abandoned). The “free market of ideas” ideology was most forcefully put by the younger Murdoch son James in his 2009 MacTaggart lecture at the Edinburgh Television Festival, when he argued that impartiality was “an impingement on freedom of speech and on the right of people to choose what kind of news to watch”.

The dues and dont’s of Ofcom’s impartiality argument

Now, however, Ofcom’s approach to GB News and TalkTV suggests that it is covertly introducing those ideas from *New News, Future News* through an over-flexible interpretation of the “due impartiality” qualification by the 2003 Act. Its approach – and, in particular, its interpretation of the word “due” – is expanded upon in section 5 of its *Broadcasting Code* and in the accompanying *Guidance*.

The *Code* explains at some length that “due” means “adequate or appropriate to the subject and nature of the programme”. This does *not* mean, it emphasises, that every argument has to be represented and given an equal amount of time. Furthermore, “the approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience”. Importantly, Ofcom’s *Guidance* also states that “just because material is broadcast on a ‘rolling news’ channel does not necessarily mean that the

material would be characterised as ‘news’ content”.

There appears to be confusion here between Ofcom’s *Guidance* and its *Code*, which the regulator has been exploiting in its opaque decision-making around these two overtly partisan channels. For the *Code* does not differentiate “news content material” from other content, but specifically states that in “matters of political or industrial controversy and matters relating to current public policy” there are “special impartiality requirements” and these apply to “news and *other programmes*” (emphasis added). This is particularly important, as controversial subjects are GB News’s stock-in-trade, especially during their opinion-driven evening programmes.

Moreover, those evening programmes are highly personality-driven – precisely the model followed by Fox News – and thus could be regarded as falling into the category of what Ofcom calls “authored” programmes: for example, *Dan Wootton Tonight* (of which Wootton is also the executive editor), *Farage*, *Jacob Rees-Mogg’s State of the Nation*, and *Laurence Fox* (the clue is in the programme titles).

In these cases, the *Code* states that presenters may express their own views on controversial matters but that “alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality”. Ofcom’s *Guidance* adds that alternative views “must not be included in a way that they are merely dismissed by the presenter and used as a further opportunity to put forward the presenter’s own views”. Anyone who has watched Wootton’s “discussion” of – to take just one example – BBC funding would struggle to find any serious attention being paid to alternative views beyond his own vociferous conviction that the licence fee is an iniquitous imposition that should be scrapped. The same goes for most other “matters of political controversy” on those evening shows, whether it be trans rights, small boats, Brexit, immigration or Boris Johnson.

Given this very wide – and, in our view, unhealthy – discretion now being exercised by Ofcom, it is perhaps unsurprising that it has not upheld a single complaint against GB News on impartiality. The only two upheld complaints have related to editions of *The Mark Steyn Show* discussing Covid-19 vaccination, one of which Ofcom found to be “materially misleading”, the other “potentially harmful”.

Apart from its very liberal reinterpretation of statute, Ofcom is also guilty of running an opaque complaints process that makes it very difficult to

analyse precisely the nature of complaints or how they are assessed. Its online complaints form makes no reference to the *Code*, nor does it ask complainants to identify which section they claim has been breached. This might explain why relatively few complaints are considered under this heading, despite widespread concerns about what appear to be multiple breaches (though the low number might also reflect the channel’s relatively small audience). Since classification of complaints appears to be at Ofcom’s discretion, we have little idea about whether someone believing they had complained about bias actually had their complaint considered under that category.

Given that successful navigation of its complaints process requires time and specialist knowledge (and we have no idea how many might have started a complaint before giving up), it’s hard to avoid the conclusion that Ofcom is reluctant to consider complaints under the heading of impartiality. A simple factsheet with links to the *Code* and *Guidance* would allow potential complainants to familiarise themselves with the relevant sections, and then let them choose the precise headings under which they want their complaint to be considered. The form should invite complainants to state explicitly which rules they believe have been infringed.

Ofcom failed to pursue a single complaint

Of those GB News programmes that were assessed under the due impartiality heading, those that received the most complaints were another *Steyn* episode (17) and Farage’s interview with Donald Trump (14). The most complained-about presenters were Laurence Fox, Neil Oliver and Dan Wootton, with most of those complaints assessed under the “materially misleading” heading. None of these complaints was pursued by Ofcom.

Some clues to the underlying problem – and also the confusion – with Ofcom’s approach were apparent when its CEO Dame Melanie Dawes gave oral evidence in March to the House of Commons Digital, Culture, Media and Sport select committee. In response to a question by Kevin Brennan, the Welsh MP, on whether the GB News line-up could really constitute “diversity”, Dame Melanie replied that “even a programme presented by somebody with a very strong set of political views needs to make sure that other voices are heard, or they will come up against our guidelines”. Later, she talks about the importance of context and the “quite different expectations of a top-of-the-hour news bulletin, where impartiality and balance are extremely important, and of something that is more of a

discussion show, where, fundamentally, people may well know very clearly what the opinions of the presenter are but, as long as they are talking to a range of people and representing different viewpoints on that programme... that will often be in line with our broadcasting code rules”.

Those considerations appeared to be set against “freedom of expression”, a phrase that has emerged from Ofcom with greater regularity over the last few years and which, in the current context, has taken on distinct culture warrior overtones. At one point, Dame Melanie states explicitly that “the phrase ‘freedom of expression’ is a very important part of this debate – one that perhaps should be a little bit more prominent”. Later, she tells the committee that “we are always thinking about freedom of expression here and do not want to see just a single, monocultural, a mono-representation of views on British TV. When you compare what you get in the UK with what you see in America, which is unregulated, it is very, very different”.

Implicit in this analysis are the connected (and worrying) notions that America’s unregulated free-for-all might be a good thing, and that the requirement for impartiality in broadcasting somehow dictates a “mono-representation of views”. The first notion is – for the reasons given above – dangerous, and the second is a disturbing echo of the “metropolitan liberal elite” mantra emanating with increasing frequency from the right.

Few would challenge the fundamental importance of the Article 10 right to freedom of expression contained in the European Convention on Human Rights and the Human Rights Act 1998, and its importance at the heart of any democratic society. But freedom of speech has increasingly become a rallying cry on the right for the relaxation of rules governing any speech on any platform – regardless of its provenance and the damage it might inflict on others, or on public and democratic life in general.

However, with enormous irony, the vital role that impartiality in broadcasting should play in promoting both free expression and a healthy democracy was best outlined in a 2020 Court of Appeal judgment involving the Russian news channel RT and Ofcom. RT had challenged Ofcom’s decision to fine it £200,000 for seven programmes broadcast in March and April 2018, which Ofcom found breached the impartiality regulations. In rejecting that appeal, the court laid down that, as every person is entitled to participate in a modern democratic state, “it is essential that all viewers, and not just average viewers, have access to the differing viewpoints that enable that individual viewer to come to an informed view on individual topics”. It went on to argue that “permitting a provider of television

services to avoid the requirement of ‘due impartiality’, even for one programme, would severely harm the quality of political discourse in this country” and, in doing so, would seriously harm the rights of others, as protected by Article 10(2), because “individual viewers will not be exposed to the contrasting views necessary to assist the viewer to take a full role in the modern democratic state”. The court sounded a warning:

“Viewers of news on media which are not subject to impartiality regulations may receive only one viewpoint to the exclusion of other viewpoints. In such circumstances a viewer may interact only with one viewpoint, and the media accessed by that viewer may become ‘an echo chamber’ or ‘information silo’ for that single viewpoint. Given the multiplicity of sources, and the corresponding increased likelihood of a viewer accessing only media according with or reflecting that viewer’s own viewpoint, the importance of a provider of television services maintaining ‘due impartiality’ in each broadcast programme becomes greater, and not lesser.”

There could hardly be a better legal or political argument, not only for a statutory impartiality regime but for proper regulatory enforcement. As events in the US have demonstrated, that regime is more than a legacy of the public service tradition in broadcasting; it remains a principle rooted in ideal journalistic norms of accuracy, fairness and integrity which – importantly – are still supported by the great majority of citizens. Far from undermining the democratic imperative of free expression, impartiality rules sustain an informed democracy in what the growing number of authoritarian leaders around the world like to call a “post-truth world”. But it requires a regulator that is robust and confident. Ofcom is failing to demonstrate that it is up to the job.

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