Hierarchy to homeostasis?

Hierarchy, Markets and Networks in UK media and communications governance.

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Abstract.

The author considers propositions that market and network governance are supplanting hierarchical governance in contemporary UK media and communications, Liberalisation of media and communication markets, adoption of new public management in publicly owned bodies, "outsourcing" of regulation from statutory to self-regulatory bodies and "fourth way" co-ordination of Internet institutions suggest that the importance of markets and networks as potentially "homeostatic" modes of governance is growing. However, hierarchical governance remains important, the Communications Act 2003 prescribes more than 260 duties for the statutory regulator, Ofcom, and the BBC makes a major intervention in broadcasting markets. All three forms of governance fail in distinctive ways and the author argues both that the potential for network governance failure is less well recognised than are market and hierarchy failures and that the complexity of established governance arrangements itself constitutes a distinctive form of failure of governance.

Keywords.

UK media, governance, regulation, governance, networks.

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Hierarchies, markets and networks.

Thompson (2003) has identified three modes of social co-ordination or governance – through hierarchy, markets or networks. Persuasive arguments have been advanced that hierarchical governance (and thus the role of states) is giving way to either or both market and network governance. Moran (2003), for example, proposes that in the UK hierarchical "club" governance has been supplanted by market governance in the form of a "hyper-innovation" distinguished by privatisation and liberalisation (Moran's rhetorical use of the intensifier "hyper" may suggest that the argument is being tipped). Whereas Taylor (2001) and others (see, *inter alios,* Barabasi 2002, Barry 2001, Castells 1996 and 2001, Keohane and Nye 1998) have argued that it is network governance that is growing in salience and that "What is emerging at the moment is a new *network culture"* (Taylor 2001: 5) which responds to the complexity of modern societies which in turn, Taylor argues, mandates network governance. However in contrast to hierarchical governance, both market and network governance share a normative self-regulating, or homeostatic, character: market governance through the influence exerted by the "invisible hand" (Smith 1776) and network governance because of its intrinsic properties of reciprocity - if Thompson's account of network governance as distinguished by co-operation, trust, solidarity and loyalty is accepted (Thompson 2003: 112).

Why this putative shift to homeostatic co-ordination or governance? Because, it's argued, an epochal shift in social organisation has taken place because contemporary social relationships are just too complex to be managed by hierarchical "command and control" systems. "The moment of complexity", for Taylor, constitutes a "tipping point where more is different" and mandates a shift to network governance. Taylor (2001: 4) identifies the "explosive development of cybernetic, information and telematic technologies since the Second World War" as triggering this "tip" to networks. Castells, perhaps the best known proponent of this thesis, contends that network organisation "constitute[s] the new social morphology of our societies" (Castells 1996: 469) and similarly defines technological change as the driver of this transition: "the "new information technology paradigm provides the material basis for its pervasive expansion throughout the entire social structure" (Castells 1996: 469).

The references to Castells and Taylor cited above exemplify an often made argument that media and communications have a crucial constitutive role in the growing salience of network governance and also that, in a kind of elective affinity, network governance increasingly characterises governance of media and communications themselves. What empirical evidence is there to support these propositions? How far are they born out by the governance of media and communications in the UK?

Major changes in the governance of UK media and communications have certainly taken place in recent times. Although the print and film sectors remain privately owned and self-regulated (under the law) major changes have taken place in network media – that is, broadcasting, telecommunications and the post – which lend empirical support to propositions of epochal change. In 1955 UK broadcasting was undertaken by a publicly owned monopoly, the BBC (lawful commercial broadcasting began in 1955), telecommunications was undertaken by two publicly owned monopolies, Post Office Telecommunications and Hull Telephones (the latter confined to providing service in and around Hull, an area where Post Office Telecommunications was not permitted to provide service) and postal services were the sole prerogative of the Royal Mail. Half a century later, there is no publicly owned presence in telecommunications where hundreds of private companies compete to provide a range of services; in broadcasting the BBC (together with other public bodies - Channel 4, S4C and the Gaelic Media Service) maintains a significant presence but competes against hundreds of private radio and television channels; and in postal services the Royal Mail also competes in a substantially liberalised market though against fewer private sector competitors than have entered broadcasting and telecommunications markets.

Although these dramatic changes in UK media and communications have been accompanied by the invention of new agencies of hierarchical governance (notably the regulators Ofcom and Postcomm) it seems obvious that there has been a substantial shift away from hierarchical governance. But the shift seems to favour market, rather than network, governance. Does this suggest that the claims of Castells (1996: 469) for a "new social morphology" and Taylor (2001: 5) for a "new network culture" are poorly founded?

Network governance.

Recent developments in the UK, as elsewhere, lend p*rima facie* support to Castells' and Taylor's propositions. There is a clear shift towards self-regulation, or co-regulation, in areas of media and communications where formerly hierarchical "command and control" regulation obtained. For example, the statutory regulatory agency for electronic communications, the Office of Communications, Ofcom, has "outsourced" regulation of television advertising to the private sector self-regulatory body the Broadcast Committee of Advertising Practice (BCAP) [1]. BCAP, or, sometimes, CAP (Broadcast), states "We regulate the content of all TV and radio commercials on channels and stations licensed by Ofcom. We also regulate advertising on interactive television services, TV shopping channels and Teletext services" (BCAP http://www.cap.org.uk/cap/about/cap_broadcast/ on 24.2.2006). BCAP's parent body (the Committee of Advertising Practice) refers to its sponsoring industry, UK advertising, as setting "the standard in successful self-regulation" (CAP http://www.cap.org.uk/cap/about/ on 24.2.2006). Ofcom's statutory Broadcasting Code was formulated through "extensive consultation with broadcasters, viewers and listeners and other interested parties" (Ofcom 2005: 2) http://www.ofcom.org.uk/tv/ifi/codes/bcode/ofcom-broadcasting-code.pdf on 24.2.2006) and so on. In the first two months of 2006 Ofcom had opened nine new consultations and in the preceding year, 2005, it undertook 79 separate consultations (source Ofcom website at: http://www.ofcom.org.uk/consult/condocs/?page=1&sector=All&subsector=All&open=No&sortOn=datepublished on 3.3.2006).

Such changes are particularly marked, as one might expect in emerging media such as the Internet rather than in established or "legacy" media. As one of the prophets of the Internet, John Perry Barlow, proclaimed:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather (Barlow 1996).

Oratic and overblown though Barlow's statement may be, the institutional structure and practice of Internet governance in the UK suggests that hierarchy is not sovereign. The sponsoring Secretaries of State stated, of the Bill that became the UK Communications Act 2003 (CA 2003), that "it is not the intention…. to extend regulation into the Internet" (DTI/DCMS 2002: 48). A DTI (Department of Trade and Industry) source (interviewed by the author 4.8.2003) also testified to the subtle efforts given to drafting the Act so that Internet services were neither caught by provisions for television licensable content services nor for telephone numbering. As another DTI interviewee (interviewed by the author 14.7.2003) stated: "there's an underlying feeling that we're not in a telecoms situation. Overcontrol puts someone out of business and someone else in I-space takes over".

Not only was the Communications Act 2003 (an act to create a consolidated regulatory regime for broadcasting and telecommunications under an integrated "converged" regulator, the Office of Communications – Ofcom) drafted to exclude the Internet but key bodies such as Nominet, (which administers the .uk domain), and LINX, the London Internet Exchange, (through which c60% of UK Internet traffic passes), operate under a network governance regime whereby their customers form their governing bodies.

Nominet is a non profit distributing company and claims to be "cost and not profit oriented" with cost based pricing of services. It is controlled by a Council of Management comprising two executive directors (both ex officio and one of whom shall be the Managing Director of the company) and four non executive directors – the non-executives are elected by Nominet's members at the company's annual general meeting. Nominet also has a Policy Advisory Board (PAB) which comprises two of the non-executive directors, five representatives of appointed organisations (such as the Confederation for British Industry [CBI] and Companies House – the UK Company registration office) and eight representatives who are elected by Nominet members. Dr Willie Black (when Nominet's Executive Chairman, interviewed by the author in Oxford on 1.9.2003) claimed Nominet as a leading instance of what he termed a "fourth way" – that is, a well run, reasonably priced and efficient private organisation, "managing a valuable resource" and operating in circumstances where supply is constrained, responsive to its users but not formally regulated by an external body.

Like Nominet, LINX is a "fourth way" not for profit organisation which prices to recover costs. Its customers are members of LINX and are "expected to contribute towards the running of LINX by volunteering for work required to run and manage LINX" (LINX MoU 3.1) and to abide by the LINX Memorandum of Understanding (LINX 2003). In turn, they are eligible to participate in the governance of LINX.

Nominet and LINX seem to well exemplify the characteristics of network governance which Thompson identified, that is self regulation based on relationships of co-operation, trust, solidarity and loyalty (Thompson 2003: 112), and to bear out

Thompson's claim, following Riles 2001, that networks have a kind of "elective affinity" with self-regulation and with "bottom up type of organizational arrangements…. [that] strongly connect to 'private interest governance' and the sphere of non-governmental organizations" (Thompson 2003: 30). Indeed, the importance of network governance in the Internet sector suggests that network governance will grow in general salience as the architecture and organisation of electronic communication networks in general become more Internet like. See, *inter alia*, Devoteam's (2003) well evidenced and persuasive account of the development of New Generation Networks (see also TM Denton 1999).

Moreover, several synoptic scholarly studies, such as those undertaken by the University of Oxford's Programme in Comparative Media Law and Policy (PCMLP) and the Hans Bredow Institut of the University of Hamburg, have identified a growing recourse to self-regulation (or co-regulation) for media and communications. PCMLP found, in a study of Internet regulation across the world, "Authorities in Europe and elsewhere in the developed world have responded…. by resisting calls for statutory regulation and encouraging the industry [ie the Internet RC] to regulate itself" (PCMLP 2004: 3). In the UK self-regulation of Internet content is undertaken by the Internet Watch Foundation (IWF). The Hans Bredow Institut's study of "Co-Regulatory Measures in the Media Sector of the EU" (Hans Bredow Institut 2006) similarly identified the growing salience of "regulated co-regulation" more generally in media and communications across Europe.

However, the undoubted growing contemporary empirical salience of civil society and network governance in media and communications is not the whole story. Neither market nor hierarchical governance is absent – even in the Internet. And, whilst distinctions between hierarchical, market and network governance have considerable analytical and heuristic power, actual regimes often display a complex, hybrid, character rather than the purity of theory.

Market governance.

It is a truism to observe that one of the "grand narratives" of UK governance over the last quarter of a century has been a re-balancing towards market and away from hierarchical governance (see, for example, Moran 2003). This has been manifested in a re-engineering of the internal relationships of public sector bodies to embody the precepts of "new public management" (NPM) on private sector lines (Osborne and Gaebler 1992) as well as in reshaping the outward facing relationships of public bodies through liberalisation and privatisation. These trends have resonated through the media and communications sector where market entry has become easier under the combined impact of Government policy, which shifted rapidly from the control of entry via the licencing of firms to a regime of general authorisation and promotion of entry, and technological change which mitigated capacity constraints (notably communication satellites but fibre optic cable and digital compression techniques provide further cases in point) that had formerly inhibited market growth.

In the residual public sector, notably the BBC and the Royal Mail (now a public limited company), top managers (respectively John Birt, Director General of the BBC from 1992-2000, and Adam Crozier, Chief Executive of the Royal Mail 2003-date) introduced NPM type measures and the both the BBC and the Royal Mail have been charged with meeting commercial as well as public interest targets. Moreover, promotion of competition has been constituted as a central element in communications regulators' mandates (and thus applying to the public sector bodies in so far as they are under regulators' oversight). For example:

The Postal Services Act 2000 (5.1) provides, *inter alia*, that:

> the Commission shall exercise its functions in the manner which it considers is best calculated to further the interests of users of postal services, wherever appropriate by **promoting effective competition** (author's emphasis) between postal operators. Postal Services Act 2000 Chapter 26. http://www.opsi.gov.uk/acts/acts2000/20000026.htm on 24.2.2006.

The Communications Act 2003 (3.1) provides, *inter alia*, that:

> It shall be the principal duty of OFCOM, in carrying out their functions-
>
> (a) to further the interests of citizens in relation to communications matters; and
>
> (b) to further the interests of consumers in relevant markets, where appropriate by **promoting competition** (author's emphasis). Communications Act 2003 Chapter 21. http://www.opsi.gov.uk/acts/acts2003/20030021.htm on 24.2.2006.

Indeed, one could claim the media sector as the path breaker in opening up the now familiar UK mix of market and hierarchical governance embodied in both the Postal Services and Communications Acts. The Independent Television Authority (ITA) – which successively metamorphosed into the IBA (Independent Broadcasting Authority), the ITC (Independent Television Commission) and was finally assimilated into Ofcom – was established in 1954 to oversee the introduction of commercial, advertising financed, television to the UK (the first European country to have commercial television) is often seen as the first of the UK's North American style regulatory agency and thus as the first such agency in Europe.

Homeostasis.

We might reformulate the propositions (Castells 1996, Moran 2003, Taylor 2001 etc) of migration towards network and market governance regimes rather as a teleological migration towards homeostatic governance. For both network and market governance regimes offer, at least in theory, a *telos* of a self-regulatory, homeostatic, equilibrium independent of hierarchy. A good example of this presumption is to be found in the UK Cabinet Office's Strategy Unit's (2002) analysis of Ofcom's powers; this shows an anticipation of an **inverse** relationship between hierarchical and market systems of governance: the better market governance works the less hierarchical governance will be required. Hierarchical governance will, in this vision of its operation, "wither away" as a competitive homeostasis develops:

Sector Specific Retail price controls (RPI-x) or rate of return regulation	All diminish with increased likelihood of competition

Wholesale price controls (RPI-x) and service level agreements Wholesale price controls (cost plus) and service level agreements Requirements to allow interconnection Co-regulation with industry Alternative dispute resolution (ADR) Self-regulation by industry	
Competition Law. Investigation under the Competition Act 1998 Referrals to the Competition Commission	

(Strategy Unit 2002: 80).

The Strategy Unit maps a path leading towards homeostatic market governance: the market's invisible hand (Smith 1776) will govern firms' behaviour and establish an equilibrium in which prices and long run costs converge. In such circumstances, firms secure rents (ie profit beyond the levels required to maintain the system in equilibrium) only if they innovate, eg in content or services, and are thereby able to create and capture a new market where they can again secure rents in the, theoretically, short period before other firms imitate them and re-establish a competitive equilibrium. This compressed sketch of competition theory suggests, contrary to assumptions in some contemporary literature on the governance of electronic communications, that self-regulation is not exclusive to network governance but may also be found in market governance regimes. In theory at least both markets and networks may be self-regulating – it is, however, an empirical question as to whether in any particular instance a homeostatic, self-regulating, system, the objective of competition theory and, putatively, a constitutive element of network organisation, actually exists.

The return of the repressed – hierarchy.

However, we are far from a homeostatic arcadia, whether of network or market governance, in the real UK media world. Even though market and network governance do have a striking empirical and doctrinal salience, no one could imagine hierarchical governance was absent from UK media and communications when confronted with the 590 pages, 411 clauses and 19 schedules of the Communications Act 2003!

Hierarchical governance continues to play a large part in governance of UK media and communications though the salience of the new regulators Postcomm and Ofcom reflects a number of potentially conflicting assumptions and values. Notably:

- that there are important public interests that may not be secured through the operation of well functioning markets (eg universal postal, telecommunication and broadcasting services at affordable prices)

- that the presence of dominant legacy firms (such as British Telecom (BT), the Royal Mail and the BBC - created as public monopolies) mandate effective regulation to allow effective well functioning markets to emerge

- that there are important positive and negative externalities associated with media content that require effective regulation by an expert sector specific agency such as Ofcom (though it's important to note that such regulation applies unevenly across the whole media sector and more strongly to television than to print, radio or the Internet)

- that markets will fail in a technical sense and may become dominated by one or few firms and thus threaten the diversity and pluralism important both to free and democratic societies and to economic efficiency.

Although the presumption that well functioning markets are likely to more effectively secure the public interest than will command and control regimes (hence Ofcom's and Postcomm's duties to promote competition) underpins contemporary UK media and communications regulation (indeed, it does not seem too much to argue, the contemporary market regime was devised to remedy the failures of hierarchical governance) also recognises that markets may fail. Accordingly, the Communications Act 2003 reserves hierarchical powers for the Secretary of State (notably in respect of universal service and radio frequency spectrum management); Ofcom is charged with significant duties of content and media ownership regulation; and government intervenes in broadcasting on a massive scale to redress perceived market failure (the BBC alone receives more than £3bn of public funding annually). These measures have largely been formulated to address any failure in market governance. But what of failure in network governance?

Network Failure.

The concept of failure in network governance seems novel – whilst there is an abundant literature on hierarchical and market governance failure the possibility of systemic failure in network governance does not seem to have been identified in the scholarly literature. The intoxicating discovery of epochal change in the form of a putative general transition towards the adoption of network governance and co-ordination regimes has left lacunae both in empirical (to assess how far such epochal claims may be substantiated) and in theoretical (to consider how far features of other types of governance regime are likely to be found in network governance) enquiry.

The concept of governance failure is well established in respect of both hierarchical (ossification and lack of innovation, weak efficiency incentives, poor responsiveness to users, susceptibility to producer capture etc) and market (exclusion of the poor, abuse of significant market power, capture by owners and/or managers etc) systems of governance: the complexity of communication and media governance arrangements in the UK (not least the length and tortuous character of the Communications Act 2003) reflect attempts to guard against both types of governance failure (as well as historical accretion, contingency, the effects of interest group lobbying and a host of other factors). But there is no equivalent notion of "network failure" though the growing salience of network governance suggests that a matching concept of "network failure" could be elaborated with advantage.

"Dark networks", such as the Mafia or al Qaeda (see Glasius and Kaldor 2002: 24-25) may be instanced as examples, perhaps provide an instance of one type of "network failure" whereby unwelcome social consequences attach to the system of governance in question: a type of governance failure analogous to the exclusion, or underrepresentation, of the interests of the poor under market governance regimes. Another may be the tendency for the values of networks to converge with the interests of those networked; this seems to be an intrinsic quality of network governance – not surprising perhaps that those networked construct and operate the network so as to advance their own interests! But, as regulatory functions are increasingly shifted from hierarchical (discharged by statutory regulators) to network governance (discharged by self or co-regulatory bodies such as BCAP and the IWF) this form of network governance failure may become both more important and more controversial.

The late Sir David Calcutt's (second) review of UK press regulation and privacy issues identified a notable instance of network governance failure. Calcutt found the newspaper industry's self-regulatory body, the Press Complaints Commission, deficient. He stated:

> The Press Complaints Commission is not, in my view, an effective regulator of the press. It has not been set up in a way, and is not operating a code of practice, which enables it to command not only press but also public confidence. It does not, in my view, hold the balance fairly between the press and the individual. It is not the truly independent body that it should be. As constituted, it is, in essence, a body set up by the industry, financed by the industry, dominated by the industry, and operating a code of practice devised by the industry and which is over-favourable to the industry (Calcutt 1993: xi).

Calcutt's critique of an instance of network governance through co-regulation was echoed in a more general sense by the now defunct Scottish Advisory Committee on

Telecommunications (SACOT). SACOT argued persuasively that “Trade associations and other existing industry bodies are not suitable structures to exercise co-regulatory functions” (SACOT 2003:2). Moreover, as well as the objections raised by Calcutt and SACOT, network governance may insufficiently take into account the views and interests of those at the margin and of the marginalised; see, inter alia, the persistent critique of self-regulatory network governance by Sandy Starr in “Spiked” (eg Starr 2003). Starr’s general critique applies neatly, as he argued in a later commentary (Starr 2005), to the Government’s recent attempt to win informal support through co-regulation what formerly (and perhaps should formally) be done through hierarchy: that is the suppression of thus far lawful communications – what the Home Office and Scottish Executive labelled “extreme pornographic material” (see the Home Office and the Scottish Executive 2005) in their Consultation on the Possession of Extreme Pornographic Material.

Network governance failure thus seems, at least as a provisional judgement, to inhere in a structural tendency to govern through self-selecting and self-confirming groups of agents acting informally. In instances such as these we see how closely network governance may approximate to the characteristics of the “club” form of hierarchical governance which Marquand described (see also Moran 2003) as a system based on shared understandings, assumptions and trust as follows:

> The atmosphere of British government was that of a club, whose members trusted each other to observe the spirit of the club rules; the notion that the principles underlying the rules should be clearly defined and publicly proclaimed was profoundly alien (Marquand: 1988: 178).

Hierarchy rather than homeostasis?

It may be only in the heady atmosphere generated by epochal claims of transition to new social morphologies or discovery of hyper-innovation that the claim that hierarchy is back would be news: many might rather think it had never gone away. But epochal claims demand attention and have the merit of signalling that changes have been made. Hierarchy may be back (or never have gone away) but it's back in a different way – and is different because circumstances have changed. Why has governance of UK media and communications changed and how has hierarchical governance been re-articulated?

Technological change has changed the terms on which contemporary governance of media and communications may be conducted and the Internet epitomises the two most important changes. First, media are converging, the boundaries between hitherto distinct media are blurring, meaning that policy and regulation, hitherto based on distinct and different technologies (such as print, wired one to one electronic communication and wireless one to many electronic communication), must change. Convergence has two faces, new, hybridised, media are coming into existence and there is also an increasing substitutability between media that have hitherto been separate (Werbach 1997).

Second, "national" communication sovereignty is eroding; satellite transmission has abolished the relationship between cost and distance of communication and has made national control of radio frequency communication more difficult. And this, together with the factors of increased connectivity, greater traffic volume, browser access and digitisation of content have made national control of access to Internet delivered content more difficult.

It is easy to exaggerate both the impact of changes such as these and their novelty. Governments and hierarchical governance still dispose of significant power – firms are located in specific jurisdictions and are thereby subject to governmental influence and authority, governments co-operate across borders and so on. And there are historical precedents both for the emergence of new media of communication and for the internationalisation of their sphere of operations. However, such prudent scholarly cautions against large scale generalisation aside, there is much to suggest that matters have changed significantly and in terms of governance, national political authorities' ability to manage media and communications sectors and markets has diminished.

Effectively, governments now have three governance strategies open to them:

- Liberalise and go with the flow in the hope that hierarchical governance at the margin together with market and network governance will produce acceptable outcomes.

- Subsidise to secure desired outcomes.

- Share sovereignty in order to exercise some, albeit, shared power.

The UK has adopted all these strategies.

Liberalisation.

The first strategy, liberalise and manage at the margin, clearly informs the regime governing most of UK media and communications (though the length and complexity of the CA 2003 reminds us that managing at the margin can be a complex business!). Effectively this is a recipe for market governance lightly leavened by hierarchy ("regulation with a light touch") and conveniently signals that the clear analytical distinction between the three distinct modes of governance, hierarchy, market and network, identified by Thompson is not always found in practice. Patricia Hodgson, the last chief executive of the Independent Television Commission (ITC) before the ITC was subsumed into Ofcom, enjoined Ofcom to "focus on its competition duties; minimise burdens, sustain competition and much will follow" (Hodgson 2003: 14). There are three main areas of difficulty associated with the liberalisation strategy arising out of the failure of light touch hierarchical and/or network governance to reliably redress market failures.

The first kind of difficulty arises from the tendency towards excessive delay when generic *post hoc* competition law, notably the Competition Act 1998 and Enterprise Act 2002, rather than sector specific *ex ante* regulation is applied - "justice delayed is justice denied". Several commentators have remarked that competition law is too slow to provide effective remedies. The Director of Public Policy of AOL UK (interviewed by the author 28.7.2003) asserted that the "problem lies in the timing of the regulatory process". It may take up to 3 years for judgement". This estimate is supported by the testimony of Margaret Bloom, when the Office of Fair Trading's Director of Competition Enforcement, who stated: "cases have taken longer than we expected when planning for the introduction of the Act. A realistic estimate for an infringement decision ranges from one year – in a very straightforward case – to 3 years or possibly even longer. Perhaps there are no “straightforward” infringement cases” (Bloom 2003: 5). The uncertainty to which such delays give rise may also be amplified by the delays occasioned by the, otherwise laudable, lengthy consultations which characterise Ofcom’s practice. For example, the Broadcasting Code, to which I refer above, took effect on 25.7.2005 more than 18 months after Ofcom’s establishment. Moreover, the importance of consultation has grown with as regulatory discretion has increased.

The second kind of difficulty was also identified by Patricia Hodgson when she referred to the increase in regulatory discretion arising from Ofcom’s mandate. She observed that “Ofcom has reminded us that Parliament asked it to deregulate whilst giving it some 260 duties, double those of its parent bodies” and concluded that the regulator cannot but exercise discretion in prioritising when it is charged with dealing with so many objectives. “How can a regulator be asked to reconcile competing political goals when, by definition, the regulator is unelected?” (Hodgson 2003: 9). In negotiating this uncomfortable contradiction Ofcom has, she claimed “Wisely….. committed itself to less but more effective regulation, aiming at strategic interventions to achieve bundles of results. (Hodgson 2003: 10). Hodgson noted that power, and the ability to exercise it on a discretionary basis, had shifted from government and the civil service to the regulator “this transfer of talent and responsibility to a “fourth arm” of government must have affected the civil service. Three successive governments have now shown mounting impatience with the civil service, by-passing it with regulators, quangos and political advisors” (Hodgson 2003: 12). The exercise of regulatory discretion, if it is not to be capricious and ill-informed, also tends to make regulation slow for the regulator must gather evidence and may consult widely.

The third area of difficulty arises at the intersection between regulated market governance and network governance in liberalised regimes. Consultation, self and co-regulation may be seen as different points on a continuum of joint activity by regulator and regulates. In varying degrees, all of these practices may lead to governance being performed by unaccountable (ie required neither to report or give reasons for their decisions nor submit to election or other means of being held to account by their constituencies) and incompetent (in the sense of being unable to resist capture by powerful) institutions. And it's in this terrain, ranging from consultation through co-regulation to self-regulation, that the analytical distinctions between hierarchical, market and network governance may become impenetrably blurred.

How do the network attributes identified by Thompson - co-operation, solidarity, trust and loyalty - play out when the network in question may be made up either of different, sometimes competing, firms and/or between firms and regulator(s)? Perhaps through a shared ideology, or put another way, at a different social site. Instead of being embodied in formal network institutions, such as self-regulatory agencies, these values are sustained and reproduced in social networks bound together by a shared ideology. As remarked earlier in connection with the idea of network failure, self-regulating organisations tend to exclude those who don't share the interests and values of the self-regulating community (or network).

The apparent opening up of governance implied by network governance through self-regulation and co-regulation is echoed in hierarchical institutions, whether Government or regulator, increasingly having recourse to consultation (and pseudo-consultation). Few could do other than applaud such an opening towards the voices and perceptions of those who will be affected by Ofcom's decisions. Consultations go some way towards mitigating the closure and return to some aspects of "club" governance (see Marquand 1998 and Moran 2003) that inevitably attends the exercise of regulatory discretion. But there is room for some reasonable doubt about the ability of a representative range of those affected by Ofcom's decisions effectively to contribute to consultations on so wide a range of issues, almost all of which require respondents to possess considerable expertise if they are to identify their own and others' interests and represent them appositely. True, the practice of consultation has stimulated civil society networks such as Ofcomwatch (www.ofcomwatch.co.uk) but not only are the voices heard in consultations overwhelmingly those of businesses likely to be materially interested in the topic in question but there are opportunities for responses to be conditioned by the framing of questions on which respondents' views are sought. And the translation of representations elicited in consultations into rules and practices remains the prerogative of those running the consultation.

Subsidy and the limits of the liberalisation.

The second strategy option, the strategy of exercising hierarchical power by subsidising desired activities in media and communications rather than legislating to inhibit those which are not desired, has a long history dating, at least, from the subsidies paid by C17th governments to their supporters. More recently, and with less partisanship, newspapers and printed works have been favoured with postal and VAT concessions and commercial broadcasters (notably Channels 3 and 5) have been awarded spectrum at favourable rates in exchange for public service content and coverage. Subsidies such as these of course condition the development of markets and technologies: the same content provided in both a printed and an electronic medium is subject to different financial regimes – print is exempted from VAT, electronic isn't.

Subsidy is concentrated in the audio-visual sector and particularly on public service broadcasting (PSB). The BBC receives by far the largest support from taxation[2] exceeding £3bn pa (in 2004 licence fee funding amounted to £2,940,300,000 and funding for the World Service from the Foreign and Commonwealth Office amounted to £225.1m). In 2004, S4C (Sianel Pedwar Cymru – the Welsh language public television service) received £101,264,000 and the Gaelic Media Service £8.5m. Further support to the audio-visual sector was channelled, largely as lottery awards, through the UK Film Council which in 2004-5 disbursed £31,788,000. Such initiatives represent a hybrid form of governance: use of hierarchy to rebalance market forces. Subsidy in UK media and communications thus flows, overwhelmingly, to the broadcasting sector (though the BBC disbursed £69.2m on its website, bbc.co.uk, in 2004, somewhere between the £71.3m devoted to the BBC radio service Radio 4 and the £53.8m spent on the BBC radio service Radio Five Live). For it's in broadcasting that media and communication markets are thought most to fail and in broadcasting that the liberal (or, in Moran's terms, hyper-innovatory) paradigm is most thought to be flawed.

British debate about public service broadcasting over the last two decades has been dominated by the notion of market failure. In 1986 the Peacock Report (Peacock

1986) looked forward to a future, before the end of the C20th, when technological change meant intervention would no more be required in broadcasting than in print. Market failure, and thus the need for publicly supported PSB, would come to an end. In governance terms this meant the prospect of a dramatic diminution of hierarchical, and a corresponding growth in the importance of market, governance.

In response to the Peacock analysis, Andrew Graham (1999) and others built a powerful “standard defence” arguing that market failure in broadcasting and thus a need for PSB, would continue despite technological change. de Long and Froomkin’s (1999) account of the "new economy" suggests why the “standard defence” is powerful. They proposed that the new economy - notably the information sector (including broadcasting) – is intrinsically different to the “old economy” because the new economy doesn’t conform to what they identify as the "three pillars" of the market system - excludability, rivalry and transparency. The "New Economy" is an economy of non-excludability, non rivalry and non-transparency. Non-transparency, that is the property of new economy goods and services whereby their characteristics are not fully evident before consumption (ie that they are experience goods) has latterly not been a major influence on media policy and governance for this non-transparency/experience good aspect of the new economy is long established (books, other written works and indeed speech are all non-transparent before consumption). However, the other two properties identified by de Long and Froomkin (non-rivalry and non-excludability) have been important shaping factors.

Free to air broadcasting is an outstanding case in point. It is non-rival because one person's consumption of a broadcast does not deny another a consumption opportunity.

If I eat an apple it is not available for someone else to eat but if I watch a television programme it is still possible for others to watch it without loss to me (or anyone else). It is non-excludable because a free to air broadcasting service makes available to all what it makes available to one. In contrast, pay television returns to the old economy by excluding potential users who could enjoy the goods and services offered at no additional cost were they not artificially excluded from doing so. Welfare is reduced and additional costs are built into the system as the intrinsic non-excludability of the broadcasting medium is circumvented. Pay television converts a public good - as economists call this class of non-excludable goods - into a private good.

However, this standard defence of PSB, might be thought to prove too much. For it applies as much to free to air commercial broadcasting as to PSB and also applies to other elements of the "new economy" such as printed works (the "new economy" is of course not quite as new as many of its proponents assume) which are also non-rival and whose excludability depends on law, notably an effective copyright regime, rather than their intrinsic properties. The "standard defence" therefore customarily invokes another gambit and refers to information goods which confer long term benefits but which no individual thinks worth paying for. Examples of such merit goods, include high culture, scientific research, education etc. Because free markets tend to undersupply merit goods it's generally accepted that the state should provide them - hence public funding for education, the arts, research etc. And because broadcasting is a good way to distribute merit goods, state intervention in support of public service broadcasting is necessary and desirable. But although the "standard defence" eloquently and persuasively makes the case for hierarchical intervention in the media, and particularly so in broadcasting, it provides few guidelines as to what a **proportionate** intervention might be.

Accordingly, in some quarters the principal recipient of subsidy in UK media and communications, the BBC has come to be seen as overfunded – as an “800 pound gorilla” (as its former Director General, Greg Dyke [2003], characterised it in a rather unReithian way). In this view of things, the BBC is seen as using its size and market power aggressively thus imperilling the emergence, or survival, of commercial competitors in radio, online or television services with damaging effects on diversity and pluralism.

Subsidy to redress market failure may thus, at least in theory (and there is no consensus on whether this problem exists in practice) maintain rather than redress market failure particularly when external circumstances change – eg through technological developments. In this view of things, the BBC may be perceived as a disproportionately large intervention standing in the way of the putatively well functioning electronic media markets which technological change has made possible. From the point of view of some proponents of market and/or network governance, the BBC thus appears as a dominant incumbent “legacy” institution kept in place by hierarchical governance and which inhibits the emergence of homeostatic governance (whether through markets and/or through networks)[3].

Sharing sovereignty.

The third possible governance strategy open to governments, the sharing of sovereignty has been reflected in the significant extent to which the UK’s accession to the European Union has resulted in a reshaping of media and communications governance in the UK. The UK acceded to the European Communities (now the

European Union) in 1972. In 1989 the European Communities' Television without Frontiers Directive (TVWF) was first promulgated. The Directive (European Parliament and the Council 1997) made it clear that broadcasting was not exempt from the general rules governing economic life in the community and that Member States could not lawfully discriminate against broadcasting services emanating from another Member State. It is hard to imagine the presence of important UK based services such as Sky Television, let alone offshore services like Atlantic 252, without TVWF. And without TVWF the UK would not have become a location of choice for "footloose" European broadcasters eg the commercial television services based in the UK which serve Scandinavian markets.

In early 2006, Ofcom listed between 600 and 700 Ofcom licenced cable and satellite television services including, for example 21 different MTV channels serving a range of countries in their native languages (see the Ofcom website at http://www.ofcom.org.uk/static/tvlicensing/cs/main.htm on 28.2.2006). Chalaby (2002 p 185) has estimated that c 80% of transnational television channels in Europe are UK based. If there is "a race to the bottom", as Peter Humphreys has sometimes proposed (Humphreys 2005), it seems that the UK is winning.

Moreover, the EU's competition and telecom liberalisation Directives have shaped significantly the UK regulatory environment. As the Cabinet Office Strategy Unit observed of Ofcom's powers to address firms' accumulation of possibly anti-competitive significant market power (SMP), "In dealing with SMP, Ofcom's powers will be largely determined by the EU regulatory framework. This framework restricts the majority of regulatory activity to those instances where there is SMP as identified by the process of market reviews (Strategy Unit 2002: 66). The impact of Europe extends beyond its influence on the structure and regulation of communications infrastructures. The European Convention on Human Rights and, to a lesser extent the European Convention on Transfrontier Television, have also contributed to the re-shaping of communications governance in the UK. In principle therefore, a sharing of sovereignty has the potential to improve the effectiveness of hierarchical governance which in the specific instance under consideration, the EU, has been exercised to secure better market governance.

The actual practice of media and communications governance in the UK, though lending some empirical support to the propositions that hierarchical governance has been displaced by either or both market and/or network forms of homeostatic governance, suggests that the epochal changes in favour of Castells' (1996) and Taylor's (2001) notions of network governance and Moran's (2003) notion of market/hyper-innovatory governance are somewhat overstated. But the relative salience of hierarchy, markets and networks has certainly changed and the two latter forms of governance have undoubtedly risen in importance over the last fifty years. Moreover, the exercise of hierarchical governance has changed and has increasingly has been exercised through a sharing of sovereignty, through subsidy rather than inhibition.

Conclusion.

In 50 years media and communications in the UK has changed from a series of public monopolies, (the print and film sectors of course excepted), to a substantially liberalised and pluralised environment. In 1955 the BBC's monopoly of UK broadcasting was broken with the establishment of ITV[4]. Post Office Telecommunications subsequently became British Telecom which now competes against 300 or more suppliers of telecommunication services (including Cable and Wireless, formerly a public sector body which then provided telecommunication services only outside the UK's frontiers). The Royal Mail is now a plc and competes against a number of new entrants. And in broadcasting the BBC now competes against a host of radio and television channels including the publicly owned Channel 4, though the BBC still accounts for 55% of radio listening (RAJAR 2006) and c33% of television viewing (BARB 2006).

Today, instead of the straightforward command and control systems of hierarchical governance which obtained 50 years ago for all UK media and communications except the print sector, governance is effected through a complex intersection of different systems with both market and network governance assuming a much greater role than before. Complexity has further increased because of the effect of sovereignty sharing which has been intimately linked with technological change in the sector. The direction of travel in media and communication governance is clear – in broadcasting, posts and telecommunications there has been a pronounced shift towards market governance (and in some sectors, notably the Internet, towards network governance and co-regulation). But the pace of change differs from sector to sector.

However, although the direction of change towards market and network governance is clear hierarchy still plays a major role. The BBC retains a special status and the broadcasting sector is characterised by hierarchical governance to a greater extent than other sectors such as telecommunications or the Internet. But, unlike other publicly owned providers of communication services such as the Royal Mail and Channel 4 and unlike other all other providers of electronic communications services, whether broadcasters or telecommunication service providers, the BBC is not fully subject to the jurisdiction of an independent regulatory body and retains significant self-regulatory powers. The BBC, unlike all other media and communication enterprises, is not subject to market governance in respect of its funding – the licence fee is a tax (see ONS 2006). Moreover, the Communication Act 2003 provides a legal context which though structured to foster and facilitate market governance in general still includes important elements of hierarchical governance principally in respect of broadcasting.

But hierarchical governance is now practiced somewhat differently to the way it was fifty years ago – the plethora of duties which the CA 2003 lays on Ofcom means, necessarily, that regulation must be exercised with discretion. Hierarchical governance is also practiced more transparently and with considerably more opportunities for intervention from below – whether manifested through the somewhat absurd on line voting (promoted by the Department for Culture, Media and Sport (DCMS) and the UK Film Council soliciting support for the film sector) concerning allocation of lottery funds or through the by now habitual public consultations on policy and regulatory initiatives.

However, in the UK, despite the rise of network governance (without, as yet, a clear recognition of its – like any other system of governance - disposition towards failure and the distinctive character of network governance failure), the move towards markets rather than administered systems and the attempts to diffuse hierarchical power through the establishment of a powerful independent regulator endowed with significant discretion, much power still resides with Government. For example, Government sets the level of the BBC licence fee, determines the terms of the BBC's Charter and appoints members of the BBC Trust (and members of the Channel 4 Board). Moreover, the Secretary of State has the power to direct Ofcom on a number of important issues including spectrum allocation and universal service and to otherwise influence the practice of regulation.

But governance of media and communications in the UK has opened up in several senses. The preponderance of hierarchical governance, which lasted unchallenged by networks or markets until the 1950s for broadcasting, until the 1980s for telecommunications and until the 21st century for postal services, has given way to a mixed governance regime of hierarchy, markets and networks. Hierarchical governance has become notably more open, eg through extensive consultations and significant increases in institutional transparency, though the exercise of hierarchy has at the same time become more discretionary and therefore less predictable and open.

Failures of hierarchy led to embrace of markets (see *inter alia* Moran 2003) and technological change has seemed to vindicate (and necessitate) this change by opening up the possibility of markets working well, notably by reducing barriers to entry. Where there is a consensus that market failure is structural and endemic, notably in respect of broadcasting, a significant element of hierarchical governance (notably through the BBC as the Secretary of State for Culture Media and Sport acknowledged when stating "In pure competition terms, the BBC is an intervention in the market, and one of very large scale" [Jowell 2005: np]) obtains with the aim of mitigating market failure.

However, the possibility of failures in network governance appear to be less clearly identified and where such failures exist they are less clearly countervailed by other forms of governance. Homeostatic network governance has delivered real benefits but the danger of "network governance failure", notably through capture of governance bodies by a narrow group of interested parties, has attracted far less attention than have the undoubted dangers of failure of markets and hierarchy.

The governance of UK media and communications does much to bear out contentions that market and network governance, homeostatic governance, is growing in salience relative to hierarchical governance. But hierarchy remains a very powerful force in governance, notably through the effect and implementation of the Communications Act 2003 (and the Postal Services Act 2000) and the force exerted by the BBC. But governance, whether network, market or hierarchical, doesn't manifest itself in a pure unalloyed form. Characteristically the clear analytical distinctions made by scholars for heuristic purposes map poorly onto a complex and contradictory world of practice.

The multiplicity of different systems, and combinations of systems, of governance in UK media and communications (whether market, network or hierarchical command and control) together with the melding of national and supra-national hierarchical systems has, in important respects, made governance more opaque. In the UK the very multiplicity of agencies, the complexity of the relevant legislation, the uneven application of different regulatory and governance regimes to different media and institutional formations mean that governance has become harder to understand and increasingly challenging even for experts to master. In spite of doctrines of transparency (sometimes realised in little more than the posting of documents on websites) and inclusion (manifested in a plethora of consultations in which the power to frame questions and select arguments and evidence from responses in order to substantiate conclusions remains with those who manage the consultations) such complexity means governance remains to a significant extent closed to effective scrutiny and participation. It is therefore also closed to the pervasive adoption of governance arrangements characterised by the co-operation, trust, solidarity and loyalty which Thompson (2003: 112) nominated as distinguishing characteristics of network governance. As well as the specific governance failures in and of each of the analytically separate systems of hierarchical, market and network governance in UK media and communications a general failure therefore arises from the complexity and multiplicity of the governance systems that have accreted around media and communications in the UK.

Notes.

[1] The legal foundation for the establishment of CAP (Broadcast) and its role within the new broadcast co-regulatory system is the Deregulation and Contracting Out Act 1994. This Act allows for a Minister or public authority to delegate or 'contract out' specific functions or duties to another person or organisation. Ofcom has been given the power to contract out its functions under DCOA by Section 1(7) of the Act. The contracting-out process means that broadcast advertising Codes, previously known as the Radio Authority's Radio Advertising and Sponsorship Code and the Independent Television Commission (ITC) Television Advertising Standards Code, are now the responsibility of the Broadcast Committee of Advertising Practice (BCAP http://www.asa.org.uk/ASA_2004_rebuild/ASAAppBase/AnnualReport2004/cap_introreview.shtml).

[2] On January 20th 2006 the Office of National Statistics formally classified the BBC licence fee as a tax (ONS 2006).

[3] The proposal to establish local television stations in the UK has stimulated a wealth of interesting commentary – several instances of which illustrate the difficulty in some circumstances of distinguishing between network and market governance and institutional arrangements. Both Ofcom's discussion paper "Digital Local" (Ofcom 2006) and a grass roots statement (Hewson 2005) make clear that entry of civil society and network governance in the local television arena is likely to depend on ability to enter the relevant markets – a classic market governance issue.

[4] ITV is the acronym for Independent Television usually used to refer collectively to the television channel formally known as Channel 3 and to the Channel 3 licensees. However, the limited company ITV currently holds only the majority of Channel 3 licences – strictly speaking neither STV (Scottish Television) nor Ulster Television is part of ITV.

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