
MEDIA AND COMMUNICATIONS REGULATION AND THE PUBLIC INTEREST

Introduction

We are witnessing the increasing globalisation of the media and communications technologies which connect peoples across the world, crosscut the boundaries of nation states, enable a dynamic global marketplace and contribute to the emergence of a complex transnational culture. Indeed, fundamental changes in modernity itself have been stimulated by the rapid development of a global market in media and communications, extensive movements of peoples and the increasing viability of real-time connections between individuals, businesses, social institutions and states on an unparalleled scale. The importance of media, information and communications technologies to modernity has a long history; from print through telegraphy, radio, film, television and now digital and networked media, communication technologies have both shaped and been shaped by the diverse processes of social, economic and political life (Appadurai, 1996; Curran, 2002; Held and McGrew, 2003; Rantanen, 2005; Thompson, 1995). But today, globalisation, capitalism and the mediated network society (Castells, 2003) have all become inextricably linked: hence Tomlinson (1999: 1–2) defines globalisation as ‘an empirical condition of the modern world, which I call *complex connectivity*. By this I mean that globalisation refers to the rapidly developing ... network of interconnections and interdependencies that characterises modern social life’.

Some commentators argue that modernity has not merely speeded up but also entered a distinctive new phase of late capitalism (Giddens, 1998), altered not least by the contemporaneous political transformations by which state socialist regimes and developing countries become absorbed into the dynamics of global capitalism. Global markets are qualitatively different from previous international flows of trade because they exploit the new level of coordination and integration of financial markets, real-time

production processes, complex dynamics of distribution, and significant flows of people across national boundaries (Castells, 2003). Government control over markets, social life and culture is challenged by the perceived imperative to deregulate in order to open up markets and so maximise the benefits of globalisation. Global media markets in particular play a critical role in shaping these transformations by facilitating global connectivity and undermining state control while, at the same time, being themselves shaped by those same processes of globalisation.

From the middle of the twentieth century until the 1980s, governments were accustomed to media systems organised on a national scale, amenable to top-down regulatory control by the state and recognised for their central role in underpinning social cohesion and national identity. A broad consensus supported the institutional management of this strong regulatory approach, typically based on a mix, differently constituted in different countries, of economic policies focused on delivering accessible and diverse media content from a range of suppliers (more significant in the USA) and of state or public ownership of large portions of a national media system through public ownership of telecommunications and public broadcasters (more significant in Europe). In liberal democracies, regulatory legitimacy rested on the claim that these policies and institutions served the public interest. And this, in turn, was defined either descriptively – put simply, as what the public wants – or, alternatively, according to the important but more complex normative ideal of what would or should serve the public interest (Freedman, 2008). As will become evident as this book unfolds, the persistent tension between these contrasting images of the public interest – mapping on to the discursive figures of ‘the consumer’ and ‘the citizen’ respectively – has driven much regulatory and critical debate in the media and communications sector and also more widely (Clarke et al., 2007). Two key features of the emerging global media system have more recently put both of these approaches to regulation at risk: transformations in the production, distribution and marketing of digital media (Tambini et al., 2008); and the increasing power of global media corporations operating across national borders and pressing for open markets (McChesney, 1999). Not only is the development of multimedia and convergent devices and platforms revolutionising the character of media systems and markets and, therefore, the everyday experience of the public, but it also makes it increasingly difficult for governments to implement media and communications policies based on shared national values and aimed at delivering social and cultural policies. At the same time, the expectations of a well-functioning, secure and efficient communication system have grown hugely, as society places ever more reliance on media and communications for the conduct of its fundamental processes of commerce, political participation, education, community, health and more.

The UK's New Labour government of 1997–2010 responded to these challenges in the media and communications sector by creating a new regulatory regime instituted by the Communications Act 2003 and including the establishment of a newly converged regulatory agency for a converging technological environment: the Office of Communications (Ofcom). This has been controversial in its consequences for the media and communications sector in particular and in what it reveals of the workings of the New Labour approach more generally. Since Ofcom has acted on behalf of government while remaining relatively independent, it has suffered from the controversy that attaches itself to all 'quangos' ('quasi-autonomous non-governmental organisations'). Specifically, those from the neoliberal¹ perspective have feared that such bodies too easily become an insidious and unaccountable extension of the state; meanwhile, those taking a social democratic² approach to governance have hoped – albeit with critical doubts along the way – that such bodies can achieve beneficial outcomes precisely because of their political independence, their concentration of expertise and their flexibility in working with industry, civil society and the public. The present book tracks how actors from these two perspectives have viewed, and indeed become involved in, the day-to-day operation of Ofcom across a range of policy domains. But such activities, and the associated controversies, were all abruptly interrupted by the change of government in the UK in mid-2010, with a threat to the very existence of Ofcom being one of the incoming Coalition government's first acts, later modified but not entirely rescinded. The next steps in the history of media and communications regulation are, at the time of writing, still uncertain.

In this book, we position changes in media and communications regulation in the wider context of globalisation, market harmonisation (i.e. supposedly deregulation to reduce constraints on trade within states and across borders) and technological convergence (the much-hyped ability to deliver media content on a range of platforms and devices). Our focus is distinctive in that, rather than seeking to review any and all policy deliberations over the past decade or two, we ask more specifically about the particular implications of these developments for the public interest. From the early debates in Parliament during the passage of the Act in 2003, through to designing the institutional features of the new regulator, Ofcom and, then, the subsequent processes employed in reaching crucial policy decisions, the public interest has been framed in terms of the interests of citizens and those of consumers. Whether conceived of as mutually compatible or conflictual, these twin dimensions of the public interest provide a critical lens by which to explore the regulatory regime Ofcom had developed and how this compares with alternative approaches beyond the UK or within it (including Ofcom's legacy regulators). Thus rather than offering a more conventional analysis of how Ofcom has managed competition, issued licences,

determined spectrum allocation, and so forth, we examine its consequences for a series of public interest objectives. In particular, we argue that the Communications Act 2003 and its primary offspring, Ofcom, have enabled new ways of governing, indeed a new model of governance emblematic of the ways in which liberal democracies are responding to the challenges of globalisation. In this new model, power is partly dispersed to new regulatory bodies which operate as public-facing institutions in the public sphere. As we shall see, such an argument requires, first, a theoretical and empirical argument about the role of institutions in the public sphere and, then, an analysis of whether and to what extent the operation of Ofcom as an institution in the public sphere has resulted in significant benefits for the public – i.e. the consumer and, especially, the citizen – interest. To be sure, many questions arise. Has this meant the (partial) withdrawal of the state from media regulation in order to embrace neoliberalism, allowing the market to dominate? Or has it facilitated a new form of state intervention, instituted through the many strictures of the Communications Act, to ensure that Ofcom regulates media so as to support social and cultural purposes? Before we can address such questions directly, we need to backtrack and argue the case more carefully for the ways in which globalisation is reshaping regulation, with complex consequences for society and the public sphere.

Regulation and the role of the state

From the beginnings of modern political theory there has been a debate about whether the state is best when this is small in scope, focused on creating the conditions in which people can live without constraint and allowing commerce to innovate and develop according to its own logic, or whether a strong state is necessary to counter the extreme effects of modernisation and capitalism so as to enable citizens themselves to further their interests and realise their potential. There are considerable intellectual, political and social challenges to be faced as the state seeks to balance the protection of public interests in the face of powerful global economic interests exerting long-term pressures towards deregulation. In Britain since 2010, the pendulum has swung back to emphasise the small state (or the ‘big society’ of Cameron’s Coalition government), countering New Labour’s reformist social democracy agenda of the 1990s as supported by a strong yet decentralised state. But in an international context, the politics of particular states takes them in divergent, indeed sometimes conflicting directions in this regard.

One vision of globalisation is that it creates the conditions under which transnational processes of governance, along with some rejuvenation of local and community-based organisations, can take over some of the functions previously managed by national governments (Held and McGrew, 2003).

Consequently, the power of national governments diminishes, being dispersed both upwards and downwards. As Jessop (2000: 75) puts it, in the trend towards the 'de-nationalisation of the state', there is a:

'hollowing out' of the national state apparatus with old and new state capacities being reorganised territorially and functionally on subnational, national, supra-national, and trans-local levels. State power moves upwards, downwards, and sideways as state managers on different territorial scales try to enhance their respective operational autonomies and strategic capacities.

However, although nation states have undoubtedly lost some autonomy and power in the face of global markets and culture, they remain important. Thus, however radically one conceives the challenge to the nation state, it is worth asking how the state adjusts to these changing conditions. One answer is that the state spawns new regulatory agencies that permit it to act in a more dispersed and flexible manner. Such regulatory reform enables the dispersal of power downwards, as functions of the state are performed through regulation rather than through legislation and the work of central government departments. This trades central control for the flexibility of quasi-governmental bodies working with industry, civil society and the public but accountable to Parliament, resulting in a form of governance and administration that involves strategic interventions at a variety of levels rather than prioritising executive, top-down control at the national government level.

Given such shifts, we use the term 'regulation' to refer to the relations between power and the ordering of social behaviour at all levels of society from the nation state up to the transnational organisation and down to the subnational organisation or community and, even, the individual. In late modernity, the hitherto predominant focus on the nation state is changing, and regulation takes on a new meaning and significance, part of a broader shift which allows for a more strategic, flexible relationship between the state and a variety of agencies, firms and publics. Jessop regards these changes in the role of the state as necessary if it is to stimulate a competitive, 'globalising, knowledge-driven economy'; hence the increased focus of states on the administration of everyday life and the conduct of business at the micro level as well as on the coordination of economic policy at the super-national level (Mulgan, 1997).

In addition to the 'de-nationalisation of the state', Jessop (2000) also identifies the 'de-statisation of the political system,' as reflected in a crucial 'shift from government to governance'. As Donges (2007: 326) observes, 'governance refers to the dynamic structure of rules between actors that are linked in different networks and permanently forced to negotiate, without a center that has the power to command and control'. The changes brought about by the knowledge-based economy are central here as the complex

and dynamic nature of the economic system demands more flexible and responsive modes of coordination:

Accordingly there is a movement from the central role of the official state apparatus in securing state-sponsored economic and social projects and political hegemony towards an emphasis on partnerships between government, para-governmental, and non-governmental organisations in which the state apparatus is often only first among equals. (Jessop, 2000: 75)

In terms of regulation, again this implies a greater range of activities by regulatory agencies beyond their role as economic regulators. As we shall see, in the case of Ofcom this is evident in the efforts devoted to fostering partnerships and networks of connection among stakeholders in the media and communications sector, encompassing government, industry, civil society and the public, all in the interests of increasing flexibility and responsiveness, the development of expertise and the collection of knowledge about products, the market and audiences.

Finally, Jessop (2000) discusses the trend towards an 'internationalisation of policy regimes'. In the knowledge-based global economy there are increasing transactions and communications across national borders and the consequent need for coordination beyond the boundaries of the nation state. This trend intersects with the previous two because this coordination is not likely to be satisfied by traditional connections between national governments but rather demands interconnections among a diverse range of institutions and actors, at local, national and international levels. Jessop's three themes – the dispersal of power or denationalisation of the state, the shift from government to governance or the destatisation of the political system, and the internationalisation of policy regimes – together capture the changing obligations of governance and the state, resulting in the rationale for regulatory reform adopted by the New Labour government of 1997–2010 (and as discussed further in Chapter 2).

Regulation, civil society and the public sphere

A self-regulating media system must maintain its independence *vis-à-vis* its environments while linking political communication in the public sphere with both civil society and the political center; second, an inclusive civil society must empower citizens to participate in and respond to a public discourse that, in turn, must not degenerate into a colonizing mode of communication. (Habermas, 2006: 420)

What are the implications of such complex changes in the state for its relations with its public? Responding to widespread hopes and concerns over

the potential for and the fragility of citizenship in complex, plural, fragmented societies, Habermas's (1962/1989) theory of the public sphere critically examined the changing relations between commerce, state, civil society and the public. We turn to his work, and the theoretical developments that followed, to provide the analytic criteria by which changing regimes of regulation (the institution of Ofcom, its relations with the state, stakeholders and the public) can be evaluated in terms of its advancement, or otherwise, of the interests of citizens and/or consumers. We also draw on Habermas's work to frame our focus not only on the practice of regulation, but also on the discourses surrounding regulation, for discourses and practices cannot easily be disentangled. Moreover, while practices are situated, the discourses that surround and shape them draw flexibly on a more extensive landscape of ideas, including provision for the actions of citizens of the public sphere. Since the concept of the public sphere is an idealisation of the contexts of social life in which citizens can, through the free exchange of ideas, form a collective representation of the public interest that may challenge and bring established power to account, a range of civil society organisations are also expected to support the public sphere. As Alexander and Jacobs argue, civil society works not only through its relations with, or autonomy from, the state and economy, but also 'as a communicative space for the imaginative construction and reconstruction of more diffuse, but equally important, collective identities and solidarities' (1998: 1). Hence discursive constructions of the citizen – and, in relation to media and communications, explicit or more often implicit constructions of the audience (Livingstone, 1998) – play a role in the design and practice of regulation.

In his early work on the public sphere, Habermas argued against the liberal welfare state in so far as this protects the economic and social well-being of the public while limiting citizen involvement to the actions of consumers in relation to welfare services and to the actions of voters in the political sphere. For Habermas, the decline of public engagement in modern society resulted from the tendency of public institutions to rationalise and manage – rather than stimulate and enable – public life. However, as a social democrat, Habermas is optimistic that it is possible, even in the large-scale, complex societies that we now live in, to create the conditions in which the public engage more thoroughly, and more consequentially, in social and political life. In his early work, he proposed that this could best be achieved by protecting the public from the influence of both the state and the market by supporting an independent public sphere which sustains rational critical discussion that, in turn, generates a freely developed consensus which any legitimate government would be bound to take account of. One key threat to this public sphere, Habermas further argued, comes from the media which have gradually

become ever more professionalised and market-oriented, intervening in and compromising the public sphere by reshaping public discussion, especially in complex modern societies, according to their own commercial rather than public objectives.

Although Habermas's (1962/1989) theory of the public sphere was enthusiastically received by the academic community, it was also the object of considerable criticism and he was charged with, among other things, having adopted an idealised conception of public engagement and failing to come to terms with the realities of democracy in complex, plural societies. Instead of aiming to represent the public will through public discussion, alternative conceptions of deliberation favour the inclusion of diverse, even oppositional, interests in a republic of voices (Calhoun, 1993; Fraser, 1990), although just how these voices are to be articulated and brought to the attention of the political sphere remains unclear. One way forward, in a complex pluralistic society with multiple and dispersed interdependencies between institutions and publics, is for a range of institutions, including the media and regulatory agencies, to play a role in giving opportunities for expression and the interplay of different arguments and voices (Bohman, 1996; Dahlgren, 2009; Livingstone and Lunt, 1994). This includes, but goes beyond, the participation of individuals, as prioritised in the traditional theory of the public sphere, instead emphasising diverse forms and contexts of engagement over the capacity of a singular, independent public sphere to achieve a unique consensus. Although more easily applicable to today's social conditions, this approach also faces a significant problem, namely how public opinion can gain sufficient legitimacy to command the attention of established power. Collins and Sujon (2007) propose, following Hirschman's famous analysis of accountability in terms of the strategies available to the public of exit and voice, that in so far as they have any power, consumers hold broadcasters to account through their ability to exit, while citizens hold them to account, if at all, through voice. Further, as Gangadharan (2009: 337) observes of Ofcom's parallel in the USA, the Federal Communications Commission, 'participation may not be sufficient; a commitment to public-spirited decision making among agency officials is also needed alongside procedural safeguards for participation'.

In today's increasingly diverse and complex sphere(s) of engagement between public (citizens and consumers), civil society, state and, indeed, industry, we find Habermas's later emphasis on the role to be played by institutions in the public sphere particularly helpful. Applying this to the analysis of Ofcom's role as one among many dispersed agencies at arm's length from government, a critical analysis of its power and potential – for and against the public interest – is opened up. Thus we turn to an examination of Habermas's ideas, as developed in *Between Facts and Norms* (1996),

in relation to the role of institutions in the public sphere. Habermas proposes that the network of state administrative institutions should each form its own public sphere, by contrast with his earlier formulation of a single national public sphere. Where the quality of democracy in Habermas's early work depended on a distinct public sphere able to generate consensus, in his later work it depends on effectively engaging publics as part of the operation of bureaucratic and administrative institutions (see also Bohman, 1996: 188). In other words, he now elaborates the normative expectation that the institutions of the state should make the processes within and between institutions more public and more deliberative. Habermas (1996) supports his argument about the normative role of institutions in the public sphere through recourse to the sociology of law. Specifically, he takes the law to be the paradigm case of a complex network of social institutions which has the potential for a radical reconstruction of society that combines effective enforcement with public engagement and reflexivity regarding the rationalising tendencies of institutions.

On this view, institutions should sustain diverse engagements in a networked society, promoting public deliberation with legal, administrative and regulatory agencies. The plurality of forms of association is critical to Habermas's arguments, and he draws on Cohen and Arato's extensive (1992) survey of civil society to support his case. He argues that civil society is organised in part through its connections with the other significant social systems but that it has two distinctive features; first, that it is strongly interconnected with the everyday lives of individuals, and second, that it articulates public opinion in a way that has a legitimate claim on government and administration.

Civil society is composed of those more or less spontaneously emergent associations, organizations and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere. (Habermas, 1996: 367)

Habermas imagines the process of engagement as a distillation of public opinion flowing from public discourse through processes deliberation in civil society to communication in the political sphere. He contrasts this with the managed expression of public opinion that emerges from the operation of opinion research commissioned by the administrative process. The value of the public sphere, then, lies less in its potential to produce a consensus (a potential about which many have long been sceptical) but in its heightened sensitivity to the problems experienced in people's everyday lives, in what he terms 'the lifeworld'. Additionally, Habermas draws attention to the specific potential of civil society in mediating the relation between public opinion and the social institutions of the state and commerce:

From the perspective of democratic theory, the public sphere must, in addition, amplify the pressure problems, that is, not only detect and identify problems but also convincingly and *influentially* thematize them, furnish them with possible solutions, and dramatize them in such a way that they are taken up and dealt with by parliamentary complexes. (Habermas, 1996: 359)

We suggest, therefore, that as part of the social democratic project of supporting public deliberation and engagement, regulatory agencies that engage multiple stakeholders have a potentially important role to play as institutions in the public sphere. Hence, in this book we examine Ofcom's work in the media and communications sector by drawing on Habermas's four criteria for judging whether the institutions of the liberal democratic state can exercise power effectively and with legitimacy so as to be collectively binding (Habermas, 1996: 384-6). While Habermas focuses on the relationship between the institutions of the state and the law, in what follows we apply these criteria to the workings of a statutory regulatory institution also charged with the legitimate and effective management of power, albeit at arm's length from the state. Habermas's criteria develop a normative vision, leading him to ask, as do we, whether the institution -

- (i) recognises when it is dealing with issues of public concern, within a reflexive awareness of the problems of society as a whole, in such a way as to acknowledge and enable deliberation among the different and often unequally resourced viewpoints and interests at stake while effectively resolving the issue at hand;
- (ii) recognises through its principles and practices that it represents one institution among many (state, corporate, public, civil society, etc.), each with its own logic and demands, while also dealing fairly with the public sphere (which operates within the 'lifeworld' rather than the 'system world', as Habermas terms it³), balancing these often conflicting requirements without sacrificing one to the other;
- (iii) gives equal recognition to effectiveness (ensuring that markets are competitive and that consumers are protected) and legitimation (ensuring the engagement and assent of that public in whose interest regulation operates), for promoting one may or may not promote the other, and neglecting either risks a vicious circle of negativity and distrust;
- (iv) respects rather than undermines the right to self-determination of citizens, judging the nature and consequences of its institutional processes and decisions reflexively as these unfold in practice (rather than presuming about them in the abstract).

These criteria – concerning the public interest, the balancing of constraints, the combination of effectiveness and legitimation, and reflexivity regarding consequences – combine to offer a normative account of regulation appropriate to the complex interdependencies of the knowledge society. For in the knowledge society, knowledge creation, use and distribution are vital to the economy, politics and culture, and yet they simultaneously exacerbate the limits on governmental power and public administrative

institutions (Mansell, 2002). Although these criteria address the process of public deliberation in governance, clearly, their significance is more fundamental. For the implication must be that if, in addition to the effective management of markets and the conscientious administration of commerce, these criteria are followed – in other words, that regulators and other key social agencies act as institutions in the public sphere – the regulatory outcomes will indeed advance the public interest.

With this guiding idea in mind, we scrutinise Ofcom's actions and working methods, examining our selected case studies in terms of an assessment of both the processes and their ultimate benefits, or otherwise, in relation to the public interest. In short, we assess whether, as the Communications Act 2003 itself demanded of Ofcom, the regulator has furthered the interests of citizens and consumers. After all, from the outset, Ofcom was tasked with acting as a principled, converged, evidence-based regulator in an international context that increasingly favours self- and co-regulation rather than audit and supervision. The new regulator was accountable to Parliament, it followed operating principles emphasising high levels of public consultation, transparency and research, and it had an explicit remit to inform and educate the public to encourage them to be critical consumers of media services, while fostering an inclusive climate of public discussion and consultation to engage citizens (and their representatives) in media and communications policy making.

Market innovation versus social democratic values

It must be said that, in the media and communications sector, regulatory agencies, government departments, civil society bodies and public service broadcasters often claim to act in the interest of the audience, although they variously conjure the image of the citizen, the consumer, the public or the individual in so doing (Livingstone, 2005; Syvertsen, 2004). In this sense, it is commonly acknowledged that, although the pressing rationale for changing the regulatory regime in media and communications centres on market and technological innovations, the interests at stake are not only economic and technological, but also social, cultural and democratic. But although the arguments for regulation refer to the public interest or the public sphere, there are grounds for scepticism that such arguments are more than superficial. Some commentators have seen in Ofcom the triumph of neoliberal governance rather than any significant contribution to social and cultural policy. Others, no doubt because an important feature of the New Labour project was the attempt to find a 'third way' between state ownership and the *laissez-faire* economics of neoliberalism, have used criticism of Ofcom – a prominent child of New Labour – as a vehicle for

expressing their wider scepticism about New Labour's version of social democracy (Giddens, 1998). But the history that led to the establishment of Ofcom is longer and more complex than such criticisms imply.

Nation states meet regulatory challenges from different starting points, with differing resources and particular political histories. In the UK, a well-developed media system – including a successful model of a public service broadcasting system, a flourishing industry, an international reputation for high-quality programmes and services and a track record of innovation – set the scene for a growing consensus through the 1980s and 1990s to release the potential of the market for media and communications while sustaining the important social and cultural value delivered by the media system. Such a decision relied on a longer history of investment in public policy to ensure that media and communications first and foremost serve the public interest by providing knowledge and information and recognising cultural diversity while strengthening cultural heritage, as well as connecting people in the public sphere and engaging them in the political sphere. From the 1950s to the 1970s, key social policy principles were 'hard wired' into the British Broadcasting Corporation (BBC), the public service commitments of independent broadcasters and the public ownership of telecommunications organisations committed to the principles of universal access and service. Indeed, an important legacy was the role that the media played in the post-war reconstruction of nation states and the emerging European project – reflecting the nation back on itself, in forming and maintaining a sense of unity and continuity in a fluid and uncertain world (Scannell, 1989; Uricchio, 2009).

Yet by the 1970s the need for technical innovation and establishing market conditions that would give commercial broadcasters and the telecommunications industry an equal opportunity for investment and innovation was being increasingly recognised. The BBC and universal telecommunications services, part of the pride of the post-war welfare contract, were increasingly claimed to have a distorting effect on the market for media and communications. At the same time, the rationale for thinking of media and communications primarily as a market was tempered by the realisation that this might put at risk the contribution that the media made to society, politics and culture, as had been guaranteed by public service broadcasting and universal access to publicly owned telecommunications services for nearly half a century. Would global media content dilute or replace locally and nationally produced programmes and so diminish the capacity of the media to define the national and the local? What of the key role played by public service broadcasting in national politics, enabling access to political argument and debate in a mediated public space at a distance from the centres of political power? And what of the role of the media in sustaining the cultural public sphere, supporting high culture in the face of difficult

market conditions and providing a context for innovation in both popular and high culture. In so far as, during the twentieth century, politics, culture, community and identity had all become mediated to a significant degree, globalisation and privatisation threatened to disrupt a vital connection between media and society.

If the risks to social and cultural life from technological, institutional and societal change are high, so too are the risks of not responding to the imperatives of the global market and the competitive opportunities of the knowledge society. Indeed, at least in the UK, the fear of losing economic competitiveness in the digital era challenged complacent assumptions that all could be left alone, as was starkly put in the government's *Digital Britain: The Interim Report* (DCMS and BERR, 2009: 3):

The Communications Sector is one of the three largest sectors in our economy alongside energy and financial services ... More importantly, the digital economy underpins our whole economy and builds our national competitiveness. Our readiness to adopt digital technology has driven productivity gains throughout our wider economy ... But our productivity still lags well behind the USA and we face new challenges from the innovative companies of the successful Asian economies.

Because of the necessity of developing a media and communications market as a point of entry into the developing global knowledge society, no government is able to ignore the need to review the regulation of media and communications. Knowledge is increasingly the most important resource in modern societies, paralleling the importance of labour power in industrial society. Extending far beyond the traditional provision of quality television programmes on a restricted number of channels, combined with universal access to telephony, the demands of the knowledge society require a very substantial investment in infrastructure and a media policy that is sensitive to market principles to ensure a dynamic approach to media content production for a global market. In the late 1990s, this was taken to require a radical overhaul of the regulatory regime, since European media markets were among the most highly regulated among Western industrial democracies. A critical question, therefore, was whether media and communications should continue to need special protections because of their important social, political and cultural roles, even though the historical justification for this on economic grounds was ever less compelling. If media and communications were to continue, even in part, to stand outside the market, then what proportion of not-for-profit media would be desirable and how could that be achieved while still encouraging and opening up the market? Such questions will raise difficult issues of governance if regulation is to meet the often contradictory needs of the market and society without favouring one and damaging the other.

Van Cuilenberg and McQuail (2008) suggest that we are entering a new age or 'third paradigm' of media policy due to the increasingly global spread of the media, the increasing power of global media corporations, the long-run trend towards deregulation, and the uncertainties over the potential effectiveness of regulation or government intervention. They propose that media policy must combine economic, social and cultural policies with a concern for the role of media in political culture. Yet regulation will have to strike a balance between political, economic and social concerns and pressures, being efficient in its coordination of the market while at the same time intervening – with legitimacy – in areas of political culture and social policy. It will also have to achieve all this without falling back on either the normative convictions of public service or public ownership or on the ideology of completely free markets since there is still no political consensus or public support for a completely deregulated media and communications industry. But what values can guide a regulator in this context?

While Habermas's criteria, elaborated above, concern the processes or operation of the regulator, accepting as he does the mutual dependency (rather than clear separation) between public and private spheres (and, thus, the interdependency of process and outcome), Van Cuilenberg and McQuail focus more on the values that should properly constitute its goals – freedom of communication, access and control/accountability. Freedom combines a reduction of the constraints on communication as much as possible (negative freedom) with a media policy that enhances positive freedoms such as public debate or creativity. Access concerns the accessibility of communication resources to individuals and groups. Accountability they link to control, for policy should address both who controls communication resources and also how that is justified or accounted for. All three are, in different ways, at risk in the new media environment – hence we are witnessing contemporary and upcoming struggles especially in relation to the balance between deregulation and the pluralism of media ownership, digital media and the internet over universal broadband and the digital divide, rights regarding personal information and surveillance, constraints on the right to communicate, and questions of accountability for online provision.

Similar arguments regarding the normative expectations of media regulation are suggested by Freedman (2008) in his comparison of the US and UK systems: in a post-war USA context, liberal pluralism is valued for holding in check the tendency towards a concentration of power among elites in a representative democracy, by its promotion of informed citizens, public access to media, the circulation of diverse and marginal voices, the communication of public opinion to the state, and the protection of individual freedoms from the state. The threat to such values – whether framed in social democratic terms (in Europe) or liberal pluralist ones (in the USA), come from

the neoliberal commitment to 'free markets, individual rights, personal choice, small government and limited regulation' (Freedman, 2008: 36). But not all would judge that market failures will thereby cease. In particular, there is scant agreement on whether market failure should itself be defined in purely market terms or also include social and cultural values, and this leaves unchecked both the justification for state intervention and any arguments against it. This tension between regulating according to a market logic and regulating to promote the social democratic values of the public sphere is, in different ways, illustrated by each of our chosen case studies.

Introducing the case studies

In this book, we examine the emerging regime of regulation in the context of academic theories of globalisation and governance, while also emphasising the analysis of regulatory practice. In the three chapters that follow this, we look at the broader context of academic theories of regulation and then discuss the debates leading up to the establishment of Ofcom as a media and communications regulator, focusing on the arguments over whether regulation should serve the interests of consumers or citizens. We then trace this through to the nature of Ofcom as both a statutory agency and an institution in the public sphere, dissecting its internal and external relations, structures and functions. Our chosen case studies, in the following four chapters, explore how Ofcom has dealt with important areas of media policy, all of which are found on the agendas of many governments around the globe – the review of public service broadcasting (PSB), actions regarding the potential influence of advertising on obesity, work on promoting media literacy, and work on developing community radio.

Linking the first case study to the foregoing discussion, we note that Graham and Davies (1997) justify the continued public funding of public service broadcasting even from an economic policy perspective. They argue that it is possible to support public service broadcasting while enabling markets, and they doubt the claims that commercial broadcasting will deliver the social gains and public value provided by the mix of publicly funded and commercial public service broadcasters. They argue that the problems identified in emerging national markets of concentration of corporate ownership are also likely to arise in the global market (see also McChesney, 1999). Global markets and convergent technologies increase the potential for greater horizontal and vertical integration within those powerful media corporations with major stakes both within and across different sectors of the market. In turn, these corporations gain the power to influence governments to a degree that undermines the importance of ensuring a plurality of providers. This alone could justify governments

continuing to regulate so as to protect the public interest at a national level. Graham and Davies' arguments are based on well-established ideas about the features of media and communications technologies and markets that lead to market failure. High production costs, along with the small purchase costs of media content, create a situation in which significant resources are required to produce television and radio programmes but each of these then sells for relatively small amounts of money, increasing the likelihood that only a few companies will have the resources to produce and distribute media content and will therefore dominate the market. In addition, there are reasons to think that as consumers audiences are unlikely to pay for public service content even if they agree as citizens that public service broadcasting is a good thing.

Inherent to this discussion is a distinction between the public's interest as consumers and their interest as citizens. The argument is that there are reasons to doubt that commercial broadcasters, oriented towards the public as consumers, will deliver the full range and depth of quality public service broadcasting we have come to expect in the UK and Europe more generally. On the other hand, public service broadcasters lack the direct accountability to audiences that consumer sovereignty brings to commercial enterprises. This points towards a future in which public service broadcasting must seek legitimation through increased public engagement and accountability, including a more explicit account of its public value. We examine Ofcom's position on these issues in Chapter 5 in relation to its reviews of public service broadcasting.

Public service media act, perhaps presumptuously, in the interests of citizens, creating trusted products and services. The broader move towards deregulation, the opening up of markets on a global scale and the reduced importance of public service media and national government policy point to a world in which individuals will increasingly have to take responsibility for their own use of technologies and consumption of media and communications content. In the emerging global, technologically diverse and fast-moving markets for media and communications, individuals will have greater choice and will need to rely much more on their own judgements of quality, truthfulness and enjoyment. This raises important questions of media literacy and, as we might expect of a broad-based regulator charged with furthering the interests of citizens and consumers, Ofcom has developed a media literacy policy, as we shall examine in Chapter 6.

Beyond this, Ofcom's role, as specified by the Communications Act 2003, also includes its intervention in broader public policy issues in which the media play an important role. The capacity of the regulator to act collaboratively with other branches of government, to manage a co-regulatory relationship with parts of the industry, to conduct research, and to formulate and influence policy is examined through the case study of Ofcom's

intervention in the highly charged public debate about the role of advertising in increasing childhood obesity (see Chapter 7). Finally, Ofcom's intervention in the community radio sector, a case in which the media may (or may not) be regulated so as to support community engagement in mediated public life, is considered in Chapter 8. This brings to the fore the crucial question of how the media should be regulated if they are to support the capacity of citizens to make a difference to power through the expression of their views, voices and actions by being part of a republic of voices? Whereas the public service tradition spoke to power on behalf of the public, it is now increasingly asked if an alternative model – of a more diverse media, less centralised, more flexible – could afford greater potential for public deliberation and civic engagement, in other words for cultural as well as political citizenship (Stevenson, 2003)?

These selected case studies reflect part, not all, of Ofcom's scope, but they well exemplify the diversity of the regulator's activities as an institution in the public sphere, including its research, consultation, market analysis and policy review and enforcement, as well as its manifold practices of engaging with regional and global governance, national government departments, civil society bodies, industry bodies and the public. But before examining these, we consider in more depth the changing nature of regulation itself.

Notes

- 1 Neoliberalism is an approach to economic and social policy that emphasises the importance of market regulation. Pertinent to the present discussion, this positions audiences as consumers and seeks to turn knowledge about audiences into a tradable commodity (Freedman, 2008; Hamelink, 2002).
- 2 Social democratic approaches to regulation combine a focus on social justice that is typical of left-wing politics but reject the idea of a revolutionary change in capitalist economies in favour of a more gradual reform so as to incorporate social and cultural policies and thereby ameliorate the detrimental effects of the market on the public (Giddens, 1998).
- 3 By 'system world', Habermas refers to the dominant logic of strategic and instrumental rationality as it operates in institutions and other formalised structures, in contrast with the lifeworld, characterised by informal ways of life and modes of everyday communication, whether in the public sphere or the intimate realm of the family (Outhwaite, 1996).