

Contested media environments in South Africa: developments in regard to the making of communications policy since 1994.

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Abstract:

Political transition in South Africa has seen ongoing contestation around communications policy and law, even as government has reduced the opportunities for participation and systematically sought greater control over the communications environment. Indeed, it is at one level arguably these control attempts that have elicited responses. At another level, the contestation is a function of the “policy” of “managed liberalisation” that informs government interventions. Meanwhile, although broadbased participation around policy has over time taken second place to elite pluralism, there remains a vibrant diversity of actors. This is especially in regard to governmental control of broadcasting. Even predating the dawn of democracy in South Africa, the field of public broadcasting in particular has been a terrain of ongoing, although changing, ideological and policy contestation involving government, parliament, businesses, media practitioners, the regulator and civil society NGOs. This has been evident in regard to SABC’s business model, its editorial policies and its relicensing. The absence of new policy framework to deal with convergence in the communications field, with its implications for the independence of the regulator, could presage continuing contestation. In short, the democratic media environment – in contrast to its monopolised character under apartheid – is a dynamic policy space reflecting numerous interests at play.

1. Introduction:

Politics dominated media under apartheid; money is what has come to matter at the threshold of South Africa’s second decade of democracy, including even in public broadcasting (see Fourie, nd; Netshitenzhe, 2004; Wasserman, 2004). This does not mean an absence of policy and politics, however: the commercialisation of the country’s media, and especially broadcasting, is a function of specific policies and laws, and their practical effect, and of contestation around these. The market rules in South African media does not mean the absence of political choices and contestations. The market dispensation also does not automatically exclude violations of media freedom (nor corporatist collaboration between media and government of a propagandistic nature).

Against this backdrop, this paper tracks the major changes in South African media policy making and law, since the ending of apartheid. This environment is what sets the parameters of media’s shape and role, especially in broadcasting. The policy and legal dimension is a broader matter than cases of specific departures from media freedom and/or the maintenance of independence from government over the past 12 years. In general, such violations and interventions by government may often constitute a practical

pattern which can be much more significant than any formal policy or law in existence. For example, there may be an implicit or de facto policy at work when the public broadcaster does live coverage of the ANC election launch but not of other parties (as happened in 2005). Likewise, when a reporting team is dispatched when the Minister of Health calls SABC to attend a press conference (as also happened in 2005). The focus of this paper, however, is precisely on the realm of policy-making and law in South Africa because this arena goes far beyond the symbolic into substantive shaping of the overall media landscape. Thus, much as practical incidents around media freedom and independence are important, South Africa does indeed have a meaningful “deep structure” of policy-making and law, and this environment impacts profoundly on the logic of the country’s media, and especially the SABC, and in both political and economic terms.

This paper assesses this post-apartheid media environment from the point of view of the nature of “negotiated liberalisation” in cases of political transition, which is a perspective adopted by Horwitz (2001). This focuses on the extent to which South Africa has evolved a “progressive” media policy environment with participatory and deliberative democratic stakeholder politics, or whether there is an evolution towards a top-down, state-directed liberalisation in the interests of those classes that benefit from globalisation rather than the broader society. Horwitz overall describes the 1990s experience in terms of the grassroots and participative trajectory, which he says “derived less from any unvarnished ANC commitment to participatory democracy than to the strength of a strong political culture of ‘consultation and transparency’ linked to the practices of the trade unions and the township civic organizations during the internal insurrection of the 1980s”. (It can be noted, however, that Horwitz (1997) also noted what he called “the triumph of electoral over participatory democracy” in regard to telecoms).

Commentators like Harber (2006) see more recent history as evidencing much less participative character. He writes: “Every few years, it seems, the mandarins of communication make a bid to take power away from the broadcasting regulator, [the Independent Communications Authority of South Africa – GB], Icasa. The pattern has been regular: they table a new Bill that lessens Icasa’s independence, every industry player goes to parliament and unanimously and unequivocally warns that this is unconstitutional, damaging to our broadcasting industry and against everything we are preaching to the region, the continent and the world about the need for independent regulation.”

Implicit in all this is how transitional South Africa lends itself to being analysed. If it is not appropriately assessed in terms of mass participation, what are the alternative frameworks? One is the classic liberal paradigm of a predictably control-seeking government (anti-democratic) that inexorably moves towards suppression of an independent media (pro-democratic). Another alternative is a liberal pluralist paradigm that recognises that the interests and issues at play are more diverse than the classic liberal paradigm would suggest. This paper’s analysis suggests that a liberal pluralist assessment is more appropriate than a liberal one.

The narrative begins by sketching the situation prior to 1994, and goes on to assess the changes since then, largely through a periodisation linked to different Ministers of Communication holding office. The political and legislative media environment in general is examined, with special attention to various significant moments of contestation.

2. The apartheid media landscape

Apartheid underwent several phases during its existence, and it is hard to generalise about the state of the media environment over this entire period. However, at least as regards the years preceding the 1994 first democratic elections, some specific characteristics can be noted.

In legal terms, the strict controls of the 1970s and especially the 1980s State of Emergency years had come to an end. SABC's status changed with a new board being appointed. There was also legislation in 1993 that inaugurated an independent regulator, the Independent Broadcasting Authority (IBA 1993). These elements have continued, contested, through the post-apartheid era.

As regards economics, the vast majority of broadcast media was commercialised, with the SABC also financed largely through advertising. These aspects, inherited from the apartheid past, have also persisted in the media environment - and been the subject of controversy.

What has changed has been policy on state power in regard to the structure of the broadcasting market. Previously, there had been limited competition in broadcasting (aside from M-Net, Capital Radio, 702 and Bophutatswana broadcasting), which meant a political monopoly of the airwaves that was on the terms of the apartheid government's interests. In sum, broadcast media in the early 90s came out of a context that was more politicised than commercialised, in terms of its character.

In 1990, almost all major print media (privately-owned) was in the hands of white capital. Afrikaans-language media companies received an indirect state subsidy from government through printing contracts such as for the telephone directory. The major groups owned subscription broadcaster M-Net. The structure of the industry began to change shortly before the new era dawned, when Argus sold the *Sowetan* to black-owned NAIL, and foreign investor Independent Newspapers purchased the Argus company. Such changes, however, did not do much to address the structural exclusion of black (or diverse class) owners from holding media assets.

The pre-democracy mediascape included an "alternative press" that was on gradual decline from its heyday of anti-apartheid activity during the 1980s. This reflected the slow "normalisation" of South Africa which reduced the "franchise" of this sector on covering black-led politics, at the same time as diminishing the interest of audiences in a diet of unadulterated political content.

The ANC in 1992 specified a media policy that included a dose of neo-liberalism which stood uneasily with a certain tendency and tradition both within the exiled elements of the organisation and its internal allies as well. This character in effect conceded, in the wake of the collapse of Eastern European socialism, that pluralism was essential to democracy. The notion of state-controlled media, or of people's media (with the fringe alternative press emerging as the new mainstream), was put on the back-burner. But there were some participatory thrusts still present – the policy promoted access for all to media, and access to information. It further specified that media freedom needed to be complemented by conscious effort to ensure that debate was not limited to an elite.

Most these characteristics in the media landscape became issues of debate as the post-apartheid era unfolded.

3. Early contestation:

As Horwitz (2001a, 2001b) has tracked, the communications landscape that emerged post-apartheid had its roots in the contestations around broadcast media policy that began several years earlier (see also Tleane and Duncan, 2003:57; Minnie 2000). To summarise here, a confluence of three forces – with diverse traditions – saw strong debate resulting in parameters being agreed ahead of the actual transfer of power. In simplified form, one can identify the commandist/statist traditions in the long-exiled ANC; the community-based roots of internal resistance groups; and in the National Party, a new-found penchant for a business sector that would be free from political interference. The most significant agreement reached in the contest between these traditions was to take broadcasting out of the political power stakes altogether. This reflected the realisation of the then ruling National Party that media pluralism and independence would work in its interests in the medium term and that a trajectory in this direction needed to be set up in advance of the elections (in which it would likely lose power). On the part of the ANC – also influenced by groups oriented to civil society and “alternative press” – there was a need to wrest broadcasting away from the ambit of the National Party in the build-up to elections, and the acknowledgement that a state-controlled model was not in the interests of a genuine democratisation programme.

This historic compromise, which evolved through a range of encounters in diverse fora, took broadcasting out of the realm of political control (at least temporarily). It also led after the elections to the reform of government communications services and the dropping of the ANC of aspirations to start a supportive newspaper and to commandeer airtime on SABC. While contestation was mainly around the pro- and anti-apartheid forces, there were also differences within the camps of the ANC and civil society/alternative press. While the latter sought support to build up their relatively small-scale media, the ANC was more interested strategically in the mainstream media arena. Thus it was that the alternative press's Independent Media Diversity Trust initiative died through want of funds circa 1996, and it was only eight years into democracy that the ANC government finally responded to the issue. The Media Development and Diversity Agency was eventually established by law in 2002. (However, it remains under-funded, compared to what government spends on an official magazine – see Harber, 2005b).

What also emerged as guarantor of the negotiated settlement compromise was a vision for the media landscape with depoliticised and diversified broadcasting through the location of substantial power in the hands of a regulator, whose independence was enshrined in the 1993 interim democratic constitution. The final (1996) constitution continues this provision in Section 192: “National legislation must establish an independent authority to regulate broadcasting in the public interest, to ensure fairness and diversity of views broadly representing South African society.” In fact, this had been given effect to already in 1993, in the form of the Independent Broadcasting Authority (IBA) Act. According to the Act, the IBA was to exist to “function wholly independently of State, governmental and party political influences and free from political or other bias or interference”.

The SABC was also restructured, in that its board was appointed by the President on recommendation by parliament after public interviews with potential candidates. A year before the elections, loud contestation took place when the apartheid government announced that liberal ex-politician Frederick van Zyl Slabbert would chair the board – leading to the reversal of the decision and the appointment of Dr Ivy Matsepe Casaburri in May 1993. She would later become minister of communications.

In the years immediately after the elections, formal political involvement in the media landscape faded away almost entirely, notwithstanding some debate about whether the president should be given regular airtime on SABC. The then Minister of Communications, Pallo Jordan, adopted a very hands-off approach, and indeed the early development of policy was, in effect, decentralised to the IBA.

As reviewed below, the IBA thus became the key player in communications policy in the early post-apartheid period. The only real policy initiative from the new government in its early years was a commission, which included civil society media representatives, that reviewed the SA Communications Services. This led to the setting up of the Government Communications and Information Service in 1998. A seminar convened by the Parliamentary Committee on Communications in April 1997 about possible limits on foreign investment in print media came to naught.

Significantly, the IBA Act had called for an inquiry into the viability of public broadcasting, cross-media ownership rules, and local content provisions, implying that this research was needed for policy development. Once constituted, the IBA proceeded to implement this provision in what became known as “the Triple Inquiry”. An indication of the participatory nature of this preliminary policy development stage was that 46 written submissions were made to the IBA, with 35 additional oral submissions, followed by another 49 written representations and “a further 100 hours was spent listening to the various inputs received from organisations and individuals” (IBA 1995).

The IBA Act and the Triple Inquiry resulted in a three tier broadcast landscape characterised by three kinds of licensing – public, private and community. The philosophy here was that the three sectors with their different purposes would be

complementary: serving different audiences with different content and drawing on different sources of advertising (respectively: national, regional and local). Commercial would grow the industry and provide pluralism and jobs; public would promote education, national identity, minority languages and culture; community would give local listeners access. In fact, as is noted below, the reality was somewhat less complimentary and also less distinctive as regards the three sectors.

One especially significant policy element in the Triple Inquiry report was its assessment that SABC's viability was assured even with the sale of the more commercially run television and radio stations, and in the face of competition. However, it did identify some areas of programming that would require public subsidy. The corporation's business model was seen as being a mix of advertising and sponsorship, licence fees, government grants and other income such as merchandising their products and leasing facilities.

The report's recommendations for privatising part of SABC elicited opposition from the corporation. According to Horwitz (2001a), there was also a faction in the ANC that believed in a large SABC being necessary to transform society. The SABC argued that it would not be able to fulfil its public service mandate with the two channels as recommended by the Triple Inquiry, and made a special argument to retain two of the commercial radio stations that the IBA had recommended be sold off. At the beginning of 1996, the ANC-dominated parliament came into the arena as a policy player, and adopted a position that the SABC retain its three television channels and the two of the original eight radio stations that had been recommended should be sold (Barnett 1999). This indeed was the policy implementation that took effect.

An issue that became apparent in this situation was a disjuncture where IBA made policy, but where parliament had the final say. Further, that the government as a third factor retained the power to dispose of assets as it saw fit. Thus, the sales revenue from the privatisation – to the chagrin of SABC – went to the central fiscus rather than back to the corporation. Further, whatever the IBA might believe about government grants for the public broadcaster, it was toothless in regard to actually mobilising funds in any direction. An embryonic split power situation pertained, and however healthy this may be in terms of democracy, in other ways its potential dysfunctionality and instability predisposes it to being changed.

At any rate, the part sell-off of SABC stations worked to the benefit of a fraction of the business community who gained from the black "empowerment" preferencing in the sale. The subsequent opening up of the airwaves more broadly by the IBA, with the authority also licensing seven greenfields stations in March 1997 to black-controlled consortia, was a factor in disappointing big (white) business. Nonetheless, despite their loss, it was hard for anyone to reject policy measures for redress and for black ownership in the context of South African history and the character of democratic transformation. A similar situation applied with the IBA Act's constraints on cross-ownership by the (white) newspaper industry of broadcast assets, and with limits on concentration of radio ownership and extent of foreign ownership.

Where contestation did arise was from would-be private broadcasters unhappy that the IBA decided to prioritise the licensing of community, rather than commercial, radio stations. This delay may have frustrated the (white) business sector, but it also reflected the strength of opinion emanating from civil society groupings as well as an orientation in government (albeit short-lived) towards the “RDP” – the mass-oriented Reconstruction and Development Programme. The prioritising of community radio also reflected the ethos of the newly-born IBA, which in its first flush was keen to assert its own institutional role and status in shaping the media landscape, and unwilling to play second fiddle to external forces - be these government or business.

In summing up this period, one can point to the involvement in design of the media landscape by a range of distinct players: civil society, various business groups, the IBA as an institution, parliament, and – to a relatively limited extent – government.

4. Government steps in

This situation of government staying on the policy sidelines was unlikely to last. As tracked by Horwitz in the 1990s (although primarily in telecoms, rather than media), various developments signalled a more interventionist stance. Pallo Jordan was replaced by Jay Naidoo in 1996, who was much quicker than his predecessor to perceive a role for government in regard to the media, and especially with regard to SABC.

Meanwhile, and significantly outside the communications ministry, a small step was taken in the late 1990s towards setting up what would become the Media Development and Diversity Agency. This was promoted by the Government Communications and Information Service, however, rather than the Department of Communications to whom SABC and Icasas reported. While not under-rating the importance of this agency, its belated creation, narrow remit and limited resourcing all reflects the original perspective on the part of the ANC, namely, that the real media action is in the mainstream, and especially in broadcasting. Where Naidoo did intervene, however, was in initiating direct support by the Department of Communications for the community radio station – a development that duplicated the MDDA to an extent, and which also lacked the arms-length relationship that the MDDA enabled.

An early area, adjacent to media, where Naidoo and the Department of Communications showed their hand was in telecoms. Unlike the old regime, the democratic government did not directly issue licences for cellular operators – it set up a special regulator for that purpose. But in a departure from the 1993 compromise which took broadcasting out of the political arena, this new regulator was far less independent than the IBA. Thus, while the IBA’s councillors were nominated by public parliamentary process and appointed by the president whose only power was to veto recommended candidates, the SA Telecommunications Regulatory Authority had its members appointed directly by the minister. Further, while the IBA had full authority over who to license in broadcasting, the Minister retained the right to decide in regard to telecoms. At the same time, in what was to become an enduring pattern, even greater powers that were sought by the ministry

were blocked by parliament, notwithstanding that the institution was dominated by the same (ruling) party.

Meanwhile, Naidoo was far from neglecting the IBA itself. Taking advantage of accountability problems, where IBA councillors were accused of abusing institutional credit cards, government moved to clip the wings of the organisation. It argued that the regulator's role was to regulate and implement policy – not to make policy. The contention was that government was elected precisely to make policy, and it should not neglect this responsibility. Accordingly, instead of leaving policy to the IBA, Naidoo took the initiative. Under his leadership, a Green Paper process, drawing in handpicked stakeholders such as academics and the broadcasting industry, commenced in 1997. The final version of this paper was released for comment in November 1997, and government then produced its policy decisions in a white paper published in June 1998. A draft Broadcasting Bill came out just two months later: in August 1998. This author, in a presentation in March 1998 (see Berger, 1998), asked whether the policy process was in danger of losing credibility, with government seeming to bypass it or seeking to pre-empt further changes. “There is also concern over the seriousness with which consultation is regarded, whether government does not already have its mind made up and is simply using the consultation process to create a false legitimacy for the policy” (Berger, 1998). It seemed that the participative tradition out of which the IBA was born and began its early years, was in decline. At the same time, the 1998 Broadcasting Bill, according to Tleane and Duncan (2003:163), heralded a period when “the continuing contest for the SABC had scaled new heights”. Indeed, as discussed below, the intensification of issues was signalled by the legislative crystallisation of White Paper thinking about the public broadcaster going into the 21st century.

Importantly, the Green Paper had posed as a question the issue of which body should make policy. A technical task team's “Discussion Paper” (1998:8) that was prepared for a colloquium in March 1998, proposed that “policy making is a shared responsibility of ... Parliament, Government and the Regulating Authority”. Uppermost, however, were the relative powers of the IBA and the government. In the end, the contestation produced a compromise: the 1999 Act specified policy-making as the prerogative of the Minister, but with conditions: policy had to be in the form of broad directives that also had to be transparent (published in the Government Gazette), and open to public response. Government would also have to consult the IBA and parliament in the process. These provisions in the law were a further indication of the role of parliament as a check on Ministerial quests for unfettered authority. This is something that would continue to be an issue in subsequent years.

In terms of actual policy, the Green Paper saw two models: a commercial one taken to its logical extreme whereby SABC would be corporatised, with the state as shareholder; and a civil service model with a charter. The White Paper came out in favour of corporatisation, and a particular business model whereby SABC would have a commercial arm that would cross-subsidise the public service arm. These positions were then laid down in the 1999 Broadcasting Act. Tleane and Duncan (2003) argue that the Act gave “the Minister of Communications an extraordinary degree of control over the

SABC's finances", including the amount set for cross-subsidisation. The same authors warned that the Act's Charter for the SABC did not bind the commercial arm, and they were also sceptical about whether the PBS stations would in fact carry less advertising. Summing up the way that government policy impacted on SABC, they wrote:

The SABC has been forced into financial self-sufficiency, leading to an ever-increasing dependency on advertising revenue, a source of funding that has in-built biases towards historically privileged audiences. In effect, the mixed funding model has been used as a smokescreen to hedge off any criticism that the government is unwilling to finance the public broadcasting mandate, while at the same time allowing it the room to change its financial commitments. Given the lack of clarity about what form the "mix" in the mixed funding model should take, and "fixing" this "mix" in policy or even the law, this model creates a mirage of a sustainable public broadcaster. (2003:71)

The legacy of this policy decision has had major ongoing repercussions. The Broadcasting Amendment Act in 2002 required re-licensing of SABC due to the corporatisation of the broadcaster and its division into two wings: Commercial Broadcasting Services (CBS) and Public Broadcasting Services (PBS). The process commenced in 2004. In SABC's proposals to Icasa about its relicensing, the broadcaster proceeded from the standpoint that it already practised accounting separating between the two services, and that Icasa did not need to spell out the difference any further. All that was needed was for the regulator to formalise which SABC stations were in which division. Anything more specific (such as language or drama obligations) being set out for each wing (or station) would threaten the financial viability of institution. The corporation as a whole would meet its public obligations. This argument was strongly opposed by the majority of private broadcasters, who were fierce competitors for audiences and advertisers with SABC, who wanted a policy dispensation where the broadcaster would be more hamstrung in its commercial activities and less of a law unto itself in how it could interpret (and dodge) public service obligations on its platforms (Berger, 2006).

NGO group FXI amongst others responded by hammering the SABC for taking as a given its business model (and therefore accepting the underpinning governmental policy), and seeking the lightest-touch possible relicensing so as to avoid watertight commitments that could cost money and/or reduce ad earning potential. According to FXI (2004a), "... the SABC has failed to present a vision that government will be prepared to fund ... There is no activism apparent from the SABC on this matter. If it were to throw up a bold vision, and then challenge government to live up to its policy and fund it, then at least some aspects of a proper public broadcasting system could be achieved..." It concluded: "As a result, quasi-commercial broadcasting becomes a self-fulfilling prophecy." (FXI 2004b). In other words, SABC had forfeited a chance to try to influence government policy on public broadcasting. FXI was correct on this particular issue, but this is not to portray the public broadcaster as passively going along with all government's policy preferences. For example, in 2002, the corporation had come out in opposition to government policy when facing a bid by the Minister for more control (see below).

Also in the 2004 relicensing process, another NGO, the Media Institute of Southern Africa (Misa), had called on Icasa (as distinct from SABC) to set conditions that would put pressure on national government to amend the policy framework which underpinned SABC's reliance on advertising. Although the regulator, like SABC, sometimes opposes government policies, it did not explicitly at least do so on this occasion. This is probably because it recognised that policy was legally the preserve. Further, government, not Icasa, controlled the strings of public purse which the NGOs wanted to see loosened so as to fund SABC for public broadcasting purposes. Notwithstanding such disjunctures, the regulator in the relicensing process did indeed go on to impose detailed and costly requirements on the stations (although even the public service arm remains authorised to carry substantial advertising). The entire operation therefore is now legitimately on a commercial footing which entails a view of itself as competing with, rather than complementing, other broadcasters.

While rival media businesses and SABC itself have sought particular outcomes in how Icasa interpreted this basic policy (and the 2002 law), the NGO sector has challenged the basic policy itself. Meanwhile, eight years after the White Paper crystallised the policy thinking of two arms within the SABC, the corporation itself began to question in February 2006 whether this model was sufficient to ensure that it could do the public service job required of it. SABC protested Icasa's final licensing conditions, warning that its commercial business model might not be able to deliver with the obligations placed on its stations.

At the same time, the 2005 re-licensing has not led to a total dichotomy within the SABC. A common "Content Hub" that came into being in 2005 co-ordinated the programming for all three television stations. Cross-promotion and multi-platform selling of advertising was not banned by Icasa in the relicensing, despite requests for this by the country's main private TV station, e.tv. Nonetheless, in 2006, the corporation's CEO, Dali Mpofu put onto the public agenda that SABC wanted a reassessment of its commercialised funding model (Mpofu, 2006). It may be that unless there is change in government policy in this regard, the Corporation will not be able to meet all its licence conditions. Whether this would get government to change policy and give public funding to the SABC is entirely another question. As it stands, the policy requires SABC to make even more money to pay for a now-measurable public service – and yet without compromising that service in the process. This is a policy replete with requirements that pull in different directions, and may well elicit further contestation as role players lobby for or against one outcome rather than another.

One other development grew out of the government's policy on creating a distinction between commercial and public service wings of SABC. The 2002 Broadcasting Amendment Bill required the SABC to have two "management boards" – to be appointed by the Minister out of the members of the overall Board. One board was to be responsible for the commercial wing, and the other the public service. Critics of the proposal included the SABC itself, and the argument was that the plan would disempower the existing board in regard to boards closely tied to the minister. Icasa was also amongst

those bodies that criticised this provision, arguing that “(i)t bears repeating that the Board members are appointed in terms of section 13 of the Broadcasting Act by the President upon the advice of the National Assembly, following a public and transparent process. The Minister has no involvement in the appointment process of the Board.” Similarly, Cosatu (2002a) said the proposal suggested Ministerial interference in the Board’s operations. Parliament responded by rewriting the Bill so as to replace the envisaged management boards by sub-committees of the board, with the powers and functions being determined by the board itself rather than the minister. These changes eroded the controls that government would otherwise have exercised in terms of the original Bill.

In sum, Naidoo’s legacy of canvassing participation but then proceeding anyway set in place a particular business model for SABC which in turn has continued to elicit further policy participation and challenge by a range of actors.

If all this was a legacy of Naidoo’s approach to policy as regards SABC, his era also saw additional interventions – and contestation over these – in regard to the sector’s regulator. In 2000, the IBA and SATRA were merged into a single body. This followed the lines of the 1998 White Paper (see Burns 2001). The question in this merger was which dispensation would prevail – the autonomous one of the IBA (as per the 1999 Broadcasting Act), or the government-dependent one of SATRA. In the end, after various groups made representations to parliament, a compromise came into being: despite there being a single regulator, a dual administration persisted. Thus, the law stated that Icasa would be subject only to broad policy from government as regards broadcasting decisions; but to specific government approval, veto or superceding process as regards telecoms. As convergence subsequently evolves, however, this dichotomy becomes increasingly unsustainable (see below). For now, the point is that what was signalled by merger policy was, once more, an initiative coming from the top, meeting with opposition, and then being changed.

5. The Casaburri era: intensified contestation.

Jay Naidoo represented a new phase, with government seeking to be a player in the media arena (though not via providing public funds for public broadcasting). His 1999 successor, Ivy Matsepe Casaburri, came to symbolise a third era. This was one in which government policy strove for far greater control over broadcasting. In a sense, Naidoo had entered a terrain that had previously been forfeited in the settlement negotiations. He had defined parameters and boundaries. Casaburri wanted formalised and greater government authority within this realm. Naidoo initiated policy, unlike his predecessor; Casaburri’s initiations sought greater control than Naidoo’s had.

The new minister inherited a mixed broadcast landscape from Naidoo. Notwithstanding the intended complementarities of the three broadcast sectors, it became clear that they were all competitors as regards national and regional advertising. Further, their functional specificity was not quite as clear-cut as originally envisaged. For example, all sectors, not just community, provided degrees of community access and participation in programming. Private broadcasting produced an amount of public service programming.

All competed with each other for advertising, and much SABC content was indistinguishable from the popular commercial-style found on private sector stations. It was the SABC's role in particular that was to come under fire as a contested policy issue during Casaburri's term of office.

However, notable in the early part of Casaburri's ministry was the appointment by parliament of an SABC board headed by Dr Vincent Maphai. This iteration of directors came to stress its distinctive and independent role vis-à-vis government. The structure jealously insisted on the independence of the public broadcaster in relation to government, a corollary of which was to appoint a CEO who could ensure the financial autonomy of the corporation, and avoid government bail-outs as had happened previously. This was Peter Matlare, formerly of private broadcaster Primedia. Under him SABC concentrated on making money – not only to wipe out a deficit he inherited, but also to make profits (see Tleane and Duncan, 2003). There was, it emerged, something of a disjuncture between the independent orientation of the new board, appointed by parliament (and approved by the president), and the control-seeking desires of the government. (This would change in 2005 when a new board closer to government was appointed – see below).

The view at SABC was that government funding would entail government control, and the less of each the better. Part of the interest in radical commercialisation was in compensation for the earlier loss of six of SABC's most lucrative regional stations, i.e. those which could have contributed most to the operation of the whole. As indicated, these had been privatised in September 1996. The revenues had gone into the general fiscus, not back to the corporation – and there was still no sign of public subsidy to underwrite unprofitable programming at SABC. There is of course an irony in selling off the money-spinners in one period, and in a later period pushing the remaining less profitable ones into increased commercial mode to try and balance the books in a later period. That situation reflects in part the legacy of a disjuncture between policy influence (IBA Triple Inquiry recommendation), parliamentary decision and law; and financial policy by government.

For a time, it was hard for government to fault the intensified commercial approach at SABC. After all, the alternative to neo-liberal economic policies would have required funding mechanisms operating outside of the market, i.e. mainly public funding from the fiscus (in South African conditions, increasing license fees from the public to requisite levels is not a viable option). Indeed, the 1999 Broadcasting Act was followed by the 2002 Amendment Act which explicitly corporatised the SABC. This meant that not only would the institution run as a company, with the state as shareholder; it should also pay tax to the state. This business model left meant that government interventions on the structure or content of the SABC would have to come mainly from the outside – via policy and regulation, rather via control of purse-strings. The result was a forwards-backwards dance, with many of the steps proposed by government eliciting opposition from various quarters, and the government's basic commercial model itself coming under fire.

In particular, the market-driven dimension of the SABC's activities, the result of governmental policy on broadcasting, elicited contestation from civil society. Trade union federation Cosatu, and the Freedom of Expression Institute NGO, complained about the pursuit of middle-class and English-fluent urban audiences which derived from SABC's quest for advertising (see Tleane and Duncan, 2003:165-6; Msomi, 2004). Others such as the then chairperson of the Portfolio Committee on Communications and the Pan South African Language Board also condemned SABC for marginalising African languages. <http://www.sabcnews.com/politics/government/0,2172,43166,00.html>).

Even within the ANC itself, at a party level rather than government, there was unhappiness with the inadequate servicing of African languages. In a discussion document, titled Media in a Democratic South Africa, the party argued: "There is a need to develop a public-funded model in order for the public and community media to serve as vehicles to articulate the needs of the poor, rural people, women, labour and other marginalised constituencies" (ANC 2002a). It said that advertising and commercially driven media was limited, and would only create "poor cousins of the commercial media". At the party's conference at the end of 2002, it again called for public funding to remedy poor service in indigenous languages, provincial and local issues. The event further demanded that SABC should service deaf people, and over a five year period ensure that its programming was mainly local content. A publicly funded model for the public broadcaster needed to be in place by 2012. (See ANC 2002b). SABC itself (2005) recognised the problem, saying it was "onerous" to have to manage the contradiction between chasing revenues and delivering public service broadcasting. As noted earlier, in 2006 the CEO himself called for the model to be reviewed (Mpofu, 2006).

What the Casaburri period thus entailed as regards policy on funding public broadcasting was substantial dissatisfaction coming from all kinds of quarters. Tleane and Duncan (2003) suggest that the blame, however, cannot be laid upon the Department of Communications which had been seeking public funding for SABC, but on the Treasury and general governmental policy which opposed this.

What was interesting about this was that unlike other interest groups, the ANC attributed the problems not to SABC, but to the wider environment and government policy. Despite it being the ruling party, however, the ANC's conference position was not translated into practical policy by government. (What did happen, however, was an almost clean sweep change of members of the Maphai-era SABC board in October 2003, when the president announced the candidates chosen by parliament to replace the previous board whose formal term of office had come to an end).

Although there was no action on the funding model, government did not sit back without doing anything. Indeed, Casaburri had herself expressed unhappiness with inter alia SABC's neglect of languages, and her response was twofold. First, she sought to remedy the situation (and deal with other matters of concern to government) by requiring the corporation to develop Editorial Policies (This is discussed extensively below).

Second, the Department of Communications came up with a proposition for two new TV stations to provide indigenous language services, and this became part of the 2002 Broadcasting Amendment Act. For Tleane and Duncan (2003), the initiative amounted to a statement of profound mistrust in the SABC's ability to meet its mandate. But in other ways, the policy position partly addressed the argument that even if the SABC could afford to deliver on African languages, it still had too few daily prime-times to cater equitably for 11 languages across its three television channels. Now, there would be five opportunities. However, the initiative begged the question of control of, and funding for, the two new stations – i.e. it re-raised government's policy of not funding public broadcasting.

The language issue was not all there was in the new stations: Government's initial bid was to propose the new ventures as being outside SABC and directly reporting to it. This thrust was later changed by parliament, which was encouraged to do so by representations from various groups – including NGOs like the SA National Editors Forum and the SABC itself, where they were legislated to instead become part of the public broadcaster's portfolio. A big SABC was about to become bigger – to the concerns of private broadcasters, but at least the new channels would be subject to the checks and balances for public broadcasting of the dispensation for the SABC, as distinct from being directly government-controlled outlets. Of course, unless the funding model changed, however, the two stations would also face the same problems as SABC already had in regard to financing its language and other obligations. In passing the Broadcasting Amendment Act, parliament did not consider this matter in depth, and nor was it followed through in the budget. Nonetheless, following the requirement of the Act, the regulator in 2005 licenced SABC to run the two stations – with the licence conditions envisaging them as being funded mainly through advertising. SABC itself, however, had long maintained that this was not workable, and stated in 2006 that it was negotiating with government on funding for the two outlets.

Once again, the issue reveals a pluralistic picture in terms of the diverse role players and their institutions that were involved in shaping the media environment for public broadcasting. And again, the pattern was one in which government's initial proposals underwent substantial change as a result of this.

According to Tleane and Duncan (2003), “the crisis of accountability” faced by the SABC reached “boiling point” in 2002. This assessment refers to the strong reaction during that year to the Broadcasting Amendment Bill. Responsive to the outcry, the parliamentary Portfolio Committee on Communications held public hearings and deliberations on the draft law in September and October 2002.

Part of the controversy here was around the inclusion of the term national interest in the Amendment bill. The 1999 Act mentioned only public interest; the bill took this further by requiring the SABC reporting “to advance national and public interest of the Republic in accordance with the Constitution”. (RSA 2002a; see also

<http://iafrica.com/news/sa/162095.htm>;

<http://www.sabcnews.com/politics/government/0,2172,41336,00.html> Tleane and

Duncan (2003) have summarised the debates here. In brief, NGOs and opposition parties argued for only the “public interest” to be retained, and mechanisms spelt out for actualising accountability to the public rather than to government. Government, however, rationalised that accountability to itself as elected representative was a more effective method of realising accountability. Hence, broadcasting should serve the “national interest” as represented by the government. Influential government official Joel Netshitenzhe (2004) later added an argument that while public interest fluctuated, government could ensure enduring national interest based on the values of the constitution. Icasa (2002) said the Bill’s definition of national interest as constitutional values (of dignity, non-racialism, multi-partyism, etc.) was superfluous because broadcasters were already subject to the constitution. SABC said that the reference to national and public interest was “unintelligible as well as undermining of the SABC’s independence” (http://www.theherald.co.za/herald/2002/09/17/news/n16_17092002.htm). Cosatu (2002b) said it was problematic to include references to national and public interest because the terms could mean many different things. While national interest included the constitution’s founding principles, “its full meaning is likely to extend beyond this”. In the subsequent view of the FXI head Jane Duncan (Duncan 2002), the Bill represented the government seeking “to impose its own definition of what constitutes the national interest”. In the end, parliament retained the bill’s formulation by including both the national interest and the public interest in the final Act (1992).

As indicated above, government also put forward a policy and legislative requirement that SABC have editorial policies. This is another specific issue and moment around which contestation happened. It is worth looking at in some detail, because it reveals in microcosm some of the particularities of the period and its contrast to communications policy making in the 1990s.

6. The Editorial Policies proposal

According to the 2002 Broadcasting Amendment Bill, the SABC needed to have editorial policies and a Code of Conduct in order to be more accountable. Enormous contestation arose around this provision and its subsequent implementation.

Various motivations for the Editorial Policies were given by the Minister of Communications, Dr Ivy Matsepe-Casaburri, viz. that SABC’s content was imbalanced in terms of language, as well as irrelevant, and guilty of ignoring government leaders. The Bill (RSA 2002a) specified that the corporation’s board (i.e. as distinct from the SABC staff or the public - GB) should prepare the policies, and the Minister would approve (or by implication, reject) the outcome.

A related aspect to the Editorial Policies in the Bill was the scrapping of a clause in section 6 of the 1999 Broadcasting Act whereby the SABC’s governing Charter provided the corporation with freedom of expression and journalistic, creative and programming independence. This was replaced with terminology that required “accurate, accountable and fair reporting”. Other sections in the Bill added the words “responsible reporting”. As a package therefore, the draft law envisaged that the policies would be a mechanism

whereby such requirements could be elaborated. Thus it stated: “the Board and individual journalists of the Corporation shall be subject to the policies of the Corporation ... and act in the best interests of the Corporation”.

These provisions led various stakeholders to accuse the Minister of seeking increased governmental rather than public accountability of the corporation (Tleane and Duncan 2003:170; Holomisa 2002). And though government may have hoped to see the Bill passed in its initial form, the Parliamentary Portfolio Committee on Communications decided to call for public comment. It also scheduled public hearings during September 2002. In the representations that followed, among the critics were the regulator Icasa and indeed the SABC itself. Icasa argued that the South African constitution kept the executive out of its turf. It recalled that its founding Act said that no Ministerial policy direction “may be issued which interferes with the independence of the Authority or which affects the powers and functions of the Authority”. Accordingly, the regulator argued that the Bill “may be unconstitutional in that it seems to usurp a power exclusively reserved for the Authority” in regard to the provisions for the Minister to approve policies for the SABC. An important additional criticism by Icasa (2002) was in regard to the proposed deletion of the freedom of expression section of the Charter. It said that this step would imply “that the Corporation will no longer enjoy such freedoms”.

For its part, the SABC also rejected the Ministerial control features of the Bill. In its submission, the broadcaster described the requirement that its policies be submitted to the Minister for approval as “inappropriate and unconstitutional”. It further said there was sufficient sectoral regulation of journalistic ethics and principles to ensure fair and accurate reporting, and that in addition it would also have its own Code of Conduct and policies for reporting. (see SABCnews.com September 17, 2002, 11:30; http://www.theherald.co.za/herald/2002/09/17/news/n16_17092002.htm)

Another point was raised by the South African National Editors Forum (Sanef) which said the Bill subverted the authority of the Board and its powers by vesting them with the Minister instead, and that this essentially stripped the SABC of its “independence from Government” (Sanef, 2003).

Connecting the Ministerial approval of policies issue with the independence clause deletion, Cosatu (2002a:7) said these provisions “raised the spectre of a state or state-controlled broadcaster”. Opposition political parties said they would challenge the Bill in the Constitutional Court if it was passed without amendment. Other critics also suggested that the bill would give government the power to define “accurate” and balanced reporting (see Cosatu 2002a, 2002b; Tleane and Duncan 2003; FXI 2002; Holomisa 2002; <http://www.sabcnews.co.za/politics/parliament/0,2172,43275,00.html>)

In response to all this lobbying, the parliamentary committee rewrote the bill (see RSA 2002b). While retaining the formulation of the SABC board needing to prepare and submit policies (as distinct from SABC management and staff), it said these should be submitted to Icasa (i.e. not to the Minister). This preserved independence but it went

against Cosatu's preference (2002a; 2002b) that parliament should approve the policies. Perhaps strangely, the new Bill specified only submission of the policies to Icasa – in other words it did not authorise Icasa to approve or reject the policies. The Board was thus the supreme arbiter of the policies (constrained only by the need to ensure they were within the parameters and purposes spelled out in the legislation). Icasa's role in this schema was thus only to monitor the wider effect of the policies inasmuch as these impacted on its legal mandate to ensure SABC's compliance with its own general Code, the licence conditions, the objectives of the Act and the Charter.

Corresponding with proposals by Cosatu (2002a; 2002b) amongst others, the revised Bill compelled the SABC Board to adopt a participatory approach by ensuring public involvement in the development of the policies. The requirement for SABC to have to consult broadly in the development of the policies was hailed by three advocacy groups – the Media Institute of Southern Africa (Misa), the Media Monitoring Project (MMP) and the FXI. They all said they had found the broadcaster – dubbed by FXI as “Fortress SABC” – to be extremely inaccessible prior to this point (see Duncan 2002; MMP 2004). Indeed, even the Minister herself told parliament that her Ministry had tried unsuccessfully over two years to engage the Corporation in debate about its role and obligations (Matsepe-Casaburri 2002).

Significantly, and separate from the Editorial Policies process, the revised Bill also instructed the SABC to provide suitable means for regular public inputs and to ensure that such public opinion was given due consideration. FXI (2002a) and Duncan (2002) have argued that the government, in initiating the Bill, with the original Ministerial approval of the policies, had conflated the need for public accountability of SABC with state accountability, and therefore had missed other opportunities to increase independence and accountability – such as statutory broadcast councils, advisory bodies, and annual promises to the public. However, the law did require the SABC to “provide suitable means for regular inputs of public opinion on its services and ensure that such public opinion is given due consideration.” Thus, for example, in 2005 the Board engaged in provincial consultations with key stakeholder groups. However, such mechanisms even when partly practised by SABC are referred to in the editorial policies. Still, the parliamentary approach on the whole represented a privileging of a participative over a power approach to policy formulation.

Significantly, the parliamentary committee also reversed the original Bill's attempt to scrap the clause which guaranteed the SABC freedom of expression and independence. The revised Bill also dispensed with the provision about “the best interests of the Corporation” as well as the phrase “responsible reporting”. Instead, it made reference only to “a high standard of accuracy, fairness and impartiality”. (However, as noted earlier, despite the representations, the Bill's original inclusion of advancing the national interest, alongside the public one, remained).

After the 2002 Broadcasting Act (as amended) was gazetted (RSA 2003), the SABC drafted editorial policies, and put them out for public comment – in printed form in many languages, through public meetings, and through promotion of the opportunity on its

platforms. The broadcaster itself at one point reported receiving over 2000 submissions (http://www.sabcnews.com/south_africa/general/0,2172,63186,00.html), but at the end of the consultation process, one of its policy officials said there had been 920 written submissions, 847 of which were from individuals and 73 from organisations (Hassen 2004:11). He added that there had also been internal consultations within the corporation as well, although it is not clear how far the participatory paradigm extended in this regard. The importance of this consideration lies in how the policies are regarded, and even known about, amongst the people who are, at the end of the day, the agencies who should be using the guidelines in their daily practice. Anecdotal evidence since the policies were adopted suggests that there are problems here.

The groups that took advantage of the consultative process to make written submissions included the ruling ANC, the SA Communist Party, the SA National Editors Forum, the FXI, Misa, Rhodes University Journalism and Media Studies Department (Berger, 2003a) and diverse religious groups among the active stakeholder organisations. The phenomenon was a good example of how policy can be contested, with various interest groups advancing their causes (see Meenaghan and Kilty 1994).

The ANC, in its submission on the draft editorial policies, said the exercise served “as a model for public policy development” (ANC 2003). According to SABC itself (2004b), “this depth of consultation on editorial policy is believed to be unprecedented for a public broadcaster anywhere”. This claim, however, needs to be placed alongside the criticisms of prior inaccessibility of the SABC, and the fact that the initiative arose from parliament, not from the broadcaster itself.

SABC did indeed adopt some changes to its policies in response to the representations, although the criteria for accepting some recommendations rather than others were not made clear. Mainly, the fact of consultation per se seems to have been deemed by SABC to legitimate its final outcome. In early 2004, the policies were adopted by the board and officially put into effect, but there has been little subsequent work in the way of keeping the policies alive in the public mind. This weakens the Minister’s and the SABC’s views at the outset that the policies would clarify what the public could expect from the public broadcaster and hold it accountable accordingly.

To summarise the significance of the whole exercise, one sees government initiating a policy process in the form of a legislative amendment. Parliament throws the process open, and many groups – including SABC and Icasa – take part. The result is a law that diminishes the power the government originally sought, requires wide public consultation. It is unclear, however, how this consultation impacts substantively, and not only symbolically, on the content of the policy and its subsequent implementation.

7. The Convergence Bill

The trend up to 2002 had seen government moving away from wide consultation and a participative policy development and legislative process, and it was parliament that – responding to lobbying – reversed the tendency on a number of issues. In 2003,

government became even less inclined towards lengthy consultative processes – a politics that with the Convergence Bill would ironically lead to an even heightened role being played by parliament, civil society – and by the state president as well.

The Convergence Bill arose from a colloquium in July 2003 convened by the Department of Communications. Despite references to the need for a new policy, the director-general Andile Ngcaba put the focus of the event on drawing up an actual draft law, with a proclaimed timetable of one month. In attendance at the two day event were representatives from the opposition parties, plus the broadcasting, telecoms and internet industries. Civil society, apart from a trade union representative, was mainly absent. There was no green or white paper process in any of this. And when Ngcaba turned down appeals from business to slow down the runaway train, and do policy work before rushing into law, the industry took a second-best option: it jumped aboard by volunteering legal experts to “help” in drafting the law. Draft legislative proposals were agreed as a self-acknowledged “incomplete end-product” by mid-September, and in December, the draft Convergence Bill was published – to a barrage of criticism.

Most elements that came under fire are traceable to the absence of a policy that would have informed the law. Thus, it failed to define convergence – the key phenomenon it was supposed to be regulating. Another lacuna was reference to convergence within a value-based context of freedom of expression – leading to fears that the government intended to license websites. Further, while the “Convergence Policy Committee” originally proposed that the Minister “shall” publish the text of any policy directions given by government to Icasa, and also get comment on such from Parliament, the Bill diluted this, saying that the Minister “may” do so.

In effect, the bill retained the provisions of the Broadcasting Act as regards the conditions for licensing traditional broadcasting (including local content quotas and political impartiality), and introduced some changes in terms of telecommunications. But despite its nomenclature and use of undefined jargon like “technology neutral”, the bill had limited difference to the prior unconverged legislation. Previously, licensing had been done in vertical bundles – so licensed broadcasters implicitly received a licence to use the airwaves as well as a content licence for audio and/or audiovisual platform. Now it was supposed to be disaggregated into separate horizontal services, each of which would require a different licence and where more competition was possible. One anticipated impact to be to allow telecom operators to do business no longer in terms of the technology they utilised (eg. cellular, landline), but in terms of the services offered (eg. voice, data, audio-video). The licencees would thus be able to utilise whatever technology is available, for example voice-over-internet-protocol if they wish to sell telephony services. Broadcasting and internet service provision could be sold over numerous technologies. The system was intended to create gaps for smaller players such as Internet Service Providers selling telephony services, or with signal distribution companies or cellphone companies deciding to disseminate video content as well.

The problems of trying to leapfrog or bypass policy, and going straight to law, on such a complex issue caught up with the whole process. Convergence was not an issue where previous guidelines, such as the White Paper, or even the 2002 Broadcasting Amendment

Act, were of much help. Drafting legislation on this issue ought not to have been mere amendments and refinements of earlier law. Hence, in retrospect, it was probably predictable that what should have been a primarily legal process inevitably turned into a policy formulation one at the same time. The messy situation led to a lengthy and hotly contested situation with several versions of the Bill, and ultimately the splitting of the initiative into two laws – neither of which kept the original name of “Convergence”.

The wide ranging implications of the legislation brought an unprecedented range of representations as the process evolved. There were IT companies, telecoms companies, communications equipment manufacturers, communications service providers, value-added network services, the MDDA, the Post Office, the Universal Service Agency, law firms, signal distributors, a school’s association, broadcasters from all three sectors – public, private and community, the regulator, political parties and NGOs – many dealing with only issue specific matters rather than the legislation as a whole.

Many amongst this host of lobbies pointed out that the Bill, even its second reincarnation, continued to suffer from ill-defined licence categories. They also hammered government for a lack of policy which would have informed the law.

For example, e.tv declared that many of the concerns expressed could have been avoided “had this Bill been preceded by a national convergence policy process”. Likewise, MTN, the SNO (Second Network Operator), the National Association of Broadcasters, the Institute of Electrical Engineers and others repeated the refrain that there ought have been a policy process entailing Green and White Papers.

Emerging out of these representations, however, was parliament being persuaded to reverse the government’s original attempt to water down the 1999 Broadcasting Amendment Act concerning Ministerial powers to issue policy determinations. The initial bill had proposed that the Minister would be entitled to make national policy, and “may” consult Icasa, unlike earlier legislation that specified “must” consult Icasa. The final Act spells out the areas where and means whereby the Minister makes policy: Icasa must be consulted; draft policy directives must be published in the Government Gazette so that interested parties can make written submissions; and the final directive must be in the Gazette. The law expressly forbids the Minister from deciding on licensing as such.

However, retained in the Act is the provision for the Minister to decide if and when anyone can apply for a network services (i.e. infrastructure) licence. The wording is that “in consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister”. However, as argued below, without an elaborated policy framework for convergence, there is no clear logic for singling out this area. Certainly, the provisions remain very controversial amongst service providers who seek to “self-provide” their own infrastructure. There are already differences in interpretation as to whether municipalities’ getting permission to self provide allows them to service residents in their areas as well as the officials. Earlier versions of the Bill had also laid down that the Minister’s approval was needed for granting licences for broadcast, communications

services and communications network services. (As noted, this was the extension of the old SATRA model into constitutionally-sanctioned broadcasting territory.

Unsurprisingly, this provision incurred opposition, on the basis of violating section 192 of the constitution. The final act limited this (as discussed above) to communications infrastructure licences.)

What complicates all this is that Icasa previously had set the pace for broadcast licences while government's role has been limited to broad policy. On telecoms, however, the Minister had the final say in decreeing what phone licences should be given, when, to whom, and with what conditions. That was possible when broadcast and telecoms services could still be distinguished. However, it is by no means clear that this will continue to be the case when all are reduced to digital data flow services, travelling via any range of technology. In as much as this utilises the scarce resource of radio spectrum, an amount of regulation, and even licensing, is likely to secure legitimacy. Inasmuch as the content of the data deals with generally illegal issues such as child pornography or hate-speech, which would incur legal penalties, these are not issues of Icasa licensing. Where complications arise are in policies specifying local content, cross-ownership or electoral balance, inasmuch as the rationale and practicality of regulation that applied to traditional broadcasting may be inappropriate when technologies used do not utilise frequency spectrum. In addition, parties licensed to use spectrum for one initial purpose could later use it for a range of purposes: eg. a cellphone company could also come to disseminate audiovisual content or offering internet service provision, or a signal distributor (like Sentech) offering telephony and internet service provision. Increasingly, it would be difficult to distinguish between these communication services (eg. Voice over internet telephony, and other forms of telephony; between telephony and one way or interactive broadcasting; between internet service provision and disseminating audiovisual content).

What this shift portends is rendering redundant Icasa's dual regulation regimes for telecoms and broadcasting. That being the case, the question arises as to which of the two systems prevail in a world of unified regulation. In the Convergence Bill, government wanted the whole to operate on the telecommunications model: i.e. that all services should be subject to government licensing control, with Icasa acting as an administrative body rather than as an independent regulator. Indeed, this was reflected when the issue of Icasa's powers vis-à-vis the Ministry was later extracted from the Bill and incorporated into the Icasa Amendment Bill. The proposal in the bill was to drop the word "independent" from the future title of the regulator. As discussed below, the bill here was changed by the National Assembly, but in turn its version was changed in key areas by the House of Provinces towards the government's original vision. Finally, the approved law went to the president who, after being lobbied, sent it back to parliament as being potentially unconstitutional.

These complications are some reasons why the 2004 bill attracted 65 critical submissions and much adverse media coverage. In 2005, more than 40 critiques reached parliament. Almost 30 direct representations were also made to the parliamentary committee dealing with the law. These were responses to the bill's second – and supposedly improved –

version. The result was that the second version of the bill underwent so many amendments, that it effectively became a third edition (Berger, 2005).

Early on, Ngcaba had argued that opportunity costs were being lost while the country's legal framework remained archaic. But despite – or rather because of – the rushed process, it was only in November 2005, some 29 months of public representations and parliamentary deliberations, that a finalised bill was ready for adoption in the House of Assembly. The law was then held up until July 2006, until the contested Icasa Amendment Bill, returned to parliament by the president, was resolved. As a result, it finally only took effect, as the Electronic Communications Act, two years after the process was initiated at the Convergence Colloquium.

The entire experience meant that the absence of participatory input into policy led in turn to the legislative process in effect ending up serving a similar purpose. In sum, by short-circuiting policy issues and racing into legislation, government ended up with a time frame that dragged on as clauses were debated and redrafted. As it turned out, that impatience led to such slow law-making that, early in 2005 and under pressure from the President, the Minister of Communications had to make interim policy announcements in regard to internet telephony, rather than wait on the convergence law. The unhappy mixing of roles and phases created, ultimately, a legal product that is still likely to lead to yet further contestation, including court action, as Icasa attempts to regulate accordingly.

This likelihood is because the final law in many respects fails to clearly foresee the shift of indistinguishable data flows across global networks. In large part, while the Electronic Communications Act makes for more niche-based licencing, it still remains in the SATRA-IBA paradigm. Thus, it simply locates previous telecoms and previous broadcasting law next to each other in a single Act, with no deep integration or merger of the two fields. According to the law, there are four kinds of licences that can be given: (a) electronic communications network services; (b) broadcasting services; (c) electronic communications services and (d) radio frequency spectrum.

Earlier broadcast law falls under the “broadcasting services”, and telecoms into network services and electronic communications services. The definition of “broadcasting” seems to refer to a pre-digital world, in that the definition of “broadcasting services” is of an electronic communications service: one that “excludes data or text services with still images or where audio-visual or audio material is incidental to the service”. Another quality that is cited is that this service is defined by being “unidirectional”. In this perspective, anyone seeking to do or continue with “classic” radio or TV broadcasting will need a licence – and the conditions here (eg. community or commercial; local content) are simply a repeat of those from earlier broadcasting legislation. But, when dataflows are indistinguishable or convertible, or made interactive, the concept breaks down.

What begins to become further contentious is the provision that “broadcasting” on the above definition is deemed to exist irrespective of the use of the airwaves, i.e, no matter “whether conveyed by means of radio frequency spectrum or any electronic

communications network or any combination thereof”. What this means is an extension of regulation to audio or audio-visual services irrespective of whether they require use of the airwaves or not. A “classic” radio station streaming content via wired Internet, or even a net-native station, if it was “unilinear”, would need a licence. Cable TV would also. Perhaps even a teenager wanting to send an MMS to a friend would need a licence.

On the other hand, whether digital data flows are unilinear or interactive is not a function of the data as such, but of whether the technologies enable interactivity and whether consumers make use of it. As it stands then, the law could mean that if you introduce a chatforum or sms channel into an audiovisual feed (online, or on-air), you are no longer “unilinear” and can escape licensing. Most likely, what the lawmakers wanted to distinguish is “push” (unilinear) from “pull” dimensions of content dissemination. When content is “cast” – sent out – it would thus count as broadcasting; when the transmission has to be initiated it would not. If so, this is not very clearly spelled out in the law.

Another dimension to consider is that what today is conventionally known as interactive (i.e. not unilinear) broadcasting, whether by airwaves or cables, would not require a broadcast licence because in legal terms it no longer counts as broadcasting. Instead it might have to seek a licence for an “electronic communications service”, which is defined as “any service” that consists “of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services.” On the other hand, the Act says that “electronic communications”, while covering the emission, transmission or reception of information, does not include “content services”. The latter are not defined.

The complexity is when both digitised “information” and “content” lose distinction – for example, what is initially written as text can be received in audio form, and vice versa. The question of what service is being offered becomes blurred, and what licencing regime applies is a moot point. All this could run up against the right to freedom of expression in the constitution. However, the implication is that if you are in the content business, the only area you need a license is in regard to “unilinear” transmission (irrespective of channel). Websites will not need licenses unless they work in “unilinear” ways with audio and audio-visual content.

All these problems with the law are compounded by the impracticality of requiring license for internet-based services that are accessed in South Africa, but are also hosted outside of national jurisdiction. Icasa can anticipate a number of court cases as it attempts to implement this law and all its complexities.

8. The Icasa amendment proposal.

The Icasa Amendment Bill emerged in October 2005, as a sister piece of legislation to the former Convergence Bill. It was aimed at redefining the functions and powers of the Authority in the light of the convergent licensing provisions in the Electronic Communications Act. But it also entailed an attempt by the Minister to gain the power to decide who becomes a councillor, or gets fired as one, and to manage them through a

performance appraisal system. Lastly, it specified a funding mechanism that maintained government, rather than Icasa, as being in charge of the budget of the agency.

The most controversial of these was the appointment of councillors. Specifically, the initial bill proposed that the Minister of Communications would set up a panel of industry-based experts who in turn would submit names to her, from which she chooses and appoints the councillors. In this scenario, the panel would take the place of parliament in the existing system, and the president's role excluded. Thus, in the place of the formula of Parliament→President→Icasa, the new proposal was Minister→Panel→Minister→Icasa. Besides for arguing that this system was more efficient and less politicised, the Ministry motivated it as separating the functions of legislature and executive – by implication, parliament sticking to its role of law-making rather than the executive matter of appointing Icasa councillors.

Objections came thick and fast. For example, signal distributor Orbicom argued strongly that: "Icasa, being required to regulate in the public interest, should be accountable to the public, and this can only be achieved if Icasa is accountable to Parliament and if Councillors are appointed by the President, on the recommendation of Parliament." For this company, the appointment changes would compromise the personal and functional independence of Authority because councillors would curry favour with the Minister in order to secure their tenure of office.

The proposed performance management system also came under fire, with the chairperson of the SA National Editors Forum asking: "Would a chair go against ministerial inclinations if it is likely to affect his/her bonus?" (see Naidu, 2006; Harber 2006b). The Second National Operator (SNO), then due to start competing with semi-state company Telkom, called the Bill an unconstitutional "intrusion of the executive into the realm of regulation". It also made the point that "the fact that the Convergence Bill will have the effect of harmonising infrastructure regulation across telecommunications networks (which falls outside the protection of section 192) and broadcasting networks (which are protected by section 192) implies that the Icasa Amendment Bill must afford Icasa the same level of institutional independence from the executive arm of government as was afforded to it under the Independent Broadcasting Authority Act ..."

On the financing of Icasa, there was substantial unhappiness with keeping the regulator dependent on government for funding. Internet Solutions stated that: "In order for a regulatory authority to be viewed as being independent it has to at least enjoy independence in terms of finance, structure and decision making from the operators it regulates and from the relevant government ministry to which it has to co-operate with." The SNO also recommended an independent budget for the regulator, expressing regret that there was no longer the provision from previous drafts of the Convergence Bill, for Icasa to retain a portion of licence fees, rather than to remit these to the National Revenue Fund. It stated that "one of the factors that has compromised the independence of Icasa has been the fact that it is under-resourced, and has had insufficient finances to fulfil its statutory and constitutional mandates." It further criticised the proposal to give the line ministry to which Icasa accounts, the Ministry of Communications, such a strong say

over the budget. This was because of structural conflicts of interests in that the Ministry also had responsibilities to promote government's stake in Telkom (the major rival to the SNO), as well as wholly state-owned SABC and Sentech (which similarly operate as players in competitive business environments).

At least 15 business and advocacy bodies mobilised against the proposed appointments process and various other aspects of the Icasa Amendment Bill. The National Assembly gave the Minister her way on performance appraisal, but produced a compromise formula on the appointments aspect. It dropped the existing system of Parliament→Presidency→Icasa, but also did not go with the Government's preference for Minister→Expert Panel→Minister→Icasa. Instead, it re-inserted a role for itself on the lines of Parliament→Expert Panel→Minister→Parliament→Icasa.

However, when the bill went to the second parliamentary chamber, the National Council of Provinces, it was further amended to revert to the Government's preferred system which excluded parliament. This was then sent back to the House of Representatives, which passed it although with a small amendment to give the legislature a weak role of final confirmation of the councillors: thus Minister→Expert Panel→Minister→parliament→Icasa.

In total there were five versions of the bill before this last version finally went to the president to sign. That was not the end of the story, however. After substantial lobbying by civil society groups, the Act was sent back to parliament for reconsideration on the grounds of being possibly unconstitutional. Once again, the MPs debated. The final law now sets out a system as being Parliament→Expert-advice-where-need-be →Minister→Parliament →Icasa. In other words, parliament is reinstated in the process – it originates the names, and recommends 150% more than needed to the Minister, whose choices are then subject again to Parliamentary approval. However, the President is removed from the equation, representing one less check-and-balance that was there previously – and which indeed proved critical in terms of the actual progress of the legislation itself. Although arguably Minister and President are in the same party, the history of this law shows how different criteria are brought to bear by the two offices. Changes were also made so that performance appraisal is not done unilaterally by the minister – parliament must be consulted in appointing a panel to do this function, and must also receive a report. The Minister also no longer has the power to unilaterally dismiss a councillor; parliament must first “request” this.

What the whole process demonstrates once again, however, is that one can clearly see a case of how government's attempts to drive an intervention in the communications arena have been tempered by the mediation of other state institutions and because of the mobilisation of interest groups. The latter were predominantly businesses in the Electronic Communications Act, but civil society was most active in lobbying the presidency on the Icasa Amendment Act.

9. Conclusion.

Significantly, Horwitz and other writers used the term “negotiated liberalisation” in regard to the 1990s. In the subsequent decade, the Department of Communications in the Electronic Communications Act in particular uses the phrase “managed liberalisation”. The difference is telling. Horwitz noted that the negotiations in the 1990s depended on two elements: a state “hospitable” to participatory politics, and a civil society ready and organised to make use of the opportunity. The civil society actors in the 2000s have been joined by organised business, and their joint involvement appears to be precisely a response to the narrowing of “hospitality”, rather than as a result of government policy.

According to FXI, commenting on the Icasa Amendment Act developments:

It should be noted that this is not the first time that the President has turned back possibly unconstitutional legislation: in 1999, he referred the Broadcasting Bill back to Parliament after representations were made to him about the possibly unconstitutional powers given to the Minister relative to the regulator (Icasa's predecessor, the Independent Broadcasting Authority). Also, Departmental attempts to increase the powers of the Minister, and erode the independence of Icasa and the South African Broadcasting Corporation (SABC), have also been thwarted at various stages of debate on the Icasa Bill in 2000, the Broadcasting Amendment Bill in 2002, and the Convergence Bill in 2005.

As also outlined in many of the examples covered in this paper, the government has sought greater Ministerial powers. For opposition parliamentarian, Dene Smuts, there has been a political tactic to introduce “shock measures that reverse the negotiated order”, and then “having created a panic, to retreat in a show of reason, namely to compromise a position which becomes the new norm or point of departure.” (Smuts, 2002). What she suggests, therefore, is that government has learnt to propose excessive changes as a means to get lesser ones. This may be the case, but in many ways, this goes deeper than tactics. The FXI (2006) stated that it was “concerned about the persistent tendency of the Department of Communications to draft constitutionally dubious legislation, and the Institute calls on the Department to desist from this now-firmly established trend.” Such assessments, however, locate the source of the problem in the attitudes and politics of the government. They are not without some relevance to understanding policy development post-apartheid, but the matter also goes deeper.

Managed liberalisation, according to Gillwald, has its roots in part from the state seeking the maximisation of state assets within the telecoms field. Also entailed, however, is the interest of government in protecting state assets from unfettered competition. Yet even with this motive, the approach is not only about a defensive corporate interest in past-investments. It is also predicated on the position that state assets are an essential tool in achieving government objectives; for example, to achieve universal service or African languages services. The extent to which this stance has blurred into political control motives varies over case and time, but generally government has sought greater authority in order to pursue its particular interpretation of national interest.

At any rate, however, none of this occurs in a vacuum. There is a contradictory imperative within which government operates. Thus, in a sense, government's penchant to seek more control is endemic to its view of itself as a developmental state, and in particular as operating in terms the notion of "managed liberalisation". This phrase is erroneously referred to as a "policy" by the Department of Communications. The phrase means a planned move to deregulate much of the communications sector while keeping control over the pace and scope. However, "managed liberalisation" is not a policy, only a strategic orientation. It is an approach that gives no clear guidance about where there's to be "management" (i.e. control) and where the "liberalisation". It certainly does not equate to a policy on communications (let alone convergence) as such – one that would coherently and explicitly seek to address the contradictory tendencies of promoting commercialisation on the one hand, and of channelling its character and impact on the other.

Not only is "managed liberalisation" not a substitute for policy per se. In particular, it is also not an alternative to a participatory-based policy process. The strength about post-apartheid South Africa is not just the democratic principle of shared governance in policy-making (while acknowledging that government has the final say). It also vests in the aggregation of interests and wisdoms which make for a far better final product. This is shown, perversely, in the positive changes that have usually come about as a result of participation in key issues.

As noted at the outset of this paper, the question is how to assess transitional South Africa. A classic liberal paradigm would assume a notion of "power corrupts" and of "bad guys" in government seeking control for control sake. However, a liberal pluralist paradigm recognises contradictions and spaces that are created by a managerialist-inclined government nonetheless paying allegiance to the "liberalisation" part of "managed liberalisation", and which allow for the representation of elite interests when the latter mobilise themselves. The result is not quite mass-participation, but it is also far from that of a dead democracy. It is a continuously contested terrain, a legacy of our "negotiated revolution", with vibrant roles being played by the key institutions involved and a wide range of actors from civil society and business.

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