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From state to 'independent' regulation: a critical analysis of the Independent Communications Authority of South Africa

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Chapter One: Introduction

1.1 Background

Independent regulatory authorities (IRA) in Southern Africa are new phenomena that have come as a result of a variety of factors that have effected changes in the global and local political system. These changes have been part of the broader broadcast and telecommunications policy changes that have swept Southern Africa in the past two decades. Some of these changes have been driven by globalisation pressures, as states, more especially the developing countries, have been trying to incorporate themselves into the global economy (Chakravartty and Sarikakis, 2006). Global pressures are such that it is difficult for individual states to make unique policy changes that are not shaped or influenced by the global regulatory trends (Cogburn, 1998). The pressure can be seen in the global growth of IRAs, as "[b]etween 1990 and 2000 the number of 'independent' national telecommunications regulatory agencies multiplied from 12 to 101 …" (Chakravartty and Sarikakis, 2006: 54).

The lure of attracting foreign investors, who it is hoped will bring about the needed financial injection to finance infrastructural development and many other projects associated with the development modern technology, has induced states to succumb to globalisation forces (Teer-Tomaselli, 2004; Chakravartty and Sarikakis, 2006). Establishing independent authorities to regulate the communications sector independently of political and economic influence is part of the neo-liberal global agenda that seeks to liberalise the sector (Teer-Tomaselli, 2004). Largely because of the different political environments within the Southern African Democratic Countries (SADC), there has been a differential response to these developments in the region, but most states have adopted the global trends and instituted IRAs (Banda, 2006).

The interesting aspect of the growth and development of IRAs in the Southern African region is how some states have been able to negotiate the growing local and global

pressures to institute "independent" regulatory authorities (Banda, 2006). The local pressures were a result of the changing political environments that most African countries faced (Chakravartty and Sarikakis, 2006). Using three countries in the region, to illustrate, Zambia was moving from an authoritarian rule of Kenneth Kaunda to a multiparty democracy (Kanene, 2002); Malawi was trying to adapt to its first multiparty democracy after 1994, as prior to that it was an authoritarian state ruled by Hastings Banda for more than three decades (Misa, 2001/2); and South Africa was in a state of transition from apartheid to its first democratic rule in 1994 (Teer-Tomaselli, 2004).

Post-apartheid South Africa saw the establishment of various institutions that were meant to ensure that the country is not only seen as democratic, but also functions as such. Among the many institutions established were the Independent Broadcasting Authority (IBA) and the South African Telecommunications Authority of South Africa (SATRA), both predecessors of the Independent Communications Authority of South Africa (ICASA). These structures were created under politically sensitive conditions that required compromises from all major parties, especially the National Party (NP) and the African National Congress (ANC) (Barnett, 1998). These are two political parties that were dominant in the Convention for Democratic South Africa (CODESA) talks, and also went on to form a coalition government after the first democratic elections won by the ANC in 1994.

After decades of state control and regulation of broadcast and telecommunications, Zambia established its first regulatory authority in 1994. The Communications Authority of Zambia was established by the Telecommunications Act No. 23 of 1994 (Kantumoya, 2001). The Authority was "… responsible for the general supervision and control of radio communications, the approval of sites, and the allocation of telecommunications and broadcasting licences to independent operators" (Sasman, 2002). However, the government still retained control in many ways, as the Board of Governors was responsible to the Minister of Communications and Transport and the latter had the final say on who is awarded a licence (Misa, 2001/2).

Malawi recently launched its communications regulator. The authority known as the Malawi Communications Regulatory Authority (MACRA) was by the Communications Act of 1998 to liberalise and regulate the communications sector (Sasman, 2002). "The Act puts in place a legal framework for the regulation and provision of services in the communications sector comprising telecommunications, broadcasting and postal services" (Sasman, 2002). The direct role of the government in electing the Board of Governors and the repeated changing of the board members has led to accusations that government never really intended to establish an independent regulator (Misa, 2001/2).

1.2 Aims and objectives

The aims and objectives of this study are informed by this background. Thus the principal aim is to establish the extent to which ICASA is "independent". Among the primary objectives, the study aims to examine the independence of ICASA from the government, more specifically the Minister of Communication and various elected officials. In addition, the study will probe the extent to which ICASA is independent from its regulatees, with special reference to major broadcasting and telecommunications institutions such as SABC, Telkom, MTN and Vodacom. The study will also critically analyse the decision-making process of the regulatory body, and the transparency and independence of the decision-making process[1].

1.3 Rationale

The most interesting aspect in this study and also the main motivating factor is the development of "independent" broadcast and telecommunications regulatory agencies in South Africa, something which had not existed before 1994. More specifically, the study details how they developed and why they were seen as ideal and very much desired in an era that saw the rise of democratic governance. When looking at the institutional structure

[1] This study is to some extent influenced by: Thatcher, (2002). 'Regulation after delegation: Independent regulatory agencies in Europe' In *Journal of European Public Policy*, Vol. 9, Issue 6.

of these independent regulatory agencies and how they function, one notices that they were established as part of political compromises that largely emanated from fear of both industries being in the hands of government or specific groups (Barnett, 1998). Looking at the hastened process of development, it seems as if these regulatory bodies were meant to challenge the status quo and effect changes within the broadcast and telecommunications industries in the short term rather than the long term. Thus it is essential to question whether these political compromises led to weak (compromised) institutional structures of the regulatory bodies or not.

The Independent Communications Authority of South Africa has been in the news for all the wrong reasons. None of the media reports have touched on positive policy developments or successful implementation of such policies by the regulator. The reports have focused on various issues like the mass exodus of senior managers, the alleged incompetence of chairperson, Paris Mashile, and the failure of ICASA to speed up the process of awarding a licence to the second national operator to challenge the monopoly of Telkom, South Africa's only provider of landline telecommunication services (Gedye, 2006).

Questions about the independence of the IBA are reflective of the transformation period in which it was formed, while those regarding SATRA are indicative of the political era when the regulatory body was established. Only one political party was in majority control of the government, and it could develop policies without having to compromise too much in trying to accommodate differing views (Horwitz, 2001). If the ANC was genuine about its rhetoric regarding the establishment of independently regulated broadcast and telecommunications sectors, post-1996 politics presented it with a good opportunity. As to what the ANC has done after its promises of an independent regulator remain to be critically analysed in this study, and that question is one of the motivating factors for undertaking this study. Has the current ANC-led government put mechanisms in place to ensure that ICASA functions as an independent regulatory body with very limited or no political and economic influence?

SATRA was a regulatory body that largely functioned from the office of the Minister of Telecommunication until the merger of IBA and SATRA to form ICASA. The merger took place in 2000, and it was informed by the Telecommunications Act that established SATRA, the Constitution Act No. 108 of 1996 reinforcing the IBA Act of 1993, and the Broadcasting Act of 1999 (Mtimde, 2005: 6). The merger resulted largely from technological developments, since "[c]onvergence of the computer, telecommunications and broadcasting sectors meant that one can no longer clearly distinguish between these sectors on the basis of their ability to deliver data, voice or video" (Hitchens, 1997: 208). The merger saw councillors from both IBA and SATRA forming part of the new body to be led by a new CEO who was still to be appointed (Langa, 1999). The middle to lower managers were brought under ICASA, even though there were uncertainties about some becoming redundant over time and losing their jobs as the merger matured (Langa, 1999).

Overall, of large interest to this study is whether the institutional weaknesses that characterised the predecessors of ICASA were inherited by the latter, and as such continue to undermine the independence of broadcast and telecommunication regulation in South Africa, particularly taking into consideration the fact that IBA was largely independent when compared to SATRA. Was the communications ministry going to take advantage of telecommunications policy to rein in on broadcast regulation, or was the Minister going to respect the relative independence of broadcast regulation and continue tight grip on telecommunications? These are some of the major challenges that this study hopes to critically analyse

In addition, what made the merger more interesting was the views of the broadcast industry, as Mandla Langa, the former chairman of IBA and ICASA, stated that the broadcast industry players feared that "… broadcasting will be swamped by telecommunications as a result of the merger" (Langa, 1999: 9). The fear emanated from the lack of independence of the telecommunications industry and its regulator, as it was thought that this lack of independence would be transferred to the new regulatory agency and subsequently to broadcast regulation and the industry. Secondly, fear also emanated from the fact the telecommunications sector was a big money spinner and was expected

to play a big role in the economic development of the country, and thus had the potential to overshadow broadcast issues (Langa, 1999).

1.4 Research questions

The research has raised and seeks to address the following questions:

1. To what extent is ICASA independent from the government, political officials and its regulatees?
2. To what extent is ICASA's decision-making process transparent and independent?
3. Is ICASA's funding and financing system an enabling or hindering factor in the independence of ICASA?

1.5 Hypotheses

Three sets of hypotheses guided this study. The major assumption is that ICASA is not independent to the extent that it should be. Secondly, it is assumed that the funding and financing system does not adequately empower the Authority to ensure that it functions effectively without influence. Thirdly, it is assumed that various challenges like the funding and financing system could also jeopardise the chances of having an open, independent and extensive decision-making process.

1.6 South African literature

"Independent" broadcast and telecommunication regulation in South Africa is a new phenomenon that is borrowed from Western countries. Thus there is limited academic literature on South African broadcast and telecommunication regulatory issues. However it should be noted that despite the paucity of academic literature on this area, there are a number of opinion pieces in the media, where the emphasis is on a variety of issues ranging from policy to organisational and structural subjects.

Literature that exists is largely focused on the genealogy of regulatory institutions and how they can be effective in developing countries, where broadcast and telecommunication sectors are not as developed as in Western countries (Hills, 2003; Horwitz, 2001; Gillwald, 2001; Teer-Tomaselli, 2004). Emphasis is on the creation of the IBA, how it was developed and how it regulated broadcast media after decades of the sector being controlled by government (Duncan, 2001). The same also applies to Telecommunications, where the focus has been on the establishment of SATRA, and how the agency regulated an industry that grew to be attractive to government and private interests (Horwitz, 2001; Gillwald, 2001; 2003; Cogburn, 1998).

The core of existing literature on the genealogy of regulation in this country has been written by Horwitz (1992; 1994 and 2001). Horwitz focuses on policy developments brought about by the apartheid government, and the implications these changes had on the structure of post-1994 regulation of the communications sector (1992; 1994; 2001). Beyond this, he has also written an insightful historical analysis about the formation, growth and development of the IBA and SATRA (Horwitz, 2001). Much emphasis is on the independence of these structures and the policy changes they brought to the industry. However, most of this literature was published prior to the formation of ICASA and in the early days of the Authority, thus he does not deal with issues relating to ICASA as an independent regulatory institution (Horwitz, 1994; 2001).

The other issues that arise in the existing literature are mainly policy matters for specific issues like local content, regulation in a converging environment and whether ICASA has fulfilled its mandate or not (Barnett, 1998; 1999; 2000). Largely because of the perceived importance of broadcasting in South Africa, ICASA has mostly been mentioned or critically analysed in papers that question its policy on local content regulation. The Authority has also been analysed regarding matters that relate to the role of the only public service broadcaster in South Africa, the South African Broadcasting Corporation (SABC) (Barnett, 1998; 1999; 2000).

Existing telecommunications literature also pertains to policy developments in the sector. Given the historical development of telecommunications services in South Africa, much emphasis in this literature is on analysing whether the policy will ensure that the industry is viable without compromising access to telecommunications services. Gillwald argues that the telecommunications changes in South Africa might have been done with good intentions but that they have produced poor outcomes that will not aid the growth and development of the sector (2001). In this convergence era, another area of study that is getting more attention is convergence policy, with analysis that looks at whether the new policy liberalises the sector, promotes and facilitates technological development without compromising competition and the primary question of access (Collins, 2004). Zlotnick also deals with the policy issues and the questions of universal service and access, but argues that these are human rights issues that should be addressed sensitively (1999).

One of the studies similar to this is by Gillwald, in which she focuses on "… the changing institutional arrangements …" of the IBA, SATRA and the Universal Service Agency (USA) (2001). Her literature deals with the processes that led to the formation of these structures and the questions relating to their independence (Gillwald, 2001). However, just like Horwitz, she does not address issues relating to ICASA's independence.

Furthermore, the other study that deals with issues similar to those addressed in this study is a Master of Law thesis by Thandeka Mxenge, whose study focuses on the independence of ICASA in regulating telecommunications (Mxenge, 2004). However Mxenge does not focus on the independence of ICASA as an institution, but only on power relations between the Ministry of Communication and ICASA's role in regulating telecommunication (Mxenge, 2004). This is only one aspect of the regulator, as it excludes broadcast regulation. Cohen's (2003) journal paper also looks at the independence of ICASA in the early days, but just like Mxenge (2004) she deals largely with the telecommunication aspect of the regulator. However, she does look at issues that this study will deal with, such as regulatory capture by government, relating it to the role

of the Minister in telecommunications regulation and the funding and financing structure of ICASA (Cohen, 2003).

The independence of ICASA can be understood if there is a holistic analysis of its broadcast and telecommunications regulatory functions, its funding and financing system and the decision-making processes. Nonetheless, it has to be said that certain aspects of the studies by Cohen (2003) and Mxenge (2004) will be important in reaching a conclusion about the independence of ICASA. Outside the comments and opinion pieces in various journals, there seems to be no academic research study that focuses on the institutional independence of ICASA. Thus this study has been devoted to engaging this issue.

1.7 Independence

The use and the meaning of "independence" in this study is as defined by the Constitutional Court in relation to regulatory and other state institutions in South Africa. The definition came about in the case involving the *New National Party v Government of the Republic of South Africa and others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999). In this historic case, Justice Langa spoke of the independence of the Independent Electoral Commission (IEC) as determined by financial and administrative independence. Even though the case involved the IEC, the ruling was significant as it had a bearing all the Chapter 9 and associated institutions, of which ICASA is one. Explanation of what are Chapter 9 and associated institutions will be dealt with later in the study.

Justice Langa argued that financial independence can be determined by the ability of the institution to "… have access to funds reasonably required to enable (it) … to discharge the functions it is obliged to perform under the constitution…." In relation to administrative independence he stated that administrative independence "… implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act." These are two of the

important pointers that determine the independence of regulatory institutions, as any form of influence on financial and administrative aspect of regulatory institutions means that the said institution lacks the necessary independence to carry out its functions.

The third pointer that indicates whether Chapter 9 and associated institutions like ICASA are independent or not, is institutional independence. The Constitution of the Republic states that these are state institutions that support democracy and thus should be independent from the executive arm of the government or any other political or economic influence that might compromise institutional independence (RSA Constitution of 1996).

1.8 Conclusion

This chapter begins with a brief political background to the study, which has informed the aims and objectives. This is followed by rationale that states the main motivational factors of the study with a large proportion of it being an extension of background information on the genealogy of regulation in South Africa. Research question(s) and hypotheses are also highlighted in anticipation of what might transpire as the study develops. There is also a concise analysis of literature that pertains to South African regulatory issues, and a definition of the use of "independence" in this study.

The following chapter looks at existing literature on broadcast and telecommunication regulation while noting international trends on regulatory issues, and also focuses on a theoretical framework, which gives conceptual foundation and direction to the study by focusing on public interest and other theories of regulation. In methodology, it is noted that the study is fundamentally qualitative, but will make use of institutional analysis and supplement it with interviews of relevant officials from media-related organisations. Following this, a brief history of broadcast and telecommunications regulation in South Africa will be given to lay down the foundation for the findings.

Chapter Two: Literature review and theoretical framework

2.1 Introduction

Independent broadcasts and telecommunication regulation activities in Africa are a new phenomenon and their development is modelled on the regulatory activities of Western countries (referring to Western Europe and North America). Thus, as indicated earlier, much of the literature on regulatory issues reflects the changing political and media landscape in the Western countries. Since Western media and, to a certain extent, regulatory institutions, are independent of state control, much of the focus on regulatory issues is on whether to re-regulate or deregulate and the implications of policy choices (Siune, 1998; McChesney, 2000; 2003; 2004; Hitchens, 1995; Humphreys, 1996; Gripsrud, 1999; Feintuck, 1999; Keane, 1991; Murdock, 1990; Michael, 1990). The nature of this debate is summarised by Porter (1992: 39), as he argues, "[t]he question of whether one should re-regulate comes up as often as whether one should deregulate further[2]". This question seems more pertinent today because of technological developments that have rendered the scarcity debate obsolete (Siune, 1998).

2.2 Regulation and convergence

Technological developments in the second part of the last century have radically altered the role and perception of technology in society. Thus Berg argues, "[n]umerous technological developments have altered the way we consume, produce and interact with media" (2006: 1). This change has not only affected audiences/citizens' interaction with media, but has also affected policies that shape and influence the extent to which people interact with the media through regulation or lack of it.

Technological developments have obliterated gaps between the traditionally separate technologies that had different functions, like television and telecommunications (Hearst, 1992). Hitchens posits that "[c]onvergence of the computer, telecommunications and

[2] Deregulation is the elimination of regulatory regimes to permit the market to regulate itself, while to re-regulate is the opposite, as the latter brings back the regulatory system.

broadcasting sectors mean that one can no longer distinguish between these sectors on the basis of their ability to deliver data, voice or video" (1997: 208). According to Murdock, the revolutionary aspect of these changes is the fact that "[t]he 'digital revolution' … allows sound voice, sound and text and images to be stored and transmitted using the same basic technologies …" (1990: 2). By means of a technological device like a cellular phone, which was primarily meant for communications services, one can now access television, radio programmes and the Internet.

Furthermore, technological developments have justified regulatory and policy changes, as different communications sectors are no longer regulated separately. The "[i]ncreasing digitalisation [of communications technologies has] … called into question old policies created for two industries once perceived to be fundamentally different" (Sterling, 2000: 59). Some advocates of deregulation have exploited the call for regulatory and policy changes to argue for deregulation of the whole communications sector (see for example, Temin, 1992; Altshuler, 1992). The most desired regulatory change brought by convergence is that adopted by institutions like ICASA, which regulates converged communications sectors under one regulatory institution rather than separately.

The telecommunications sector has experienced fundamental changes as a result of technological developments. Harris posits that technological developments in the telecommunications sector have resulted in the "[r]apid growth in the use of computers, data, and transactions processing systems … [and that this] has induced demand for data communications services …" (1995: 127). Advocates of telecommunications deregulation have used this growth to reinforce their arguments against telecommunications regulation, saying that the latter hinders competition and potential technological development (Temin, 1992; Altshuler, 1992).

For the advocates of broadcast regulation who used the "scarcity of frequency" debates to argue successfully for the regulation of broadcast media, technological developments have rendered their arguments obsolete (Siune, 1998; Branston and Stanford, 2003). Digitisation and "cheaper broadcasting technologies" like cable and satellite, have

ensured that there is a multiplicity of channels available, from strictly sport and news channels to many more channels that carry different programmes (Branston and Stanford, 2003: 477). In essence, advocates of deregulation argue that if the scarcity issue is a genuine reason to regulate broadcast media, why should regulation be seen to be relevant if the scarcity debate has been resolved?

2.3 Deregulation

As much as deregulation is a word that has been in use for some time now, it is a concept that is used in arguments for different policy objectives. For Branston and Stanford (2003), deregulation means the relaxation of certain media laws like ownership laws, while for Temin (1992) and Altshuler (1992) it means total elimination of the whole regulation system to allow the market to regulate itself. McChesney argues, "[d]eregulation in practice in media markets is synonymous with increased commercialisation" (2003: 125). For Watson and Hill "[d]eregulation is more than a policy instrument; it serves as a cohesive mythology around which those who would benefit from these short- and long-run interests might rally" (2000: 86). Despite the different interpretations of this concept, what unites advocates of deregulation is their desire to see the state, through regulatory policy, assuming a very minimal if not non-existent role, allowing the market to reign supreme.

Pro-market regulation or deregulation debates have gained momentum in this era of commercialisation of the media which itself is an outcome of deregulation policy over the years. Mosco posits that "[s]upporters of deregulation claim that this policy diminishes the role of government in economic life by eliminating those rules that limit market competition" (1990: 38). For advocates of deregulation it seems as if any form of regulation that is not market regulation or at least self-regulation by the industry players is undesirable and is seen as some form of governmental influence to try and exert control over the industry. In this commercialised communication industry, "[c]onventional thinking assumes that if media markets were more competitive and more responsive to the public, they would provide the best possible way to regulate the …

[communication] system" (McChesney, 2004: 189). The government's' role is detested because of the belief that the latter tends to protect the needs and interest of state-owned media and neglect the needs and interests of the market that seeks to deliver on the media needs and interests of the consumers (Keane, 1991).

In addition, market regulation proponents advance the idea that regulation of ownership hinders the economic growth and development of the communications sector and also violates the public interest concept that is used to justify regulation (Keane, 1991). Sterling et al. argue that some countries deregulated their telecommunications sectors because, just like the Americans, they had come to see it "… as a strategic resource, an engine for economic growth and development, and an important element of international trade" (2006: 212). The economic aspect of the communications industry has usurped the societal importance of the industry, where the role and performance of communication institutions is dictated to by liberal economic policies that are predominantly advocated by conglomerates pushing for deregulation.

2.4 Market failure

Arguments put forward by advocates of deregulation show that their stance is informed by the fear of the state as a traditional threat to media and telecommunications freedom and independence. However, Feintuck argues, "[w]hat distinguishes this [present] era is that the main threat to free expression has shifted from government to private corporate power" (1999: 16). Since traditional threats have ceased to exist in many countries, the industry is growing and developing in a skewed manner that will not help it to achieve the independence that an open and competitive industry must have.

The modern media is not playing the ideal role that it is expected to play because of newly developed interests and objectives. Initially, strong business links to the media were thought to be killing the media and diverting it from fulfilling its role, but now the problem has become even bigger, for "[t]he issue is no longer simply that the media are compromised by their links to big business: the media are big business"

(Curran, 2000: 123). If the media have become big business then they will have to operate like other big businesses and also have similar objectives, which are to simply make profit, and to measure success by revenue accumulated at the end of every financial year.

The same problem also exists in the telecommunications sector, which is a much more profitable and bigger business than broadcast and print and media, and thus needs to be protected from government influence or control (Sussman, 1997). Telecommunications owners no longer speak about quality service or cheaper telecommunications prices, but have rather focused more on expanding their companies through mergers and or acquisition and ultimately increasing profit (Sussman, 1997). Excessive focus on profit is definitely not in the public interest but rather in the owners' interest, and this is where regulation as a policy instrument is needed, to intervene on behalf of the citizens. The disproportionate focus on the interests of a few owners, to the detriment of the public, is thus regarded as market failure that can be corrected by regulatory measures.

2.5 Monopoly and economic concentration

The issue of government threat to the market is seen as an excuse by market regulation advocates pushing for the expansion of profit-making initiatives at the expense of society. McChesney argues;

> The notion that the choice for media policy is government regulation versus deregulation and free markets is inaccurate. All media systems are the result of explicit government policies, subsidies, grants of rights and regulations. So the real issue is not regulation versus free markets, but, to the contrary, regulation in the public interest versus regulation to serve purely private interests (2003: 126).

Regulation is largely an undesirable policy instrument in the view of media owners as it limits the extent to which they can purely focus on expanding profit-making initiatives through mergers and acquisitions that have led to monopolist tendencies in the communications sector.

Media monopoly and concentration in no more than two sectors is a thing of the past, and now the trend has moved to conglomeration "… whereby media firms … have major holdings in two or more distinct sectors of the media, such as book publishing, recorded music, and broadcasting"(McChesney, 1999: 19). This has seen a radically narrowed-down number of media companies, for in the process of consolidating various media sectors under one conglomerate firm, other firms will have to be bought out of the industry and others will merge so as to be more competitive (McChesney, 1999; Bagdikian, 2004). Media monopoly by a few owners has completely changed the way media now functions and the direction it is expected to follow.

Monopoly and economic concentration through mergers and acquisitions justifies regulation of ownership, as market regulation has created industry owners who have become *de facto* regulators. Conglomerates "… use their greater financial power to drive new entrants out of the market-place by launching expensive promotional campaigns, offering discounts to advertisers, or buying up key creative personnel …" (Golding and Murdoch, 2000: 79). With this behaviour, conglomerates ensure that newcomers will struggle until they sell or merge with already existing media conglomerates and the outcome is the end of competition, lack of diversity and poor-quality services. Thus it is imperative to regulate the communications industry to curb the destructive power of market-regulated industry.

The growing wave of mergers and acquisitions which has led to concentration and monopoly has necessitated the need to develop regulatory measures at regional level, as this pattern also has effects at regional level (Levy, 1999; Thatcher, 2002). Since the 1980s the European Union has been introducing regulatory measures to counter balance the undesirable consequences of deregulation in most EU member states (Hitchens, 1997). Though relative success has been experienced in the telecommunications sector, in the broadcasting sector there have been serious problems because of the sensitive and complex nature of the industry (Thatcher, 2002; Levy, 1999; Hirsch and Petersen, 1992).

2.6 Public interest

This section looks at various aspects of the public interest, a controversial concept with a contested definition that has been used to justify different communication policies under various circumstances (Blumler, 1998; Melody, 1990; McQuail, 1992; van Zoonen et al., 1998). It has been used to justify regulation and deregulation, and almost every communications policy associated with the two policy instruments (Croteau and Hoynes, 2001; Hood, 1986; McQuail, 1991). Hence it is necessary to first discuss the use and the significant value of the concept before dealing with conceptual clarification.

2.6.1 The value of the public interest

Regulating the communications sector in the public interest is seen as a norm by scholars who value the significant role of the concept in regulatory issues (see for example, Napoli, 2001; Feintuck, 1999 and McQuail, 1992). Thus in discussing the theories of regulation the public interest concept will almost always come up. The significance of the public interest is summarised by Napoli, as he argues that "… within the context of communications policymaking, the overriding concern is with the public interest as a decision-making tool for policymakers and as an evaluative tool for policy analysts" (2001: 71). As a tool for policy makers the public interest informs/shapes policy formulation process and decisions. As an evaluative tool for policy analysts it is used to check whether regulatory decisions that have been taken are in the public interest or not.

The conceptualisation of the public interest is dependent upon how one perceives the role of the media in society. However, what cannot be argued against is "… that mass media are not the same as any other business or service industry, but carry out some essential tasks for the wider benefit of society, especially in the cultural and political life of the country" (McQuail, 1991: 70). The public interest can thus be located within socio-economic, cultural and political aspects of life, and its discussion should include a combination of all facets of life of different people.

In broadcast regulation where there is significant regulation of content, the justification of such is linked to the public interest. Croteau and Hoynes argue, "[c]ontent restrictions are an effort to protect the public interest by preventing or limiting 'negative' or 'harmful' media content" (2001: 213-214). Diversity of content is in the public interest as homogeneous and entertainment-oriented content is not in the public interest, for it might lead to a poorly informed society (Melody, 1990; Feintuck, 1999). Content can be deemed to be serving and fulfilling the media needs and interests of the public if it is primarily geared towards protecting and enhancing the societal morals and value system. What this means is that content regulation and the quality of programming should be guided by the public interest principle, rather than any other principle that might benefit a few people at the expense of the public.

Concerns about quality of programming have seen public service and community media being closely associated with the concept as compared to the commercial media. Hence Feintuck posits, "… the public interest is given probably its most concrete manifestation in the form of public-service broadcasting", yet this does not mean that the latter is identical to the public interest (1999). In addition, Blumler posits, "[o]nly strong and committed public [service] television bodies can be expected to serve the public interest…" (1998: 60). As long as there is still an acknowledgement that public broadcasting is for the well-being of the public and has a central role in the socio-economic, political and cultural development in society, then the public interest concept will continue to be closely associated with public service broadcasting (PSB). The perceived/expected role of PSB should embody the public interest values by fulfilling the public service role of offering quality and diversified information that fulfils the broader media needs and interest of the public.

2.6.2 Deregulation and the public interest

The proponents of deregulation have also argued their case using the public interest as a guiding principle to secure and serve what is in the best interest of consumers (see for example, Blumler, 1998; Melody, 1990). These advocates of deregulation strongly

believe that free market competition can provide best services in the public interest as consumers will determine what they want through increased consumption of those programmes or services (Hood, 1986). The free market related perception of the public interest has led to definitional-related arguments like; the public's interest defines the public interest (Croteau and Hoynes, 2001). What this means is that the market, through supply and demand, will serve as a guiding principle as to what is in the best interest of the public.

The arguments used to justify market regulation are also used in justifying the free market related perception of the public interest. The fundamental argument is that technological developments have improved the availability of channels, and as such the abundance of channels will add to the public's diversity requirements (Blumler, 1998; Melody, 1990; Hood, 1986). This argument fails to acknowledge the fact that it has been stated many times that more channels do not necessarily mean more diversity, as most entertainment channels provide more of the same product (Feintuck, 1999; Hood, 1986; Meier and Trappel, 1998). Hence Melody correctly notes that "… greater choice does not necessarily mean greater diversity, adequate service to minority interests, or improved conditions of access to audiences for those desiring it" (1990: 23). In a market-regulated system the public interest is not really in the interest of the broader public, but simply a guise for private interest.

One major problem that arises is that the advocates of deregulation seem to be oblivious to the public interest threats posed by commercialisation and concentration through mergers and acquisitions. Commercial service providers are largely interested in maximising profits through proven formulas and these formulas have not helped provide diversity, while mergers have led to a reduction in the number of communication providers (Melody, 1990; Feintuck, 1999; Meier and Trappel, 1998). This has the potential to lead to local and global socio-economic and political agendas being shaped by a few conglomerate owners who want to maximise profits, rather than providing essential and informative content that can help build and sustain a well informed democratic society (citizens), something which is in the public interest.

2.6.3 Conceptual clarification

The argument that the public interest definition is contentious has triggered different responses from various scholars (see for example, McQuail, 1992; Morrison and Svennevig, 2002; Melody, 1990; Feintuck, 1999). While some scholars, like those aforementioned, may believe that the concept indeed has a debatable meaning, Napoli differs from the rest and provides his own perspective of the "non-controversial" definition of the public interest (2001). The far-ranging debates provided by these scholars have elevated the significance of this concept amidst the growing use of the concept in regulatory and many other media-related activities.

Before looking at the various definitions of the public interest it is necessary to briefly define the "public" in "the public interest", as this will help clarify one element of the supposed confusion and also ease the critique of the concept. A simple yet very relevant definition of the public is given by van Zoonen et al., as they posit that the public is "… more or less a unified group of citizens that belong to a well-defined nation state" (1998: 3). Ideally one's material conditions or social status do not determine whether or not one becomes part of the public. The unity of a group of citizens from different class and "racial" background is a huge challenge to the idea of a unified public, but this does not necessarily mean there is no existing public.

The definition of the public as a "group of citizens" means that the value of the public within any nation-state should be seen through relevant and meaningful participation in the socio-economic and political spheres of the nation-state. Hence anything that is associated with the public should be "… of concern to everyone and pertaining to a common good or interest …" of the citizens within a nation state (Zoonen et al., 1998: 1). It is this concern for the broader needs and interest of society that fulfils the public in any concept that seeks to include the use of the word public in a normative and simple way.

The perceived lack of precise and concise definition of the public interest has led to the concept being seen as a political tool rather than as a policy instrument. Blumler argues, "[i]n concrete terms, the public interest can never be definitely pinned down", but can only be exploited by those given the power to determine it (1998: 54). Reiterating the same point made by Blumler, Feintuck says, the lack of precise definition of the public interest has left the "… concept … ready [to] capture and reinterpretation" and thus vulnerable to manipulation (1999: 59). Such arguments can lead to perceptions that the public interest is a concept that is employed to maintain the dominant views and interest of those who are in control or of those who are able to influence communications regulation.

However, judging from the use of the concept in different situations it is not surprising that there are various definitions of the public interest concept, from a simple definition to the more complicated definition touching on different aspects of life. Even though he also agrees that the concept has been "slippery and controversial", McQuail continued to give his own definition of public interest (1991). He argues, "… a simple definition, drawn from the field of public planning says that something 'is in the public interest if it serves the ends of the whole society rather than those of some sectors of the society'" (McQuail, 1991: 71). In a more apprehensible and expansive definition he "… uses (sic) the term 'public interest' to refer to 'the complex of supposed informational, cultural and social benefits to the wider society which go beyond the immediate, particular and individual interests'" (McQuail, 1992: 3). Even though there is no specific reference to any section, class, race or cultural group of the society, there is an inference that any definition of the public interest should include all the sectors of society without prejudice against or bias towards any group.

Despite the ranging arguments about the nature of the public interest, Napoli dismisses all the debate about the controversial definition and understanding of the public interest (2001). He posits that "… to argue that the public interest is an ambiguous term, as many critics have, is itself an ambiguous statement …" (Napoli, 2001: 65). The rationale behind Napoli's position is his belief that the concept exists at three different levels, and

that any critique should be clear as to what level of the concept is controversial, rather than arguing as if all levels are debatable (2001). The three levels of the public interest as argued by Napoli are the conceptual level, the operational level and the application level (2001). The conceptual level is the only level of interest to this study.

2.6.4 Conceptual level

The conceptual level of the public interest is something that has been addressed by authors like McQuail, even though he does not say much about the application and operational level of the public interest (1992). McQuail (1992) lists three different conceptual levels as the preponderance theory, common interest theory and the unitary theory, and these typologies are similar to those discussed by Napoli (2001).

2.6.4.1 Preponderance theory

The first type of the conceptual level of the public interest seems to be more influenced by the democratic or populist way of doing things. The preponderance or majoritarian conceptualisation of the public interest views the concept as dependent on "aggregation of individual interest" (Napoli, 2001: 72) or "the will of the people" as McQuail (1992: 22) puts it. What this means is that the interest of the public can only be determined by people themselves; even though there might be differences within society, the majority's interest is sufficient to be taken as representative of the needs and interest of the public.

Within the preponderance theory there are no super humans or structures that are exalted to a higher level, where they supposedly know more than the people as to what is in the public interest, theirs is to help bring together and interpret the aggregate views of the public. Hence Napoli argues that preponderance theory assumes that the role of the regulator is that of the "…interpreter of community policy preferences, who must then translate these policies into effective policies" (2001: 72). In this case, the public is seen as being constituted by rational citizens who know what they want and need in their lives, and therefore no one should pretend to know better than them. The preponderance

theory's view of the public and their role seems to be similar to the definition of the public espoused by Zoonen et al.. Perhaps these authors can endorse this form of the public interest as reflective of the genuine needs and interest of the public (1998).

However, the preponderance theory is beset by problems that characterise the weakness of all majoritarian/democratic systems. The majoritarian way of gauging the public interest does not address the interest of the minorities who might hold different views and have different interests from the majority. McQuail summarises the weak aspect of this theory as being "… insensitive, or just irrelevant, to some key issues, especially matters of a longer term, minority or technical character" (1992: 25). This variant of the public interest theory will never fully reflect the broader and authentic interest of the public if it will continue to be informed by the majority view. Even the so-called public opinion polls, which are used to gauge public views, are not a true reflection of the public, as they reflect the dominant (sometimes manufactured) view of the public and neglect the minority view.

Within communications regulation, the preponderance theory can only work, to a large extent, if the regulators consult the broader public in the process of formulation. Yet in reality this is not the case as most regulatory agencies like the FCC, in America, do not consult the public in the policy formulation process or implementation (Napoli, 2001). In South Africa the IBA did not hold sufficient and broad public consultation forums prior to policy formulations and implementation processes for a variety of reasons (Langa, 1999). What this means is that communication policies are therefore informed by those who can organise themselves and lobby to influence the policy formulation process, and this can only be powerful politicians, civil society groups, interested individuals and the regulatees.

2.6.4.2 Common interest theory/ Procedural conceptualisation

The second variant of the public interest is not fundamentally different from the preponderance theory, as it has an element of the majoritarian view. The common interest

theory is based on the "presumed" interest that the public is thought to have (McQuail, 1992: 23). The only relation that the common interest variant of the public interest has with the preponderance theory is that the common interest can also be determined by the majority view. It is rare to find minority views being seen as common interest, as that would mean they override the interest held by many. An outright differentiation can only come about through clear criteria/means of what constitutes the common interest, and that must not in any way reach consensus through numbers.

Common interest can largely be determined by the process used, thus Napoli calls this variant procedural conceptualisation rather than common interest, even though both terms refer to one variant of the public interest (2001). According to Napoli the procedural conceptualisation proposes the view that if the consensus reached "… reflect[s] the input of various interests, then the public interest has been served" (2001: 74). The focus in this theory is to find any procedure that can bring about a dominant view that is somehow representative of the many unified groups that constitute the public.

Common interest is a controversial theory on its own, and using it as a means to determine the public interest will lead to more questions around the latter concept. The major problem is that common interest may not be common to everyone, and as a result problems may arise when the supposed public interest will not be of interest to everyone. It is for this reason that McQuail argues that the common interest stops becoming common "… when significant numbers of supposed beneficiaries do not welcome what is claimed in, or done on, their behalf" (1992: 23). This goes back to the issue of the means of determining the public interest. In any society individuals will forever hold different views that are informed by material conditions and aspirations for the future. From the aggregate views, there will be similarly dominant or minority interests and the challenge in that is how to reach a consensus that will cater for all without discrimination or negation of the other.

Furthermore, the common interest is an impracticable variant of determining the public interest as it undermines the essence of communications regulation. Firstly, it reduces the

role of the regulator to that of "… monitoring the policymaking process in order to assure that it allowed for equivalent participation among interested parties" (Napoli, 2001: 75). Additionally, the most evident weakness of common interest theory is that it reduces the public interest "… to a value-free label applied to whatever decisions emerge from the policy making process" (Napoli, 2001: 74). Regulators are deemed to be illegitimate determiners of the public interest, and as such cannot centralise the process of establishing the public interest, as it is the public that has to reach consensus through acceptable and inclusive means.

The norms and values that are embodied by regulatory agencies are undermined and are considered irrelevant by the common interest theory. Hence Napoli correctly argues that the procedural "… conceptualisation ignores the normative principles guiding the decision-makers in the process" of policy formulation (2001: 75). This argument is also presented by McQuail, as he argues that this variant is "weak on substance" and as such cannot be seen as a useful indicator of the public interest (1992: 23). In sum, the common interest is too dependent on the procedure that has not been fully clarified to determine the concept that requires more than procedural based definition. The means cannot always determine and justify the outcome, more especially if there is lack of normative principles and values guiding the policy formulation and implementation process.

2.6.4.3 Unitary theory

The third and last variant of the public interest differs from the common interest and preponderance theory in that it has reduced the role of the masses in determining the public interest. Using the unitary theory, "[t]he public interest is seen as what is most in accordance with a single ordered and consistent scheme of values under which what is valid for one is valid for all" (McQuail, 1992: 23). This theory gives more privilege to values and principles (substance over choice) as they override the outcome-based process in determining the public interest.

The interest of the public is not completely negated, but has been given more meaning rather than an empty choice. Thus Napoli argues, "… the public interest is best conceptualised as our 'highest common concerns' … that are informed by the ultimate interest of all man" (2001: 23). The highest common concerns do not discriminate against the minority, but rather cater for the interest of all people as they are determined by "… interests [that] individuals share by virtue of their role as a member of the public…" (Napoli, 2001: 23). Just like the majoritarian and common interest theory, the unitary theory seems to value the importance of the public in shaping the public interest. However, in this case the public interest is determined by the higher structure or ideology that must encompass the values and principles that the public is thought to share.

Given the argument that regulators rarely consult the public in determining what is in the public interest, most regulatory agencies can agree with this conceptualisation of the public interest. More especially since Napoli argues that the unitary theory "… gives policy makers and policy analysts substantive guidance in the decision-making process" (2001: 76). Unlike the majoritarian and common interest theory, the unitary theory encourages a central and authoritative role of the regulatory bodies in determining the public interest.

However, the central and authoritative role that is envisaged for the regulators is the weakness of the unitary theory, and this has brought intense criticism against this variant of the public interest concept. The unitary conceptualisation is said to be authoritarian and therefore non-democratic and paternalistic, for it does not allow unlimited space for the public to drive the process of shaping and influencing the public interest (McQuail, 1992). In a society that is characterised by a variety of cultural groups and languages, it is highly improbable that a single structure/institution can adequately and honestly define the public interest without meaningful input from the public.

The coherent value system used to define the public interest might not be compatible with a way of life and consequently the interest of a section of the community. McQuail goes further to argue that there are minimal or no chances of finding "… a unitary value

system to which we can appeal in order to settle broad issues" (1992: 25). In fact there is a high risk of adopting a unitary value system that will serve the end of one group and negate the other sections of the public.

In concluding the debate about the conceptual definition of the public interest, Napoli argues that "… calls to redefine the public interest in communications regulation have virtually never addressed the conceptual level" (2001: 78). These calls have focused on operational and application levels, as they agree on the unitary concept as a more rational and appropriate variant of the public interest (Napoli, 2001). Even though Napoli's argument could be the most rational way of looking at the public interest, it does not take away the fact that there will be that group of people and scholars (see for example, Morrison and Svennevig, 2002; Melody, 1990; Feintuck, 1999) who will question some merits of the concept, thus the concept will remain debatable for some time to come (2001).

2.7 Public versus national interest

The interpretation and use of the public interest concept in South Africa has shown that the vague interpretation of the term can be exploited for self-seeking interest, leading to questions around the validity of such a concept. After the liberalisation of the broadcast media in South Africa there have been intense debates around the nature, understanding and use of the term public interest when considering it in relation to terms such as national interest (Wassermann and de Beer, 2005; Netshitenzhe, 2002; Tleane and Duncan, 2003). Such debates were expected largely because of the history of South Africa, where the apartheid government shaped and influenced policy of almost every sector including the media. Now under the democratically elected government, the media is expected to be free from government intervention and function in the public interest that is not determined by government.

The media which was used to enforce the apartheid ideology is now targeted as an instrument of reconciliation and nation-building (Wassermann and de Beer, 2005). Thus

the Thabo Mbeki led government is arguing that the media "… should serve the 'national interest' as the interests of the nation are best represented by a government whose (sic) level of popularity (and level of legitimacy) has been tested at the polls" (Tleane and Duncan, 2003: 23). The essence of this argument is that the government does not represent and cater for the needs and interests of a specific and exclusive section of the public, but serves the interest of the society as whole.

The South African government's argument seems to be influenced by the general critique of the definition and role of the public within the public interest. The essence of this argument is that in a country like South Africa with a fragmented society that has a range of "racial" and class-divided groups, the public interest can best be served by the national interest and as such the public should unite to serve the national interest (Netshitenzhe, 2002). Thus the public interest as perceived by media groups is elitist, in that it largely speaks of the role of civil society (Netshitenzhe, 2002). It does not cater for the poorest of the poor who do not have access to information or civil society activities and are thus not included in the decision-making structures' of these bodies (Netshitenzhe, 2002). The current Minister of Arts and Culture, Pallo Jordan, calls the excluded poorer section of society the "the second public", as they are discriminated against and prohibited from partaking in the mainstream media and civil society activities (Wassermann and de Beer, 2005: 47). These questions constitute a part of the broader challenges that face the advocates of the public interest and will continue to compromise full acceptance of the public interest; however some of the issues have been addressed above.

The problematic aspect of the above argument is the definition and interpretation of the national interest which puts more emphasis on the central role of the government. More especially when considering that relations between the media and the state in Africa have been characterised by antagonism, hence the role of the government in media activities will always be viewed with suspicion. In view of this history, it is thus no surprise that public interest advocates argue that "… the national interest all too often becomes the interest of those who wish to remain in power, often a single political party, and often against the wishes of the very public interests they claim to represent" (Tleane and

Duncan, 2003: 23). Adding to the criticism of the national interest, Kupe argues that the concept "… can often be a narrow set of justifications, policy choices and strategies of implementation that undermine the public interest", more especially in times of crisis (2005). Looking at the history of the media in South Africa it will be difficult for the government to successfully justify their argument and change the stance of the advocates of the public interest. The principal fear is that accepting the public interest as defined by the government will lead to media that serves as the mouthpiece of the government rather than watchdogs of state and other public interest related activities.

The second criticism levelled against national interest is due to lack of full control from nation-states to act in a manner that purely serves the national interest and is also representative of the interest of the people. In this global era, the role of the state has been, and is continuously being, pushed aside and individual nation-states no longer represent the interest of all people. Globalisation has been characterised by the increasing role and power of multinational companies that are largely from the developed regions of the world, and this trend has ensured that the state remains "… relatively powerless to change the structural inequalities engendered by globalisation" (Tleane and Duncan, 2003: 52). The reduced power of the state means that the government cannot claim to be acting in the national interest that represents the interest of all its citizens if its action is influenced by global powers. Thus it is better to allow the public, through free media, to determine what is in the public interest.

For developing countries like South Africa, the best way to avoid the negative challenges and influences brought about by globalisation is to ensure that the role of the media and the regulation of the communication sector are in the public interest. The concept "… embodies values of justice and equality which individuals and groups [within a nation-state] seek to attain and engage in struggle to achieve" (Kupe, 2005). Even though the "second public" will not be directly involved in shaping the public interest, their needs and interest are catered for, as the public interest that is largely defined by the people will mainly represent the interest of all the people.

Advocates of the national interest should accept that the role of the government is not completely benevolent and is also not solely confined to providing for the needs and interests of all people. As political players, there is also a need from the incumbent government and officials to consolidate power and this can sometimes serve selfish rather public interest. Thus it should be accepted that "[w]hat is in the public interest is in the national interest but what is in the national interest is not always in the public interest" (Kupe, 2005). The interdependence of countries and foreign policy initiatives means that governments can take decisions that are not necessarily in the public interest, rather decisions that chiefly serve the political interest of the party in power.

2.8 Theories of regulation

There are numerous theories of regulation that try and explain the genealogy, the structure, the function and the outcome of regulatory activities. The oldest and the widely used of these theories is the public interest theory of regulation. There are also other theories like regulatory failure or "perverted" public interest theory, private interest or interest group theory and conspiracy theory (Horwitz, 1989; Baldwin and Cave, 1999). The list also includes regulatory capture theory, organisational theory, conspiracy theory and many more theories that have not been mentioned here (see Napoli, 2001; Horwitz, 1989; Baldwin and Cave, 1999; Sterling et al., 2006). All the above mentioned theories are useful in any study that deals with regulatory activities or regulatory institutions, but this study will make use of only two theories that are more relevant than the other theories.

The first theory to be used is the public interest theory of regulation. The primary reason for choosing this theory is simply that "… the theory still remains the yardstick by which regulation is measured [and that] can be seen in the mammoth literature assessing regulatory failure" (Horwitz, 1989: 27). In addition, the theory is essential since "… the public interest is posited as either a theoretical standard or as a historical fact of a regulatory agency's birth" (Horwitz, 1989: 27). It should be borne in mind that ICASA has to regulate the broadcast and telecommunications industry in the public interest. The

theory will help in analysing why agencies are established and why they are supposed to regulate in the public interest.

The second theory chosen is the regulatory capture theory of regulation. The motive for using this theory is informed by the assumption that, if ICASA is not independent, it can only be that it has been captured by the market or the government. As the intention of establishing the regulatory agency was nothing else but to regulate the communications industry in the public interest.

2.8.1 Public interest theory of regulation

Before discussing the main elements of the public interest theory of regulation, it is necessary to define what is meant by regulation, as a concept or policy, or as a legal activity. Baldwin and Cave's definition of regulation is applicable to all fields that deal with regulation and the regulated industries (1999). Even though Baldwin and Cave have used media-related examples, they argue;

> Regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities …, but the influence of regulation may also be enabling or facilitative … as, for example, where the air waves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential chaos of an uncontrolled market (Baldwin and Cave, 1999: 2).

Using a more government policy oriented definition, Hartley posits, "[r]egulations are administrative rather than legislative instruments, but they are backed by statute. Rules are meant to provide a framework that will bring about stability and prevent disorder" (2002: 200). Both these definitions are more aligned with the public interest theory of regulation, as regulation is seen as a desirable instrument to correct the wrongs or failures brought about by the unlimited freedom of the market to the detriment of society.

The historical development of this theory has shaped how its proponents have understood and conceptualised regulation as a tool/instrument that should cater for the needs and interest of the public. Thus, "[p]ublic interest theories centre on the idea that those

seeking to institute or develop regulation do so in pursuit of public interest related objectives (rather than group, sector or individual self interest)" (Baldwin and Cave, 1999: 19). Regulation is seen as an outcome of benevolent intention and action on the part of the state or those who establish such agencies to protect the needs and interest of the citizens.

The public interest theory is not highly influenced by those who believe in state-protected monopolies or by neo-liberal policies that view unlimited market freedom as good for society. Largely because of its history of emerging when there were natural monopolies, the concept does state that where economic conditions dictate that there should be a regulated monopoly, as an unregulated monopoly benefits only a few owners (Sterling et al., 2006).

Even though the public interest theory views competition as essential for the benefit of society, the argument goes that the market should not be left alone, but should also be regulated to curb potential abuse of power (Vietor, 1994; Sterling et al., 2006; Newberry, 1999). Hence the "… theory treats the creation of regulatory agencies as the victorious result of the people's struggle with private corporate interests" that normally results in a few individuals and companies benefiting from an unregulated monopoly or free market system (Horwitz, 1989: 26).

The interventionist role of the state as envisioned by the public interest theory and also the biasedness of regulation towards society should not be confused with arguing for a socialist/communist system. Rather, as argued by Horwitz, the theory comes from the school of thought of welfare economics, a concept that proposes "…state intervention to secure both socially desirable economic redistributions and general economic efficiency" (1989: 22). What this means is that, as much as protecting the interest of the general masses is the principal reason for the establishment of regulation that should be balanced with safeguarding the viability of the market. Non-viability of the market would also affect society thorough non-availability of goods or services, meaning regulation has worked against the needs and interest of society instead of benefiting them.

The theory has some weaknesses that have seen it being questioned by proponents of various theories of regulation. The first critique challenges the public interest view that regulation is established with good intentions of protecting the needs and interest of the citizens/consumers against the powerful and unscrupulous market. Vietor argues, "[t]he public-interest models … seem naïve …" as not all regulation and regulatory activities are launched by government for the well being of society (1994). Thus private interest or interest group theory suggests that regulation is designed to serve the interest of a few elites through government and business coalition (Sterling et al., 2006; Horwitz, 1989; Vietor, 1999).

This argument not only questions the objectives behind regulatory activities, but also casts into doubt the supposedly benevolent role of the government in establishing regulation. The argument is that if you have government officials involved in business, they are bound to use regulation as a legal means to strengthen their grip on the market (Sterling et al., 2006; Vietor, 1999; Baldwin and Cave, 1999). It is suggested that business people with the dual role of government responsibility will be unlikely to engage in activities that will severely curtail the profitability of their business ventures.

The third critique is that the public interest theory does not sufficiently acknowledge the fact that regulation is not only desirable to, but sought by the public. This is despite the fact that the theory tries to state the importance of maintaining a viable market for the benefit of all stakeholders involved in the regulated industry. Newberry posits that by means of regulation, society seeks protection from the exploitative power of the market, while business people seek legitimacy of regulatory power to protect their investments (1999). This argument shows that private interest and interest group theory are correct in the view that regulation is not only a victory for the people, but also for business that seeks stability and guarantees of a stable market to ensure maximum returns.

Horwitz notes that it may be argued, "[t]he strength of the public interest approach is that … it is grounded in historical understandings about the origins of some regulatory

agencies" (1989: 26). However, that strength has been criticised by some scholars who view it as its Achilles heel (see for example, Sterling et al., 2006; Vietor, 1999; Baldwin and Cave, 1999). As a result Sterling et al. posit "… that the public interest theory is normative; that is, it is a theory that explains what regulators should do, rather than explaining why regulators actually act as they do" (2006: 28). The theory is not holistic in that it does not take into consideration various regulatory factors like "organisational and institutional constraints" (Horwitz, 1989: 23).

The organisational factors and institutional constraints are an essential element in the functioning of regulatory bodies, as they can determine whether regulation will serve its purpose or not, and as such any holistic theory of regulation should factor them into play. Baldwin and Cave note that, "… it has been argued that regulators may succumb to venality and be corrupted by opportunities for personal profit so that regulation is biased by the pursuit of personal interests" (1999: 20). This argument is similar to the point made above, that government officials might use policy and delegation powers to pursue their personal interests. Similarly with regulators there is little that can stop them from taking advantage of regulatory power given to them to engage in corruption.

2.8.2 Social/content regulation

Content regulation is largely associated with broadcast regulation rather than telecommunications regulation. Content from the latter is normally private and restricted to only a few people who have agreed to be part of that specific conversation while content from the former goes from the source to the mass and has more consequential effect than telecommunications on many aspects of life. The need for content regulation is as a result of the power of broadcast media. Feintuck posits that, "[w]e rely to a large extent on both the broadcast and printed media as communicators of politics, of culture and of 'information', and, as such, the media exercise great power in our lives" (1999: 3). In an era where commercialisation of the media has led to trivial material replacing quality programming, the value system of any democratic society should be protected through content regulation.

It should be noted that content regulation is only employed in broadcast regulation as print media is not regulated like broadcast media. This can largely be attributed to the history of broadcast media, but also to the fact that broadcast media have become more influential and accessible to the general masses than print media (Feintuck, 1999). In South Africa and most probably in many developing countries, mainly because of literacy levels, more people watch television and listen to radio than read newspapers and magazines (Mersham, 1998; Teer-Tomaselli and de Villiers, 1998).

For a country like South Africa where there is an outcry about moral degeneration and lack of local programming to facilitate political and racial tolerance and reconciliation, content regulation should be effectively employed. More especially since this type of regulation is directed towards "… the physical, moral, or aesthetic well being of the population…" (Napoli, 2001). The regulatory agency working together with broadcasters, especially public service broadcasters, can promote the screening of programmes that will address such issues.

Behavioural/ content regulation is easier to enforce, and can be effectively enforced prior to awarding of broadcast rights. This is because the licence is the most important tool for "[i]t contains the conditions and obligations under which the licensee must operate" (Hills, 2003: 60). The conditions should ensure that licensees cater for the broader media needs and interest of society. In a country like South Africa licence conditions should also cater for the previously disadvantaged group.

2.8.2.1 Different forms and uses of content regulation

Content regulation comes in various forms that are informed by the nature of the broadcast media being regulated. Generally there are two ways in which content regulation can be put into effect. Hoynes and Croteau argue that the first "… approach calls for limits on certain types of content or for restrictions on who has access to certain types of media" (2001: 211). As a consequence of this type of regulation, most television

programmes are required to indicate at the beginning of the programme whether it is suitable for family viewing or adults-only. Violent programming or programming with strong language and explicit nude scenes and pornographic material are not suitable for minors and cannot be shown during earlier viewing times.

The second type of content regulation is "… lesser known … [and] calls for the mandatory inclusion of certain types of content," like children's programming (Hoynes and Croteau, 2001: 211). If there is no mandatory call for inclusion of children's and educational programming, there is a likelihood that broadcasters, more especially commercial broadcasters, will focus on purely homogeneous and entertainment-oriented content that seeks to maximize consumerism and profit.

In this highly commercialised media environment, there is gross "under-representation (sic) [of] the opinions of ethnic and regional minorities, gays and lesbians, greens, elderly citizens, socialist and other minorities" (Keane, 1991: 77). For Africa the situation is worse as Hills posits, "[w]ithout regulation in Africa, there would be no local programming industry and no local music industry, [but] only Western imports" (2003: 28). The minority group's opinions and programming that accommodates and caters for their media needs and interests can (and will) only be fully represented when they are seen as desirable to advertisers. To be acknowledged in the commercial world, their status has to change from that of citizens to consumers.

Diversity should not only be seen as programming, diversity of languages is also important as it enhances accessibility of content to a broader society within a nation-state. In a rapidly commercializing African media environment, minority languages are in danger of being further pushed down the periphery of official and widely spoken languages at the expense of commercially viable English language programming. Feintuck highlights the importance of media in sustaining languages as he argues, "… a language that does not have access to media is doomed, for the media are an extension of people speaking to each other" (1999: 45). Hence it is imperative to regulate content, for "[o]nly with regulation can local languages survive" (Hills, 2003; 38). In this context,

content regulation is essential to ensure that commercial imperatives do not lead to the erosion of local languages. Commercial media culture will only acknowledge local languages once they begin to be perceived as commercially viable.

2.8.3 Economic/structural regulation

Economic regulation is applicable and utilised in both broadcast and telecommunication regulations, but historically it has been mainly used in telecommunications regulation. Telecommunication has been regulated as common carriers, meaning that it "… provides communication services through both wire and wireless means …" for profit purposes (Sterling et al., 2006: 21). Unlike in broadcasting, there is no community, commercial or public telecommunication service; profit making is a principal and only factor of operation. Telecommunication services are desirable for their profit making potential that is regarded as a big booster to national economies (Sussman, 1997).

Telecommunication services were regulated as a public utility largely for technical and political reasons. Public utilities are "… natural monopolies that provide essential services, and are regulated to avoid misuse of their status" (Sterling et al., 2006: 22). The focal point of regulation was determining the price which these public utilities would charge for the services they provide (Michael, 1990). The idea of regulating the price was to ensure that the services were not out of reach of the masses, hence the status of public utility.

Economic or structural regulation has become very important in this period of excessive commercialisation of the media, where monopoly and oligopoly by a few conglomerates has become a norm in many countries (Bagdikian, 2004; Doyle, 2001). Economic regulation is, by and large, used to determine the structure of the market, so as to avoid issues such as market failure or monopoly of the communications industry by a few media companies (Hills, 2003; Napoli, 2001). Using ownership and cross ownership limitations, regulators have somehow managed to regulate the rate at which mergers and

acquisitions take place. Nonetheless, in this period of deregulation most countries have adopted policies that have seen ownership and cross-ownership restrictions being relaxed.

In the United States of America, the 1996 Telecommunications Act increased the licence period of radio from seven to eight years, while that of television was extended from five to eight years (Sterling, 2000: 60). In addition, "… national radio station ownership limits were to be abolished", while the number of broadcast entities permitted to be owned by an individual or company were increased (Sterling, 2000: 60). In South Africa, ICASA has increased the number of broadcast entities that can be owned by an individual or company (Langa, 2001). The regulator has also relaxed foreign ownership restrictions on commercial broadcast entities from twenty-five per cent to thirty-five per cent (Langa, 2001).

Commercial broadcasters primarily exist to maximise profit and are dependent on advertising revenue, while community broadcasters only use the little they get as profit to sustain production (Thorne, 1998). What this means is that if the regulatory body decides to issue more broadcast community licences and only one or two commercial licences, there will be a monopoly of advertising revenue by the two commercial broadcasters. This is because competition for advertisers will be limited to the two commercial broadcasters, given the fact that community broadcasters are not supposed to be highly dependent on advertising revenues, for their primary motive for existence is not profit making (Thorne, 1998).

In a competitive and diverse communications sector, "[a]n ideal market would contain radio and TV outlets supported by different forms of financing" (Hills, 2003: 41). In such an ideal industry, there will be equitable distribution of advertising revenue through competition, and the scenario is also likely to bring about a balance in diversified output from a variety of broadcasters.

The consequences of this type of economic regulation also have an impact on content and its regulation. Hills argues, "[m]ethods of financing have important consequences for

programming" (2003: 41). What this means is that if ICASA decides to award more broadcast licences to commercial operators, there is a likelihood that the quality of programming in South African broadcast media will be entertainment-driven. On the other hand, if the regulator grants more broadcast licences to community and public service broadcasters there are good chances that quality programming will lack entertaining programmes, and this is not ideal for the viability of the sector.

2.8.4 Capture theory of regulation

Capture theory of regulation can be divided into two different ways which can help explain why regulatory capture takes place. The first explanation involves "… the vague and conflicting mandate …" that leads to confusion and capture (Horwitz, 1989). The second explanation is known as Bernstein's model or the life cycle theory, where capturing of an agency is said to be facilitated by the changing political and sometimes economic circumstances (Sterling et al., 2006; Baldwin and Cave, 1999; Horwitz, 1989). Both explanations of capture theory of regulation do accept the fact that regulation was established in the public interest (Sterling et al., 2006; Baldwin and Cave, 1999; Horwitz, 1989).

Even though the establishment of regulatory bodies is done with more or less good intention, what is actually done is not always consistent with the mandate. The outcome leads to regulatory failure, where the regulator fails to fulfill its mandate because of being captured either by the market or the government (Horwitz, 1989). This capture theory of regulation is a sub-theory of regulatory failure theory, and "[t]he implication of capture theory is that a captured agency systematically favours the interests of regulated parties [or sometimes political interests] and systematically ignores the public interest" (Horwitz, 1989: 29). Regulation in the interest of the regulated parties or market capture is more likely in developed countries where there is rapid and intense commercialisation of the media and telecommunication sectors. Regulation in the interests of the government or political interest is more common to developing regions like Africa, where the media is still fighting for its independence from the state.

The negation of the regulation mandate by regulatory agencies can be attributed to a variety of factors that are affected by the specific context in which such a move happens. However, primary reasons can be found in a "… shift in political alignment and/or change in the larger political climate" (Horwitz, 1989: 30). The argument presented by Horwitz is essential in analysing the regulatory functions of ICASA, in terms of whether it is a captured institution or whether it is regulating broadcast and telecommunication in the public interest. It should be noted that prior to 1996, the South African macroeconomic policy was informed by the Reconstruction and Development Programme (RDP), and after 1996 the policy moved towards the neo-liberal Growth, Equity and Redistribution programme (GEAR) (Lodge, 2002). This political and economic shift had the potential to impact greatly on the initial mandate and perception of the roles IBA and SATRA had to play in a neo-liberal economy.

Also of utmost importance is the fact that the development of media and telecommunication policy and the establishment of regulatory institutions in South Africa took place during a politically sensitive period that was characterised by compromises. It is thus essential to acknowledge that "… the compromise legislation which marked the founding of many regulatory agencies called for contradictory goals to be resolved (or avoided and masked) by ceding tremendous discretionary power to the agencies" (Horwitz, 1989: 393). This placed the agencies in a vulnerable position being susceptible to undue influence from the interested groups, as it seemed easy to manipulate the ambiguous mandate and powers of the regulatory institutions (Horwitz, 1989).

The most interesting explanation of regulatory capture is the life cycle theory which follows regulatory agencies from their genealogy to their organisational operation. The theory does acknowledge that regulation is established in the public interest, though in the beginning it will be staffed by inexperienced regulators whose advantage is their passion and eagerness to do their job (Sterling et al., 2006; Baldwin and Cave, 1999). At this stage the young regulators intend to "… establish their reputation"; hence they tend to be hostile to the regulated industry as they do not want to be viewed as hiding their

incompetence through conforming (Horwitz, 1989: 30). The young regulators' approach to their job is that of public servants very much willing to provide social welfare while ensuring that they get noticed for upcoming work promotions. This could also be likened to newly recruit young soldiers who aspire to be army generals, and as such are ready and willing to serve the cause of their country, even if it means going against their beliefs and values.

The zeal and enthusiasm of the young regulators is not sufficient to ensure that the regulatory body fulfils its ambiguous mandate. Thus Sterling et al. posits that the organized private groups find it easier to influence the regulatory agencies because of the inexperienced staff and the failure of the scattered citizens/consumers to lobby successfully (2006). The regulated industry will always be interested and actively participant stakeholders in regulatory activities, and given an opportunity they will influence/capture regulation to serve their interests.

Furthermore, for capture theorists the growth and development of regulatory agencies is characterised by vulnerability rather than an impermeable structure. The argument is that, as the agency becomes mature and the workforce gets more experienced, the regulatory body immerses itself within the regulatory environment, while having to be content with less political and structural support from government than envisaged (Sterling et al., 2006). The support can range from many issues, but the focal and critical point is the operational budget which determines almost everything that the agency has to do, and this will frustrate the staff to seek new challenges and opportunities elsewhere (Sterling et al., 2006; Horwitz, 1989).

Such developments favour the interests of the regulated industry, as it gives them an opportunity of influencing the weaker regulatory body through the revolving door phenomenon. The remaining staff will regulate in the interest of the private firms as they hope to be given "… financially rewarding positions with the regulated firm(s)…" when they leave the agency (Sterling et al., 2006: 28). During this period "… the agency relies more and more upon precedent when taking decisions and adopts a reactive stance" that

betrays the public interest objectives (Baldwin and Cave, 1999: 25). The deteriorating state of the more mature regulatory body erodes the passion and enthusiasm that characterised the young and inexperienced workforce.

In the final stage of regulatory capture, the agencies show no resemblance to the body that was established and, in its initial stages, took decisions that were in the public interest (Baldwin and Cave, 1999). Thus after being captured, regulatory bodies function simply to protect the private/industry interest (Baldwin and Cave, 1999; Sterling et al., 2006; Horwitz, 1989).

Just like the public interest theory of regulation, capture theory has its limitations and is critiqued using other theories of regulation to illustrate those weaknesses. The first critique is that not all agencies were established in the public interest, and they also exist in different economic and political environments that might not always lead to regulatory capture (Sterling et al., 2006; Horwitz, 1989). The conspiracy theory argument is that, regulation is designed to serve the market rather than the public, therefore there is no truth in saying the agency was captured, as the primary motive of establishing the agency was to serve the industry (Sterling et al., 2006; Baldwin and Cave, 1999; Horwitz, 1989).

Capture theory does underline the role of the staff in the process of regulatory capture but has given them an exaggerated, independent and central role. Baldwin and Cave argue, "[i]nstitutionalist theorists centre on the notion that institutional structure and arrangements, as well as social processes, significantly shape regulation …" (1999: 27). The economic interest of the workforce cannot easily shape regulatory activities. Even though they could be tempted to serve the industry in the hope of securing lucrative offers after leaving the agency, all that will be impossible if there is solid institutional structure (Baldwin and Cave, 1999).

2.6 Conclusion

Despite the various regulatory challenges from proponents of market regulation and realities of the agency being captured by the government or the regulatees, there is still a need to regulate in the public interest. The arguments put forward by critiques of public interest theory of regulation have not given convincing reasoning as to why market regulation should override the objectives of regulating the communication industry in the public interest. The other theories of regulation do not deal with the importance of serving and protecting the communication needs and interests of the broader public, something that is a fundamental objective of institutions like ICASA.

Chapter Three: Methodology

3.1 Introduction

The nature of this study is qualitative, though the primary area of focus is institutional analysis. Semi-structured face-to-face interviews have been conducted to supplement various policy documents as data. The questions that have been developed for interview purposes are informed by the rationale, literature reviewed and the broader general issues that have been raised in the media regarding the nature and the role of ICASA. Interviewees are representative of the various communications industry stakeholders. Data collection ranges from primary data in the form of policy documents and the secondary literature. Since there is a range of documents employed, the study also made use of document analysis.

3.2 The value of qualitative methods

Qualitative research, as argued by Van den Bulck, "… is grounded in the interpretative tradition, stating that there is no such thing as an objective social reality, but instead that reality is a social and cultural construction … that can only be approximated, never fully appreciated" (2000: 59). Jensen posits that "…qualitative approaches examine meaning production as a process which is contextualised and inextricably integrated with the wider social and cultural practices" (1991: 4). The use of qualitative analysis in this study ensured that policy documents are interpreted from a contextualised environment that acknowledges the social and cultural change of the period when policy was formulated and the current context in which it is applicable.

The value of the qualitative method lies in the fact that it goes beyond surface construction of meaning and can be utilised to look at in-depth construction of meaning. Qualitative researchers believe that the world is characterised by complex issues, and therefore any attempt to analyse such issues should "strive for depth" rather than surface meaning (Wimmer and Dominick, 1994: 140). Striving for depth in any research project

brings about the diverse, unique and complex nature of research work without compromising quality.

The depth and diversity cherished in qualitative work allows researchers to embark on projects that might not be suited to numerical analysis. Hence Van den Bulck argues that "[f]or qualitative data analysis there is a heavy reliance on interpretation and analysis of what people do and say without making heavy use of measurement or numerical analysis" (2000: 59). Research on institutional or policy analysis is dependant on qualitative methods, as the behaviour of communication institutions or the policy effects of such institutions cannot be quantified, but can be understood through rigorous policy and institutional structure analysis.

Furthermore, in qualitative research the role of the researcher is central to the whole process. The researcher is not pushed to the peripheral role of a passive observer, but is a participant observer "…who is defined emphatically as an interpretive subject" (Jensen, 2002: 236). The interpretive subject brings his/her cultural political and socio-economic background to the process, thus the method acknowledges the meaningful and subjective role of researcher.

The subjective role of the researcher might seem disadvantageous because it has the likelihood of resulting in partial and artificial outcomes. However, it has to be said that qualitative research "… deals with 'interpreting' social realities …" (Bauer et al., 2000: 7). These realities are scattered and "… without the active participation of the researcher no data exist …" (Wimmer and Dominick, 1994: 140). The role of the researcher is more defined when it comes to data gathering. The choice of interviewees in any qualitative study influences the findings. This also applies to this study, particularly when it comes to interviewees. Among the interviewees, there is a good probability that they will have a range of different views on the role of the regulator and the nature of the relationship between the regulator and regulatees and the government. Even though the social and cultural knowledge of the researcher will have a bearing in how he/she gathers and interprets the findings, this does not necessarily compromise the quality of the

research. Our basic understanding and interpretation of the world is socially constructed, there is no researcher who can claim to have knowledge of the world that is a mirror reflection of the world as it is.

One of the major elements of qualitative research is the demand for consistency in the research process. Largely because of the strength and variety of the method "… the qualitative researcher examines the whole process believing that reality is holistic and cannot be subdivided" (Wimmer and Dominick, 1994: 140). The independence of ICASA cannot be thoroughly examined if the focus is to be on its relations with the government and not the regulatees. A thorough and comprehensive analysis of the extent of independence of ICASA should analyse all the factors that can curtail the independence of the regulator.

3.3 Institutional analysis

To get a comprehensive understanding of institutional analysis it is necessary to provide a definition of what is an institution. The word institution is used to refer to a variety of establishments like family, parliament and big businesses (Peters, 1999). However, "… an institution is not necessarily a formal structure but rather is better understood as a collection of norms, rules, understandings, and perhaps most importantly routines" (Peters, 1999: 28). What this means is that an institutional analysis will have to determine how these norms, rules, understandings and routines are shaped and brought together to either enhance or deter the growth and development of the institution. In this study, institutional analysis served as a means of identifying whether ICASA's norms, rules, understandings and routines allow or hinder institutional independence.

Institutional analysis addresses issues around the genesis (historical studies) of the institution, the current set-up (contemporary studies) and also predicts the future through policy-oriented analysis (Bertrand and Hughes, 2005). Historical studies are necessary as they allow the study to engage "… in the process of adding detail to the historical accounts of the development of the institutions … while also producing new

understandings based upon both more extensive data and altered frameworks of interpretations" (Bertrand and Hughes, 2005: 116). While contemporary studies are essential when analysing "… how organisations are structured, how they operate and how individuals operate within them" (Bertrand and Hughes, 2005: 120). In this case much emphasis is not on the origins of ICASA, even though there are reflections on the structural set-up that the Authority inherited from IBA and SATRA, and also how it functions at the moment and the possibilities for the future.

Media exists in an environment that is influenced by a range of national and international socio-economic and political factors that are conveyed by a variety of institutions that interact with the media in different ways. This is essential for one to acknowledge when studying media institutions. Therefore, in institutional analysis one should have a holistic approach and look at the role played by other institutions in influencing the nature of the communication sector (Hansen et al., 1998). An analysis of ICASA's independence will be insufficient and the findings misleading if it does not include the role of the government as the formulator of communications policy framework, and the relations between ICASA, the government and the regulatees.

3.3.1 Policy oriented analysis

As argued above, the role of various actors/institutions that inform the South African media policy, including government and non-government structures and individuals, was analysed to get a broader understanding of regulation policy in South Africa. As Hansen et al. argue, "[i]n communication policy analysis one needs to be aware of the many, and different forces that play a part in the policy-making process" (1998: 87). Regulation and policy related issues can be understood by analysing South Africa's communication policy and ICASA's organisational structure as informed by the Constitution, communication legislation, and parliamentary speeches by members of Parliament or general remarks from the Minister of Communication.

Looking at policy issues from an array of actors is important when considering the fact that it is sometimes difficult to confine policy to a set of formal documents associated with formal structures. Hansen et al. posit that "[p]olicy is very often not made up of a coherent set of statements, nor very often a comprehensive, well thought out set of statements" (1998: 67). Media comments from government officials and/or parliamentary speeches and communication related debates do serve as policy statements.

Furthermore, Hansen et. al. argue that "…communication analysis seeks to examine the ways in which policies in the field of communication are generated and implemented, as well as their repercussions or implications for the field of communication" (1998: 67). Van den Bulck on the other hand argues that "[p]olicy research [is] both historical and contemporary, and can either be about the policy of a particular media institution … or about a media policy in the field at large such as governments' (sic) cable policy …" (2002: 89-90). The major focus in this study is on critically analysing the extent of ICASA's independence and whether the agency's decision-making process is transparent and independent.

3.4 Interviews

To gain more information and an understanding of broadcast media and telecommunication policy issues in South Africa, interviews were conducted with officials from various organisations that play an influential role in South Africa's media policy. These organisations varied from the regulatory body, ICASA, to the parliamentary portfolio committee on communications and media advocacy organisations such as Freedom of Expression Institute (FXI), National Community Radio Forum (NCRF) and National Association of Broadcasters (NAB). From amongst the regulatees, the ideal situation was to interview representatives from major broadcasting and telecommunications organisations such as the SABC, MTN, Cell C, Vodacom and Telkom. However not all were available. Only one representative from Vodacom responded positively to an interview request.

The individuals interviewed are those that inform and shape, or, in some cases they have shaped and informed, media policy in their particular organisations, like Dr Tracy Cohen, a councillor at ICASA, Mr Lumko Mtimde, a former councillor at ICASA and now Chief Executive Officer (CEO) at Media Development and Diversity Agency (MDDA). From Inkatha Freedom Party - member of Parliamentary Portfolio Committee on Communications, Suzanne Vos was interviewed. Coming from one of the opposition parties in South Africa, the IFP member is vital in giving views that are not those of the government. The other interviewee is former ICASA Councillor and now an independent consultant, Libby Lloyd.

On the part of advocacy organisations, interviewees are those that either head the various organisations or those in charge of policy related matters. From NAB the interviewee is Chairperson, Dan Moyane, who is also Executive Chairperson of Primedia Broadcasting. From FXI the interviewee is Executive Director, Jane Duncan, who has written numerous articles on issues of media policy in South Africa. From NCRF the interviewee is Programmes Officer, Mpho Mhlongo.

The interviewee from Vodacom is Government Relations and Regulation Affairs Executive, Pakamile Pongwana. The interviewee from Primedia is Group Human Capital and Regulatory Affairs Manager Khahliso Mochaba, who is also a former Telecommunications Law lecturer at the School of Law at The University of the Witwatersrand.

The type of questions to be directed at government officials will be centered on how they view ICASA as a regulatory body. Do they think ICASA has the independence and support that will enable it to regulate broadcast and telecommunications in the public interest, and also what do they think of (power) relations between ICASA the minister of communications? The latter questions were also directed at the regulatees, but the difference will be questions that touch on relations between ICASA and regulated industry, as to how the latter views this relationship. Does ICASA ensure that the broadcast and telecommunication market is competitive locally and internationally, and

also the issues of whether does ICASA (regulation) still have a role? If so what role do they envisage? The questions directed at the advocacy groups range from how do they view the relationship between ICASA, the government and the regulatees, and whether the relations have benefited the public or not. If not, what could be the reasons behind such relations? Such questions will start from general regulatory issues and then narrow down to the independence of ICASA. For more information, refer to the interview guide in Appendix A.

3.4.1 Semi-structured interviews

Interviews were conducted in two ways, using face-to-face semi-structured interviews and email interviews. Deacon et al. argue that "[s]emi-structured interviewing (sic) abandons concerns with standardisation and control, and seeks to promote an active, open-ended dialogue" with more freedom when compared to other forms of interviews (1999: 65). This kind of interview, which is sometimes referred to as an in-depth interview, is unique in that, when carried out meticulously and correctly, it combines "structure with flexibility" in a balanced manner (Deacon et al.: 1999.). The principal reason why face-to-face semi-structured interviews served as a primary form of interview is that they enable both the interviewer and interviewee to explore the subject in depth through open-ended questions.

The second unique aspect of this kind of interview is that the interviewer is able to bring out both the formal and the informal qualities of interviews. Even though face-to-face interviews are characterised by flexibility, the interviewer retains control of the interview by adhering to a set of questions or themes set out before the interview (Deacon et al., 1999; Legard et al., 2003; Gaskell, 2000; Baxter and Babbie, 2004). Thus Deacon et al. "… suggests that these sorts of interviews are better described as 'conversations *with a purpose'* " (1999: 65). In this way the interviewer is able to fulfil the interview objectives by controlling the interview, and through the relaxed and conversational environment, the interviewee will not feel intimidated or as if (s)he is being interrogated rather than interviewed.

Furthermore, semi-structured interviews have two advantages that might not necessarily be found in the other genres of interviews. Firstly, the semi-structured interviews tend be interactive and give the interviewer an opportunity "… to follow up issues with further questions and probes" (Gaskell, 2000: 46). Even some of the themes that are not in the interview guide or those issues that the interviewer did not know about can be raised, and this is dependent on the respondent answers. Hence, Berger argues that "[i]n conducting such interviews, you often obtain unexpected information that other forms of research [and interviews] might not discover" (1991: 59). The interviewee might reveal more information about the subject in question if they feel the interviewer has not done his/her research properly, and think that it could be better to advise the latter on more issues of that nature. In addition, when people begin talking they tend to reveal issues they were not willing to talk about, more especially if a related and interesting topic comes up from the interview (Berger, 1991; Gaskell, 2000).

However, it should be noted that face-to-face semi-structured interviews have a few weaknesses that can result in serious challenges for interviewers. The first challenge is to get the most relevant and responsive interviewees, as "[s]ome interviewees talk around any subject and are hard to pin down; others are afraid to express their feelings" (Berger, 1991: 58). The dangers of this are that the interviewees might give out a great deal of information that has little or nothing to do with the objectives of the interview, but merely about themselves and their knowledge of the industry – not really related to the study or interview objectives. Those not willing to express their feelings might give one-word answers with no context or background, making the interview a futile exercise.

Secondly, using this type of interview can lead to volumes of information that can enhance the study, but it can equally prove to "… be difficult to handle the enormous amounts of material that depth interviews can generate" (Berger, 1991: 59). Despite the problems that might be experienced when utilising the semi-structured interview, this kind of interview remains the most relevant to collecting data and bringing about edifying qualitative findings.

3.4.1 Email interviews

Email was used to conduct interviews with interviewees not based in and around Gauteng, like Cape Town based members of the parliamentary portfolio committee of communication. Using an email as a form of interview is very convenient, as "… it is cheap and requires comparatively little organisational effort and time; the respondent can fill in the questionnaire in his/her own time and environment …" (Van den Bulck, 2000: 64). The disadvantage of this kind of interview is that there is a low response rate, largely because of "… confusion and annoyance on the part of the respondent" if the questions are not written well in a clear and simple language" (Van den Bulck, 2000: 64). The other disadvantage is that the questions might not be answered by the relevant officials. However the disadvantages do not reduce the importance of these types of interviews, as in this case they were of the utmost importance when it came to members of the parliamentary portfolio committee of communication. It proved to be very difficult to have face-to-face interviews with officials who are based in Cape Town or any other area outside Gauteng.

3.5 Data Collection

Data collection largely comprises of primary documents that are complemented by secondary data from existing work on South African media policy. Primary sources include policy documents from ICASA and government's communication department and non-governmental organisations (NGOs) that have an interest in South African media policy. The type of documents used ranges from electronic documents to original hard copies. Secondary data consists of existing research from published and unpublished material.

3.6 Document Analysis

The nature of the study required the use of document analysis to gain a better understanding of principal policy issues that govern the institutional role and organisational structure of ICASA. Document analysis is "an integrated, and conceptually informed, procedure and technique for locating, identifying, retrieving and analysing documents for their relevance, significance and meaning" (Van den Bulck, 2002: 90). Data collection for the purpose of institutional and policy-oriented analysis can be a complicated, ineffective and disorganised exercise if there is no appropriate organisation to give direction to the whole process of data collection. As a result it is important to use the document analysis method, which "… is just as much concerned with the access to and acquisition of the right documents, as with the actual analysis and with the interpretation of these documents" (Van den Bulck, 2002: 90).

3.7 Conclusion

This chapter has presented the methodological tools used in this study and also justified why such tools were used. The study is qualitative, as analysing the independence of ICASA largely depends on the analysis of policy documents and papers, and therefore quantitative methods would not have been suitable. Even though the study is qualitative, the principal tool of research is institutional analysis. Institutional analysis has been supplemented by face-to-face semi-structured interviews and email interviews. The interviewees are from various media-oriented organisations and NGOs. The notable weakness of the study is that the number and diversity of interviewees is lacking. The diversity of interviewees could have been better if some of the targeted government and parliament officials had agreed to be interviewed.

Chapter Four: Broadcast and telecommunications regulatory history in South Africa

4.1 Introduction

This chapter gives a historical summary of broadcast and telecommunications regulation in South Africa without presenting the findings or carrying out any analysis. The importance of this chapter with regards to the question of independence is that the government controlled almost all aspects of the communication sector. There was no independent communications regulatory authority, and, when studying the independence of the current regulatory body, it is important to briefly look at the history of regulation and how far regulation has come in South Africa.

The history of broadcast and telecommunications regulation in South Africa has gone through various phases that have largely been shaped by the country's political changes. Under apartheid, where state intervention was seen as a norm and a necessity for the ruling party, broadcast and telecommunications regulation was conducted by the government. During the transformation period in the early 1990s, where the political future of this country was decided in the Convention for a Democratic South Africa (CODESA) talks, the behaviour and future of the communications industry was determined by the CODESA participants. In post-apartheid South Africa independent regulators for both broadcast and telecommunications were established to ensure minimal intervention from the government. At the start of the new millennium the two regulators were merged into one communications regulator, the Independent Communications Authority of South Africa (ICASA).

4.2 Broadcast regulation: Pre-1994

Since the early beginnings in the early 20th century, South African broadcast media has been controlled by the state. During apartheid, broadcast ownership and policymaking powers have been in the hands of the government (Hayman and Tomaselli, 1989;

Tomaselli and de Villiers, 1998). In addition, the licensing and regulation of broadcasting was controlled by the government through the Department of Posts and Telecommunications, with the Postmaster General acting as the regulator (Hayman and Tomaselli, 1989). This type of behaviour was not surprising since the government wanted to control every aspect of South African society, and to ensure that segregation policies were implemented using every means available.

The envisaged role of broadcast media made the South African Broadcast Corporation (SABC) the most valuable tool of the government. From the early 1920s till the late 1970s and the early 1980s, the SABC, which was the only available broadcaster, served as the mouthpiece of the government by endorsing state policies that perpetuated black people's suffering (Golding and Duffy, 1998; Barnett, 1998). As if to reward the SABC for its role as state broadcaster, the Radio Act of 1952 gave more power to the SABC by setting it free from everyday ministerial bureaucracy, but denied it the necessary editorial independence (Hayman and Tomaselli, 1989). In fact, Hayman and Tomaselli argue that, it is because of the understanding and the influence of the Broederbond within the SABC and in government, that the latter was given licensing powers (1989). This made the SABC the *de facto* regulator of the broadcasting industry in all aspects. This was more especially the case, when taking into consideration the fact that the government could not issue new broadcast licences for private broadcasters without first consulting with the SABC (Hayman and Tomaselli, 1989).

4.2.1 The transformation period

Government and the SABC's role in broadcast regulation came to an end in the early 1990s after the release of Nelson Mandela and the unbanning of all political movements that were exiled in the apartheid era. Broadcasting and telecommunications issues were in the main agenda during the Kempton Park (CODESA) talks that laid the policy foundations for a post-apartheid South Africa (Barnett, 1998). The two dominant political parties that shaped the outcomes of these talks were the National Party and the African National Congress (ANC) and its allies, even though there were numerous media-

oriented non-governmental organisations and trade unions that influenced the process (Currie, 1993). For a better understanding of the regulatory issues in South Africa, one needs to understand the central role of the CODESA talks, as they laid the foundation for the current communications regulation framework.

The talks led to a change in broadcasting and telecommunications policy and commissions that were to look at the formation and implementation of regulatory bodies for both sectors. However, the development of policies for both broadcasting and telecommunications differed at the time because of a variety of reasons. Horwitz argues,

> The absence of a consultative process in the telecommunications sector led constitutional negotiators to annul a previous decision at CODESA to deal with broadcasting and telecommunication policy together and instead to proceed with establishing a regulatory authority for broadcasting separately (2001:196).

Broadcasting policy was given more attention because of the fact that broadcasting was, and still is, seen as an ideological institution that should be independent of undue political control (Horwitz, 2001). Thus in the post-1994 democratic dispensation "[b]roadcasting has been given a central role as an instrument of post-apartheid social integration … [where it] has been conceptualised as a key site for nation-building cultural strategies" (Barnett, 2000:52).

The importance attached to broadcasting policy, more especially that of the SABC, reflects the lessons that CODESA participants learned from the abuse of broadcasting services by the apartheid regime. Knowing very well what they had done when they were in power under apartheid, the National Party wanted to prevent the incoming government from using the supposed public broadcaster as the mouthpiece of the government, thus they began the process of commercialising the corporation with the hope of privatising it in the end (Louw, 1993). The ANC and its allies agreed with the National Party that the SABC should be taken out of the government's control, but not that it be fully commercialised and subsequently privatised (Pahad, 1993). The fear was that this would lead to the retention of broadcast power in the hands of the white elite who had the

economic power to buy media companies. What made the situation grave is that the same group also controlled advertising (Pahad, 1993).

The ideological and cultural importance of broadcast media and the potential abuse of the SABC necessitated a compromise decision that would somehow satisfy the main parties involved. Horwitz posits that both parties reached some kind of consensus mainly because "… the ANC was fearful of NP control of broadcasting before the election; the NP was fearful of the possibility of ANC control after the election" (2001: 141). As a result of fear on both sides, the differences between the ANC and the NP did not stop the formulation of new broadcasting policy, with an emphasis on the role of the SABC and the formation of a regulatory body.

Despite all the ramblings about the nature of the post-apartheid SABC and the general broadcast policy that was to govern the country's broadcast sector, the talks were successful. The success is derived from the fact that "… one of the few concrete issues settled was the agreement to the principle of an independent regulatory authority for broadcasting and telecommunications" (Barnett, 1998: 554). Broadcasting continued to get favourable treatment, and thus the creation of the IBA and setting up of Triple Inquiry to look into the future of post-apartheid broadcasting and the envisaged role of the SABC (Louw, 1993). Also of importance is the fact that, by overseeing the policy development process, the CODESA participants wanted to shape broadcasting as an instrument of nation-building for a non-discriminatory society (Barnett, 1998).

4.3 Telkom Monopoly Pre-1994

The structure of the telecommunication service in South Africa was no different from the rest of the world, as it was run as a parastatal with special privileges. As part of continuous state intervention, "… telecommunications had been run through the office of the Minister of Communications and Transportation as part of a traditional Post, Telephone and Telegraph (PTT) monopoly" (Horwitz, 1992: 291). Just like many other

services, telecommunication services were provided under the broader apartheid policies; hence the government could not privatise the services.

At the height of apartheid, when the nationalist government enacted all kinds of laws to tighten its grip on power, telecommunication services were not left out, for they were seen as an essential tool to maintaining the system – just like broadcasting. The 1958 Post Office Act gave regulatory powers to the Postmaster General, who in turn had to report to the Minister of Communications and Transportation (Zlotnick, 1999). Given the political context, independent regulation was unheard of at that time and thus there was no apparent argument in favour of it.

Changes in the telecommunications sector began to be imminent only towards the 1990s, as the government was looking to change its policy. Perhaps sensing a change in the political future of the country, the Nationalist Party moved to privatise the telecommunications industry (Horwitz, 1992). These changes took place before the CODESA talks, as "[i]n 1991 the posts and telecommunications functions of the SAPT (South African Posts and Telecommunication) were separated and the telecommunications arm of the SAPT was corporatised" (White, 2003). This move could have been influenced by the privatisation wave that was sweeping the international markets, and the South African government was looking at ending self-imposed isolation and looking at becoming a meaningful player in international markets (Horwitz, 1994). However, there is another argument that says that the National Party government wanted "… to maintain white control in the event of a future black majority government" (Horwitz, 2001: 47).

The unbundling of the old SAPT did not in any way affect the monopolisation of the telecommunications sector by the government. A new telecommunications company called Telkom was created by the government to function as a private corporation, with the state retaining full ownership and control (Horwitz, 1992). The government did not foresee Telkom as just another telecommunications company; the 'private' company "… was granted the exclusive power, monopoly, to provide telecommunications services

as well as the power to authorize any other person to conduct telecommunication services" (Zlotnick, 1999: 215). It seems that the government strategy in telecommunications was similar to that in broadcasting, for just like the SABC, Telkom became a *de facto* regulator of the telecommunications industry.

The actions of the government did not go unnoticed in the Kempton Park talks and this created a very tense atmosphere that threatened the spirit of goodwill prevailing at the convention. The ANC delegation and its allies warned the National Party government that any action towards unilateral privatisation of telecommunication would not be acceptable and would be reversed once the ANC was in power (Horwitz, 1992). This warning posed a serious threat to the NP government, since the ANC had at some stage alluded to nationalisation of essential services that were to be unilaterally privatised by the NP government during the talks (Horwitz, 1994).

The ANC threats were never implemented during the convention, and this was due to the decision taken to suspend the discussion of telecommunication issues. As mentioned above, telecommunications talks were deferred because of the perceived importance of broadcasting before the first democratic elections. Gillwald argues that one of the main reasons why the telecommunications policy talk suffered in the CODESA talks is because the ANC and its allied members "… were reticent about dealing with telecommunications, because of the lack of understanding of the technical and economic issues" (2001: 3). Thus they may have taken this precautionary measure because of fear of taking decisions that could in future harm the prospects of ensuring successful and meaningful participation of black people in the sector. Any position taken in the CODESA talks was to bind the forthcoming government in almost all aspects. The ANC knew that if at any stage it was to renege on major policy decisions taken in these talks, this would be declared to be unprincipled, and was also going to strain the possibilities of different parties working together for a better political future of this country.

Given their monopoly over state power and the uneasy stance of the ANC in discussing telecommunication issues, the National Party was arrogant enough to continue putting

into effect some of the plans they had made outside of the talks. On the eve of the first democratic elections, "… the government granted two mobile cellular licences, operating on the GSM standard, to Vodacom (in which Telkom had a 50% stake) and to MTN Cable wireless, Transtel…" and a black-owned company (White, 2003 :3). This act proved to be the last from the Postmaster General who was taking decisions in accordance with Telkom, since the latter was the *de facto* regulator and a beneficiary of the new mobile cellular licences (Gillwald, 2001).

Even though the ANC was not entirely pleased with the licensing of the two mobile cellular licences, it seems as though the ownership structure of the winning companies was sufficient to ease the tension and anger of the ANC and its allies. As Horwitz argues, amid strike threats "[t]emperatures cooled somewhat when the government agreed to maintain a 50 per cent stake in one of the licenses and to increase the level of the black shareholding" (2001: 205). The agreement encapsulated the objectives of the ANC and its allies in the CODESA talks, something that Pahad had mentioned before (1993). They wanted to break the apartheid government monopoly in the communications sector without agreeing to sell off all state-owned companies before they came into power. By disposing of all state-owned communications companies into private hands it would mean that the white-owned businesses would benefit, as they had the economic muscle to outfox the few existing black-owned companies. Their aim was to pave the way for black economic empowerment without compromising the power of the incoming ANC government.

Unlike broadcasting, telecommunications policy did not benefit much from the Kempton Park talks. For broadcasting there was a concrete policy framework meant to establish the independent broadcasting regulator, while for telecommunications there was nothing except the squabbles that resulted from unilateral decisions taken by the National Party government. Instead it was left to the incoming government to decide the future of telecommunication policy in this country.

4.4 The IBA Era 1993-1999

The completion of the Viljoen[3] report led to an important era in the history of broadcasting regulation in South Africa. The report gave birth to the Independent Broadcasting Authority Act which guided the establishment of the Independent Broadcasting Agency (IBA) in 1993 "… to oversee the transformation and development of the post-apartheid broadcasting systems" (Barnett, 2000: 55). The Act was informed by the history of broadcasting in this country and the need to have a relevant and independent broadcast regulator in the new democratic dispensation and globalisation period.

The manner in and the conditions under which the IBA Act was developed saw the regulatory body being fiercely attacked from all angles, and these attacks largely emanated from the politics surrounding its establishment, as noted by Barnett that:

> …the IBA Act is … shaped by the political compromises of the period of negotiated transition which brought apartheid to an end. The IBA is bound by its founding legislation to 'protect the integrity and viability of public service broadcasting services.' This effectively translates into a responsibility to protect the financial viability of the SABC [rather than that of the whole industry] (1998: 555).

While Horwitz argues that the institutional flaws of the IBA are "… derived from the IBA having been founded as the product of political negotiations as opposed to the result of a considered mandate from a democratically elected government" (2000: 147). The main objectives were to ensure that the SABC, which was state-controlled up until that time, would be taken out of government control. Hence the view that the "[p]assage of the IBA Act had been undertaken in the pressure-cooker environment of the political negotiations to ensure the impartiality of the state broadcaster for the upcoming election" (Horwitz, 2001: 148). Seemingly, the problem with the IBA was that the focus was on general policies that were meant to appease political groups on the issue of broadcast

[3] The Viljoen Task Group was unilaterally instructed in 1990 by the NP government to look into the future of broadcasting in South Africa.

regulation and the governance of institutions like the SABC. This could have compromised the clear policy direction the IBA was to take as an independent regulatory body in a democratic South Africa and a changing technological environment.

Despite the noted shortcomings, when the IBA began operations it brought new dimension to the broadcasting sector, compared to the broadcasting policy under the apartheid regime. The notable difference was the process that the IBA undertook in formulating broadcasting policy. Barnett argues that the IBA's Triple Inquiry was a significant step in broadcasting regulation in South Africa because; it "… was the most extensive and thorough policy review process in the South African broadcasting history …" (1999: 652). The CODESA talks provided the broader policy framework that led to the establishment of the IBA and the determination of how the latter should function, while the consultative IBA's Triple Inquiry informed the concrete policy that was to guide broadcast regulation.

The primary objective of the IBA was to diversify and protect the viability of the broadcasting sector in the public interest. Under the apartheid government, it was only the SABC that provided commercial and public broadcasting, of which the latter was nothing but a state broadcaster. The IBA report argued that, to provide for the broader broadcast needs of society without stifling competition, the sector would have to be divided into public service, community and commercial broadcasting (Barnett, 1998, 1999, 2000; Horwitz, 2001). In this way the broadcasting industry would consist of a fair number of entertainment-driven channels that would be separate from informational and educative channels.

Another major policy change brought about by the IBA's Triple Inquiry report pertains to the broader ownership structure of the broadcast sector. During CODESA and the policy formulation process there was a concern about the concentration of broadcast media into the hands of one minority sector of the community. One of the report's recommendations, which was adopted by parliament, was to ensure that there is diversity of ownership, as the new policy was meant to facilitate "… the entry of previously marginalised groups

into ownership structures of ownership" (Barnett, 1998: 560). The main motivating factor for policy change was the perception that, without change in ownership structure, the proclaimed new era would amount to nothing if the structure would not be significantly different to what it was under apartheid.

The process of diversifying the ownership structure happened under controversial circumstances that were not really acceptable to the old guard and those in power. The government thought that the IBA had too much power and was abusing it, while the SABC wanted to protect their dominance in the industry. The controversy erupted when the IBA unbundled the SABC by selling off six of its regional stations to new private owners who were required to have black shareholders in their ownership structures (Langa, 1999). Former Minister of Posts, Telecommunications and Broadcasting Jay Naidoo reacted angrily to the independence shown by the IBA in the unbundling process. In one of his tirades against the IBA he said the regulator was "… a runaway agency answerable to no one", and announced that his department would take over the framing of broadcasting policy and scale down the IBA to the status of a "normal" regulatory body" (Horwitz, 2001:171). This was one of the many attacks the IBA endured because of the lack of understanding of independent regulation in the new political dispensation.

However, this attack did not deter the IBA from fulfilling its objectives. Shortly thereafter, more broadcast licences, known as the Greenfields radio stations, were issued. Just like the ex-SABC radio stations, the new entrants were required to have individuals or groups from the previously disadvantaged community in the ownership structures (Horwitz, 2001; Teer-Tomaselli and Tomaselli, 2001).

To challenge the monopoly of the SABC in free-to-air broadcasting, a new broadcast television licence was issued in 1998 to the Midi Group, the owners of e.tv, which began operating in October the same year (Berger, 2001). Cross-ownership policies were instituted to stem the development of monopoly structures that resembled the apartheid era dominance of the SABC (Golding-Duffy and Vilakazi, 1998). In addition, more than eighty (80) community radio stations were licensed by the IBA to ensure diversity of the

three broadcast mediums (Langa, 1999) The importance of these changes is that if broadcasting was indeed going to serve "[a]s a project of reconciliation and unification … [and to facilitate the] process of opening-up communication between previously separated communities," then the ownership structures had to change and include all racial groups (Barnett, 2000:54).

Significant broadcast policy changes pertained not only to ownership, but also included various issues like content. In the quest to forge a new identity in a multicultural society, broadcast policy called for the IBA to regulate local content to ensure more local programmes in all of South Africa's eleven official languages (Golding-Duffy and Vilakazi, 1998; Teer-Tomaselli and Tomaselli, 2001). Barnett argues that "[c]ultural policy in the 'new' South Africa is shaped by the overriding goal of 'nation-building', of which language policy is at the core of the nation-building idea" (2000:53). Apartheid relegated all indigenous African languages to secondary status using broadcasting. Thus the new government saw fit to use the very same broadcasting to reverse the pattern.

The regulatory experience from 1993-1997 was used to amend the IBA Act with an Act that would bring together the CODESA agreements and the worldwide industry trends that necessitated policy and regulatory change. The Broadcasting Act was passed in 1999 to achieve many objectives, but its primary goal was, argues Gillwald, to help clarify the relationship between the Minister and the regulator (2001). This was necessary given Minister Naidoo's reaction to the unbundling process and the awarding of Greenfield licences.

Secondly, the Act sought to provide direction regarding satellite licensing and terrestrial broadcasting that is provided by M-Net (Gillwald, 2001). The White Paper that informed the Broadcasting Act "… recognised the convergence of telecomm broadcasting and computing, and contained an entire chapter on converging services … indicating the need for a converged regulator" (Gillwald, 2001: 9). After the passing of the Broadcasting Act, the broadcast and telecoms regulators were merged in the year 2000 to form the Independent Communication Authority of South Africa.

4.5 Telecoms regulation in democratic South Africa

The failure to address telecommunications reform in the CODESA talks meant that the incoming government after the 1994 election would have more say in how telecommunication policy would be shaped. Thus the formation of the telecommunication regulation was largely in the domain of the new ANC government, which facilitated the formulation and implementation of the telecommunications regulatory body.

The process of formulating telecommunications policy reflected the broader policy objectives of the ruling ANC. The then Minister of Posts, Telecommunications and Broadcasting, Pallo Jordan, initiated an open and consultative process policy formulation process that included all stakeholders (Horwitz, 2001; Gillwald, 2001). Initially the "… reform process followed the reconstruction and development programme (RDP), the tripartite alliance's post-apartheid political economic policy framework, in both spirit and in deed" (Horwitz, 2001). The policy objectives were to ensure that the black majority has access to what has been previously denied them, as "[t]he RDP base document … identified affordable access to communications services as a basic need to be targeted" (Gillwald, 2001: 5).

The policy process moved from the Green and White papers and then culminated in the Telecommunications Act of 1996 (Gillwald, 2001; Horwitz, 2001). The process had its controversial moments, Gillwald posits that "[a]s the process moved from the White paper through the 14 drafts of the legislation, some core principles were, however, undermined and some of the carefully constructed faith in the process eroded" (2001: 6). The reasons could be that the country was just about to adopt a new Constitution under the democratic government, and the National Party was about to pull out of the government of national unity. While, on the other hand, the ruling ANC was going through policy changes of its own, and those policies were to directly affect the

regulation of the telecommunication industry. The policy was changed from the Reconstruction and Development Programme (RDP) to Growth, Employment and redistribution (GEAR) policy, which Gillwald argues, is a "… macroeconomic policy which sought to secure the confidence of international business as key to economic growth and employment creation" (2001: 6).

These changes show that the process of forming the telecommunications regulatory body came under intense pressure from various groups that had a lot to gain or to lose from telecommunications policy design. Even though this time around the pressure was not as intense as during the CODESA period, it contained many elements. Hence Horwitz posits that;

> South African telecommunications were affected by the same forces that challenged traditional telecommunications regimes in other nations: the erosion of monopoly boundaries by technology and demand from large corporate users, the interrelated damage to the cross-subsidy system and attacks on the natural monopoly rational (2001: 178).

The ANC government was at a cross roads and was not clear on what direction to take in order to produce a progressive document on the future telecommunication policy, as it tried to respond to local problems that had a long and historical basis. On the other hand it was faced with globalisation challenges coupled with technological developments that necessitated deregulation and powerful multinational companies seeking to explore new markets.

The challenges facing telecommunications policy were noted in the final draft of the White paper. Zlotnick puts these challenges into perspective as he argues;

> The White paper directed that a careful balance had to be struck between the phased introduction of competition in the telecommunication sector with its emphasis on free market on the one hand, and the protection of a regulated monopoly in order to secure access to telecommunications services for disadvantaged persons and underserviced areas on the other hand (1999: 216).

The final draft of the White paper had both elements of GEAR and RDP, as the issue of the free market and competition is a neo-liberal agenda of GEAR, and the concern about

improving access to the previously disadvantaged can be associated with some aspects of RDP.

4.5.1 The telecoms regulator

After a broad and lengthy consultation process, the South African Telecommunication Regulatory Authority, SATRA, was established by the Telecommunication Act of 1996 to regulate telecommunications in the public interest (Mtimde, 2006; White, 2003). Despite the controversy around the policy that was to guide the independent telecoms regulator, Zlotnick argues, the creation of an independent regulator was symbolic because of the separation of functions and powers between service providers and the regulator (1999). This argument is directed at Telkom, which was a *de facto* regulator prior to 1994, as government consulted with it before taking decisions on telecommunications policy.

The new Telecommunication Act and the establishment of SATRA did not curtail the dominance of Telkom in the industry. Instead Telkom's dominance in the new democratic dispensation was enshrined in the Telecommunications Act. As Zlotnick posits;

> The Telecommunications Act entrenches the position of Telkom in a number of ways. Principally, Telkom is deemed to be the holder of licence to provide public switched telecommunications services for a period of 25 years. More significantly, for the first five years of that period Telkom has the exclusive power to provide certain services. This period of exclusivity can be extended by an additional year if Telkom meets certain obligation to install lines in certain areas (1999: 217).

Telkom was given this role with the view that it will improve the installation of the fixed line services to the previously disadvantaged areas that were not a priority in the apartheid era.

Rolling out fixed line services to the black majority was the primary aim of the ANC government, thus a separate structure was created to aid Telkom in ensuring higher telephone density in the black communities. The Universal Service Agency (USA),

which was also set up by the Telecommunications Act, was tasked with facilitating "… the achievement of affordable universal service in South Africa" (Gillwald, 2001: 7). Additionally, given the high cost of telecommunication services "… a universal service fund [was instituted] to subsidise service to the needy people" (Gillwald, 2001: 7).

SATRA, just like the IBA, was beset by institutional issues that related to power relations between the regulator and the government, more especially the Minister of Communication. Telecommunication controversies were much more intense because the ANC government did not want to give away influence and control of SATRA and the telecommunications industry. Firstly, the ANC had realised the economic importance of the sector and the role that it could play in attracting foreign investors to a country that needed the injection of foreign cash (Horwitz, 2001). The economic importance of telecommunications is not an exaggeration, as Gillwald argues; the sector "… has grown from about R7 billion in 1992 to around R43 billion in 2001" (2005: 471).

Secondly, the government had to ensure that there was an increase in the number of black investors in the sector, and the thinking was that this could be achieved if the government played a significant role in regulating the sector (Horwitz, 2001). The second point stemmed from the ANC's "… fear that SATRA might be captured by the old white interest" which had the financial muscle and expertise to achieve that easily (Horwitz, 2001: 52). In all, it seems as though the ANC government thought that giving away full regulatory power to an independent regulator was too risky, as it would not help speed up the process of achieving some of its party objectives.

The above reasoning gave government sufficient reasons to retain regulatory powers in the Department of Communications office. Any regulation made by SATRA had to be approved by the Minister, as the former was tasked with monitoring and enforcing regulatory decisions made by the latter (Gillwald, 2001). Secondly, "[t]he Minister was also responsible, in terms of the Act, for calling for further cellular licence applications and for granting the licence, which would be issued by SATRA" (Gillwald, 2001). The powers vested with the Minister saw the government being critiqued for interference in

regulating telecommunication, especially since the Minister had "… a veto power on all telecommunications regulation" (Mtimde, 2006). Accusations against government interference painted a bleak picture about the role and commitment of the government to ensure that democratic institutions such as SATRA remain free from undue influence and control.

4.6 The converged regulator – ICASA

Towards the end of the 20th century, South Africa was forced by a changing technological environment to follow the worldwide trend in regulating broadcast and telecommunication sectors. Largely because of convergence, the difference between telecommunications and broadcasting were fast eroding, as both could be delivered using digital technology (Sterling, 2000). The trend necessitated a change, whereby the separate telecommunication and broadcast regulators were converged into one regulator (Hitchens, 1997). This was done primarily to develop policy that would ensure regulation was up to date with new technological trends and developments (Sterling, 2000; Hitchens, 1997).

At the dawn of the new millennium, IBA and SATRA were merged to form the Independent Communications Authority of South Africa (ICASA). The merger was informed by the Telecommunications Act that established SATRA, the Constitution Act No. 108 of 1996 reinforcing the IBA Act of 1993, and the Broadcasting Act of 1999 (Mtimde, 2005: 6). Structurally, the merger saw councillors from both IBA and SATRA forming part of the new body to be led by a new CEO that was still to be appointed (Langa, 1999). The middle to lower managers were brought under ICASA, even though there were uncertainties about some being redundant over time and losing their jobs as the merger matured (Langa, 1999). The former chairman of IBA, Mandla Langa, took over as the first chairperson of ICASA. The regulator has had changes in senior personnel, where the new chairperson is now Paris Mashile.

4.7 Conclusion

This chapter has briefly summarised the history of communications regulation in South Africa. It has noted that the Independent Broadcasting Authority (IBA) was established under the IBA Act of 1993 to regulate the broadcast industry (Horwitz, 2001). A couple of years later the South African Telecommunications Regulation Authority (SATRA) was established to regulate the telecommunications industry under the Telecommunication Act of 1996 (Horwitz, 2001). Even though SATRA was meant to function in the mould of the IBA, it lacked independence, largely because of meddling with the policy by the government (Horwitz, 2001). Technological developments led to the merger of both IBA and SATRA to establish a converged regulator, the Independent Communications Authority of South Africa (ICASA).

Chapter Five: Findings

5.1 Introduction

This section presents the findings from the review of the policy documents, interviews, media statements and papers that commented on and intended to influence the institutional independence and mandate of ICASA. These findings will be divided into three broad themes, with each theme comprising various sub-themes. All the themes and sub-themes have been influenced by and can be located in the aims and objectives, rationale, research questions, literature review, interview guides and the policy documents used. The said themes are institutional independence, administrative independence and the funding and financing system of ICASA. These themes are the primary definers of the independence of all Chapter 9 and associated institutions as stated by the Constitutional Court of South Africa. It should be noted that this chapter merely presents the findings which are subjected to rigorous analysis in the subsequent chapter. This approach allows for a clear separation of analysis from a presentation of findings.

5.2 Institutional independence

Institutional independence deals with power relations between the Authority and various interested stakeholders such as the government and the industry. As argued by Justice Langa, Chapter 9 and associated institutions such as ICASA can receive support from various different institutions, but that support should not undermine institutional autonomy of the former. The independence of the Chapter 9 and associated institutions is protected by the Constitution and should be respected by all four estates of the state and other various interested stakeholders.

5.2.1 Constitutional independence

ICASA's independence is enshrined in the Constitution of the Republic of South Africa, as it falls under the category of the Chapter 9 and associated institutions. The significance of these Chapter 9 and associated institutions is their role in society, as they are said to be

state institutions that support Constitutional democracy. Not only are these institutions protected by the Constitution, but they are also expected to enhance the democracy that protects them.

Section 181(2) under Chapter 9 of the Constitution says, "These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice" (RSA Constitution of 1996). Their centrality to democracy requires that they be closely associated with no institutions, individuals and actions that might be harmful to the democracy of the republic (RSA Constitution of 1996). They should also not function directly under any government ministry or department (RSA Constitution of 1996). Rather, the support should flow in the other direction, as Section 181(3) says, "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions" (RSA Constitution of 1996).

The support and protection from other state organs should not subsequently translate into compromise of independence or vulnerability to undue influence. Thus section 181(4) says, "No person or organ of state may interfere with the functioning of these institutions" (RSA Constitution of 1996). Such institutions are only accountable to the Parliament as oversight institutions that are constitutionally and democratically representative (RSA Constitution of 1996). Section 181(4) says, "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year (RSA Constitution of 1996).

The definition of and placement of ICASA under the Chapter 9 and associated institutions has been challenged, more recently by the Department of Communications (DoC) in its submission to the Constitutional review of the Chapter 9 and associated institutions. The DoC argued that;

…there may be no justification for the regulator to be in the Constitution, in particular to be grouped with chapter nine institutions responsible to support democracy in our country. That does not mean that the regulator has no role to play in the nurturing of our democracy, but that by its nature and the ever changing environment within which it operates, it can play an effective role outside the Constitution, in particular chapter nine that accommodates institutions with a particular mandate (Department of Communications, 2006).

The commission led by Professor Asmal was tasked with looking at the success and relevance of these institutions by assessing "… the extent to which society had been transformed and human rights entrenched through the operation of these institutions" (Asmal report, 2007: ix). ICASA was reviewed along with the many other Chapter 9 institutions, and its inclusion led to controversy.

The controversy stems from the fact that ICASA is not mentioned in section 181(1) along with the other Chapter 9 institutions as an institution that supports Constitutional democracy. It is only in section 192 that the Constitution states that, "National legislation must establish an independent Authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society." This has been interpreted as excluding ICASA from receiving the support and protection that these institutions typically receive. The Constitution speaks of a broadcast regulator rather than an electronic communications regulator, which regulates more than broadcasting, including telecommunications, network services and electronic communications.

The Asmal report does note part of these challenges. It argues that;

> A possible explanation for this distinction is that the Constitutional entrenchment of the broadcasting regulator was decided only in 1996, shortly before the passage of the final Constitution. The negotiators debated the proper location in the Constitution of the principle that had been embodied in section 15(2) of the 1993, as the drafters of the 1996 Constitution did not believe that the provision should form part of the Bill of Rights. Nevertheless, it was thought that the protection afforded by section 15(2) of the 1993 Constitution was sufficiently important to require incorporation elsewhere in the Constitution (Asmal report, 2007: 190).

The Executive Director of the Freedom for Expression Institute Prof. Jane Duncan argues that, as much as ICASA is slightly different from the other Chapter 9 institutions, it

should not be removed from that section. She further argues that it is essential for ICASA to be recognized as a constitutionally guaranteed institution and rather than removing the clause from the Constitution, it should be broadened to be relevant with the work done by ICASA (Duncan, 2007: personal interview).

5.2.2 Appointment of councillors

The appointment and removal process of councillors has been amended from the ICASA Act of 2000 to the current process legislated in the ICASA amendment Act of 2006. The amendments largely relate to the replacement of the President's role in the appointment and removal process of councillors by the Minister of Communications. These are the changes that prompted CEO of Media Development and Diversity Agency (MDDA) and ICASA former councillor Lumko Mtimde to state that in relation to recent developments in communications legislation "[t]he problems are not with the ECA but rather the new amendments to the ICASA Act" (Mtimde, 2007: personal interview).

The ever-growing functions of ICASA, which now regulates postal services, have seen an increase in the number of councillors eligible to be appointed to the regulator. In terms of the ICASA Amendment Act of 2006 the number of councillors has been increased to eight in addition to the chairperson, up from the seven councillors legislated in the ICASA Act of 2000. The Minister has the power to appoint the councillors upon the approval of the National Assembly. According to section 7(1) of the ICASA Amendment Act, the process must include;

> (a) participation by the public in the nomination process;
> (b) transparency and openness; and
> (c) the publication of a shortlist of candidates for appointments….

After this process, "The National Assembly must submit to the Minister a list of suitable candidates at least one and a half times the number of councillors" (ICASA Amendment Act of 2006, section 7(1A)). Following this, "The Minister must recommend to the National Assembly, from the list contemplated in subsection (1A), persons whom he or she proposes to appoint to serve on the Council" (ICASA Amendment Act of 2006,

section 7(1B). If the National Assembly is not satisfied with the composition of the list, it may send it back to the Minister to review some names till the National Assembly approves it (ICASA Amendment Act of 2006). The final process can only take place when the National Assembly has approved the list, and then the Minister can proceed to officially appoint the councillors by a notice in the Gazette (ICASA Amendment Act of 2006).

It should be noted that "… beyond requiring that the Minister reconsider his or her selection of appointees, the legislation is silent as to what happens if the Minister and the National Assembly disagree on the Minister's selection of appointees"(Asmal, 2007: 196). Duncan says that the procedure has the potential to delay the process of appointment when the National Assembly and the Minister do not agree on the list (personal interview: 2007). The Minister can decide to get "nasty" and "… withhold his or her list to the very last minute and the send it to the National Assembly, who actually has no choice (but to approve it), because of the pressures of having to appoint the ICASA council" (Duncan, personal interview: 2007).

5.2.3 Removal of councillors

The removal of councillors from office can also be initiated by, or be officially finalised by, the Minister. Councillors can be removed from office for a number of reasons that include misconduct, failure to perform their duties efficiently or missing three consecutive meetings without the council's approval (ICASA Act of 2000). They can also be removed if they are found to hold office outside ICASA or if they have an interest that may interfere with their work or may present conflict of interest with their office (ICASA Act of 2000).

In addition, a councillor may be removed if she/he participates in a council meeting where she/he fails to disclose that she/he might have direct or indirect interest, and that interest might result in him/her not fulfilling council duties in an impartial manner (ICASA Act of 2000). The ICASA Amendment Act adds that the councillor may also be

removed if they do not want to sign the performance agreement contract designed and administered by the Minister.

At the commencement of any hearing or investigation process by the National Assembly the Minister must suspend the councillor in question from office (ICASA Act of 2000). "She/he can only be removed from office if there is 'a finding to that effect by the National Assembly; and the adoption by the National Assembly of a resolution for that councillor's removal from office'" (ICASA Act of 2000, section 8(2)(a)(b)).

Any councillor can voluntarily resign from office after sending three months' written notice to the Minister, and the resignation will take effect at the end of the three month period in which the Minister received the resignation letter (ICASA Amendment Act of 2006; ICASA Act of 2000). Any replacement for the removed or resigned councillor is allowed to occupy that office for the remainder of the term of office, unless the Minister directs that such councillor holds office for a longer period, which may not exceed one subsequent term of four years (ICASA Amendment Act of 2006).

5.2.4 Composition of the council

To enhance the credibility of the council and the Authority, the councillors should be made up of individuals who "are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service" (ICASA Act of 2000, section 5(3)(a)). In a country that has a history of racial and many other forms of segregation, the Act also requires that the council reflect the demographics of society beyond just race (ICASA Act of 2000).

Since ICASA regulates a broad sector that demands a variety of skills, the Act also requires that the council must consist of individuals who are experts and possess qualifications in a number of fields. They should "possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law,

marketing, journalism, entertainment, education, economics, business practice and finance or any other related expertise or qualifications" (ICASA Act of 2000, section 5(3)(b)(ii)).

5.2.5 Council terms of office

The terms of office for the councillors and the chairperson of the council differ. The chairperson of the council may hold office for a period of five years from the date of appointment (ICASA Amendment Act of 2006). The chairperson is eligible for reappointment at the end of the term provided he/she goes through the same process of appointment as new councillors (ICASA Act of 2000). The councillors may hold office for a period of four years, and they may also be reappointed to office at the end of their term provided they go through the same process as new councillors (ICASA Act of 2000).

The term of office is seen by a former ICASA councillor, Libby Lloyd, as sufficient to ensure retention of the skills and expertise required by the Authority (2007: personal interview). Her basis for this view is that continuity can be ensured by the overlapping terms of office, where different councillors come and go at different times. Lloyd further argues that the overlapping terms will ensure that there is institutional memory retained (personal interview: 2007). The Group Human Capital and Regulatory Affairs Manager at Primedia Broadcasting, Khahliso Mochaba, also shares the same sentiments as Lloyd that the term of office is acceptable as it has the possibility of a second term (personal interview 2007).

5.2.6 Council power

The council is responsible for the day-to-day decisions taken by the Authority. The council should not be involved in the managerial issues of the Authority, even though it remains the highest decision-making body (ICASA Act of 2000). The chairperson is expected to provide leadership in the decision-making process (ICASA Act of 2000). In addition, the chairperson is also expected to chair meetings of the council, and at times

he/she may convene special meetings of the council and propose a convenient venue and period (ICASA Act of 2000).

Only special meetings of the council may be determined by the chairperson, general meetings of the council should be determined by the council itself (ICASA Act of 2000). Two or more council members can also write to the chairperson and request a special meeting and the latter must convene such a meeting within seven days, if he/she fails to do so, the councillors may arrange such a meeting on their own (ICASA Act of 2000). A majority of the councillors at any meeting can proceed and take binding decisions, as they are deemed to be a quorum (ICASA Act of 2000). In council meetings decisions are taken by a majority vote (ICASA Act of 2000). Where there is no majority the chairperson must break the deadlock (ICASA Act of 2000). Section 11(4) (b) of ICASA Act of 2000 says, in the event of an equality of votes regarding any matter, the chairperson has a casting vote in addition to his or her deliberative vote.

The council is responsible for the appointment of the managerial/ professional staff to assist in administration duties. The council must appoint a chief executive officer (CEO) to handle administration and financial operations of the Authority (ICASA Amendment Act of 2006). The incumbent is accountable to the council, which has to direct and supervise his/her performance (ICASA Amendment Act of 2006). In case of absence, the CEO may appoint a senior staff member to take on the duties, but may not appoint a councillor (ICASA Amendment Act of 2006). In any event of longer period of absence the council may appoint an acting CEO (ICASA Amendment Act of 2006).

The CEO must assist the council in the appointment of professional staff that are deemed necessary by the council (ICASA Act of 2000). The staff should represent broad sections of society (ICASA Act of 2000). “The Authority may pay to the persons in its employ such remuneration and allowances and provide them with such pension and other employment benefits as are consistent with that paid in the public sector” (ICASA Act of 2000, section 14(3)).

In view of the work that ICASA is doing and the requirement for skills and expertise needed in this area, the Authority has been given the power to appoint experts to assist in performance areas that require special skills (ICASA Amendment Act of 2006). The Minister must approve the appointment of experts who are not citizens of the Republic; the Authority has complete power only when it comes to the appointment of local experts (ICASA Amendment Act of 2006).

5.2.7 Performance management system

The ICASA Amendment Act has introduced a performance management system for the chairperson and the councillors. "The Minister must, in consultation with the National Assembly, establish a performance management system to monitor and evaluate the performance of the chairperson and other councillors" (ICASA Amendment Act of 2006, section 9(1)). After confirmation of appointment, any councillor or chairperson is expected to enter into a performance management agreement with the Minister (ICASA Amendment Act of 2006). When the agreement is signed between the Minister and the councillors, it should set out a performance target that must be reviewed at least once a year.

The performance management system should consist of a standard and consistent procedure to measure the performance of the councillors and the chairperson. The National Assembly is involved in the process in two stages; firstly, it is consulted when the panel constituted by the Minister evaluates the performance of councillors and the chairperson (ICASA Amendment Act of 2006). Secondly, "The panel contemplated in subsection (4) must, after an evaluation of the chairperson or other councillor, submit a report to the National Assembly for consideration."

5.2.8 ICASA and industry relations

There is no specific policy that dictates how the Authority and the industry should relate. The relationship is largely confined to the hearings processes conducted by ICASA before final regulatory decisions are taken. Section 4(4) of the ICASA Amendment Act

requires the Authority to gazette any intentions to regulate and then invite interested parties to make written representations. After receiving the representations, the Authority must inform the Minister and then conduct public hearings in respect of draft regulations (ICASA Amendment Act of 2006). The interested parties may vary from the industry players to NGOs and many other groups.

Chairperson of the National Association of Broadcasters (NAB), Dan Moyane, says that relations between ICASA and industry players from broadcasting are healthy, as they have not found any antagonism from ICASA and he hopes that ICASA has not experienced any antagonism from them (personal interview: 2007). He further states;

> ICASA is open; you can get in touch with whoever you so wish to talk to in terms of whatever…. ICASA has very recently accepted that you can contact them about any particular issue even before they make a decision…. ICASA has [also] been battling with license conditions under EC Act and they have consulted us as NAB. They told us their problems, [and] then we shared ideas on what could be the solution. It has been a healthy engagement on both sides (Moyane, 2007: personal interview).

Pakamile Pongwana from Vodacom believes that the relationship between ICASA and the industry is improving. "… I know that [previously] it was actually an antagonistic relationship. It was a relationship that [was based on the terms that] 'You are regulated, I am the regulator, and you do what I say'" (Pongwana, 2007: personal interview). Pongwana also feels that at times the regulator has been antagonistic in its regulatory approach, and that is not desirable when the regulator wants to cultivate and maintain good relations with the sector it is regulating (2007: personal interview). However he still emphasised that as much as the relationship is not ideal, it is gradually developing and moving in the right direction (Pongwana, 2007: personal interview).

The sometimes friendly and sometimes antagonistic relation between ICASA and the industry is also confirmed by the Authority's councillor Tracy Cohen. Her argument is that;

> … you will never have one kind of relationship (as) in many ways we have a lot of cooperation from the industry, and in many other ways we have a lot of resistance…. It depends on issues and processes (Cohen, 2007: personal interview).

Resistance comes from the fact that the industry always wants to have an influence over policy, as they want to serve their narrow partisan interests (Cohen, 2007: personal interview).

5.3 Policymaking powers

The government's Department of Communication (DoC) is responsible for the drafting of national communications policy. This arrangement has existed from the days of IBA and SATRA, where the government, through the DoC, formulated policies that were expected to be implemented by the relevant regulatory authorities.

Entrusting policymaking powers to the government is not unique to South Africa; it is a worldwide trend that is now seen as a norm. One of the reasons for accepting the government's policy making powers is because of the argument that the independence of regulatory institutions does not include the power to formulate policy (Cohen, 2003). Policymaking powers should be left to the government, which is deemed to act in the interest of the industry and the public (Cohen, 2003). Rather than granting policy making powers, the independence of Authorities should be measured by the independence to implement government national policy in that specific sector (Cohen, 2003).

Section 3(1) of the Electronic Communication (EC) Act of 2005 affirms the role of the Minister of Communications in regulation, as it says, "The Minister may make policies on matters of national policy applicable to the ICT sector, consistent with this Act and of the related legislation …." Subsection 3(2) of the Act states that, "The Minister may also issue policy directions to the Authority" (EC Act of 2005). However those policy directives should not interfere with the administration duties of the Authority, as section 3(3) says, "No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a license, except as permitted in terms of this Act" (EC Act of 2005).

The policy making process is intended to be open and transparent and also take into consideration the views of the relevant and interested stakeholders. In issuing policy directions the Minister;

> (a) must consult the Authority; and
> (b) must, in order to obtain the views of the interested persons, publish the text of such policy direction in the Gazette-
> (i) declaring his or her intention to issue the policy direction.
> (ii) inviting persons to submit written submissions in relation to the policy direction in the manner specified in such notice in not less than 30 days from the date of notice.
> (c) must publish a final version of the policy direction in the Gazette (EC Act of 2005).

The Authority's role in the policy making process is largely limited to making recommendations to the Minister regarding any policy published in the Gazette. The Authority's influence on policy and its relationship with the department of communication seems to be based on many processes of engagement and sharing of ideas. Cohen puts it that, other than giving recommendations, ICASA has bilateral meetings with the Director General in the department and the Minister approximately three or four times a year, and these meetings are always formalised (2007).

Beyond making recommendations regarding Ministerial policy directives, the Authority is expected to perform its function of implementing national policy. As section 3(4) of the EC Act says, "The Authority, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)."

5.4 Administrative independence

Administrative independence is the second pointer that indicates whether the regulatory agency is independent or not. This aspect primarily pertains to the everyday decisions that the Authority takes in regulating the sector. It includes the awarding of licenses, renewal or amendment of licenses without being influenced by the industry or the

government. Administrative independence can only be realised when the council has the authority to approve everyday regulatory decisions.

5.4.1 Regulatory supremacy

The regulation of broadcasting and telecommunication under the ICASA Act has been separated and conducted on different levels of independence. When it comes to broadcast regulation, ICASA has had, and continues to have, the final word on almost all regulatory decisions taken (EC Act of 2005). Prior to the EC Act of 2005, telecoms regulation was done in conjunction with the Minister, where, for example, licensing decisions taken by ICASA had to be approved by the Minister, who in effect had the ultimate decision on regulation (Horwitz and Currie, 2007).

Mochaba finds the structural setup of the converged regulator problematic in the sense that when dealing with broadcasting there is independence, yet on the other hand there is lack of independence when dealing with telecoms (2007, personal interview). She further states that this is unusual, as she believes that ICASA is supposed to have one operational policy harmonised by national policy and legislation that appreciates convergence (Mochaba, 2007: personal interview).

It should be borne in mind that this arrangement is a result of the different levels of administrative independence between ICASA's predecessors, the IBA and SATRA. The arrangement has continued to exist despite section 3(3) of ICASA Act of 2000 stating that, "The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice." The Act also goes on to state that, "The Authority must function without any political or commercial interference" (ICASA Act of 2000, section 3(4)).

The regulation of broadcasting under the IBA was independent of outside influence from the early days. The history of broadcasting and the conditions under which negotiations for broadcast policy formulation took place ensured that the envisaged regulator had the

independence to regulate the sector free of undue influence (Horwitz, 2001). Independence of the IBA was attainable because, "… no one was in power and all parties' objectives were concerned with safeguarding their rights and curtailing those of a government which no one was guaranteed of being part at that time" (Gillwald, 2003: 4).

The objectives of the IBA Act emphasised the independence of the Authority. The IBA was legislated:

> To provide for the regulation of broadcasting activities in the public interest; for that purpose to establish a juristic person to be known as the Independent Broadcasting Authority which shall function wholly independently of State, governmental and party political influences and free from political or other bias or interference; to provide for the representation of that Authority by and its functioning through a council, and to define the powers, functions and duties of that Authority; to provide for the devolution of powers relating to the administration, management, planning and use of the broadcasting services frequency bands to the said Authority; and to provide for incidental matters (IBA Act No. 53 of 1993).

What further entrenched the IBA's independence was the Constitutional guarantee of its independence under the Chapter 9 institutions. However, the reference to only broadcast regulation has become a controversial issue, as mentioned above. The argument is whether ICASA should be classified as one of the Chapter 9 institutions or not, as it regulates broadcast and telecommunication, while the Constitution speaks only of a broadcast regulator.

The telecommunications regulator never received the complete administrative independence and Constitutional protection that the IBA received. Many reasons have been detailed above as to why the telecoms regulator, SATRA, did not have the kind of regulatory independence that the IBA had. The primary reason and the most important one is that the ruling ANC realised the economic importance of this sector and wanted the government to retain a level of control over regulation, in order to use the sector to drive economic growth opportunities offered by the burgeoning industry (Horwitz, 2001).

The regulation of telecommunications under SATRA took place under the concept known as regulatory dualism, but in this case the Minister retained ultimate control. Thus

Cohen (2003: 85) argues that "… the SA (telecoms) regulatory framework presents a case for agency capture – *by government*, rather than industry … creating a situation in which the regulator spends its youthful phase trying to free itself from the control legislative provisions impose". This argument is informed by the fact that regulatory dualism proposed by the Telecommunications Act did not empower the Authority, but gave more power to the Minister of Communications. Horwitz and Currie (2007: 454) noted that;

> …the Telecommunications Act gave the Minister the responsibility for issuing Telkom licenses and determining whether and when various parts of the sector would be open to competition. The Act also gave the Minister power over interconnection policy and Telkom tariffs for an initial 3-year period. The Minister retained the power to invite and endorse applications for major licenses and to approve certain regulations drafted by the Regulator. The Act empowered the Regulator to assess license bids and make recommendations to the Minister, but it could not award a license – the Regulator merely "issued" a license on approval by the Minister. Only in the case of non-restricted licenses, such as VANS and PTNs, could the Regulator take a decision on its own. The Minister may issue policy directions. The Minister does not have the power to *issue* regulations, but [he/]she retains the power to *approve* certain regulations, without which the regulations cannot be promulgated.

The government's involvement and role in the regulation of telecoms was that of a policymaker, regulator and a major role player as it still retained 70 per cent ownership of Telkom. The government's occupation of these three roles has been described as a conflict of interest by many in the industry (Markovitz, Vos, Moyane, 2007: personal interviews). Markovitz believes that the government cannot justify the many hats it is wearing in the regulation of telecoms (2007: personal interview). He further argues that many commentators and experts have stated that;

> …to be a policy maker and a shareholder is a fundamental conflict of interest. On the one hand you have to think as a policymaker what is good for the people of South Africa, what is good for the market as a whole…. As a shareholder you are concerned with the narrow interest of shareholder returns and that is fine. [However] to be both is a problem … (Markovitz, 2007: personal interview).

The critique also goes to government's conflicting interests and objectives, as its policy outcomes ended up showing that Telkom shareholders received huge investment returns at the expense of the poor masses. Vos posits;

> An obvious emotional disparity can be drawn between the benefits accrued by recently-empowered Telkom shareholders compared with, for instance, the individual benefits of Telkom's outreach since liberation to enable the majority of apartheid disabled learners and educators (2007: email interview).

Vos also argues that telecommunications policy was not really meant to benefit the masses, but largely to protect "Telkom [as it] was being groomed for sale to the well-connected and one only has to 'follow the money' and the subsequent deals to see the veracity of this contention" (2007: email interview).

On a slightly different tune from the above comments, Cohen says;

> I think a conflict of interest remains at a structural level…. I don't have a problem with government involvement, but I do think that the division that holds the shares on behalf of government should not be the division that makes the policy…. I don't think you should have policymaking and ownership in the same portfolio (2007: personal interview).

It is only since the promulgation of the EC Act that ICASA is no longer expected to have its telecommunication regulatory decisions approved by the Minister. This move was firstly proposed in the failed convergence Bill of 2005 that was turned back by the President. However, looking at submissions regarding the Convergence Bill, it is a move that is very much welcomed. In its comments on the Convergence Bill, the Wits Link Centre stated that they approve "... the removal of the veto powers of the Minister on regulations prescribed by ICASA. Ministerial approval of regulations has created regulatory bottlenecks in the past that have undermined the effectiveness of the regulator" (Gillwald, 2003).

5.4.2 Ministerial Authority over regulations

Even though the Minister no longer has to approve telecommunication regulation, she still retains power in regulating some services. The remaining ministerial regulations are largely contained in the new EC Act, which has been praised for giving ICASA sufficient powers and huge responsibility of ensuring smooth transition towards digitisation of the broadcast and telecoms sectors (Vos, 2007: email interview). However there have been

questions raised about the Act as well, as Cohen says "… the Act is not clear, … [it] is very messy and contradictory in some places and it requires a lot of analysis to be implemented correctly" (2007: personal interview).

The EC Act gives the Minister power to be involved in and also to control the regulation of the radio frequency spectrum.

> The Minister must approve the national radio frequency plan developed by the Authority, which must set out the specific frequency designated for use by particular types of services, taking into account the radio frequency bands allocated to the security services (section 34 (2) of EC Act of 2005).

The Minister's role is re-emphasised in section 34(8), which state that after the hearings "… the Authority must forward the national radio frequency plan to the Minister for approval" (EC Act of 2005). The plan can only be made official and be published in the Gazette once the Minister has approved it; if the Minister is not happy with the plan she/he can send it back for further consultation (EC Act of 2005).

Duncan is concerned about the overarching powers given to the Minister, as she feels that "… the Minister may be tempted to drop the frequency plan in a way that privileges…" state parastatals (2007: personal interview). The Minister also represents the country in international forums, including the International Telecommunication Union. (EC Act of 2005). The Authority still retains power in so far as administering and managing the use and licensing of the radio frequency spectrum (EC Act of 2005).

The Minister's involvement in regulatory activities is extended to infrastructural and network licensing. This is seen as problematic, because infrastructural regulation determines the structure of the market (Gillwald, 2006). Section 21(1) of EC Act of 2005 states that;

> The Minister must, in consultation with the Minister of Provincial and Local Government, the Minister of Land Affairs, the Minister of Environmental Affairs, the Authority and other relevant institutions, develop guidelines for the rapid deployment and provisioning of electronic communications facilities.

On the other hand, while the Authority has the power to grant network licences, it can only do so in line with the policy or policy directives from the Minister (EC Act 2005).

5.5 Funding and financing

This section on funding and financing looks at how ICASA is financed and what happens to the licence fees that the Authority collects. The funding and financing system of any regulator is important in determining the independence and effectiveness of that regulator. The Asmal report on Chapter 9 institutions acknowledges this argument, as it points out that "adequate funding is a prerequisite for an effective and independent regulatory agency" (2007: 1999).

The funding and financing system of ICASA has gone through numerous legislative changes that have seen the Minister's role entrenched in the process. The ICASA amendment Act section 16(1) says that, "the Authority may receive money determined in any other manner as may be agreed between the Minister and the Minister of Finance and approved by Cabinet." What has not been clarified in this clause is whether ICASA should be financed by money from licence fees, the government through Parliament, directly from the Department of Communication budget or any other way that is different from these. It is only in the ICASA Act where there is clarity that the "The Authority is financed from money appropriated by Parliament" (ICASA Act of 2000, section 15(1)). The other source of revenue which is not significant is the "… interest earned on cash balances" (Asmal, 20007: 200).

The CEO of the Authority is charged with being the accounting officer as stated in "… section 36 of the Public Finance Management Act, 1999 (Act No.1 of 1999)…" (ICASA Act of 2000, section 15(2)). He/she has to manage all the finances of the institution and has to account to the council regarding all the finances of the Authority including the licence fees obtained from the regulatees (ICASA Act of 2000).

ICASA may not use any money it gets from licence fees without the approval of the Minister. "All revenue received by the Authority in a manner other than in accordance with subsection (1) must be paid into the National Revenue Fund within 30 days after receipt of such revenue" (ICASA Act of 2000, section 15(3)). "The Authority's budget allocation takes the form of direct transfers from the Department of Communications" (Asmal, 2007: 200).

ICASA has to submit financial reports to the Minister at the end of every financial year detailing income and expenditure (ICASA Act of 2000). The financial report is part of the annual report that the Authority has to submit to the Minister, who will then table it to Parliament on behalf of the Authority (ICASA Act of 2000). The Minister in consultation with the Minister of Finance also determines the remuneration packages and allowances of the chairperson and councillors (ICASA Act of 2000).

The funding and financing system of ICASA has been criticised by many commentators in the academic arena and the industry (Vos, Pongwana, Mhlongo and Mochaba, 2007: personal interviews). The criticism is largely related to the Minister's involvement in the budget allocation process and the inadequate funding that ICASA receives from government. Vos and Mochaba share similar views: that the current funding and financing of ICASA is a huge problem that inhibits the Authority's activities and effective regulation (Vos, 2007: email interview; Mochaba, 2007: personal interview).

The inadequate funding of ICASA has recently been seriously questioned because of the added responsibilities brought about by the EC Act and the increasing number of councillors (Asmal, 2007). This growth has led to the Authority's budget deficit, as expenditure far outstrips government allocation (Asmal, 2007). The sad part about ICASA's budget is that;

> No additional financial resources have been allocated to the regulator, despite increasing the size of Council, and adding enormous procedural and substantive demands on policy and licensing processes, requiring the establishment of an entirely new ex ante framework for regulating competition, absorbing the Postal regulator from the Department of

> Communications and generally on the organisational business practices of the regulator (Gillwald, 2007: 10).

In view of the above, some commentators do not necessarily discard the view that funding and financing can be a hindering factor in the independence of regulatory agencies, but believe that funding has more impact on effectiveness rather than independence. Mtimde says that;

> Whereas there is no direct link to the current model and the hindering thereof of independence, there are perceptions to that effect. Most importantly, the current model does not enable the Regulator to be adequately resourced in order to attend to the challenges of the industry as they present themselves. As a result the Regulator may lag behind in terms of its ability to be on top of developments in the industry. Therefore, the current funding model is a factor in terms of adequately resourcing the Authority though not much of a factor affecting independence per se (2007: personal interview).

This observation is also shared by Cohen as she argues that,

> … lack of funding does not always translate into lack of independence. So I think, yes more resources would make us more effective. I don't know that it would make us more or less independent. I think funding needs to be linked to effectiveness not necessarily [to] independence. (Maybe the thinking is that) … if you don't have resources, you can't do your job effectively, you become less credible, less useful and therefore your independence will be compromised … (2007: personal interview).

Inadequate funding has also been linked to lack of highly skilled staff and experts at ICASA. The Authority regulates an industry that has a shortage of experts, and the lack of funding for it has not helped its situation, as it cannot afford to pay market-related salaries that would help to retain highly skilled staff (Moyane, 2007: personal interview).

Chapter Six: Analysis

6.1 Introduction

This section primarily deals with interpreting and analysing the findings of this study. It also answers the research questions and clarifies comments and issues raised in the aims and objective, rationale, literature review and the theoretical framework**.** The themes employed are primarily derived from and are a continuation of the findings section and the other sections of the study.

The first theme deals with the role of the independent ICASA amidst the institutional challenges that face the Authority. Questions around the inclusion of ICASA under the Chapter 9 and associated institutions have the potential to compromise the independent role of the Authority if they are not addressed. Institutional challenges also include the questionable role of the Minister in various institutional activities such as the appointment and removal of councillors.

The second theme of funding and financing is central to the institutional independence and effectiveness of ICASA. Inadequate funding and financing can affect the capacity of the Authority to attract the necessary and desired professional labour. In a sector that offers lucrative remuneration packages, lack of funding can also lead to the Authority losing staff to the industry and subsequently being "out regulated" or, in worse circumstances, being captured by the market.

Administrative independence, which is the last of the three themes, is important as it deals with the everyday regulatory process. The Authority has regulatory supremacy in most decisions; it is only in a few instances like the National Radio Frequency Plan and infrastructural regulation, where the Minister must approve decisions taken or initiate the whole process. The main problem is in the very few regulatory instances where the Minister is involved, as the Authority has to regulate independently of undue influence, (Duncan, 2007: personal interview).

6.2 The role of "independent" ICASA

The seemingly general consensus by interviewees around the importance of ICASA is that it has a meaningful role to play in regulating a sector that has recently been liberalised. Even in liberalised markets, social and economic regulation is still important, as it can be used to counterbalance the negative factors associated with market failure (Keane, 1991). The issues include the regulation of content, prices and the general market structure in the public interest (Feintuck, 1999). When the market caters for the select few, desirable regulatory measures must be used to redress the wrongs and cater for the broader public interest (Hills, 2003; Hoynes and Croteau, 2001).

The broadcasting sector, which is the main outlet for cultural and political expression, should be regulated to ensure diversity of views and content that is accessible in all forms to the broader society (Moyane, 2007: personal interview). The Authority's role in the telecoms sector is also essential, since it regulates a sector dominated by the government-owned Telkom (Markowitz, 2007 personal interview). The new legislation has further liberalised the sector without questioning the relevance of regulation, in the process raising questions of what to regulate and when to regulate (Pongwana, personal interview: 2007).

Advocates of market regulation have questioned the necessity of regulation in an era where digitisation has brought a solution to the problem of scarcity of frequency (Siune, 1998). Yet is seems there is a problematic issue that these advocates did not really look into, and that is the ongoing mergers and acquisitions that have resulted in concentration and monopoly (McChesney, 2000; 2003 and 2004). Even in South Africa there has been a growing pattern of mergers and acquisitions leading to the concentration of media assets into the hands of a few media conglomerates such as Naspers, Avusa (formerly known as Johncom), Kagiso Media and Primedia.

Conglomeration of the media has shown that there is still a need to regulate the communications sector in South Africa. Vos argues that in light of the new technologies, ICASA's role is not diminished but is broadened (2007: personal interview). She states that;

> ICASA must play a crucial role in helping to establish South Africa as an advanced/advancing Information Society. [In addition] ICASA has many other spectrum issues to regulate (ie: allocating spectrum for a single network with national coverage – Digital Mobile Broadcasting Services) which is also envisaged by Government. It now has to publish frequency spectrum bands and also make spectrum available for envisaged mobile services and disaster management. ICASA will [also] have to provide opportunities for ICT expansion and ensure that regulation helps and not hinders development throughout the ICT sector (Vos, email interview: 2007).

In view of the challenges faced by ICASA it is thus important to ensure that the Authority has all the necessary independence required to be effective and to function without political and economic influence. As Gillwald (2006: 4) posits, "[t]he independence of the regulator is inextricably linked to and dependent on the structures which underpin the institutional arrangements and the environment in which it operates." ICASA can be regarded as an independent regulatory institution if it is proven to be "… a body with its own powers and responsibilities given under public law, which is organisationally separated from ministries and is neither directly elected nor managed by elected officials [or market players]" (Thatcher 2002: 956).

6.3 Institutional challenges

Although a high measure of Constitutional independence for ICASA has been guaranteed, this could be further improved. Questions around the inclusion of the Authority as one of the Chapter 9 and associated institutions can be avoided if ICASA is placed in its rightful place among other Chapter 9 institutions in section 181 of the Constitution. As suggested earlier, Placing ICASA under section 181 of the Constitution will further enhance the independence of the Authority. Putting it as one of the Chapter 9 and associated institutions has to a certain extent ensured "… that a certain standard of independence and accountability has been developed in relation to state institutions that exist outside the sphere of government" (Duncan, 2007: personal interview).

Broadening section 192 of the Constitution to include the converged regulator is a good idea, but is not adequate to deal with the controversy surrounding the Constitutional independence of ICASA. The reasons given for the late inclusion of the broadcast regulator in the Constitution and its placement in section 192 of the Constitution should be expanded and used as the basis for including the converged regulator under section 181 of the Constitution. Since ICASA is now a converged regulatory body, it also regulates broadcasting, a sector that has an enormous role to play in strengthening democracy. That role might not be as direct as the role of the other Chapter 9 institutions, but it is very significant and central to sustaining democracy in South Africa (Duncan, 2007: personal interview).

Among its many roles, the regulator is expected to regulate content and ownership in order to ensure a diversity of views and players. In this young South African democracy, regulating content and ownership is even more important when considering that prior to democracy not all people were allowed to participate in the political and economic activities of the country. Thus an open and diverse media environment, guaranteed by an independent Authority, should be able to provide valuable information that can increase the level of debate, where all stakeholders are equally aware of what is happening in and around them, for the good of society (Curran, 1991).

Curran furthers his argument and puts it more succinctly when he argues that, "[t]he media …[must] provide a channel of communication between government and governed, which helps society to clarify its objectives, formulate policy, co-ordinate activity and manage itself" (2000: 127). This goes to show that the media is central to the democratic governance of any state that perceives itself to be democratic. If the media operates in an environment where it can fully maximize its role without undue influence and control, society will become positively involved in governance matters through media's holistic reflection of socio-economic and political issues.

6.3.1 Unconstitutional role of the Minister

The Minister of Communication's central role in institutional activities that shape and influence the structural setup of the Authority is controversial and undesirable. The most worrying development is that the Minister's participation in the institutional activities of ICASA were limited in the ICASA Act of 2000, and this only changed with the ICASA Amendment Act of 2006 and the Electronic Communications Act of 2005. Any process that involves the appointment and removal of the councillors is either initiated by or has to pass through the Minister (EC Act of 2005). Such involvement has the potential to be exercised negatively, as a subtle way of using legislative powers to usurp regulatory control by undermining the Authority's independence.

The appointment and removal process of councillors "… is claimed to be the most visible and effective formal control" of regulatory agencies (Thatcher, 2002: 958). The danger in giving such powers to individuals is that at worst they can be used to "… select (appoint) political cronies" (Thatcher, 2002: 958). Thus the dangers of giving too much influence over appointment and removal to the Minister can also prove to be detrimental to the independence of ICASA if she/he decides to abuse those powers and appoint partisan individuals. If this happens it will not be good for the Authority's credibility, since it is already experiencing lack of credibility, as its independence is somehow questioned (Asmal, 2007).

Furthermore, the involvement of the Minister in the appointment and removal process of councillors can be deemed unconstitutional if the inclusion of ICASA under Chapter 9 institutions is not questioned. The Constitution speaks of the role of the President in the appointment of key decision-makers of all Chapter 9 institutions. As one of the Chapter 9 and associated institutions, the President should be involved in the appointment of ICASA councillors and should not delegate those powers to the Minister.

The same Constitutional problem also applies to the removal of councillors from office, a process which can also be initiated by, or be officially completed by, the Minister. Section 194(3) of the Constitution of the Republic states that;

> The President
>
> (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
> (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

The Minister's central role in the process thus becomes undesirable and unconstitutional.

The Constitutional review committee of the Chapter 9 and associated institutions notes that the current appointment process of councillors is undesirable (Asmal, 2007). The report recommends that, "[t]he appointment procedures for councillors be reviewed to support and assert the Authority's independence further" (Asmal, 2007: 203). The report also calls for reverting back to the original inclusion of the President's role in the appointment process, as it states, "[t]he President on the recommendation of the National Assembly, should appoint the councillors" (Asmal, 2007: 203). The danger with the current process is that the Minister's central role "… in this respect could be seen as infringing on the independence of …" the Authority (Asmal, 2007: 23).

Lack of clarity from the EC Act as to what happens when the Minister and the National Assembly do not agree on the list does not aid the effectiveness and independence of the appointment process. The process needs to be precise and concise to avoid controversies that may arise if the Minister and the National Assembly have strongly opposing views about the proposed list. Any method used in addressing the negative perception about the Authority's independence can benefit from the meticulous and open process that gives sufficient power to the multiparty National Assembly.

The National Assembly should also be central to guiding the performance management system established by the Minister to monitor and evaluate the performance of the councillors. The way the system is envisaged is unconstitutional and usurps the oversight

role of Parliament. Section 181(4) of the Constitution is clear in that, "These institutions (referring to Chapter 9 institutions) are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year" (RSA Constitution of 1996). However, the way that the performance management system has been established means that the Authority must report to the Minister instead of Parliament.

Even though the National Assembly is involved in the performance management system, it should control the process and consult with the Minister for advice rather than use the present system. The danger of allowing the council to report to the Minister is that the process can be used to reward or punish those councillors who are perceived to be agreeing and disagreeing with the Minister on certain decisions. This is likely to be the case in this context, as the history of relations between the Authority and the Minister shows that there have been disagreements, more especially over telecoms regulation. The notable disagreement between the Minister and the Authority involved the awarding of the second national operator (SNO) licence, where the former wanted two licences awarded instead of one (Hlengani, 2005). These disagreements and other factors have thus far deprived the telecoms sector of a competitor for Telkom as there is a continuing delay of awarding of the SNO licence.

Alternatively, instead of accounting directly to the Minister, the Authority must report to the National Assembly as the Constitution dictates or the Parliamentary Portfolio Committee on Communications, as it is a multiparty structure. The involvement of the Portfolio Committee could help deal with perception issues, and the positive factor could be that the committee has "… always enjoyed a constructive relationship with the Regulator" (Vos, 2007: email interview).

6.3.2 ICASA and industry relations

Relations between the Authority and the sector it regulates are largely confined to procedural issues when it comes to regulatory decisions. Currently there is nothing to suggest that ICASA has been captured by the market, as regulatory decisions have not

been overtly favouring the sector. Instead, as many interviewees have stated, the regulatory body is free of undue influence from the sector (Mhlongo, Mochaba and Moyane, 2007: personal interview). Any influence that the sector has on the Authority is mainly through formal hearings (Mhlongo, Mochaba and Moyane, 2007: personal interview).

The Authority has managed to exert itself in the sector and has regulated with few major difficulties from the sector. The major challenge for the Authority remains its relations with Telkom, as there have been instances where the latter has tried to intimidate the former as it has the financial power to sustain long litigation processes that might result from strong disagreements (Horwitz and Currie, 2007). A notorious example is when Telkom refused to abide by the Authority's price regulation and instead opted to go to court. Fearing long litigation that the Authority could not sustain, the latter reached an out of court settlement with Telkom on the operator's terms (Horwitz and Currie, 2007). Such incidences will prove to be a stern challenge to relations between ICASA and the sector, especially when it comes to major decisions that are challenged in the court of law. The sector might try to utilize its financial power to exploit the underfunded Authority and push for regulatory decisions in their favour.

Relations between Telkom and the government have also made it difficult for ICASA to regulate telecommunications independently and effectively. The main problem is that the DoC has an interest in the healthy and increasing share price of Telkom, and on the other hand has to formulate policy that will ensure that the sector is viable (Horwitz and Currie, 2007). The protection of share prices is the winner in this instance, as an agreement, signed prior to the Telecommunications Act states that Telkom and Thintana Communications, the black empowerment shareholders, "… would [not] be compelled to follow any legislation that violated the Shareholder's agreement" (Horwitz and Currie, 2007). This agreement was not made public, but it can be assumed that it pertained to issues that related to entrenching the incumbent's monopoly in the sector, and this was bound to clash with the regulator's mandate (Horwitz and Currie, 2007). There is no clarity as to whether this agreement is still in force, but the close relations between

Telkom and the government and the latter's role in the sector are making it difficult for the Authority to regulate independently and effectively.

An example of the regulatory difficulties that have been brought about by this unhealthy relationship between Telkom and government relate to the price saga. In realising that telecoms prices were rising, ICASA ordered Telkom to set the price cap productivity at 3 per cent against the 1.5 per cent that was set by the Minister of Communications in 1997 (Horwitz and Currie, 2007). The Minister sided with Telkom on this issue as it did not approve the regulation till the regulator abided by 1.5 per cent (Horwitz and Currie, 2007). Even though telecoms regulations are no longer approved by the Minister, this example shows that relations between ICASA and industry players like Telkom will always be affected by the government's many roles that hinder independent and effective regulation by the Authority.

6.3.2.1 Averting revolving door

The revolving door is the constant movement of staff between the sector and the regulatory body (Sterling et al., 2006). The movement is generally unidirectional, from the regulatory body to the sector, where regulators hope to achieve better remuneration packages (Sterling et al., 2006). The negative consequences of such developments are that the workforce begins to regulate in a manner that favours the industry (Sterling et al., 2006). Thus the revolving door symbolises the beginning of a systematic capture of the Authority by the industry. The best way to deal with the revolving door syndrome is to contractually discourage key decision-makers and professional staff from leaving the Authority and moving straight into the industry.

Even though the study did not look into a specific number of ICASA employees leaving the Authority to the sector and vice versa, there seems to be no significant number of key decision-makers rotating between the sector and the Authority on a constant basis. However, a cooling-off period is an ideal system that can be employed to avert any development of the revolving door pattern. This is a point that is also made by Mhlongo who argues that;

> [s]ometimes there might be problems when one moves into a company that he [or she] has licensed. People might begin to clear their path while still working for ICASA, by regulating favourably on behalf of some organisations. A cooling-off period is a good idea, but it does not guarantee that someone has not engaged in activities that will favour specific companies (2007: personal interview).

Of the high profile employees that have left ICASA lately, very few have gone directly to the industry to work for an organisation that is regulated by the Authority in a position that requires him/her to deal with ICASA directly.

The closest that the revolving door issue has come in to play, is when the former chairperson of ICASA, Mandla Langa joined Vodacom. This move has been defended on the basis that he is consulting for Vodacom within the Southern African region, but outside ICASA's jurisdiction (Pongwana, 2007: personal interview). Even though former councillors Libby Lloyd and Lumko Mtimde have left ICASA, they did not go directly to the private sector. Mtimde is the CEO of MDDA, while Loyd is an independent consultant. The recent move in the opposite direction has been that of former Cell-C Executive Head of Regulatory Affairs, Karabo Motlana, who is now the CEO of ICASA.

The cooling-off period is important as it will prevent situations like that of Markowitz, who, immediately after leaving his post as special adviser to Mandla Langa, joined Primedia as director of convergence (Bloom, 2005). Markowitz defended his move and argued that "[t]here are no restraints in employment contracts at ICASA at the moment. As an advisor on contract for six years, I was always free to seek employment elsewhere" (Bloom, 2005). Nevertheless, the cooling-off period will need to be implemented along with major changes in the funding of ICASA.

The changes envisaged by Vos and Cohen are slightly different, but all speak to the necessity of the cooling-off period. Vos argues that;

> …there should not be a golden turnstile through which they (employees) exit ICASA with all manner of confidential industry knowledge "up their sleeves" (in a manner of speaking) that they have had at their disposal and go straight in to the very industry they previously regulated (for the knowledge they possess) for very large pay packets! This is blatantly wrong. There should be a "cooling-off" period and it is for this reason that Councillors

> need to be appropriately remunerated (while serving on ICASA) to allow for this (2007: email interview).

Cohen has no problem with the cooling-off period as long as it will be appropriately funded. Thus she argues;

> I think ideally there should be a cooling-off period, but I think that market realities … (make it difficult). Given that we have all worked here at subsidised rate, way below what we would be earning in the industry, it's very difficult for us to fund our own cooling-off period. I think that it would be useful if we had six months cooling-off period, but there should be mechanisms from government to contribute to your income during that period or a sort of severance package or something. I think it is a lot to ask people who have done public service to now say, 'you have to go beyond that for six months or a year without an income' (Cohen, 2007: personal interview).

The seemingly ideal relations between ICASA and the industry can be challenged by the revolving door phenomenon if the lack of a cooling-off period persists and the remuneration is not improved to competitive and market-related standards. Improved financing for the Authority can ensure that it is not "out regulated" by the industry. It will ensure that the Authority can sustain lengthy and expensive litigation processes that might result in regulatory decisions being challenged by major industry players like Telkom and can stem the high staff turnover to ensure that the Authority can regulate effectively.

6.4 Regulatory interference

The independence of regulatory agencies should also be marked by the ability to regulate independently from political and economic influence. Loss of regulatory power means that the Authority does nothing, but simply endorses whatever decision taken by those who control the regulatory process. ICASA has the powers to regulate the sector, but there are instances where its powers are curtailed due to authority given to the Minister of Communication. The curtailment of these powers is unconstitutional, as the Authority has to regulate the sector without undue economic and political influence. The Constitutional Court affirmed the administrative independence of all Chapter 9 institutions including ICASA.

In the case of *New National Party v Government of the Republic of South Africa and others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999), the Constitutional Court reaffirmed the importance of administrative independence of the Chapter 9 institutions. The ruling stated that administrative independence

> … implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness."

The Constitution states that the role of the executive is to assist the Chapter 9 institutions to fulfil their mandate, but not to interfere in the every day administrative function of the institution.

The recent EC Act of 2005 has given the Authority the necessary, but perhaps not sufficient, independence it needs in regulatory powers. The Act has brought to an end dual regulation by removing the controversial the role of the Minister in approving telecoms regulations. However, the Minister still retains some regulatory powers when it comes to infrastructural regulation and network licences, and he/she is also expected to approve the National Radio Frequency Plan. All these regulatory expectations are unnecessary impediments in the independence of the Authority. "An independent regulator should not share its regulatory role with any institution or office" (Mxenge, 2004: 27).

The main threat posed by the Minister's role in the regulatory process is that she is not an uninterested participant in the communications sector. There is conflict of interest, as the Minister still has to look at the interest of various portfolio organisations like Telkom and Sentech. This conflict of interest was alluded to by Duncan, who mentioned that the reality of the Minister's involvement in some regulatory decisions might result in very dubious and biased judgements that will benefit her portfolio organisations at the expense of market viability and competition (personal interview: 2007).

However, the major problem is that the DoC does not really view ICASA as one of the Chapter 9 institutions, but mentions it along with its various other portfolio organisations like those aforementioned (*The Star*, 2005). Hence the new legislation has given the Minister some organisational appointment powers, which were supposed be fully left to the Authority. Very little or no reason can be justifiably given as to why the Authority has to consult the Minister before appointing any foreign experts, as this process should signal basic administrative independence. This does not only compromise the Authority's administrative independence to the Minister, but it is also very tedious. In overseeing an institution that has serious skills problems, the council should be given the essential powers and independence to manage core administrative duties of the Authority without Ministerial interference.

6.3.1 Decision making process

Complete and credible administrative independence should be complemented by an open and transparent decision-making process. An open and legitimate decision-making process is also an essential indicator of independence for regulatory authorities, as "[t]heir decisions may be accepted because of the process they use-notably whether they make decisions transparently, stay within their legislative mandate, are accountable, use due process or have expertise" (Thatcher, 2002: 958). Thus it is important to analyse the transparency of the decision-making process to fully understand the degree of administrative independence.

Despite regulatory interference by the Minister in some regulatory activities, the Authority still retains substantial regulatory powers, and its decision-making process is open and transparent. Beyond the abovementioned areas where the Minister has to approve proposed regulations, the Authority does not have to seek regulatory approval from the Minister (EC Act of 2005). Whenever the Authority has to exercise its regulatory powers it has to inform the Minister of its intentions, but does not have to seek approval (EC Act of 2005).

Transparency and openness is ensured by conducting public hearings during the drafting of regulations. This is done to take into account the views of all stakeholders in the

industry including the regulatees. Moyane concurs with the view that ICASA's decision-making is transparent and open, as decisions can be challenged in the hearings (personal interview: 2007). On a slightly different note, Mhlongo argues that it is not easy to comment on the decision-making process as it might seem open, yet it is actually very complex (personal interview: 2007). However, he still maintains that, "[t]he fact that some decisions are challenged (in hearings) … means that there is a level of independence and transparency" (Mhlongo, personal interview: 2007).

6.5 Underfunded mandate

ICASA's funding and finance system does not allow the Authority the necessary independence and financial power to ensure it fulfils its mandate without undue influence. The Minister's role in determining and approving the Authority's budget is also undesirable as it gives the Minister unnecessary influence in many institutional activities of ICASA. Moyane argues that the current funding model is problematic because the DoC sometimes "… feels it's got the right to tell ICASA what to do because it is funding ICASA" (2007: personal interview).

The importance of adequate funding for regulatory independence and effectiveness has been mentioned above, but it still cannot be overemphasised. It is important that the independent regulatory agency's funding and financing system is designed in such a way that will not compromise the operational budget and leave it vulnerable to political or economic influence. Capture theorists argue that operational budget is one of the most crucial aspects and indicators of any independent regulatory agency's independence from political and economic influence (Sterling et al., 2006). The danger in giving budget making powers to political or economic actors is that they can use it to further their interests, as they are interested stakeholders (Sterling et al., 2006).

In addition, Thatcher cautions against giving complete and unrestrained funding powers to political actors (2000). He argues that it should be borne in mind that "[s]etting the resources of IRAs (independent regulatory agencies) offers elected politicians a further tool of control" (Thatcher, 2002: 958). The effectiveness and independence of the

regulatory agency can easily be compromised by controlling its funding and financing so as to ensure that it does not fulfil the mandate. Its credibility will be questioned and ultimately its independence compromised when it does not fulfil the mandate.

An underfunded mandate of independent regulatory Authorities like ICASA can easily and correctly be interpreted as a ploy to frustrate their activities and undermine their independence. Gillwald argues;

> The effectiveness of a politically non-compliant regulator can be undermined by simply not providing them with adequate resources to attract skilled staff and councillors through competitive remuneration packages, utilising the best consultants, even having resources to fulfil the public administrative procedures and defending their decisions in the courts (2006: 13).

A well-funded regulator should be able to independently devise a plan of action and fulfil its mandate without undue influence from its funders.

It is a well document fact that ICASA is underfunded, and this has affected its ability to independently fulfill its mandate (see for example, Gillwald 2006; Asmal, 2007). The history of underfunding the regulator dates back to the days of the IBA. In his IBA annual report to Parliament, Mandla Langa, complained to the Parliamentary portfolio committee that lack of funding had denied them an opportunity to expand their services (1999). The situation was so dire in that it resulted in the Authority shutting down several regional offices around the country; also heavily relying on research conducted by the industry (1999). It is unfortunate that the issue of insufficient funding has continued to dog the converged regulator. Even though this study did not look into the actual finances of ICASA, interviewees like Cohen, Moyane, Mhlongo, Mochaba and Duncan acknowledged the fact that the Authority is not adequately funded (2007: personal interviews).

6.5.1 Ministerial funding?

The Minister's role in the Authority's budget-making process is not desirable, as it can lead to perceived and real interference. As a Chapter 9 institution, the Authority's budget should not be approved by the DoC, for this compels the Authority to submit annual

reports to the Minister. The powers and influence that the Minister is given in the budget-making process undermine the Authority's independence. These powers are also no different from the powers that the Postmaster General and the then Minister of Post and Telecommunications had when the industry was state regulated (Mxenge, 2004).

The abovementioned Constitutional Court ruling stated that funding for the Chapter 9 and associated institutions should be independent of Ministerial influence. In his Constitutional judgement that involved the case between *New National Party of South Africa v Government of Republic of South Africa and others*, Justice Langa ruled that; "It is for Parliament and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the commission to carry out its Constitutional mandate …" (Duncan, 2001: 171).

The review of the Chapter 9 and associated institutions noted this problem as well, and stated that locating budget-making powers inside the government departments is not aiding the perception of the Chapter 9 institutions' independence or lack of it (Asmal, 2007). The report states that the process "creates a false impression that the institutions are accountable to the respective government departments for use of their finances" (Asmal, 2007: 19). In the case of ICASA, it is clear that the Authority is unfortunately accountable to the Minister and not the National Assembly, as it has to submit a thorough annual financial report to the Minister, and this, as aforementioned is unconstitutional.

The report also states that;

> Since most of the institutions are accountable to the National Assembly and Parliament maintains oversight over them, the committee is of the view that Parliament's Budget Vote would be a more appropriate location for the budget process (Asmal 2007: 19).

Having a budget that is determined by the National Assembly coupled with using a portion of the licence fees could significantly improve ICASA's funding situation.

6.5.2 Skills conundrum

Lack of skills is detrimental to the independence of regulatory authorities as it has the potential to result in institutional incapacity and ineffective regulatory agency. More

importantly, it can lead to capture by the industry players, who can exploit this dearth of skills by influencing regulatory decisions in their favour (Sterling et al., 2006; Baldwin and Cave, 1999). Sterling et al., argue that market players will always be interested and active participants in regulatory activities(2006). If the Authority is staffed by a young and inexperienced workforce, the industry can use this lack of expertise to capture the Authority to regulate in their interest through various ways that include influencing decision-making processes (Sterling et al., 2006).

Lack of expertise within ICASA is fast becoming the Authority's area of vulnerability. Gillwald posits that, "it is widely acknowledged that there is paucity of skills within ICASA to regulate this dynamic and critical sector effectively" (2006: 8). In any scenario that the Authority cannot regulate effectively, market players will exploit the opportunity and "regulate" in their own interest. If the skills crisis persists for much longer, the industry is likely to exploit the situation, more so as Cohen mentioned that the industry always tries to influence the Authority to take decisions that favour their partisan interest (2007: personal interview). The poignant part in this is that, "… without confidence and adequate expertise, a regulator cannot be able to exercise its independence from service providers" (Mxenge, 2004: 24). If this takes place it will not be a new scenario, as ICASA predecessors were "out regulated" by the industry largely because of a lack of expertise within the regulator (Gillwald, 2003).

Communications legislation has tried to address one aspect of shortage of skills in the regulator by retaining councillors for sufficiently longer periods. The four- and five-year renewable periods given to the councillors and the chairperson respectively are adequate to retain skills and expertise within the Authority, as the terms are staggered. When the term of any councillor or the chairperson expires, the incoming incumbent will be able to learn from those in office and adapt faster to the environment because of working with people who have experience and institutional knowledge (Moyane, 2007: personal interview).

However, there remains a greater problem because of insufficient funding that does not allow the Authority to pay market-related salaries. The main danger is that the under paid

staff might choose to regulate in the interest of the regulated parties hoping that they will be able to secure lucrative offers after leaving the Authority (Sterling et al., 2006: 28). As mentioned above, the critical point of agencies' support is financial support: lack of resources can frustrate the workforce and persuade them to look for greener pastures outside the regulatory agency (Sterling et al., 2006; Horwitz, 1989). In the process of looking for those pastures they might begin trying to impress prospective employers by regulating in their interest (Sterling et al., 2006; Horwitz, 1989).

The other major concern that can lead to the regulator being "out regulated" by the sector is lack of competitive remuneration, which is the primary reason why the Authority fails to attract the desired skilled and experienced personnel. Cohen concurs with the fact that financial problems have become a huge issue for ICASA with regards to attracting skilled personnel (2007: personal interview). She posits that "[w]e can't hire some of the skills we need at competitive salary" (Cohen, 2007: personal interview).

One of the councillors appointed in 2006, Andrew Barendse, did not arrive for his first day at work and instead opted to take a well-paying job with Telkom (Gedye, 2005). Barendse stated that the primary reason he did not accept ICASA's appointment is "… purely based on economics and that the remuneration package offered by ICASA was not sufficient" (Gedye, 2005).

The key staff, such as the CEO of ICASA and other senior managers, should be remunerated in such a way that will make it difficult for the industry players to poach them. Having sufficient skills and expertise at the highest decision-making level is not sufficient, as "[s]kills and expertise should largely be retained at the professional and operational level" (Cohen, 2007: personal interview). This is the level where crucial work is being done, as councillors take decisions that are largely informed by the reports they get from the professional staff. If the professional staff are not experienced enough to submit quality reports, this can lead to extra work for the council or decisions that are not well researched.

Mhlongo describes the skills problem at ICASA as very dire and states that it could in future compromise the effectiveness of the institution (2007: personal interview). He argues;

> Some junior staff at ICASA may not even understand what role they are supposed to play, and if that is the case, you start wondering what kind of reports they take to senior managers. You then begin to ask yourself what kind of mechanism is put in place to deal with such issues (Mhlongo, 2007: personal interview).

The skills paucity has seemingly created unnecessary interference by the councillors in professional administration work done by supporting staff. Gillwald notes that;

> Councillors have been accused of interfering in the day-to-day operations of the institution, undermining the CEO and staff on administrative and technical operational issues. On the other hand the absence of skills and sometimes even of staff at all has regularly compelled Council to step into the breech in order to ensure delivery (Gillwald, 2006: 11).

The Asmal report also notes that there is "… internal conflict and tensions [that] have undermined the Authority's operational effectiveness and efficiency". These allegations are given substance by the recent staff turnover at the agency, where the former CEO Jackie Mache left under a cloud (Gedye, 2005). The *Mail & Guardian* also reported that ICASA's mass exodus was as a result "… of senior officials who are fed up with council interference in management operations and the regular flouting of the regulator's policies and procedures" (Gedye, 2005).

However, council interference was not the only issue on the staff exit reports, there were many other issues that undermined the effective functioning of the regulator (Gedye, 2005). Thus Cohen argues that recent staff turnover is not a simple issue and the reasons for leaving can be attributed to a variety of factors rather than just one (2007: personal interview).

The funding and financing problem still remains at the centre of the paucity of skills. Even if ICASA can have a programme where they train the inexperienced workforce to have the required skills, very little will stop them from being poached by the industry if

there is inadequate remuneration (Gillwald, 2006). The use of expensive consultants is not sufficient to address the problem of skills shortage. The disadvantage with consultants is that, "[o]ften the solutions implemented failed to take into account the different nature of the market in South Africa; the social needs in a developing country and importantly, transferred little, if any skills" (Gillwald, 2006: 8). In addition, the other problem could be negative perception that ICASA has lost regulatory "ownership" to consultants who will impose solutions that are unlikely to address the issue of regulatory effectiveness or enhance the independence of the Authority through skills transfer (Gillwald, 2006).

Institutional incapacity can undermine all the gains that have been made towards ensuring greater independence of ICASA. Institutional independence also depends on effectiveness, as inefficiency can create a lack of credibility which can compromise the independence. This is more or less what Cohen referred to when she argued that, when "… you can't do your job effectively, you become less credible, less useful and therefore your independence will be compromised …" (2007: personal interview).

Alleviating paucity of skills is a challenge that can be addressed through improved budget that will enable the Authority to remunerate competitively. The current funding model has been in use for far too long and it is clear that the current government is not willing to increase the Authority's budget, as this will be against its macroeconomic policy of reducing government spending. Thus retention of licence fees is essential to offset the Authority's budget deficit (Asmal, 2007). Negative perception of lack of independence would be aided by the removal of the Minister's role in the funding and financing process. The Authority has to be accountable to the National Assembly and not the DoC or the Minister. The Constitution is clear in stating that all Chapter 9 and associated institutions are accountable to no one but the multiparty Parliament.

6.5.3 Alternative funding method

Recently there have been calls to change the current funding model and to include the licence fees collected from the sector. The general feeling is that the licence fees could help alleviate the inadequate funding by reducing the financial burden on the government. Lloyd argues that ICASA should be allowed to retain a portion of the licence fees, with the overall percentage from those fees still approved by the Parliament (2007: personal interview). Moyane also thinks it is wrong that the Authority collects the licence fees and forwards them to the National Treasury without retaining any percentage for itself (2007: personal interview). As argued above, the main problem with the current funding model is that the DoC feels it has the right to tell ICASA what to do because it is funding it, and this is not acceptable (Moyane, 2007: personal interview).

The retention of licence fees is not new, under the IBA it was legislated. The Authority was financed by the government from the budget allocated by Parliament, and this was supplemented by the retention of licence fees and income derived from other sources (IBA Act of 1993). The failed Convergence Bill also approved the retention of licence fees by ICASA, but this has unfortunately been excluded in the recent EC Act.

The recent review of Chapter 9 and associated institutions put forward various ways of funding ICASA, presenting advantages and disadvantages for each possible option. Without delving deep into the advantages and disadvantages of all the options, the committee did not settle on any model, but seemingly prefers the suggested alternative funding model that is also advocated by the Authority (Asmal, 2007). This model states that the Authority should be able to retain approximately 30 per cent of the licence to be able to replace the existing funding model (Asmal, 2007).

The retention of licence fees has its critics who feel that this option might be the beginning of the gradual process towards market capture. The Minister of Communications, Dr Matsepe-Casaburri has in the past argued that the retention of licence fees "…created conditions of vulnerability for the regulator since it would be funded directly by the industry it is supervising" (2005: 2). Mhlongo says the problem with retaining licence fees is that it will be difficult to sustain that model without the

industry exerting too much influence on the Authority (2007: personal interview). He continues to argue that "… how do you expect them to give one per cent and not have strings attached to it, because they could say 'we are paying your salary … so do as we say'" (Mhlongo, 2007: personal interview). Vos also advocates the retention of licence fees, but "[t]he problem being of course: 'He who pays the piper, calls the tune.' Well, that can be the case! (sic)" (2007 email interview).

Not everyone believes that funding the Authority through licence fees has the potential of leading to market capture. Duncan views the licence fee debate differently from the above comments, she is adamant that retention of licence fee is ideal for dealing with funding problems at ICASA. She argues;

> … I still battle to understand how ICASA's funding through licence fees could lead to practically a regulatory capture. I can understand in the broadest of terms what the problem may be, but it's difficult to understand how it will work, actually work out, in reality…. Let's say network operator Telkom pays a particular percentage of turnover as a licence fee and that percentage is set in term of regulations. Telkom has no choice but to pay that amount and once [it has] paid the amount directly to ICASA, it's out of Telkom's hands. I don't see practically how it can lead to regulatory capture… (Duncan, 2007: personal interview).

The advantage of retaining licence fees is that it will help avert, rather than aid, the Authority from being captured by the market. Retaining licence fees is meant to increase the Authority's operational budget, so as to ensure that it can stem the high staff turnover and reverse the deteriorating morale among the staff by paying competitive salaries. The increased budget could also help the Authority to attract skilled staff and sustain any lengthy litigation process.

6.5 Conclusion

ICASA is an independent institution, but lacks sufficient independence that is essential for independent regulatory authorities. Its institutional independence is not fully guaranteed because of the questions around its inclusion as one of the Chapter 9 institutions. If the Authority's place among other Chapter 9 institutions can be clarified, this could improve its power relations with other relevant and interested stakeholders in

the communications industry. If ICASA is to assume its role as an independent regulatory Authority, then institutional independence should be fully guaranteed. There should not be an assumption that its independence is guaranteed, but that should be reflected in the Constitution and all applicable legislations and in its relations with all relevant stakeholders in the sector. Unambiguously guaranteed Constitutional independence of the Authority is essential in offsetting the Minister's influence on the Authority's institutional activities.

Funding and financing for ICASA should also be revisited as the Authority is inadequately funded to fulfil its mandate. Lack of sufficient funding has aggravated the paucity of skills, as the Authority cannot compete with major companies in paying attractive market-related salaries. This has put the regulatory agency at a disadvantage of losing all the best talent to the sector. It has given the industry an opportunity to "out regulate" the Authority. The imminent danger is that this situation has the potential to lead to market capture.

Lack of complete authority over administrative duties encroaches on the independence of ICASA. Sharing some regulatory functions with any institution is not acceptable; as the primary purpose of ICASA is to regulate the communications sector without undue political or economic influence. In areas where the Minister has to regulate she might have different ideas to those of the Authority and this might affect the viability of the sector. More so, since the government has some parastatals that are under the regulatory jurisdiction of ICASA. In all areas where the Minister still retains regulatory approval powers, the conflict of interest exists, and this does not aid the sector in any way. Most importantly, it makes inroads into the independence of ICASA. Even though the decision-making process of the Authority is consultative, independent and transparent it has the potential of being undermined by lack of holistic administrative independence.

ICASA can be guaranteed sufficient funding if its budget is determined by the National Assembly and supplemented by a certain percentage of the licence fees, if the Parliament cannot meet the Authority budget requirements. Concerns raised by the Minister and others like Mhlongo, that funding the Authority from licence fees would make it

vulnerable to the industry, can be addressed through legislation. The Authority will not have to deal directly with the industry players in paying those fees to its budget; instead legislation will compel the market players to do so and the National Treasury will determine how much ICASA receives.

Chapter Seven: Conclusion

7.1 Introduction

This chapter sums up the discussion developed in the preceding chapters. More importantly, it sums up the developments of communication regulation in South Africa, moving from state to independent "regulation". The study sought to establish the extent to which ICASA is "independent". Secondly it sought to examine the independence of ICASA from the government, more specifically the Minister of Communication and various elected officials. It also sought to probe the extent to which ICASA is independent from its regulatees, with special reference to major broadcasting and telecommunications institutions. The study also sought to critically analyse the decision-making process of the regulatory body, and the transparency and the independence of the decision-making process.

The South African communications sector has come a long way from state regulation to being regulated by an independent Authority. The Constitution has affirmed the necessity of having an independent communications Authority, as it is deemed to be as important as the other Chapter 9 and associated institutions. ICASA has a significant role to play in enhancing the country's fledging democracy. Thus the Constitutional court has ruled that any independent Chapter 9 and associated institution should have, as primary indicators of independence, administrative and financial independence. Institutional independence is also an important signifier of independence, as it determines power relations between the Authority and all the estates of the state and related or interested institutions.

7.2 Summary of arguments and findings

The following is a summary of the main arguments and findings and arguments made in the study. The findings and analysis chapters are synthesised to bring about concise arguments made in the study.

7.2.1 Constitutional matters

The converged communications regulator's independence is constitutionally guaranteed, but not to an extent that it should be. ICASA is assumed to be protected by section 192 of the Constitution, mainly because the independence of its predecessor, the broadcast regulator, was enshrined in the latter section of the Constitution. Being placed under section 192 instead of 181 of the Constitution with other Chapter 9 and associated institutions has left the Authority vulnerable. The Constitutional vulnerability of ICASA stems from the fact that it is not given the protection and status that is accorded to other Chapter 9 institutions. ICASA's role is different from that of other Chapter 9 institutions, which have a direct role to play in enhancing the democracy that protects them. However, this does not preclude the Authority from being protected by the constitution as it regulates a sector whose role in society is socio-economic, political and culturally significant. Clear constitutional protection of any regulatory agency is a vital first step in ensuring that all interested stakeholders cannot engage in activities that seek to undermine the independence of any Authority.

7.2.2 Ministerial interference

The Authority is not absolutely independent of undue influence from the Minister of Communications. The approval of telecommunications regulation by the Minister has been curtailed by the EC Act of 2005. The Authority has the necessary independence it needs to regulate most aspects of the communications sector. It is only in a few areas such as the National Radio Frequency Plan and infrastructural regulation where the Minister still plays a significant and central role.

The Minister is not only involved in certain regulatory issues, but she is also central to the appointment and removal process of councillors. The Minister does not approve the list of councillors, but plays an important role in submitting a specific number of names to the National Assembly. This gives her the power to select partisan individuals that she feels will not question her if she interferes in the administrative duties of the Authority.

Furthermore, the EC Act has further entrenched the central role of the Minister in the Authority's activities. The performance management system is there to evaluate annually the performance of councillors. Seeing that there was previously no system in place to ensure that councillors' performance is evaluated and they are held accountable, the performance management system is a move in the right direction. The role of the Minister in the evaluation process raises many questions that relate to councillors' independence from her office. Close relations between the Authority and Minister are in the policymaking process. The DoC, which functions under the guidance of the Minister, is responsible for drafting communications policy, while ICASA's role in the whole process is to give recommendations before final policy decisions are taken.

Even though the Minister still retains influence in certain areas of ICASA's regulatory activities, the Authority still has control when it comes to most administrative issues. ICASA's council has the power to employ supporting professional staff and the chief executive officer to oversee the everyday administrative duties.

7.2.3 ICASA – Industry relations

Relations between the Authority and the industry are largely confined to interactions in regulatory hearings that have to be organised by the Authority to obtain the views of industry players about draft regulations. Beyond that, there is very little interaction between the Authority and the industry, except in the movement of staff between the Authority and the industry. The movement of staff from ICASA to the industry is not good for the Authority, as it can result in the "revolving door", which does not always yield positive results for regulatory agencies. The "revolving door" can lead to a slow,

but systematic capture of the Authority by the industry, as regulatees begin to regulate in the interest of the regulated industry, hoping to obtain well-paying jobs in the industry. This movement can be stemmed by improved salary packages for the regulatees.

7.2.4 Funding

ICASA is funded through money allocated by Parliament. Communications legislation does not allow ICASA to be funded through alternative means like retaining a certain percentage of licence fees, something that was permitted in the IBA Act. The current funding mechanisms have yielded poor results as ICASA is inadequately funded, a fact that has been acknowledged by various interviewees (Cohen, Duncan, Moyane, Mhlongo and Mochaba, 2007: personal interviews). Even the recent report on Chapter 9 and associated institutions acknowledges that ICASA is poorly funded and that this has the potential to undermine its independence (Asmal, 2007).

Inadequate funding has not aided the Authority's skills deficit, as it cannot afford to attract the desired skilled personnel due to remuneration packages that are not market related. Even when the Authority has attracted skilled individuals, it cannot retain them, as seen in the case of Andrew Barendse, an appointed councillor who opted to take a well-paying job with Telkom rather than arrive for his first day at work (Gedye, 2005).

7.3 Implications for theory

It is now well known that the establishment of communications regulatory institutions in this country was affected by political negotiations and compromises. As the public interest theory states, regulatory institutions are established in the interest of the public, and so the IBA and SATRA were established in the public interest, and ICASA is supposed to regulate in the public interest. The compromises emanated from the fear that the communications sector could be dominated by a few political or economic players to the detriment of the public interest. To protect and enhance the young democracy, regulatory agencies were instituted to serve the public interest.

Even though the public was not directly involved in the talks and agreements that led to the establishment of these regulatory institutions, the participants believed that the decisions taken were in the interest of the public. Seemingly, the participants conceptualised the public interest in a unitary sense, as they were convinced that their intentions and actions embodied the values and principles that were to benefit society as a whole. In this case, independent regulatory institutions were essential to protect the communication needs and interests of society and their establishment is seen as an outcome of benevolent intention and action of the state or those who institute such agencies to protect the needs and interest of the citizens.

The direct involvement of the public in ICASA's activities is mainly in the decision-making process, where the Authority holds public hearings for draft regulations. However, the shortcoming with the process is that they tend to involve the interested and organised groups and individuals who have access to all kinds of information that will enable them to be meaningful participants. The poorest and disadvantaged sections of society, which Pallo Jordan calls the second public, is not involved in the process. The interest of this poorer section of society is assumed to be catered for by the common good values and principles that are adopted in the decision-making process.

Advocates of market regulation within the National Party government wanted to commercialise and ultimately privatise the communications sector before the CODESA talks on establishing regulatory institutions gained momentum. However, unlike most advocates of market regulation who believe that regulation will stifle competition and growth in the sector, their objectives were to ensure that the white minority retained their controlling stake in the sector. This kind of behaviour provided support for the argument of Watson and Hill, that deregulation is favoured by those who will benefit from it, either in the long or short term (2000). The ANC rejected any talks of commercialisation and ultimately privatisation because they knew that the white section of society that benefitted from apartheid still controlled the economy and had the financial power to dominate a market-regulated sector (Pahad, 1993).

Even though ICASA was established to regulate in the public interest, the current undesirable financial state has the potential to undermine these objectives. The capturing of an agency can be facilitated by the changing political and sometimes economic circumstances (Sterling et al., 2006). Furthermore, continued lack of sufficient funding can lead to a sustained pattern of "out regulation" of the Authority by the sector (Gillwald, 2003). The regulatory capture argument that Authorities do not always carry out their mandate because of being captured by the market or the state will prove to be true in the case of ICASA if the financial situation is not improved.

ICASA is beyond the stage where the workforce is only happy to regulate the sector and put little or no emphasis on the poor remuneration. The Authority cannot attract skilled individuals or keep those that are there for longer periods as a result of non-competitive salaries. The revolving door described in Bernstein's model or the life cycle theory is beginning to emerge, as the Authority has been experiencing staff exodus in the past three to four years (Gedye, 2006). Even though this exodus is for a variety of reasons, better remuneration packages from the sector is one of them.

The study has established that ICASA is an independent regulatory agency; but that it does not independently regulate the sector to the extent that it should. Regulatory interference by the Minister of Communications in certain areas does not allow the Authority the necessary independence it should have. An independent Authority should not share its duties with any other institution or office under any circumstances (Mxenge, 2004). This is more problematic when coupled with the funding and financing system that has thus far generated poor funding for the Authority.

Albeit the various challenges that have the potential to undermine its independence, ICASA still regulates the broadcasting, telecommunications and, recently added, the postal services. As a converged regulator, it carries out both social and economic regulation. In relation to broadcasting, it regulates different programming and the languages used. There are quotas on local content programming to ensure that the public can easily access content that is familiar, and also to ensure that the local industry grows.

In this era of commercialisation of the communications sector, social regulation is essential to counterbalance the flooding of the market with entertainment-driven programming at the expense of quality and educational products. When it comes to economic regulation, which deals with the structure of the industry, the Authority has instituted ownership quotas to avoid the dominance of a few companies.

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Appendix A

Interview Guides

The following set of questions served as an interview guide for each of the stakeholders involved in the discussion and interview process. This provides the general framework of the issues discussed.

Interview guide for ICASA employees:

1. What do you see as the key role of ICASA in the communications industry?
2. How would you describe the general relationship between ICASA and the governments department of communication?
3. How would you describe the relationship between ICASA and the governments department of communication in the regulation of telecommunications?
    a. Should the government be involved in the regulation of telecommunications, while still being a market player?

4. How would you describe the relationship between ICASA and the governments department of communications in the regulation of broadcasting?
5. Does ICASA play a meaningful role in the development of communications policy?
6. How would you describe the relationship between ICASA and the regulated industry?
7. Does the human resource and capital dominance of the regulated industry affect the way ICASA regulates the industry? If so how?

8. What do you think of ICASA's funding and financing system? Is it an enabling or hindering factor in the independence of ICASA?
9. Should senior managers and councillors be allowed to leave ICASA and go directly to any private firm regulated by ICASA?
10. Is the period of office given to the chairman and the councillors sufficient to retain skilled and experienced staff at ICASA?
11. Has the new Electronic communications Act changed the relations between ICASA and the government and also the regulatees?
12. Is ICASA's decision making process independent and transparent?
13. Do you think ICASA is an independent regulator, with very minimal or no existence of undue influence from the government and the regulated industry?

Interview guide for former ICASA employee(s):

1. What do you see as the key role of ICASA in the communications industry?
2. In your tenure at ICASA, how were relations between government and the regulatory agency?
3. Looking at your tenure, what do you think of the governments' role in the regulation of telecommunications?
    a) Should the government be involved in the regulation of telecommunications, while still being a market player?
4. Also looking at your tenure, what do you think of the governments' role in the regulation of broadcasting?
5. What do you think of ICASA's funding and financing system? Is it an enabling or hindering factor in the independence of ICASA?
6. Should senior managers and councillors be allowed to leave ICASA and go directly to any private firm regulated by ICASA?
7. Is the period of office given to the chairman and the councillors sufficient to retain skilled and experienced staff at ICASA?
8. Looking at ICASA since you left what has changed? If there are no progressive changes what needs to be done to bring about such?
9. Do you think the new Electronic Communications Act will enhance the independence of ICASA, and the latter's relations with the government and the industry?

Interview guide for the regulatees:

1. Do you think ICASA still has a meaningful role to play in the regulation of broadcast and telecommunication industry in South Africa? If so what role do you envisage?
2. How would you describe the relationship between ICASA and the regulated industry?
3. How would you describe the general relations between ICASA and the governments' department of communications?
4. What do you think about the governments' role in the regulation of telecommunications?
    a) In your view, should the government be involved in the regulation of telecommunication, while still being a market player?

5. What do you think about the governments' role in the regulation of broadcasting?
6. What do you think of ICASA's funding and financing system? Is it an enabling or hindering factor in the independence of ICASA?
7. Should senior managers and councillors be allowed to leave ICASA and go directly to any private firm regulated by ICASA?
8. Is ICASA's decision making process independent and transparent?
9. In your view, do you think ICASA is an independent regulator?

Interview guide for the members of parliamentary portfolio committee on communications:

1. How would you describe the relationship between ICASA and the parliamentary portfolio committee on communications?
2. What do you see as the key role of ICASA in the communications industry?
3. What do you think of relationship between ICASA and the governments department of communications?
4. What do you think about the department of communications' role in the regulation of telecommunications?
    a) Should the government be involved in the regulation of telecommunication, while still being a market player?
5. What do you think about the governments' role in the regulation of broadcasting?
6. In your view what would be an ideal role of the government in the regulation of communications in South Africa?
7. What do you think of ICASA's funding and financing system? Is there any need for change if so why?
8. Should senior managers and councillors be allowed to leave ICASA and go directly to any private firm regulated by ICASA?
9. Is the period of office given to the chairman and the councillors sufficient to retain expertise and experience at ICASA?
10. Do you think the new Electronic Communication Act will enhance the independence of ICASA, and the latter's relations with the government and the industry?

Interview guide for the media oriented non-governmental organizations.

1. Do you think ICASA still has a meaningful role to play in the regulation of broadcast and telecommunication industry in South Africa? If so what role do you envisage?
2. What do you think of relationship between ICASA and the governments department of communications?
3. What do you think about the department of communications' role in the regulation of telecommunications?
    b) Should the government be involved in the regulation of telecommunications, while still being a market player?
4. What do you think about the governments' role in the regulation of broadcasting?
5. In your view what be would an ideal role of the government in the regulation of communications in South Africa?
6. What do you think of ICASA's funding and financing system? Is there any need for change if so why?
7. Should senior managers and councillors be allowed to leave ICASA and go directly to any private firm regulated by ICASA?
8. Is the period of office given to the chairman and the councillors sufficient to retain experience at ICASA?
9. Is ICASA's decision making processes independent and transparent?
10. Do you think the new Electronic Communication Act will enhance the independence of ICASA, and the latter's relations with the government and the industry?
11. Do you think ICASA is an independent regulator, with very minimal or no existence of undue influence from the government and the regulated industry?