Rethinking (Reluctant) Capture: The Development of South African Telecommunications 1992-2002 and the Impact of Regulation

Tracy Cohen[*]

"Few men have the virtue to withstand the highest bidder."

- George Washington

"We cannot change anything until we accept it. Condemnation does not liberate, it oppresses."

- C.G. Jung

Introduction

The South African telecommunication sector has recently been the subject of renewed interest as it commences its second phase of liberalisation and opens up its fixed line market to competition. With democracy in place in 1994, the challenge of economic and social development created by the ravages of apartheid, required detailed government policy in every sector. Telecommunications was no exception. Since the promulgation of the 1996 Telecommunications Act,[1] developmental objectives, particularly universal service, the advancement of small and medium enterprises (SMMEs) and the empowerment of historically disadvantaged individuals have rivalled more pedestrian sectoral reform goals often prioritised in other countries, such as the promotion of innovation and competition.

In 2001 the government began to articulate its plan for the future of telecommunication policy, post-exclusivity. Its vision continues to assume a positive correlation between telecommunication infrastructure and economic growth and suggests that policy is tailored to achieve that end.[2] It also continues to draw on ideas of distributive justice but rhetoric has begun to shift from universal service objectives to stressing the importance of foreign investment and of maximising revenue from the

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[*] Graduate Fellow, Centre for Innovation Law and Policy, University of Toronto. *This paper is a work in progress written for the TPRC Conference, Washington D.C., 28 September 2002. Certain data for comparative analysis is still to be included and an updated version will be posted prior to the conference. Please do not cite or circulate. Comments to be sent to* t.cohen@utoronto.ca

[1] Act 103 of 1996, amended by Act 64 of 2001.

[2] K. Eggleston, et al., "Information and Communication Technologies, Markets, and Economic Development' *The Global Information Technology Report 2001-2002: Readiness for the Networked World*,

restructuring of state assets. At her most recent Parliamentary media briefing, the Minister of Communications underscored the connection between investment, economic growth and development and located foreign and domestic investment as "central factors" in addressing the "social ills of poverty unemployment, illiteracy and underdevelopment"[3]

With an unprecedented downturn in the global telecommunication market,[4] this paper assesses some of the new policy proposals for the sector already in the early phases of implementation. In doing so, a brief overview of the development of the South African (SA) telecom industry will be provided and the contours of the new policy landscape, sketched. It is suggested that a key concern regarding the sector's economic future lies in the regulatory environment and the role of vested interest groups in shaping its overall development. A number of legislative provisions having an adverse impact on sound regulatory governance, will be examined. These have motivated an attempt to understand regulation and specifically regulatory independence in a particular context. It is suggested that dominant theoretical perspectives on regulation and independence are informed by narratives which may no longer be capable of broad application without contextual modification. Creative and alternative legislative tools will need to be employed to recognise differences, while ensuring that a baseline of independence can be maintained, even if the institutional design may vary across countries and regulatory agencies.[5] The paper will suggest that unless a number of fundamental legislative design flaws are remedied, the South African telecommunication regulator will remain seized by inappropriate battles with policy makers seeking to secure certain outcomes, while large market players continue to manipulate the sector in the pursuit of their own interests. A tentative theory of "reluctant capture" will be advanced to further explain this contention.[6] The paper concludes that the SA telecoms sector still remains an attractive and lucrative market on the ascent. However, until the regulatory landscape is perceived

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Centre for International Development at Harvard University (Oxford: Oxford University Press, 2002). Available online at http://www.cid.harvard.edu/cr/pdf/gitrr2002_ch07.pdf (Accessed 26 August 2002).

[3] Dr. Ivy Matsepe-Casaburri, Parliamentary Media Briefing, Parliament, Cape Town, 13 August 2002.

[4] 'The Great Telecoms Crash' Economist, 20-26th July 2002.

[5] The terms "commission"; "agency" and "authority" will be used interchangeably.

[6] While other countries present possible opportunities for extrapolation, application is limited here to SA.

as secure and certain, encouraging the participation of foreign capital in the domestic market may prove to be an elusive goal.

SA Telecoms: 1992-2002

Coinciding with the broader political transformation to democracy in 1994, the early 1990's saw the start of a unique reform process in telecommunications and broadcasting in South Africa.[7] Telecommunications services had historically been delivered on a monopoly basis through a government department responsible for Postal and Telecommunication services (SAPT). The Department fell under the full control of the Post-Master General (PMG) who was subject only to the Minister of Posts and Telecommunications.[8] By the late 1980's, SAPTS was beset by a number of problems common to many PTTs,[9] the most notable of which was its enormous debt, which made expansion impossible. A confluence of international and domestic pressures, including the trend towards asymmetrical deregulation abroad and the pressure of the anti-apartheid struggle at home, resulted in the Department's commercialization in 1992.[10]

Beyond structural changes affecting financial operations and corporate governance, the locus of power and the mechanics of the monopoly remained completely unchanged. The monopoly provider, Telkom SA Ltd fell to the control of the Postmaster-General and the Minister who continued to determine tariffs and fees. Telkom retained the power to prohibit others from offering any service without its explicit authorization, [11] preserving, as Zlotnick observes, a direct link through the Minister, between government and the licensee.[12] As one newspaper editorial aptly characterized it at the time, "Whatever similarity exists between [Telkom's] stranglehold on telephonic

[7] The seminal text detailing this process is Robert Horwitz, *Communication and Democratic Reform in South Africa,* (Cambridge: Cambridge University Press, 2001).
[8] s 2(1) of *The Post Office Act* No. 44 of 1958.
[9] " PTT" is used to refer to a state-run telephone company. The term "telco" is used interchangeably with PTT and the term "telecom(s)" is used as a standard abbreviation for "telecommunication(s)"
[10] s 3(1) and 4(1)(b) of the *The Post Office Act.* The option of privatization had been swiftly quashed by the African National Congress (ANC) who had threatened to re-nationalize the company after the ANC had come to power. Similar threats were repeated in 1993 when the *ancien regime* attempted unilaterally to grant cellular licences to Vodacom (Pty) Ltd and MTN (Pty) Ltd.
[11] ss 7(2) read with 78 and 90A(2).
[12] See M. Zlotnick, "An Overview of Telecommunications and Broadcasting Regulation in SA". Unpublished monograph on file with the author.

communications and private enterprise is in the imagination only of the government which foisted it on the public".[13]

After the historic first democratic elections in SA in 1994, the ANC inherited a telco that had largely failed to resolve its legacy dilemmas: an inefficient, severely debt-ridden telephone company, now belonged to them. Little had changed, except that the delivery of telephone services to redress past inequality was now a stated government priority linked to the broader developmental goals that that had buttressed the ANC's election platform.[14] Thus began an historic consultation process, somewhat distinctive in its inclusiveness[15] where all sectoral stakeholders participated in the development of a White Paper on telecoms policy[16] which was ultimately to become the blueprint for legislation and a future beacon for assessing how the consultative policy product has been finally realized and, where appropriate, deviated from. The White Paper articulated a commitment to the ideal that telecommunications is not simply an aspect of development, but rather a precondition for its success. Thus, under the oversight of an independent regulator, competition would be gradually phased in while allowing a limited exclusivity for Telkom to concentrate on the roll-out of service to previously disadvantaged areas.[17] A thirty per cent stake in the incumbent was sold to strategic equity partner (SEP)[18] who would supply the capital required to fund expansion, and the management capacity and skill to ensure it met the development challenges ahead.[19]

The 1996 Act and Beyond

[13] Editorial, *Cape Times* 15 June 2002. Cited in Horwitz, *supra* note 7.
[14] The ANC's post-apartheid macro-economic plan for the country, the Reconstruction and Development Programme (RDP), specifically included telecommunications development in its agenda.
[15] This took place under the auspices of the National Telecommunications Forum (NTF), which comprised of operators, unions, consumers, manufacturers, contractors, academic institutions, professional associations and the state.
[16] Government Gazette No. 16995 Notice No 291 of 13 March 1996.
[17] H.N. Janisch and D. Kotlowitz. 'African Renaissance, Market Romance: post-apartheid privatization and liberalization in South African broadcasting and telecommunications" Symposium paper, "Has privatization worked? The International Experience?" CITI, Columbia University, 12 June 1998, at 61.
[18] The consortium, Thintana Investments is comprised of SBC Communications (18%) and Telekom Malaysia (30%).
[19] Of the R5.45 billion transaction (at the time, USD 1.26 billion), R4.4 billion was retained by Telkom for infrastructure spending.

The White Paper found expression in the 1996 Telecommunications Act, [20] which established the legal and regulatory framework for telecommunications. Most significantly, the Act fundamentally changed the way in which telecommunications was to be regulated, by establishing an independent Authority tasked to fulfil a public interest mandate.[21] The Independent Communications Authority of SA (ICASA)[22] thus retrieved all licensing functions from Telkom, thereby separating the roles of policy formulation (the Department of Communications), operations (Telkom) and implementation (Regulator).[23] Telkom's exclusive right to provide telecommunications services was however, barely altered by the 1996 Act: its monopoly looked largely as it did in 1992, but was redefined in a trilogy of licenses issued to the telco in May 1997.[24] The quid pro quo for exclusivity, tightly girded with the rhetoric of "redress" was a roll-out requirement to double the network over five years with an optional sixth year, if it achieved its rollout and service targets.[25] Telkom has since elected not to apply for its extension in 2001 but the delays in licensing its competitor will produce the same result if they successfully done so. The Act also entrenched the duopoly status of Vodacom and MTN - whose initial licenses were controversially granted under the old regime.[26] Amidst a furore to be discussed below, a third cellular operator, Cell-C (Pty) Ltd, was subsequently licensed in February 2001. The 1996 law also formalized the operation of all other non-exclusive service sectors including Private Telecommunications Networks (PTN); Value-added Network Services (VANS) and Internet Service Provision (ISP).[27]

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[20] No 103 of 1996.
[21] This central goal is expanded upon in s 2(a)-(s).
[22] ICASA was preceded by the South African Telecommunications Regulatory Authority (SATRA) until July 2000 when the erstwhile separate regulatory bodies for telecoms - SATRA - and broadcasting – the Independent Broadcasting Authority (IBA) – merged pursuant to the promulgation of the ICASA Act, No. 13 of 2000.
[23] W. Melody, "On the Meaning and Importance of 'Independence' in Telecom Reform", *Telecommunication Policy*, 1996 (21) 3 at 195.
[24] s 36(1). The "Telkom License" contains three separate licenses: *Government Gazette* 17984 GN R768 (PSTS); GN R769 (VANS) and GN R770 (Radio) of 7 May 1997.
[25] Telkom was required to roll-out 2.6 million new lines in total; 1.7 of these in priority areas and 120 000 new public pay phones.
[26] *Government Gazette* 15232 GN R1078 of 29 October 1993. The source of the controversy was the perception that the apartheid government was trying to accomplish in mobile services what they had failed to do in fixed line telephony, namely, privatize lucrative services prior to elections.
[27] VANS and ISPs are prohibited from using their networks for the carrying of voice, s 40(3). PTN's cannot bypass the Telkom network, must be used solely for purposes related to the internal company operations and require a licence where such networks interconnect to the PSTN, s 41.

Manufacturing and equipment supply is fully deregulated and competitive, subject only to the condition that all equipment meets type approval standards set by the Authority.[28]

In early 2001, the second consultative forum for broad participation in formulating the country's telecom policy was held. Notably however, the heady mood of reform politics characterizing the mid-90's had passed:[29] the ANC government, still facing heavy unmet social policy demands, was well within its second electoral term. With Telkom's monopoly about to expire, amendments to the law in 2001 introduced novel approaches to realizing the developmental goals articulated in policy since 1994.[30] A new "development speak" removed from the lofty goals of the initial Reconstruction and Development Program, now sees articulation the maximization of state assets, as part of a broader plan to restructure state-owned enterprises.[31] This shift in focus, from roll-out to revenue maximization, was slowly emerging throughout a rather irresolute policy process which was noteworthy for its ambivalence in regard to future market structure.[32] The new legislative innovations now ensure that various companies with differing degrees of state shareholding are included in all major licenses. First, a second network operator (SNO) will be licensed in 2003 to compete with Telkom, in which 30 per cent to be shared between the two, has been set-aside for EsiTel and Transtel, the communications divisions of the state electricity and transport utilities, in order "to maximise use of their respective existing telecommunications infrastructure, facilities and

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[28] s 54, Telecommunications Act, 1996.

[29] Horwitz's thesis argues that the uniqueness of the political reform process had an impact on creating the anomaly of the telecoms reform process within that broader transformation, at 179.

[30] Telecommunications Amendment Act, 64 of 2001. Agreement not to pursue the additional year followed discord regarding market structure, post exclusivity, between the government and SBC management which was only resolved mid 2001.

[31] See Ministry of Public Enterprises, "Policy Framework: Accelerated Agenda for the Restructuring of State Owned Enterprises," 10 August 2000. Available online at http://www.polity.org.za/govdocs/policy/soe/policyframework01.htm (accessed 26 August 2002)

[32] The first Policy Direction, published in March 2001 suggested granting only a SNO licence incorporating Transtel and Esi-Tel. See Government Notice of Intention to issue Ministerial Policy Directions, 20 March 2001, online at http://docweb.pwv.gov.za/docs/policy/telpoldir.html. A second Policy Direction, published in July 2001, announced that a third network operator (TNO) would also be licensed and that Esi-Tel and Transtel were to be included in the SNO and TNO, respectively. See Department of Communications, Policy Directions Issued by Minister of Communications, 26 July 2000 at http://docweb.pwv.gov.za/docs/policy/policydirections.html Finally, a joint policy statement issued with the Ministers of Trade and Industry and Public Enterprises in August 2001, marked a return to the original policy of only a SNO, (incorporating Transtel and EsiTel) with a TNO being licensed in 2005, subject to the completion of a market feasibility study.

resources."[33] This 'maximum use' sentiment holds much appeal for many in the industry who have been seeking alternative service and facilities provision during the exclusivity years. To this end, given the extent of their respective networks, arguably capable of competing nationally with Telkom, EsiTel and Transtel have urged the Minister to authorize them to provide interim service while a 51 per cent equity partner is sought.

Sentech (Pty) Ltd, the wholly state-owned signal distributor, will have its current service offering augmented by two new licenses to enable it to compete in multimedia and international gateway services, but will not be a direct service supplier to end users.[34] Remaining faithful to the development promise of the White Paper, a further 19 per cent stake in the SNO was also set aside for an empowerment component to the SNO license.[35] A number of under-serviced area licenses, also requiring strong evidence of empowerment shareholding, will be granted later in 2002, to small businesses and co-operatives for areas where teledensity measures below 5 per cent.[36] The Act also provides for a number of issues, which will facilitate an Initial Public Offering (IPO) of Telkom shares in 2003.[37] (Table 1 below illustrates the structure of the market post exclusivity and the regulatory relationships.)

While many of the telecom proposals were highly contested by various interest groups, they are now matters of settled law.[38] However, it is too early to conclusively suggest whether the new market structure alone will facilitate or impede growth in the

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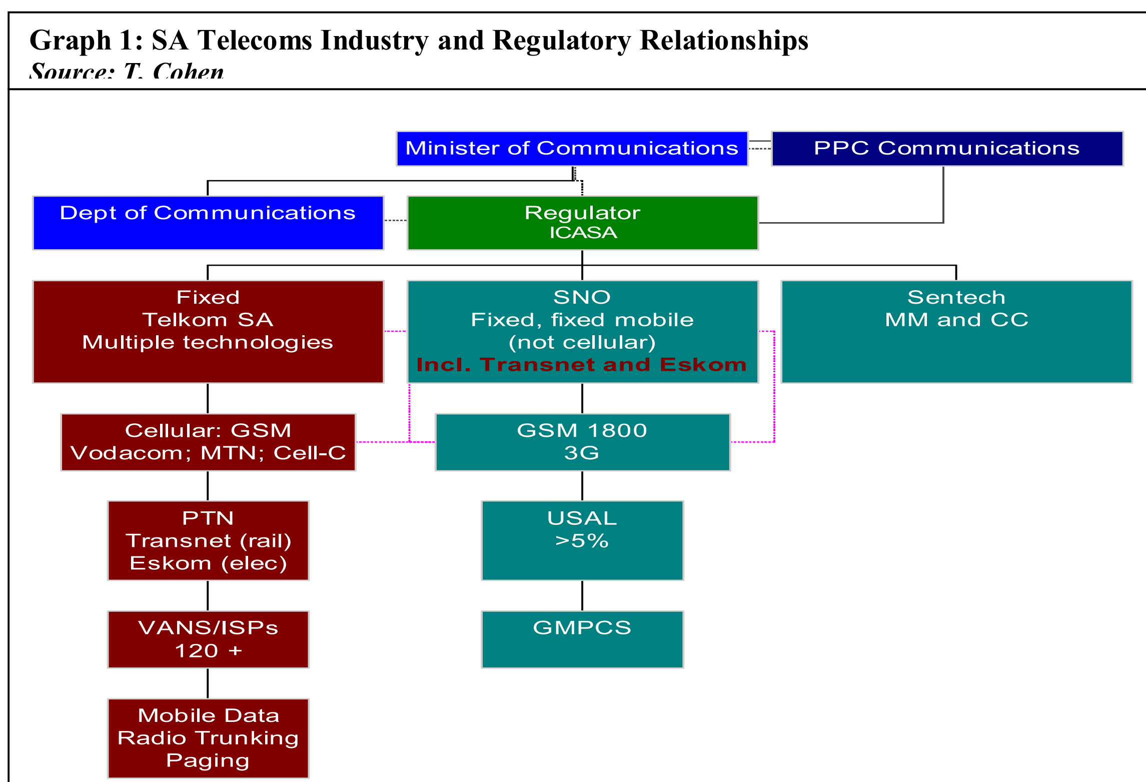
[33] Minister of Communications, BEE ITA Government Gazette, Notice 22971, 20 December 2001.
[34] s 32C, Telecommunications Act, as amended.
[35] ICASA has concluded that public tender and evaluation process and recommended Nexus Connection as a preferred applicant to the Minister, conditional on it providing acceptable proof of financial ability. See ICASA Press Release, "Award of the 19% BEE stake in the Second Network Operator " available online at http://www.icasa.org.za (Accessed 26 August 2002).
[36] s 40A, Telecommunications Act, as amended.
[37] Telkom's total assets are valued at R51.8 billion, making it the country's third largest parastatal after Eskom and Transnet. See Telkom Annual Report, 2001.
[38] Act 64 of 2001. Contestation included a discriminatory access regime to the GSM 1800 spectrum; the continued prohibition on voice over IP (VoIP) for VANS and the number of fixed line players to be licensed. It was widely speculated for example, that intensive lobbying by Telkom and M-Cell, the parent company of cellular operator MTN, a potential bidder for the SNO was responsible for the turnaround in decision from a TNO to a SNO. Government holds a 24.5 per cent stake in M-Cell, which lost R6 billion on its market capitalization following the second policy announcement in July 2001. See Lesley Stones, "Industry plea for state to rethink telecoms policy", *Business Day*, 31 July 2001 available at http://allafrica.com/stories/200107310141.html

sector.[39] A number of issues emerge as clear cause for concern, most significantly, the incumbent advantage afforded to Telkom by virtue of its position in the market;[40] the downturn in the international telecoms industry and the lack of readily available investment capital and investor interest in the SNO.[41] However, one common factor that has unequivocally affected, and continues to adversely impinge on market growth in the future is the unresolved question of independent and effective regulation, and the legislative arrangements compromising that goal. These are discussed in detail, below.



Graph 1: SA Telecoms Industry and Regulatory Relationships
Source: T. Cohen

Regulating Independence

[39] It is worth noting however that teledensity has grown from 10% in 1994 to almost 29% in 2002 (fixed and cellular combined). Fixed line penetration figures are less impressive for a number of obvious technological reasons. However, despite Telkom's installation of over a million new lines in 2001, they disconnected 600 000 lines in 2000/1 for non-payment and fraud, leaving a net annual roll-out of less than half a million lines and a churn rate in excess of 16 per cent. See Telkom Annual Report 2000/1 at http://www.telkom.co.za/annual_report2001/AnnualReport2001.pdf (Accessed 3 March 2002).
[40] Stemming from the technological and organizational learning that has taken place through the years of operating a PSTS, which will not be immediately available to the SNO. See James Hodge, "Promoting Competitive Outcomes in the Fixed Line Telecommunications Sector in South Africa" *TIPS Working Paper 6* – 2001.
[41] M. Bidoli, "Tough Road Ahead" *Financial Mail,* 19 July 2002.

It is widely accepted that independent regulation is an essential ingredient of structural reform in a country's telecom sector and that its presence or absence will directly affect the quality and speed of that reform. [42] It is, inter alia, crucial to raising investment capital and to ensuring efficient and responsive service delivery, whether in a competitive or exclusive supply market.[43] In recognition of its centrality to successful reform, the number of independent telecom regulators has grown from 13 in 1990 to 112 in 2001, and their requirement is contained in a number of international and regional agreements.[44] For example, the EU's Open Network Provision (ONP) Framework Directive requires a body that is legally distinct and functionally independent of other telecommunication organizations.[45] The WTO's Regulatory Reference Paper[46] adopted by all countries that signed the Fourth Protocol on Basic Telecommunications in 1998,[47] calls for regulatory bodies to be separate from, and not accountable to suppliers of basic telecom services. However, while almost all countries recognize the need for a separate regulator, the complex relationships with government and industry result in many manifestations of that ideal which cannot simply be measured by structural separation alone. As the ITU's *Trends in Telecommunication Reform 2002* notes, ‘independence’ is “a concept that is most refracted through the lens of political culture. What one government may consider vital in terms of independence, another may consider impractical, unwise or even impossible.”[48] This sentiment is clearly evidenced in the ITU’s most recent regulator's survey reflecting diverse forms of institutional design and degrees of separation from government: many country regulators report to sector ministries; some like SA, report to Parliament and others to their Head of State.[49] All tend to reflect however that while a minimum baseline of separation is required,

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[42] International Telecommunications Union, *World Telecom Development Report, 2002.*
[43] W.H. Melody, *Telecom Reform: Principles, Policies and Regulatory Practices* (Lyngby, Denmark: Den Private Ingeniorfond, Technical University of Denmark, 1997) at 22.
[44] ITU, World Telecommunication Regulatory Database, 2001.
[45] ITU, *Effective Regulation: Trends in Telecommunications Reform 2002* (Geneva: International Telecommunications Union, 2002) at 28.
[46] *Reference Paper on Regulatory Principles used for consideration as additional commitments in offers on basic telecommunications,* WTO, NGBT (24 April 1996). See http://www.wto.org/wto/press/refpap-e.htm. (Accessed 25 April 1997).
[47] *Fourth Protocol to the Basic Agreement on Trade in Services,* 30 April 1996, WTO Doc. S/L/20.
[48] *Trends in Telecommunication Reform, 2002* op cit., at 152.
[49] For example, Ecuador and the Dominican Republic.

independence cannot be absolute. Nor arguably, should it be.[50] Melody's well-known characterization of independence addresses the broad political spectrum recognizing the multifaceted nature of the concept. He notes that while independence need not necessarily (and rarely does) include the power to make policy, it must include "the power to *implement* policy without undue interference from politicians, or industry lobbyists.[51] This echoes Bernstein's suggestion that the independence of regulatory commissions differs in *degree,* rather than *kind* from that of other government departments.[52]

The above graph sketches the regulatory roles and responsibilities created by the 1996 Telecommunications Act in SA. While regulatory practice does not always neatly dichotomize into policy creation and implementation, the Act, separating policy formulation, operations and regulation, accords with Melody's three-tier model and definition.[53] As the graph shows, the regulator ICASA, is accountable only to Parliament, (through the Parliamentary Portfolio Committee on Communications (PPC)) but has a working relationship (indicated by the dotted line) with the Department of Communications and the Minister on matters of policy. The ICASA Council – the highest decision-making body in the organization – is comprised of 7 councillors, appointed by the President on the recommendation of the PPC, following a public nomination and hearing process.[54] The criteria for appointment, procedures and grounds for removal are specified in the legislation.[55] Like many other countries, the regulator's entire operating budget is determined, supplied and annually reviewed by Parliament, with no provision to use regulatory fees raised from industry towards operating costs.[56] ICASA's independence however is statutorily entrenched: the Authority is subject only to the

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[50] There are concerns regarding political accountability of non-elected officials, and practically, isolation from other commissions or agencies can result in adverse consequences, especially for nascent agencies that have much institutional learning to do.

[51] Melody, above note 43 at 25.

[52] Although Bernstein was making his characterization within the US separation of powers doctrine, it remains useful for examining commissions in other contexts. See Marver. H. Bernstein *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1955) at 146.

[53] The establishment of SATRA in the Telecommunication Act has been repealed and replaced by s 3, ICASA Act, 13 of 2000.

[54] *Ibid.*, s 5. An organogram of the organization is available at http://www.icasa.org.za/

[55] *Ibid.*, ss 5-13.

[56] *Ibid.*, s 15(1). Some countries regulators are permitted to use a percentage of license fees toward operating costs. Examples include Botswana (78%); Brazil (1%); UK (82%); USA (87%).

Constitution and the law, and must function without any political or commercial interference.[57] Although textual support suggests a secure level of independence, assaults on the regulators autonomous status have accompanied its nascent development right from inception.[58] These offensives, together with the legislative provisions that emerged in the Telecommunication Act, as amended suggest a revision of the theory of regulatory independence and capture – which it is argued are two sides of the same coin - and require that the theories of regulation and notions of independence be removed from the North American context that has shaped them and be examined within the unique landscape that SA telecoms history presents.[59]

Rethinking Regulatory Capture

Theories explaining why we regulate and the proliferation of government intervention in economic activity are well documented.[60] Perhaps more than before, telecommunication markets suggest a *locus classicus* of the need for regulatory oversight to set rates and tariffs where (natural) monopolies exist;[61] to counter information asymmetries, anti-competitive behaviour and predatory pricing;[62] to manage competition and the transition thereto; to protect consumers, ensure privacy, quality and continuity of service[63] and to ensure efficient spectrum resource management and allocation. This paper therefore assumes a role for public oversight as a central element of any reform effort to ensure that

[57] s 3, ICASA Act, op cit.

[58] The Broadcasting Authority has had its share of similar struggles. 'An' independent broadcasting authority is protected by the SA Constitution (s 191). Because of its establishment prior to the 1994 democratic elections, it was feared that the IBA's additional degree of independence found in its power to formulate broadcasting policy would be diluted by the proposed merger. The matter was finally resolved, at least textually, by including the words, "as required by s 192 of the Constitution" in the ICASA Act's main object of regulating broadcasting in the public interest. See s 2(a).

[59] See below notes 70 to 72 and accompanying text.

[60] See for example C.F. Adams, et al., *Prophets of Regulation* (Cambridge, Mass: Harvard University Press, 1984) B.M. Mitnick, B, *The Political Economy of Regulation: Creating, Designing and Using Regulatory Forms* (New York, Columbia University Press, 1984) and G.J. Stigler, *Chicago Studies in Political Economy* (Chicago: University of Chicago Press, 1988).

[61] The merit of the natural monopoly argument is not discussed here. See C. Foster, *Privatization, Public Ownership and the Regulation of Natural Monopolies* (Oxford: Blackwell, 1992).

[62] See R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 1992) at 12-13.

[63] M. Whicker, *Controversial Issues in Economic Regulatory Policy* (California: Sage, 1993) at 42-47.

the broader objectives of economic development and social justice are achieved.[64] Critics of regulation may disagree, citing numerous adverse effects of government interference in markets for the purpose of increasing the common good. [65] Those views, while valid in many instances, are not considered here. Even a cursory consideration of the history and evolution of SA telecoms suggests that the effort to extend basic telephony to non-served areas would have been fruitless without targeted governmental policy and an independent agency to give effect to that vision. [66] This agency in turn requires skills, institutional knowledge and sufficient insulation from interest groups (and self-interested individuals within the organization) seeking to maximize their own welfare.[67] However, oftentimes, the regulator is dependent on these groups for funding, information, or technical and specialised expertise. And it is within these relationships and through their maturation that independence is thought to be compromised and capture by the regulated, occurs.[68]

Although subtle in operation and capable of many manifestations, "capture" or "industry-orientation" [69] is broadly defined as the situation where an agency is said to become a tool of the regulated, governed by the commercial interests of the parties it regulates, rather than the public interest. It can occur as a result of actions both by government and industry:[70] an interest group may infiltrate a process the agency follows

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[64] D. Townsend, "The Vital Role of Regulation in the Telecommunications Sector" in *Implementing Reforms in the Telecommunications Sector: Lessons From Experience* Wellenius, B and Stern, P (eds.) (Washington D.C.: The World Bank, 1994) at 505.

[65] Criticisms include its bureaucratic nature; that it slows innovation and reduces market efficiency, protects regulated industries at the expense of the public; is costly and contributes to inflation by supplanting market decisions with those of the regulatory body and that it reduces the ability of corporations to compete in international markets by prohibiting collaboration amongst local producers through anti-trust legislation. See Whicker, op cit., at 47-52.

[66] This is predicated on the assumption that, for a range of practical and political reasons, the state is best placed to deliver services that would not otherwise be delivered in a competitive market where players would "cherry-pick" by seeking to serve only lucrative aspects of that market.

[67] Public Choice Theory highlights the private interests in governmental decisions, placing emphasis on the inclination of self-maximizing individuals or groups to subordinate broader public interest goals to personal self-serving ends. See A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, 1994) and Baldwin and Cave, *supra* at 23.

[68] Other theories, notably Stigler and Peltzman focus on economic interests as the source of capture. Here regulation itself becomes a commodity, when the regulator has a "rent" to dispose of as a result of a monopoly profit. The industry this becomes incentivized to influence the regulator, who might in the process become captured. See S. Peltzman, "Towards a More General Theory of Regulation" (1976) 19 *J. Law and Econ* at 211; G.J. Stigler, " The Theory of Economic Regulation" (1971 2 *Bell J. of Econ* 3; cited in Baldwin and Cave, *Ibid.,* at 22.

[69] L.L. Jaffe, "The Independent Agency: A New Scapegoat" (1956) 65 *Yale L.J* at 1068.

[70] See R. Gonenc; M.Maher and G. Nicoletti, "The Implementation and effects of Regulatory reform: Past Experience and Current Issues", OECD, ECO/WKP 2000, 24.

in making a particular decision, or formulating a rule or regulation. Regulatory personnel previously employed by industry, government or organizations representing regulatory beneficiaries may be sympathetic to submissions and seek to influence outcomes in favour of those leanings. Influence may also be exerted through direct incentives or threats to decision-makers during the process.[71] Once evidence of capture emerges, the independence of a regulator is immediately brought into question and legitimacy becomes difficult to reclaim.[72]

The seminal account of the regulatory life-cycle culminating in capture was proffered by Bernstein in 1955.[73] In his historical account of the development of the regulatory movement in the United States, commencing in 1887 with the establishment of the Interstate Commerce Commission (ICC), Bernstein posits that despite unique elements and differences, all regulatory commissions experience a "life-cycle" comprised of general historical patterns of evolution from "birth to decay". These suggest "a rhythm of regulation whose repetition suggests that there is a natural life-cycle for an independent commission."[74] Influenced by internal and external factors, the cycle ends in the commission becoming captured by interest groups and eventually being rendered ineffective.

Another influential study is Downs' account which considers the life cycle of bureaus less in terms of an aging process, but rather by reference to organizational shifts in personnel which occur throughout its tenure, so that during each stage, bureaucrats with different motives and scope of interest, dominate the organization.[75] Five types of bureaucrats comprise the Downsian model: 'zealots', loyal to narrowly defined policies

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[71] D. Rodriguez,"The Positive Political Dimensions of Regulatory Reform" (1994) 72 *Wash. U.LQ.*1 at 14.
[72] See R. Samarajiva, "Establishing the legitimacy of New Regulatory Agencies" 24 *Telecommunications Policy* (2000), at 183. Some degree of capture is likely to be experienced by all regulatory commissions, if not as an entire organization, through individual employees that manifest consistent bias. Some suggest that this linked to an agency's personnel recruitment strategy, notably, the 'revolving-door' syndrome involving personnel interchange between the regulator and the industry, more common to established commissions. See Whicker, *supra* at 61. Alternatively, this interchange can be seen as crucial for an agency to develop the skills and knowledge it requires for it to be effective. If transparency in operations is prioritised however, these concerns can be adequately addressed.
[73] Marver.H. Bernstein, above note 52. There are other ways to consider the regulatory life-cycle. Bernstein himself offers a rendition in terms of the 'attacks' on regulation that will be made by various groups over time, indicating its maturation, namely judicial review; procedural requirements and influencing public opinion, at 95-99.
[74] *Ibid.*
[75] Anthony Downs, *Inside Bureaucracy* (Boston: Little Brown and Company, 1967).

within the agencies original mission, typically control an agency during its youth. 'Climbers' tend to be self-interested chasers of power, income and prestige, and dominate during a bureau's middle years. 'Conservers' are more focussed on the status quo than climbers and pursue personal convenience and security at all costs, dominating a bureau during its old-age. 'Advocates' who are loyal to broadly defined social functions rarely dominate and are present during the early and middle years of an agency's life. Finally, the occurrence of 'statesmen' in a bureau at any point is rare, and loyal to society as a whole, they never dominate its mission.[76]

While theoretical and practical studies indicate that all regulatory institutions are likely to experience capture at some point, this paper asserts that regulatory institutions in particular contexts *begin* their life-cycle, already captured in numerous ways. The specific case of SA telecoms regulation serves as an apt example and will be discussed following a brief account of Bernstein's theory to set the framework for detailed analysis.

Capture: an inevitable end?

Bernstein posits that regulation typically commences as a policy response to a political call to address a social problem or goal, or to protect the public from undesirable activity. The length of this initial phase - *gestation* - is influenced by the perceived severity of the problem and the extent of pressure from both reform and opposition elements. [77] Despite the agency's creation at the peak of reform fervour, this tension will generally produce a first statute that reflects a compromise. This may result in a regulatory mandate that lacks clarity (perhaps through a vague public interest objective?) and, because of the length of time involved in this phase, the statute may be outdated by the time it is enacted.[78] However, the outcome leaves regulators to carry out missions that legislators have negotiated between interest groups that while in effect are compromises, are seen by all participants to be endeavours in pursuit of the public interest.[79]

With that perception, the regulatory body enters its *youthful* phase with vigour and determination, innocence and freedom from taint and corruption. The atmosphere

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[76] *Ibid.,* at 88. Detailed explanation of the behaviour of each type of individual is at 109 -Zealots; 93 ff - Climbers and Conservers; 103ff -Advocates and 110- Statesmen.
[77] Baldwin and Cave above note 62 at 25.
[78] Bernstein, at 76.

however is far from neutral, and rapidly becomes one charged with posturing and bravado: the new agency, inspired by its goal is focussed on exerting its power and the regulated industry is equally intent on resisting it, reminding the agency of its strengths at every possible opportunity.[80] Yet the political pressure and the public support that gave birth to the agency is at its peak and the commission must seize the opportunity to clearly define and commit to the public interest while these levels of support are highest. [81] Bernstein summarizes this window of opportunity thus,

> [with] powerful political support and leadership…the commission may have [its] only opportunity to make a material contribution to the shape of things. But the opportunity does not last very long…It is remarkable how quickly political interest disappears. [The agency] must establish its beachheads and extend and fortify its lines without delay…before the force behind the agency's directive is spent and the dissident groups have found ways of moderating or checkmating the new program.[82]

Also characterizing this second phase of the life-cycle, and evidenced in the SA context, is a spate of legal battles, which serve to test and define the scope of the Authority's powers. Advantage usually lies with private interests (the incumbent) trying to preserve the status quo, while an untested statute falls prey to highly specialized and skillful industry lawyers. Right from ICASA's creation, Telkom (and to a lesser extent, others) have contested the substance and process employed in decision-making.[83] While substantive challenges can indeed serve to strengthen the legitimacy of the regulator, similar attacks on lax procedure does little to advance regulatory interests. The fact that SATRA began in earnest, to set rules and procedures for its operation, and then abandoned that framework, has only served to aggravate procedural claims.[84]

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[79] *Ibid.*, Baldwin and Cave, *supra* at 21.

[80] The agency lacks administrative experience and its legal powers are unclear and untested. Industry on the other hand, has vital interests to protect and are well organized and financed.

[81] K.C. Davis *Administrative Law* (St Paul: West Publishing Company, 1951) at 164, cited in Bernstein at 80. See below note 85.

[82] Ibid at 81. Also quoting E.S. Redford *Administration of National Economic Control* (New York: The Macmillan Co., 1952) at 386.

[83] *Telkom SA (Limited) v. Maepa and Others,* (8 April 1998), TPD 25840/97 (High Court of South Africa). See also *Telkom SA Ltd* v. *The Independent Communications Authority of SA et al*, Unreported, Case No.: 19014/2000, 19 March 2001. See below notes 107 and 139.

[84] SATRA developed a comprehensive rules and procedures document governing inter alia, internal procedure; public hearings; requirements for filings and contact with the Authority, which to date, has not been officially adopted. The publication of a clear and precise code of conduct for agency employees and

The third phase – *maturity* - begins when the first signs of political support began to wane.[85] As the agency moves out of the political mainstream, it begins to pay increasing attention to the needs of industry, stressing compromise and co-operation as it seeks to avoid conflict.[86] With declined political support, the commission's standards of regulation become determined more by the industry it regulates and it is unlikely to extend regulation beyond limits acceptable to these interests. Greater co-operation with industry also leads the development of relationships between industry and agency employees and facilitates the "revolving door" syndrome in which staff move back and forth between the agency and the regulated industry - which increasingly value (and reward) the institutional knowledge and connections the former bring.[87] While necessary skills transfers take place, this situation has had a highly deleterious effect on ICASA as it struggles to build institutional capacity and to retain skilled individuals.[88]

As 'devitalization' sets in, the agency begins to rely increasingly on settled procedures and becomes less proactive as it focuses on its own political battles unassisted by public opinion and broader political leadership. Internal skirmishes amongst employees over policy find a strong faithfulness to precedent, which in turn, results in an increasingly myopic view of the public interest. It is evidence of this passivity, according to Bernstein, that marks the *mature* agency. Little effort is made to revisit regulatory objectives and redefine parameters: operations become heavily judicialized as the agency concentrates on caseloads and adjudication. This keeps "attention focussed on yesterday's problems, with little or no attention given to the need for revision of regulatory methods and standards."[89] Finding itself politically isolated; lacking in public support; shackled by precedent and backlog; ignored in its demands for staff and

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councillors has at least set the contours of ethical behaviour. (Available online at http://www.icasa.org.za/?FromHome=1&Cmd=ViewContent&ContentID=180)

[85] Bernstein suggests that there is nothing sinister in this. Political support climaxes after the legislation is enacted and support can only be maintained at this intensity for a limited time. Once the statute is enacted, it is presumed that administration will take effect and statutory authority will be exercised. Moreover, champions of the legislation cannot afford to identify indefinitely with its objectives and the interest groups served by its promulgation. See Bernstein, *op cit.,* at 82-83.

[86] Baldwin and Cave, op cit., at 25.

[87] Marcia Lynn Whicker, *supra* at 59 and 60. See also above note 72.

[88] Although not unique to SA, ICASA chairperson, Mandla Langa has repeatedly appealed to the telecoms industry to refrain from poaching qualified personnel from the Authority, who Langa suggests is 'subsidizing' the industry. See Phillip de Wet "ICASA wants business to back off" *ITWeb,* 27 March 2002.

[89] Bernstein, *op cit.*, at 90.

humbled by its lack of finances, the lethargic commission finally surrenders and becomes captive to the regulated groups.[90]

The final phase – *debility and decline*- sets in. The loss of purpose flowing from abandonment during maturation by the public and the polity results in the adoption of safe policy options, facilitating the passage from passivity to debility. Beset with "administrativitis,"[91] the agency's primary mission becomes its own subsistence amongst the regulated. Personnel begin to doubt not only its original statutory objectives, but also what these objectives ought to be.[92] Productivity may decrease and a history of teamwork may result in unofficial pacts not to exceed current quality and output. As Redford notes, the regulator ultimately finds its own position amongst the contending forces in society and thinks only in terms of protecting its own system, existence and power against substantial change.[93] Ultimately the executive responds by cutting or failing to approve budgets, which affects staff retention and motivation.[94] The regulator is in turn increasingly reliant on industry for capacity, which continually reinforces the status quo in the latter's favour. While the strength of internal political leadership, competent personnel and a sense of purpose can delay what Bernstein's views as an inevitable end for commissions, it cannot avert it. Nonetheless, this period is unlikely to end until a crisis calls urgent attention to the failure of regulation and the need to redefine policy and objectives, suggesting that the historical pattern might come full circle.

Regulatory Independence and Capture in the SA

There are of a number of criticisms regarding Bernstein's treatise that may immediately spring to mind: the most obvious of which is that his study was published almost 50 years ago, and would consequently fail to take into account more recent developments, current literature and targeted training programmes[95] which proffer refinement in institutional

[90] *Ibid.*
[91] The term was coined by US Senator Paul Douglas commenting on the tendency of the commission to be passive when the public interest requires positive action.
[92] Bernstein, *op cit.,* at 94.
[93] Redford, cited in Bernstein at 87.
[94] According to the 2001National Expenditure Estimates, ICASA's current budget is approximately R107.3m (USD 10.1 m) for 2002, increasing to R116.4 m (USD 11m) in the 2003/4 fiscal year.
[95] The International Telecommunications Union; The Commonwealth Telecommunications Organization and the US Agency for International Development are three instances of funded regulatory training for newly established bodies. The ITU has recently established a forum for existing regulators and policy-

design.[96] Administrative reforms over recent years in many countries have also contributed to a better understanding of the proper role and functioning of regulatory and other commissions.[97] Moreover, the last ten years of telecom reform have produced more regulatory commissions than ever before, and coupled with the years of institutional learning and practice of others, has assisted newly established regulators develop more quickly into efficient functioning organizations with a firm sense of their challenges and potential pitfalls. Second, the confinement of Bernstein's study to US commissions also limits its application somewhat, as these commissions are the product of a particular history and operate in a specific administrative legal paradigm. [98] Moreover, his assumption that regulation is always the policy response to a political call for action may be an overly broad generalization.[99] Nonetheless, whatever the veracity of these and other criticisms against his thesis,[100] the Bernstein life-cycle has much to offer studies in regulation and is very useful for comparative purposes. To that end, the remainder of this paper examines the life-cycle to date, of the SA telecoms regulator in that mould.

Albeit a slight simplification, it is arguable that the ‘political call to policy’ – and hence the *gestation* period began in the late-1980’s with the need for reform in the telecoms sector, as part of a broader political transformation to address the inequities of apartheid and partly to conform with wider international developments. The response, negotiated by coalitions of reformers and conservatives – was the gradual liberalization of the sector - through the creation of the 1996 Telecommunications Act, which in turn established the first independent telecoms regulatory authority in the country, SATRA.[101]

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makers interested in establishing a regulatory body to facilitate dialogue to share experiences and problems. They also offer numerous international seminars and workshops dedicated to this goal. See http://www.itu.int/treg (visited 25 August 2002).

[96] Two practical resources aggregate many of these: the ITU's *Trends in Telecommunication Reform 2002: Effective Regulation* above note 45 and Intven, H. *Telecommunications Regulation Handbook* (Washington, D.C.: Infodev, 2001).

[97] For example, many projects under the Law Reform Commission of Canada in the 1980’s produced a wealth of literature on the reform of administrative and regulatory bodies.

[98] Jaffe located his criticism of Bernstein in this context suggesting that given the political framework in the US, and the role of agencies and commissions, the merits of the independent commission have been exaggerated. Policy-making cannot be dislocated from politics. He asserts that the case for reform is broader and that Bernstein merely scapegoats the commission for lack of a clearer programmatic approach. See L.L. Jaffe, "The Independent Agency: A New Scapegoat" (1956) 65 *Yale L.J* at 1069-1076.

[99] Ibid.

[100] P. Quirk "Industry Influence in Federal Regulatory Agencies" (Princeton, N.J. Princeton University Press, 1981).

[101] See above note 22.

While clearly imbued with a general public interest objective, the 1996 Act in many respects, was lacking in precision: a number of provisions suggested broad powers for the regulator, but have required judicial interpretation and refinement during its *youthful* stage.[102] This phase was certainly characterized by vigour and enthusiasm, with much regulatory chest-puffing and bold decision taking confidently informed and guided by the public interest. The first ruling SATRA gave was to prohibit the operation and use of call-back systems, which allegedly threatened Telkom's exclusivity (revenue) on international calls and, as it was reasoned at the time, would adversely affect the universal service roll-out objective.[103] Yet, so confident of the correctness of its action and commitment to the values it would reflect, the regulator failed to apply procedural rigour and was immediately taken on review.[104] Shortly thereafter, the Authority ruled against Telkom's contention that the provision of Internet Protocol was its exclusive domain. The decision was strongly informed by universal service, the public interest and access to information ideals, as ruling in Telkom's favour would potentially threaten the existence of the competitive Internet industry.[105] Once again, the matter was taken to court on procedural irregularity.[106] Telkom were successful in their claim, but the court was disinclined to exercise its discretion to set aside the regulator’s ruling in the absence of any evidence of prejudice against Telkom.[107]

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[102] Specifically s 5(2)(b) of the Telecommunications Act provided that the Authority may perform all such acts and do all such things as are reasonably necessary for or ancillary, incidental, or supplementary to the performance of any of its functions. Uncertain of whether this gave the regulator the authority to make rules and procedures of the type contemplated by its rules and procedures committee (RAPCOM), the precise meaning of this provision was extensively debated within that forum for weeks.
[103] Ruling FR-0001 in *Government Gazette* No. 18214, Notice 1200, 15 August 1997. It is arguable that SA underestimated the revenue it would still get from increased call termination on Telkom's PSTN under the accounting rate regime.
[104] The case has to date, never received judicial pronouncement.
[105] Pronouncement P-0001 of 14 October 1997.
[106] The source of the consternation was that an advisory committee formed to assist the Authority determine the matter pursuant to s 27 of the Act, had altered the original question by slightly reformulating it. The court agreed however that this did not affect the substantive consideration of the matter by SATRA.
[107] *Telkom SA (Limited) v. Maepa and Others,* (8 April 1998), above note 83.The Judge ordered the case to proceed to oral evidence for final determination but the matter was postponed indefinitely. The expiration of Telkom's exclusivity and further sector liberalization now makes this question and the ruling, redundant.

SATRA however had a less usual developmental path than its successor. It was to be a short-lived body with different terms of office for councillors,[108] which resulted in half the members of council leaving the Authority before the merger, stripping the newly formed body of existing key institutional telecom knowledge.[109] The merger between the IBA and SATRA also occurred at a very sensitive time in the political history of the organization amidst a highly controversial licensing debacle for a third cellular operator. A delayed decision-making process, rife with alleged irregularity resulted in a court review of the decision to recommend Cell-C (Pty) Ltd as the preferred bidder.[110] This culminated in months of controversy, exposed serious internal discordance within the regulator, raised allegations of improper tendering procedures, undisclosed links to applicants by both council and its auditors; and corruption and government interference in the final decision.[111]

While it is difficult to delineate beacons signalling when each phase of Bernstein's life-cycle applied to SA commences and ends, if declining political support is a marker for the mature regulator, it is fair to suggest that SATRA soured by the third cellular mêlée, reached phase three in the life-cycle *maturity,* as ICASA was being established, and the latter began life already matured by the formers legacy, with a marked decline in both political and general public support.[112]

Significantly, evidence of Bernstein's 'negotiated outcome between interest groups' was also evident during the gestation phase as these groups clashed over the

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[108] Two councillors were to serve 2-year terms; the remaining three were to serve 4-year terms, and the chairperson had a 5-year term, s 10(1) and (2). While ICASA terms are still staggered, all councillors, with the exception of the chairperson, who still has a 5-year term, are appointed for terms of 4-years.
[109] Both the IBA and ICASA had 6 councillors each: the merged authority was to have 7 in total.
[110] Decision of the Minister of Communications on the Third Mobile Cellular Telecommunications License', Press Release, 16 February 2001at http://docweb.pwv.gov.za
[111] See *Special Report of the Auditor-General on an Investigation at the SA Telecommunications Regulatory Authority* (Pretoria, 10 February 2000). An affidavit by the outgoing SATRA chairman, Nape Maepa alleging government interference in council deliberations prompted the review. The minister sought leave to appeal in the High Court on the basis that she was drawn into the licensing process to ensure that SATRA adjudicated in a fair and transparent manner. This, she claims was misinterpreted by rival bidders and the court as executive interference. The parties eventually settled the matter, the terms of which have apparently never made public. See M. Zlotnick "South African Telecommunications Regulation: A Review and Prospects for the Next Five Years." Available at http://www.gtlaw.com.au (Accessed 22 August 2002).
[112] Hostility between the government and SATRA had reached heightened levels prompting a response from the Department on SATRA's handling of the Interconnection Guidelines following the third cellular case as "the last kick of a dying horse". See 'Ngcaba slammed for comments', *ITWeb,* 9 June 2000. See below notes 134 to 138 and accompanying text.

precise powers to be given to the regulator. In some sense then, the telecoms regulator in SA had two gestation periods, one prior to SATRA's formation, and one preceding ICASA's creation. While the merger had been contemplated in the White Paper and was largely accepted as a prudent rationalization of resources in light of technological convergence, concerns emerge that SATRA was considered "too independent" for government. Nonetheless, the merger appeared fortuitously timed to deal with both the allegations of impropriety and to renew a quality of leadership and inspire confidence in a rather shaken industry. Regardless, both phases preceding each manifestation of the Authority - as SATRA and ICASA - evidenced efforts to minimize regulatory power at conception.[113] Rodriguez suggests that these are essentially efforts to capture the agency "at the threshold to ensure that the regulatory program and agency structures are designed to aid the regulated groups' agenda."[114] In the SA context, the "regulated group" must primarily include the government as majority shareholder in the incumbent.

In ICASA's case, directly as a result of the cellular debacle, much political wrangling occurred over the provisions of the proposed merger Bill, as parliament tried unsuccessfully, to give the powers of appointment and removal of councillors to the executive.[115] In terms of SATRA however, events emerging during the final drafting stages of the original enabling statute - the 1996 Telecommunications Act – signalled that the future regulatory agency would face ongoing challenges to its independence. Just prior to finalization of the Bill, a number of proposals were made, some of which were adopted in the final draft, to greatly increase the power of the minister with regard to the regulator: namely, that the regulator be accountable to the minister, rather than parliament; and that ministerial discretion replace all previously agreed upon, fixed timelines on competition and liberalization matters.[116] Horwitz notes that so expanded was the minister's prerogative in this draft of the Bill, that it was unclear what, if anything, was to be the role of the regulator. Rodriguez's 'threshold' argument seems to have particularly accurate application here: the executive seemed intent on ensuring that

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[113] "Telecoms Bill is said to undermine ICASA" *Business Day* 16 March 2001.
[114] Rodriguez, above note 71 at 15.
[115] There was also debate over a proposed clause allowing regulatory decisions to stand, even if an improper interest is established on the part of a councillor. This was scrapped in the final Act. See Barry Streek, "New Communications Bill Amended" *Mail and Guardian,* 14 April 2000.
[116] Horwitz, above note 7 at 264.

any regulatory body to emerge, which would direct essential infrastructure at this crucial phase of transition, would be accountable to and controlled by it.[117] This sentiment resonated with many in the SAPTS old guard, who as Horwitz notes, had been long trying to find a way to secure their power and position.[118] Yet in the sanctity of the consultation that had characterized SA's telecom reform negotiations, this assertion of ministerial prerogative had a particularly unpleasant resonance.[119] Some characterized these new ministerial powers, not previously agreed upon during the White Paper process as an "unholy alliance" between Telkom and the policy makers, casting doubt on "the impartiality of a regulatory authority which is appointed by, and is responsible to the Minister, who is himself, responsible for promoting the interests of Telkom."[120]

But slogans, rhetoric and formal submissions did little to change the reality.[121] The final draft preserved ministerial prerogative in a number of important ways, including the power over interconnection policy and Telkom tariffs for a three-year period; the responsibility for issuing Telkom licenses[122] and determining the periods after which competitive supply of similar services may be authorized;[123] as well as having the final say in awarding major licenses generally.[124] The Minister lost the battle to have SATRA accountable to his office, and also to appoint and remove councillors, with that power being retained for the state President on the advice of the PPC. As mentioned above however, the debates on the ICASA merger Bill in 2000 saw the Ministry try to take a second bite at the appointments cherry, only to be defeated again on the issue.[125]

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[117] *Ibid.,* at 266.
[118] *Ibid.,* at 267.
[119] Especially statements that seemed to undermine the very value of the stakeholder consultation process. Then Minister Naidoo made clear his opinion by stating that "government has to move forward when consultation stops delivering." Quoted in Horwitz, *supra* at 269.
[120] Information Technology Association, *Submission to the Portfolio Committee on Communications on the Telecommunications Bill*, 15 October 1996, cited in Horwitz at 272.
[121] Horwitz summarises the various submissions in this regard and the political sensitivities these reflected at 273ff. Political support for 'a' regulator had also been compromised at that time, by the irregular spending behaviour of a few serving on the first IBA council, allowing the minister to drum up support for stronger agency control.
[122] s 36(1)(a).
[123] s 36(4).
[124] s 35(a) stipulates that all major licences including PSTS; mobile cellular; national and international long distance and multimedia services require ministerial approval to be issued and s 34(2)(a) prevents application for any of the above unless the Minister has issued an invitation to apply for such service.
[125] See supra note 115 and accompanying text.

It is precisely within this realm that the main source of concern regarding the sector's economic future is located: the regulatory environment as it stands and the role of certain interest groups in shaping its overall development. These legislative provisions, a product of a particular history, create a form of "regulatory dualism" establishing cumbersome procedures and possibly compromising effective regulation. This suggests the following: first, that ICASA has prematurely reached Bernstein's maturity phase in terms of declining political support; and second, that this is where the life-cycle theory departs from its orthodox rendering.

Combined, the ministerial prerogative and regulatory dualism propose textual support that the regulatory authority was indeed captured at birth, and has spent a considerable amount of its youthful energy, dedication, focus and determination, trying to free itself from a reluctant state of capture from government, manifested through its statutory relationship to the Minister and the Department of Communications, particularly in matters of licensing and gazetting regulations. Presumably the motivation for governmental control is its 70 per cent share in Telkom (and now equity in Sentech and the SNO) and the resultant commitment to that interest in pursuing objectives that may best serve its welfare - and arguably the welfare of the broader population had Telkom been able to deliver in full, on its roll-out targets.

Nonetheless, it warrants outlining the operation of this relationship to highlight the enduring problem is poses. In terms of the Telecommunication Act, the Minister, as opposed to the regulator, has the power to invite and grant applications for major licenses[126] and to approve certain regulations drafted by the Authority.[127] In terms of this dualism, the regulator is tasked with assessing and evaluating license bids and can only make a recommendation to the minister, but cannot ultimately award that licence – its role limited to merely *issuing* the license on approval by the minister. Similarly, the regulator cannot invite applications for a major service licence, which remains at the discretion of the minister, subject to existing policy dictates. Only in the case of non-restricted licenses, such as VANS and PTNS, can the regulator take a decision on its own

[126] s 34(2)(a)-(b) read with s 35(2).
[127] s 96.

after due consideration.[128] The licensing of Cell-C aptly served to reflect the difficulties created by having this role split between an executive arm of government and an independent agency.[129] Efforts to "clarify" this in the 2001 Amendment Act only served to more clearly delineate its operation, not address the source of the problem. The amendment now empowers the Minister to accept, reject, require further information from ICASA or refer the application back to it for further consideration, but does not alter the fact that she still retains the sole power of approval.[130] Similarly with regulations, while the Minister has the authority to issue policy directions in certain delineated areas, she does not have the power to issue regulations, but she retains the power to approve regulations made by ICASA, without which, these regulations cannot be promulgated.[131] A judicial skirmish over the interconnection guidelines for the industry, which would also replace the Ministerial Guidelines on Interconnection for Telkom, [132], serves as a useful cautionary tale.

Following an extensive public consultation process begun by SATRA, [133] ICASA published draft interconnection and facilities leasing guidelines in March 2000.[134] Under the legislation, these required ministerial imprimatur before they could be gazetted as law. After a lengthy delay, the minister finally approved the guidelines only to publish a notice unilaterally revoking them just one month later, on the basis that there had been insufficient public consultation and that the merger between the IBA and SATRA required further postponement so as to allow the IBA to participate in the process.[135] SATRA reinstated the guidelines, claiming that the Minister's actions were *ultra vires* and resolved that it would continue to apply the withdrawn guidelines to a number of pending industry disputes.[136] It was widely speculated both by the regulator and industry that Telkom, unhappy with the pricing methodology and provisions for interconnection,

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[128] s 35(1)(b)
[129] s 34(2)(a)(ii).
[130] s 35(2)
[131] s 96.
[132] *Government Gazette* 17984 GN R771 of 1997.
[133] *Government Gazette* 19159 GN R1683 of 1998.
[134] *Government Gazette* 20993 GN R1259 of 2000.
[135] *Government Gazette* 21108 GN R1680 of 2000.
[136] SATRA, Media Release, 6 June 2000 at http://satra.gov.za/press-page.cfm

had pressured the minister into revoking the SATRA guidelines.[137] Aside from caustic public criticism of SATRA's actions by the Department, the Ministry remained silent on the issue.[138] A year later, a reviewing court finally confirmed that the withdrawal had been unlawful and ultra vires and reinstated the guidelines, noting that,

> the function of the Minister is to prescribe policy. The function of the Authority is to regulate, inter alia, by making regulations. The Minister does not have a free hand in dictating policy. She must consult the Authority and other interest groups. Similarly, the Authority does not have a free hand to regulate. It must do so within the bounds set by the policy directions. In such a scheme, it would indeed be strange that the Minister would be limited in her power to lay down policy directions, policy being the field where she is supposed to be paramount, but unfettered in her power to withdraw regulations, the making of which lies within the competency of the Authority. […] As a pure question of legality, her act of withdrawing the guidelines was invalid. [139]

While a cursory examination of recent regulatory activity by ICASA arguably does point to an early phase of maturation on Bernstein's account, there is however very little indication of debility and decline. Strong political leadership is manifest within the current council and although continually facing key personnel losses to industry, the authority has also managed to retain and attract individuals with institutional knowledge.[140] While there may be some marginal signs of senescence, the organization has only been operational for five years, suggesting that these would be premature. Gains, while small, are evident, and while many decisions remain on appeal by the incumbent, victories such as the interconnection judgement are important benchmarks in the pursuit of the original public interest objectives. Quantitative and thorough assessment of the subjective perceptions of personnel regarding purpose and mission and their faithfulness to the original regulatory enterprise would be required to assess whether, and how

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[137] See 'Satra's Last Stand' *World Reporter,* 6 June 2000. The guidelines proposed long-run incremental cost (LRIC) as the pricing methodology, and Telkom had strongly lobbied for the implementation of the Efficient Pricing Component Rule (ECPR). ECPR bases interconnection charges on the net incremental costs of interconnection, plus the "opportunity costs" or margin lost by the incumbent as a result of traffic taken by the new entrant. This approach is generally not accepted by regulators as a reasonable option, see Intven, above note 96.

[138] Lesley Stones, 'Clash Looms as SATRA takes on Minister' *Business Day,* 8 June 2000.

[139] *Telkom SA Ltd* v. *ICASA, supra* note 83 at 18

[140] Mandla Langa, "The Challenges Ahead: Regulating in 2002 and Beyond". Speech delivered at the National Association of Broadcasters, AGM, 27 February 2002. Available online at www.iba.org.za/Mandla_Langa's%20speech_27%20Feb%202002.doc (Accessed 31 August 2002).

intensively, passivity prevails. Moreover, while there is little doubt that the traditional Bernstein vision for ultimate capture by industry will play itself out to a greater or lesser degree with ICASA, as the authority enters the second phase of liberalization, it may arguably be renewed by novel challenges it faces, the prospects of increased competition, interaction with new interest groups and the experience and energy of new staff and councillors. These challenges however, also include finding acceptable policy responses to dealing with reluctant capture, or more practically stated, the dualism inherent in regulating under ministerial prerogative. The following section briefly considers some alternatives.

Working with Reluctant Capture

Considering the complexities inherent in the enterprise of regulation, an ideological shift in conceptualising the nature of the problem is primarily required. At its most basic this suggests that condemnation of the regulatory environment alone is unlikely to produce any meaningful changes. Recognition and acceptance, primarily by the government of the fundamental problem – the conflict of interest – that pervades the sector by virtue of the government's shareholding in Telkom, and other soon to be licensed operators, is crucial. Gillwald notes that this conflict may result in the protection of Telkom and the its major shareholder, the state, at the expense of broader sector and economic growth. "If however, this is formally acknowledged, which it seldom is, the state can manage the conflict by separating out the narrower responsibilities for the incumbent, from the broader policy responsibilities of the sector."[141] How exactly that should be done is not the focus of this paper, but recourse to administrative law, creative legal modelling and benefiting from lessons in other jurisdictions facing similar problems, may all be useful.

One possibility that may enhance regulatory independence is to adapt from the Canadian telecommunications law, the notion that the regulator be able to forbear from regulating portions of the market, where it is consistent with broader policy objectives.[142] Under the Canadian model, the regulator can effectively withdraw and let the market regulate itself where competition is efficient and consumers are benefiting. While this

[141] A. Gillwald, "Policy and Regulatory Challenges of the Digital Divide" AfricaTelecoms 2001 (on file with the author).

requires further exploration, the SA regulatory regime is not optimized to allow the Authority to refrain from regulating where it does not deem it necessary to do so, affording the regulator an option to avoid unnecessary disputes.

Also importantly, a repeat of previous policy tussles over the structural independence of the agency need to be avoided. Although the appointment and removals process for councillors appears to be settled law, it is not an unassailable provision: if history is instructive, it may face challenge again. Considerably more profile needs to be given to the issue of interaction with the executive over core regulatory functions. It is suggested in this paper, that the current dualism between the two be revisited, and more importantly, revised. Few, if any, possibilities to reverse this paper's contention of reluctant capture exist without that tie being simplified – not in operation – but by practically addressing the essence of the problem. The fact that the Minister tables ICASA's annual report in Parliament does little to counter perceptions of ministerial influence. Similar discussions should be had regarding accountability and parliamentary oversight. Maintaining public and political support for the regulator – and hence keeping it from 'debility and decline,' requires an informed body politic as to the ongoing importance of the regulator's role, and to whom it is accountable and why.

Most significantly however, discussion needs to commence on employing alternative funding mechanisms for the regulator (and other agencies in SA) beyond parliamentary appropriations.[143] While it is not uncommon for regulators to be financed in this manner, independence can more confidently be ensured if the agency has control over the way in which monies are raised and how those are apportioned. [144] Autonomous financing and adequate resources are directly linked to effective functioning and the ability to carry out a legislative mandate: it has an impact on the hiring and retention of qualified staff; operational management including adequate office and facilities procurement; the ability to represent the organization in international fora and

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[142] s 34(1) and (2) *Telecommunications Act* (1993) [Canada].

[143] s15(1) ICASA Act, 2000. Similar concerns were noted in 2001 regarding the effective functioning of the Human Rights Commission due to inadequate budget allocation. See "Rights Commission Underfunded, Lacks Independence" *Allafrica.com,* SAPA, 28 November 2001.

[144] *Trends in Telecommunications Reform,* above note 45 at 137.

importantly, the ability to pursue and defend litigation.[145] Strict accounting measures would still avail the Authority to parliament's oversight, ensuring political accountability and minimizing risks of impropriety.[146] Of course financial freedom does not automatically parlay control into independence. Singapore's regulator has almost full financial autonomy, yet a very close working relationship with the oversight ministry prevails to which all major decisions are often deferred.[147] Full fiscal control for ICASA would however mitigate the reluctant capture thesis, at least to some degree, by removing the potential for manipulation that exists in the 'dualist' decision-making model.

Conclusion

Through a brief review of the history of SA telecoms reform, including a sketch of the policy contours for the second phase of liberalization, this paper has endeavoured to illustrate that developmental and distributive social goals aimed at redressing apartheid inequities in the sector, albeit legitimate in ideal, have created a situation in which the executive retains a complex and overly broad oversight role in regard to the regulatory authority. This supervisory role is a product of legislative fiat created by provisions in the Act entrenching ministerial prerogative and a dualism between the executive and the regulator in the licensing and regulation- making arenas. There is a possibility that this will only intensify as its shareholding interest in the sector diversifies through the award of licenses to other state owned enterprises and in the run up to Telkom's IPO in 2003.

In addition, the paper has presented an account of Bernstein's regulatory life-cycle and suggested that while his version predicts industry capture in the last phase of the cycle, the SA regulatory framework presents a case for agency capture - *by government*, rather than industry - at gestation and birth, creating a situation in which the regulator spends its youthful phase trying to free itself from the control these legislative

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[145] *Ibid* at 138. It should be noted that ICASA had to approach parliament for additional funding in order to obtain legal representation in the court review of the third cellular licence. See T. Cohen "Domestic Policy and SA's Commitments under the WTO's basic Telecommunications Agreement: Explaining the Apparent Inertia" (2001) *Jnl of Intl Economic Law* 4(4) at 748.

[146] Alternative funding mechanisms could include any of the following or a combination of licensing and regulatory fees; fees for the allocation of spectrum or numbering; fees for type approval or other specialized engineering tasks; a regulatory tax; income from assets including interest, investment income or property and income from enforcement action or fines. *Ibid.,* at 141-142.

[147] *Ibid.,* at 140.

provisions impose. While the regulator acknowledges the need for a certain degree of political patronage, it seeks to establish its bona fides amongst the various sector interest groups– including government - by flexing regulatory muscle in accordance with its interpretation of its mandate. The statutory provisions linking ICASA and the Minister in terms of core regulatory functioning however, facilitates unwarranted opportunities to be drawn into unnecessary policy battles over the implementation of this mandate.[148] A number of examples were used to illustrate the practical manifestation of reluctant capture, including the award of the third cellular licence and the judicial fracas over interconnection policy.

A number of legal tools and alternatives were alluded too as possible solutions to mitigate, if not fully address the situation, although these would require further examination for their practical application, and others might need to be sought. At best, an uncoupling of the dual roles between ICASA and the Minister is suggested as is alternative funding mechanisms to parliamentary appropriation for financing the regulatory authority.

The SA telecoms sector is about to embark on a highly challenging period as it begins to open its fixed line market to competition. With the current downturn in the global telecoms market, it faces many challenges. The country's social and economic development agenda is as pressing as ever, necessitating creative solutions for service delivery – and requiring foreign investor interest and capital.[149] Whether its current articulated vision to effect this is sufficient will depend on many exogenous and endogenous factors, but foreign and domestic investment is unlikely to flow if regulatory design matters are left un-addressed. As one news article decried at the time in reference to the third cell debacle, "There is not more than one foreign investor that would be

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[148] The third cellular licensing case speaks directly to this, as does the interconnection review case and more recently a Telkom tariff rate review case regarding contested administrative conditions in which tariff filings were allegedly lodged. This resulted in a threatened court review, which culminated in a settlement agreement between ICASA and Telkom, smacking of political compromise. See 'Settlement Agreement entered into between ICASA; The Chairperson of ICASA and Telkom SA (Ltd) regarding fees and charges for the 2002 tariff year, 5 June 2002.

[149] Bidoli, above note 41.

happy to recommend South Africa as an investment destination after this process."[150] That said, the SA telecoms sector remains a lucrative market at the ascent of its potential. Telecoms (services and equipment) account for 4 per cent of total GDP (which itself has grown almost 50 per cent since 1994)[151] and which translates into SA spending more on telecommunications than most developed European nations. [152] The extent to which the suggested reluctant capture theory proves true, it needs little more to correct it than traditional perceptions of capture require elsewhere: a strong commitment to transparency, fairness and independence and bold political leadership in the regulatory authority.

From a theoretical standpoint however, the paper suggests that regulation, like most things, should be viewed in context and that existing theoretical accounts, informed by different narratives and experiences may have decreasing purchase in the SA context, where distributive goals have been prioritised over other sector reform objectives. While still sceptical of the efficacy of the dualism model, the benefit of hindsight allows the genesis of these broad ministerial powers to be similarly contextualized within legitimate service delivery goals. To the extent that these targets have shifted, or these powers handicap effective regulation, it requires urgent attention, if these aims are still to be achieved.

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[150] *ITWeb* 30 June 2000, cited by Gillwald, A "Think Global, Act Local - Contextualising Regulatory Challenges" – ICASA Workshop, August 2002. See also Langa, M. "It's about more than the cost of a call" *Sunday Times,* 13 January 2002.

[151] Which in 2000 was measured in excess of R 800 million. SA Reserve Bank Time Series Analysis Sheet 1: GDP at market prices 1999-2000.

[152] See Bain and Company SA: The SA Telecommunications Industry Structure and Regulation" cited in A. Gillwald, "The Policy and Regulatory Implications of Broadband", study presented to the ITU, 5 April 2001.