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Contested media environments in South Africa: the making of communications policy since 1994. (draft, not for publication or citation)

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Abstract:

Democratic transition in South Africa has seen complex developments over who controls communications. Unlike the Apartheid era of racist state control, aspirations for a nonracial and pluralistic landscape have largely been fulfilled. However, the democratic period saw increased involvement by government in communications policy making, and a decline in participatory opportunities and processes. This has reflected a desire by government to steer communications for reasons that are professedly "transformational" or developmental (even if in effect not always such), and which are also sometimes politically self-serving.

In overview, the post-Apartheid government's commitment to a mixed economy has come to entail the inherently contradictory approach of "managed liberalisation" in the communications arena. In turn, this has also given both space and cause to (mainly) elite interests to contest a range of policy matters. The institutions of parliament and the communications regulatory authority have been sites of this contestation. Opposition to government, changing technologies that complicate attempts at regulation, the inexorable marketisation of the arena as a result of the liberalisation leg of the equation – all these have also seen many instances of government having to temper its managerial inclinations. The contemporary reality therefore is one of elite pluralism, with a vibrant diversity of actors even if civil society is far from having the influence it once had.

These developments are evident especially in regard to public broadcasting where the SABC has been contested in terms of its political independence, transformational role, editorial policies, business model and license conditions. There has also been major contestation around policy and law concerning the independence and authority of the regulator, the power of the minister, and communications convergence. Technological and market dynamics in all of this presage a future of continuing, even intensified, elite contestation, with government role ultimately being diminished – for both better and worse.

1. Introduction:

Racial politics dominated media under Apartheid; colour-blind money is what had come to matter at the threshold of South Africa's second decade of democracy (see Fourie, nd; Netshitenzhe, 2004; Wasserman, 2004). This does not mean an absence of policy and politics: the intense commercialisation of the country's media, and

especially broadcasting, is a function of specific policies and laws, and their practical effect, and of contestation around these. That the market increasingly rules in South African media does not mean the absence of political choices and contestations. Further, the market dispensation does not automatically exclude state attempts to control media politically nor a scenario of corporatist collaboration of a propagandistic nature between media and government. However, in practice, the configuration in South Africa does ultimately diminish the power of the state over the communications landscape, and it is more likely to perpetuate elite pluralism rather allow for control of communications by a consolidated ruling bloc of whatever racial complexion.

This paper assesses the post-Apartheid communications environment, mainly as regards media and to a lesser extent telecommunications, from its origins in "negotiated liberalisation" (Horwitz, 2001a, 2001b). It focuses on how South Africa evolved from a "progressive" policy environment with participatory and deliberative stakeholder politics, to a top-down, state-directed liberalisation mainly in the interests of industry, which increasingly means the market, not the state, dominates the communications environment.

Commentators like Harber (2005, 2006b) see this evolution in liberal terms. For instance: "Every few years, it seems, the mandarins of communication make a bid to take power away from the broadcasting regulator, [the Independent Communications Authority of South Africa – GB], Icasa. The pattern has been regular: they table a new Bill that lessens Icasa's independence, every industry player goes to parliament and unanimously and unequivocally warns that this is unconstitutional, damaging to our broadcasting industry and against everything we are preaching to the region, the continent and the world about the need for independent regulation" (Harber, 2006a). To caricature this perspective slightly, it reads South African post-Apartheid history as evidencing the existence of a power-hungry state held at bay by a communications industry seeking freedom. Civil society is not a significant force in this, and media and telecommunications are in effect separate arenas. Government reluctantly concedes to liberalisation because it is pressured to, although it would really prefer a commandist model in relation to communications, and the real inclination frequently comes to the fore.

Such a perspective is altogether too simplistic. It entails an aprior assumption of a predictably control-seeking government (i.e. anti-democratic) that inexorably moves towards suppression of an independent media (pro-democratic) as well as stifling telecommunications development through state-controlled vehicles. An alternative paradigm is a "social democratic" position that would read the asstate merely seeking to do its duty through intervening to ensure "transformation" of the legacy inequities of Apartheid. A fourth (Marxist) account sees transition as a captured state and corrupted ANC increasingly acting in alliance with capital to promote a pro-profit market landscape for the benefit of a mixed-race middle class. This paper acknowledges the insights to be had from each perspective, but concludes that a liberal pluralist assessment more aptly grasps the dynamic at play. It tracks how government strategy both embraces liberalisation and at the same time seeks to control the process, and how this contradication accounts for the substantial (elite) contestation that has occurred. The prediction is that liberalisation will increasingly

reduce scope for government interventions for whatever reason – political, promoting class inequality or delivering on transformation.

The narrative begins by sketching the situation prior to 1994, and goes on to assess the changes since then, largely through a periodisation linked to different Ministers of Communication. The political and legislative media environment in general is examined, with special attention to various significant moments of contestation. Four phases are identified. The first is sees a government hands-off approach in which the regulator rules pretty much autonomously; the second sees the state gaining strong control over telecommunications and also insisting on a policy-making role regarding broadcasting. Although checked by various forces and institutions, the third phase involves increased governmental intervention – for a range of reasons (some narrowly political and related to promoting government, others more related to transforming race and class deprivations). The fourth and current phase sees market forces playing an ever greater role, with the influence of both state and civil society comparatively diminishing into the future. This scenario does not fully meet the interests and aspirations of any single interest group (whether government, parliament, regulator, business, civil society, citizens or consumers), but it is a reality likely to endure. Market relations, with all their pro's and con's, will become ever more central to the communications landscape.

2. The Apartheid media landscape

The years preceding the 1994 first democratic elections already laid the foundations for the future environment. In legal terms, the strict controls of the 1970s and especially the 1980s State of Emergency years had come to an end. As regards economics, the vast majority of media was commercialised, with the SABC also financed largely through advertising. These aspects have persisted in the media environment – and been the subject of ongoing contestation. Telecommunications in 1994 was a separate field from media, but had seen two private cellular companies being licensed, and was soon to be followed by the part-privatisation of fixed line operator, Telkom (see Horwitz, 1997).

The ANC in 1992 did not give much attention to telecommunications policy, but it did draw up a media policy that included a dose of neo-liberalism which stood uneasily with a control-oriented tendency within the organisation. However, in the wake of the collapse of Eastern European socialism, it had to be generally conceded that a degree of private pluralism was essential to democracy. A state-controlled media landscape was discredited. Neo-liberalism also meant that substantively off the ANC's agenda was any idea of public-funding for people's media (or any vision of the fringe "alternative press" emerging as the new mainstream). However, reflecting ANC populism plus civil society input, the policy also included some participatory policy thrusts such as access for all to media, and access to information. It further specified that media freedom needed to be complemented by conscious effort to ensure its benefit was not limited to debates among elites. Many of these policy positions were to either inform, or to be amended by, actual practice of the ANC-dominated government in the years after 1994.

3. First phase: hands-off by government

After the ANC came to power, it had priorities other than communications. For example, it took six years to legislate on its access to information policy, and to actualise the constitutional right to freedom of information, with the Promotion of Access to Information Act (2000). The terrain of corporate print media escaped major attention altogether – in part due to the immunity of a constitutionally-enshrined right to freedom of the media and to the wider balance of forces. One exception was broadcasting, having been largely a state-monopoly under Apartheid, and which was a clear candidate for early changes – but even here government would play little role in the early years.

As Horwitz (2001a, 2001b) has tracked, the broadcast landscape that emerged post-Apartheid had its roots in contestations that began several years earlier (see Tleane and Duncan, 2003; Minnie 2000). An historic compromise in 1993, also reflecting a balance of power at the time, took broadcasting out of the political power stakes. Thus, the National Party agreed to relinquish control of SABC ahead of the election, in return for the ANC committing to the same after the poll. Civil society was not just an equal partner in this negotiated resolution, it also brokered the deal and drafted the legislation. A year before the elections, the SABC was restructured, in that its board was appointed by the President on recommendation of parliament after public interviews with potential candidates. What also emerged as guarantor of the compromise was the location of substantial power in the hands of a broadcast regulator, whose independence was enshrined in the 1993 interim democratic constitution and retained in the final 1996 constitution. This arrangement had already been given practical effect in 1993, in the form of the Independent Broadcasting Authority (IBA) Act that year.

In the post-election period, the then Minister of the newly-created Department of Communications (DoC), Pallo Jordan, adopted a very hands-off approach, and the early development of policy was, in effect, decentralised to the IBA. As reviewed below, the IBA thus became the key player in communications policy in the early post-Apartheid period.[1]

Significantly, the IBA Act had called for an inquiry into the viability of public broadcasting, cross-media ownership rules, and local content provisions, the findings of which would guide licensing policy and practice. Once constituted, the IBA proceeded with what became known as "the Triple Inquiry". An indication of the participatory nature of this policy development stage was that 105 written and 35 oral submissions were made to the regulator (IBA 1995).

The IBA Act and the Triple Inquiry report (IBA 1996) put into effect a policy of a three sector broadcast landscape characterised by three kinds of licensing – public, private and community. The philosophy was that the three would be complementary. In fact, as is noted below, the reality was much more sector competitive in terms of audiences and advertising, and it was also less distinctive in regard to content. One especially significant policy element in the Triple Inquiry report was its assessment that broadcast pluralism would benefit from privatising SABC's more commercially-

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1. The only real policy initiative from the new government in its early years was outside the DoC and which took the form of a commission, which included civil society media representatives, to review (and reinvent) the government communications services.

run television and radio stations. It also identified some areas of SABC programming that would require public subsidy.

SABC responded by arguing for a lesser privatisation, and at the beginning of 1996, the ANC-dominated parliament came into the arena as a policy player, and decided in favour of SABC's position so that ultimately a third of its radio stations, but none of its TV channels, would be sold off (see Barnett, 1999).

The development reflected a disjuncture where IBA made policy, but where parliament had the final say. Further, government as a third factor retained the power to dispose of assets as it saw fit. Thus, the sales revenue from the privatisation went to the central fiscus rather than back to the corporation. Further, whatever the IBA might believe about government grants for the public broadcaster, it was toothless in regard to actually mobilising funds in any direction. A split power situation pertained, and however healthy this may be in terms of democracy, its potential dysfunctionality and instability invited government attempts to re-engineer the equilibrium into a different and more workable balance.

At any rate, the sell-off of SABC stations worked to the benefit of an embryonic fraction of the business community who gained from the black "empowerment" preferencing in the sale. The subsequent opening up of the airwaves more broadly by the IBA, with the authority also licensing seven new stations in March 1997 to broad-based black-controlled consortia, was evidence that liberalisation could work for transformation. Although this disappointed big (white) business, it was hard for any forces to reject policy measures for redress and for black ownership in the context of South African history. A similar situation applied with the IBA Act's constraints on cross-ownership by the (white) newspaper industry of broadcast assets, and with the limits it placed on concentration of radio ownership and the extent of foreign ownership.

Where contestation did arise was from would-be private broadcasters when the IBA decided to prioritise the licensing of community, rather than commercial, radio stations. While this delay may have frustrated the (white) business sector, it also reflected the strength of opinion emanating from civil society groupings as well as an orientation in government (albeit short-lived) towards the "RDP" – the mass-oriented Reconstruction and Development Programme. The prioritising of community radio corresponded with the 1992 ANC policy provision about enhancing access to media, although it did not emanate from government. Indeed, it reflected the way in which the new-born IBA was unwilling to play second fiddle to external forces – be these business or government.[2]

In summing up this period, one can point to the involvement in design of the media landscape by a range of distinct players: civil society, various business groups, the

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2. More than most other interventions, this resulted in non-racial pluralism in broadcasting – by 2006 an estimated 90 of some licensed 122 radio stations are community stations. SABC then had three commercial radio stations and 15 supposed to be public service channels (although they also carry advertisements). There were also 14 privately-owned commercial radio stations. SABC had three TV channels in operation, and faced one private national TV channel - etv. (See OMD 2005; BBC-WST, 2007).

IBA as an institution, parliament, and only to a relatively limited extent, government. Telecommunications was not a major issue in this period.

4. Second phase: Government steps in

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

Under the new minister, the government set up a special regulator for telecommunications in 1996 – the SA Telecommunications Regulatory Authority (Satra). But in a departure from the 1993 compromise which had taken broadcasting out of the political arena, this new body was far less independent than the IBA. Thus, while the IBA's councillors were nominated by public parliamentary process and appointed by the president whose only power was to veto recommended candidates, Satra had its members appointed directly by the DoC Minister. Further, while the IBA had full authority over who to license in broadcasting, the Minister retained the right to decide in regard to telecommunications. While Satra's role was to license and oversee new industry players (preferably black), it also levied licensees for contributions to a body called the Universal Service Agency. Aimed at compensating for market failure by promoting community internet access centres and rural telephony, the agency (renamed in 2006 as the Universal Service and Access Agency) is generally agreed to have itself been a failure since its inception (http://blog.apc.org/en/index.shtml?x=5053903).

Naidoo also turned government attention to the IBA. Taking advantage of accountability problems, where IBA councillors were accused of abusing institutional credit cards, he moved to clip the wings of the organisation. Government's argument was that the regulator's role was to regulate and implement policy – not to make policy. The contention was that government was elected precisely to give direction and transform society, and it should not neglect this responsibility. Accordingly, instead of leaving policy-making to the IBA, Naidoo took the initiative, although not complete control. Under his leadership, a Green Paper process, drawing in handpicked stakeholders such as academics and the broadcasting industry, commenced in 1997. The final Green Paper was released for comment in November 1997. Government then produced its policy decisions in a White Paper published in June 1998 and a draft Broadcasting Bill came out a mere two months later. This rapid sequence caused doubts about whether government had taken seriously responses made to the White Paper (Berger, 1998). The participative tradition out of which the IBA was born and had continued in its early years, was beginning to decline.

Importantly, the Green Paper had posed as a question the issue of which body should make policy. A government "Discussion Paper" (1998:8) proposed that "policy making is a shared responsibility of ... Parliament, Government and the Regulating Authority". But who was entitled to the greatest share? In the end, contestation in various forums, and involving opposition parties, the media and civil society, produced a compromise. The 1999 Broadcasting Act specified policy-making as the prerogative of the Minister, but with conditions: policy had to be in the form of broad

directives that also had to be transparent (published in the Government Gazette), and open to public response. Government would also have to consult the IBA and parliament in the process. These provisions in the law were a further indication of the role of parliament as a check on Ministerial quests for unfettered authority. This would continue to be an issue in subsequent years.

As regards public broadcasting, the White Paper proposed that SABC get a public service charter (akin to the BBC), and a corporatised business model (unlike the BBC) whereby the SABC would have a commercial arm that would cross-subside a public service arm. These positions were then laid down in the 1999 Broadcasting Act. Tleane and Duncan (2003:71) warned that the Act's Charter for the SABC did not bind the commercial arm, and noted: "The SABC has been forced into financial self-sufficiency, leading to an ever-increasing dependency on advertising revenue, a source of funding that has in-built biases towards historically privileged audiences."

The legacy of this policy decision, based ultimately on neo-liberal premises that ruled out subsidisation through public funds, has entailed major ongoing repercussions. One was the Broadcasting Amendment Act of 2002 that required a formal re-licensing of SABC due to the corporatisation of the broadcaster and its division into Commercial Broadcasting Services (CBS) and Public Broadcasting Services (PBS). The relicensing commenced in 2004 with SABC arguing that all that was needed was for the regulatory authority to formalise which SABC stations fell into which division. Anything more specific (i.e. public service obligations such as language or drama) being set out would threaten the financial viability of institution as a whole. This argument was strongly opposed by the majority of private broadcasters who wanted to see SABC more hamstrung in its commercial activities and less of a law unto itself in interpreting its public mandate.

From civil society, the Freedom of Expression Institute (FXI) amongst others said the the SABC had taken as a given its business model (and therefore accepted the underpinning governmental policy), and was seeking the lightest-touch relicensing so as to avoid watertight commitments that could cost money and/or reduce advertising-earning potential (FXI, 2004). As it turned out, the relicensing process culminated in the regulator issuing detailed and costly public service requirements for most SABC's stations (although even the public service arm remained authorised to carry substantial advertising) (Icasa, 2005a, 2005b). For SABC, this meant the broadcaster is now required to be even more commercial, so as to make even more money, to pay for a now-measurable public service – and yet without compromising that service in the process. This imperative pulls in different directions, but Government meanwhile has kept up its refusal to fund the institution, arguing that it has had other priorities to meet. There is of course also a policy irony in SABC selling off the money-spinners in one period, and in a later period being required to milk its remaining less profitable enterprises. At heart, government regarded SABC as a strategic tool of government, but required it to self-finance through activities that contradict a transformation orientation. The stand reflects in a nutshell government's ongoing dilemma vis-à-vis the communications field. In sum, and to return the root of the issue, Naidoo's legacy of canvassing participation but then proceeding anyway set in place a particular business model for SABC which in turn continued to elicit further policy participation and challenge by a range of actors – and SABC itself.

Another, more political, development grew out of the government's White Paper policy of creating a distinction between commercial and public service wings of SABC. The 2002 Broadcasting Amendment Bill (introduced under Naidoo's successor) required the SABC to have two corresponding "management boards" – to be appointed by the Minister (a departure from the existing parliamentary system). Critics of the proposal included both the SABC and the regulator, and parliament responded by dropping the proposal from the Bill – thereby blocking a move that seemed to be motivated more directly by political power interests than transformation issues.

An earlier politically-oriented intervention during Naidoo's tenure was in regard to the sector's regulator. In 2000, the IBA and Satra were merged into a single body as per the 1998 White Paper (see Burns 2001). The key question in this merger was which dispensation would prevail – the autonomous one of the IBA (as per the 1999 Broadcasting Act), or the government-dependent one of Satra. In the end, after civil society and industry made representations to parliament, a compromise came into being: despite there being a single regulator, the body would operate a dual administration. Thus, the law stated that Icasa would be subject only to broad policy from government as regards broadcasting decisions, but to specific government approval in respect of telecommunications. As convergence subsequently evolved, this dichotomy would become increasingly unsustainable (see below). At the time, however, the merger signalled once more, an initiative coming from the top, meeting with resistance, and then being changed.

By the time Naidoo's left office (seemingly not having pleased the President sufficiently), government was much more involved in the design of the broadcast and telecommunications landscapes than it had been at the start. The motivation in this period appeared to be mainly to want to steer developments in a direction that would avoid an uncontrolled market situation. This was especially evident in the decision to part-privatise Telkom, but also to give it a five-year monopoly on fixed line services on condition that it rolled out two million lines to under-served communities – a developmental intervention idea that failed in practice (see Gillwald 2004). But in addition to seeking to promote transformation, aspects of Naidoo's interventions also appear to have sought to strengthen government political authority more narrowly.

5. Third phase: intensified control and contestation.

Naidoo's 1999 successor, Ivy Matsepe Casaburri, came to symbolise a third era in which government policy strove to get similar levels of control over broadcasting as existed over telecommunications. Naidoo had entered a terrain that had previously been forfeited in the 1993 negotiations, and he staked government's claims. Casaburri now wanted formalised and greater government authority within this realm. As in the case of the two boards discussed above, Casaburri's initiatives sought to build on Naidoo's legacy to give government a greater say for political reasons, but some of her interventions were also aimed at promoting transformation issues more broadly.

It was the SABC's role in particular that was a contested policy issue during Casaburri's term of office. However, notable in the early part of this period, was the appointment by parliament of a new SABC board that in turn concentrated on SABC

making money and avoiding government bail-outs as had happened previously (see Tleane and Duncan, 2003).

For a time, it was hard for government to fault the intensified commercial approach at SABC. After all, the alternative to neo-liberal economic policies would have required public funding from the fiscus.[3] Indeed, the 1999 Broadcasting Act was followed by the 2002 Amendment Act which explicitly corporatised the SABC. This meant that not only would the institution run as a company, with the state as shareholder; it would also pay tax to the state.

The market-driven dimension of the SABC's activities (the direct result of governmental policy on broadcasting), elicited much contestation from civil society. Trade union federation Cosatu, and the FXI, complained about the corporation's pursuit of middle-class and English-fluent urban audiences which derived from the quest for advertising (see Tleane and Duncan, 2003:165-6; Msomi, 2004). Others such as the then chairperson of the Portfolio Committee on Communications and the Pan South African Language Board also condemned SABC for marginalising African languages. http://www.sabcnews.com/politics/government/0,2172,43166,00.html). SABC itself (2005) recognised the problem, saying it was "onerous" to have to manage the contradiction between chasing revenues and delivering public service broadcasting. In 2006 the CEO himself called for the model to be reviewed (Mpofu, 2006).

Even within the ANC itself, at a party level rather than government, there was unhappiness. In a 2002 discussion document, the party argued: "There is a need to develop a public-funded model in order for the public and community media to serve as vehicles to articulate the needs of the poor, rural people, women, labour and other marginalised constituencies" (ANC 2002a). The party's conference at the end of 2002 called for a publicly funded model for the public broadcaster by 2012. (See ANC 2002b). Despite it being the ruling party, however, the ANC's conference position had no visible impact on government policy and practice.[4]

Although there was no action on the funding model, government did not sit back. Indeed, Casaburri had herself expressed unhappiness with inter alia SABC's neglect of languages, and her response was twofold. First, she sought to remedy the situation (and deal with other matters of political concern to government) by requiring the corporation to develop Editorial Policies (This is discussed extensively below). Second, the DoC came up with a proposal for two new TV stations to provide indigenous language services, and this became part of the 2002 Broadcasting Amendment Act. For Tleane and Duncan (2003), the latter initiative showed DoC's distrust in the SABC's ability to meet its language obligations. At any rate, the new station plan also begged the questions of control and funding. Government's initial bid was to propose the new ventures as being outside SABC and directly reporting to it. This politically self-serving thrust was later changed by parliament after by representations from various NGOs and the SABC itself, and the two stations were legislated to instead become part of the public broadcaster's portfolio.

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3. In South African conditions, increasing license fees from the public to requisite levels is not a viable option.
4. Tleane and Duncan (2003) suggest that the DoC had sought public funding for SABC, but it was the Treasury and general governmental policy which opposed this.

What this meant was that a big SABC was about to become bigger – to the concerns of private broadcasters. But at least the new channels would be subject to the checks and balances for public broadcasting of the dispensation for the SABC, as distinct from being directly government-controlled outlets. However, this also meant the two new stations would also face the same problems as SABC already had in regard to financing expensive language delivery. In 2005, Icasa authorised SABC to run the two new stations – with the licence conditions envisaging them as being funded mainly through advertising. SABC itself, however, had long maintained that this was not workable, and stated in 2006 that it was negotiating with government on funding for the two outlets. For these reasons, and because of impending technology change towards digital broadcasting, the new channels had still not come on stream by April 2007. Inasmuch as government's original policy for the initiative was based on "transformation" reasons, it was also undercut by government's wider neoliberal policy on funding.

Once again, the issue reveals a pluralistic picture in terms of diverse role players in shaping the media environment for public broadcasting. And again, the pattern was one in government's proposals were a mix of political control and transformation-oriented service delivery, and where these aspirations were reduced as a result of contestation and the inherent limits of government's overall policy approach.

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

6. The Editorial Policies proposal

According to Tleane and Duncan (2003), "the crisis of accountability" faced by the SABC reached "boiling point" in 2002. According to the 2002 Broadcasting Amendment Bill, the SABC needed to have editorial policies and a Code of Conduct in order to be more accountable for its public service obligations. Enormous controversy arose.

Motivations for the Editorial Policies by the Minister of Communications were that that SABC's content was imbalanced in terms of language, as well as irrelevant, and also guilty of ignoring government leaders. The Bill (RSA 2002a) specified that the corporation's board should prepare the policies, and the Minister would approve (or, by implication, reject) the outcome.

A related aspect in the Bill was the scrapping of a clause in the 1999 Broadcasting Act whereby the SABC's governing Charter provided the corporation with freedom of expression and journalistic, creative and programming independence. This was replaced with terminology that required "accurate, accountable and fair reporting". Other sections in the Bill added the words "responsible reporting" and added "national interest" to the existing "public interest" within the various objectives to be served by SABC. As a package therefore, the draft law envisaged that the policies would be a mechanism whereby such requirements could be elaborated and enforced. Thus it stated: "the Board and individual journalists of the Corporation shall be

subject to the policies of the Corporation … and act in the best interests of the Corporation".

These provisions led various stakeholders to accuse the Minister of seeking increased governmental rather than public accountability of the corporation (Tleane and Duncan 2003:170; Holomisa 2002). And though government may have hoped to see the Bill passed in its initial form, the Parliamentary Portfolio Committee on Communications decided to call for public comment and scheduled public hearings. In the representations that followed, among the critics were also the regulator Icasa and indeed the SABC itself (see Icasa 2002; SABCnews.com September 17, 2002, 11:30; http://www.theherald.co.za/herald/2002/09/17/news/n16_17092002.htm)
The issues they disputed included the inclusion of "national interest", the proposed deletion of the freedom of expression clause, and the proposed Ministerial powers over editorial policy. A host of civil society groups added additional criticisms (Sanef, 2003; Cosatu, 2002a, 2002b; Tleane and Duncan 2003; FXI 2002, 2003; Holomisa 2002;
http://www.sabcnews.co.za/politics/parliament/0,2172,43275,00.html)

In response the parliamentary committee rewrote the bill (see RSA 2002b). While retaining the formulation of the SABC board needing to prepare and submit policies, it said the policies should then be submitted to Icasa (i.e. not to the Minister). This preserved SABC's independence and went further by adopting proposals by Cosatu (2002a; 2002b) amongst others, that the Board adopt a public participatory approach in the development of the policies. On the whole, parliament's ruling privileged participative over a power approach to policy formulation.

Significantly, the parliamentary committee also reversed the original Bill's attempt to scrap the clause which guaranteed the SABC freedom of expression and independence. Also dropped were the provisions about "the best interests of the Corporation" as well as the phrase "responsible reporting". However, despite the representations, the Bill's original inclusion of advancing the national interest, alongside the public one, remained.

After the 2002 Broadcasting Act was gazetted (RSA 2003), the SABC drafted editorial policies, and put them out for public comment in printed form in many languages, through public meetings, and though promotion of the opportunity on its platforms. At the end of the consultation process, SABC said there had been 920 written submissions, 847 of which were from individuals and 73 from organisations (Hassen 2004:11).[5]

To summarise the significance of the whole exercise, the result was a law that spelt out in more depth that the SABC needed to strive for a better balancing between its

5. Regarding internal consultations within the corporation itself, it is not clear how far the participatory paradigm extended in this regard. The importance of this consideration lies in how the policies are regarded, and even known about, by the people who are, at the end of the day, the subjects who should be using the guidelines in their daily practice. Some evidence since then (see Sisulu and Marcus, 2006) suggests that there have been problems in both disseminating knowledge and in the the impartiality of interpretation of these guidelines.

divergent imperatives of commercial operations and public service.[6] The whole experience made it appear as if South Africa had returned to the participative traditions of the transitional period. However, the historical moment passed, and government's next policy move turned out to be very different. The DoC's basic thrust to increase control of the electronic communications environment through greater control was not changed by the "setbacks" experienced on the Editorial Policy initiative.

7. Phase 4: Government wins some, but contestation and its strategic logic ultimately gives market forces much of the play

The trend up to 2002 had seen government moving away from participative policy development, and it was parliament that – responding to lobbying – blocked the Minister on a number of issues. In 2003, government showed even less inclination towards lengthy consultative processes – a politics that with the Convergence Bill would ironically lead to an even heightened role being played by parliament, civil society and by the state president as well. Thus, in contrast to the situation in 1993, the ANC in government no longer seemed to see civil society as allies and advisors for transformation; it believed it knew best. In the end, government would have more power in some respects – but also less in many others.

The Convergence Bill arose from a colloquium in July 2003 convened by the DoC. Despite references to the need for a new policy, the director-general Andile Ngcaba put the focus on drawing up an actual draft law, with a proclaimed timetable of one month. In attendance were representatives from the opposition parties, plus the broadcasting, telecommunications and internet industries. Civil society, apart from a trade union representative, was mainly absent. There was no green or white paper process – even though convergence is a qualitatively new phenomenon that cannot be simply regulated on the basis of previous separate policies for broadcasting and telecoms. When Ngcaba turned down appeals from business to do policy work before rushing into law, the industry took a second-best option: it jumped aboard by volunteering legal experts to "help" in a "Convergence Policy Committee" that would draft a new law. Draft legislative proposals were then produced as a self-acknowledged "incomplete end-product" by mid-September. In December, a draft Convergence Bill was published – to a barrage of criticism.

Notwithstanding the nomenclature, the bill retained the provisions of the Broadcasting Act as regards the conditions for licensing traditional broadcasting (including local content quotas and political impartiality), and introduced significant changes in telecommunications. What was new was that previously, licensing had been done in vertical oligopolistic bundles – so, for example, licensed broadcasters had received a licence to use the airwaves as well as a content licence for audio and/or audiovisual platform. Now all this would be disaggregated into separate horizontal services, each with a different licence and where new players could enter the industry. One anticipated impact was to allow telecommmunication operators to do business no longer in terms of the technology they utilised (eg. cellular, landline), but in terms of the services offered (eg. voice, data, audio-video). The licencees would thus be able to utilise whatever technology became available, for example voice-over-internet-

6. This orientation was later laid down in compulsory and more-measurable licence conditions when it came to SABC's relicensing process (see Icasa 2005b).

protocol if they wish to sell voice telephony services. Broadcasting and internet service provision could be sold over numerous technologies. The idea was to promote competition in the interests of expanded and cheaper services in the communications arena. As will be evident, however, government also sought to increase its political control as part of the process.

The problems of trying to leapfrog or bypass policy, and going straight to law, on such a complex issue caught up with the whole process. Hence, what should have been a primarily legal process inevitably turned into one that simultaneously, instead of sequentially, dealt with policy and law. The messy situation led to a lengthy and hotly contested situation with several versions of the Bill, and ultimately the splitting of the initiative into two laws – neither of which kept the original name of "Convergence". These complications are some reasons why the 2004 bill attracted 65 critical submissions and much adverse media coverage. In 2005, more than 40 critiques reached parliament. Almost 30 direct representations were also made to the parliamentary committee dealing with the law.[7] These were responses to the bill's second – and supposedly improved – version. The result was that the second version of the bill underwent so many amendments, that it effectively became a third edition (Berger, 2005a).

Early on, DoC had argued that opportunity costs were being lost while the country's legal framework remained archaic. But because of the rushed process, the new law finally only took effect, as the Electronic Communications Act, three years after the process was initiated.[8] Retained in the law is the original characteristic of a persistent dualism between telecommunications and broadcasting services. In a tortuous distinction, however, not all transmission of audio-visual content counts as "broadcasting": only that which is "unilinear" transmission will need such a licence. Yet "unilinear" transmission could apply to some dissemination methods via cellphones and websites, but not others, no matter whether the actual content is identical in all cases. Among other contentious issues are interconnection and facilities leasing, the "grandfathering" of existing rights, and whether traditional broadcasters will receive frequency rights (hitherto bundled with their broadcast licence) or whether these will go to other licensees (who may digitise and use or sell them for many additional purposes). The law, in short, is likely to generate fierce representations and legal actions by various industry lobbies (see Berger, 2006).

This was a provision, eventually dropped by parliament after lobbying, which would have watered down the 1999 Broadcasting Amendment Act concerning Ministerial powers to consult on policy directives. The obligatory requirement of Ministerial consultation was reinstated in the final law, and there was also a provision that expressly forbade the Minister from deciding on licensing as such. Earlier versions of the Bill had laid down that the Minister's approval was needed for granting licences

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7. Criticisms came from IT companies, telecommunications companies, communications equipment manufacturers, communications service providers, value-added network services, the MDDA, the Post Office, the Universal Service Agency, law firms, signal distributors, a private schools' association, broadcasters from all three sectors – public, private and community, the regulator, political parties and NGOs – many dealing with only issue specific matters rather than the legislation as a whole.
8. As it turned out, that impatience led to such slow law-making that, early in 2005 and under pressure from the President, the Minister of Communications had to make interim policy announcements in regard to internet telephony, rather than wait on the convergence law.

for broadcast, communications services and communications network services. This would have extended the old Satra model to all licensing (see Berger, 2005b). The final act – responding to protests – limited government power to the Minister deciding if and when anyone could apply for a network services (i.e. infrastructure) licence on a substantial scale. The apparent rationale for this was so government could protect its own enterprises in this area (Telkom and Sentech). Critics argue that this contradicts the wider pro-competition objectives of the law, but government argues these entities are strategic levers for transformation and need to be protected for this reason.

8. Sister convergence legislation and overall significance

The Icasa Amendment Bill emerged in October 2005 from the former Convergence Bill, as a sister piece of legislation to the Electronic Communications Act. The idea was to redefine the functions and powers of the Authority in the light of the new licensing.

Echoing the thrust of the original Convergence Bill, where all services should be subject to government approval, and Icasa functioning as an administrative arm of government, the proposed amendments to the Icasa Act dropped the word "independent" from the title of the regulator. It also entailed an attempt to take parliament and the president out of appointing and firing councillors, and to manage the appointees through performance appraisal of them by the Minister. Lastly, it specified a funding mechanism that maintained government, rather than Icasa, as being in charge of the budget of the agency. The bill here was changed by the National Assembly to keep Icasa's name intact and give the Minister less control, but in turn its version was changed by the House of Provinces back towards much of the Minister's original vision. Finally, the approved law went to the president who, after being lobbied extensively, sent it back to parliament as being potentially unconstitutional.

The eventual law reinstates Parliament in the Icasa council appointments, though in a lesser role than previously. The President, however, remains entirely removed from the equation – which is one less check-and-balance that had been there previously – and which indeed, as shown above, had proved critical in terms of the actual progress of the legislation itself.[9] Performance appraisal remains, but parliament must be consulted.

Government's attempts to drive convergence interventions in the communications arena were tempered by the mediation of other state institutions (in this case parliament and the president) and because of the mobilisation of interest groups (including state-linked players like Telkom, Sentech, SABC, Icasa). Most lobbying came from businesses in the Electronic Communications Act, but civil society did most of the work on the Icasa Amendment Act.

The outcome of the whole package is that while government is more powerful than previously in regard to Icasa councillors, the regulator itself is a less powerful body than it used to be. The Minister retains the prerogative to initiate licences for

9. Although Minister and President are in the same party, the history of this law shows how different criteria are brought to bear by the two offices.

infrastructure, but what is new now are requirements that weaken Icasa vis-à-vis industry interests in the market place. First, the regulator has to ensure that no previous licencee (including – though not only – Telkom, SABC, Sentech) is deprived of previous rights – which limits its ability to promote competition. Secondly, Icasa now has to respond – within 60 days – to whomever comes knocking with a proposal for a local class licence, and if not – the licence may be taken as given. "(I)t means curtailing Icasa's ability to independently decide strategic priorities on the basis of government policy and its own analysis of social needs and economic sustainability." (Berger, 2006).[10]

The ultimate irony of all this, therefore, is that state control – while being kept partly at bay in terms of political strings on Icasa – is also reduced in terms of the market.

If liberalisation is an unfolding process, "managed liberalisation" is in a sense a means towards a deregulated outcome. There also would have been

9. Boundaries of policy

Communications policy making in post-Apartheid South Africa has generally been located in the DoC. One initiative emerged outside of the Department, in the form of the Government Communication and Information Services. It was this sector of the executive that championed the birth of the Media Development and Diversity Agency in 2002 which provides (on a small scale) finance and training to grassroots media. It draws on contributions from the mainstream media industries, and from government grants). On balance, however, the MDDA is a minor factor in the broader communications landscape, and its character does not much alter the status of the DoC as the locus of state communications policy.[11]

However in 2006, two new developments arose which reflected the interests of other state agencies in the the communications field, and in a sense reflected government's lack of confidence in the DoC. The first was an initiative by the Department of Home Affairs to re-write the Film and Publications Act so as to include the mainstream media in its system of pre-publication screening (which up to then had applied only to pornographic titles and to cinematic materials). This step was immediately condemned by the industry and by civil society groups, on the basis that it undermined the constitutional-enshrined jurisdiction of the regulator, Icasa, over broadcasting content. The media industry also highlighted its self-regulation under Icasa in the case of broadcasting and the Press Ombudsman in the case of newspapers. The bill was then shelved temporarily. Had it come to pass, however, it would have reduced the indirect influence that the DoC had over broadcast content via its broad policy directives to Icasa, and would have greatly extended governmental say over all media.

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10. In fact, Icasa was already leaning in the direction of serving business interests when it opened bidding in 2006 for subscription television licences. Community and provincial free-to-air television licensing were thereby delayed. This is a reversal of the situation in 1995 when community radio licensing was prioritised above the commercial.
11. In fact, the DoC provides its own direct subsidy to community radio, independently of the MDDA (which has more checks and balances to prevent political bias in funding).

The second area of interventions in the "turf" of the DoC was signalled in the announcement by the Ministry of Public Enterprises that it would create a semi-state broadband infrastructure company, in the wholesale market, to be called Infraco. This initiative trod squarely on the toes of the DoC under which falls the part-privatised Telkom (which amongst other things co-owns the undersea broadband cable, SAT3), Sentech (signals provider, including of wireless internet), and the EASSy broadband cable to be built up the east coast of Africa. The Infraco initiative was widely interpreted as being a response to the inability of the DoC to ensure a steep reduction in telecommunications costs in South Africa. This inability was painted as not just an issue of constraints on the levers available to DoC, but also the managerial competence in the department – else, Infraco could have as easily have been sited within the DoC's portfolio of state-linked communications enterprises.

What these two steps represent is, arguably, a consequence of the contradictions around the role of the state in the communications arena. While the DoC is tied to "managed liberalisation" (see below), i.e. ultimately a market-centred emphasis, the notion of government being a player, and not just a controlling referee or facilitator, seems to have informed both the Home Affairs and Public Enterprises initiatives. In each case, state bodies other than the DoC were presented as giving government the necessary control to resolve what it saw as social and delivery problems. Seen holistically, they reflect new awareness that DoC's market-oriented trajectory (and competence) will not alone producing the social and economic engineering sought by government (and sometimes against government!).

10. Conclusion.

While Horwitz and other writers used the term "negotiated liberalisation" in regard to the 1990s. In the subsequent decade, the DoC – for example, in the Electronic Communications Act in particular came tout the phrase "managed liberalisation". The difference is telling. Horwitz noted that the negotiations in the 1990s depended on two elements: a state "hospitable" to participatory politics, and a civil society ready and organised to make use of the opportunity. A decade later, the civil society actors in the 2000s were joined en masse by organised business, and their combined (if uneven) involvement was often precisely an angry response to the narrowing of "hospitality".

As outlined in many of the cases covered in this paper, the DoC has sought much greater Ministerial powers in the communications arena. For opposition parliamentarian, Dene Smuts, this includes a political tactic to introduce "shock measures that reverse the negotiated order", and then "having created a panic, to retreat in a show of reason, namely to compromise a position which becomes the new norm or point of departure" (Smuts, 2002). What she suggests, therefore, is that government has learnt to propose excessive changes as a means to get lesser ones. A similar point of view comes from the FXI (2006). Such assessments, however, locate government actions in power-mongering attitudes in the government. They are not without some relevance to understanding policy development post-Apartheid, but the matter also goes deeper.

"Managed liberalisation" has its explicit roots in 2001 as part of state discourse about seeking the maximisation of state assets within the telecommunications field in the face of liberalisation (Gillwald and Esselaar, 2004; Gillwald 2004). Indeed, several

other government departments – for instance, in transport and energy – picked up the rhetoric at the same time (see Dobson, 2002; Jackson and Cassim, 2004; Eberhard, 2004). There are two components to it: allowing new competitors into a less regulatable market, and at the same time protecting state assets from unfettered competition. The latter is predicated on the position that state assets are an essential tool in achieving government objectives; for example, to achieve universal service or African languages services. The extent to which this stance has blurred into political control motives varies over case and time.

The complication is managed liberalisation embodies an intrinsic contradiction: management implies control; liberalisation implies autonomy (see van den Broek, 2006). "Big bang" deregulation or taking full state control of the landscape. Contestation is a consequence of the move away from participation to government-dominated policy making, but the controversial content of the policy – giving cause for objection – is largely a function of government seeking to do two things simultaneously: unleash market forces but steer them in the interests of transformation and political self-interest. Complete control is not an option when liberalisation is officially embraced. But liberalisation itself is a target of intervention so that it can be controlled for a variety of reasons.

Erroneously referred to as a "policy" by the DoC, "managed liberalisation" is only a strategic orientation, in that it gives no clear guidance about where or why there's to be "management" (i.e. control) or "liberalisation". It certainly does not equate to a policy that would coherently and explicitly seek to address the contradictory tendencies of promoting commercialisation on the one hand, even within state assets, and of channelling its character and impact on the other.

The limits of "managed liberalisation" are evident in developments in 2006 as noted in the case of Infraco. But there have also been enormous sums of money pledged to both SABC and Sentech to ensure digital migration of broadcasting in time for the 2010 Soccer World Cup, and state subsidy of set-top boxes that is likely to have to follow. (See Stones, 2007)

In regard to making sense of all this, a classic liberal paradigm would assume a notion of "power corrupts" and of "bad guys" in government seeking control for control's sake. But such liberal and neo-liberal views are also blind to positive, and often necessary, roles of the state in regard to development and transformation. The Marxist ignores contradictions between state and business and amongst state-linked entities. The social democratic position minimises abuses of state and market power. What perhaps better captures the character of the situation, however, is an approach that takes cognisance of all three approaches and dynamics: i.e. one that acknowledges the pluralism. A liberal pluralist paradigm recognises contradictions and spaces that are created by a managerialist-inclined government that also pays allegiance to the "liberalisation" part of "managed liberalisation", and which in turn allows for the representation of elite interests when the latter mobilise themselves.

If "managed liberalisation" is not a policy, nor a panacea that renders redundant any direct state intervention such as Infraco, what is its utility? The answer may rest with the convenient vagueness of the contradiction. The point is that the principle and rhetoric of management also lends itself to control for other purposes – like political

power, as evidenced in many of the interventions of government over the years. The healthy thing is that there is not an easy transition to pure control, and also that there is not a corporatist scenario of no contradictions between management and liberalisation.

Thus while it is the case that the DoC has been heavy-handed with policy, the rhetoric "Managed Liberalisation" may serve its interests by precisely not being spelled out. Good policy practice would set out the criteria by which it would be clear what the intent and limits are of management, and of liberalisation. But that would rule out illiberal forms of control – i.e. those that are self-serving, rather than societal-serving.

The answer probably is that there is some mix of chaos and conspiracy. However, arguably, government's increased pursuit of political control over the organising agencies of the landscape, has been in direct proportion to its loss of control of that landscape as brought about by liberalisation and deregulation. What does emerge from all this is that neither Managed Liberalisation, nor Infraco interventions, is a substitute for a participatory-based policy process. The strength about post-Apartheid South Africa is not just the democratic principle of shared governance in policy-making (while acknowledging that government has the final say). It also vests in the aggregation of interests and wisdoms which make for a far better final product. This is shown, perversely, in the positive changes that have usually come about as a result of participation in key issues.

The result of the post-Apartheid period in communications policy is not quite mass-participation, but it is also far from being a dying democracy or a step on the road to Zimbabwe. It is a continuously contested terrain, a legacy of our "negotiated revolution", with vibrant roles being played by the key institutions involved and a wide range of actors from civil society and business. Increasingly, "managed liberalisation" leads towards a strengthening of the market vis-à-vis the state. The contestation around this suggests an elite democracy, which is not quite what many democrats had initially hoped for, but it is also a major advance on the monopolistic control of communications that characterised Apartheid.

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