

Chapter 24E

Independent Communications Authority of South Africa (ICASA)

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24E.1 Broadcasting in the apartheid era

Broadcasting in the apartheid era was characterised by the near total monopoly of the South African Broadcasting Corporation ('SABC') over the airwaves.¹ In terms of the Broadcasting Act itself, the SABC operated as a state, as opposed to a public, broadcaster. Its governing structures were under tight political control. The State President appointed the SABC Board as well as the chairman and vice-chairman.² State control of the SABC was also evident in the make-up of the SABC staff — the *Broederbond* determined the appointments of the SABC Board, its Directors General

1 Apart from the subscription television service M-Net, which carried no news, South Africa radio and television broadcasting activities were carried out entirely by the SABC in terms of the Broadcasting Act 73 of 1976 ('1976 Broadcasting Act'). While there were certain free-to-air broadcasting services based in former TBVC states (Transkei, Bophuthatswana, Ciskei and Venda) that were capable of being received in parts of South Africa, including, Bop TV, Capital Radio and Radio 702, these had limited coverage areas and the majority of South Africans had no access to these services. Radio Freedom, broadcast by the African National Congress ('ANC') from five countries in Africa was capable of being received in South Africa but did not broadcast continuously. *Truth and Reconciliation Commission of South Africa Report Volume 4*, (1998) 172 ('TRC Report').

and 'most top level and many other mid-level managers'¹³— and in broadcast content. The SABC's unwritten policy was 'to ensure National Party . . . control and white privilege.'¹⁴ According to the *TRC Report*, media analysis shows that 'news bulletins maintained and cultivated a mindset among white viewers that apartheid was natural and inevitable'¹⁵ and that SABC programming 'was instrumental in cultivating a "war psychosis" which in turn created an environment in which human rights abuses could take place.'¹⁶

24E.2 Broadcasting in transition and the independence of the broadcast regulator

In 1990, the National Party government appointed the Viljoen Task Group to investigate the future of broadcasting and the SABC embarked on a process of internal restructuring.⁷ The ANC and its allies quite naturally responded that 'any restructuring of South African broadcasting could not be considered under the conditions of old-style secret deliberations by an elite white commission.'⁸

2 1976 Broadcasting Act s 4(2) and (3). The 1976 Broadcasting Act contained very little detail as to how the SABC was to go about its broadcasting activities. Section 11(a) provided merely that one of the objectives of the SABC was 'to carry on a broadcasting service in the Republic.' As was widely suspected, the proceedings of the Truth and Reconciliation Commission have revealed that the SABC was subject to direct governmental interference in the form of the *Broederbond* and internal security forces. *TRC Report* (supra) at para 25–26.

3 *TRC Report* (supra) at para 25–26.

4 *Ibid* at para 14.

5 *Ibid* at para 168.

6 *Ibid*. The *TRC Report* contained detailed confirmation of this assessment. Major Craig Williamson told the TRC that 'a "special relationship" existed between the SABC and the intelligence community's units for STRATCOM. The state, he said, was at a disadvantage because it did not own/control any credible print media. It counteracted this by its use of radio and television.' *Ibid* at para 25. This programming was not aimed only at whites. Government used the SABC as a key strategic resource in both the white and black communities to support its Apartheid policies. The 1976 *Broederbond* 'Master Plan for a White Country' stated that the 'mass media and especially the radio will play important parts. The radio services for the respective black nations must play a giant role here.' *Ibid* at para 28. The so-called Bantu programming arm (nine radio stations and two television stations in 1984) of the SABC was also under tight political control. Of eighty-five senior employees working in these services, only six were black. *Ibid* at para 27.

7 P Horwitz *Communication and Democratic Reform in South Africa* (2001) 126–7.

8 *Ibid* at 129. One of the most important events for the restructuring of broadcasting was the Jabulani! Freedom of the Airwaves Conference. The recommendations coming out of the Jabulani! Conference 'effectively set the terms of the public debate.' Horwitz (supra) at 133. These recommendations included: the need to recognise three levels of broadcasting: (public, commercial and community); the public service broadcaster had to cater for all tastes and be independent of government; all South African indigenous languages had to have access to broadcasting and that education was to be a broadcasting priority. *Ibid*.

In 1993, the political groupings represented at the Kempton Park negotiations on South Africa's future constitutional dispensation agreed on more than the provisions of the Interim Constitution.⁹ They also agreed on two other pieces of legislation: the Local Government Transition Act¹⁰ and the Independent Broadcasting Authority Act.¹¹

The IBA Act has been described by commentators as a 'radical piece of legislation.'¹² It introduced a number of significant changes to the broadcasting environment, including:

- a three tier broadcasting system composed of community,¹³ commercial,¹⁴ and public broadcasting;¹⁵
- a competitive commercial broadcasting sector with limitations on the number of licences a single person could control¹⁶ and on the levels of foreign ownership;¹⁷
- a bar on party political control of broadcasters;¹⁸
- various categories of signal distribution licences, that is, licences for the distribution of signals for broadcasting purposes;¹⁹

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- local content quotas for both radio and television;²⁰ and

9 Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

10 Act 209 of 1993.

11 Act 153 of 1993 ('IBA Act'). Broadcasting had been on the agenda of the CODESA negotiations. 'Broadcasting was placed within the terms of reference of CODESA working group 1, Subgroup 3, which was mandated to examine the creation of 'a climate and opportunity for free political participation, including the political neutrality of and fair access to, the state controlled media.' CODESA, and later the Kempton Park ('MPNF') negotiators, wanted to ensure that the broadcasting regime in a post-apartheid South Africa would not operate as it had under the National Party government. The result was the passage of the IBA Act. See Horwitz (supra) at 139.

12 Horwitz (supra) at 145.

13 IBA Act s 47.

14 IBA Act s 46.

15 IBA Act s 45.

16 IBA Act s 49 and 50.

17 IBA Act s 48.

18 IBA Act s 51.

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- an independent regulator to regulate broadcasting in the public interest — the Independent Broadcasting Authority ('IBA').²¹

Both the ANC and the NP viewed the restructuring of broadcasting as essential to the success of the 1994 elections. Both parties were anxious about the extent to which the other party might exploit the SABC to improve their showing at the polls.

(a) The Interim Constitution

The Interim Constitution engaged the regulation of broadcasting through IC s 15(2) (freedom of expression). IC s 15(2) provided:

All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

The phrase 'media financed by and under the control of the state' underscores the centrality of the political debates on the future role of the SABC during the transition. The requirement of impartiality and diversity of opinion reflects concerns about past abuse and anxiety over future misuse.²² The section is, however, oddly silent as to how the state media is to be regulated so as to ensure both impartiality and diversity of opinion.

(b) The Final Constitution

The Final Constitution specifically requires the independent regulation of broadcasting.²³ FC s 192 provides:

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.²⁴

FC s 192 frames the regulation of broadcasting in manner that differs substantially from its predecessor, IC s 15(2). First, FC s 192 concerns itself with all broadcasting — not only with 'media financed by or under the control of the state.' All broadcasters — not just the SABC — are affected by the provisions of FC s 192. Second, FC s 192 explicitly requires that national legislation establish an independent authority to regulate broadcasting. Third, FC s 192 gives content to the role of the independent regulator. It must regulate broadcasting 'in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.'

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One fascinating anomaly is that the independent authority to regulate broadcasting provided for in FC s 192 is not mentioned in the general provisions that

20 IBA Act s 53.

21 IBA Act s 3 (now repealed).

22 *TRC Report* (supra) at para 22.

23 Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').

24 FC s 192 is found in FC Chapter 9: 'State Institutions Supporting Constitutional Democracy'.

govern the 'State Institutions Supporting Constitutional Democracy' ('Chapter 9 Institutions').²⁵ Indeed, informal comments by certain members of the Portfolio Committee on Communications indicate that some members of the ANC believe that the only constitutional protection afforded to the independent authority to regulate broadcasting is contained in FC s 192 itself.

A literal reading of FC ss 181, 193 and 194 suggests that they do not apply to the independent authority to regulate broadcasting. However, a number of other theories of statutory interpretation could lead one to a different result. For example, according to the mischief rule, a 'court may have regard to 'the mischief' that the Act was designed to remedy.' The requirement that the broadcasting regulator be independent, ensure fairness and promote a diversity of views supports a generous reading of FC ss 181, 193 and 194 with respect to their application to the broadcasting regulator.²⁶

Even if the courts decide that FC ss 181, 193 and 194 do not apply directly to the independent authority to regulate broadcasting, these sections may play an important role in determining whether super-ordinate legislation does indeed provide for the kind of independent authority required by FC s 192. The appointment and removal procedures provided for in enabling legislation require an examination of those statutory provisions in terms of the 'independence' required by the Final Constitution.²⁷

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(c) International Best Practise

25 See FC ss 181, 193 and 194. FC ss 193 and 194 deal with, respectively, appointment and removal procedures.

26 Bolstering the independence of the regulator is important for a number of reasons. First, given the history of abuse in respect of government interference in broadcasting, having an independent authority to regulate broadcasting is essential in order to make a decisive break with the past. Second, given high illiteracy rates in South Africa, a significant number of South Africans rely on broadcasting to meet all of their news and information needs. Independent regulation ensures that broadcasting will meet these needs effectively. Third, the authority to regulate broadcasting is required to fulfil the crucial and on-going role of regulating broadcasting in the public interest. The independence of the broadcasting regulator is of vital and lasting concern to our democracy if South Africa is to vouchsafe access to a diversity of views in broadcasting.

27 It is instructive to consider how the Constitutional Court has dealt with other issues relating to regulatory independence. In the *First Certification Judgment*, the Constitutional Court held that: '[f]actors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence.' *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1453 (CC) ('*First Certification Judgment*') at para 160. The Constitutional Court found that the removal provisions in the proposed Final Constitution regarding the Public Protector and the Auditor-General did not comply with the Constitutional Principles. The Constitutional Court also found that the fact that the proposed Final Constitution did not specify what the role and the functions of the Public Service Commission would be and did not specify what protections it would have, meant that the Constitutional Court could not certify that the Constitutional Principle requiring the establishment of an independent and impartial public service commission had been met.

More recently, the Constitutional Court has commented on the nature of the institutional independence required in respect of the Independent Electoral Commission, another Chapter 9 Institution. In *New National Party of South Africa v Government of the Republic of South Africa and Others*, Langa DP, with respect to the general nature of the IEC's independence, and, with regard to its financial and administrative independence wrote:

While constitutional provisions securing the independence of the authority to regulate broadcasting are still uncommon, the international trend is toward such basic guarantees.

The Council of Europe's Committee of Ministers has adopted a recommendation to member states on the independence and functions of the regulatory

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[Financial independence] . . . implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the [1996] Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees . . . [Administrative independence] implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires 'to ensure (its) independence, impartiality, dignity and effectiveness.' The Department [of Home Affairs] cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be given funds to enable it to do what is necessary.

It follows from what I have said that the Department, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirements of the Constitution and the Electoral Commission Act which provide that the Commission be independent and subject only to the Constitution and the law, that it has the responsibility for managing elections, that it is accountable to the National Assembly and not the Executive, and that all other organs of State must assist and protect it to ensure its independence and effectiveness.

1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*New National Party*') at paras 98-100. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) ('*Langeberg Municipality*') at para 27 (Court held that although the Independent Electoral Commission is an organ of state, it is not within the national sphere of government. It wrote: 'It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national.') The holdings and the dicta in the *First Certification Judgement* and *Langeberg Municipality* generate the following criteria for an assessment of independence: (1) an independent body is one that is outside government; (2) an independent body is one whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the Executive and can be removed only on objective grounds relating to job performance; (3) an independent body is one that is sufficiently well funded by Parliament to enable it to perform its functions; (4) an independent body is one that has control over its own functions. These criteria suggest that policies or laws that undermine the independence of the broadcasting regulator violate FC s 192. See, further, S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS December 2004) Chapter 24.

authorities for the broadcasting sector.²⁸ The Recommendation locates the need for independent broadcasting regulation in terms of the predicate conditions of open and democratic societies.²⁹

In 2001, a number of participants in a UN/UNESCO conference on the broadcast media developed the Windhoek Charter on Broadcasting in Africa. In respect of regulatory independence, the Windhoek Charter reads:

All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among others, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party.³⁰

In 2002, the African Commission on Human and Peoples' Rights, passed a Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa.³¹ Clause VII thereof deals with Regulatory Bodies for Broadcasting and Telecommunications and sets out the following key principles:

28 'Recommendation of the Council of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector' (2000) 23, available at <https://www.wcd.coe.int/ViewDoc.jsp?id=393649&Lang=en> (accessed on 26 May 2005) ('Recommendation').

29 The appendix to the recommendation contains guidelines concerning the independence and functions of the regulatory authorities. In brief these require:

- rules governing membership of regulatory authorities are a key element of their independence and should be defined so as to protect them from any interference, in particular by political forces or economic interests;
- rules regarding dismissal must ensure that dismissals are not used as a means of political pressure;
- arrangements for funding of regulatory authorities be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently;
- regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities and to adopt internal rules, subject to clearly defined delegation by the legislator;
- one of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of licences;
- regulatory authorities should be accountable to the public for their activities and should publish regular or ad hoc reports relevant to their work;
- in order to protect the regulatory authorities' independence, it is necessary that they should be supervised only in respect of the lawfulness of their activities and the correctness and transparency of their financial activities.

Clauses II-V.

30 *Windhoek Charter on Broadcasting in Africa* (2001) Clause 2, available at <https://www.alc.amarc.org/legislaciones/afrika.pdf> (accessed on 26 May 2005).

31 African Commission on Human and Peoples' Rights 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa, available at http://www.achpr.org/english/_doc_target/documentation.html?/resolutions/resolution67_en.html (accessed on 24 May 2005).

- broadcasting and telecommunications must be regulated by a public authority which is independent and protected against interference, particularly of a political or economic nature;

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- the appointment process in respect of such a body shall be open and transparent with participation by civil society and it shall not be controlled by any particular political party;
- such a body must be accountable to the public through a multi-party body.

24E.3 The independent communications authority of south africa

In 2000, the Independent Communications Authority South Africa Act established an independent authority to regulate broadcasting: the Independent Communications Authority of South Africa ('ICASA').³²

ICASA's mandate is to regulate both broadcasting and telecommunications in the public interest.³³ In so doing, ICASA is required to perform the duties and exercise the powers that had been given to the previous regulators of broadcasting and telecommunications, respectively, namely the IBA,³⁴ and the South African Telecommunications Regulatory Authority ('SATRA'). These duties and powers are found in three separate pieces of legislation: the Telecommunications Act,³⁵ the IBA Act, and the Broadcasting Act³⁶ (collectively, the 'underlying statutes').

(a) Appointment and Removal of Councillors

ICASA Act s 5 read with ICASA Act s 3(2) provides that ICASA acts through a Council of seven members, including the Chairperson, all of whom are appointed by the President on the recommendation of the National Assembly in accordance with the following principles:

- public participation in the public nomination process;
- transparency and openness;
- publication of a shortlist of candidates who must meet required criteria and who are not subject to disqualification.³⁷

32 Act 13 of 2000 ('ICASA Act') s 3.

33 ICASA Act s 2(a) and (b).

34 ICASA Act s 4(1)(a) and (b).

35 Act 103 of 1996 ('Telecommunications Act').

36 Act 4 of 1999 ('Broadcasting Act').

37 ICASA Act s 5(1).

The criteria for appointment embrace a commitment to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service.³⁸ Councillors of ICASA must be representative of

a broad cross-section of the population of the Republic³⁹ and must possess suitable qualifications, expertise and experience of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, marketing, journalism, entertainment, education, economics, business practise and finance or any other related expertise and qualifications.⁴⁰

Section 8 of the ICASA Act provides for the removal of ICASA councillors. A councillor may be removed from office of the grounds of: misconduct;⁴¹ inability to perform the duties of office efficiently;⁴² absence from three consecutive Council meetings without Council permission and without good cause;⁴³ having other remunerative employment or holding another remunerative office which is likely to interfere with the exercise of the Councillor's duties or which creates a conflict between such employment/office and his or her office as a Councillor;⁴⁴ failure of a councillor (or a Councillor's family member or business partner) to disclose an interest in a business on application for a licence;⁴⁵ and becoming disqualified as contemplated in terms of section 6(1).⁴⁶ Before a Councillor can be removed on these grounds, the National Assembly has to have made a finding that grounds for removal exist and must have adopted a resolution calling for that Councillor's removal from office.⁴⁷ The President must remove a Councillor from office upon the adoption of such a resolution by the National Assembly and may suspend a Councillor from office upon the start of the proceedings by the National Assembly for the removal of the Councillor.⁴⁸ The current appointment and removal provisions

38 ICASA Act s 5(3)(a).

39 ICASA Act s 5(3)(b)(i).

40 ICASA Act s 5(3)(b)(ii).

41 ICASA Act s 8(1)(a).

42 ICASA Act s 8(1)(b).

43 ICASA Act s 8(1)(c).

44 ICASA Act s 8(1)(d) read with ICASA Act s 7(6).

45 ICASA Act s 8(1)(e) read with ICASA Act s 12(2)(a) and (1).

46 ICASA Act s 8(1)(f).

47 ICASA Act s 8(2).

48 ICASA Act s 8(3).

contained in ICASA Act ss 5 and 8 meet the constitutionally required standard of independence laid down in FC s 192 and are sufficiently similar to the appointment and removal procedures for other Chapter 9 Institutions to pass constitutional muster.

The real threat to ICASA's current level of independence is created by the underlying statutes. The three underlying statutes do not satisfy the criteria for independence required by the Final Constitution and articulated by the Constitutional Court.

(b) Legislative Provisions Regarding the Powers, Duties and Independence of ICASA in the Regulation of Broadcasting

The IBA Act constituted a 'decisive break from the past'.⁴⁹ This decisive break took the following form:

The Authority shall function without any political or other bias or interference and shall be wholly independent and separate from the State, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the State, the government or any political party.⁵⁰

This statement on the nature of the IBA's independence from political interference appears far more fulsome and categorical than comparable provisions of the ICASA Act.⁵¹ Before the IBA Act was amended by the Broadcasting Act in 1999, it was clear that the IBA was free to formulate broadcasting policy within the broad objectives for the broadcasting sector set out in IBA Act s 2.⁵²

In respect of policy formulation and implementation, the member of the Executive responsible for broadcasting, the Minister of Communications, had no stated role in the original IBA Act. Major inroads into the independence of the IBA occurred with the coming into force in 1999 of the Broadcasting Act. The Broadcasting Act was primarily intended to deal with the corporatisation and restructuring of the SABC and

49 *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (The late Mahomed DP's used this felicitous phrase in describing the nature of the Interim Constitution.)

50 IBA Act s 3(3), repealed by ICASA Act Schedule 1.

51 See ICASA Act s 3(3) and (4).

52 The IBA Act empowers ICASA (then the IBA) to hold public enquiries in respect of broadcasting matters. IBA Act s 28. The IBA and ICASA have held many such enquiries which have resulted in the formulation of a number of important policy documents. See, eg, the Triple Enquiry Report, the Private Sound, Television Broadcasting, Community Broadcasting Report and the Revised Code of Conduct for Broadcasters Report, available at www.icasa.org.za, (accessed on 30 May 2005). The Triple Enquiry Report was ground breaking. It resulted in the privatisation of six of the SABC's regional radio stations and contained important proposals on local content quotas and cross media control (that is control of both broadcasting and print media) that have reshaped the broadcasting landscape. The IBA's policy formulations have also resulted in regulations governing the operation of broadcasters with regard to the imposition of local content quotas, the definition of advertising and the regulation of infomercials, and programme sponsorship in respect of broadcasting activities. See General Notice 245, *Government Gazette* 23135 (22 February 2002); General Notice 2247, *Government Gazette* 25378 (22 August 2003); R 426, *Government Gazette* 19922 (1 April 1999).

to provide a legislative framework for the regulation of satellite broadcasting. The Schedule to the Broadcasting Act, however, contains numerous amendments that reflected increasing executive branch control over broadcasting regulation.

Section 13A is headed 'General role and powers of the Minister'. Section 13A(2) empowers the Minister to direct ICASA (then the IBA):

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- (a) to undertake any special investigation and inquiry on any matter within its jurisdiction and to report to the Minister thereon;
- (b) to determine priorities for the development of broadcasting services;
- (c) to consider any matter within its jurisdiction placed before it by the Minister for urgent consideration.'

While the Minister is required to consult ICASA before issuing such a direction, ICASA may not refuse to comply with a direction where, for example, it believes that the public interest requires it to undertake a special enquiry or to consider urgently a particular matter.⁵³ Section 13A(2) violates FC s 192 by subjecting ICASA to direct executive control.

Section 13A(5)(a) empowers the Minister to issue 'policy directions of general application on matters of broad national policy consistent with the objects mentioned in section 2 of the Broadcasting Act.'⁵⁴ Before a policy direction is made the Minister must consult ICASA, engage in a notice and comment procedure in the Government Gazette and refer the proposed direction to the Parliamentary Portfolio Committee for comment.⁵⁵ In terms of section 13A(5)(b), ICASA 'must consider' a policy direction issued by the Minister in performing its functions. While ICASA must consider a policy direction, that does not mean that it must act in accordance therewith. Although the ICASA Act creates the opportunity for government to interfere with the regulation of broadcasting by ICASA, the Minister has not yet engaged in the kind of mischief FC s 192 was intended to cure.

Government interference, of course, is not confined to actions by the Executive. ICASA's authority to regulate broadcasting has been undermined by the Legislature on at least two occasions.

First, the Telecommunications Amendment Act introduced section 32C to the Telecommunications Act.⁵⁶ Telecommunications Act s 32C(1)(b) provides that with effect from 7 May 2002, 'Sentech Limited⁵⁷ shall be granted a licence to provide

53 IBA Act s 13A(4).

54 These matters include: the radio frequency spectrum, for the purposes of planning broadcasting and other services, universal service coverage targets of the public broadcasting services and the application of new technologies that interface with broadcasting.

55 IBA Act s 13A(6).

56 Act 64 of 2001.

57 A 100% state-owned company which engages in a variety of broadcasting, broadcasting signal distribution and telecommunications activities, but which is primarily a broadcasting signal distributor.

multimedia services to anyone who requests such service.' While this provision appears in the Telecommunications Act, it is clear that a multi-media service, being a quintessentially converged service, involves broadcasting.⁵⁸

The licensing of Sentech is constitutionally suspect in two respects. The licence to Sentech Limited is granted by Parliament, not ICASA. This legislative grant undermines the independence of the broadcasting regulator because multi-media services by definition involve broadcasting and places under state 'control . . . those matters directly connected with the functions which [ICASA] has to perform under the Constitution.'⁵⁹ Any future competition in respect of multi-media services is to be introduced not by the regulator, but by the Minister. In terms of section 32C(3)(a) of the Telecommunications Act, it is the Minister who shall invite applications for other multi-media services on a date to be fixed by the Minister and it is the Minister that grants additional multi-media licences. This grant of power by the Legislature to the Executive violates FC s 192. The second legislative act undermining ICASA occurred when the Broadcasting Amendment Act granted two additional regional television licences to the SABC.⁶⁰ ICASA's role in this regard was reduced to drafting licence conditions and determining whether or not these regional services were entitled to draw revenues from advertising.⁶¹

Despite these legislative incursions into ICASA's ostensibly independent domain, South Africa's broadcasting legislation grants ICASA sweeping powers to regulate broadcasting in a fair and impartial manner. These powers include the ability to: (1) determine important policy issues in a range of position papers; (2) invite applications for licences, evaluate these and proceed to grant and issue licences to the successful applicants; (3) impose licence conditions upon broadcasting licenses;⁶² and (4) make regulations on a range of broadcasting-related matters without requiring the assistance of any other person or body.⁶³

(c) Legislative Provisions Regarding the Powers, Duties and Independence of ICASA in the Regulation of Telecommunications⁶⁴

58 The broadcasting features in the definition of a multi-media service contained in Telecommunications Act s 1 are as follows: 'a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including. (i) audio; (j) visual content.'

59 *New National Party* (supra) at para 99.

60 Act 64 of 2002.

61 Broadcasting Act s 22A(3).

62 IBA Act s 43(2).

63 IBA Act s 78.

64 A number of the ideas contained in this section were first published elsewhere. See J White 'South Africa' in C Long (ed) *Global Telecommunications Law and Practice* (Revision Service 6, 2004).

FC s 192 does not require all electronic communications to be independently regulated. The requirement of independent regulation applies only to broadcasting. With to the regulation of telecommunications, ICASA lacks meaningful institutional independence.⁶⁵ The Telecommunications Act enables the the Executive,

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particularly, the Minister, to so thoroughly determine telecommunications policy that one leading commentator has argued that ICASA has, in respect of telecommunications regulation, been 'capture[d] by government.'⁶⁶

(d) Policy Formation

The signal difference in regard to ICASA's position *viz a viz* broadcasting and telecommunications policy directions issued by the Minister is that according to section 5(4)(d) of the Telecommunications Act, ICASA 'shall perform its functions in accordance with a policy direction issued under this section.' ICASA is not free to act independently of the Ministerial policy directions in respect of telecommunications even where it is of the view that the public interest so requires.

(e) Regulation Making

The Telecommunications Act does not empower ICASA to make its own regulations. Every regulation crafted by ICASA must be approved and published by the Minister before it takes legal effect.⁶⁷

This lack of institutional independence with regard to telecommunications is not simply a problem in theory. Regulations passed by ICASA often remain unapproved or unpublished for months. At the time of writing, the Minister's refusal to approve and to publish ICASA's regulations with regard to VANS has deleteriously affected a competitive sector of the telecommunications market.

The regulations regarding Facilities Leasing and Interconnection Guidelines provide yet another example of ICASA's lack of institutional independence. While Telecommunications Act ss 43(3) and 44(5) grant ICASA the authority to prescribe such guidelines, the Minister withdrew these guidelines shortly after approving them.⁶⁸ In *Telkom SA Limited v The Independent Communications Authority in South*

65 After the 1994 elections, the first democratically-elected government set to work re-regulating the telecommunications sector. Traditionally, this sector had been controlled by the Post-Master General and, following the incorporation of Telkom SA Limited ('Telkom'), by Telkom, in terms of the Post Office Act, Act 44 of 1958. Telkom was the exclusive provider of all telecommunication services save for mobile cellular telecommunication services.

The Telecommunications Act introduced far-reaching changes in regard to telecommunications. It established: (a) SATRA, an independent body to regulate telecommunications in the public interest; (b) competitive licensing procedures for certain telecommunications services such as Value-Added Network Services ('VANS') and Private Telecommunications Networks ('PTNs') and (c) provided for a period of exclusivity during which no-one other than Telkom could provide certain Public Switched Telecommunication Services ('PSTS') or certain telecommunication facilities.

66 T Cohen 'SA Telecommunications and the Impact of Regulation' (2003) 47(1) *Journal of African Law* 67, 83.

67 Telecommunications Act s 96(6) read with Telecommunications Act s 95(3).

Africa & Others, the High Court set aside the Minister's withdrawal of the guidelines.⁶⁹ The High Court wrote:

[T]he function of the Minister in respect of an amendment or withdrawal is confined to approving and publishing it. In other words, the amendment or withdrawal cannot emanate from her. It must come from [ICASA]. It would be ludicrous for the Minister to approve a withdrawal of which she is the author. The Minister cannot unilaterally withdraw regulations.⁷⁰

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(f) Licensing and Pro-Competitive Determinations

Perhaps the most troublesome aspect of ICASA's lack of independence with regard to telecommunications is to be found in the licensing regime established by the Telecommunications Act. International norms for independent regulation require that licences be awarded without government interference. South Africa's telecommunications regulatory regime, however, requires Ministerial intervention throughout licencing process.⁷¹ The Minister determines the telecommunications market structure by deciding both when invitations to apply for such licences will be issued⁷² and who will be granted these licences.⁷³

In terms of section 35(2) of the Telecommunications Act, once ICASA has made a recommendation to the Minister, the Minister may accept or reject the recommendation or may request further information from ICASA or may refer the recommendation back to ICASA for further information. It is clear that the statutory regime does not, in fact, allow the Minister to substitute her or his decision for that of ICASA. However, this provision has not been observed in respect of the licensing of the Second National Operator ('SNO'). It appears that the Minister will grant the PSTS licence despite ICASA having twice recommended that the awarding of a 51% stake therein not be granted.

Section 35A of the Telecommunications Act gives the Minister sweeping powers to ignore entirely the existing regulatory regime for licensing created by ICASA.⁷⁴ Section 35A(1)(a) provides that '[n]otwithstanding the provisions of sections 34 and

68 The Interconnection Guidelines are contained in Notice 1259, *Government Gazette* 20993 (15 March 2000) as amended by Notice 3457, *Government Gazette* 24203 (19 December 2002). The Facilities Leasing Guidelines are contained in Notice 12560, *Government Gazette* 20993 (15 March 2000).

69 *Telkom SA Limited v The Independent Communications Authority in South Africa & Others* 1904/2000 (Unreported, Transvaal Provincial Division, 2000) ('*Telkom SA*').

70 *Ibid* at 19.

71 See Telecommunications Act s 34(2)(a): a public switched telecommunications service licence, a mobile cellular telecommunications service licence, a national long-distance service licence, an international telecommunication service licence, a multi-media service or any other telecommunication service as prescribed.

72 Telecommunications Act s 34(2)(a).

73 Telecommunications Act s 35(2) read with Telecommunications Act s 35(5).

35 in the case of the major licences,⁷⁵ the Minister may, in specific instances, determine the manner in which applications may be made, such as by way of auction or tender, or both, and the licensing process and the licensing conditions that will apply.⁷⁶ Given the apparently unfettered power to do away with the statutory and the regulatory framework set out in sections 34 and 35 of the Telecommunications Act, s 35A(1)(a) may violate both FC s 192 and FC s 44. (The latter provision of the Final Constitution vests national legislative authority in Parliament.) In *Executive Council, Western Cape Legislature v President of the RSA*, the Constitutional Court held that the grant by the legislature to the executive of '[a]n unrestricted power to amend the Transition Act cannot be justified on the grounds of necessity.'⁷⁷ While s 35A of the Telecommunications Act does not

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expressly grant the Minister the power to amend sections 34 and 35 of the Telecommunications Act, her unfettered discretion to determine the applications process, the licensing process and the licensing conditions amounts to such a power.⁷⁸

74 Telecommunications Amendment Act 64 of 2001.

75 Telecommunications Act s 34(2)(a).

76 Note that these 'specific instances' are not defined anywhere in the legislation.

77 *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62.

78 An instructive example of Ministerial intervention in the licensing process has been the 2002–5 licensing of the SNO to bring about a duopoly in the PSTS market. The South African PSTS market has been dominated by Telkom. Telkom's PSTS monopoly officially ended on 7 March 2002. However the licensing of the SNO has been fraught and at the time of writing we have yet to see the licensing of a competitor to Telkom. In brief, invoking her licensing powers in terms of the Telecommunications Act, s 35A, the Minister set out a three stage licensing process:

- 30% of the SNO would be set aside for the electricity and transport para-statal companies which had their own telecommunication networks.
- 19% of the SNO would be set aside for a black economic empowerment shareholder and issued an invitation to apply for that stake.
- An invitation to apply for the remaining 51% stake was issued by the Minister.

The criteria made it clear that an international operator with capital and extensive experience was sought. Unfortunately, given the depressed international telecommunications market and (no doubt) the convoluted SNO licensing process, no such operator applied. ICASA evaluated both of the applicants and recommended that neither be granted the 51% stake in the SNO. The Minister then again invoked s 35A and announced that the 51% stake would be awarded by the Minister following a non-public process that entirely excluded ICASA. Again, invitations to apply were issued. After finding that two of the applicants who responded to the second invitation to apply had 'qualified' for the 51% stake, the Minister then announced that ICASA would be involved in evaluating the applicants. ICASA once again found that neither met the qualification criteria and again recommended that the 51% stake not be granted but that it be warehoused and invitations reissued when the global telecommunications market had recovered sufficiently. The Minister took some months to consider ICASA's recommendation, and then, contrary to the provisions of section 35(2) of the Telecommunications Act — which do not allow her to substitute her own decision for that of ICASA's — announced that each of the applicants would be given 13% in the SNO and that the remaining 25% would be warehoused until a future date. In fact, each of the applicants was given 12% in the SNO. It appears that the remaining 26% is to be given to a consortium of foreign telecommunications operators.

24E.4 ICASA: the challenge of convergence

This bifurcated nature of ICASA's independence *viz a viz* broadcasting and telecommunications regulation, will be especially difficult to manage given the fact that convergence of technologies means that the boundaries between telecommunications and broadcasting are increasingly blurred. It is often difficult to say whether a particular technological innovation should be classified as falling within the domain of broadcasting or telecommunications. Indeed, convergence was the rationale for the merger of SATRA and the IBA and the establishment of ICASA in the first place.

Parliament has recently released the Convergence Bill⁷⁹ in an attempt to 'promote convergence in the broadcasting, broadcasting signal distribution and

The Minister is also responsible for determining when the telecommunication facilities provisioning market is to be opened up to competition. One of the key features of the current telecommunications regulatory environment is the fact that Telkom, whose largest shareholder remains the South African government as represented by the Minister, is the exclusive provider of certain telecommunications facilities. For example, only Telkom and/or the SNO may provide telecommunication facilities used by VANS licensees and only Telkom and/or the SNO may provide the fixed lines used by mobile cellular service licensees. This facilities-based exclusivity is entirely in the hands of the Minister. She or he decides when each of these exclusivity periods is to end. The precise wording used is 'until a date to be fixed by the Minister by notice in the Gazette'. Similarly, the Minister is responsible for determining when the provision of voice services will be opened up to competition. Section 40(3)(a) of the Telecommunications Act provides that no person who provides a VANS 'shall permit that service to be used for the carrying of voice until a date to be fixed by the Minister by notice in Gazette'. On 3 September 2004, the Minister made series of determinations ('Ministerial Determinations') in regard to the above, including setting 1 February 2005 as the date upon which, *inter alia*:

- mobile cellular telecommunications service licensees may utilise 'any fixed lines which may be required for the provision of the service';
- VANS 'may carry voice using any protocol'; and
- VANS 'may also be provided by telecommunications facilities other than those provided by Telkom and the SNO or any of them'.

ICASA then undertook a series of public stake-holder discussions and released a media statement giving its legal interpretation of the Ministerial Determinations, including, in particular, that the effect of section 4(a) of the Ministerial Determinations was that from 1 February 2005, VANS 'may self-provide facilities'. ICASA then set about engaging in a regulation-making exercise to ensure that appropriate VANS licence conditions would be in place before 1 February 2005. Unfortunately, on 25 January 2005, the Minister issued a media statement (which obviously cannot alter the legal status of the Ministerial Determinations made in terms of the provisions of the Telecommunications Act) in which she said, *inter alia*, '[t]he issue of self provisioning was issued in the government's policy determination only in relation to mobile cellular operators in terms of fixed links it is the intention that value-added network operators may obtain facilities from any licensed operator and as specified in the determinations.' The Telecommunications Act does not empower the Minister to substitute the facilities provisioning restrictions found in the Telecommunications Act with her own facilities provisioning restrictions. The Telecommunications Act allows the Minister only to determine when the particular facilities provisioning restrictions set out in the Telecommunications Act will come to an end. This she has done in the Ministerial Determinations. However, the Minister has refused to approve and publish ICASA's VANS regulations. The disputes between the two parties regarding the self-provisioning issue, has left the entire VANS sector in a state of flux.

79 B9-2005, *Government Gazette* 27294 (16 February 2005).

telecommunications sectors.¹⁸⁰ The Convergence Bill will repeal the IBA and Telecommunications Acts and amend the Broadcasting Act.⁸¹

The Convergence Bill meets the urgent need for a single electronic communications statute through its rationalization of the existing statutory framework for broadcasting and telecommunications. While the Convergence Bill will undoubtedly go through many iterations prior to promulgation, several provisions of the Bill threaten ICASA's independence and appear to be constitutionally infirm.

First, the Minister determines the date when, as well as the geographical area within which, communications network services licences may be granted.⁸² ICASA may only accept and consider such licences from a date to be fixed by the Minister by notice in the Gazette.⁸³ Because broadcasting signal distribution has a significant impact on broadcasting, the regulation thereof should be carried out by the independent authority envisaged by FC s 192 without involvement by the Minister. Second, ICASA is required to submit to the Minister for approval proposed licence conditions in respect of individual licences.⁸⁴ The issuance of broadcasting licences is a quintessentially regulatory function and FC s 192 contemplates the

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discharge of such a duty by an independent authority.⁸⁵ Third, ICASA will be obliged to submit any frequency band plans to the Minister for approval.⁸⁶ The regulation of frequency spectrum is another aspect of broadcasting that requires oversight by an independent authority. Fourth, while Parliament and the Executive should bear ultimate responsibility for the development of macro-policy, ICASA should remain solely responsible for micro-policy formulation and implementation of the macro-policy developed by Parliament. ICASA alone should be responsible for conducting enquiries as to how best to implement the macro-policy goals determined by Parliament, making regulations, issuing invitations for applications for licences (where appropriate), granting licences, and regulating the frequency spectrum. Where the current Convergence Bill enables the Minister to determine such micro-policy outcomes, its provisions are, at the very least, suspect.

80 Convergence Bill, Preamble.

81 Convergence Bill s 88 read with the Schedule.

82 Convergence Bill s 5(5).

83 Convergence Bill s 5(4).

84 Convergence Bill s 9(2)(a).

85 Convergence Bill s 5(2)(c).

86 Convergence Bill s 34(7)