

**MIDLANDS STATE UNIVERSITY**

**FACULTY OF LAW**

**APPROVAL FORM**

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a research project entitled “*An Analysis of POTRAZ in light of international best practices*” submitted by Sandra Stella Maponga (R114307N) in partial fulfilment of the requirement of the Bachelor of Laws Honours Degree at Midlands State University.

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## DECLARATION

I, **SANDRA STELLA MAPONGA**, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgement, references and by comment included in the body of the report, and that it has not been submitted in part or full for any other degree at any other university.

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**STUDENT SIGNATURE**

...../...../.....

**DATE**

## DEDICATION

To the Lord God Almighty.

## ACKNOWLEDGEMENTS

I am greatly indebted to the Lord Almighty who has taken me this far. Had it not been for His mercies this degree would not have been possible.

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## **Statutes and Cases Cited**

### **Zimbabwe**

Postal and Telecommunications Act Chapter 12:05

Constitution of Zimbabwe

### **South Africa**

Independent Communications Authority of South Africa Act, 2000, No. 13 of 2000

Public Finance Management Act, 1 of 1999 (PFMA).

South African Constitution

Telecommunications Act, 103 of 1996.

### **Cases**

*Independent Electoral Commission v Langeberg Municipality* (CCT 49/00 [2001] ZACC 23; 2001 (3) SA 925 (CC) [www.saflii.org](http://www.saflii.org))

*Law Society of Zimbabwe v Minister of Transport* SC/59/03

*PTC v Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S)

*Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1995 (2) ZLR 199 (S)

## **List of Abbreviations**

BAZ	Broadcasting Authority of Zimbabwe
CRASA	Communications Regulators Association of Southern Africa
DoC	Department of Communications
FCC	Federal Communications Commission
GATS	General Agreement on Trade in Services
ICASA	Independent Communications Authority of South Africa
ICT	Information and Communication Technology
ITU	International Telecommunications Union
POTRAZ	Postal and Telecommunications Regulatory Authority of Zimbabwe
PTC	Postal and Telecommunications Corporation
PTO	Public Telecommunications Operator
SATRA	South African Telecommunications Regulatory Authority
USF	Universal Service Fund
WTO	World Trade Organisation

## **Abstract**

The study sought to analyse the role of POTRAZ in the regulation of telecommunications regulations vis-à-vis international best practices. Telecommunications play a pivotal role in a modern society which is characterized by new technological advancements on a daily basis. It is also a major contributor in economic development especially in Zimbabwe thus there is need to ensure that the regulatory authority complies with international requirements so as to aid economic development and also preserve the freedom of expression. The study argues that the Postal and Telecommunications Act stifles the role of POTRAZ since it grants a lot of power to the Minister who overly interferes with its functions. It is further argued that the appointment process, financial funding and lack of execution mandate by POTRAZ cripples its role in telecommunications regulations thus directly affecting its independence as prescribed in terms of international law. A comparative analysis with South Africa clearly shows that POTRAZ falls short of international telecommunications best practices. The study was also exploratory as it came up with insightful recommendations mainly that there be a revision of the Act to ensure compliance and guarantee the independence of POTRAZ for it to function effectively.

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## CHAPTER 1

### 1.1 Introduction

The importance of telecommunications in a modern and dynamic world cannot be overlooked since it has the capacity to transform economies and reach a wide audience. It then becomes important for there to be a regulatory authority which will be responsible for monitoring the development of the sector and implementing new policies to keep up with developments. The regulator must also be able to function independently to ensure fairness and attract new investors. Regulation is thus important in the telecommunications sector not only to maintain order in the field, but also to facilitate entry by removing barriers to competition; ensuring fair business practices and protecting the rights and needs of consumers. The need to establish a separate authority to regulate the telecommunications industry arises due to the need to insulate the authority from political interference.<sup>1</sup> It is argued that any unbiased and efficient public administration requires protection from political pressure, and it is natural to extend this concept to regulatory authorities which need extra freedom.<sup>2</sup> It is further propounded that the degree of independence given to the regulator should depend on the extent of good governance existing in the country. The ITU states that clear separation of the policy-setting function from the policy implementation function allows policy-makers to be held politically accountable, while regulators are held legally and administratively accountable.<sup>3</sup>

### 1.2 Background

The 1990s wave of liberalisation and privatisation of former state broadcasting and telecoms monopolies brought unprecedented changes in the global communications sector.<sup>4</sup> This ensued in the rapid development of technology which included the growth of the internet, mobile and other wireless voice and data services, which meant that

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<sup>1</sup> Blackman, C and Srivastava, L (2011) *Telecommunications Regulation Handbook* Tenth Anniversary Edition

<sup>2</sup> Samarajive (2002) Independence of multi-sector utility regulation, Discussion Forum on World Dialog on Regulation for Network Economies, [www.regulateonline.org](http://www.regulateonline.org) (Accessed on 6 April 2016)

<sup>3</sup> ITU 2002 Trends in Telecommunication Reform 2002: Effective Regulation: Geneva: International Telecommunication Union.

<sup>4</sup> ITU 2002(n 3 above)

without proper regulation, the sector would not thrive.<sup>5</sup> The effective and efficient regulation of this sector in many countries triggered greater economic growth and development, increased investment, job creation, lower prices, better quality of service, and more rapid technological innovation.<sup>6</sup> Telecommunications networks were considered as natural monopolies because of the huge infrastructure requirements which are difficult to duplicate thus they were owned by the state. The incumbent operators were inefficient and were offering poor services to the public as is the case with many state owned entities and need for privatization and allowing competition was compelling.<sup>7</sup>

The Postal and Telecommunications Corporation (P.T.C) was the first telecommunications company in Zimbabwe and it was owned by the government. It was the sole provider of communication services thus the demand for service was high. The decision in *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation*<sup>8</sup> opened the market for new players. In that case Retrofit had requested P.T.C to issue it a license to provide the public with a mobile cellular telephone service in Zimbabwe which request was declined. The court in that case struck out the monopoly granted to the Corporation as violation of the right to freedom of expression. The court further stated that the freedom of expression include the transmission of information by cellular telephones thus by holding on to the monopoly only a small percentage could access the service thus this was a violation of the right.

Subsequently the Zimbabwean government enacted the Postal & Telecommunications Act [Chapter 12:05] that provided for the creation of Post and Telecommunication Regulatory Authority of Zimbabwe (hereinafter referred to as "POTRAZ").<sup>9</sup>The functions of the board are provided for in section 4 of the Act and these include inter alia, to exercise the licensing and regulatory functions of postal and telecommunications services in Zimbabwe, to secure that reasonable demands for postal and

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<sup>5</sup> Blackman (n 1 above)

<sup>6</sup> Blackman (n 1 above)

<sup>7</sup> Blackman (n 1 above)

<sup>8</sup> 1995 (2) ZLR 199 (S)

<sup>9</sup> The Telecommunications Act (2000) also led to the de-merger of the former Posts and Telecommunications Corporation (PTC) into three commercial entities, namely the incumbent fixed telephone service provider (TelOne), a mobile cellular company (Net\*One) and a public postal operator (Zimpost).

telecommunication services are satisfied, to promote the interests of consumers, purchasers and other users, in respect of the quality and variety of postal and telecommunications services provided and telecommunications apparatus supplied and to maintain and promote effective competition between persons engaged in the provision of postal and telecommunications services

### **1.3 Problem Statement**

POTRAZ is responsible for establishing a healthy competitive environment in the telecommunications sector and it decides on various issues such as competition, issuance of licenses, interconnection, tariff guidelines and consumer protection among other issues. The power exercised by POTRAZ is quite high thus there is need for the authority to be independent from political interference or any form of influence for the industry to be productive. The Postal and Telecommunications Act which establishes the board cripples the power of the regulator to effectively execute its mandate. The Act gives with one hand and takes with the other, for instance the board is supposed to make decisions regarding the sector like licensing and development of new technology however the responsible Minister has the power of veto and can rescind, reverse or suspend the decisions of the board.

This means that the power given to POTRAZ is only theoretical as every decision it makes can be reversed anytime thus it cannot effectively carry out its duties prescribed in terms of the Act. Inasmuch as it must be acknowledged that POTRAZ is a government entity, its mandate is critical and the influence therefore must be minimal. The fact that the government also is the owner of Tel One and Net One which falls under the purview of POTRAZ also makes it difficult for the board to deal with other market players on a fair level without bias. The writer is not advocating for complete independence without any form of interference as this may be prejudicial to consumers but is advocating for minimal influence as will be discussed in the analysis. Absolute independence of a regulator is neither possible nor desirable, a public regulator is not created to do as it likes but to implement public (government) policies and to operate within its legal mandate thus there should be checks and balances to ensure that the

regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient.<sup>10</sup>

#### **1.4 Objectives**

- To describe the development of the telecommunications industry in Zimbabwe.
- To analyse the independence of POTRAZ in the regulation of the sector vis-à-vis international laws.
- To compare the regulatory authority of Zimbabwe and that of South Africa
- To give recommendations and conclusions.

#### **1.5 Methodology**

A qualitative analysis and desk top research approach will be adopted. Since there is not much literature in Zimbabwe on the telecommunications sector, reliance will be placed on international articles and books. The writer will use the library and the internet for journals and other authoritative texts. A comparative approach will also be made use of in Chapter 4. International instruments on telecommunications to which Zimbabwe is party to and the Post and Telecommunications Act will be made reference to.

#### **1.6 Literature Review**

The telecommunications sector is vital in the economic development of a nation thus it calls for effective regulation. Walker states that the three most critical needs for regulation are to protect customers, to ensure fair competition and to promote competition.<sup>11</sup> This then implies that there is need for an impartial regulator who ensures that the needs of the consumers are met and also ensures that market players are treated fairly.

The Federal Communications Commission (FCC) defines an independent regulatory agency as, “an effective regulator should be independent from those it regulates,

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<sup>10</sup> MISA, Zimbabwe position on the independence of broadcasting and telecommunications regulatory bodies

<sup>11</sup> Walker .P (2001) WWW Regulation: The why, what and whither of Communications Regulation, *IEE Electronics and Communications Engineering Journal*, [www.iee.org](http://www.iee.org). (Accessed on 1April 2016)

protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. The regulator must be adequately funded from reliable and predictable revenue sources.<sup>12</sup>

The independence becomes an even more important issue when the government holds a share or the full control of the incumbent operator(s). The regulation can be subject to conflict of interest because the government may try to protect the incumbent through policy implementation of the regulator.<sup>13</sup> For example the fact that the government owns Net One and Tel One makes it important for POTRAZ to be independent.

Also in the case of *Law Society of Zimbabwe v Minister of Transport*<sup>14</sup> where the Applicant was challenging the constitutionality of interception powers given to the President, the court had this to say;

*“The issue here is not that the powers have been abused or are likely to be abused by the President but rather there are no mechanisms in the Act to prevent such an abuse. In the absence of such mechanisms the powers centred on the Minister are too broad and overreaching to be reasonably justifiable in a democratic society.” That same context also applies in this case where the power exercised by the Minister over the POTRAZ is just too broad which denigrates the Authority to a “toothless regulator”.*

Melody states that “the term 'independence', as used in the context of telecoms reform is often misunderstood; it does not imply independence from government policy, or usurping the power to make policy, but rather independence to implement policy without undue interference from politicians or industry lobbyists”.<sup>15</sup> No matter how independent the regulator is, it is still a part of the government implementing government policies. The writer also associates with this proposition by Melody. Min also adds that no matter

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<sup>12</sup> ITU 2002 (n 3 above)

<sup>13</sup> ITU 2002 (n 3 above)

<sup>14</sup> SC/59/03

<sup>15</sup> Melody, W.H (2003) Stimulating investment in network development: Roles for telecommunications regulation, World dialog for network economies, theme for 2003, [www.regulateonline.org](http://www.regulateonline.org). (Accessed on 1 April 2016)

how independent the regulator is it is still a government agency the regulator has to act with close cooperation with the policy maker to implement the policies of the government effectively.<sup>16</sup> Therefore it is best to grant the correct amount of independence the regulator requires depending on the social and political context. However even though that it the issue, there is need for the government to give POTRAZ its autonomy so as to sufficiently carry out its legal mandate.

Wu also postulates that the leader of the regulatory authority should have sufficient authority and autonomy if the regulatory body is to function independently.<sup>17</sup> Independence derives from things such as whether the leader can be removed easily by the executive, whether the leader has a fixed term in office and if that term is sufficiently long enough. If the leader cannot be removed no matter what decision is made and the term in office is fixed or for life, then that person can make independent decisions not bending to political pressure.<sup>18</sup> This is also applicable in Zimbabwe where the regulatory board does not have any security of tenure and in the past 2 years the board has been dissolved three times! This makes it difficult for the board to fully exercise its powers.

## **1.7 Chapter synopsis.**

This study comprises 5 chapters structured as follows;

### **Chapter One**

The chapter will lay the basic framework of the topic, the problem statement, state the objectives and the methodology to be adopted and it will also give brief summaries of the chapters

### **Chapter Two**

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<sup>16</sup> Min. W (2000) Telecommunications regulations: Institutional structures and responsibilities, working party of telecommunications and information service policies, OECD, [www.oecd.org](http://www.oecd.org) (Accessed on 31 March 2016)

<sup>17</sup> Wu. I 2004 "Traits of an independent communications regulator: A search for indicators, federal communications commission, international bureau, Working Paper 1, <http://ftp.fcc.gov/ib/working-papers> (Accessed on 4 April 2016)

<sup>18</sup> Wu (n 17 above)



This Chapter will describe the development of the telecommunications sector and the advantages which were brought about by liberalisation. It will also highlight the importance of regulating the telecommunications sector.

### **Chapter Three**

This chapter will analyse the mandate of POTRAZ in relation the doctrine of independence and International Best Practices.

### **Chapter Four**

This chapter will give a comparison between POTRAZ and The South African Telecoms Regulatory System.

### **Chapter Five**

This chapter will propose different recommendations and conclude the topic.

## Chapter Two

### 2.0 Development of the telecommunications sector in Zimbabwe and importance of an independent regulator

#### 2.1 Introduction

The Telecommunications industry is a major contributor of productivity across economies and societies. The Telecommunications industry is not only a significant contributor towards the economic activities of countries, but also towards the growth of other industries. In recent times, developing nations have witnessed significant transformation within this sector due to the impact it has had on their economies.<sup>19</sup> Telecommunications basically is defined as the art and science of ‘communicating’ over a distance by telephone, telegraph and radio.<sup>20</sup> It the transmission, reception and the switching of signals, such as electrical or optical, by wire, fibre, or electromagnetic (i.e. through-the- air) means.<sup>21</sup>

#### 2.2 Development of the telecommunication sector in Zimbabwe

The telecommunications industry in Zimbabwe dates back to 1980 where it was regulated by the government through the Postal and Telecommunication Corporation (PTC). This means that the government held the monopoly over the sector and it was very difficult for other new players to enter into the market. The formation of state-owned monopolies was advantageous mainly because it was considered to be an efficient way to centrally plan and manage these sectors and to ensure that the goods and services were delivered to the public.<sup>22</sup> Due to the political history of Zimbabwe, the government’s aim was to provide services to previously disadvantaged areas thus ensuring affirmative action. In this regard, the monopoly provider was government-regulated and government-owned. The monopoly status was necessary to attain a number of objectives. It enabled the government to exercise central control,

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<sup>19</sup> Venkatram. R. *Factors influencing telecoms growth: A case study of China and India*, 2012, 2

<sup>20</sup> L.Thornton *Telecommunications law in South Africa*, (2006),19

<sup>21</sup> H Newton Newton’s *Telecom Dictionary* 18 ed (2002) 733.

<sup>22</sup> Unpublished: IWN Bandaranayake: *Impact of the regulators independence on the Telecommunications Industry*: Unpublished MBA thesis, Asian Institute of technology, Thailand, (2005), 9.

thus being able to provide a less expensive telecommunications services by avoiding unnecessary overlap and duplication. This also helped the government to provide a mobile cellular telephone service to people in areas where such a service is not commercially viable, to ensure that development takes place in an orderly and methodical fashion, taking in areas of marginal interest and to attract more easily expertise and subsidiary participation.

In the telecommunications industry, governments, for a long time, regarded markets as natural monopolies.<sup>23</sup> But this idea was eroded because governments came to the realisation that, not all segments of the telecommunications industry showed signs of a natural monopoly; technological advancements reduced previously prohibitive fixed costs; and increases in demand for telecommunications services called for installation of new capacity.<sup>24</sup> In the case of *Retrofit v Minister of Information*<sup>25</sup> it was held unconstitutional for PTC to monopolise the telecoms sector as this constituted a fundamental breach of the freedom of expression guaranteed in the Constitution. In 2000, the Postal and Telecommunications Act came into effect creating the Postal and Telecommunications Regulatory Authority (POTRAZ) responsible for regulating the sector.

### **2.2.1 The decision in Retrofit and its implications**

In the Retrofit case the applicant company wanted to establish a mobile cellular telephone service in Zimbabwe. It applied to the respondent, the Posts and Telecommunications Corporation, for a licence to establish this service. The PTC declined to grant a licence on the ground that the service was one over which it enjoyed a monopoly in terms of s 26(1) of the Postal and Telecommunications Services Act.<sup>26</sup> In a previous ruling in this matter *PTC v Retrofit (Pvt) Ltd*<sup>27</sup>, the Supreme Court had decided that the PTC had an exclusive monopoly to provide public telecommunications services and that it had no statutory power to grant a licence to another person to

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<sup>23</sup> Bandaranayake (n 22 above), 10

<sup>24</sup> M. Khosa : *The interplay of sector regulators and competition authorities in regulating competition in telecommunications: The South African Case*, (2009), 30.

<sup>25</sup> 1995 (2) ZLR 199 (S)

<sup>26</sup> Chapter 12:02

<sup>27</sup> 1994 (2) ZLR 71 (S)

operate a mobile cellular telephone service. The applicant applied to the Supreme Court under s 24(1) of the Constitution, challenging the constitutionality of the monopoly bestowed on the PTC in respect of public telecommunications services. It argued that the monopoly, and consequent inability of the PTC under the law to licence the applicant to become a provider of a mobile cellular telephone service, violated s 20(1) of the Constitution, in that it interfered with its freedom of expression and, more particularly, its right to receive and impart ideas without interference.

The court in the case held that, telecommunications services are a vitally important means of communication in the modern world and are crucial for conducting business affairs and providing information and in facilitating social interaction thus for the PTC to be given a monopoly over telecommunications services and then to furnish the public with a highly inefficient telephone system available only to a small percentage of the population manifestly interferes with the constitutional right of everyone to receive and impart ideas and information.

The court further stated interference with a constitutional right is not reasonably justifiable if it arbitrarily or excessively invades the right according to the standards of a society that has proper respect for the rights of the individual. The objectives advanced by the PTC for the monopoly were not of sufficient importance, taken singly or cumulatively, to warrant the serious inroads into the right. The court further stated that the objectives of the PTC could be just as readily achieved without any dependence on a monopoly. Without its monopoly, the PTC would still be able to provide a comparatively inexpensive, good quality mobile cellular telephone service to both urban and outlying communities and to control an excessive intrusion into the field by the private sector.”<sup>28</sup> This landmark ruling opened the telecommunication sector in Zimbabwe which saw new market players coming into play thus contributing towards the development of the sector and the economy in general.

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<sup>28</sup> Page 220-225 of the *Retrofit case* supra

## **2.2.2 Advantages of liberalisation**

Liberalisation refers to fostering conditions for competition through the relaxation of previous government restrictions in areas of social or economic policy, by opening up a sector to entry by private companies.<sup>29</sup> Competition exists when there are two or more suppliers in a market competing with each other to sell goods or services to customers. The rationale for competition is that it encourages lower prices, more or better services, and induces suppliers to be more efficient and offer a better choice of services.<sup>30</sup>

Thus the liberalisation of the telecommunications sector in Zimbabwe brought about a lot of positive changes in relation to technological change with regards to convergence and competition as new market players were licensed thus providing quality, affordable and better services.

## **2.3 The role of an independent regulator.**

An independent regulator plays a pivotal role in the telecommunications sector. Introducing competition to an industry that has been dominated by monopolies is not easy, especially when the new entrants need to interconnect their networks with that of the incumbent operator who doesn't accrue many benefits from it but rather stands to lose.<sup>31</sup> The need for regulation in the telecommunications sector thus becomes apparent. The regulation aims to achieve a level playing field for all operators, create a healthy environment to attract capital and investment and also ensure rights and needs of consumers.<sup>32</sup>

The central dilemma of the transition from a monopoly situation to that of stable and functioning competition in telecommunications entails guaranteeing new network administrators and service providers fair access to the market and controlling the dominant position of the former Public Telecommunications Operator (PTO) on the market hence, the need to ensure competitive markets for new entrants and for

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<sup>29</sup> Khosa (n 24 above) 35

<sup>30</sup> Khosa (n 24 above) 35.

<sup>31</sup> Bandaranayake (n 22 above), 24.

<sup>32</sup> Bandaranayake (n 22 above) 1

consumers alike was the major reason behind the creation of new regulatory bodies and the implementation of new regulatory rules.<sup>33</sup>

According to Thornton<sup>34</sup>, the main reasons advanced for specialised regulation of telecommunications are; to maintain control over the use of a valuable national resource, namely the radio frequency spectrum; to control anti-competitive behaviour by dominant players in the market, which in turn will lead to the realisation of universal service and to increased quality and choice; and to ensure the development and implementation of effective universal service policies. It is further argued that nature of telecommunications is borderless thus at least it must be regulated through international law.<sup>35</sup>

It must also be noted that for a regulator to effectively carry out its mandate it must be independent without any external influence. This will ensure that the institution is will be able to reinforce the principles of fairness, impartiality and economic efficiency. It is imperative to state that the term 'independence', as used in the context of telecommunications regulation, does not imply independence from government policy or the power to make policy, but rather independence to implement such policy without undue influence from politicians or industry lobbyists.<sup>36</sup> It also entails the ability to acquire specialised skills being managed without interference and to be held responsible for the results according to the set standard of performance.<sup>37</sup> The independence of the regulator is essential in relation to issues such as the credibility of the regulator, the enforceability of its decisions and investor confidence in the regulatory system. The regulator's dealings with the government must be kept at an arm's length. The independence of the regulator ensures that the regulator will make independent decisions that do not unduly favour one participant over another.

The regulator must be independent from political influence and must be seen to be independent in performing its duties which relate to licensing. It must be seen as fair in

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<sup>33</sup> Bandaranayake (n 22 above) 3

<sup>34</sup> Thornton (n 20 above) ,19

<sup>35</sup> Thornton (n 20 above), 19

<sup>36</sup> Melody (n 15 above)

<sup>37</sup> Melody (n 15 above)

distributing scarce resources. The doctrine of independence as determined by the International Telecommunications Union (ITU)<sup>38</sup> entails the separation of regulatory and operational functions, neutrality, insulation from external pressure, or simply the designation of an official publicly identified as having the regulatory responsibility and not subservient to the rest of the Ministry.<sup>39</sup> The doctrine has been extended to encompass independence from operators, policy makers and interested parties.

## **2.4 Conclusion**

From the preceding discussion it has been clearly indicated that it is imperative to have an independent regulator which administers the telecommunications sector in a fair, competent and impartial manner. It is however prudent to note that in Zimbabwe it is not expressly mentioned whether POTRAZ is an independent regulator or it is a regulator in general. The ITU calls for an independent regulator as will be highlighted in the following Chapter.

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<sup>38</sup> The ITU is a global organisation which includes public and private telecommunications matters.

<sup>39</sup> ITU, The changing role of Government in an era of telecom deregulation: Report of the Colloquium held at ITU Headquarters 17-19 February 1993.

## **Chapter Three**

### **3.0 POTRAZ regulation vis-à-vis international best practices**

#### **3.1 Introduction**

An independent regulator is in a “healthy” position to be effective and serve the interests of the public interest thus it must possess specific characteristics to achieve independence. These characteristics include guarantees of independence for the regulator, a participatory and transparent appointment process, suitably qualified personnel, public accountability, sufficient mandate and power, as well as adequate funding.<sup>40</sup> These ideal characteristics specified for a regulator to be an independent, will be used as a yardstick to measure POTRAZ’s status as an independent regulator.

A regulator’s independence should not only be enshrined in law, but should be evident in all spheres of its influence. Given the necessary ability to enjoy independence, a regulator is enabled to fulfill its mandate and be effective.<sup>41</sup> The importance of telecommunications to economic and social development is well established both for developed and developing countries. Independence thus is a pre-requisite when it comes to realizing other broader objectives such as achieving socio-economic goals, managing public sector reform, promoting competition, encouraging investment, and acting as an impartial arbiter. Regulatory independence is predicated on a separation of policy-making from policy implementation and a separation from the regulator and those regulated.<sup>42</sup>

The International Telecommunications Union states that regulatory authorities must be independent from interference so as to carry out their mandate sufficiently and this also applies to POTRAZ which is the regulatory authority of the telecommunications sector in Zimbabwe. This chapter will highlight the role of PORTAZ in relation to independence vis-à-vis what the International Telecommunication Union prescribes.

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<sup>40</sup> ITU (n 3 above).

<sup>41</sup> Unpublished: P. Govenden: ‘Toothless Regulator?’ A critical analysis of ICASA’s regulation of the SABC so that it functions as a public broadcaster : Unpublished MA thesis, University of Witwatersland, South Africa,(2009) p21

<sup>42</sup> Blackman (n 1 above)



## **3.2 Functions of POTRAZ**

The functions of the POTRAZ inter alia include, exercising the licensing and regulatory functions of postal and telecommunications services, securing reasonable demands for postal and telecommunication services, promoting the interests of consumers, maintaining and promoting effective competition and monitoring tariffs charged with a view of eliminating unfair business practices among such licensees.<sup>43</sup> It must also be noted that besides the ITU, Zimbabwe is also part to the SADC which established the Communications Regulators Association of Southern Africa (CRASA) which advocates for the establishment of an independent regulator. This means that the government is under an obligation to ensure that POTRAZ is independent from its excessive interference. Thus after highlighting the international and regional obligation of Zimbabwe in respect of an independent regulator, the discussion will move on to interrogate the independence of POTRAZ in carrying out its legal obligation.

### **3.2.1 Appointment Process**

The Postal and Telecommunications Act prescribes that the POTRAZ board shall consist of people who have an interest in the development of the sector and they should have experience and/or professional qualifications in telecoms, finance, law, accountancy and administration.<sup>44</sup> However, the board members are only appointed by the President of the Republic in consultation with the Minister of Information, Technology and Communications.<sup>45</sup> The fact that the board is appointed by the President shows that there is interference by the executive which affects the board from being objective. The Appointment of the board members by the President also means that their allegiance will be towards the one who appointed them of which the board is supposed to fulfill the interests of the public. Already this is contrary to international standards which state that the public must be involved in the selection process thus there is need for the Appointment of the board to be carried out publicly so as to avoid excessive interference by the state. Therefore, an independent regulator's appointment

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<sup>43</sup> S4 of the Posts and Telecommunications Act

<sup>44</sup> Section 6(2) of the Posts and Telecommunications Act

<sup>45</sup> S6 (1) Of the Posts and Telecommunications Act.

process typically involves the participation of the public, through for instance hosting public hearing and allowing the public to participate in the nomination of suitable candidates. The appointment process of an independent regulator should not be representative of political and economic interests. An independent regulator's appointment process of members and systems removes all power what so ever from the ruling party and "excludes representation of political and economic interests."<sup>46</sup>

Thus, its appointment process should not be controlled completely by the ruling party as this could lead to the appointments being purely political rather than in the public interest. Along with a participatory and independent appointment process, an independent regulator should also appoint its personnel, systems of governance and management structures in a manner that is open and transparent.<sup>47</sup> The appointment process for members and systems of governance and management structures of an independent regulator must be transparent and open.

The ITU also states that a member of an independent regulator may not be an employee of government or public service, an official of a political party or an employee of a broadcasting or telecommunications company. The personnel employed at an independent regulator are also required to be independent from the government, political parties and the regulated industry so that the regulator's independence is not compromised.<sup>48</sup> The Postal and Telecommunications Acts states that the President shall not appoint a person as a member and no person shall be qualified to hold office as a member who has a financial interest in any business connected with cellular telecommunication, postal or telecommunication services or systems, or a member of Parliament.<sup>49</sup> This shows that in a way the Act endeavours to comply with the provisions of the ITU though only Parliamentarians are disqualified from office which implies that an active member of a political party can be appointed and this has a negative bearing on the role of the POTRAZ board in effectively carrying out its mandate.

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<sup>46</sup> Govenden (n 41 above) 22

<sup>47</sup> Legal and Institutional Aspects of Regulation, Module 6, ICT Regulation toolkit, ITU, [www.ictregulationtoolkit.org](http://www.ictregulationtoolkit.org) (2006) (Accessed on 30 July 2016)

<sup>48</sup> ICT Toolkit (n 47 above)

<sup>49</sup> Section 8 1(b),2 (a) of the Postal and Telecommunications Act

### 3.2.2 Structural independence

The WTO's GATS agreement emphasises the need for regulators that are separate from, and not accountable to, any service provider. This is important to POTRAZ, where the government is not only a policy maker in the sector, but is also an owner of companies that provide electronic communication services (ZBC, Tel One and Net\*One). A regulator that is not structurally independent from service providers is vulnerable to the twin pressures of industry and political 'capture', as both sides will try to sway its decisions and when a regulator is 'captured', it often lacks credibility as its decisions are neither objective nor transparent.<sup>50</sup> The fact that POTRAZ is directly influenced by the government shows that there won't be any fairness in the competition market as other players will be treated more favourably than the others thus clearly affecting the mandate and independence of the board. However one must hasten to say that total independence is not desirable as there must be sufficient checks and balances but the interference must be minimal. An independent regulator therefore is required to be institutionally located outside government ministries and have constitutional guarantees of independence.<sup>51</sup> This institutional location ensures that the interest the regulator represents is that of the public. The WTO reference paper on regulation in 1997 also recognizes the importance of impartiality of the regulator where it stated that, "the regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."<sup>52</sup>

Structurally, POTRAZ is not independent from service providers since the government is involved in electronic communication service providers like ZBC and Net One. It often lacks credibility as its decisions are neither objective nor transparent. There is need for independence in terms of service of market players in the Telecommunications industry. The issue of non-payment of fees by Telecel and Netone towards the Universal Service

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<sup>50</sup> Telecommunications Regulations Handbook, (2011) The International Bank for Reconstruction and Development / The World Bank, InfoDev, and The International Telecommunication Union

<sup>51</sup> Govenden (n 41 above) 21

<sup>52</sup> Telecommunications Handbook (n 50 above)

Fund causes the market to be one which lacks credibility from potential investors and also discourages the license paying providers from doing so.

### 3.2.3 Financial independence

The International Telecommunications Union states that, “the source of a regulatory authority’s funds and the process by which these funds become part of the authority’s actual budget can directly impact on the degree of a regulator’s autonomy and competence.”<sup>53</sup> The ITU also states that, “the funding sources and budgeting processes of regulatory authorities can have an important impact on their independence, efficiency and cost of regulation.”<sup>54</sup> The source of a regulatory authority’s funds and the process by which these funds become part of the authority’s actual budget can directly impact on the degree of a regulator’s autonomy and competence when carrying out its responsibilities.<sup>55</sup> A good example is the Botswana Telecommunications Authority’s (BTA) is financially independent. No ministry has involvement in its budget and an independent audit firm is appointed annually to audit the books of the BTA. The African Green Paper recommends that in order for a regulator to be truly independent, it should preferably be self-financing and have its own budget.<sup>56</sup> POTRAZ receives its funding from the government.

Where a regulator is directly financed by a government Ministry, for example, it is difficult for its decisions to be independent of that Ministry. This has negative implications on the principle of freedom of expression. There should be an equilibrium between financial independence and public accountability so that the regulator works within its scope and has to account for that.<sup>57</sup>

The Act states that the funds of the POTRAZ shall consist of fees, charges and other income accruing to the Authority from licences issued and other things done by it, such

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<sup>53</sup> ITU 2002 (n 3 above)

<sup>54</sup> <http://www.ictregulationtoolkit.org/en/Section.2114.html>

<sup>55</sup> F.Gilardi, *The independence of regulatory authorities* in L.David (ed.), *Handbook of Regulation*, 2010.

<sup>56</sup> ITU 2002 (n 3 above)

<sup>57</sup> MISA, (n 10 above)

moneys as may be payable to the Authority from moneys appropriated for the purpose by Act of Parliament; and such other moneys as may vest in or accrue to the Authority, whether in the course of its operations or otherwise.<sup>58</sup> This means that POTRAZ also relies on monies granted through government allocation thus also affecting its independence. It must be highlighted that there are two primary ways of funding a regulator's budget. The first is through allocation from a government budget and the second is through allowing the regulator to collect monies from spectrum or licence fees, fines, and other administrative costs.<sup>59</sup> A way of guaranteeing regulators' financial independence could be through the adoption of a combined funding mechanism, where a budget allocation is supplemented by fees levied on operators.<sup>60</sup> It has to be noted, however, that increased financial independence must be balanced with public accountability by coming up with a system of ensuring that the regulator does not overspend or over-charge its fees.

Financial independence was interpreted in the *Langeberg decision* to mean the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and relevant legislation.<sup>61</sup> Financial independence is important in that, if the regulator is properly funded, it will be able to perform its functions properly and to attract qualified people to implement its regulatory objectives. A regulator that is not properly funded can affect the industry negatively, in that it will not be able to carry out its functions effectively and efficiently. For example, if a regulator is unable to settle industry disputes timeously, this may adversely affect the stability and competitiveness of the market.<sup>62</sup> Also, if the regulator is well funded it will be able to attract highly qualified human resources skills. Given the fact that POTRAZ is not independent financially, it falls foul of the ITU requirements. A regulator's independence should not only be enshrined in law, but should be evident in all spheres of its influence.

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<sup>58</sup> Section 19 of the Posts and Telecommunications Act.

<sup>59</sup> Blackman (n 1 above)

<sup>60</sup> MISA (n 10 above)

<sup>61</sup> *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00 [2001] ZACC 23;2001 (3) SA 925 (CC) www.saflii.org

<sup>62</sup> ITU (n 3 above)

### **3.2.4 Tenure of office**

POTRAZ board members also have no tenure of office as the Act states that their stay in office is dependent on them complying with the terms and conditions of employment fixed by the President.<sup>63</sup> The fact that these terms and conditions are not explicit means that this clause can be abused as exemplified by the dissolution of the POTRAZ board for three times in the last 2 years. The fact that the conditions of service are not clear means that the POTRAZ board is not independent and one can never know when they have toed the line. This is also contrary to public policy as one is not given the right to be heard and no enquiries are even made before dismissal although this has a direct impact on the public. The 3-year period of office for each member is too short for any of them to make any impact. International law requires that members of regulatory agencies be appointed for a minimum of 5 years so as to ensure continuity. This also shows that there is need to comply with international standards so as to allow the board to be independent, effective and innovative.

### **3.2.5 Clear mandate and enforcement mechanism**

A regulator in the field of communications must be granted, by law, the ability to make binding decisions over all players in that sector. Currently, the authority of POTRAZ is seriously jeopardised as the country's laws state that the Minister responsible for that agency has the right to reverse any decisions the regulator may have made. The Postal and Telecommunications Act states that the Minister may suspend, reverse or rescind the actions or decisions of the Board if it is not in the national or public interest.<sup>64</sup> This means that the board is not autonomous since it cannot make decisions without being vetoed and this is contrary to international law principles. Once an independent regulator has been established, it must be given full autonomy to make and enforce its decisions. A regulator that has no decision-making authority like POTRAZ does not command the confidence and trust of the competing service providers. POTRAZ is thus crippled as its decisions are subject to scrutiny by the Minister and they can be reversed anytime thus it cannot decide anything meaningful.

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<sup>63</sup> Section 10 of the Posts and Telecommunications Act

<sup>64</sup> Section 26 of the Posts and Telecommunications Act

Sufficient mandate and power are crucial requirements in enabling an independent regulator to perform its duties effectively in the public interest. The ITU stresses that regulatory bodies are crucial to democracy because it removes policy implementation away from the political arena, and views the public interest as supreme in decision making.<sup>65</sup> An independent regulator should also have adequate mandate and power so that it does not become dependent on other institutions to perform its duties effectively, like the presidents department, political associations and in particular the regulated industry.

The writer hastens to state that she is not stating that the POTRAZ is not independent but the way in which provisions in the Act are couched leaves the board exposed and there is room for abuse. In the case of *Law Society of Zimbabwe v Minister of Transport*<sup>66</sup> where the Applicant was challenging the constitutionality of interception powers given to the President, the court had this to say;

*“The issue here is not that the powers have been abused or are likely to be abused by the President but rather there are no mechanisms in the Act to prevent such an abuse. In the absence of such mechanisms the powers centred on the Minister are too broad and overreaching to be reasonably justifiable in a democratic society.”*

That same context also applies in this case where the power exercised by the Minister over the POTRAZ is just too broad which denigrates the Authority to a “toothless regulator”. The ministerial role in POTRAZ entails that the regulator is not in a place to make any sound regulatory decision without the interference of the Minister which is essential for promoting credibility of any regulator and is a condition precedent for encouraging investment, innovation and furthering public interest in the telecommunications sector. The ITU calls for a regulator that is not influenced by the government. A regulator that does not possess adequate mandate and power will be ineffective and unable to serve the public interest.

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<sup>65</sup> ICT Toolkit (n 47 above)

<sup>66</sup> ITU (n 3 above)

### **3.2.6 Competition**

The independence of POTRAZ is important since it fosters competitive markets, which are characterised by the efficient supply of telecoms and broadcasting services. This implies that if the board is not interfered with it will be able to attract investors and this encourages competition which in turn will lead to better services, reduced tariffs and the consumer will be the ultimate winner. Competition is also closely linked to the universal service goals. Once competition is increased it means that information will be made available to a wider network of people including the disadvantages and those in rural areas. The goal of universal service is to make sure that electronic communication services are accessible to the widest number of users at the lowest cost and this is achievable through. The obvious means to achieve universal service is usually through the establishment of a Universal Service Fund (USF)<sup>67</sup> to finance the provision of these services, thus there is need to ensure that all mobile operators are contributing towards this cause other than burdening Econet which has been consistent in its payments.

### **3.2.7 Public accountability**

Public accountability is also an important issue in regulation and it implies that since regulators are normally tasked with serving the public interest rather than government, commercial, or individual self-interest, they are expected to account, on a regular basis, to the public on how they carry out their daily duties.<sup>68</sup> An independent regulator ought to be accountable to the public through putting in place accountability mechanisms, such as reporting to a specific body like the legislature, produce an annual report and consult regularly with the public and stakeholders on policy matters.

POTRAZ does not account to the public on its important functions thus there is need for it to provide reasons on how it grants or refuses to grant other players operating licenses other than failing to account. For instance there is the issue of license fees, only Econet is contributing thus there is need for the board to come clean on why other

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<sup>67</sup> Section 73 of the Postal and Telecommunications Act

<sup>68</sup> Blackman (n 1 above)



network providers are not doing the same. In order to win the confidence of all stakeholders, it is necessary for the regulator to publish decisions, documents, and other relevant materials regarding its proposed activities. Where there has been an application for a license, the regulator should be accountable both to the applicant and the public. POTRAZ is not that accountable and transparent and should therefore adopt such policy that is in line with the ITU requirements.

### **3.2.8 Transparency**

Transparency is important in telecoms regulation thus there is need for POTRAZ to be transparent in its operations though retaining its independence. Transparency entails making available, in a timely fashion, all relevant information which include regulatory rules and policies, upcoming regulations, and all previous regulatory decisions and agreements.<sup>69</sup> Such openness on the part of the regulator enhances the confidence of all stakeholders in the independence of that regulator and strengthens its legitimacy.<sup>70</sup> Importantly, transparency reduces the probability that interested parties will believe that decisions are biased or discriminatory. This also reinforces the accountability issue where POTRAZ must be able to avail documents to the public which state how it uses funds on the different projects.

### **3.2.9 Predictability**

An independent regulator should be predictable and have stability. The POTRAZ Board has been dissolved three times in the last two years and this shows instability. Also, investors in any sector always require that any regulatory processes of that sector are predictable. Independent regulators are predictable if they adhere to the rule of law. The most important features of the rule of law are respect for precedent and the principle of *stare decisis*.<sup>71</sup> Respect for precedent means that regulators do not reverse policy decisions unless there is evidence that those decisions have led to obvious problems. Predictability also enhances confidence in, and the credibility of, the regulator.

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<sup>69</sup> ITU 2002 (n 3 above)

<sup>70</sup> MISA (n 10 above)

<sup>71</sup> Blackman (n 1 above)

### **3.3 Conclusion**

As depicted above it is clear that POTRAZ is ineffective, inefficient, institutionally weak as it is not legally guaranteed its independence from political interference. The net effect of this inefficiency is that the country's electronic communications sectors are severely underdeveloped, as investors are wary of putting their resources in such an unpredictable sector. POTRAZ should therefore be improved and its role and powers be aligned with the requirements of the doctrine of independence as determined by ITU.

Despite the fact that the ITU states that the regulator must be independent from any interference POTRAZ still has a long way to go before complying with this principle. The board does not have any decision making powers and the way in which it is appointed shows that there is too much over interference from the government. The next chapter will compare and contrast the Zimbabwean telecommunication regulatory system with that of South Africa.

## **Chapter 4**

### **4.0 The South African Telecommunication Regulatory System**

#### **4.1 Introduction**

The South African telecommunications industry is regulated by three distinct groups that is, the Independent Communications Authority of South Africa (ICASA), the Minister of Communications and the Department of Communications (DoC). In addition to these three officials and institutions, the Competition Commission plays a role in the regulatory process with regard to competition and related issues.<sup>72</sup> The ICASA however is generally responsible for the day to day running of the sector. The sector is constituted of both private and public telecoms operators. Unlike the Zimbabwean legal framework, the South African Constitution explicitly states that the ICASA is an independent institution.<sup>73</sup> ICASA was established through a merger between the Independent Broadcasting Authority (IBA), which was governed by the IBA Act, and the South African Telecommunications Regulatory Authority (SATRA), which was governed by the Telecommunications Act. The merger was influenced by the increasing convergence of the broadcasting, telecommunications and information industries, as well as for efficiency and cost benefits.<sup>74</sup> ICASA is mandated to regulate the country's information and communication technology (ICT) industry in the public's interest.

The ICASA Act reinforces the constitutional provision by stating that ICASA must be independent and subject only to the Constitution and the law.<sup>75</sup> ICASA is also called upon to be impartial, to perform its functions without fear, favour or prejudice and to function without any political or commercial interference.<sup>76</sup> All these principles in the Act

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<sup>72</sup>L. Mokgosi, *The Telecommunications Regulators* in Thornton, *Telecommunications Law in South Africa*, (2006), 101

<sup>73</sup> S192 of the South African Constitution 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.

<sup>74</sup> Govenden (n 41 above)

<sup>75</sup> S3(3) of the ICASA Act

<sup>76</sup> S3(4) of the ICASA Act

are not found in the Postal and Telecommunications Act of Zimbabwe which may lead one to draw an inference that POTRAZ is not an independent institution.

## **4.2 Independent Authority of South Africa (ICASA)**

### **4.2.1 Functions**

The ICASA is the ICT sector-specific regulator responsible for telecommunications, broadcasting and postal issues in South Africa. Its functions are provided for in terms of the Act and these include amongst other things, licensing network operators and service providers, managing the radio frequency spectrum, making policy recommendations to the Minister and monitoring compliance by providers of communications services with the applicable regulatory requirements.<sup>77</sup> ICASA's public service mandate is also explicitly connected to the country's political history and socio-economic developments, as reflected in provisions of its founding and underlying statutes.<sup>78</sup> Thus the functions of ICASA are more closely related with those of POTRAZ though the difference comes in the implementation of the functions. ICASA functions with less external influence whereas in Zimbabwe the ICT Minister overly interferes in the day to day running of POTRAZ.

In terms of competition, ICASA views its responsibility as ensuring a level playing field, where rules apply equally to all industry players. The regulator maintains that it is for this reason that it has a strong belief in open and transparent processes which it achieves through mechanisms such as developing regulations and policies; engaging in consultative processes when developing rules, regulations and policies; and through its adjudication functions.<sup>79</sup>

### **4.2.2 Licensing and Dispute Resolution**

ICASA deals with the day-to-day regulation of the telecommunications industry. In order to ensure the effective implementation of government policy, ICASA has been given the power to make regulations in terms of sections 95 and 96 of the Telecommunications

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<sup>77</sup> S4 of the ICASA Act

<sup>78</sup> Mokgosi (n 72 above)

<sup>79</sup> Mokgosi (n 72 above)

Act where it has been empowered to make radio regulations and other regulations permissible in terms of the Act. ICASA is also a licensing authority and it participates actively in the licensing process and in the issuing of licences.<sup>80</sup> ICASA evaluates all applications for licences and makes recommendations to the Minister as to who should be awarded the licence and also proposes the conditions of the licence.<sup>81</sup> If the Minister approves the recommendation of ICASA, it then issues the licence.<sup>82</sup> In Zimbabwe the situation is different, even though the Act states that the Authority issues licenses, in practise it is the Minister who has the power to grant or disallow the issuance of a license and POTRAZ only rubberstamps the decision of the Minister.

With regard to the radio frequency spectrum, ICASA has the duty to plan, control and manage.<sup>83</sup> This is also different from the Zimbabwean scenario in that South African adopted convergence by merging its broadcasting and telecommunication sectors to fall under the supervision of ICASA. In Zimbabwe even though section 4 of the Act stipulates that POTRAZ is in charge of licensing and regulating the radio frequency spectrum, in actual fact the Broadcasting Authority of Zimbabwe (BAZ) is largely responsible for the broadcasting sector.

ICASA also has the power to adjudicate disputes arising in the telecommunications industry. In the event that there is a dispute between service providers, or between service providers and consumers, this dispute must be submitted to ICASA for determination.<sup>84</sup>

#### **4.2.3 Structural independence**

ICASA exercises its powers and performs its functions in terms of both the enabling legislation and the policy directions made by the Minister.<sup>85</sup> The Minister does not decide for or impose upon ICASA how its powers should be exercised. This is important

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<sup>80</sup> Mokgosi (n 72 above), 111.

<sup>81</sup> S 35 (1)( a) and(b) of the Telecommunications Act

<sup>82</sup> s 35(6) of the Telecommunications Act.

<sup>83</sup> s28(1) of the Telecommunications Act.

<sup>84</sup> s100 of the Telecommunications Act.

<sup>85</sup> s 5(4)(d) of the Telecommunications Act.

as it ensures that ICASA will be able to make independent decisions that do not unduly favour one participant over another.

In South Africa, there are conflicting interests between the Minister and ICASA regarding the exercise of the Minister's powers in terms of the Telecommunications Act and whether that exercise of powers interferes with the independence of ICASA.<sup>86</sup> This is mainly based on the fact that the Minister holds the majority shareholding in Telkom thus he has a direct interest in its success. ICASA, on the other hand, is expected to regulate through legislation and regulations, supplemented by the policy directives of the Minister.<sup>87</sup> This affects the neutrality of the Minister in matters affecting Telkom. This is even worsened by the fact that ICASA receives its funding from the government.<sup>88</sup>

In terms of section 43(3) of the Telecommunications Act, ICASA is mandated to prescribe guidelines relating to the form and content of interconnection agreements to be concluded amongst telecommunications service operators. These guidelines are of great interest to Telkom as the holder of the public switched telecommunications license, as competitors will have to interconnect to its infrastructure.<sup>89</sup> ICASA published the guidelines and the minister withdrew them without consulting ICASA. This led to ICASA applying to the court to assess the validity of the guidelines. The court held that the functions of the Minister as provided for in the Telecommunications Act, with regard to the amendment or withdrawal of guidelines, were limited to approval of the guidelines or approval of the withdrawal thereof thus the Minister could therefore not on her own initiative withdraw or amend the guidelines.<sup>90</sup> This pronouncement by the court is commendable as it helped in giving a clear distinction between the role of the minister and that of ICASA. In Zimbabwe however it is quite inauspicious that such pronouncements have not been made though these are necessary since they ensure that the role of a regulator is not interfered with.

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<sup>86</sup> Mokgosi (n 72 above) 115.

<sup>87</sup> Mokgosi (n 72 above) 115.

<sup>88</sup> s 15(1) of the ICASA Act.

<sup>89</sup> s 43(1)(a) of the Telecommunications Act provides that any public switched telecommunications service licensee shall, when requested by any other person providing telecommunication services, interconnect its telecommunication systems to the telecommunication system of the other person, in accordance with the terms and conditions of an interconnection agreement entered into between the parties.

<sup>90</sup> Mokgosi (n 72 above) 115.

However it must be noted that amongst the many challenges hindering ICASA's performance are, interference with its independence due to state involvement and ministerial influence, funding constraints, being a feeding ground for skills development, as well as "poaching" of its employees by the industry.<sup>91</sup> It is further argued that ICASA is not adequately fulfilling its mandate with regards to ensuring accountability, transparency and access to information, as well as fully achieving its regulatory objectives.<sup>92</sup>

#### **4.2.4 Appointment of board members**

The councilors appointed to ICASA must be independent from the industry, and must avoid conflicts of interest in the performance of their duties.<sup>93</sup> A councilor is thus prohibited from participating in any matter in which he has an interest whether direct or indirect.<sup>94</sup> ICASA councilors are appointed by the President on the recommendation of the National Assembly.<sup>95</sup> Before making recommendations to the President, the National Assembly has an obligation to engage the public in the nomination process and this is meant to ensure transparency and openness.<sup>96</sup> It must also be noted that in South Africa, a person cannot be considered for a position as a councilor if he or she is an office bearer or political movement or organisation of a political nature.<sup>97</sup> The appointment process of councilors in South Africa is more transparent as compared to Zimbabwe. In the latter there is no public engagement and it is the Minister who makes recommendations to the president. Furthermore, there is no provision which disqualifies a councilor from appointment on the basis of being an office bearer of a political party, which has an impact on the independence of the board and decisions can be made on a party basis.

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<sup>91</sup> Govenden (n 41 above)

<sup>92</sup> Govenden (n 41 above)

<sup>93</sup> Mokgosi (n 72 above) 118

<sup>94</sup> s12 of the ICASA Act

<sup>95</sup> s 5(1) of the ICASA Act.

<sup>96</sup> s 5(1) of the ICASA Act.

<sup>97</sup> s 6(e) of the ICASA Act.

#### 4.2.5 Tenure of office

ICASA councilors do not hold office for life and the chairperson holds office for a period of five years from the date of his or her appointment.<sup>98</sup> The councilors are employed for a fixed period in order to ensure the development of institutional memory and some continuity in the functioning of ICASA. The purpose of the rotation is to ensure that the independence of the councilors is not compromised either by developing relationships with industry players or in any other way.<sup>99</sup> The grounds on which a councilor may be removed are clearly stated in section 8 of the ICASA Act.<sup>100</sup> The tenure of office for councilors in South Africa is more or less similar with that of Zimbabwe except that in the latter a councilor holds office for a period of 4 years and the grounds of dismissal are not as comprehensive as those in the ICASA Act.

#### 4.2.6 Funding

The ICASA is financed from money appropriated by Parliament.<sup>101</sup> Any other revenue obtained other than by Parliament appropriation is paid to the National Revenue Fund within 30 days.<sup>102</sup> ICASA must be accountable to the government as to what it would have used the funds provided to it for. The ICASA must also within three months after the end of each financial year, supply the Minister with a copy of the annual report, the financial statements of ICASA and the Auditor-General's report on those financial statements. ICASA is also bound by the Public Finance Management Act (PFMA).<sup>103</sup> The object of the PFMA is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies.<sup>104</sup> In terms of funding, South Africa and Zimbabwe share the same fate

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<sup>98</sup> S 7 (1) of the ICASA Act

<sup>99</sup> Mokgosi (n 72 above) 120

<sup>100</sup> These grounds include (a) misconduct; (b) inability to perform the duties efficiently; (c) absence from three consecutive meetings of the council without the permission of the council; (d) contravention of section 7(6) which prohibits the councillor from having any other remunerative employment or occupation which is likely to interfere with the exercise by any such councillor of his or her functions in terms of the Act or the underlying statutes, and (e) his or her becoming disqualified as contemplated in section 6(1) s 6(1) of the ICASA Act deals with various grounds of disqualification. NB The list is not exhaustive.

<sup>101</sup> S 15 of the ICASA Act

<sup>102</sup> S15 (3) of the ICASA Act

<sup>103</sup> Public Finance Management Act, 1 of 1999 (PFMA).

<sup>104</sup> Mokgosi (n 72 above) 121



as both regulators are not financially independent and depend on money from Parliament which has a negative bearing on their decision making process. However in South Africa, there is some degree of transparency and accountability as opposed to Zimbabwe. Even though the Act states that POTRAZ must be accountable for the funds it is shocking to notice that at one point the board “dishes out” 10 United States Dollars to participants who had attended the launch of ICT innovation fund for start-ups.<sup>105</sup> Even though one may argue that it was necessary to give the attendants money for food and that the amount was insignificant, this act on its own shows that the Authority is not accountable as this is unheard of and who knows how much money has been dished out by the board behind closed doors.

### **4.3 Department of Communication DoC**

The Department of Communications (DoC) mainly regulates the Human Resources Fund.<sup>106</sup> This includes keeping account of the annual contributions to the Fund and of any money accruing to the Fund from any other source. The Fund was to be administered by the Director-General of the DoC in consultation with ICASA.<sup>107</sup> The Telecommunications Act spells out the functions of functions of the Director General in administering the fund.<sup>108</sup> Within the DoC is the Frequency Spectrum Directorate which is provided for in terms of the Broadcasting Act.<sup>109</sup> The functions of the directorate are provided for in terms of the same enabling act.<sup>110</sup> The DoC is an integral component in telecoms regulation since it ensures sufficient checks and balances especially with

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<sup>105</sup> POTRAZ was handing out free money yesterday, literally, Financial Gazette, 29 September 2016.

<sup>106</sup> Section 15 of Schedule 2 to the Skills Development Act, 97 of 1998 provides that, subject to sub-item (2) thereof, the Human Resources Fund referred to in s 78(1) of the Telecommunications Act continues to exist as if ss 78–87 of that Act had not been repealed. The consequence of this is that the DoC continues to have the powers and functions set out in ss 78–87 of the Telecommunications Act, prior to their amendment by the Telecommunications Amendment Act, 64 of 2001.

<sup>107</sup> s 78(4) of the Telecommunications Act, prior to amendment by Act 65 of 2001.

<sup>108</sup> Section 80(2) of the Telecommunications Act provided that, in administering the Fund, the Director-General: (a) shall monitor and keep abreast of the human resource needs of the telecommunications industry; (b) shall evaluate the effectiveness of education, research and training in the Republic in meeting those needs; (c) shall identify courses, programmes and schemes which will serve those needs; (d) may entertain applications for grants and subsidies from educational institutions, employers, voluntary associations and community development organisations in the field of education, research and training; and (e) shall monitor and control the use of such grants and subsidies by recipients and beneficiaries thereof.

<sup>109</sup> s 37(1) of the Broadcasting Act.

<sup>110</sup> s 37(4) of the Broadcasting Act. The functions of the directorate are also provided as follows, developing policy with regard to the radio frequency spectrum and to undertake technological and economic research of the radio frequency spectrum to ensure the efficient use of the spectrum.

regard to radio frequency and there is also the strengthening of transparency and accountability in the use of funds availed to ICASA.

#### **4.4 The Minister of Communications**

The Minister is empowered in to issue out policy directions to ICASA in terms of the Telecommunications Act.<sup>111</sup> There is an overarching mandate on ICASA to comply and carry out its functions in terms of the policy directions issued by the Minister.<sup>112</sup> As to telecommunications regulation section 35 of the Telecommunications Act provides a comprehensive outline of the powers of the Minister.<sup>113</sup> The Minister also has the power to approve all radio regulations and all other regulations made by ICASA.<sup>114</sup> From the functions outlined it is very clear that the Minister is involved in making policy directions not its implementation. ICASA is also directly involved in the license issuance process and it makes recommendations to the Minister which shows a clear separation of power.

#### **4.5 Conclusion**

As observed, South Africa has a comprehensive telecoms legal regime, which in the view of the author is much independent as compared to Zimbabwe. The appointment process, tenure of office, execution of policy is much clearer and transparent. The fact that there are three distinct departments which supervise the sector depicts a clear separation of powers which promotes sufficient checks and balances. The Constitution of South Africa and the ICASA Act clearly state that ICASA is an independent institution and this leaves out any doubt as to its independence and how much the state can interfere in its affairs.

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<sup>111</sup> s 5 (4) of the Telecommunications Act

<sup>112</sup> s 35(2)(a) of the Telecommunications Act.

<sup>113</sup> The Minister has power to initiate and participate in certain licensing processes, and to approve radio regulations and other regulations made by ICASA, the Minister in licensing issues also has the power to: (a) accept recommendations made by ICASA; (b) request further information from ICASA; (c) reject the recommendations of ICASA; and (d) refer the matter back to ICASA

<sup>114</sup> S 95 (3) and s 96 (6) (a),(b) and (c) of the Telecommunications Act.

However like Zimbabwe there are still points of interference between the Minster and ICASA which affects the independence of the sector. ICASA is also not financially independent which may affect its independence especially when dealing with telecoms operators like Telkom. Even though that is the state of affairs, Zimbabwe can still learn a lot from its South African counterparts. This comparative analysis has thus been able to show the similarities, differences, strengths and weaknesses of the Zimbabwean and South African telecoms regulatory system. The goal was to see where Zimbabwe could learn and improve, which recommendations are going to be dealt with in the next chapter.

## **Chapter 5**

### **5.0 Recommendations and Conclusion**

#### **5.1 Introduction**

From the preceding discussion it is without any doubt that the direct interference from the ministry is perceived as very damaging to the independence of the regulator. Thus it can be concluded it is very important for the perceived independence, not to put the regulatory body under the ministry but to distance it from the ministry as much as possible.<sup>115</sup>

#### **5.2 Recommendations**

##### **5.2.1 Appointments and tenure of office**

For POTRAZ to be independent factors affecting the appointments to the regulatory body are very important and they should be as little politicized as possible.

- The Act must also disqualify active political party members from holding any influential position in POTRAZ so as to ensure independence of the board.
  
- Public appointments of board members are also necessary to ensure compliance with international standards and the public must also have a say on the appointments thus guaranteeing transparency and openness of the appointment process.
  
- Board members must also be appointed for a fixed term of at least 5 years which is renewable for another term which promotes continuity and innovation. This is also in line with ITU principles.

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<sup>115</sup> Bandaranayake (n 22 above), 25

- The mandate of the board must also be clearly articulated so as to avoid a scenario where a councilor may be fired from office for failing to comply with terms of office fixed by the president of which these terms are not explicit.

### **5.2.2 Structural independence**

It is important for the independence that the regulatory body has substantial authority and functional responsibilities in the industry. These include spectrum allocation, granting licenses and collecting industry data.

- Section 26 of the Act must also be amended to limit the powers given to the Minister. The Minister must not overly interfere with the affairs of POTRAZ. POTRAZ must be in a position to make its own decisions and implement them though the writer is not advocating for total independence as this is not desirable. Inasmuch as there must be sufficient checks and balances these must not affect the independence of POTRAZ. A cue must be taken from the South African Telecommunication Regulatory System.
- The Act and/or the Constitution must be able to guarantee the independence of POTRAZ by explicitly stating so in the provisions as stated in the ICASA Act and South African Constitution.

### **5.2.3 Financial independence**

- It is important for the regulator to be self-sustaining, by earning its own income through levies and license fees, rather than depending on funding by the government or donors which may be linked to conditions.
- Financial independence for POTRAZ is very necessary given the fact that the government owns Tel One, Net One and Telecel thus if POTRAZ gets funding from the government it will be difficult to make neutral decisions in that should POTRAZ rule against any of these operators, it would have indirectly ruled

against the government and thereby against the 'hand that feeds it'. Thus there is need to follow the Botswana Telecommunications Authority's footsteps which has total financial independence and can create a level playing field by being fair to all market players.

- There is also need for POTRAZ to be transparent and accountable to the public on how it functions and also on the administration of its funds

### **5.3 Conclusion**

The preceding discussion has managed to elucidate the role and functions of POTRAZ in relation to international best practices. Moreso, considerable effort has been made to compare the Zimbabwean telecommunications regulatory system with that of South Africa. From those distinctions, it is very clear that Zimbabwe falls short of international practices in terms of the independence of the Authority thus there is need to ensure compliance. It might also bring questions as to why compliance with international law is imperative and in these concluding remarks the writer will justify why she was advocating for independence of the POTRAZ.

It must be noted that section 99 (3) (k) of the Act states that the Minister has regulatory authority on such matters as the Minister may consider appropriate or necessary to give force and effect, within Zimbabwe, to the provisions of the International Telecommunication Constitution and the Constitution of the Universal Postal Union. This provision on its own shows that by being an ITU member, Zimbabwe has an obligation to ensure that it complies with the provisions set thereof and in principle, the state must ensure that the Authority is independent of an external influence which compromises the role of POTRAZ.

Section 46 (c) of the Constitution states that when interpreting the bill of rights a court, forum or board must have regard to international law, treaties or conventions to which Zimbabwe is party. One may argue that since telecommunications fall under the right to freedom of expression it automatically means that international law must be applied in certain instances. It must also be noted that the writer is aware of section 36 of the Constitution which prescribes the domestication of international instruments to which

Zimbabwe is party. However despite that fact, Zimbabwe is party to the International Telecommunications Union whose provisions must strictly be complied with. Freedom of expression is the most important right yet it is the most denied right thus by ensuring compliance with international law, this right will be safeguarded. The writer thus calls for POTRAZ's compliance with international law so as to promote the total independence of the institution. Despite the fact that the Authority is a parastatal, the issues which it deals with are of public and economic importance thus state interference must be minimized.

## **BIBLIOGRAPHY**

### **Textbooks**

Blackman. C and Srivastava. L (2011) Telecommunications Regulation Handbook Tenth Anniversary Edition.

Gilardi. F, The independence of regulatory authorities in L.David (ed.), Handbook of Regulation, 2010.

Thornton. L, Telecommunications law in South Africa, (2006).

Telecommunications Regulations Handbook, (2011), The International Bank for Reconstruction and Development / The World Bank, InfoDev, and The International Telecommunication Union.

### **Articles**

H Newton Newton's Telecom Dictionary, 18<sup>th</sup> ed, (2002).

<http://www.ictregulationtoolkit.org/en/Section.2114.html>

ITU (2002) Trends in Telecommunication Reform 2002: Effective Regulation: Geneva: International Telecommunication Union.

ITU, The changing role of Government in an era of telecom deregulation: Report of the Colloquium held at ITU Headquarters 17-19 February 1993.

ITU Report: Effective Regulation Case Study: Botswana.

Legal and Institutional Aspects of Regulation, Module 6, ICT Regulation toolkit, ITU, [www.ictregulationtoolkit.org](http://www.ictregulationtoolkit.org) (2006) (Accessed on 30 July 2016)

Khosa .M (2009), The interplay of sector regulators and competition authorities in regulating competition in telecommunications: The South African Case, (2009)



Melody, W. H (2003) Stimulating investment in network development: Roles for telecommunications regulation, World dialog for network economies, theme for 2003, [www.regulateonline.org](http://www.regulateonline.org). (Accessed on 1April 2016)

Min. W (2000) Telecommunications regulations: Institutional structures and responsibilities, working party of telecommunications and information service policies, OECD, [www.oecd.org](http://www.oecd.org) (Accessed on 31 March 2016)

MISA, Zimbabwe position on the independence of broadcasting and telecommunications regulatory bodies

Samarajive ( 2002) Independence of multi-sector utility regulation, Discussion Forum on World Dialog on Regulation for Network Economies, [www.regulateonline.org](http://www.regulateonline.org) (Accessed on 6April 2016)

Unpublished: IWN Bandaranayake (2005) Impact of the regulators independence on the Telecommunications Industry: Unpublished MBA thesis, Asian Institute of technology, Thailand.

Unpublished: P. Govenden (2009): ‘Toothless Regulator?’ A critical analysis of ICASA’s regulation of the SABC so that it functions as a public broadcaster : Unpublished MA thesis, University of Witwatersland, South Africa.

Venkatram. R. (2012) Factors influencing telecoms growth: A case study of China and India.

Walker .P (2001) WWW Regulation: The why, what and whither of Communications Regulation, IEE Electronics and Communications Engineering Journal, [www.iee.org](http://www.iee.org). (Accessed on 1April 2016)

Wu. I 2004 “Traits of an independent communications regulator: A search for indicators, federal communications commission, international bureau, Working Paper 1, <http://ftp.fcc.gov/ib/working-papers> (Accessed on 4April 2016)