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From monopolies, virtual monopolies and oligopolies to.... what? Media policy and convergence in South Africa and the UK.

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Introduction

Both South Africa and the UK have recently published Bills aimed at improving their respective regulatory regimes for convergence. The UK's bill was adopted by Parliament and the resulting Act, the Communications Act 2003, became law on December 29th 2003. Thus far, South Africa has not progressed its Draft Convergence Bill of 2003 into law but in other respects South Africa has led developments, not least by establishing its converged regulator, ICASA (Independent Communications Authority of South Africa) in 2000 – three years before the UK's Ofcom opened for business.

“Convergence” means different things in different places and other countries have also established regimes of converged regulation. Several EU Member States have established a “converged” regulator – Finland and Italy for example. And the United States' Federal Communications Commission (FCC) and Canada's Canadian Radio-television and Telecommunications Commission (CRTC) are also cases in point. But what's meant by convergence is not always the same. The Finnish FICORA, for example, has responsibility for regulating postal services (in the UK postal services are the responsibility of PostComm) and Italy's AGCOM has more responsibility for press regulation than does either the UK's Ofcom or South Africa's ICASA. Germany is different again and proposes an integrated regulator for the network industries (electricity, gas and telecommunications) whereas both Ofcom and ICASA regulate only communications.

The UK Communications Act 2003 is the latest stage in an uneven, protracted, but seemingly inexorable, transition from a UK electronic communications regime of monopolies to one based on competition. 50 years ago the UK had a monopoly, state owned, broadcaster and a monopoly, state owned, telecommunications service provider (with the quirky exception of the city of Hull where a municipally owned monopoly operated) as well as a postal monopoly. In

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2004, none of these monopolies remain. 50 years ago competition in UK media and communications was confined to the press sector, and these arrangements could most charitably be described as oligopolistic. There was no price competition and entry was restricted due to a combination of distribution monopolies, very high entry costs, union closed shops and so on.

The UK print sector is still oligopolistic, but is more open than before. A number of new dailies and Sundays have entered the market, the most striking example of which is "The Independent" owned by a figure familiar to students of the South African press, Sir Tony O' Reilly. But in electronic communications, 20 years or so after liberalisation, the end of monopoly has come. The UK has literally hundreds of telcos and scores of television channels and radio stations. And in March 2004 competition in UK postal services entered a new stage with Deutsche Post securing access to the Royal Mail's distribution network. Postal services are "interconnecting" in the same way as telecommunication networks.

The process of liberalisation began in 1954 when the UK established a commercial challenger to the formerly monopolistic BBC. In 1984 the Telecommunications Act provided for competition to the monopoly British Telecom, first through a duopoly and then through full competition. Liberalisation has produced creditable results. In the UK voice telephony teledensity is close to 100%; 75% of UK adults own or use a mobile (cell) 'phone (OfTel 2003); 48% of UK homes have Internet access and 18% have broadband; 56% of adults are regular users of the Internet; and 61% have used the Internet at some time (e-envoy 2003: 6-7). However, the old state monopolies still have high market shares. In Q1 2003-4 in the fixed line telephony market BT [British Telecom] had 57% of calls and 82% of lines (OfTel 2003a) and the BBC has a 38% share of the television final consumption market and 53% of the radio market.²The story is thus one of transition from monopoly to oligopoly rather than to real competition in some important sectors.

Nonetheless, the strength of the incumbents notwithstanding, the UK has experienced a decisive shift in its organisational paradigm. Rather than controlling market entry it has

² Radio share data at <http://www.rajar.co.uk/INDEX2.CFM?menuid=9> on 11.8.2003.

Television share data derived from ITC Annual Report 2002 at: http://www.itc.org.uk/itc_publications/annual_report/2002/Overview_of_Commercial_TV.asp#market_size and http://www.itc.org.uk/latest_news/press_releases/release.asp?release_id=683 on 11.8.2003.

moved, with the qualified exception of broadcasting, to a regime of general authorisations and encouragement of entry rather than controlling entry through licensing. This, and the official embrace of the doctrine of “convergence” manifested in the creation of an integrated, (or more exactly not wholly disconnected, policy and regulatory regime), is fully consonant with trends in the European Union – notably those embodied in the 2002 telecommunication “liberalisation package”³.

The UK Communications Act 2003

The Communications Act 2003 may be the longest Act ever to appear on the UK Statute Book – it has 411 clauses and 19 schedules and prescribes at least 260 separate duties for Ofcom. There is therefore room for doubt as to whether the Government has succeeded in its aim to “simplify the regulatory framework” (DTI/DCMS 2002: 3). Mercifully, the South African Draft Convergence Bill is considerably shorter with only 68 sections! The length and complexity of the UK Act and the number of duties it prescribes for Ofcom means, as the outgoing Chief Executive of the Independent Television Commission stated, that Ofcom cannot but exercise discretion in prioritising its duties: “Ofcom has reminded us that Parliament asked it to deregulate whilst giving it some 260 duties, double those of its parent bodies. Wisely, Ofcom has committed itself to less but more effective regulation, aiming at strategic interventions to achieve bundles of results”. (Hodgson 2003: 10).

Furthermore, the new policy framework established under the Act seems poorly endowed with the “resilience and adaptability for the future” (DTI/DCMS 2002: 3) that the sponsoring Secretaries of State sought to achieve. Not least because the Act is drafted to exclude the Internet. A curious omission in an Act that is supposed to be both forward looking and technologically neutral but one of which the Government was fully aware. Indeed, the sponsoring Secretaries of State themselves stated “it is not the intention.... to extend regulation into the Internet” (DTI/DCMS 2002: 48).

The exclusion of the Internet from Ofcom’s jurisdiction will mean that regulation in the UK will not be fully “converged” or technologically neutral because video signals transmitted over different paths will be differently regulated. “Broadcast” (whether over a wired or wireless infrastructure) signals will fall under the jurisdiction of Ofcom, but the same content, if

³ European Parliament and the Council of the European Union (2002, 2002a, 2002b, 2002c).

accessed over the Internet, will not.⁴ Further instances of discrimination between technologies are present in the Act. For example, Clause 316 provides Ofcom with powers to direct holders of broadcasting licences – but not providers of electronic communication services. Many of these confusing and contradictory provisions are owed to Parliament for the Act was extensively discussed in both the House of Commons and the House of Lords and also by a Joint Parliamentary Scrutiny Committee. Consequently, some provisions of the Act, notably on broadcasting, reflect the particular concerns of individual Members of Parliament (and the interests that lobbied them successfully).

The Act can be best understood as a move to a regime of competition based regulation of the electronic communications sector but with five main areas of exception to this principle. The Act liberalises electronic communications markets by:

- Establishing a regime of general authorisations rather than specific licences - except for broadcasting.
- Liberalising national and concentration of ownership regulation (but retaining some prohibitions of concentration of ownership and introducing a public interest test for certain cross media mergers).
- Introducing spectrum trading.

The Act establishes Ofcom as the lead competition authority (sharing concurrent powers with the Office of Fair Trading [OFT]). However, as the No 10 Strategy Unit (ie the Prime Minister's Office) has observed, Ofcom's most important sectoral competition powers derive from transposition of the relevant EU Directives in the Act:

“In dealing with SMP [significant market power RC], Ofcom's powers will be largely determined by the EU regulatory framework. This framework restricts the majority of regulatory activity to those instances where there is SMP as identified by the process of market reviews (Strategy Unit 2002: 66).

⁴ The official Explanatory Notes to the Act state that “material from a stand alone site, whether it be text, web-cast or video images” shall be excluded (Parliament 2003 Clause 526). This contrasts interestingly with the provisions in the South African Draft Bill which bring all content, defined as “any sound, text, still picture, moving picture or other audio-visual representation, sensory representation or any combination of the above which is capable of being created, manipulated, stored, retrieved and communicated electronically, but excludes content contained in private communications between consumers” (Section 1 SA 2003).

The EU Directives “transposed” through the Communications Act 2003, notably the liberalisation package of 2002, have given Ofcom considerably stronger powers as a competition regulator than those that its predecessors enjoyed and Ofcom’s competition powers have also been strengthened (compared to those enjoyed by its predecessors) by the UK’s Competition Act 1998 and the Enterprise Act 2002.

However, the Act identifies five major areas of exception to the general governing principle of competition based regulation. These are:

- Spectrum policy.
- Content regulation.
- Universal service obligation.
- Ownership regulation.
- Public Service Broadcasting.

The Act’s provisions, notably in its treatment of these areas of exception, reflect the well founded belief that markets and competition will not always be sufficient to realise acceptable social and democratic outcomes. In respect of the newspaper press, the UK market has been less subject to state management than has its electronic communications markets – state intervention has been confined to cross media and concentration of ownership regulation. The Communication Act 2003 continues to provide for media ownership regulation though its requirements are more permissive than before. The most striking area in which the UK state still intervenes is in broadcasting. The broadcasting regime is complicated but the high shares of consumption achieved by public service broadcasters, notably the BBC and Channel 4 which together account for close to 50% of both radio and television consumption, indicates the high level of intervention.

As in South Africa, the UK has benefited from recent entries to the national newspaper market (though local newspaper markets have tended to become more subject to monopoly and ownership of local titles has become increasingly concentrated) though, unfortunately, the UK has not attracted as many new entrants to the newspaper market as has South Africa. Nonetheless, the welcome growth in South African titles does suggest that sometimes resources can be spread too thinly. The segmentation of South Africa’s newspaper markets – by class, region and language – mean, as Allister Sparks⁵ observed, “there are too many low-

⁵ Formerly editor of the Rand Daily Mail 1977-1981.

circulation newspapers feeding off a relatively small advertising cake. The consequent shortage of revenue means newsrooms are understaffed” (Sparks 2003: 92).

However, in other domains South Africa’s communications markets appear less open. Telkom still enjoys a monopoly in provision of fixed line telecommunication services (in spite of Telkom’s licenced period of exclusivity being scheduled to end in 2002) and has been able to set the terms for entry, or not, to some related and adjacent markets. SABC with a c71% share of television viewing and 75% of the radio market (Source: SABC Report 2002-3 at <http://www.sabc.co.za/default.asp> on 1.4.2004)⁶ is also strikingly dominant.

The South African Draft Convergence Bill

Turning to the South African Draft Convergence Bill, a visitor should exercise caution when commenting on a host’s proposals. Comment always implies a norm and may sometimes veer into unwelcome and inappropriate prescriptiveness – whether by implication or direct injunction. It’s uncomfortable for all to hear “oughts”, implicit or explicit, issuing from the mouth of one who has neither to live with the consequences of her or his proposals nor is as deeply embedded in the relevant milieu as are his or her hosts. Nonetheless, I think it’s better to say something rather than nothing and so I’ll turn now, somewhat diffidently, to South Africa.

The South African Draft Convergence Bill identifies 17 principal objectives (clause 2) including:

- Universal provision of communication services and connectivity for all (2)
- Encouragement of investment and innovation (3)
- Promotion of competition (5)

These, and the fourteen others, are worthy objectives. But their number suggests that ICASA will have to exercise a considerable body of expert judgement and regulatory discretion for goals such as these are not always easily reconciled. However, I will focus on South Africa’s choice to control market entry through licencing of electronic communications providers is in contrast to the UK’s move to a regime of general authorisations (except in some areas of broadcasting).

⁶ SABC public service radio has a share of c62%, SABC commercial radio a share of c13% SABC public service television has a share of c 56% and SABC commercial television a share of c15% (SABC Report 2002-3 at <http://www.sabc.co.za/default.asp> on 1.4.2004).

Why licence? The South African Draft Bill sets out the reasons. Essentially they are to:

- manage spectrum and standards (Clauses 35-39)
- to impose conditions of licence. – empowerment, diversity of communities involved in provision (Clause 14 and objectives 7 and 15)

And to realise specific objectives of:

- Universal provision of communication services and connectivity for all (2).
- Safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa (8).
- Promote a broad range of content services in all official languages providing a diversity of news, views, information and entertainment to meet the content needs of all South Africans (16).

The Draft Bill also proposes positive measures to liberalise markets, to ensure entrants have access to essential facilities on reasonable terms (40-52), to establish a complaints procedure and to advance consumer interests (Clauses 53- 60) (though the latter measures do not, as presently drafted, provide adequately for consumer redress). However, though Draft Bill strengthens ICASA's independence and authority by removing the requirement for ICASA regulations to be approved by the Minister⁷, powers continue to be reserved (Section 7) for the Minister in:

- Spectrum management
- USO
- International obligations

These principles are not dissimilar to those embodied the UK Act. Where differences begin to emerge are in the South African proposals to reserve Ministerial powers of direction on:

- Application of new technology.
- Financial regulation (presumably rate of return for licencees)

⁷ Nonetheless, the principles of transparency and consultation⁷ are weakly present in section 7.7 where the Minister is not required to consult either ICASA or more widely.

- Pace and extent of network liberalisation.

Though the Draft Bill is not wholly clear on what is meant by the different classes of licence it specifies, the criteria indicated for awarding licences do not appear to prioritise network rollout, universal service or development of competition. Rather they provide (at 14.2) for empowerment of historically disadvantaged groups. Concern appears to focus more on who shall have access to the scarce resource of the licence rather than on those to whom services should be extended.

Moreover, the Draft Bill proposes an extension of licensing in respect of content services (section 13.3.a). It defines content as “any sound, text, still picture, moving picture or other audio-visual representation, sensory representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically but excludes content contained in private communications between consumers” (definition in clause 1). As drafted, this appears to be a significant extension of Ministerial powers of prior restraint. Happily, Minister Ivy Matsepe-Casaburri has disavowed this intention, since such provisions have an obvious potential to chill South Africa’s Constitutionally protected principle of freedom of expression.

Of course, it’s not yet clear what the future of the South African Draft Bill is to be. But the extant published draft is an interesting marker of a modest shift towards a new sort of regime in South Africa. Section 15, for example, provides for some unspecified types of service to be provided without a licence. But the Draft Bill does not tackle some of South Africa’s major policy challenges. Notably how to optimise use and development of existing assets such as Sentech’s wireless networks (which might provide a basis for a third public telecommunication network) and the Eskom and Spoornet/Transtel infrastructures that are to form the basis for the long delayed SNO (Second Network Operator). Still less does it facilitate further entry that would enable new entrants (with appropriate regulation to ensure that incumbents do not anti-competitively lever their market power) to compete away rents, if any, enjoyed by the Telkom incumbent and any second and/or third public networks.

The Internet sector in South Africa

The absence of such measures underpin the concerns expressed by South African telecommunication users – not least by key players in the Internet sector. Consider some representative critiques of the absence of competition in fixed line telecommunication and related markets:

“The biggest issue in all our lives is the Telkom issue. It has become huge. If the government doesn’t do something soon, Telkom could destroy this whole market.... It’s ridiculous; your monopoly supplier is your biggest competitor (Mike Brierly MD MTN Network Solutions in World Wide Worx 2004: 96).

“The biggest inhibitor is the high price of bandwidth. Small businesses ideally need unlimited bandwidth at fixed price in order to make it work for them and their customers,” Perlman⁸ says. (at

<http://www.itweb.co.za/sections/internet/2003/0312051041.asp?O=S&CiRestriction=leon%20perlman> on 30.3.2004).

Such critics’ concerns seem well founded. South Africa has c 3.7m Internet users, but access growth rates are in decline – in 2003 connectivity grew only c 6%. Whereas in previous years growth rates were higher. In 2002 growth was 7% and in 2001 20% (World Wide Worx 2004: 62). South African ISPs are classified as a VAN (Value Added Network Service) and are thus required to obtain facilities from Telkom (which also competes in the ISP market) for a key input. An estimated 70-80% of ISP costs are the VANS charges paid to Telkom (Gillwald 2004: 28). It’s not surprising therefore that the non-Telkom sector of the South African VANS market has declined. In 2004 the South African Competition Commission found Telkom had acted anti-competitively and recommended a fine of 10% of turnover (c R3.7bn). The recommendation is now under consideration by the Competition Tribunal but changes have not yet taken effect⁹.

I focus on the Internet for two reasons. First, it is paradigmatic of convergence – the driver of re-regulation and the flood of new communications law around the world of which the UK and South African initiatives are representative. Kevin Werbach, of the United States’ Federal Communications Commission’s Office of Plans and Policies (FCC OPP), crisply focused this proposition in his challenging analysis of the impact of the Internet on both communications markets and on communications regulation. Werbach contended:

The Internet is substitutable for all existing media. In other words, the Internet potentially poses a competitive threat for every provider of telephony, broadcasting and data communications services (Werbach 1997: 1).

⁸ Leon Perlman is Managing Director of cellular.co.za

⁹ See Bloom 2003 for melancholy confirmation that the time taken for competition authorities to hand down judgements may be protracted.

And, second, because the Internet focuses a fundamental ethical issue in communications policy to which I will now turn. It might be objected that pro-Internet policies, which would redress the problems I've indicated above, would cut across South Africa's universal service objectives (USO). When 70% of South African households lack fixed line connectivity, why focus on the three and a quarter million or so users of the Internet in South Africa? ¹⁰

Here the issue is the extent to which the claims of the un-telephoned and Internet users are rival claims. They may be thought to be so. It would be hard to argue that all the resources – human, financial or material, required for advancing the interests of Internet users are irrelevant to the task of making wired voice telephony accessible to all South Africans. But it would also be hard to argue that the un-telephoned would not benefit from the efficiency gains to the South African economy, the amortisation of network costs over larger volumes of traffic and so on, which would accrue from a more efficient and effective South African Internet. And, as I hope to show, the disadvantaged do stand to gain (though not immediately) from establishment of advanced IP networks.

Ethical issues.

Determining the balance of advantage, or harm, that might accrue from, on the one hand, policies designed to improve the accessibility and functionality of the Internet in South Africa and, on the other, policies designed to extend voice telephony services to those who are currently denied them exemplifies one of the classic problems of utilitarianism. Here, as is often the case, it's hard to know which of rival courses of action will better achieve the classic utilitarian goal of the greatest happiness of the greatest number.

But USO is not just a utilitarian issue. It's also an issue of rights, fairness and justice. And here I want to ask whether, and if so in what circumstances, it would be unfair and unjust to make claims for the literate, comparatively wealthy and, doubtless, disproportionately white population of South African Internet users when there are unsatisfied claims of the illiterate, poor and preponderantly black population lacking basic wired telephone service.

I will short circuit important empirical questions here – like the relative importance of wired versus wireless telephony; reasons for the decline in the number of Telkom's wireline subscribers – a loss of over 2 million subscribers on fixed network during Telkom's period of

¹⁰ An estimated 1.75m corporate users, 1m dial up users and 0.47m academic users (World Wide Worx 2004: 61).

exclusivity - and price increases of over 27% percent a year (despite stated efficiency gains including job losses of around 30 000). I'll try and focus on what seem to me important, and not straightforward, questions of principle. I will draw on John Rawls' influential arguments for "justice as fairness" which have plausibly been claimed to have decisively re-orientated and re-invigorated modern political philosophy¹¹ and will explore how far Rawls' ideas are applicable to some of the communication policy challenges faced by South Africa.

Rawls and telecommunications policy

Let me begin by posing the question – does justice require that everyone has the same? Or to frame the same question a bit less starkly, should public policy aim to minimise inequality? If so, it seems straightforward to say that until everyone has basic telephone service (and other basic services) no-one should have enhanced services. Or, to put it less dog-in-the-manger-ishly, new resources should be directed to improving the position of the worse off rather than improving the position of the better off. This, broadly I think, paraphrases the core principle of the systematic consideration of justice and fairness elaborated by Rawls.

Rawls proposes a "difference principle" whereby all "social primary goods" – rights, liberties, opportunities, income, wealth (Rawls 1999: 79) are "to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured" (Rawls 1971: 303).¹² The attractions of this position are obvious. But so too are some of the objections which have been raised. It is a remarkably absolutist position. Almost any expenditure or investment made that did not benefit the absolutely worst off person would seem incompatible with Rawls' principle of difference.

One of Rawls' principal interlocutors, Robert Nozick in his "Anarchy, State and Utopia" (1974), set himself to arguing for the legitimacy of certain kinds of inequality. Nozick argued, among other things, that inequality derived from the exploitation of advantages that were not illegitimately gained was not unjust. He gave the persuasive example of the wealth enjoyed by sports stars. Wealth that has accrued from the willing payments of people like us. Are we,

¹¹ Rawls' "A Theory of Justice" was first published in 1971 and reissued, revised in 1999. Will Kymlicka, for example, referred to Rawls' "Theory of Justice" as giving rise to the "rebirth of normative political philosophy" (Kymlicka 1990: 9). Rawls died in 2002.

¹² I quote from the first version of "A Theory of Justice" because in his revisions Rawls softened this definition subsequently formulating it as "all social values – liberty and opportunity, income and wealth, and the social bases of respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage" (Rawls 1999: 54).

Nozick asked, to be denied the possibility of paying to watch Venus Williams from our legitimately gained resources if the consequence of us doing so were to be growth in the inequality between Venus Williams and all of us? Surely not. However, unlike the difference in sporting skills (and the wealth that derives from them) between Venus and us, it would be hard to argue that social and economic inequality in South Africa generally derives from the exploitation of legitimately gained advantage. Quite the reverse. One might thus conclude that Rawls' principle of difference should prevail – distribution should be unequal and in favour of the massively least favoured in South Africa.¹³

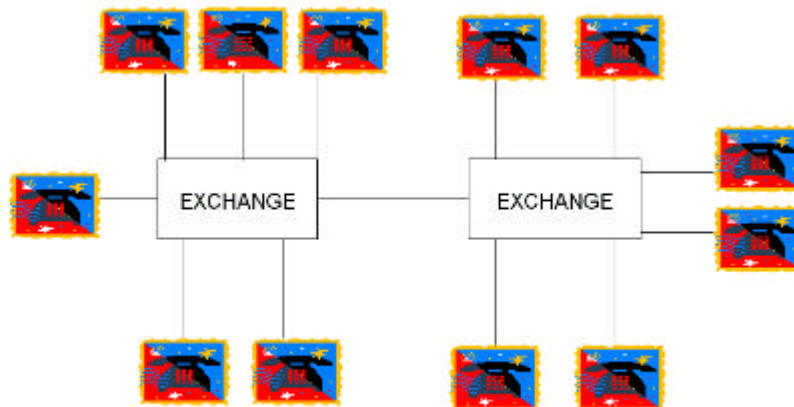
In terms of telecoms policy (and leaving aside the rival claims of provision of universal access to clean water, electricity, health care, education and housing etc) a roll out of universal access to voice telephony in South Africa should, under a Rawlsian set of values, seem to take priority over improvement of enhanced and Internet services. And rather than a European style doctrine of general authorisation, the established South African model of restricted entry to telecommunication markets through licences with universal service conditions should continue to prevail. Here, let's leave aside for a time the obdurate empirical question of the effectiveness of South Africa's USO policies (see Gillwald 2003) and stick to the issues of principle.

Consider other objections to Rawls, ones I find more persuasive than Nozick's in respect of the issues under consideration. Rawls' model is undynamic - he constructs his distributional calculus as both a zero sum game and one where the goods that are up for distribution are already present. Rawls doesn't consider adequately the problem of creation of resources – in our case the provision of telecommunication infrastructures – and his system is, in consequence, static. Consider an example that will, I hope, illuminate my objection to Rawls.

We know that telecom tariff baskets are often constructed so that different classes of users pay different prices for the same service. To take a simple example. If we have a simple two exchange network in which each exchange serves six customers and the annual cost of the

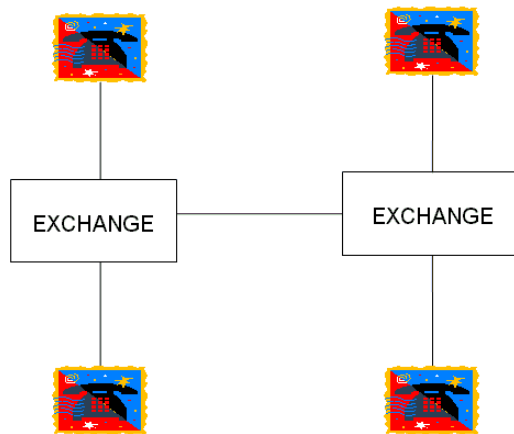
¹³ The South African Gini-coefficient (an index of income disparity – the higher the numerical value of the Gini coefficient the greater the disparity between the income of the best and worst off) was 0.59 in 1995, an improvement from 0,68 in 1990 (Whiteford and McGrath 1994: 73) Income disparity among black households has, however, widened, as is indicated by the increase in the [Gini-coefficient](#) from 0,35 in 1990 to 0,52 in 1995. Although the general distribution of income in South Africa has improved, the poorest of the poor have become even more impoverished ([Anon. 1997:56](#)) from <http://www.ngo.grida.no/soesa/nsoer/issues/economic/driver.htm> on 22.3.2004.

network is 1920 accounting units (dollars, pounds, euros, rand it doesn't matter). If costs are shared equally, each telephone user pays 13.34 accounting units per month for service.



- Annual Network cost 1920 units. If customers split costs equally each pays 13.34 per month.

Let's say that's unaffordable for eight of the twelve customers (and let's call them residential customers). The four remaining customers (let's call them businesses) are left with all the costs (though these might fall somewhat as the number of customers falls – let's say to 1,200 units) and are considerably worse off – instead of paying 13.34 units a month each now pays 25 units.

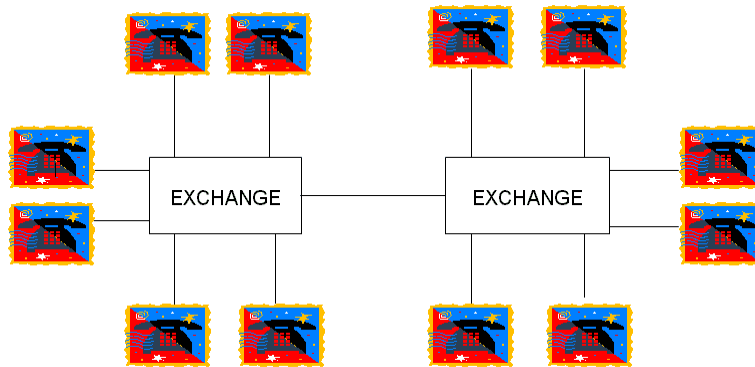


- Annual Network cost 1200 units. If customers split costs equally each pays 25 per month (i.e. each is worse off by 11.66 per month and can call / be called fewer subscribers).

These remaining four customers, for whom prices have risen, will be better off if the eight lost customers return to the network and pay anything more than 7.51 units a month (reducing business customers' monthly charges to, at most, 24.98).¹⁴ Moreover, the business customers will benefit from the "network externality" by being able to communicate with the eight residential customers who have been attracted back to the network.¹⁵

¹⁴ The sums don't add up perfectly – but let's say the difference is accounted for by the costs of regulation!

¹⁵ Fod Barnes first developed this worked example, when a consultant at Oftel in the mid 1990s, and I've subsequently adapted and used it in Collins and Murrone 1996.



- Annual Network cost 1920 units. 18 customers split costs unequally all are connected and benefit at, say, a price split of
 - 4 customers pay 24.98
 - 8 customers pay 7.51



Intuitively, I think we feel fairness is satisfied if the customers least able to pay are charged less than those most able to pay. All are better off, and the utilitarians among us are satisfied, if we contrive a tariffing scheme – such as that sketched above - that attracts and keeps as many people connected as possible. Rawls’ difference principle also seems to be satisfied. The unequal distribution is to the benefit of the least favoured. But the chances are that in the real world such a scheme will work only if the network is optimised for those who are paying most. For they are the ones (let’s call them the rich or business) without whom there will be no network. If they drop off the network, or the network doesn’t exist in the first place because regulation doesn’t allow it to develop, the least favoured will continue to have nothing.

Doesn’t the network have to be created for the high payers first? And here we enter a space where we might feel unfairness is creeping back in. Yes, people are being treated differently, yes, priorities are being set to suit the advantaged (whether we call them businesses as I’ve done in this example, or we could call them the wealthy, the green, the blue or the white). But within these unequal arrangements there is the potential for all to be better off than they would otherwise be. Although, initially at least, the least favoured may not benefit. But if we take a Rawlsian snapshot, static, view the initial expenditure on the network for the notional business users is illegitimate. It won’t immediately benefit the worst off. Indeed, some of them may never benefit. Perhaps they will die in the period between the construction of the network for

the four business users and the notional second stage roll out of the network at marginal cost to the eight residential users.

But establishing a network is a dynamic process. Inevitably, when something new arrives access to it will be unequal. The first users are likely to bear significant costs (and bear the risks of backing the wrong technology or application), and are unlikely to do so unless they perceive that they will benefit. But their expenditure, and their demand, will provide the conditions in which others will be able to use the facilities established. The potential is there for the least well off to benefit under inventive and unequal tariffing regimes of the kind I've sketched above. Moreover, this is how, historically, electronic communications networks have developed, whether we take the history of fixed, mobile or Internet as our exemplar.

Let's extend the argument a little further. I haven't considered what economists call the externalities that attach to the existence of well functioning telecommunication networks. I won't rehearse them here but, as you all will know better than I, the ANC's 1994 Reconstruction and Development Programme (RDP) recognised the importance of the positive externalities that derive from an efficient and pervasive telecoms infrastructure. The ANC stated, "The telecommunications sector is an indispensable backbone for the development of all other economic sectors" para 2.8.3 (ANC 1994: 34).¹⁶ Even those who lack access to the telecommunications infrastructure are likely to benefit, albeit indirectly, from a well functioning telecommunications infrastructure. It is not always obvious that redistribution, eg on Rawlsian lines, is more effective than increasing productive efficiency as a means of improving welfare.

But in South Africa inequalities are grotesque. Arguing for importance of principles other than distributional equality doesn't mean I think redistribution is unimportant. But one has to acknowledge that competition seems to have been more effective in extending voice telephony services to the excluded than has South Africa's conditions of licence based fixed line USO strategy. Mobile telephones, originally envisaged as a toy for the rich with a possible South African market of 200,000 users, have now become the pre-eminent means of making voice telephony accessible to the excluded¹⁷. South Africa has three competing cellular

¹⁶ The RDP continued, "An effective telecommunications infrastructure which includes universal access is essential to enable the delivery of basic services and the reconstruction and development of deprived areas" (ANC 1994: 34).

¹⁷ Doubtless, some of the success enjoyed by the South African mobile network operators is due to the inadvertent "infant industry' subsidy accorded to the networks by the underpricing, relative to international

networks with c14.4m subscribers. Innovative tariffing, community phonestops, entrepreneurship by intermediaries has extended, and continues to extend, service. Whereas Telkom's fixed line monopoly, justified because of the promise it offered to extend wireline service to the untelephoned, has seen a fall in the number of subscribers with all the wasted investment and infrastructure that involves.

Entry control and universal service in South Africa

One of the chief rationales for entry control via licences has been to ensure delivery of the USO and this is, in principle, a persuasive ethical rationale. An important objection to a regime of general authorisation is that it's only through restricted entry and conditions of licence that justice and fairness can be achieved. But this argument seems to me to be open to two sorts of objections. First the empirical, it's not apparent that superior levels of justice and fairness have been better secured in the SA fixed line market where entry has been strongly constrained than in the SA mobile market where entry has been much less restricted. And second the principled, Rawlsian, objection that a general authorisation regime would not secure "the advantage of the least favoured" (Rawls 1971: 303) is flawed, both because it derives from too static a vision of distributional justice and, because it departs too far from the characteristics of electronic communication networks. It promises to excessively chill development and deny all benefits which they might otherwise enjoy – albeit unequally. Thus far, I think we have to acknowledge, the established South African licence based regime has not been notably successful in delivering the USO. Moreover, as I've argued above, a Rawlsian insistence on the legitimacy of expenditure only when it benefits the least favoured may lead to a blocked, static, communications regime where, under Rawlsian principles, the investment necessary to create the infrastructures required for unequal pricing which favours the least advantaged may never be made.

What might follow from a South African policy regime of general authorisations? Almost certainly a more productive use of existing assets where economies of scope permit firms to offer public telecommunications services – eg from those such as Eskom and Spornet slated as making up the second network operator (SNO) and Sentech as a possible third network operator (TNO). And there may well be others. Telkom might well be incentivised under such a regime again to put some of its underused assets – eg the unused loops connecting those who have dropped off its network – to productive use. An open entry regime

comparisons, of South African mobile network licences. Gillwald (2004: 7) estimates that South Africa's 3rd mobile network operator paid c \$2.2 US per head for its licence whereas Morocco's second network operator paid c \$39.47 per head.

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would mitigate the chilling effect of Telkom's un-customer friendly treatment of the VANS market - treatment that is plausibly seen as an important factor in South Africa lagging world Internet penetration and usage trends. It would consequently reduce the deadweight of information search and transaction costs in the South African economy.

Voice over IP (VoIP), which would undoubtedly become more widely used under such a regime, would certainly erode Telkom's monopoly fixed line revenue base and its theoretical ability to cross subsidise socially desirable network roll out and use. But VoIP is happening anyway – and is probably unstoppable – and there is room for doubt as to whether the cross subsidy regime operated by Telkom has effectively rolled out and extended network access satisfactorily. Moreover, UK experience (and that in other countries where entry control has been reduced or eliminated) suggests that a fixed line incumbent may retain market dominance for a long time after it is subject to competition.

None of these possible, and in my view likely, benevolent outcomes of a regime of general authorisations, are, in principle or necessarily, hostile to the key social objective of extending access to voice telephony throughout South Africa. Nor is such a regime incompatible with an old fashioned USO fund to accelerate the build out of wired and/or wireless networks. General authorisations does not mean no regulation. – rather it means encouragement of entry under common conditions conducive to effective competition. There is no reason why a levy, similar to the existing levy of 0.5% on turnover (Telecom Amendment Act 2001. Section 27), should not continue cutting in when firms' turnover exceeds an appropriate threshold. Indeed, it's quite conceivable that the aggregate resource available for under serviced areas would increase under such a regime of general authorisations plus USO levy.

Conclusion

Let me draw two sets of conclusions. First, a pragmatic conclusion – there are good grounds to suppose that a policy of general authorisations plus USO levy would not worsen the lot of the underserved. Indeed it would probably improve it. And such a regime would also be friendlier to the South African economy than is the existing regime of wired monopoly and an uncertain future of duopoly. Some would certainly gain, the disadvantaged would not be worse off and might well be better off. Only a rather dog-in-the-mangerish ethics (and sometimes it seems Rawls' ethics have that characteristic) would stand in the way.

And second, a conclusion of principle, and one I'm pleased to be able to make as an itinerant member of South Africa's, indeed the continent's, leading university. The conclusion in principle is my modest chip in the towering edifice of Rawls' "Theory of Justice". His system

of justice as fairness is, I think, a rather static system and one that leads to somewhat perverse conclusions when applied to electronic communication networks.

My title refers to monopolies and oligopolies and you will doubtless have been unsurprised to learn that I'm against both, though I acknowledge that one can have too much of the good competition thing - as the present structure of the South African press suggests. But evidence suggests that greater benefits do accrue from ready entry to markets than from restricted entry. And there is some strong evidence to suggest that South Africa is disadvantaged by lack of competition, that is by monopoly and/or oligopoly, in key market sectors. I therefore suggest a move to a regime of general authorisations is worth considering in South Africa. There seem to be good reasons to believe that such a regime would benefit the economy generally, would not worsen the plight of the disadvantaged and would provide a basis for them to enjoy future benefits that would not otherwise be available to them. Neither the current licensing regime, nor that foreshadowed in the Draft Bill, both of which restrict entry, promise as much.

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