A DECADE OF DUAL DEREGULATION: COMMUNICATIONS REGULATORY POLICY REFORM IN NIGERIA, 1994 TO 2004

By

ABUBAKAR DANLAMI ALHASSAN

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To my older brother, Late Yusufu Alhassan—You are by far a more brilliant, courageous, humble, honest, patient, gentle, kinder, and virtuous and person than I am—May Allah be pleased with your great humanhood.
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# TABLE OF CONTENTS

ACKNOWLEDGMENTS ........................................................................................................................................4
LIST OF FIGURES ............................................................................................................................................7
LIST OF ABBREVIATIONS ..............................................................................................................................8
ABSTRACT .....................................................................................................................................................9

CHAPTER

1 INTRODUCTION ...........................................................................................................................................11
   Overview of Theoretical Framework ..............................................................................................................16
      Regulation and Public Policies ..................................................................................................................16
      Policy Reforms in Developing Countries .................................................................................................26
      Creating Independent Regulatory Agencies .............................................................................................30
   Research Questions .......................................................................................................................................33
   Methodology ..................................................................................................................................................33
   An Outline of the Rest of the Dissertation .....................................................................................................36
   Justification/Significance and Limitations of the Study .................................................................................37

2 LITERATURE REVIEW ..................................................................................................................................41
   Theoretical Justifications for Regulation and Public Policy .............................................................................42
   Communications Regulation ..........................................................................................................................47
   Deregulation as Regulatory Policy .................................................................................................................60
   Independent Agencies as Imperative to Regulatory Policy .........................................................................62
      Emergence of the Independent Regulatory Agencies .................................................................................63
      International Telecommunications Union Study Group Report ..............................................................68
   Conclusion ....................................................................................................................................................72

3 HISTORICAL EVOLUTION OF THE OWNERSHIP STRUCTURE OF COMMUNICATIONS INDUSTRY .................................................................................................................................74
   Colonial and Post-Colonial Communication Policies ....................................................................................74
      Colonial and Post-Colonial Monopolization of Broadcasting .......................................................................74
      Colonial and Post-Colonial Monopolization of Telephony .........................................................................83
   Commencing Regulatory Reforms ................................................................................................................88
   Dual Deregulation Commences .....................................................................................................................97
   Conclusion ....................................................................................................................................................101
## 4 LEGISLATING REGULATORY REFORMS, AGENCIES’ ORGANIZATIONAL STRUCTURE, AND THE IMPACT OF REFORMS ON THE COMMUNICATIONS ENVIRONMENT

Establishing Regulatory Agencies: The Statutory Instruments .......................................................... 105
- The NBC Decree .................................................................................................................. 106
- Regulating Religious Expressions on the Airwaves ............................................................. 111
- The NCC Decree ............................................................................................................... 118
- A New Communications Act ............................................................................................. 123
- NCC Decree vs. Nigerian Communications Act .................................................................. 130

Agencies’ Organizational Structure ....................................................................................... 132
- NCC’s Organizational Structure .......................................................................................... 133
- NBC’s Organizational Structure ......................................................................................... 134

Conclusion ................................................................................................................................. 136

## 5 A DECADE OF DUAL DEREGULATION AND THE CHANGED STRUCTURE OF COMMUNICATION SECTOR: A DISCUSSION AND ANALYSIS

The Changed Structure of Communications Sector ............................................................... 138

Answering the Research Questions ......................................................................................... 144
- First Research Question ...................................................................................................... 145
- Second Research Question ................................................................................................. 146
- Third Research Question .................................................................................................... 157
- Fourth Research Question ................................................................................................. 159

## 6 SUMMARY, CONCLUSIONS, POLICY RECOMMENDATIONS, AND SUGGESTIONS FOR FURTHER STUDIES

Summary and Conclusions ....................................................................................................... 163

Policy Recommendations ........................................................................................................ 166

Suggestions for Further Studies ............................................................................................... 168

LIST OF REFERENCES: ............................................................................................................. 170

BIOGRAPHICAL SKETCH ......................................................................................................... 178
## LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-1</td>
<td>Global growth of regulatory agencies (adapted from ITU reports)</td>
<td>12</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
<td></td>
</tr>
<tr>
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<td>-----------</td>
<td></td>
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<td>BBC</td>
<td>British Broadcasting Corporation</td>
<td></td>
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<tr>
<td>DBS</td>
<td>Direct Satellite Broadcast</td>
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<tr>
<td>FCC</td>
<td>Federal Communications Commission</td>
<td></td>
</tr>
<tr>
<td>FRCN</td>
<td>Federal Radio Corporation of Nigeria</td>
<td></td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunications Union</td>
<td></td>
</tr>
<tr>
<td>MMDS</td>
<td>Multichannel Multipoint Distribution Service</td>
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<td>NBC</td>
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<td>NCC</td>
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<td>NFMC</td>
<td>National Frequency Management Council</td>
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</tr>
<tr>
<td>NITEL</td>
<td>Nigerian Telecommunications Limited</td>
<td></td>
</tr>
<tr>
<td>NMCP</td>
<td>National Mass Communication Policy</td>
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<tr>
<td>NTA</td>
<td>Nigerian Television Authority</td>
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<td>NTP</td>
<td>National Telecommunications Policy</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific, and Cultural Organization</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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Nigeria, Africa’s most populous nation, commenced deregulation of its communication sector in the early 1990s. The then military regime enacted legislation that established regulatory agencies named National Broadcasting Commission (NBC) and Nigerian Communications Commission (NCC) to deregulate the broadcasting and telecommunications sector respectively. Until this development, telephony was the exclusive monopoly of the federal government and the federal and state governments exclusively monopolized broadcasting. The first licensed private communications providers commenced operations in 1994. About a decade after commencing the regulatory reforms, i.e. by the end of 2003, there is significant change in the Nigerian communications sector including over 100 percent increase in the number of broadcast stations and over 400 percent increase in the teledensity of the country. This study, adopting communication regulations theories and the ITU Guidelines for establishing communications regulatory agencies as analytical framework, examined the regulatory policy reform that is credited with these significant changes in the Nigerian communications sector. The study found that both public and private interests, bureaucratic elements, as well as local and global factors influenced the regulatory policy reforms in Nigeria’s communications sector in the last decade.
Consequently, it is difficult, if not impossible, to explain Nigeria’s regulatory policy reforms in terms of a single existent communications regulations theory. In view of the inadequacy of the existent theories to explain Nigeria’s communication regulatory policy reform, the study suggested the adoption of the theory of government failure as analytical framework for examining communications regulatory policy reforms in developing countries like Nigeria. Further, the study found that based on the ITU Guidelines, while the telecommunications regulator, NCC, may be said to be somewhat independent, that is not the case with NBC, the broadcast regulatory agency. The study concluded by suggesting regulatory policy reforms necessary to make the NBC independent and to enhance the independence of NCC.
CHAPTER 1
INTRODUCTION

Telecommunications regulatory policy reform, largely resulting from globalization and technological development is “occurring at an unprecedented rate.” In Sub-Saharan African countries like Nigeria, changes in telecommunications regulatory policy have resulted in increased access to voice services, especially mobile telephones; expanded Internet access (though user penetration is still comparatively low – only one tenth of world’s average); and reduced costs for engaging in business transactions (although broadband and international calls are still the most expensive in the world). In addition, regulatory reforms in broadcasting are credited with expanding communication channels through the licensing of private broadcasters.

Prior to regulatory reforms, both telecommunications and broadcasting were the exclusive monopoly of governments in Sub-Saharan African countries including Nigeria. One observer noted that “African governments rushed to control” media, telecommunications and postal services immediately after independence. According to Goran Hyden and Michael Leslie for nearly two decades government control and monopoly of communications was justified on

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1 INTERNATIONAL TELECOMMUNICATIONS UNION, ESTABLISHMENT OF AN INDEPENDENT REGULATORY BODY 2 (2001).
3 Id. at 6.
4 Id. at 7.
5 Goran Hyden and Michael Leslie, Communications and Democratization in Africa, in MEDIA AND DEMOCRATIZATION IN AFRICA 1 (Goran Hyden, Michael Leslie & Folu Ogundimu eds., 2002).
7 Chris W. Ogbondah, Media Laws in Political Transition, in MEDIA AND DEMOCRATIZATION IN AFRICA 60 (Goran Hyden, Michael Leslie & Folu Ogundimu eds., 2002).
the basis of national development but the situation began to change in the 1980s when government power began to be viewed as a potential detriment to national development.8

The reforms in Nigeria may be viewed as part of an increasing global diffusion of regulatory reforms,9 which has led to the emergence of new regulatory policy institutions impacting social and economic life.10 Among the new regulatory policy institutions that have emerged are national telecommunications regulatory agencies, the number of which, according to the International Telecommunications Union (hereafter the ITU), has grown globally from only 12 in 199011 to 124 by mid-200212 and has reached 140 by the year 2005.13

![Figure 1-1: Global growth of regulatory agencies (adapted from ITU reports)](image_url)

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8 Goran Hyden and Michael Leslie, *Communications and Democratization in Africa*, supra note 5, at 1.


10 Id.

11 Supra note 1.


Nigeria, Africa’s most populous nation, commenced communications sector regulatory policy reform in 1992 when the then military regime enacted two decrees establishing the Nigerian Communications Commission (NCC)\(^{14}\) and National Broadcasting Commission (NBC)\(^{15}\) as regulatory agencies for telecommunications and broadcasting respectively. The NBC Decree was enacted following the adoption of a National Mass Communication Policy two years earlier. In the year 2000 the government adopted a National Telecommunications Policy\(^{16}\) based upon which a new Communications Act was enacted in the year 2003.\(^{17}\) The NCC was conferred with the broad responsibility for “technical and economic regulation of the privatized sector of the telecommunications industry”\(^{18}\) and specifically with facilitating the entry of private providers into markets for telecommunication services,\(^{19}\) promoting fair competition and efficient market conduct\(^{20}\) and establishing technical standards.\(^{21}\) The NCC is also responsible for the “implementation of the Government’s general policies on communications industry.”\(^{22}\) Similarly, the NBC was conferred with, among other responsibilities, receiving and processing


\(^{16}\) FEDERAL REPUBLIC OF NIGERIA, NATIONAL TELECOMMUNICATIONS POLICY (2000), available at www.ncc.gov.ng (last accessed December 12, 2006)

\(^{17}\) NIGERIAN COMMUNICATIONS ACT 2003 S. 150 (assented to by President Olusegun Obasanjo on 8th July, 2003). (hereafter the NCC Act 2003).

\(^{18}\) NCC Decree 1992 S. 4(a).

\(^{19}\) NCC Decree 1992 S. 2(b). (Section 15(h) identified telecommunication undertakings to include provision and operation of public pay-phones, provision and operation of private network links by cable, radio or satellite, provision and operation of mobile communication, community telephones, value added networks and repair and maintenance of telecommunication facilities.)

\(^{20}\) NCC Decree 1992 S. 2(a).

\(^{21}\) NCC Decree 1992 S. 2(h).

\(^{22}\) NCC Act 2003 S. 4(1).
applications for the ownership of private broadcasting services including cable television and direct broadcast satellite (DBS). NBC’s responsibility also includes advising the government “generally on the implementation of the National Mass Communication Policy with particular reference to broadcasting.”

Both commissions commenced operations in 1993 and licensed the first private telecommunications operators (PTOs) and private broadcasters that same year. The newly licensed PTOs and private broadcasters commenced business in 1994 and within a decade, i.e. by the end of 2004 Nigeria’s teledensity had grown exponentially from only about 500,000 main lines and 12,800 mobile lines to 1,027,500 main lines, and 9,147,200 mobile lines; thus the total lines about 10,147,700. The broadcasting industry also grew, as the number of private and public broadcast stations in Nigeria rose to 160 by 2004, almost doubling the ninety broadcast stations that existed when the NBC commenced operations. Beyond broadcast stations, the NBC also licensed about ten cable re-transmission and DBS providers, thereby improving the hitherto chaotic situation where almost all DBS and cable retransmission providers were said to be operating illegally. Despite these progress, the commissions have also had their challenges or set backs including the continuing problem of interconnection and universal service in the

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23 NBC Decree 1992 S. 2(1b).

24 NBC Decree 1992 S. 2(1a).

25 INTERNATIONAL TELECOMMUNICATIONS UNION, WORLD TELECOMMUNICATIONS INDICATORS (BASIC INDICATORS) 1 (2005).


telecommunications sector and the licensing process and enforcement of political programming regulations in the broadcasting sector.

The regulatory policy reform which ended government monopoly of telecommunications and broadcasting is regarded as deregulation in the sense that, as Martha Derthick and Paul Quirk observe, it led to the “removal, to whatever degree, of the earlier restrictions.”29 This dissertation examines Nigeria’s communication policy reforms with a particular emphasis on the ten-year time frame of 1994 to 2004 when substantial deregulation occurred. Although, as Jeremy Tunstall rightly observed, communications deregulation has no neat beginning and hardly a neat ending,30 the year 1994 marked the commencement of operations by the licensees and during the ten years that followed there had been five years of military rule (1994-1999) and five years of democratic rule (1999-2004). Therefore, the decade 1994-2004 seemed an adequate time for the policies to have germinated and for their implications to be obvious enough for examination.

This dissertation will be conducted from the prism of the five theories of telecommunication regulation identified by Robert Horwitz, namely public interest, regulatory failure, conspiracy-capture, organizational behavior, and capitalist state theory, with the aim of ascertaining which of the theories best explains the deregulation of communications in Nigeria.31 The employment of this theoretical framework is functional because, according to Ann Majchrzak, unlike hypothesis testing where a study sets out to test specific theories, the multidimensional nature of policy research makes it “too great a risk and luxury to approach a

[policy] problem with predetermined theory of its causes and effects.\textsuperscript{32} Rather, the policy researcher engages in “iterative process whereby information and model building are constantly interchanged.”\textsuperscript{33}

**Overview of Theoretical Framework**

An examination of regulatory policy reform, which is the subject of this study, necessitates an overview of theoretical framework to be used in the study. While a detailed examination of theories of regulation and public policy will be undertaken in chapter of this dissertation, the focus of the following discussion is on the specific theories of regulation and public policy that will be used as the study’s framework. And, in the light of this study’s focus on Nigeria, this section will also focus on literature that articulates policy reform efforts in developing countries.

**Regulation and Public Policies**

Regulation and policies are intertwined not only because each is employed to achieve the objective of the other but also because theories employed to examine both are very similar. But a clear understanding of what regulation and policy mean is necessary in order to identify the theories used to examine them. Although it is difficult to define public policy, but according to James Anderson,\textsuperscript{34} a review of several public policy texts indicates that one of the most cited definitions is Almond, Powell, Dalton, and Strøm’s, which stated that public policy “encompass all those authoritative decisions that governments make.”\textsuperscript{35} Regulation is similarly without a single definition. For example, Marc Eisner, Jeff Worsham, and Evan Ringquist define regulation as “an array of public policies explicitly designed to govern economic activity and its

\textsuperscript{32} Majchrzak, Methods for Policy Research, supra note 32 at 19.

\textsuperscript{33} Id.

\textsuperscript{34} James E. Anderson, Public Policymaking: An Introduction 5 (1994).

consequences at the level of the industry, the firm, or individual unit of activity.”36 Robert Baldwin views regulation as “the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules.”37 Thus, it may be apt to conclude that regulation is one of the mechanisms that policymakers utilize to achieve policy objectives by “constraining the range of activities in which an individual or organization can engage.”38

Definitions of communication policy also varies, ranging from the brief one offered by Patricia Aufderheide as “a calculated government intervention in the structures of businesses that offer communications and media services,”39 to a more detailed one proffered by Hamid Mowlana and Laurie Wilson who, based on a definition by UNESCO,40 described communication policy as:

> systematic institutionalized principles, norms, and behavior that are designed through legal and regulatory procedures and/or perceived through historical understanding to guide the formation, distribution, and control of communication in both its human and technological dimensions. Furthermore, communication policies (or the perceived lack of policies) reflect the prevailing cultural, political, and economic behavior of a given system.41

From the foregoing definitions, it may be discerned that within the context of this study both public policy and regulation are government interventions in the communications sector. The

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38 MAJCHRZAK, METHODS FOR POLICY RESEARCH, supra note 32, at 25.
40 UNESCO, REPORTS OF THE MEETING OF EXPERTS ON COMMUNICATION POLICIES AND PLANNING 2 (1972) (defining communication policy as “sets of principles and norms established to guide the behavior of communication systems”).
question that deserves theoretical explication then is why do governments enact public policies and regulations in the first place?

According to Robert Horwitz, five theories of telecommunication regulation include public interest, regulatory failure, conspiracy-capture, organizational behavior, and capitalist state theory. In his book, *The Irony of Regulatory Reform*, Horwitz discusses public interest theory extensively and then examines the other four theories in relation to how they serve or fail to serve the public interest. He argued that public interest theory is generally derived from legislative intent of regulations that seek to respond to the potential conflict between interests of private corporations and that of the communities or general public. Therefore, when the workings of the free market fail to protect the public from monopolistic and other corporate abuses, government intervenes in order to protect the public interest by correcting the workings of the market. Proponents of this theory view “the creation of regulatory agencies… as the concrete expression of the spirit of democratic reform [and] …as the victorious result of the people’s struggle with corporate interest.” Proponents of public interest theory also view deregulation as a measure to dismantle cartels and monopolies or oligopolies in order to pave the way for competition in the interest of consumers.

Unlike public interest theory which emphasizes the historical circumstances of the emergence of regulatory agencies, regulatory failure theory focuses on the operations of regulatory agencies. Proponents of the theory postulate that the attempt to regulate businesses is

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43 *Id.*
44 *Id.* at 24.
45 *Id.*
46 *Id.* at 17.
a failure largely because the regulators may lack the willingness or the capacity to enforce regulations in the interest of the public either because their appointment was influenced by the industry or because they were drawn from the industry or are looking forward to a career in the industry. Regulatory failure theorists also argue that because the agencies lacks the industries’ resources for gathering the information necessary for policymaking, the agencies rely too much on the industries for such vital information and end up not only getting too close to the industry that they regulate but seeing things from the perspective of the industry.47

Similarly, conspiracy-capture theory, an outgrowth of the ‘Chicago school’ of free market philosophy,48 views the attempt to enact regulations as nothing but the result of the request by the industry for regulation in order to prevent competition through price and entry restriction. Where the industry did not initiate regulation, then subsequent actions of the regulatory agency are said to be at the behest of the regulated businesses. In short, the concerned industries either ‘conspire’ to initiate regulation or the establishment of a regulatory agency. If the agency was established by popular demand, the industry then schemes to ‘capture’ the regulatory agency upon establishment.49

The organizational behavior theory posits that regulatory agencies are like other organizations that are concerned or preoccupied with their integrity and survival more than the interest of the public. Therefore, regulatory agencies can act in order to appease the most powerful contending party or to strike a compromise between the contending parties depending

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47 Id. at 27.

48 The ‘Chicago School’ is reference to the economists who taught and authored many articles at the University of Chicago from the 1960s to 1980s who argued vigorously against government intervention in the economy and used statistical methods and quantitative analysis to theorize that free market laissez faire is better than government regulation. Foremost among these scholars are Milton Friedman, George Stigler, Gary Becker, and Richard Posner. See generally THE CHICAGO SCHOOL OF POLITICAL ECONOMY (George Stigler, ed., 1988).

49 HORWITZ, THE IRONY OF REGULATORY REFORM, supra note 31 at 23.
on what will serve their [agencies’] organization’s interests and the well-being of their agency. The capitalist state theory argues that regulatory agencies operate as part of the structures of the capitalist system whose overall aim and objective is to protect private property and the system of capitalism. The agencies therefore regulate with the sole aim of ensuring the survival and continuity of the capitalist system regardless of whose individual interest may be hindered.

Horowitz concluded that each of the theories of regulation emphasizes the origins, structures, processes or the operations of the agencies and therefore each theory has “something to offer to the understanding of regulation” while each theory also has its shortcomings. Consequently, none of the theories adequately explain regulation and it is therefore often problematic to speak of a single exclusive regulatory theory.

This assertion about lack of regulatory theory is buttressed also by Lori Brainard who, in her book titled, *Television: The Limits of Deregulation* posited that there are three major explanations (theories) for the origins of regulation, namely market forces theory, industry capture theory, and contingency theory. The market forces theory contends that public interest sometimes, especially in response to economic and technological changes, necessitates regulation in order to correct or improve the workings of a marketplace. Industry deterministic (or industry capture) theory argues that firms seek regulation to insulate them (the firms) from market competition and maximize the firms’ profits and politicians and agency personnel accede

50 Id. at 38.
51 Id.
52 Id. at 43.
53 Id. at 46.
55 Id.
56 Id. at 9.
to such industry wishes in a form of “protectionist corporate welfare.” Finally, the contingency theory argues that regulatory policy change is fluid and therefore not necessarily determined by economic and technological changes or industry interests only. Therefore, in addition to economic and technological changes as well as industry lobbying, other factors and actors such as ideas, ideologies of policymakers, citizen advocacy groups, nonprofit organizations, and non-economic values like equity all contribute to the regulatory policy processes and outcome.

There are hardly any theories on regulation in developing countries perhaps because regulatory policy reforms in those countries have only occurred in the last two decades. Nevertheless there is a growing body of scholarship that examines the general public policy process in developing countries like Nigeria. One of the best known typologies of the policy process in developing countries is the one that was initially developed by Merilee Grindle and John Thomas, which was also adopted (and slightly modified) by Mark Turner and David Hulme in their examination of public policy and management in developing countries. Grindle and Thomas argued that about six theories are employed to explain the public policy process in developing countries, namely class analysis, pluralist analysis, public choice analysis, rational actor model, bureaucratic politics theory, and state interest theory.

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57 Id. at 8.
58 Id. at 9.
59 Id.
62 GRINDLE AND THOMAS, PUBLIC CHOICES AND POLICY CHANGE, supra note 60 at 20.
The class analysis approach argues that the state exists to enact and enforce policies that serve the exploitative interests of the dominant class in the society. The inadequacy of this Marxist-based theory in explaining why the state sometimes acts against the interests of the dominant classes or make policies that benefit the dominated classes led neo-Marxists to theorize that the state occasionally acts against some individual capitalists in the interest of capitalism because the superstructure of the capitalist system is what matters most.63 In this case, the state is assigned a predetermined role of rescuing the capitalist order and policymakers’ main objective is ensuring the survival of the capitalist order nationally and internationally.64

On the other hand, the pluralism approach posits that “public policy results from conflict, bargaining, and coalition formation among a potentially large number of societal groups organized to protect or advance particular interests common to their members.”65 In this case the groups’ interests are usually economic though groups are also formed based on ethnicity, religion, values, and regions as well. These interest groups are the initiators of public policy and the state serves as the arena for battling and bargaining about the final policy outcome. The state is either neutral in such circumstances or the groups with greater resources and access to political institutions effectively influence the policy outcome.66

Somewhat linked to the pluralism approach is the public choice theory, which argues that both the state and the society are composed of self-interested individuals all intent on maximizing their personal benefits. In other words, private individuals coalesce with public officials to engage in rent-seeking, which is extracting personal/private benefits from the state

63 Id. at 21.
64 Id. at 22.
65 Id. at 23.
66 Id. at 23.
resources and or using state apparatuses. The consequence here is “a state that is captured by narrow interests, policies that are distorted in economically irrational ways by self-seeking groups and public officials that are always suspect.” Unlike the pluralism model where the state may be neutral actors, public choice theory argues that state officials are usually accomplices in utilizing public policy to further private interests.

The rational actor model of explaining public policy gives primacy to the ability of an agency and its personnel to gather all the necessary information on the policy issue and to rationally assess and evaluate the information in order to determine the best alternative course of action. However, in view of the cost and time involved in such gathering and evaluating information, as well and the incompleteness of the data available, policymakers and their organizations (agencies) engage in ‘satisficing,’ which is proffering a satisfactory rather than an optimal solution. If confronted with the need for policy change, policymakers are said to engage in ‘incrementalism,’ that is marginal changes over time. In other words, the rational actor theorists give credit to the policymakers for playing a role in the policy process but explain that ‘satisficing’ and ‘incrementalism’ are the reasons why far reaching reforms are hardly initiated or adopted.

According to bureaucratic politics theory, public policy is largely “the result of competing activities among bureaucratic entities and actors…intragovernmental bargaining, conflict, and decision making.” Therefore, policies are initiated by the bureaucrats and policymaking apparatuses rather than interest or dominant groups in the society. The views of

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67 Id. at 25.
68 Id. at 28.
69 Id. at 29.
70 Id. at 30.
these bureaucrats and policymakers are influenced not only by their positions but also by how the policy outcomes will enhance their position and that of their organization (agency). In other words, they are motivated by quest for greater power and budgetary resources for their organizations and it is their professional and organizational interests rather than the interests of the society that prevails in the policy process and outcomes.

In contrast to bureaucratic theory, state interest theory views the state as an autonomous powerful actor in its own right with the capacity of defining public problems and developing solutions for them. In this case the state has its own interests and therefore it enacts policies in pursuit of those interests that may include maintenance of social peace and promotion of national development or even maintaining its hegemony and retaining power. Under this approach, public policies may or may not be the result of societal pressures and policy outcomes may either be beneficial or detrimental to powerful interest groups. The independence and powerful nature of the state is such that no group may impose its wishes on the state and therefore “it is not possible to infer who initiates policy or who controls the state from who benefits from policy outputs.”

In conclusion, Merilee and Thomas observe that the first three theories — class analysis, pluralist analysis and public choice analysis — are society-centered because they confer too much power on societal groups. In contrast, the last three theories — rational actor model, bureaucratic politics theory, and state interest theory — are state-centered because they give all credits for policymaking to state actors in the policymaking process. Therefore, they (Merilee and Thomas) contend that neither the society-centered nor state-centered theories can adequately

\[71\] Id.
\[72\] Id. at 31.
explain the policy process in developing countries where policy elites significantly shape policy choices but are also “clearly influenced by the actual or perceived power of societal groups and interests that have stake in reform outcomes.” Further, they observed that beyond the societal and state actors, the policy process in developing has an international context due to the economic and political dependency of the developing countries on multilateral and bilateral institutions. Therefore policy reform initiatives are heavily influenced and sometimes imposed by international financial institutions and particularly the World Bank, the International Monetary Fund, and, increasingly, World Trade Organization. However, regardless of the roles played by global factors and supranational bodies such as the World Bank and International Telecommunications Union, it has been argued that communication policies are still largely developed at the national level and nation states will remain the “engine rooms” of media policy by asserting their social and cultural principles in policy frameworks. Therefore, “policy analysts must … continue to compare and contrast the regulatory initiatives now apparent across the diverse field of national policy developments”

Other than the international context introduced by Merilee and Thomas, most of the theories employed to explain the public policy process have similarities with the theories of regulation outlined by Horwitz. For example, the class analysis theory and capitalist state theory are both influenced by a Marxist analytical approach. The public choice approach and the

73 Id. at 33.
74 Id. at 39.
75 Turner and Hulme, Governance, Administration and Development, supra note 61, at 220.
77 Id. at 106.
78 Id. at 93.
conspiracy-capture theory are both informed by the notion of self-interested individuals engaged in rent-seeking. The organizational behavior theory and bureaucratic politics theory all view policymakers as preoccupied with their organization’s well-being rather than the broader public’s interest. The state interest approach and public interest theory tend to view state as an autonomous actor capable of initiating and enacting policies in the interest of the society. Since most of the theories identified by Merilee and Thomas are about public policy in general and have been employed in examining policy process in developing countries with varying results (as we shall see shortly), this dissertation will employ the theories identified Horwitz not only because they are specific to communications regulation, but also because they have not been previously used to examine communications deregulation in Nigeria.

Policy Reforms in Developing Countries

Analyses of the policy process in developing countries may be characterized by the two opposite conclusions of the studies. First, according to Goran Hyden, unlike in the West (America and Europe), where policy analysis entails the application of economic principles, policy making in Africa is not based on economic rationale.\textsuperscript{79} He identified three factors responsible for this situation, which he described as ‘policy deficit.’ These three factors are: Africa’s desire to catch up with the developed world thereby relegating every consideration – including economics – in the process; African governments’ perception of the former colonialists as responsible for financing Africa’s development due to the terrible consequences of colonialism; and development aid provided made government less concerned with costs.\textsuperscript{80} Hyden argued that neopatrimonialism, which he defined as “the absence of a separation between the private and the official spheres” is still widespread in Africa. Therefore rather than using


\textsuperscript{80} Id.
public policy as instrument for mediating “relations between private interests and public goods,”
African governments are more preoccupied with gaining advantage in multiparty politics by
using state resources for patronage. Moreover, organized interests are relatively absent or at
best not strong enough to influence policymaking and facilitate its management. As a result,
economics is marginalized by politics in the policymaking process and policy intervention may
be done “regardless of potential costs and benefits, feasibility and sustainability.” Finally,
Hyden observed that African governments derive legitimacy by seemingly resisting external
powers, including the prescriptions of multilateral institutions that may be urging economic-
based policies. He concluded that the ‘policy deficit’ is why “policy in African countries rarely
leaves behind a living legacy that society can build on and why African governments are not real
policy governments.”

Similarly, Mark Turner and David Hulme, citing examples from Africa, Latin America,
and the Middle East, observe that public policy is characterized by patronage and coercion rather
than participation because authoritarian regimes of many developing countries restrict
policymaking to a narrow circle of government officials and mass organizations and other
interest groups have either been suppressed or coerced into apathy. They illustrate this situation
by pointing out how, in Sub-Saharan African countries, which are predominantly agrarian
societies, agricultural policies either neglect or even lead to exploitation of the majority peasant

81 Id. at 136.
82 Id.
83 Id. at 22.
84 MARK TURNER AND DAVID HULME, GOVERNANCE, ADMINISTRATION AND DEVELOPMENT, supra note 61, at 71-
73.
farming families largely because “such policies are constructed by a coalition of rulers, bureaucrats, urban workers, local industrialists, and occasionally multinational corporations.”85

However, contrary to the theses of Goran Hyden and Turner and Hulme, Grindle and Thomas, who examined about a dozen cases of successful policy reforms in developing countries in Africa, Latin America, and Asia, found that policymakers are neither captives of special interests nor individuals in pursuit of self or organizational interests but active initiators of reforms. The authors concluded that the policymakers of the developing countries they examined initiated and or changed policies not for self-seeking reasons but because they were motivated by a perspective derived from “personal and professional values” that “frequently include serious concern for the public interest and public welfare of their societies.”86

Similarly, Judith Tendler observed that a lot of what has been written about governments in developing countries are findings that the officials in those countries serve their private, rather than the public interests and the governments engaged in clientelism, overspending on badly conceived programs that “create myriad opportunities for bribery, influence peddling and other forms of malfeasance.”87 She noted that such earlier examination of developing countries’ public policy that reach these conclusions include Anne Krueger’s examination of Turkey.88 However, in her (Tendler’s) examination of four cases of public sector reforms carried out by a state government in Brazil – namely rural preventive health, employment creating programs, agricultural extension, and assistance to small enterprises – she found that the performance of these programs changed “rapidly from bad to good” in the mid 1980s and remained so until the

85 Id.
86 GRINDLE AND THOMAS, PUBLIC CHOICES AND POLICY CHANGE, supra note 60, at Xiv.
87 JUDITH TENDLER, GOOD GOVERNMENT IN THE TROPICS 1 (1997).
time of her writing in 1997.\textsuperscript{89} She observed that although the World Bank and media reports tend to attribute the successes of the programs to the leadership of two successive reformist governors,\textsuperscript{90} her study found that the success of the reforms are due primarily to the efforts of dedicated workers. These workers carried out larger tasks than usual and did not exploit the greater autonomy and discretion resulting from the larger tasks they were assigned to perpetrate “the rent-seeking misbehaviors that public-sector reformers worry about – graft, bribery, and other malfeasance…[rather the] workers wanted to perform better in order to live up to the new trust placed in them by their clients and citizens in general…and the public messages of respect from the state.”\textsuperscript{91}

As the above discussion shows differing postulations on public policies in developing countries so does the literature on communication policies in developing countries. For example, on the one hand Mowlana and Wilson argue that because communication policies are usually derived from the country’s institutional system and the political and economic environments under which they operate, the policies “tend to legitimize the existing power relations, which are not necessarily working for the best interests of the developing country.”\textsuperscript{92}

On the other hand, Ogundimu and Iheduru, argued that African countries have initiated policy reforms in the communications-sector like denationalization, privatization, and free-market policies that are dismantling or modifying “inflexible command and control management

\textsuperscript{89} TENDLER, \textsc{Good Government in the Tropics}, \textit{supra} note 87, at 8 (1997).

\textsuperscript{90} \textit{Ibid.} at 13.

\textsuperscript{91} \textit{Ibid.} at 14-15.

\textsuperscript{92} HAMID MOWLANA AND LAURIE J. WILSON, \textsc{The Passing of Modernity} 109 (1990).
structures inherited from colonial administrations.” They argued that these systems were initially maintained by African countries not only because they inherited them from colonial governments but also because that system was suitable for meeting result-oriented outcomes that was encouraged by aid agencies such as the World Bank. They also contended that Africa’s inadequate postcolonial communications and transportation infrastructures are partly due to bad governance but also are a product of antiquated, centralized, and authoritarian systems inherited from colonialism that the indigenous governments initially retained because they “provided the most opportunities for controlling the system of patronage.” They (Ogundimu and Iheduru) concluded that positive hopes and optimism should be gleamed from two facts: postcolonial sub-Saharan African governments spent huge resources expanding infrastructures; and the pressure to reform the authoritarian systems is leading to “pluralism and commercially viable communications systems” because of the efficient and appropriate regulatory environments and policies that are emerging.

In conclusion, the literature indicates that there have been negative and positive outcomes of public policies and reforms in developing countries. Regardless of the end result, there is usually a government agency responsible for implementing the policies or reforms. In the communications sector it is the regulatory agencies that are usually responsible for overseeing public policies and reforms.

**Creating Independent Regulatory Agencies**

As earlier observed, a major component of or outcome of regulatory policy reform is the creation of regulatory agencies, agencies that experienced exponential growth that the ITU noted

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93 Folu Ogundimu and Okechukwu C. Iheduru, *Developments in Transportation and Communications, in AFRO OPTIMISM: PERSPECTIVES ON AFRICA’S ADVANCES* 110 (Ebere Onwudiwe and Minabere Ibelema, eds., 2002).
94 *Id. at* 118.
rose from merely 12 in 1990 to 140 by the year 2005.95 These agencies are typically the mechanism responsible for monitoring and promoting compliance with the regulations.96 Many benefits of telecommunications reform are said to be related to the establishment of an independent regulatory agency as shown by Scott Wallsten.97 Wallsten, using panel data covering 200 countries from 1985-1999, found that the creation of a regulatory agency before privatizing a nation’s telecommunications sector correlates not only with improved telecommunications investment but also with telephone penetration (emphasis original).98

Perhaps, these and other imperatives of regulatory reforms is what necessitated the ITU, as the paramount telecommunications regulatory body in the world, to convene a Study Group99 that produced “a set of best practices guidelines for countries in transition to more liberalized telecommunications markets to establish their independent regulators.”100 The Study Group, based on a consensus around the definition contained in the WTO Regulation Reference Paper,101 observed that an independent regulatory agency “is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and procedures used by regulators shall be impartial with respect to all market participants.”102 However, the report

95 INTERNATIONAL TELECOMMUNICATIONS UNION, TRENDS IN TELECOMMUNICATION REFORM 17 (2006).
98 Id.
100 Id.
102 ITU Report 2.
observed that there can be no detailed definition that will be applicable to all countries due to the differences in legal and political systems and the level of telecommunications development. Therefore, in order to facilitate the development of the best practice guidelines, the report adopted a working guideline from *The McKinsey Quarterly*, which noted that “Where a regulator exists, it is important to ensure clarity of jurisdiction and defined resolution mechanisms, adequate organizational competence and funding, and political insulation. Independence derives more from this latter factor than from any formal definition, and manifests itself in regulators’ power to dissent.”

Consequently, as part of the best practices, the report recommended a number of guidelines for nations wishing to create an independent regulatory agency. These suggestions included that the mandate of a regulator should be clearly spelled out in national laws; the regulatory agency should be structurally separated from the Ministry; the head of the regulatory body should enjoy guaranteed term of office; and other members of the regulatory body be appointed in staggered fixed terms. The Report also contained recommendations on financing the regulatory agency; adherence to transparent principles of decision making that enhances public trust and confidence; and the process for overturning agency action.

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103 *Id.*


105 *Id.*

106 ITU Report 3.

107 *Id.* at 8.

108 *Id.*

109 *Id.*

110 *Id.* at 16.
Research Questions

Based upon the literature discussed above, this dissertation will attempt to answer the following questions:

• What specific communication regulatory reforms occurred during 1994-2004 in Nigeria? What were the outcomes of these reforms on Nigeria’s communications sector?

• How may Nigerian communications regulatory reform be explained by Horwitz’s theories of communication regulation? How do these theories of regulation shed light on the policy process involved in deregulating the Nigerian communications sector?

• Because policy making in developing countries like Nigeria is influenced by international actors but nation states remain the ‘engine room’ for communication policies, which international factors influenced Nigeria’s communication deregulation and how did Nigeria’s national interests moderate those international influences?

• What is the nature of the regulatory agencies created in the process of deregulating Nigeria’s communications sector? Specifically to what extent are the NCC and NBC independent regulatory agencies based on the ITU’s best practices guidelines?

Methodology

Legislation is usually the origins of regulatory policies because it is in them that policy goals are defined “in the broadest possible terms.” Consequently, an examination of regulatory policy necessitates both legal and policy research. Legal research has been defined as “the process of locating the law that governs an individual and institutional activity and materials that explain or analyze the law.” On the other hand, policy research involves either selectively pulling together and synthesizing “theoretical literature, data, and existing research findings from a variety of sources in support of an argument or thesis,” or, in contrast, empirically collecting and analyzing original (statistical) data to support a thesis. And communication policy

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113 MAJCHRZAK, METHODS FOR POLICY RESEARCH, supra note 32 at 58.
research is that which “seeks to examine the ways in which policies in the field of communication are generated and implemented, as well as their repercussions or implications for the field of communication as a whole.”\textsuperscript{114}

In view of the above definitions, it may be deduced that triangulation is the best way to conduct this study. This means seeking information or gathering data by various means such as interviews, observations, and examination of documents and archival materials. The legal documents to be examined include both primary and secondary materials. Primary materials, which are sometimes described as ‘the law’, comprise the major sources of law, i.e. constitutional, statutory, judicial, and administrative regulation. It should be noted that primary authority emanates from legislative, judicial, and administrative bodies acting in their “lawmaking capacity”,\textsuperscript{115} therefore other materials (such as research studies) commissioned by such bodies not in their lawmaking capacity does not constitute the law and therefore not primary material.\textsuperscript{116} The secondary materials are those “that are used to explain, interpret, develop, locate, or update primary sources.”\textsuperscript{117} Consequently, books, research publications in academic and legal journals, conference papers, press and broadcast materials are regarded as secondary materials.\textsuperscript{118} The importance of primary materials is their authoritativeness, the

\textsuperscript{114} ANDERS HANSEN, S. COTTLE, R. NEGRINE, AND C. NEWBOLD, MASS COMMUNICATION RESEARCH METHODS 67 (1998).


\textsuperscript{116} Id. at 12.

\textsuperscript{117} ROY M. MERSKY AND DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 10 (2002).

\textsuperscript{118} KYO HO YOUM, Legal Methods in the History of Electronic Media, in METHODS OF HISTORICAL ANALYSIS IN ELECTRONIC MEDIA, supra note 112 at 124.
imperative of secondary sources is explaining and analyzing the law and placing it in context thereby making the sometimes arcane law comprehensible.  

Electronic and online resources in form of databases (such as LexisNexis and Westlaw) and the Internet (websites of NBC and NCC) were useful in locating primary and secondary materials ranging from regulations enacted by the agencies and agencies’ history and structure to open access journals and news reports about the activities of the agencies. Fortunately, LexisNexis currently carries reports of two major Nigerian newspapers as well feeds from BBC Global Media Monitoring Reports which includes reports from Nigerian media.

The legal research was accomplished in part by using LexisNexis and selecting ‘Terms and Connectors’. The four search terms used included broadcast w/p regulation; broadcast w/p deregulation; telecommunications w/p deregulation; telecommunications w/p regulation. The following segments of LexisNexis were searched:

1. Legal > Cases - U.S. > U.S. Supreme Court Cases, Lawyers' Edition

The need for obtaining these US primary and secondary materials is in order to incorporate them into the broader theoretical analysis of the justifications for communications regulation and to use them in illustrating the explanations of the regulatory theories outlined by Horwitz.

For secondary communication policy and regulation research beyond law reviews and periodicals available in Lexis-Nexis, two databases, ComAbstracts and Communications & Mass Media Complete, provided the bulk of literature examined. The following key terms were used

119 Id.
120 Id. at 136.
separately to search the two databases: Nigeria, communications policy, communications regulation, and communications deregulation.

To find Nigerian communication regulations and policies, the websites of Nigeria’s two communication regulatory agencies were used to retrieve primary legal and regulatory documents. Already the basic primary materials (Nigerian constitution, laws establishing the agencies, National Mass Communication Policy, and National Telecommunication Policy) had been obtained during a trip to Nigeria last summer. In addition to these sources, research commissioned by the agencies, press releases of the agencies, memoranda, and legislative documents (hearings) have also been consulted.

An Outline of the Rest of the Dissertation

In terms of organization, chapter II of this study examined the theoretical literature regarding the broad social and economic justifications for communications regulation and for factors that influence regulation and deregulation. The chapter also examined the process of policy reform in developing countries like Nigeria and the best practices for establishing independent regulatory agencies. Chapter three of the study examined the transformation of telecommunications and broadcasting regulation in Nigeria from restricted government monopoly to the beginning of deregulation and market competition. The chapter then surveyed the history of telephony and broadcasting in Nigeria, the incremental reforms in the communications sector beginning with partial commercialization in the 1980s to the implementation of the Structural Adjustment Program and the debate on national communications policy. The chapter concluded by discussing the commencement of the deregulation of communications sector and the establishment of the two regulatory agencies. Building upon the history of Nigerian communications regulation, chapter four discussed the legal instruments establishing the NCC and NBC and their organizational structure and
operational processes. In addition, the fourth chapter also examined the National Mass Communication Policy and the National Telecommunications Policy which were adopted in 1990 and 2000 and discussed how these policies influenced legislation on the NBC and NCC respectively. Chapter five provided an overall assessment of the current communications sector in Nigeria, describing the changes in market structures and providers of both broadcasting and telecommunications since the reforms of the early 1990s and also highlighted how the changes in the communications sector have affected the public in terms of widening the avenue for freedom of freedom of expression and the availability and the use of varied communication services. Finally, this chapter attempted to answer the research questions and then concluded by describing the challenges that the NBC and NCC currently face in regulating Nigerian communications sector in order to achieve polices aimed at making services more widely available to the citizenry. Chapter six will summarized the findings of the dissertation and suggested possible regulatory policy reforms for both the broadcasting and telecommunications sector. Finally, the chapter will conclude by identifying and suggesting and areas for further inquiry.

Justification/Significance and Limitations of the Study

A search of ComAbstracts database with ‘Nigeria’ as keyword pulled only 40 items out of which only about six were on communications regulation in Nigeria. Of these six articles, only two articles were written post-deregulation. A similar search of Communications & Mass Media complete database pulled 32 items of which only seven were on communication law, policy or regulation in Nigeria. Of these seven, the same previous two articles involved post-deregulation. A search on dissertation abstracts turned up only one study that examined broadcasting policy and another that looked at the state of Nigeria’s telecommunications services; both studies were completed prior to the deregulation of the communications sector.
This clearly indicates a paucity of literature on communications deregulation in Nigeria, which confirms the argument about paucity of literature on low income countries in general because there is “bias in the literature that favors the study of large markets in high income countries.”121

Secondly, this study, by applying regulation theories developed in the West to examine the Nigerian context, adds the value that comparative research brings, i.e. proving how “selected phenomena compare and contrast in different countries.”122 Other importance derived from the comparative research are said to include increasing to the universal data on the phenomena examined123 and highlighting the naivety and parochialism of assuming that theories and findings from one society are applicable in other societies.124 Finally, the imperative of comparative research especially to communication policy is heightened by globalization that has not only increased the flow of information that influences policy-making but has also seen “attempts to deploy policy experience in one country in the service of policy formulations in others.”125 Thus, according to Blumler and Gurevitch,126 “efforts to profile the incidence of policy problems across national communication systems, and the manner in which they have been tackled, could constitute genuine contribution by the research community to policy-making


123 Id. at 75.

124 Id. at 75-76.

125 Id. at 79.

126 Id.
process in different societies. Researchers with a comparative bent of mind seem uniquely qualified to perform such service.”¹²⁷

Thirdly, like most American studies of communication regulation which focus on either telecommunications or broadcasting but not both,¹²⁸ the scant literature on Nigeria’s communication regulation either focus on telecommunications or broadcasting. The imperative of convergence in communications systems necessitates examining the two concurrently, which is what this study intends to do. Moreover, and fourthly, none of the extant studies identified examined Nigeria’s regulatory policies from the prism of the competing theories of regulation outlined by Horwitz or the various theories of public policy in developing countries discussed by Grindle and Thomas. Fifth, as models for cultural and social regulation of media vary from one nation to another, highlighting the different models will help increase knowledge about such regulatory policies, enhance generalizability, and facilitate organizational learning – in this case other agencies may learn from the Nigerian experience.¹²⁹ Finally, this study hopes to contribute to the evaluation of Nigeria’s National Telecommunications Policy and therefore assist policymakers in line with the policy’s provision that “[t]he policy shall be reviewed from time to time by government to take cognizance of changes in standards, technologies, markets, and any other matters that may arise from its implementation.”¹³⁰

While the significance of this study are numerous as outlined above, the dissertation is not without its limitations. Although an IRB approval to interview policy actors and observe

¹²⁷ Id.
¹²⁸ HORWITZ, THE IRONY OF REGULATORY REFORM supra note 31 at 8.
¹²⁹ BEN GOLDSMITH, ET AL. Cultural and Social Regulatory Principles in Converging Media Systems, in GLOBAL MEDIA POLICY IN THE NEW MILLENNIUM, supra note 76 at 103.
proceedings of the commissions, a general, nation-wide strike in Nigeria during the summer of 2007 made it impossible to either interview the policy actors or attend proceedings of the commissions. Therefore, one of the major limitations of the study is the inability to employ interviews and observations in the data gathering process.

Interviews with regulators and other policy actors would have illuminated some of the major constraints encountered by the former and the perception of the latter regarding regulatory policies. Similarly, an opportunity to observe public hearings by the agencies and compare the public submissions with the policy outcome on that issue would have highlighted the extent to which public input is taken into cognizance by agencies in their rulemaking. Attending and observing Consumer Parliament, a forum innovated by the NCC that brings together subscribers and providers for discussion of consumer concerns, would have added to the understanding of the major complaints by the subscribers and the service providers’ responses to such concerns. Similarly, attending a broadcast license renewal hearing by the NBC would have provided an opportunity to grasp the audience needs and gauge whether the broadcasters are meeting such needs or not. Needless to say, all these limitations merit further study.
CHAPTER 2
LITERATURE REVIEW

In this chapter, the dissertation will examine the broad theoretical literature regarding the social and economic justifications for public policy and regulation and, in particular, the literature on communications regulation and policy with emphasis on factors that influence regulation and deregulation. The chapter will also examine the literature on regulatory agencies with an emphasis on communication regulatory agencies and conclude by highlighting the best practices for establishing independent communication regulatory agencies.

In chapter one the study highlighted and discussed five major theories identified by Robert Horwitz to explain communication regulatory policies. As will be shown subsequently, the theories outlined by Horwitz were largely derived from the broader social science literature, especially economics, political science and public policy. It must be noted that as recently as the early 1990s, regulation meant different things in Europe and the United States. In Europe, regulation is broadly viewed to include “legislation, governance, and social control,” and therefore not a distinct kind of policy-making. In contrast, in the United States regulation contains a more specific meaning because the term is used to refer to “sustained and focused control exercised by a public agency over activities that are generally regarded as desirable to society.” Therefore, in the American context, regulation requires more than just passing laws.

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2 Id. at 1.
3 Id. at 2.
4 Id., citing Landis 1966: 25-6 as saying “the art of regulating an industry requires knowledge of details of its operations, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.”
and “regulatory policy-making requires, not bureaucratic generalists, but specialized agencies or commissioners capable of fact-finding, rule-making, and enforcement.”

This study, for the most part, adopts the view of regulation as perceived in the American context taking into account that even within the United States, specialized regulatory agencies are sometimes charged with initiating and or implementing policies.

**Theoretical Justifications for Regulation and Public Policy**

The diversity of regulatory policies makes it impossible to have a single explanation of why governments regulate; each rationale adduced provides some insights regarding the vision and expectation of a regulatory policy without necessarily fully explaining the rationale for such policy. However, several authors identified explanations for government regulations and policies. Among these authors are Marc Eisner, Jeff Worsham, and Evan Ringquist, who provide three theories justifying regulatory policies. First, regulation is aimed at furthering public interest. The public interest theory, which is viewed as “the oldest and perhaps the most obvious theory of regulation,” claims that the primary goal of regulation and regulatory activity is “the protection of public from potential abuses in the marketplace,” especially abuses by monopoly power resulting from high costs of entry by other competitors and the economy of scale and scope. This (public interest) theory is also referred to as ‘consumer protection theory’. While acknowledging that the concept of public interest is amorphous, Eisner, et al., noted that the

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5 Id. at 2.

6 MARC ALLEN EISNER, JEFF WORSHAM, AND EVAN J. RINGQUIST, CONTEMPORARY REGULATORY POLICY 3 (SECOND EDITION, 2006).

7 Id. at 3.


9 Id. at 28.
concept has judicial backing based on the U.S. Supreme Court’s determination in *Munn v. Illinois*,¹⁰ specifically because when business is “affected with a public interest, it ceases to be *juris privati* only.”¹¹

Second, regulation is necessary to prevent and or compensate for market failure.¹² Market failure refers to “a circumstance in which the pursuit of private interest does not lead to an efficient use of society’s resources or a fair distribution of society’s goods.”¹³ Market failure may arise from a number of factors, including natural monopoly nonexcludable and nonrivalrous public goods, externalities resulting from costs and benefits of the transactions to third parties, lack of complete information resulting in information asymmetry, and transaction costs which are the costs of the “processes, maintenance and enforcement of transactions.”¹⁴

In a similar vein, then Harvard law professor Stephen Breyer observed that this commonly cited justification for regulation “assumes that an unregulated market is the norm,” therefore regulation is needed to the extent necessary for overcoming “one or more market ‘defects’ that might otherwise prevent purely free markets from serving the ‘public interest.’”¹⁵ Breyer classified the justifications for regulation as the need for the following: (i) controlling

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¹⁰ *94 U.S. 113* (1876). (the Court, citing England’s 17th century Lord Chief Justice Hale’s treatise *De Portibus Maris*, 1 Harg.Law Tracts 78, further held that private property “does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.” Id.).

¹¹ *Munn v. Illinois*, at 94.

¹² EISNER, at al., *CONTEMPORARY REGULATORY POLICY*, supra note 6, at 7.


¹⁴ EISNER, at al., *CONTEMPORARY REGULATORY POLICY*, supra note 6.

(natural) monopoly power; (ii) controlling windfall profits – arising from neither skill nor talent of producer;\textsuperscript{16} (iii) correcting for spillover costs – externality; (iv) compensating for inadequate information – especially lowering the cost/time of obtaining relevant information; (v) eliminating excessive competition that sometimes lead to ‘predatory’ pricing; and (iv) alleviation of scarcity – especially in the case of broadcast licenses.\textsuperscript{17}

Third, regulation (in the United States) is the outcome of regional interests vying for economic benefits. In other words, regulatory initiatives reveal how the industrial “core” and the industrial “periphery” are seeking to prevent and ensure the shift of economic benefits from and to their areas respectively.\textsuperscript{18}

Finally, another justification for regulatory policy is explained by what Sterling called ‘equity-stability theory.’\textsuperscript{19} There are two approaches to this theory view: one contends that the legislators’ action of creating regulatory agencies is informed by the desire to further social equity and fairness while the other view argues that the legislators’ goal is the need to control the excesses of capitalism in order to ensure the system’s continuity.\textsuperscript{20} The former approach contends that left to the unimpeded market forces, “society’s resources would not be distributed in a socially equitable manner; the role of regulation is to act as a corrective.”\textsuperscript{21} The latter approach, derived from capitalist state theory, noted that certain inabilities and limitations of the

\textsuperscript{16} Id. at 10.

\textsuperscript{17} Id. at 11.

\textsuperscript{18} Eisner, et al., Contemporary Regulatory Policy, supra note 6, at 10.

\textsuperscript{19} Sterling, et al., supra note 8, at 29.

\textsuperscript{20} Id. at 29.

\textsuperscript{21} Id.
marketplace and market forces necessitate the regulation of potentially self-destructive capitalist behavior.  

Contrary to the preceding theories advanced for the justifications of regulation and public policies, critics of regulation posit that two other theories may also explain regulation and public policies, i.e. interest groups’ theory and capture theory. The first contrarian theory contends that regulation is the result of cartels’ and interest groups’ demands pushed through effectively organized political coalitions. According to Sterling, Bernt, and Weiss, this is referred to as ‘Private interest or Interest Group theory.’ The theory focuses on why regulators’ action fail to serve the public interest or what regulators actually do as against what they ought to do or were established to do. The theory’s conclusion is that regulation is used by individuals and groups to serve private interests. These individuals and groups include stockholders, managers of companies, regulators and intervenors in the regulatory proceedings resulting in coalition and consensus built and reached by regulators as mediator thereby enabling the regulator to access political power for his/her own interests. A variant of this theory is dubbed ‘coalition-building theory’.  

The second contrarian theory argues that regulatory agencies are captured by the concerned industry after the agencies’ initial active regulatory period as the agencies become ‘matured’ and align themselves more with the regulated industry’s concerns, rather than the

22 Id.
23 Eisner, at al., Contemporary Regulatory Policy, supra note 6 at 8. (in further analysis, however, the authors observed that the deregulation of the last two decades seems to undermine this economic regulation theory. Id.).
24 Sterling, et al., supra note 8, at 28.
25 Id.
interest of the general public.\textsuperscript{27} It is argued that the revolving door trend resulting from movement of regulators into industry jobs and vice-versa as well as the stronger industry lobbying compared with consumer interest’s, ensures that regulators will not act in ways that will be harmful to the regulated industry’s interests.\textsuperscript{28} In other words, the regulatory agency not only identifies with, but serves the interest of the industry rather than the public’s. Consequently, not only is the government authority used to help the regulated industry, the industry’s representatives play “a central role in drafting regulatory legislation.”\textsuperscript{29} It is therefore the conclusion of this theory that “[t]he use of regulation to protect the industry reflects the contention that advanced capitalism requires a far greater integration of the state and the economy than is often supposed by free-market advocates.”\textsuperscript{30} However, it has been observed that regulatory capture is seemingly increasingly difficult in the face of multiple advocacy groups and expanded access to courts. Therefore, the industries’ new tactic is to “embroil agencies in lengthy appeals, and force regulators to justify their decisions using market criteria.”\textsuperscript{31}

While the above theories are advanced to explain regulatory policy in general, it may be appropriate to examine the theoretical justifications for communication regulation in particular. Scholars have explained how the preceding theories may be applicable to explaining communication regulation policy by arguing that public interest theory has implication for the economic and political role of communication in a democratic society and by showing the actual and potential consequences of market failure in communication industry especially with regards

\begin{footnotesize}
\textsuperscript{27} Eisner, at al., Contemporary Regulatory Policy, supra note 6 at 10.
\textsuperscript{28} Sterling, et al., supra note 8 at 28-29.
\textsuperscript{29} Eisner, at al., Contemporary Regulatory Policy, supra note 6 at 10.
\textsuperscript{30} Id. at 10.
\textsuperscript{31} Id.
\end{footnotesize}
to externalities of telecommunication networks and broadcasting and the nature of broadcasting and telecommunications as public goods and natural monopoly respectively. Thus, the next subsection will focus on justifications for communication regulation.

**Communications Regulation**

In viewing the remediying of market failure as the “primary rationale” for regulatory policy, John Kay and John Vickers identified network externalities as the benefits of the network effects to a subscriber that “depends upon who else subscribes to the same network.” In other words, the larger the network, the greater the benefits to subscribers. Therefore, network externalities are advanced as regulatory justification for requiring equal and non discriminatory interconnection by all service providers. Further, the externalities also provide rationale for designating telecommunication service providers as common carriers upon who have been conferred certain rights and obligations including providing service at just and reasonable rate without unreasonable discrimination. In telecommunications, common carriers are those engaged in wire or radio transmission of energy for hire with the exception of those engaged in radio broadcasting. In return for that obligation, the common carriers are exempted from liability for the content of the messages they transmit. The same network externalities have been advanced as the rationale for providing cross-subsidization where profit from one part of

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33 See *e.g.*, 47 U.S.C. § 251 which provides inter alia that a “telecommunications carrier has the duty— (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

34 See 47 USC 153(10).

35 *Id.*

the business (usually high-profit commercial entities) is applied to reduce the cost of providing service to non-commercial subscribers; this leads to and justifies ‘universal service’ provision. Further, the universal service provision results in externalities in terms of the emergency services that telephony may be utilized; the emergency service is also viewed as public goods that the market typically fails to provide.

Another justification for regulation of telecommunications, especially local telecommunication companies, is their status as natural monopoly. According to Sterling, who drew analogy from the holding in *Munn v. Illinois*, telecommunication companies are not only capital intensive networks that are engineered to accommodate peak demand, they also “provide essential services rather than goods” in a monopolized fashion and are therefore regarded as a public utility – thus subject to regulation. Further, in order to construct their networks, telecommunication service providers are granted not only the use of public right of way, but sometimes private property is taken through the eminent domain and granted to them.

Finally, a major justification for the regulation of telecommunications is the notion that telecommunications constitute part of the infrastructure or channels for both discourse and commerce – the major lubricants for the political and economic engines of a democratic society. Thus, the imperative of telecommunications goes beyond the private interest of profit making or socialization to the realm of common good otherwise technically referred to as ‘public

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38 *Id.*
39 STERLING, et al., *supra* note 8, at 22.
41 *Id.* at 11.
interest’. This status of telecommunications as service of public interest necessitates its designation as an economic infrastructure that is subject to government intervention through construction, maintenance, promotion, subsidy, or protection through the granting of monopoly.

The often stated justifications for broadcast regulation span technological, socio-political, and economic factors, that include spectrum scarcity, democracy, freedom of speech, and marketplace failure. To further explicate this, first take the case of spectrum scarcity. The justification and or theorizing about broadcast regulation stems from what is generally termed the ‘scarcity rationale.’ This is the understanding that the electromagnetic spectrum on which broadcast signals are transmitted is a limited resource that cannot accommodate all those who may be interested in broadcasting. As a result, this limitation necessitates government’s intervention and organization of the allocation, management, and other general technical/engineering issues related to the administration of the radio spectrum. Since electronic broadcasting is only possible through transmission of signals via spectrum and since that spectrum cannot be available to all who desire to have it, it logically follows that those who have been granted its use serve as trustees of the public. The scarcity rationale has been repeatedly upheld by the courts (including the U.S. Supreme Court) as justification for government’s

\[Id.\] at 12.

\[Id.\]

regulation of broadcasting. Perhaps the most notable cases in this regard are *Red Lion v. FCC*, and most recently, the *Prometheus Radio v. FCC*.

A second theoretical justification for the regulation of broadcasting is the notion of ‘deliberative democracy’ that can be fostered through the public interest obligation of broadcasting, especially as manifested in certain regulatory enactments such as the reasonable access and equal opportunities rule. In a democratic system of government, public participation in what is termed self-governance, requires among other things, freedom of speech and the right to receive and impart information. It naturally follows that since broadcasting serves as one of the principal avenue for such participation in public discourse it should not be monopolized.

Among the scholars who analyzed broadcast policy taking into account the above factors is Philip Napoli. Specifically, he cites three factors that he regards as the “fundamental difference between communications regulation and the regulation of other industries.” First, he notes that policy decisions regarding broadcasting have socio-political implications because “information flow is fundamental to the formation of the social and political views that guide political behavior.” He explained this by citing research on agenda-setting and the influence of media on the political process in general. Secondly, unlike other industries whose activities largely concern the economy only, broadcast regulation concern social and political issues such

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45 395 U.S. 367.
46 373 F.3d 372 (3rd Cir. 2004).
47 *Red Lion*, 395 U.S. at 388. For a thorough explication of the linkage between broadcasting and democracy, See generally, C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002).
49 Napoli, *The Unique Nature of Communications Regulation*, Id. at 565.
50 Id. at 566.
as reasonable and equal access for political candidates, indecency, and children’s programming. Thirdly, even the regulation of the economics of communication such as cable rate regulation, while protecting the consumers from possible exploitation by a natural monopoly or an oligopoly, such polices inadvertently enhance information flow to low income earners. These three factors help inform the underlying philosophy for regulating communications — serving the public interest.51

Although, according to Cass Sunstein, there is a large difference between the “public interest and what interests the public,”52 central to the goals of broadcasting should be the promotion of “American aspiration to deliberative democracy, a system in which citizens are informed about public issues and able to make judgments on the basis of reasons.”53 Therefore, communication policy is not only about market economics; rather it is more about the marketplace of ideas54 and the effects on the public sphere.55 In furtherance of the media’s role as the most potent public sphere, therefore, access must be created, if not for all, at least for discussions that are germane to the public interest and democracy. Also, because of the power inherent in broadcasting, ownership must be limited. If structural limits are not imposed we may have a situation where, as A. J. Libeling stated, “Freedom of the press is guaranteed only to those who own one.”56

51 See generally NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY, supra note 48.
53 Id.
55 Sunstein, Television and the Public Interest, supra note 52 at 504.
Broadcast regulation is also explained or justified because of externalities, that is the tendency of the consequences of the actions of two parties to rub-off beyond them, in other words, the “positive and negative effects on ‘third parties’.”\(^\text{57}\) The externalities, as earlier explained, are a reflection of the probabilities of “market failure,” in this case, it is the inability of the commercial broadcasters to produce what the audience needs,\(^\text{58}\) partly because broadcasters regard the audience “more like products being offered to advertisers than consumers paying for entertainment on their own.”\(^\text{59}\) Therefore, the commercial media tend to “favor blockbuster [entertainment] products over more diverse and small media products that people often want,” often neglecting information that citizens may need to make informed political decisions about politics and public policy. Consequently, “market processes produce excessive amounts of media products with negative externalities and insufficient amounts of those with positive externalities.”\(^\text{60}\)

Unlike the preceding scholars that seek to justify regulatory intervention, there are scholars who believe in the preeminence of free market and theorized that broadcast regulation is unjustifiable, especially with regards to new communication technologies and the First Amendment.\(^\text{61}\) One such scholar is Ithiel de Sola Pool, who examined broadcast regulation in his book, *Technologies of Freedom*. In his analysis of the emergence of electronic communications using wires, radio waves, satellites, and computers, Pool conceded that initially regulation

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\(^{58}\) Id.
\(^{59}\) Sunstein, *Television and the Public Interest*, supra note 52 at 506.
\(^{60}\) BAKER, *ADVERTISING AND A DEMOCRATIC PRESS*, supra note 47, at 96.
seemed to be a technical necessity, but observed that “as speech increasingly flows over those electronic media, the five-century growth of an unabridged right of citizens to without controls may be endangered.”62 He observed that although in principle, communications law in the United States guaranteed freedom of expression in the First Amendment, in reality it is a “trifurcated communications system”63 where print, common carriers, and broadcasters are treated separately. Pool observed that the First Amendment truly governs the print media while common carriers are obligated to serve all on equal terms without discrimination; but broadcasters are selected by government and highly regulated on the basis of “supposed scarcity of usable frequencies in the radio spectrum.”64 He then raised questions about what will happen in the unfolding convergence of these difference modes. Will convergence upset the trifurcated system and lead to more regulation of the print media when it uses the wired computer networks to deliver text? Conversely, will convergence help to free the regulated electronic media due to concerns for traditional freedom the press? Pool came down heavily in favor of the latter, that is freeing the regulated electronic communication, because he believes “freedom is fostered when the means of communication are dispersed, decentralized, and easily available.”65

Pool further argued that the initial regulation of broadcasting that was based on the notion of spectrum scarcity failed to anticipate the possibility of future solutions. He also contends that the acceptance of government to be the licensor and regulator is inconsistent with the traditional notion of the freedom of the press because it supposes that government will play a positive role

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63 Id. at 2.
64 Id.
65 Id. at 5.
on behalf of citizens’ freedom and that, to him, is unpersuasive.\textsuperscript{66} He therefore suggested the use of market forces for the distribution of spectrum rather than government allocation, which he claims is made to political favorites and often end up being bought and sold in second-hand markets.\textsuperscript{67} He outlined three reasons why the market is better: 1) it will bring proceeds to the government rather than few individuals; 2) it will reduce demand for spectrum and ensure judicious use of the available spectrum; and 3) the market will ensure insulation of licensing from government and therefore gives licensees political freedom. Pool conceded that due to other uses for which spectrum is utilized, such as aviation, the government may continue to allocate the bulk of spectrum for purposes in the same way that a city zones property for residential, commercial and other uses.

Finally, Pool wondered why the broadcast media is obligated with balancing viewpoints in the name of limited spectrum when even newspapers are becoming like ‘common carriers’ of news. He then observed that the best policy is to allow broadcasters to attain freedom much like the newspapers and learn from the newspapers that the societal expectation on them is to be fair.\textsuperscript{68} Newspapers, he pointed out, “not only run columnists of opposite tendency and open their news pages willingly to community groups, but also encourage letters to the editor. Most important of all, they accept advertising from anyone.” He criticized the continued regulation not only because the basis for it is now obsolete due to the prevalence of cable and satellite, but also because of the “political selection of broadcasters” and the regulated regime is carried out by the

\textsuperscript{66} Id. at 135.
\textsuperscript{67} Id. at 139.
\textsuperscript{68} Id. at 238-239.
values and judgments of public authorities thereby undermining the “tradition of free communication.”  

However, Eli Noam, who edited Pool’s last book (based on the manuscripts Pool left), believes Pool was at times “overly negative about government policy in achieving diversity” and in the process failed to be adequately concerned with potential abuses by private power and the realities of market failure. Further, Pool’s prescription of eliminating legal barriers, says Noam, may not be adequate to give diverse voices a hearing rather, “[a] governmental role in adding to program supply seems therefore legitimate – for example, through support of the nonexclusive public broadcasting institutions, or of programs that would otherwise not be produced.” Moreover, the need for alternative programming is justified by eminent sociologist, Herbert Gans, who demonstrated that U.S. media are biased not only towards the upper-class over the poor, but they are biased towards what he called ‘core values of American journalism’ such as ethnocentrism, individualism, responsible capitalism, etc.

Among the fierce critics of the market approach are Edwin Baker and Charles Tillinghast. A University of Pennsylvania professor of law, Edwin Baker, responds to the criticisms of broadcast regulation by free marketers in is his book and elsewhere. Baker’s general premise is that “despite the lure of equating freedom of the press with free markets, constitutional law

69 Id. at 149.


71 Id. at vii – viii.


73 Id.

does not support such equation.” Baker observed that those who equate freedom of the press with free markets are usually the proponents of media deregulation who argue that public choice about media content should be left to the market. This argument, Baker said, can be countered by the ‘plausible’ assertion that often the people do not know what they want since the public only receives what the broadcaster chooses to program.

The assumption of the economics-oriented critics of media regulations, according to Baker, is that in an ideal situation, the market encourages production of items or provision of services as long as the cost of the production will be less than the price to be paid by the purchaser, i.e. there will be profit. Baker conceded that this market model may efficiently be applicable for items such as cars but the “model applies badly to media products.” This is because in many ways media products are unlike most other products. First, media products have the characteristics of what is called ‘public good,’ that is an item for which “one person’s use or benefit from the product does not affect its use by or benefit to another person.” For example, regardless of how many people watch a broadcast, it would not cost the broadcaster or receiver anything more. Therefore since not all that partake in accessing the broadcast are willing or able to pay, somebody has to be charged to cover the marginal costs of the audience who did not pay and that somebody is most likely going to be an advertiser.

Secondly, media products produce many positive and negative externalities; that is the benefit or harm that accrues to people who do not participate directly in the transaction.

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75 BAKER, MEDIA, MARKETS, AND DEMOCRACY, supra note 47.
76 Id.
77 Id. at 7.
78 Id. at 8.
79 Id.

common or rather simple example, according to Baker, is air pollution which affects us all regardless of whether we are part of the transaction that produced it or not. In the case of the media, if an individual is passionate about well-functioning democracy and public accountability, she benefits by investigative journalism and qualitative media reportage of issues such as exposing corporate corruption, whether or not the country should go to war, etc. However, the same person can be harmed by the ignorance of others “or apathy produced by inadequate consumption or consumption of misleading, distortive, and demobilizing media.”

The third difference between media and other products Baker identified is that media products are often paid for by two purchasers because “Media enterprise commonly sells media products to audiences and sells audiences to advertisers.” This situation creates an inherent conflict of interest because what the audience wants may not be what the advertiser wants, thereby creating a divided allegiance by the broadcaster who has to hover between the two purchasers. But since “influence tends to flow towards the larger purchaser,” Baker concludes that it means the advertiser, who paid more, may influence the programming.

Thus, each of the above differences between media and other products has the tendency “to lead to results contrary to what the audience wants – what it would pay for.” For example, Baker observes that unfortunately, the influence of advertisers is increasingly resulting in censorship, skewed media content, and even impaired media competition. Therefore, rather than continue to view government interventions in terms of regulation as the only source for

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80 Id. at 10-11.
81 Id. at 11.
82 Id.
83 Id. at 14.
84 BAKER, ADVERTISING AND A DEMOCRATIC PRESS, supra note 47, at 83.
violation of freedom of the press, Baker noted that “private entities in general and advertisers in particular constitute the most consistent and most pernicious ‘censors’ of media content.” And in the process, they are preventing “the media from serving the needs of democratic society.”

Baker cited and detailed numerous cases of how corporations blocked or threatened to block media contents that they abhor. One such case is Procter & Gamble’s threat to retaliate against broadcasters criticizing its purchase of El-Salvadorian coffee. The company actually withdrew advertising from a station that refused to heed the warning. Baker explained that advertisers expect, or at least want, broadcasters to put the audience in a specific mood and ‘frame of mind’ that is receptive to, or would facilitate, advertising. Advertisers also avoided programs they regarded as ‘depressing.’ A typical example of this is Coco-Cola’s policy “not to advertise on TV news because there’s going to be some bad news presented and Coke is an upbeat, fun product.” Baker outlined the dual dangers of advertisers’ pervasive influence on media to be the reduction of the diversity of the vital information that would be available to the public and the simultaneous slanting of media’s coverage in favor of the commercial perspectives.

Finally, Baker demonstrated the powerful nexus between advertising and disempowerment thus:

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85 Id. at 3.
86 Id.
87 Id. at 100.
88 Id. at 63.
89 Id. at 63. (Citing a vice president of Coca-Cola).
90 Id. at 100.
If, as studies report, media usage promotes political involvement, particularly among those to whose political interests the media respond, and if, as economic analysis predicts, advertising leads the media to be oriented toward the more affluent, then the advertising supported media should stimulate political participation primarily among the comparatively affluent. Thus, advertising’s subsidy not only distributes news in an even less egalitarian manner than would a market system where readers pay full costs of the paper, but it also quite likely depresses the comparative political participation of the poor.91

Therefore, it may be concluded that without some regulation of broadcasting, the same scenario will be replayed in the electronic media.

Another critic of market-based broadcast regulation is Charles H. Tillinghast92 who observed that of the three arguments offered against regulation of, and as justification for deregulation of, broadcasting, one is a general argument though applicable to broadcasting, while the other two are particular to broadcasting. The general argument is that regulation has been taken over by the regulated entities and the only solution “to rid regulation of that cancer will be to root out the regulation.”93 The two arguments which are specifically about broadcasting are, first, that regulation interferes with broadcasters’ First Amendment rights and other rights, most notably property rights. The proponents of this argument view government bureaucracy as rigid and believe an unfettered, free market is the best way to serve the wishes of the listeners or viewers. The second argument against broadcast regulation is that “broadcasting is simply too complex for effective regulation by any government body, especially in light of the financial limits on an agency like the FCC.”94 Consequently, with heavy workload and limited resources,

91 Id. at 69.
92 CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 143.
93 Id.
94 Id.
thorough analysis is sacrificed for political expediency in regulatory policymaking.\textsuperscript{95} Tillinghast concluded by noting that most critics of broadcast regulation are either from, or influenced by, the Chicago school of economics which “espouses all-out laissez-faire capitalism.” He then ponders if the academics who advocate free-market solutions to regulation conducted their classes in the same manner, i.e. “[t]he students, as consumers, would know what they wanted, and the instructors would be obligated to meet their expectations.”\textsuperscript{96}

In the final analysis, the socio-political realities and nature of broadcasting necessitates regulation in order to protect the public interest inherent in preserving pluralism and assuaging market failures. However, frustration with occasional failure of regulation to ensure protection of public interest or the unintended sporadic undesirable consequences of some regulations tend to call into question the rationale for regulation. Deregulation is often proffered as a solution to regulatory failure.\textsuperscript{97}

**Deregulation as Regulatory Policy**

Three justifications usually advanced for deregulation are: 1) although regulation seeks and has the noble intention of protecting public interests, it results in “unexpected and pernicious effects;”\textsuperscript{98} 2) critics argue that regulation is used to reward political allies and entrenched industrial interests; and 3) opponents of regulation contend that governmental intervention to

\textsuperscript{95} For an elaboration of this argument and other attacks on broadcast regulation, see e.g., POWE & THOMAS KRATTENMAKER, REGULATING BROADCAST PROGRAMMING, supra note 61; and POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT, \textit{Id.}

\textsuperscript{96} TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT, supra note 92 at 144.

\textsuperscript{97} EISNER, at al., CONTEMPORARY REGULATORY POLICY, supra note 6, at 15.

\textsuperscript{98} \textit{Id.}
solve socio-economic problems produces “suboptimal results when compared with the free market.” What theories may explain the policy shift from regulation to deregulation?

Three major theoretical explanations are offered for regulatory policy change. First, regulatory policy changes are mostly generated by forces within the bureaucracy. Secondly, well-organized, issues-based interest groups affect policy changes on particular issues and or programs by forming alliances with legislators and bureaucrats responsible for those issues or programs thereby ensuring mutual benefits to the three to the exclusion of nonparticipants in what some regard as ‘iron triangle.’ Finally, the principal-agent perspective argues that elected officials (principals) seeking to maximize electoral votes, regularly control the actions of regulators (agents) in order to alter policies that will maximize their votes and the agents accede in return for maximized budgetary allocation. Because each of these explanations has its strengths and weaknesses, it has been noted that “blind adherence to theoretical parsimony” in trying to explain every policy change will lead to questionable outcomes.

Moreover, while it should be admitted that the established structures of regulatory control are receding due to the “pressure of powerful ideological, technological, and economic forces,” it is misleading to characterize such changes as deregulation. This is not only because, for the most part, the rationale for public intervention has not been challenged, but also because in many sectors the deregulation of one activity has been accompanied by regulation of other activities

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99 Id.
100 Id. at 23.
101 Id. at 23.
102 Id. at 27.
103 Id. at 32.
and “explicit regulatory structures are simultaneously enacted in place of what went before.”

Therefore, what emerges in practice is better termed “regulatory reform” because it is a “paradoxical combination of deregulation and reregulation”. In conclusion, it should be noted that “while its most zealous advocates promote deregulation as a cure-all for many economic problems, it is more productive (and more accurate) to view deregulation as simply another regulatory tool, which is better suited to some problems than to others.” This is because deregulation does not mean no regulation; rather, it usually means “replacing one tool of regulation with another, less restrictive tool.”

**Independent Agencies as Imperative to Regulatory Policy**

Whether a nation is engaged in regulation or deregulation at any particular point, there is no doubt that regulatory agencies are imperative for the need of sustained specialized activity aimed at achieving regulatory policies. While not arguing that institutional arrangements for one country are appropriate for another country due to the differences in political and administrative traditions, one may agree with Giandomenico Majone that “the American experience [of independent regulatory agencies] is very instructive,” largely because the notion of independent regulatory agencies started there and much about the phenomenon has developed there. Therefore, we shall now examine independent regulatory agencies beginning

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105 Id.
106 Id.
107 EISNER, at al., CONTEMPORARY REGULATORY POLICY, supra note 6, at 15.
108 Id.
110 Id.
with their origination in the U.S. to their global diffusion and the involvement of ITU in
establishing best practices guidelines for establishing independent regulatory agencies.

Emergence of the Independent Regulatory Agencies

Among the regulatory solutions from North America and Europe that have been
internationalized are the independent regulatory agencies. In North America, the U.S. in
particular, most regulatory agencies were established by the Congress in the 1930s “as a means
of striking a balance between the needs of emerging industries and the needs of the general
citizenry.” Further, such administrative agencies were created by Congress when full attention
is needed to an issue and “the task at hand requires continuing supervision, extensive technical
considerations, or the development of expert skills, or all of these.” For example, in 1934,
Congress, in exercising the powers conferred on it by the Commerce Clause, created the
Federal Communications Commission. The Commission was empowered to regulate
communication by wire and wireless in such a manner that will serve “public interest,
convenience, and necessity.” Thus, the FCC became the regulatory agency to which Congress


112 Thomas Vicino, American Regulatory Policy: Factors Affecting Trends Over the Past Century, 31 POLICY STUD. J., 442
(2003).

113 T. BARTON CARTER, MARC A. FRANKLIN, & JAY B. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE:
REGULATION OF ELECTRONIC MASS MEDIA 35 (6TH ED., 2003).

114 USCS Const. Art. I, § 8, (To regulate Commerce with foreign Nations, and among the several States, and with the
Indian Tribes). Id. Clause 3.

115 47 U.S.C. 151 (“For the purpose of regulating interstate and foreign commerce in communication by wire and radio
so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of
race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio
communication service with adequate facilities at reasonable charges….there is hereby created a commission to be
known as the "Federal Communications Commission," which shall ….execute and enforce the provisions of this Act”).

116 47 U.S.C. § 307(a)
has delegated some of its lawmaking authority and charged it with developing expertise to oversee the administration of communications policy.\textsuperscript{117}

However, it has been observed that such agencies are constitutional “oddities…. blurring the lines between separation of powers” because they create regulations, enforce regulations and other laws, and adjudicate on cases thereby exercising legislative, executive, and judicial powers.”\textsuperscript{118} In fact, it has been found that 90% of laws that regulate Americans’ daily lives are enacted by these “non-elected, politically insulated, job-secure, career bureaucrats.”\textsuperscript{119}

In Europe, on the other hand, most independent regulatory agencies were created in the 1980s and 1990s as part of regulatory reforms.\textsuperscript{120} The intent of their creation is said to be the willingness of the political sovereigns “to delegate important powers to independent experts in order to increase the credibility of their policy commitments.”\textsuperscript{121}

The global proliferation of the telecommunications regulatory agencies began in the 1990s as indicated by the ITU data which showed that the number of national telecommunications agencies multiplied ten times from about 12 in 1990\textsuperscript{122} to 123 by mid-2003\textsuperscript{123} and their number reached 140 by the year 2005.\textsuperscript{124} Many benefits of telecommunications

\textsuperscript{117} JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTY, RESTRAINTS AND THE MODERN MASS MEDIA 369 (2004).
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 8, paraphrasing KENNETH WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 108 (1988).
\textsuperscript{120} Giandomenico Majone, From the Positive to the Regulatory State: Causes and consequences of changes in the mode of governance, 17 J. OF PUB. POLICY 139 (1997). See generally, GIANDOMENICO MAJONE, ED., REGULATING EUROPE (1996).
\textsuperscript{121} Id. at 139-140.
\textsuperscript{122} INTERNATIONAL TELECOMMUNICATIONS UNION, ESTABLISHMENT OF AN INDEPENDENT REGULATORY BODY 2 (2001).
\textsuperscript{123} INTERNATIONAL TELECOMMUNICATIONS UNION, TRENDS IN TELECOMMUNICATION REFORM 2003: PROMOTING UNIVERSAL ACCESS TO ICTS. 3 (2003).
\textsuperscript{124} INTERNATIONAL TELECOMMUNICATIONS UNION, TRENDS IN TELECOMMUNICATION REFORM 2006: REGULATING IN THE BROADBAND WORLD 17 (2006).
reform are related to the establishment of an independent regulatory agency as shown by Scott Wallsten who, using panel data covering 200 countries from 1985-1999, found that “establishing a regulatory authority before privatizing the telecom firm is correlated with improved telecommunications investment and telephone penetration” (emphasis original). Further, he found that “in a sample of 33 countries where the data were available, investors were willing to pay substantially more for firms in countries where regulatory reform took place prior to privatization…the absence of regulatory reform requires paying investors a risk premium to compensate for future regulatory uncertainty.” Thus, the ITU suggests that in order to “lay the grounds for a favorable investment climate and promote market opportunities,” national regulatory agencies should be independent. What then constitutes an independent regulatory agency?

According to Sanford Berg, et al, an independent regulatory agency should have the capacity of achieving three broad aims: protecting consumers from powerful service providers, protecting investors from arbitrary actions of government, and promoting economic efficiency. Berg, et al identified adequate resources, appropriate legal mandates, and clear


126 Id.

127 Id.

128 INTERNATIONAL TELECOMMUNICATIONS UNION, TRENDS IN TELECOMMUNICATION REFORM 2006, supra note 124.


130 Id. at 2.
agency values and operating procedures as the necessary components for designing an independent regulator.\textsuperscript{131}

In examining the independence of regulatory agencies in Europe, Michael Thatcher\textsuperscript{132} observed that agency independence from elected officials is indicated by factors such as appointments, tenure, and removals of regulators; allocation of resources; and elected officials’ retention of the power to overturn agency decision.\textsuperscript{133} He operationalized his study of this aspect of agency independence by using five factors, namely: (a) party politicization of appointments (the greater the politicization, the lower the independence and vice-versa); (b) departure of members of agencies, both ‘forced’ and ‘voluntary’ resignations because sometimes it is difficult to distinguish the two (the less departures, the more independence); (c) tenure (the longer the greater independence); (d) allocation of financial and human resources; and (e) elected officials’ overturning decisions of agencies.\textsuperscript{134} Two other factors affecting independence of the regulatory agency identified by Thatcher are (a) relationship with regulatees (indicated by agency-industry ‘revolving door’ movement of staff, legal challenges of agency decision by industry and mergers

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\textsuperscript{131} Id. at 4.

\textsuperscript{132} Michael Thatcher, \textit{Regulation after delegation: independent regulatory agencies in Europe}, 9 J. OF EUROPEAN PUB. POLICY 954 (2002).

\textsuperscript{133} Id. at 958.

\textsuperscript{134} Id. at 959 (findings indicate that appointment of agency members is generally not politicized, except with regards to Italy’s communications regulator where all members have party affiliations and many have run for office. But in Britain, “no regulator has been recently politically active or linked to a party” [p. 959]. Although no regulator has been dismissed and, on average, regulators’ tenure have been longer than that of elected officials, but he found that regulators have limited human and financial resources. Finally, elected officials rarely use their powers to overturn agency decisions. In summary, Thatcher said governments do not use their “most visible powers” to control agencies though that does not necessarily mean agencies are independent from elected officials but it is an indication that if there is politicians’ control, it is done through resource allocation and informal contacts).
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blocked by the agency);\textsuperscript{135} and (b) procedural legitimacy of the agency (as indicated by consultation, publication of information, and openness of the agency’s decision making processes).\textsuperscript{136}

Irene Wu surveyed communications regulatory agencies of 18 countries across all regions of the world who “have recently seen significant improvement in their communications network development.”\textsuperscript{137} According to Wu, indicators of the regulator’s independence from other government organizations include an agency leader with a guaranteed term of office who cannot be dismissed for unpopular decisions; funding which is independent of political review; and a scope of authority that is distinct from the government policy-making agency.\textsuperscript{138} Measures of independence from the industry include whether the incumbent operators are privately owned and whether there is frequent exchange of staff between the regulator and the regulated industry.\textsuperscript{139} Based on responses to the survey questions regarding the three indicators of agency independence from government, Wu found (and concluded) that Nigeria is one of the five countries, along with Brazil, Canada, Hong Kong, and China whose “regulators have very robust

\textsuperscript{135} \textit{Id.} at 963 (findings in this regard are generally mixed: there is an existing, but limited ‘revolving’ door policy in Europe’s agencies [p. 963]; few mergers were blocked, perhaps because firms are dissuaded from attempting mergers that will not be approved [p. 964]; and there has been significant number of legal challenges to agency decisions, except for Britain where there is virtually no legal challenge [p. 966]).

\textsuperscript{136} \textit{Id.} at 966 (findings indicate increasing openness in decision making procedures occasioned by both political and public scrutiny, legislators demand for accountability for agency decisions, and extensive media coverage of agency activities [966-968]. Participation in the debate and decision making processes has widened to include consumer groups, users, and the European Commission. Agencies have produce consultation papers and draft decisions and invite comments; they are asking industry for and making available to the public information about costs, profit margins, and service quality in order to decide/justify price structure. In conclusion, Thatcher thinks agency decision making processes represents “[t]he greatest break with the past” \textit{Id.} at 969).


\textsuperscript{138} \textit{Id.} at 27.

\textsuperscript{139} \textit{Id.}
independence from other state institutions.”

But she also observed that regulators of Brazil, Canada and Hong Kong have “strong reputations for independence” and that because “Nigeria’s regulator is newly established, future decisions will determine whether it gains a similar reputation.”

**International Telecommunications Union Study Group Report**

The imperative of independent regulatory bodies to telecommunication sector reform led the International Telecommunications Union (ITU), as the paramount telecommunications regulatory body in the world, to convene a Study Group that produced “a set of best practices guidelines for countries in transition to more liberalized telecommunications markets to establish their independent regulators.” The Study Group relied on publications and reports from international organizations involved in telecommunications and development such as the ITU itself, World Bank, and WTO.

The Report observed that in understanding what the term independent regulatory body implies, a consensus has developed around the definition contained in WTO Regulation Reference Paper, which stated that “the regulatory body is separate from, and not accountable to, any

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140 *Id.* at 14.

141 *Id.* at 14.


143 INTERNATIONAL TELECOMMUNICATIONS UNION, *supra* note 124 at 2.

144 *Id.*

145 WORLD TRADE ORGANIZATION, ANNEX TO THE FOURTH PROTOCOL TO THE GATS AGREEMENT (1997) (the “Agreement on Basic Telecommunications” negotiated under the auspices of the WTO in February 1997).
supplier of basic telecommunications services. The decisions of and procedures used by regulators shall be impartial with respect to all market participants.  

However, the Report observed that there can be no detailed definition that will be applicable to all countries due to the differences in legal and political systems and the level of telecommunications development. Therefore, in order to “facilitate the process of developing and outlining the best practice guidelines,” the Report adopted a working guideline from The McKinsey Quarterly which noted that “[w]here a regulator exists, it is important to ensure clarity of jurisdiction and defined resolution mechanisms, adequate organizational competence and funding, and political insulation. Independence derives more from this latter factor than from any formal definition, and manifests itself in regulators’ power to dissent.” Therefore, the Report recommended that “the mandate of a regulator should be clearly spelled out in national laws… the law must specifically identify the regulatory authority and it must specify its mandate and authority.” Apart from the “structural separation of the regulator from the Ministry” which the Report says “increases perception of regulatory independence,” the Report also outlined other indicators for assessing the perceived independence of the regulatory agencies from government. Foremost among the indicators is the “method of appointment of the head of the

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146 INTERNATIONAL TELECOMMUNICATIONS UNION, ESTABLISHMENT OF AN INDEPENDENT REGULATORY BODY, supra note 124.

147 Id.


149 INTERNATIONAL TELECOMMUNICATIONS UNION, ESTABLISHMENT OF AN INDEPENDENT REGULATORY BODY, supra note 124 at 2-3.

150 Id. at 3.

151 Id. at 8.
regulatory body and his tenure.”\textsuperscript{152} The report noted that although there are variations in the practices of appointing regulatory agency heads depending “on the political and administrative tradition of the country in question,”\textsuperscript{153} but it concluded that “[r]egardless of the method of appointment, an effort should be made to ensure that the head of the regulatory body enjoys guaranteed term of office”\textsuperscript{154} in order to promote independence from both the government and other political interests. The Report observed that “Where a collegiate body heads the regulator, the members of that body are commonly appointed in staggered fixed terms.”\textsuperscript{155}

On the financing a regulatory authority, the Report observed that regulators are typically funded either through “general government appropriations or fees and contributions or a combination of both.”\textsuperscript{156} Nigeria, alongside U.S. and Nepal were listed among countries in the latter category. However, increasingly, regulators are using fees such as license fees, spectrum fees, and numbering fees as financial sources. Among the advantages of funding regulators through fees, especially in developing economies, is that “recourse to fees and contributions would reduce the financial burden on governments who may not be able to ensure a consistent budgetary amount.”\textsuperscript{157} The Report urged the necessity of minimizing costs passed on to the consumer when funding through fees and recommended that “The regulator should ensure that the financial and budgetary aspect of regulation is made transparent to the public.”\textsuperscript{158}

\begin{flushleft}
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 8.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 7.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\end{flushleft}
The Report stated that having and adhering to principles of the decision-making process enhances not only “public trust and confidence in the decision of the regulator, [but also] these principles or guidelines provide a necessary context in which the regulator applies the rules set out, promoting in turn predictability, clarity, and consistency in decision making process.”\textsuperscript{159} The Report observed that many regulators’ decision-making principles are laid out in legislation and identified four “indicators that can be used to measure adherence to the decision-making principles set out.”\textsuperscript{160} These indicators are transparency (in terms of publishing in print and online papers, studies, proposed rules or other decisions);\textsuperscript{161} timely implementation of decisions (such as timelines for decisions, issuance of license);\textsuperscript{162} feedback and monitoring mechanisms (reviewing previous decisions to ensure results are as intended or not);\textsuperscript{163} and finally, private sector participation and public involvement (i.e. seeking input from all parties to be affected and gathering all the necessary information) in order to enhance legitimacy and transparency of regulations.\textsuperscript{164}

The Report noted that “[t]he question of independence becomes more obvious when considering the issue of who can overturn the decisions of the regulator.”\textsuperscript{165} Whereas in almost all countries the independent regulator has some reporting requirement either to the responsible Ministry, the legislature or just to publish an annual report, the report stated that “in many

\begin{itemize}
  \item\textsuperscript{159} Id. at 16.
  \item\textsuperscript{160} Id.
  \item\textsuperscript{161} Id.
  \item\textsuperscript{162} Id.
  \item\textsuperscript{163} Id. at 17.
  \item\textsuperscript{164} Id.
  \item\textsuperscript{165} Id. at 8.
\end{itemize}
countries the decision of the regulator cannot be overturned except through a court decision on appeal…. [in] a substantial number of countries, … the Minister or the cabinet [has] the power to overturn decisions of the independent regulator on appeal or at their own discretion.”166 Unfortunately the report did not suggest any preferred way for ensuring oversight of the regulators’ decisions.

Therefore, from the foregoing discussion of the ITU Report, it may be concluded that the major indicators of a regulatory agency’s independence are the security of the leadership’s tenure, financial independence, and fair, transparent and accountable decision-making procedures.

Conclusion

This chapter examined the theoretical literature concerning regulatory policy, deregulation, and regulatory agencies. Although there are four theories that provide justification for policy and regulation, there are also two major theories that criticize government intervention in form of regulation and or policy. Whereas the proponents of regulatory policy intervention are concerned with public interest and the potential failures of the market, the critics of government intervention prefer the free market forces’ allocation of resources and believe in the self-corrective possibilities of the marketplace. While deregulation is presented as solution to occasional problems associated with regulation, others argued that deregulation is only an additional tool for policymakers and most sectoral deregulations are accompanied by other regulations. Finally, the imperative of independent regulatory agencies, and American invention, has been shown to include not only ensuring transparency in the regulatory policy process, but, in the case of developing countries such as Nigeria, attracting foreign investment. The global

166 Id.
recognition of the importance of these independent agencies has led the International Telecommunications Union to commission a study and publish a report on the best practices for establishing such agencies.
CHAPTER 3
HISTORICAL EVOLUTION OF THE OWNERSHIP STRUCTURE OF COMMUNICATIONS INDUSTRY

This chapter examines the transformation of telecommunications and broadcasting regulation in Nigeria from restricted government monopoly to the beginning of deregulation and market competition. The chapter surveys the history of telephony and broadcasting in Nigeria, including the incremental reforms in the communications sector beginning with partial commercialization in the 1980s to the implementation of the Structural Adjustment Program. The chapter then discusses the debate on national communications policy and concludes by reviewing the commencement of the deregulation of the communications sector and the establishment of the two regulatory agencies.

Colonial and Post-Colonial Communication Policies

Both telephony and broadcasting were introduced to Nigeria by the British colonial government in the early part of the 20th century. One thing common to the colonial government’s policy for both broadcasting and telephony is the tight, monopolized control of both sectors by Her Majesty’s government. This legacy of monopoly was continued for better or for worse by the subsequent post-colonial governments in Nigeria. First, the colonial and post-colonial policy on broadcasting will be examined.

Colonial and Post-Colonial Monopolization of Broadcasting

Broadcasting in Nigeria began through rebroadcasting in 1932\(^1\) when the colonial government established a facility in Lagos to serve as a rediffusion station that picked up and retransmits the short-wave signals of the BBC Empire Service.\(^2\) Subsequently, more facilities


\(^2\) *Id.* at 87.
were established in other Nigerian cities. In 1957, three years before independence, the broadcasting service became Nigerian Broadcasting Corporation, hereafter the corporation. As a government entity, the Corporation depended on government for its budget because, even though owners of radio and television receivers paid license fees, the revenue was inadequate and went directly to the central government’s treasury. Moreover, in its early days, the Corporation was prohibited by its ordinance from advertising.

It was argued that broadcasting should be free from direct political control was what led to converting the National Broadcasting Service into a public Corporation. However, it has also been pointed out that British colonialists held on firmly to the control of broadcasting without believing in the independence of public service broadcasting. It was only when it became obvious that their colonial rule was ending that they established statutory corporations that were to be largely independent of the new African governments.

Under the new independent Nigerian government, broadcasting remained the monopoly of the government for various reasons, foremost among, the provision of the 1963 Constitution, which guarantees freedom of expression without expressly providing the right to own and

\(^3\) Id. at 80.

\(^4\) GRAHAM MYTTON, MASS COMMUNICATION IN AFRICA 63, (1983).

\(^5\) Kolade, Broadcasting in Nigeria, supra note 1 at 80-81.

\(^6\) Id. at 81.

\(^7\) Id. at 84 (citing NBC Ordinance, pt. 3, clause 14).

\(^8\) Id. at 80.

\(^9\) GRAHAM MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4 at 65 (1983).

\(^10\) Section 25(1) of the 1963 Constitution provided that “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.” It has three caveats providing that a law “that is reasonably justifiable in a democratic society” shall not be invalidated by this provision where such law is made in the “interest of defence, public safety, public order, public morality or public health... or [for the purpose of] regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films.” S. 25(2a-c).
operate a broadcast media. Other reasons advanced for continuing government monopoly of broadcasting included the need to use broadcast media heavily for development communication such as mass literacy, health education, and agricultural extension. According to C. Ulasi, whereas the colonial government monopolized broadcasting for “propaganda purposes, political control, and the diffusion of crisis information, Nigerian inheritors of the colonial state have equally justified state monopoly of broadcasting for reasons of political stability, unity, and public interest goals as they see them.” But just before full independence and soon thereafter, the Regional governments (that later became states) established their broadcasting services. The Regions’ main motivation for establishing their broadcasting systems was allegation of the Corporation’s “partiality and partisanship;” allegations that one analyst described as “both real and imaginary.”

The history of regional broadcasting is almost the beginning of television broadcasting in Nigeria and indeed in Africa because in October 1959, Western Region’s television station based in Ibadan, pioneered television broadcasting on the African continent with the call sign WNTV. Eastern regions’ station, based in Enugu with the call sign ENTV, went on air a year later. In 1962, the Northern region and the federal government commenced television

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12 Id. at 325.


14 Id. at 41.

15 Id.

16 Id. at 40.

17 Kolade, Broadcasting in Nigeria, supra note 1, at 85.

18 UCHE, MASS MEDIA, PEOPLE, AND POLITICS IN NIGERIA, supra note 13 at 40.
broadcasting with RKTV based in Kaduna and NBC-TV based in Lagos respectively. It should be noted that each of the regions almost simultaneously established radio broadcasting alongside their TV stations. Although these regional broadcasters introduced some competition in the broadcasting environment and increased the range of available programs, they also introduced sectional and divisive politics as one critic stated:

The sole responsibility of regional broadcasting is to radiate a Regional image…The setting up of regional corporations does not bring about true competition. That can only be achieved by setting up a number of corporations having national coverage and offering a range of programmes which would benefit the whole country. There is no sign of that in Nigeria. Whatever the benefits – and there are benefits – the cost is too high and danger exists that divided control in a developing society may promote regional feeling instead of encouraging the desire to live together and act together.

Regardless of the merits and disadvantages of the regional broadcasting, they have at least altered the structure of broadcasting in Nigeria.

The structure of broadcasting continued to comprise only the national broadcaster (the Corporation) and the regional broadcasters throughout the First republic (1960-1966) and for most of the 1960s. After the overthrow of the First Republic, a new military regime abolished the regions and created 12 states. The NBC established broadcasting stations in the capitals of the 12 states where there were none. Thus, NBC’s stations were found in Lagos, Ibadan, Kaduna, Sokoto, Kano, Maiduguri, Jos, Enugu, Calabar, Port Harcourt, and Benin.

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20 UCHE, MASS MEDIA, PEOPLE, AND POLITICS IN NIGERIA, supra note 13.
23 *Id.*
Another military regime was to restructure broadcasting in 1976 and 1979. By virtue of the Decree No. 24 of 1976, (hereafter the NTA Decree), all television stations established by the regions, and inherited by states, were taken over by the federal government. All the stations were to be managed by the newly established Nigerian Television Authority (NTA). The NTA was mandated to provide “as a public service in the interest of Nigeria, an independent and impartial television broadcasting for general reception within Nigeria.” The NTA also had to ensure that its services “reflect the unity of Nigeria as a federation… [and] give adequate expression to the culture, characteristics, and affairs of each state, Zone, or other part of the federation.”

But a sweeping provision of the NTA Decree apparently conferred, to some extent, the function of a regulatory agency on the NTA as provided thus: “The authority shall, to the exclusion of any other broadcasting authority or any person in Nigeria, be responsible for television broadcasting in Nigeria.” The Decree sought to make the NTA an independent broadcaster by requiring that its “programmes maintain a proper balance” and ensure “due impartiality” especially in reporting political matters, industrial controversy, or public policy. The major drawback to this, however, is the Decree’s provision that imposed on the NTA the

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24 NIGERIAN TELEVISION AUTHORITY DECREE NO. 24 (1976).
26 NIGERIAN TELEVISION AUTHORITY DECREE, supra note 24 S.7(1).
27 Id. S. 6(1).
28 Id. S. 6(2).
29 Id. S. 7(1).
30 Id. S. 9(1b).
31 Id. S. 9(1c).
32 Id. S. 9(1d).
duty to broadcast government programs such as ministerial speeches consisting “wholly statements of fact or which explain the policy and action of the government”\(^{33}\) as well as government announcements “requested by an authorized public officer.”\(^{34}\)

Three years after enacting the NTA decree, the same federal military government that seized and centralized television stations and programming decentralized radio broadcasting by handing over 17 radio stations owned by the NBC to the states where they were located through the promulgation of the Federal Radio Corporation of Nigeria Decree (hereafter FRCN Decree).\(^{35}\) But the FRCN Decree left the SW broadcasting stations in Kaduna, Enugu, Ibadan, and Lagos under the control of the federal government while also outlawing SW transmission by any state broadcasting station and decreed all state radio stations to limit their broadcast to the AM/MW bands.\(^{36}\) The functions of the FRCN with regards to impartiality and balance outlined by the Decree were very similar to NTA’s functions outlined in S. 2(1-4).

With the promulgation of the NTA and FRCN decrees, the federal government owned radio and television stations and the state governments owned radio stations. Specifically, the states were left or confined to the AM/MW band while the federal government owned stations that transmitted nationally on the SW band.\(^{37}\) This was the structure of broadcasting left behind by the military regime which handed over power to a democratically elected government on October 1, 1979.

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\(^{33}\) Id. S. 10(a).

\(^{34}\) Id. S. 11(1).

\(^{35}\) **Federal Radio Corporation of Nigeria Decree, supra** note 25, Schedule 3(8(1)).

\(^{36}\) Id. S. 6(1).

\(^{37}\) **Mytton, Mass Communication in Africa, supra** note at 119.
The 1979 Constitution which ushered in the Second Republic contained freedom of expression provisions very similar to the Second Republic’s 1963 Constitution, but it added the right to own any medium for the dissemination of ideas, information and opinions. However, there was a caveat that stated “no person other than the Government of the Federation or of a State or any other person or body authorized by the President shall own, establish or operate a television or wireless broadcasting for any purpose whatsoever.” On the face of it, this provision can be interpreted to mean that any person interested in owning broadcast media can seek for presidential authorization. However, it soon became obvious that it is not private individuals or bodies that would own radio and television stations; rather, it was the governments of the various states as well as the federal government itself.

Perhaps the provisions regarding impartiality and maintaining proper balance when reporting political and other controversies enshrined in the decrees of NTA and FRCN were not yielding the intended results during the Second Republic for three major reasons. First, there were allegations of bias against federal government-owned media by the states that were controlled by the opposition parties. Although there are cases of bias by the federal government media, Graham Mytton argued both the FRCN and NTA were conscious of their credibility and the implications of being perceived as organs of the federal government (or worse the ruling

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38 Section 25(1) of the 1963 Constitution provided that “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.” It has three caveats providing that a law “that is reasonably justifiable in a democratic society” shall not be invalidated by this provision where such law is made in the interest of defence, public safety, public order, public morality or public health,... or [for the purpose of] regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films.” S. 25(2a-c).

39 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA S. 36(2).

40 Id. S. 36(2).

41 MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4 at 122; see also UCHE, MASS MEDIA, PEOPLE, AND POLITICS IN NIGERIA, supra note 13 at 56.
National Party of Nigeria). Therefore both media have maintained some degree of impartiality in reporting controversies including sides that were very critical of the federal government.42

The allegation of bias prompted many states controlled by opposition parties such as Lagos, Plateau, and Kano to establish their own television stations.43 Secondly, and similarly, the federal government complained of bias by radio stations of states controlled by the opposition parties44 and therefore it established FM stations in nearly all the state capitals of the federation.45 Thirdly, both the ruling party and the opposition were at consensus that neither of them should be allowed to control the various government-owned media during the subsequent general elections.46 Consequently, the National Assembly (Nigeria’s congress) enacted the 1982 Electoral Act that established a National Advisory Council to supervise and or oversee federal and state governments owned media for three months prior to and one month after the elections.47 The Council was made up of members of all political parties. The president was said to have complained bitterly about the provision but grudgingly assented to the Act.48

During the Second Republic, the newly established state television stations were confined to UHF channels because there was not enough spectrum on the VHF band that was being used

42 MYTTON, MASS COMMUNICATIONS IN AFRICA, Id. at 122.
43 Id. at 120.
44 UCHE, MASS MEDIA, PEOPLE, AND POLITICS IN NIGERIA, supra note 13 at 56; see also MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4 at 124.
45 MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4, at 124; see also UCHE, Id. at 56.
46 UCHE, Id. at 152.
47 UCHE, MASS MEDIA, PEOPLE, AND POLITICS IN NIGERIA, supra note 13, at 152; see also MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4 at 130n.
48 MYTTON, MASS COMMUNICATION IN AFRICA, supra note 4 at 130n (president Shehu Shagari was reported to have said he does not like this provision and hoped the National Assembly will consider amending it, FRCN, Lagos, 6th August, 1982).
by the federal government-owned television stations.\textsuperscript{49} Notwithstanding the UHF/VHF politics, many television stations were established by the opposition parties in states they controlled such as Lagos, Kano, Plateau, Ondo, and Gongola.\textsuperscript{50} The various state and federal government media outlets ensured that it was very difficult, if not impossible, to suppress information because what one medium suppressed, another will publish or broadcast.\textsuperscript{51}

In general, during the Second Republic (1979-1983), Nigeria was said to have the most diverse media in Africa\textsuperscript{52} as indicated by the estimated 15 dailies, 12 political weeklies, 25 radio stations and 32 television stations, all of which became conduits for political battles because the political pluralism (with 19 states, five political parties each of which controlled not less than two states) was clearly reflected in the media.\textsuperscript{53} Consequently, as they reported politics, the Nigerian mass media became “in every sense, political institutions of central importance to the functioning of Nigerian democracy.”\textsuperscript{54}

By the time the military overthrew the Second Republic in December 1983, the structure of broadcasting in Nigeria comprised federal government-owned radio and television stations that broadcast on VHF and SW/FM, and state government owned radio and television stations that broadcast on AM/FM/MW and UHF. It is not on the record that any private entity sought a license for broadcasting during the Second Republic, therefore the opportunity to test the Constitutional provision authorizing the president to grant broadcast license was missed. The

\textsuperscript{49} Id. at 119.
\textsuperscript{50} Id. at 120.
\textsuperscript{51} Id. at 119.
\textsuperscript{52} Id. at 79.
\textsuperscript{53} Id. at 118.
\textsuperscript{54} Id.
new military regime maintained the structure of broadcasting inherited from the Second Republic for the first few years. However, by the late 1980s certain factors indicated a change in the status quo of a government monopoly of broadcasting in Nigeria.

**Colonial and Post-Colonial Monopolization of Telephony**

In many African nations, including Nigeria, the telephone was introduced by European colonialists as a “mechanism of control and governance.” Nigeria’s case of telecommunication introduction is very similar to that of many African countries. Nigeria’s colonizer, Britain, as prominent Nigerian historian, J. F. Ade Ajayi observed, in order to “protect and expand her trade in the interior,” saw the need “to establish and control communications, railways, a telegraph systems and roads that cut across the existing states and communities.” The increased communication helped consolidate the powers of the British governor as more issues were then referred to colonial Secretariat in Lagos “where it can be said that everything going on the country was regulated on paper.” This is evidenced from the fact that in 1886 the first cable connection was established between Lagos and colonial office, London. The first commercial trunk telephone was only completed in 1923 and by 1952 the lines have been extended to connect the major commercial and regional political centers of Lagos, Ibadan, Kaduna, Kano, and Enugu among themselves and to the London colonial office. However, these colonial telecommunication facilities “were geared towards discharging administrative functions rather

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57 *Id.* at 23-24.

58 *Id.* at 28.


60 *Id.* at 163.
than the provision of socio-economic development of the country.” 61 Further, and unfortunately, the colonialists left behind both inadequate infrastructure and an “obsolete organizational structure” 62 characterized by a state monopoly system called Post, Telephone and Telegraph (PT&T).

After Nigeria gained political independence in 1960, similar to many nations that became independent in the 1960s, telecommunications was recognized as a tool for economic development and therefore was refocused towards achieving “national coherence and development.” 63 However, many independent African nations including Nigeria retained the system of state monopoly of telephony as part of their central economic planning and partly because of how the new countries’ cherished their national sovereignty. 64

Nigeria’s post-colonial government retained monopoly of telecommunications facilities under the auspices of Department of P&T and the constitution vested the Federal Legislature with the “exclusive” power to make laws regarding “Posts, telegraphs, and telephones,” as well as “Wireless, broadcasting and television…allocation of wavelengths for wireless, broadcasting and television transmission.” 65 The Cable and Wireless Act of 1962 vested the Ministry of Communications with the power of regulation of telecommunications.

Notwithstanding the continuing monopoly of the control and regulation of telecommunications by the federal government, Nigeria’s new leaders sought to address the inadequacy of telecommunications infrastructure through the First National Development Plan

62 Noam, Introduction, supra note 55 at 3.
63 Id.
64 Id.
(1962-68) by increasing telecommunication facilities for the major urban areas, that are also the commercial and industrial centers of the country.\textsuperscript{66} The Plan proposed the installation of additional 60,000 lines to the existing 30,000 lines.\textsuperscript{67} The Plan succeeded in ensuring the construction of a microwave linking those commercial and industrial cities as well expanding the international telephone and telex services. But of the proposed 60,000 lines, only 26,000 were installed\textsuperscript{68} such that by the late 1960s, there were only a total of 48,000 installed lines.\textsuperscript{69}

In short, the early years of post-independence and throughout the 1960s witnessed little improvement in terms of the development of telecommunications infrastructure and availability of telecommunications services largely because of the political turmoil, especially the civil war, which disrupted Nigeria’s economic activities including the expansion of telecommunications facilities.\textsuperscript{70} But the next decade and half witnessed some progress with increased installed lines, satellite earth stations, and the complete take over of international telecommunication services by the government through the acquisition of the controlling shares in the Cable & Wireless of UK, renamed the Nigerian External Telecommunications (NET).\textsuperscript{71} Moreover, the three post-civil war National Development Plans also incorporated telecommunications development, which ensured the repairing of war-damaged facilities, the introduction of Nigerian Domestic Satellite


\textsuperscript{67} Chuka Onwumechili, \textit{Dream or reality: providing universal access to basic telecommunications in Nigeria?} 25 \textit{TELECOMMUNICATIONS POLICY} 219 (2001).

\textsuperscript{68} Ajayi, et al., \textit{Nigeria After a Century of Telecommunications Development, What next?} supra note 59 at 164.

\textsuperscript{69} Akwule, \textit{Telecommunications in Nigeria}, supra note 66 at 242 (this figure does not add up taking into cognizance Onwumechili’s assertion that there existed 30,000 lines to which the new post-colonial government wanted to add 60,000 but succeeded in adding only 26,000).

\textsuperscript{70} Ajayi, et al., \textit{Nigeria After a Century of Telecommunications Development, What next?} supra note 59 at 164.

\textsuperscript{71} Id. at 165.
(DOMSAT) that operates using leased INTELSAT transponders, and the construction of alternative international telecommunications network with submarine cables.

By 1984, the structure of the telecommunications sector comprised Department of Posts and Telecommunications (P&T), responsible for internal telecommunication services; and NET, responsible for external telecommunications and thereby providing “the gateway to the outside world.” Both P&T and NET were under the Ministry of Communications. But while NET was given some autonomy, which perhaps is why it was profitable and even generating foreign exchange for the country, P&T remained tightly controlled by the government and was losing money. This might have informed the decision of the military regime to initiate a re-organization of the Ministry of Communication’s parastatals, including a modest reform of the telecommunications sector in 1985. The telecommunications and postal divisions of P&T were decoupled and the telecommunications division was merged with NET to form a limited-liability company called Nigerian Telecommunications Limited (NITEL), whose main objective was “to harmonize the planning and co-ordination of the internal and external telecommunications services, rationalize investments in telecommunications development and provide accessible, efficient and affordable services.”

There are two other major outcomes of the reorganization of the Ministry of Communications’ parastatals. First, is the emergence of what seemed like the precursor to the current NCC, i.e. the creation of the Technical Services Department in the Ministry with responsibility for “some of the regulatory and administrative aspects of telecommunications,

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72 FEDERAL REPUBLIC OF NIGERIA, NATIONAL TELECOMMUNICATIONS POLICY, supra note 61 at 11.
73 Akwule, Telecommunications in Nigeria, supra note 66 at 244.
74 FEDERAL REPUBLIC OF NIGERIA, NATIONAL TELECOMMUNICATIONS POLICY, supra note 61 at 12.
75 Id.
including frequency allocation and management, and manufacturing." Secondly, NITEL was granted some autonomy that enabled it to raise tariffs in line with the devaluation of the national currency. As a result, the company raised its tariffs by 600% and 800% in 1988 and 1990 respectively.

These modest reforms in the form of reorganization of the ministerial parastatals yielded some development in the telecommunications infrastructure and quality of services. For example, by the time the reform commenced in 1985, the installed capacity of lines was 295,350 with only 194,499 lines connected; but six years after, that is by 1991, while NITEL’s number of installed capacity had risen to 450,000 lines, only about 294,000 lines were actually connected. Further, more than 500,000 applicants were waiting for NITEL to provide them with lines. The alternative solution faltered as Bala Muhammad observed:

To compensate for its dismal performance in the residential sector, NITEL has for long been operating a payphone system. Soon after the monopoly’s inception in 1985, ITT was contracted to supply and install payphone kiosks all over the country. This coincided with a downturn of events in the Nigerian economy, and the coin-boxes became easy prey for the hard-up. Therefore, due to vandalisation in the coin-operated system, it was soon withdrawn from service.

Finally, rural telephony remained problematic even though the rural areas are where 70% of Nigerians live. Even the attempt to issue private radio licenses for rural areas resulted in only

76 Akwule, *Telecommunications in Nigeria, supra* note 66 at 244.
77 Onwumechili, *Dream or reality: providing universal access to basic telecommunications in Nigeria? supra* note 67 at 226.
80 Akwule, *Telecommunications in Nigeria, supra* note 66 at 246.
little, if at all any, progress in improving telecommunications facilities in the rural areas. In short, at the beginning of the 1990s, telecommunications services in Nigeria were not only monopolized by the government’s NITEL, but services were inadequate or poor for the urban residents and sadly unavailable in the rural areas where a majority of the nation’s populace resides. It is at this point that major regulatory policy reforms commenced in both telecommunications and broadcasting.

**Commencing Regulatory Reforms**

The first factor often cited for the commencement of regulatory reforms is the IMF/World Bank-induced economic reforms that emphasized the privatization and or commercialization of public corporations. The goals of the reforms, which were part of the Structural Adjustment Program (SAP), were said to include efficient and effective management of the (privatized) corporations to ensure profitability and end the wasteful expenditure of government resources on public corporations. This began in the 1980s, after many developed countries followed U.S., Britain, and Japan to reform their monopoly telecommunication sectors. In the name of SAP, the World Bank sought compliance not only with the project-specific conditions it normally attaches to loans, but it also asked for the initiation and adherence to broad sectoral and even national macroeconomic reforms. The World Bank pushed for reforms especially within the telecommunications sector in many African countries by linking

81 Id.


83 Mohammed, *Id.* at 83.


loans to progress in reforms, including corporatization (commercialization) and privatization. For example, in the case of Nigeria, a 1990 World Bank decision to suspend a $225 million telecommunications loan was said to be critical to the commencement of major reforms and the deregulation of the telecommunications sector because the Bank cited the need to strengthen the country’s policy framework, commercialize NITEL, and improve access to services as part of the reasons for its action. In 1988, the military regime promulgated a Decree on the reforms program and set up a committee known as the Technical Committee on Privatization and Commercialization to execute the privatization and commercialization of public corporations.

The second often cited factor is said to be local, or rather national, in the sense that within the country there were pressures resulting from the demands for telecommunications services on the one hand, and agitations by leading industry professionals and journalists for the licensing of private broadcasters. Two seminars on telecommunications and broadcasting in the late 1980s provided the forum for the articulation of the local agitations and pressures for policy reforms. At the seminar on telecommunications policy, many argued that the massive investment by government in the sector had produced negligible improvements in telecommunications services and insignificant developments in telecommunications

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87 *Chuka Onwumechili, Reform, Organizational Players, and Technological Developments in African Telecommunications: An Update, at p. 137 (2003).*

88 *Commercialization and Privatization Decree No. 25 of 1988.*

89 *Akwule, Telecommunications in Nigeria, supra* note 66 at 241.

90 *Ogundimu, Private-enterprise broadcasting and accelerating dependency: Case studies from Nigeria and Uganda, supra* note 82.


92 *See generally Tony Nnaemeka, Egerton Uvieghara, Didi Uyo, eds., Philosophy and Dimensions of National Communication Policy (1989).*
infrastructures. It was contended that both the operational and managerial problems of the sector were caused by the government’s monopoly of the provision of telecommunication services and infrastructures. While the telecommunications policy seminar did not result in the formulation of a national telecommunications policy, the seminar on broadcast reform succeeded in that regard through the recommendations of the Committee on National Mass Communications Policy.

One of the major forums where the debate about the propriety or otherwise of private broadcasting took place was the seminar on National Communication Policy organized by the Federal Ministry of Information and Culture. This seminar brought together practitioners as well as scholars from communication and related interdisciplinary subjects. The gathering, which took place in August 1987, had ideological advocates from the left, right, and the ‘middleroadists.’ The report of the seminar was subsequently modified by various government appointed panels and eventually adopted on April 10, 1990 by the then highest rule-making body of the federation, the Armed Forces Ruling Council, as the National Mass Communication Policy (NMCP). Before delving into the provisions of NMCP, it may be apt to briefly highlight

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95 NATIONAL BROADCASTING COMMISSION, NIGERIA BROADCASTING CODE (2002).
96 FEDERAL MINISTRY OF INFORMATION, NATIONAL MASS COMMUNICATION POLICY 3.
97 Id. at 5.
98 Id. at 3-4.
99 Id. at 4.
some of the arguments of the proponents and opponents of broadcast privatization, especially those presented at the seminar as well as witnessed in scholarly writings.

Proponents of private broadcast ownership argued that privatization will increase the medium available for public discourse on policy issues because “An informed public is a sine qua non for a democratic society.” They dismissed arguments about potential threats to national stability by observing that “Precisely how ethnic and civil strife might result from private competition in broadcasting has never been explained.” But an opponent of privatization observed that private broadcasters are likely to rely on foreign programming that may threaten cultural identity and peace and stability, arguing that a:

private operator in his drive for profits will air, ‘What the people want’, rather than ‘what the people need’. In most cases, as shown in the UK, Italy, Canada, Australia, and the USA, this has been interpreted to mean sex, violence, fashion, cars and gossip. Since private broadcasters will be forced to compete for adverts, they will appeal to the lowest common denominator in order to capture the largest audience.

This argument buttresses the concern for the need to use broadcasting for development communication rather than for commercial enrichment of the operator.

Others took the middle position by arguing neither for unfettered privatization nor for continued government monopoly. For example, Mohammed explored the argument that privatization and or competition will result in diversity of choice for the audience and reduce government control. He contended that broadcasters’ consideration for revenue, more than

\[\text{References:}\]

100 Egerton Uvieghara, Law reform and national communication policy, in PHILOSOPHY AND DIMENSIONS OF NATIONAL COMMUNICATION POLICY, supra note 92 at 377.

101 Ulasi, Broadcasting and the Corporate state in Nigeria: Policy, Politics, and Society: Past and present, supra note 11 at 339.

102 Madu G. Mailafiya, Media policies in Nigeria and selected Third World countries, in PHILOSOPHY AND DIMENSIONS OF NATIONAL COMMUNICATION POLICY, supra note 92 at 138.

103 Mohammed, Democratization and the challenge of Private Broadcasting in Nigeria, supra note 82 at 81.

104 Id. at 87.
audience’s taste, was likely to inform programming.\textsuperscript{105} He observed that the experience of a Nigerian privately owned print media taking sides with government and serving almost as the ruling party’s newsletter raised doubts about elimination of government control.\textsuperscript{106} He also wondered if quality programming and competition were not incompatible\textsuperscript{107} as the quest for profit margin leads to cuts in labor and production costs,\textsuperscript{108} which can hardly guarantee quality programming that is relevant to the national polity.\textsuperscript{109} Mohammed cautioned against broadcast liberalization that would lead to the rich and powerful becoming richer and more powerful while the poor and powerless get poorer and more powerless.\textsuperscript{110} To minimize this likelihood and particularly the possible concentration of ownership,\textsuperscript{111} he recommended that apart from legal requirements, corporate bodies with development-oriented interests such as pressure groups, higher education institutions, and communities, rather than those with profit-making interests, should be accorded priority in licensing.\textsuperscript{112} A similar observation was made by Emmanuel Akpan,\textsuperscript{113} who argued for the need to allow private ownership of broadcast media and to create an independent regulatory body with power to grant and cancel licenses. Akpan suggested that

\textsuperscript{105} Id. at 87.
\textsuperscript{106} Id. at 88
\textsuperscript{107} Id. at 92
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 93.
\textsuperscript{111} Id. at 94.
\textsuperscript{112} Id.
the granting of licenses should give emphasis to small and local broadcasters that are likely to provide an opportunity for democratic discussions.114

These and many other discussions informed the provisions of the National Mass Communication Policy. The policy noted that since Nigeria does not have a state ideology,115 the philosophy of the national mass communication policy can be based on chapter two of Nigeria’s constitution which outlined “The Fundamental Objectives and Directive Principles of State Policy.”116 Thus, the objectives of the policy included identifying the critical mechanisms or institutions involved in the development of Nigeria’s communication system and providing guidelines for the mobilization of such mechanisms and institutions to achieve national objectives;117 ensuring better management of communication resources;118 harnessing cultural wealth and cultivating deep sense of patriotism and propagating distinctive national identity;119 protecting and furthering at home and abroad Nigeria’s national interests and security;120 and encouraging and promoting “indigenously rooted innovation for the collective good rather than for individual self-expression.”121

The NMCP provisions regarding electronic media are contained in the policy’s Chapters IV and XII, which dealt with electronic media and regulatory agencies respectively. In Chapter

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114 Id. at 225-226.
115 FEDERAL REPUBLIC OF NIGERIA, NATIONAL MASS COMMUNICATION POLICY 5.
117 FEDERAL REPUBLIC OF NIGERIA, NATIONAL MASS COMMUNICATION POLICY 5-6.
118 Id. at 6.
119 Id. at 6.
120 Id. at 6.
121 Id.
IV, the policy noted the importance of electronic media in general and the “immense and limitless” potential of the visually oriented ones in particular. The policy objectives for electronic media included disseminating information to enhance the health, economic, cultural and other welfares of the populace; providing comprehensive coverage of the Nigerian culture; utilizing programs as vehicles for mobilizing the rural populace for national development; positively contributing to the “promotion of national unity and national integration by making sure that there is balanced presentation of views from all parts of the country;” emphasizing the broadcast of news and programs in indigenous languages; and providing “regular channels of communication between the government and the people” and providing “opportunity for healthy discussion of important national issues designed to enlighten and mobilize the public.”

With regards to the ownership of electronic media, the policy recommended that the provisions of 1979 Constitution was adequate and concluded that “[t]he time is not yet ripe for private ownership of the [electronic] media.” As part of the implementation strategy, the policy recommended the establishment of a regulatory body to ensure compliance with the provisions of the policy as well as redressing the rural-urban imbalance of information flow and recommended the establishment of rural viewing centers to enhance the flow of information.

\[122\] \textit{Id.} at 9.

\[123\] \textit{Id.}

\[124\] \textit{Id.} at 10.

\[125\] \textit{Id.}

\[126\] \textit{Id.}

\[127\] \textit{Id.}

\[128\] \textit{Id.}
Chapter XII of the policy observed that the two vital roles of laws as frameworks for sound communication policy\textsuperscript{129} are the (i) acceptance of press freedom as the “bedrock of a democratic and egalitarian society”\textsuperscript{130} and (ii) recognizing the need for protecting “the administration of government, public men, and security of life and property.”\textsuperscript{131} The policy therefore recommended the enactment of laws guaranteeing freedom of the press including right to access to information and the right not to disclose sources of information,\textsuperscript{132} as well as enactment of “humane laws which will ensure that the rights and freedoms are not abused or misused.”\textsuperscript{133} As part of the implementation strategy for these recommendations, the NMCP suggested the establishment of two regulatory bodies, to be known as National Communication Commission and the Nigerian Media Council. When established, the National Communication Commission will have three specialized divisions on print media, electronic media, and training and research in mass communication.\textsuperscript{134} The functions of the National Communication Commission, as it relates to broadcasting, include, among other things, the regulation and supervision of the operations of national media; providing parameters for all broadcasting stations (national, state, privately-owned or commercial broadcasting stations),\textsuperscript{135} “setting moral and ethical standards for broadcasting…. making broadcasting truly impartial [and] …Upholding the principles of fairness and balance,”\textsuperscript{136} and prescribing sanctions and institutionalizing a

\begin{footnotesize}
\begin{enumerate}
\item[129] Id. at 34.
\item[130] Id.
\item[131] Id.
\item[132] Id.
\item[133] Id.
\item[134] Id. at 40.
\item[135] Id. at 39.
\item[136] Id. at 40.
\end{enumerate}
\end{footnotesize}
mechanism for monitoring and enforcement.\textsuperscript{137} The composition of the National Communication Commission shall include a Chairman appointed by the president and representatives of Ministries of Information, Communication, Education; and representatives of NTA, FRCN, Nigeria Union of Journalists, Radio and Television Theatre Workers’ Union, Association of Advertising Practitioners of Nigeria, the Nigerian Institute of Public Relations and Film Makers’ Association of Nigeria.\textsuperscript{138}

Unlike the elaborate discussion of the composition, functions, and structure of the National Communication Commission, the policy was very brief about the other regulatory body it recommended to be established, i.e., the Nigerian Media Council. The policy simply stated that the Council “shall be composed predominantly of journalists of high standing and integrity. Its functions shall include the administration of the professional code of ethics and registration and accreditation of journalists.”\textsuperscript{139}

Surprisingly, although the policy stated that the time was not ripe for private ownership of electronic media, it, however, provided for the criteria “for granting private broadcasting licence when the time is considered ripe to do so.”\textsuperscript{140} The criteria included the following: the applicant must be a Nigerian or a Nigerian organization; must have no criminal conviction financial or otherwise; must satisfactorily demonstrate that he/she/it “is not under any foreign influence whatsoever;”\textsuperscript{141} and must provide “an undertaking the licensed station would not be

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\textsuperscript{137} \textit{Id.} \\
\textsuperscript{138} \textit{Id.} at 40-41. \\
\textsuperscript{139} \textit{Id.} at 41. \\
\textsuperscript{140} \textit{Id.} \\
\textsuperscript{141} \textit{Id.}
\end{flushright}
used for partisan politics."\textsuperscript{142} The license shall be valid for three years subject to renewal and can be revoked if “in the opinion of the Commission the broadcast station has been used in a manner detrimental to the national interest or where a practitioner’s complaint has been upheld after a public hearing….”\textsuperscript{143} These provisions of the NMCP were to subsequently inform both the statutory and regulatory enactments in the wake of the deregulation of broadcasting. The specifics of how the NMCP is reflected in the subsequent broadcasting statutes and regulations will be discussed further in the next chapter.

\textbf{Dual Deregulation Commences}

The internal and external demands for reforms in the communications sector finally started yielding policy results in 1992. This is because in 1992, only two years after the adoption of the NMCP, the federal military government commenced deregulation of broadcasting by enacting Decree No. 38 (hereafter NBC Decree). This decree established the National Broadcasting Commission, which was charged with among other things the processing of applications for private broadcast licenses. Also, it was in 1992 that the military government enacted Decree 75, which established the Nigerian Communications Communication (NCC). Under the Decree, the NCC was established to, among other things, facilitate the entry into markets for telecommunication services and facilities…\textsuperscript{144} and in general “create a regulatory environment for the supply of telecommunications services… and to promote fair competition and efficient market conduct….”\textsuperscript{145} The Decree, which is discussed in the next chapter, spelled

\textsuperscript{142} Id. at 42.

\textsuperscript{143} Id. at 41.

\textsuperscript{144} NCC Decree S. 2(b).

\textsuperscript{145} Id. S. 2(a).
out, among other things, the structure and other functions and powers of the Commission, criteria for awarding licenses, and local content requirements in programming.

While an examination of the NBC Decree in the next chapter shows that most of the recommendations of the National Mass Communication Policy were incorporated into the provisions of the Decree, especially with regards to the criteria for award of licenses, however, there was no similar telecommunications policy instrument at the beginning to guide the enactments for deregulating telecommunications and subsequent attempts to adopt a national telecommunications policy were tortuous. First, in the year 1998, the first National Telecommunications Policy was published. Although the policy had been approved three years earlier, the political uncertainties of the time delayed its publication.146 Second, in 1999, the new civilian government inaugurated a committee for deliberations and production of a new policy, arguing that “certain prescriptions contained in the [existent] Policy were outdated, overtaken by events or required further modification, in order to be consistent with new developments and emerging industry trends both locally and internationally.”147 The policy drafted by the Committee was approved by the government and launched in October 1999.

Finally, a year later, the same government claimed that although the new telecommunications policy had been well-received, “certain prescriptions needed fine-tuning during the course of implementation.”148 Therefore, in February 2000, the government, citing the need to “promote the policy goals of total liberalization, competition and the private sector-led growth of the telecommunications sector,”149 inaugurated a Telecommunications Sector Reform.

146 FEDERAL REPUBLIC OF NIGERIA, NATIONAL MASS COMMUNICATION POLICY 2 (2000).
147 Id.
148 Id.
149 Id.
Implementation Committee (TSRIC) to review and fine-tune the existing telecommunications policy.\textsuperscript{150} According to the then Minister of Communication, Mohammed Arzika, who chaired the TSRIC, the policy review was informed by the new democratic environment that required wide consultations on policy issues and the “need to be part of the current trend of globalization and convergence in the telecommunications industry, Nigeria needs a more proactive policy that recognizes international best practices.”\textsuperscript{151}

The newly launched National Telecommunications Policy, which was completed in May 2000 and released in September 2000,\textsuperscript{152} stated that the overriding policy objective is the modernization and expansion of telecommunications services, which should also be efficient, affordable, reliable, and available to all because that will “enhance national economic and social development, and integrate Nigeria internally as well as into the global telecommunications environment.”\textsuperscript{153} The Policy set short term and medium term objectives to be achieved within 3 and 5 years respectively. Among the short term objectives was meeting and exceeding the ITU-recommended minimum teledensity of 1 telephone to 100 inhabitants, which meant adding 2 million fixed lines and 1.2 million mobile lines within 2 years.\textsuperscript{154} And among the medium term objectives of the Policy were providing “a new regulatory environment that is sufficiently flexible to take into account new technological development and the international trend towards

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 3.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 23.
\textsuperscript{154} Id. at 23.
convergence;…[and creating] the enabling environment, including the provision of incentives, that will attract investors and resources to achieve the objectives earlier stated.”

The Policy identified four main components of the telecommunications industry as follows: federal government (responsible for enacting laws and ensuring overall development of the industry); the Ministry of Communications (formulating broad telecommunications policy and monitoring implementation and hosting the National Frequency Management Council, NFMC); the NCC; and the telecommunications service providers.

Section 3.1.4 of the NTP categorically states that “the enabling law establishing the NCC shall be reformed to ensure autonomy of the Commission. It shall provide for secured tenure for NCC’s board members as well as ensure that the Commission:

shall make its decisions regarding licensing, tariff regulation, interconnection disputes, and any other matters directly affecting industry operators, in an impartial and independent manner. It shall be guided by the overriding objectives of the National Telecommunications Policy, and considerations of fairness, equity, and transparency. Such rulings shall not be directly influenced by Government or private industry. All deliberations of the Commission shall be undertaken in a transparent manner, subject to the rights of operators to non-disclosure of proprietary and competitively sensitive information. Parties affected by regulatory decisions, including operators, customers, and competitors, shall be afforded access to the Commission’s proceedings and the right to submit opinions in support of their interests. Parties shall have the right to appeal such decisions through transparent administrative and legal channels.

Shortly after the release of the NTP, the NCC commenced preparations for the auctioning of three GSM licenses which took place in January 2001 in the nation’s capital, Abuja.
Conclusion

This chapter has discussed the transformation of telecommunications and broadcasting regulation in Nigeria from restricted government monopoly to the beginning of deregulation and market competition. The chapter surveyed the history of telephony and broadcasting in Nigeria and showed that both broadcasting and telephony were introduced by the British colonial government largely with the aim of furthering its imperialistic objectives and the newly independent administration maintained the government monopoly of both sectors for various reasons. The chapter then discussed the incremental reforms in the communications sector beginning with partial commercialization in the 1980s through the implementation of the Structural Adjustment Program. It was shown in the chapter that in addition to the internal and external factors that influenced or induced the communications sector reforms ranging from IMF/World Bank to the debate on national communications policy, technology also played a role in contributing to the need for reforms, especially broadcasting. This is because while it may be apt to conclude that international pressure and local agitations influenced and or informed the commencement of major reforms in the communications sector, a third factor may also be added — the introduction of satellite broadcasting.

During the mid to late 1980s, when IMF/World Bank were exerting pressures on Nigeria for economic liberalization and local financiers were making internal agitations for private broadcasting, another player emerged in the broadcasting environment: satellite broadcasting.159 Nigeria joined the global proliferation of satellite broadcasting in three ways.160 First, through

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160 *Id.* at 77.
the use of dishes for reception of direct-to-home satellite broadcast.\textsuperscript{161} Thus, by 1992, satellite television reception dishes in Kano and Lagos, two of Nigeria’s three largest cities, were estimated to be in thousands.\textsuperscript{162} The second means of receiving satellite news is the local stations’ re-broadcasting or incorporation of satellite supplied news from organizations like CNN.\textsuperscript{163} And thirdly, by the transmission of the satellite broadcast using the Multichannel Multipoint Distribution Service, known as wireless cable or MMDS, to subscribers for a monthly fee.\textsuperscript{164} Soon the utility of satellite broadcasting became ambivalent because on the one hand they provided some high quality news programming\textsuperscript{165} and created a whole new industry with business entrepreneurs making a living from the manufacture, supply, and installation of satellite dishes and MMDS reception equipment.\textsuperscript{166} But, on the other hand, concerns were voiced about media imperialism and the cultural invasion of foreign broadcasts.\textsuperscript{167} Worse of all, many Nigerians involved with DBS were accused of copyright violations.\textsuperscript{168} The copyright violations eventually led to the blacklisting of Nigeria for not complying with copyright laws and not paying associated fees.\textsuperscript{169} It was even argued that in view of these violations and the increasing

\textsuperscript{161} Id.

\textsuperscript{162} Id. at 78.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 82.

\textsuperscript{165} Id. at 85.

\textsuperscript{166} Id. at 81-84.

\textsuperscript{167} Id. at 74 & 78.

\textsuperscript{168} Id. at 78.

\textsuperscript{169} Id. at 84.
availability of locally fabricated satellite dishes, Nigeria’s communication environment was rendered chaotic.\textsuperscript{170}

Thus, the need to restore order to the chaotic situation is believed to have formed the basis for the commencement of reforms that would ensure that government may control DBS. Therefore, in addition to the internal and external factors identified earlier as influencing the commencement of communications regulatory reform, DBS technology may be added as another factor. This chaotic communications environment that contributed to the emergence of NBC has striking similarity with the commencement of electronic communications regulations in the United States. In the case of the United States, the Titanic tragedy of 1912, which was partly the result of the cacophony of unregulated electronic communications, brought the urgency of regulation that resulted in the creation of Federal Radio Commission, the precursor to today’s Federal Communication Commission. In the case of Nigeria, the chaotic environment in the communications sector in the 1990s, especially with regards to satellite broadcasting, partly informed the need for a regulatory agency. But this is where the similarity ends because while the RCA in United States evolved to become the FCC, which is responsible for regulating wire and wireless telecommunications as well as broadcasting and cable, the NBC remained a regulator of broadcasting and cable only, separate from the NCC, which regulates wire and wireless telecommunications.

Finally, while NITEL may have been an inefficient government monopoly, but some of the criticisms against the company are unfair. Although to a largely extent corruption and incompetence are to some extent responsible for the inefficiencies of the company in providing additional lines to deserving Nigerians, there is also the cost and cumbersomeness of laying

down cable and other wireline infrastructures compared to that of providing towers and other
infrastructures for provision of cellphone services. Therefore, without making excuses for
NITEL’s failure, it should be noted that it was not only corruption and incompetence that were
responsible for the stagnation in the provision and connection of lines by NITEL.

The next chapter will examine the provisions of the Decrees establishing the two
regulatory agencies, namely the National Broadcasting Commission and the Nigerian
Communications Commission, and discuss these agencies’ structures, powers, and operations.
CHAPTER 4
LEGISLATING REGULATORY REFORMS, AGENCIES’ ORGANIZATIONAL STRUCTURE, AND THE IMPACT OF REFORMS ON THE COMMUNICATIONS ENVIRONMENT

The last chapter examined the historical evolution of the Nigerian communications sector from its colonial beginning to the commencement of reforms with the establishment of NBC and NCC as the broadcasting and telecommunications regulatory agencies respectively. This chapter will discuss the legal instruments establishing the NCC and NBC and the organizational structure of these agencies and show how the National Mass Communication Policy and the National Telecommunications Policy, which were adopted in 1990 and 2000 respectively, influenced legislation on the NBC and NCC respectively. The chapter will also examine the organizational structure and operational processes of these regulatory agencies. The chapter will also provide an overall assessment of the current environment of the communications sector in Nigeria by describing the changes in market structures and providers of both broadcasting and telecommunications services since the reforms of the early 1990s and how these changes in the communications sector have affected the public in terms of the availability and use of varied communication services. Chapter five will end by describing the challenges that the NBC and NCC currently face in regulating Nigerian communications sector in order to achieve polices aimed at making services more widely available to the citizenry.

Establishing Regulatory Agencies: The Statutory Instruments

In 1992, only two years after the adoption of the NMCP but without any formal national telecommunications policy, the federal military government commenced the deregulation of broadcasting and telephony by enacting two decrees: Decree No. 38 (hereafter the NBC Decree) and Decree No. 75 (hereafter the NCC decree), which established the National Broadcasting Commission and the Nigerian Communications Commission respectively. The decrees spelled
out the powers of the commissions, their composition, funding, and procedure for appointment and removal of the Commissioners. An extensive discussion of the provisions of these decrees is necessary because, as Murray Weidenbaum rightly observed:

[T]he process of regulation… does not begin when a government agency issues a ruling. Rather, it starts much earlier, when Congress passes a law establishing a regulatory agency and gives it a mandate to issue rules governing some activity. The writing of the specific statute, which has been largely ignored by most organized efforts at regulatory reform, is usually the most important action in what is an extended rule-making process. Basic defects in the enabling legislation cannot be cured by the regulatory agency concerned or anywhere else in the executive branch.\(^1\)

Fortunately, Nigeria’s regulatory reform did not ignore the writing of specific statutes.

Therefore, we shall now examine these statutes beginning with the provisions of the NBC decree.

**The NBC Decree**

The National Broadcasting Commission was established under Decree No. 38 as a body corporate\(^2\) that can sue and be sued\(^3\) and which has among other responsibilities the regulation and control of the broadcast industry.\(^4\) Other responsibilities of the Commission were outlined by Section 2(1) of the NBC Decree as follows:

(a) advising the government on NMCP particularly on matters relating to broadcasting;
(b) receiving and processing applications for licenses for broadcasting, cable services, DSB, and any other form of broadcasting;
(c) recommending applications for licenses to the President through the Minister;
(d) regulating and controlling the broadcast industry;
(e) undertaking research and development in the broadcast industry;
(f) investigating complaints regarding contents and conduct of broadcasting stations;
(g) upholding the principles of equity and fairness in broadcasting;
(h) establishing a national broadcasting code and setting standards for broadcasting; and

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2 NBC Decree S. 1.
3 *Id.*
4 *Id.* S. 2(1d).
(i) promoting Nigerian indigenous cultures, moral and community life through broadcasting.

Further, the NBC Decree also empowered the Commission to initiate and harmonize government policies on trans-border direct transmission and reception of broadcast in Nigeria\(^5\) as well as monitor “broadcasting for harmful emission, interference and illegal broadcasting.”\(^6\)

Consequently, any operations or transmission “of vision or sound by cable, television, radio, satellite, or any other medium of broadcasting”\(^7\) must be done in accordance with the provisions of the Decree\(^8\) failure of which gives the Commission the power to apply sanction including revocation of license.\(^9\)

The structure of the Commission comprises a Chairman,\(^10\) the Director General,\(^11\) and ten other members representing the following interests: law, business, culture, education, social science, broadcasting, public affairs, engineering, State Security Service, and the Federal Ministry of Information and Culture.\(^12\) Members should be persons of integrity and knowledgeable about the broadcast industry or experienced and capable of contributing to the work of the Commission.\(^13\) The Chairman and all members of the Commission “shall be appointed by the President and Commander-in-Chief on the recommendation of the Minister [of

\(^5\) Id. S. 2(l).
\(^6\) Id. S. 2(1m).
\(^7\) Id. S. 2(2).
\(^8\) Id. S. 2(2).
\(^9\) Id. S. 2(1n).
\(^10\) Id. S. 3(1a).
\(^11\) Id. S. 3(1c).
\(^12\) Id. S. 3(1b) (in the 1992 Decree there were only seven other members. The representatives of engineering, State Security Service and the Federal Ministry of Information and Culture were added by the Amendment Decree No. 55 of 1999).
\(^13\) Id. S. 3(2).
The Chairman and other members of the Commission, except the Director General, shall serve for a term of three years renewable only once. The Director General, who should be knowledgeable and experienced in broadcasting, serves as the Chief Executive of the Commission and holds office for five years in the first instance and for any further period as the President may determine. A member of the Commission may be removed from office by the President if the president “is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.”

Regarding the powers to grant broadcast licenses, the NBC Decree requires that the Commission should be satisfied that the applicant is a corporation registered in Nigeria and its majority shares is owned by Nigerians; the applicant is not applying on behalf of any foreign interest; the applicant can comply with the objectives of NMCP regarding electronic media; and the applicant “can give undertaking that the licensed station shall be used to promote national interest, unity, and cohesion and that it shall not be used to offend the religious sensibilities or promote ethnicity, sectionalism, hatred, and dissatisfaction among the peoples of Nigeria” (emphasis in the original).

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14 Id. S. 3(3).
15 Id. S. 4(1).
16 Id. S. 5(3).
17 Id. S. 5(1).
18 Id. S. 5(5).
19 Id. S. 4(4).
20 Id. S. 9(1a).
21 Id. S. 9(b).
22 Id. S. 9(1d).
23 Id. S. 9(1e).
Although compliance with the requirements outlined above does not entitle an applicant to broadcast license, the Commission shall not unreasonably withhold the grant of license.\(^{24}\) However, the Commission shall not grant license to political parties or religious organizations.\(^{25}\)

In granting license, the Commission is to take into consideration distribution of stations into rural, urban, commercial, and other categories;\(^ {26}\) and it is illegal for “any person to have controlling shares in more than two television stations.”\(^ {27}\) The Commission is empowered to prescribe the appropriate fee payable for a license,\(^ {28}\) and the license is valid for five years\(^ {29}\) and for one station only.\(^ {30}\)

Regarding local content, the Decree provided that licensees’ programming “shall not be less than 60 per cent local [content] and not more than 40 per cent foreign [content] for radio and television and not less than 20 per cent local [content] or more than 80 per cent foreign [content] for cable satellite retransmission.”\(^ {31}\) On the financing of the Commission’s operations, the NBC Decree mandated the Commission “to establish and maintain a fund from which shall be defrayed all expenditure incurred by the Commission”\(^ {32}\) including the cost of administration,\(^ {33}\) payment of salaries and other remunerations.\(^ {34}\) Money to be paid into the fund includes fees and

\(^{24}\) \textit{Id.} S. 9(3).

\(^{25}\) \textit{Id.} S. 10(a-b).

\(^{26}\) \textit{Id.} S. 9(4c).

\(^{27}\) \textit{Id.} S. 9(5).

\(^{28}\) \textit{Id.} S. 13(e).

\(^{29}\) \textit{Id.} Third Schedule S. 12(1).

\(^{30}\) \textit{Id.} Third Schedule S. 12(4).

\(^{31}\) \textit{Id.} Third Schedule S. 12(5b).

\(^{32}\) \textit{Id.} S. 14(1).

\(^{33}\) \textit{Id.} S. 15(a).
levy the Commission charges broadcast stations,\textsuperscript{35} grant from state or federal government,\textsuperscript{36} and money accruing from assets of the Commission.\textsuperscript{37}

An examination of the NBC Decree shows that most of the recommendations of the National Mass Communication Policy (NMCP) were incorporated into the provisions of the Decree especially with regards to the criteria for awarding broadcast licenses. For example, although the NMCP recommended that the time was not ripe for private ownership of electronic media, it however provided the criteria for granting such licenses “when the time is considered ripe to do so.”\textsuperscript{38} Under the criteria the applicant must be a Nigerian or a Nigerian organization without criminal conviction (financial or otherwise), a satisfactory demonstration that the applicant “is not under any foreign influence whatsoever.”\textsuperscript{39} The applicant must also provide an undertaking that “the licensed station would not be used for partisan politics.”\textsuperscript{40} The license shall be valid for three years subject to renewal and can be revoked if “in the opinion of the Commission the broadcast station has been used in a manner detrimental to the national interest or where a practitioner’s complain has been upheld after a public hearing…”\textsuperscript{41} Compare these recommendations with the provisions of Section 9(1a-e) of the decree and the only contrast will be the decree requiring the applicant to be a corporation with majority Nigerian shareholding rather than an individual or a corporation wholly owned by Nigerians. Another slight difference

\textsuperscript{34} Id. S. 15(b).
\textsuperscript{35} Id. S. 14(2a).
\textsuperscript{36} Id. S. 14(2b).
\textsuperscript{37} Id. S. 14(2d).
\textsuperscript{38} \textit{Federal Republic of Nigeria, National Mass Communication Policy} 41.
\textsuperscript{39} Id. at 41.
\textsuperscript{40} Id. at 42.
\textsuperscript{41} Id. at 41.
between the NMCP and the NBC Decree is the decree, rather than requiring licensees not to use their license for partisan politics, requires them to promote national interest and prohibits them from offending the religious sensibilities or promoting “ethnicity, sectionalism, hatred…among the people of Nigeria.”42 Yet, the NMCP recommendation for prohibiting use of stations for partisan politics might have found some expression in the provision against granting licenses to political parties.43 The duration of the license is another issue for which the NBC Decree differs from the NMCP recommendation because the Decree provides for five years against NMCP’s recommendation of three years.

One major provision of the NBC Decree that may surprise advocates of the freedom of expression and or freedom of religion is the provision of section 10(a), which stated that “The Commission shall not grant a licence to a religious organization.”44 This provision is seemingly in contradiction of section 38(1) of the Constitution which provides that:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

Consequently, it may be apt to discuss what could have informed this provision with a view to understanding its possible justification in the context of Nigeria’s historical experience with religious expression.

**Regulating Religious Expressions on the Airwaves**

Nigeria is not only the most populous country in Africa, but it is said to also have the largest concentration of Muslims on the continent and it even has more Muslims than any Arab

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42 *Id.* S. 9(1c).
43 *Id.* S. 10(b).
44 *Id.* S. 10(a)
country, including Egypt.\textsuperscript{45} With an estimated population of 130 million and 40% of whom are Christians, Nigeria then has more Christians that any African country including Democratic Republic of Congo and Ethiopia. Thus, the country can be said to have the largest concentration of Muslims and Christians within the same country on the African continent. Moreover, according to a BBC survey,\textsuperscript{46} Nigerians have been found to be the most religious people in the world with 100% saying they believe in God, 95% saying they pray regularly, and 95% saying they would die for their belief.

However, Nigeria’s religious commitments long predate the BBC Survey. According to one of the eminent Nigerian historians, J.F.A. Ajayi, the two monotheistic religions of Islam and Christianity laid the foundation for the current Nigerian nation state.\textsuperscript{47} Of the five events that Ajayi identified as the milestones on Nigeria’s journey to nationhood, the first two are associated with Islam and Christianity respectively, namely: The Sokoto Jihad and Samuel Ajayi Crowther’s Mission.\textsuperscript{48} The Jihad, according to Ajayi, not only brought a large area of Nigeria together, but it also developed the idea of a cosmopolitan state which demands “loyalty to something outside parochial loyalties.”\textsuperscript{49} Crowther’s missionary activities also contributed not only to educating Nigerians and reducing some Nigerian languages to writing for the first time, it also taught different trades and skills to Nigerians “beyond kith and kin” who became bounded and who were talking about starting a new nation. Thus, in Ajayi’s conclusion, while the Jihad

\textsuperscript{47} J. F.A. AJAYI, MILESTONES IN NIGERIAN HISTORY 2. ([1962] 1980).
\textsuperscript{48} The rest events identified by Ajayi are Amalgamation of Northern and Southern Protectorates, enactment of Richards Constitution, and the Civil War. \textit{Id.} at 3.
\textsuperscript{49} \textit{Id.} at 12.
was the “first stage in our journey to nationhood,”

Crowther and his mission took Nigeria “one step further” on the journey to nationhood.

Since the Jihad was largely in the North and Crowther’s mission was largely in the South, it can be inferred why today the North is predominantly Muslim and the South is predominantly Christian although there is a significant Christian population in the Central Nigeria and a large number of Muslims (some say a majority) in the Southwest. Thus when Britain amalgamated the North and South in 1914 into one nation, it instituted a policy which saw the country divided into three regions: North, East, and West with Lagos as the capital territory. At independence in 1960, a federal political structure was adopted in view of the regionalism and geocultural zones with the aim of accommodating diversity and facilitating conflict resolution. It has been observed that in the First Republic (1960-1966) it was regional, rather than religious, concerns that dominated national politics and although religion had some influence but it was not significant.

One aspect of national policy where the influence of religion was apparent during the First Republic was broadcasting, as evident from the composition of the advisory committees of the boards of the Nigerian Broadcasting Corporation. As at March 31, 1964, the Corporation had four Boards: the Board for the Headquarters and one for each of the three regions. Each of these four boards has the following advisory committees: Headquarters: Programs, Commercial Broadcasting, Muslim Religion (13 members), and Christian Religion (14 members); Northern

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50 Id. at 13.
51 Id. at 21.
52 JOHN PADEN, MUSLIM CIVIC CULTURES AND CONFLICT RESOLUTION: THE CHALLENGE OF DEMOCRATIC FEDERALISM IN NIGERIA 7 (2005).
54 IAN MACKAY, BROADCASTING IN NIGERIA 151 (1964).
Region: Education, Muslim religion (9 members) and Christian religion (7 members); Western Region: Education, Christian religion (8 members), and Muslim religion (8 members); in the Eastern region there was only Christian religion advisory committee with six members. In short, there were Muslim and Christian religious advisory committees for the NBC Headquarters and the Northern and Western regions as well as a Christian advisory committee for the Eastern region.

But it was not only in the advisory committees that the influence of the two religions was apparent on broadcasting. In programming of NBC’s headquarters there were religious programs for Muslims and Christians. In Northern Nigeria, Sheikh Abubakar Gumi’s preachings on the radio and television are becoming popular and controversial. In Southern Nigeria the use of media for evangelism was said to have been started by Bishop Ben Idahosa who began television broadcast in 1974. Subsequently, there was an explosion of religious programs when commercialization in broadcasting enabled many preachers to buy air time on radio and television to deliver their messages. It should be noted that this was at a time when all broadcasting stations were owned and operated by the government, prior to the commencement of deregulation of broadcasting in 1992.

However, between the days when broadcasting was monopolized by government and the commencement of broadcast deregulation, there emerged an increased religiosity among

55 Id. at 151-2.
56 Id. at 34.
58 Id.; see also Rosalind Hackett, *Managing or Manipulating Religious Conflict in the Nigerian Media, in Mediating Religion: Conversations in Media, Religion, and Culture* 57 (Jolyon Mitchell and Sophia Marriage, eds., 2003).
Nigerians. According to Larkin and Meyer, increasing religious revitalization in Nigeria in the last two decades has been characterized by Pentecostal evangelism and reformist Islam both of which are said to be “fiercely outspoken religions” between whom there is deep enmity and whose “disagreements and mutual suspicion have often degenerated into violent conflict.”

Although others have argued that most of the conflicts sometimes perceived as religious are in fact ethnic or political conflicts or the results of socio-economic crisis brought about by harsh and unjust government economic policies imposed on the country by the IMF and World Bank. Many violent conflicts occurred (especially in Northern Nigeria) in the years before the commencement of deregulation of broadcasting, leading one scholar to characterize the years 1980s-1990s as “The Decade of Intolerance.” Similarly, it has been reported that between the late 1980s and early 1990s, conflicts between Christians and Muslims or between Muslim sects have led to the death of not less than 3,000 people.

For the purposes of this chapter and in understanding the rationale for the NBC Decree’s provision, we may ask: what role are the media playing in these conflicts? Three roles are ascribed to the media in these conflicts in what is seemingly a continuum from starting the conflict to escalating the conflict and managing the conflict. On at least three occasions the media were said to have been responsible for starting a conflict. These include: a 1991 *Fun Times* article alleging that Jesus and Prophet Muhammad had affairs with prostitutes; a 2002

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ThisDay article opining that Prophet Muhammad would have married one of the Miss World contestants; and the Danish newspaper, Jyllands-Posten publication of cartons of Prophet Muhammad.64

With regards to media’s role in escalating conflict, it has been observed that in 1986, media’s sensationalized reports of a inter-religious riot in the remote city of Kafanchan led to the breakout of riots in other places.65 But the media are also said to have been used to calm tensions and appeal for peaceful coexistence and it has also been revealed that during some religious tensions the media have refused to publish inflammatory publications emanating from Muslim and Christian groups.66

Thus, while the media have varied roles in religious conflicts, it may be inferred, as John Paden67 observed, that they have “more often been a source of conflict” and their reportage and “photos (sometimes doctored) of gross interethnic (or interreligious) violence have precipitated panic and flight, and more violence.”68 Moreover, Toyin Falola69 also observed that hate literature and verbal aggression are now prevalent among Muslims and Christians through sermons, speeches, writings in schools, places of worship, public arena, and colleges.70 These verbal aggressions lead to more or less “a permanent state of warfare of some kind,” and such


65 ROMAN LOIMEIER, ISLAMIC REFORM AND POLITICAL CHANGE IN NORTHERN NIGERIA 296 (1997).

66 Hackett, Managing or Manipulating Religious Conflict in the Nigerian Media, supra note 58 at 61, citing Matthew H. Kukah, Public Perceptions of the Press in Nigeria, in JOURNALISM IN NIGERIA: ISSUES AND PERSPECTIVES 175 (O. Dare and U. Adidi, eds., 1996).

67 Paden, MUSLIM CIVIC CULTURES AND CONFLICT RESOLUTION, supra note 52.

68 Id. at 179.


70 Id. at 247.
“symbolic violence” sometimes set “the stage for physical assaults or acting as postscript for physical violence.” Falola concluded that unfortunately, the rhetoric of violence has penetrated the popular culture from theatre to radio to television where humor is used maliciously and to suggest that tolerance should not be permanent.

The question therefore is how to balance the constitutionally guaranteed freedom of religion and its propagation and freedom of expression with the constitutional provision that “the security and welfare of the people shall be the primary purpose of government.” Since the aim of this chapter is neither to provide detailed discussion of the cases where media’s reportage is said to have started or exacerbated religious conflicts nor the examination of the provisions of Nigeria’s Constitution, criminal laws, and media regulations vis-à-vis religious expression and how those provisions sought to control possible incitement of religious hatred which could lead to religious violence, suffices it to say that such project merits further study.

Whereas the NBC Decree has been shown to reflect the provisions of the National Mass Communication Policy either in letter or in spirit or both, the same thing cannot be said about the Nigerian Communications Commission Decree, which was enacted also in 1992 as the statutory instrument for telecommunications sector regulation. The provisions of the Decree shall now be examined as well as the subsequent developments that led not only to the adoption of a National Telecommunications Policy but also the passage of a new statutory instrument for the regulation of the telecommunications sector.

71 Id.
72 Id., at 262.
74 Id., S.39(1-3).
75 Id., S.14(2b).
The NCC Decree

In 1992, the then military regime enacted Decree 75 of 1992, which established the Nigerian Communications Communication (NCC). Under the Decree, the NCC was established as the “a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name.”\(^7\)

The Commission’s objectives, among other things include the creation of “a regulatory environment for the supply of telecommunications services” and the promotion of “fair competition and efficient market conduct.”\(^7\) Further, the NCC is expected to facilitate entry into telecommunications markets both for services and facilities,\(^7\) as well as establish technical standards\(^7\) and ensure the optimal use of telecommunications facilities in Nigeria; all these “with due consideration for the rights of the licensees and the public interest.”\(^8\)

The NCC Decree spelled out the functions and powers of the Commission to include:

1. technical and economic regulation of the privatized sector of the telecommunications industry\(^9\)

2. ensuring quality of telecommunications services\(^10\)

3. promoting competition in the telecommunications sector\(^11\)

4. receiving and investigating complaints from and arbitration of disputes between licensees and other participants in the telecommunications industry\(^12\)

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\(^7\) NCC Decree S. 1(1).

\(^7\) Id. S. 2(a).

\(^7\) Id. S. 2(b).

\(^7\) Id. S. 2(h).

\(^8\) Id. S. 2(j).

\(^9\) Id. S. 4(a).

\(^10\) Id. S. 4(b).

\(^11\) Id. S. 4(f).

\(^12\) Id. S. 4(k-l).
5. protection of public interest\textsuperscript{85}

6. developing performance standards and indices with due regard to the best international performance indicators and Nigerian conditions\textsuperscript{86}

7. monitoring and reporting to the Minister on the charges and performance of licensees and others;

8. issuance of telecommunications licenses\textsuperscript{87} and

9. monitoring and enforcing the conditions of the licenses\textsuperscript{88}

Beside these regulatory powers, the Commission also has operational powers including the power to require any person to appear before it or any of its committee to discuss any matter, give evidence, or produce any document that the Commission deems necessary for the effective discharge of its duties.\textsuperscript{89} In addition, the Commission has the power to “do anything which, in the opinion of the Commission, is calculated to facilitate the carrying out of the functions of the Commission,”\textsuperscript{90} and, with the Minister’s approval, it may “make regulations generally for the purpose of giving effect to the provisions” of the Decree.\textsuperscript{91}

Appointment of NCC’s Commissioners is to be made by the President on the recommendation of the Minister.\textsuperscript{92} The Commission will consist of a chairman, executive vice chairman of the Commission, and eight other Commissioners “with requisite experience in any one or more of the following,” commerce, consumer affairs, financial matters, industry, law, law, law, law, law, law.

\textsuperscript{85 Id. S. 4(n).}

\textsuperscript{86 Id. S. 4(p).}

\textsuperscript{87 Id. S. 4(r).}

\textsuperscript{88 Id. S. 4(s).}

\textsuperscript{89 Id. S. 5(e).}

\textsuperscript{90 Id. S. 5(h).}

\textsuperscript{91 Id. S. 26.}

\textsuperscript{92 Id. S. 3(1).}
management, public administration, technology, and telecommunications engineering. The executive vice-chairman “shall be the chief executive of the Commission...[and] shall be a person possessing sound knowledge of and ability in the organisation and management of telecommunications matters.” The Commissioners shall serve for four years renewable only once and may resign at any time by notice addressed to the President. Any Commissioner may be removed by the President “at any time” if the president “is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office provided that not more than two thirds of the members of the Commission shall be removed at any one time.”

The Federal High Court is conferred with the jurisdiction for the trial of offenses and violations as well as all suits for the enforcement of any liability or duty arising from the Decree and regulations made by the Commission. The Commission is required to conduct an investigation about any conduct that violates or is to likely violate the provisions of the Decree and “upon proper showing of facts by the Commission [to the High Court] a permanent or temporary injunction or restraining order may be granted.... the Federal High Court may issue a writ of mandamus commanding any person to comply” with the provisions of the Decree. The Commission is also required to prepare and submit to the Minister an annual report on its activities including report on its audited accounts as well as the Auditor-General’s report.

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93 Id. S. 3(1a-c).
94 Id. S. 3(3-4).
95 Id. S. 9(1-2).
96 Id. S. 9(4).
97 Id. S. 24.
98 Id. S. 35.
The Commission is required to prepare and maintain a register\textsuperscript{99} containing information such as license issued, details on holders of licenses and permits, approved type of customer equipment, cancellations and revocation of licenses and permits, etc.\textsuperscript{100} The register to be prepared and maintained by the Commission should be available and open to the public for inspection upon the payment of a “token fee to be prescribed by the Commission from time to time.”\textsuperscript{101}

On financing the Commission, the Decree provided that the Commission “shall establish and maintain a fund from which shall be defrayed all expenditures incurred by the Commission,”\textsuperscript{102} and apply the proceeds of the fund to the cost of administration, reimbursing members of the Commission, payment of salaries or other remunerations, maintenance of Commission’s property, investment, and any functions of the Commission.\textsuperscript{103} Money that shall be paid and credited into the fund include grant from federal or a state government; all subscriptions, fees, and charges payable to the Commission; gifts, loans, and grant-in-aid; and all assets that may accrue to the Commission.\textsuperscript{104} In each year, the Commission is required to submit to the Minister an estimate of its expenditure and income for the following year.\textsuperscript{105}

While this outline of the NCC Decree seemed to project the Commission as an independent regulatory agency, but, as stated in chapter three, in the year 2000, a newly launched

\textsuperscript{99} Id. S. 22(1).
\textsuperscript{100} Id. S. 22(1a-g).
\textsuperscript{101} Id. S. 22(2).
\textsuperscript{102} Id. S. 31(1).
\textsuperscript{103} Id. S. 31(3).
\textsuperscript{104} Id. S. 31(2a-d).
\textsuperscript{105} Id. S. 34.
National Telecommunications Policy\textsuperscript{106} emphatically recommended that “the enabling law establishing the NCC shall be reformed to ensure autonomy of the Commission.”\textsuperscript{107} The new law, according to the recommendation of the new NTP, “shall provide for secured tenure for NCC’s board members”\textsuperscript{108} as well as ensure that the Commission’s decisions and actions are not only transparent and not directly influenced by the government or private sector but also that both customers and operators have access to, and the right of participating in the Commission’s proceedings and the right for both administrative and judicial appeal against the Commission’s decisions.\textsuperscript{109}

In 2003, the National Assembly, perhaps encouraged by the government’s new NTP, enacted the new National Communications Commission Act (hereafter the Act), which was assented to by the president on July 8, 2003.\textsuperscript{110} There are two reasons why an elaborate discussion of the new legislation is necessary. First, it has repealed the existent legislations, i.e. Decree No. 75 of 1992 and Decree No. 30 of 1998;\textsuperscript{111} therefore, it is the current law regulating telecommunications in Nigeria. Secondly, it was passed following the adoption of the new national telecommunications policy, which recommended the reform of the regulatory agency in order to make it (the agency) more independent and transparent in its functions. Therefore, an extensive examination of the new law will enable us to understand whether or not the expectations of NTP have been met by the new law.

\textsuperscript{106} FEDERAL REPUBLIC OF NIGERIA, NATIONAL TELECOMMUNICATIONS POLICY 3.

\textsuperscript{107} Id., at 32.

\textsuperscript{108} Id., at 32.

\textsuperscript{109} Id., at 32.

\textsuperscript{110} SCHEDULE TO THE NIGERIAN COMMUNICATIONS BILL 2003 (the Act was passed by the House of Representatives on March 12, 2003 and the Senate on May 27, 2003).

\textsuperscript{111} Nigerian Communications Act, S. 150 (2003).
A New Communications Act

The new statute, which is known as Nigerian Communications Act, has among its specific objectives the creation of “an effective, impartial and independent regulatory authority.” Other legislative intents of the Act include: the promotion and implementation of the national communications or telecommunications policy; the promotion and provision of “modern, universal, efficient, reliable, affordable and easily accessible communications services and the widest range thereof throughout Nigeria;” and encouraging “local and foreign investments in the Nigerian communications industry and the introduction of innovative services and practices in the industry in accordance with international best practices and trends.”

The Act conferred on the NCC the “responsibility for the regulation of the communications sector in Nigeria” and delegated many functions to the Commission including the followings: “granting and renewing communications licences…and monitoring and enforcing compliance with licence terms and conditions by licensees;” fixing and collecting fees for the licenses; proposing and enforcing technical specifications and standards for communications equipment in Nigeria; representing Nigeria at international organizations and fora on communications regulations and related matters. Further, the Act empowered the

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112 Id. S. 1(b).
113 Id. S. 1(a).
114 Id. S. 1(c).
115 Id. S. 1(d).
116 Id. S. 3(1).
117 Id. S. 4(e).
118 Id. S. 4(g).
119 Id. S. 4(l).
120 Id. S. 4(v).
Commission to conduct mediation and arbitration of complaints, disputes, or objections by subscribers, operators, and other stakeholders.\textsuperscript{121} Other functions of the NCC outlined by the Act are facilitating investments and entry into the Nigerian communications market; protection of consumers against unfair practices; promoting fair competition in the communications sector. Perhaps, the general function of the Commission was summarized in the two broad provisions vesting the NCC with the “general responsibility for economic and technical regulation of the communications industry”\textsuperscript{122} and the “implementation of the Government’s general policies on communications industry and the execution of all such other functions and responsibilities as are given to the Commission under this Act or are incidental or related thereto.”\textsuperscript{123}

The Act established a Board of Governance (known as the Board) entrusted with the responsibility for oversight and “charged with the administration of the affairs of the Commission.”\textsuperscript{124} The Board consists of 9 Commissioners made up by a chairman, a chief executive who shall also be the Executive Vice Chairman, 2 Executive Commissioners, and 5 non-executive Commissioners. All the commissioners are appointed by the President “subject to the confirmation by the Senate.”\textsuperscript{125} The commissioners must be Nigerians\textsuperscript{126} of recognized standing with qualification and experience in one or more of the following areas: finance/accounting, law, telecommunications engineering, consumer affairs, economics,

\textsuperscript{121} Id. S. 4(g).
\textsuperscript{122} Id. S. 4(w).
\textsuperscript{123} Id. S. 4(t).
\textsuperscript{124} Id. S. 5(1).
\textsuperscript{125} Id. S. 8(1).
\textsuperscript{126} Id. S. 7(2a).
information technology, engineering generally, and public administration.\footnote{Id. S. 7(1).} The commissioners serve for 5-year term which may be renewed no more than once.\footnote{Id. S. 8(5).} The president may remove or suspend a commissioner when the commissioner is found not to have been qualified for appointment\footnote{Id. S. 10(1a).} or the commissioner is suspended or disqualified by the profession based on which he/she was appointed;\footnote{Id. S. 10(1e).} the commissioner is demonstrably unable to effectively perform the official duties;\footnote{Id. S. 10(1b).} the commissioner was absent from five consecutive meetings without the Chair’s permission and is unable to show good reason;\footnote{Id. S. 10(1c).} the commissioner is found guilty of serious misconduct with regards to official duties;\footnote{Id. S. 10(1d).} or the commissioner breached the Conflict of Interest Rules outlined by the Act.\footnote{Id. S. 10(1f).} Before the removal or suspension of a commissioner, the president shall give written notice with reasons\footnote{Id. S. 10(2).} about his intention and the commissioner shall be given no less than 14 days to make written submission to the president.\footnote{Id. S. 10(3).} In making a final decision about the commissioner’s suspension or removal, the president shall take into
consideration the commissioner’s submission. In replacing any Commissioner, the provisions requiring the Senate confirmation applies.

The Act provided that the Minister of Communications, in the course of discharging his functions and in relating with the NCC “shall at all times ensure that the independence of the Commission, in regard to the discharge of its functions and operations under this Act, is protected and not compromised in any manner whatsoever.” Although the Act gave the Minister the responsibility for the formulation of general policy for the communications sector, however, it requires the Minister to not only “cause the Commission on his behalf to first carry out a public consultative process on the proposed policy formulation or [m]odification,” but also requires that the Minister shall “take into consideration the findings of the consultative process” in formulating the policy.

In discharging all its functions and exercising its powers, the Act charged the Commission to do so in a manner that is efficient, effective, non-discriminatory, and transparent at all times. This requirement was emphasized with regards to crucial functions of the Commission such as formulating the guidelines for, and the issuance of communications licenses. The Act made it mandatory upon the NCC to hold an inquiry prior to making any

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137 Id. S. 10(4).
138 Id. S. 11(2).
139 Id. S. 25(2).
140 Id. S. 23(a).
141 Id. S. 24(1).
142 Id. S. 24(2).
143 Id. S. 4(2).
144 Id. S. 33(3) provides inter alia that “The Commission shall at all times be guided in the formulation of licensing procedures, issuance of communications licences and preparation of licence conditions and terms, by the principles of and consideration for… transparency, fairness and non-discrimination” S. 33(3b).
regulation\textsuperscript{145} and the Commission is required to take into consideration the findings of the inquiry in making the final regulation.\textsuperscript{146} Same requirements apply when modifying or revoking the regulations.\textsuperscript{147} But in formulating guidelines the Commission is not required to hold an inquiry, although if it finds it necessary to do so, then it shall take into consideration the findings in making the guidelines.\textsuperscript{148} If the NCC decides to hold a public inquiry it shall publish a notice “in the manner it deems appropriate”\textsuperscript{149} on the period and subject-matter of the inquiry. Members of the public shall be given at least 21 days to make submissions on the matter\textsuperscript{150} and the “Commission shall consider any submissions received within the time limit.”\textsuperscript{151} The Commission may decide to hold an inquiry in private only when it is satisfied about the confidentiality of evidence involved or concerned with implications for the administration of the Act.\textsuperscript{152} Also, the NCC may prohibit or restrict the publication of evidence given in public inquiry if it determines that the information is of confidential nature.\textsuperscript{153}

An aggrieved person whose “interest is adversely affected”\textsuperscript{154} by any decision of the Commission\textsuperscript{155} may request for a statement of reasons for the decision and the NCC shall “provide a copy of a statement of reasons for the decision and any relevant information taken

\textsuperscript{145} Id. S. 71(1).
\textsuperscript{146} Id. S. 71(2).
\textsuperscript{147} Id. S. 72(2).
\textsuperscript{148} Id. S. 71(3).
\textsuperscript{149} Id. S. 58(1).
\textsuperscript{150} Id. S. 58(1a-e).
\textsuperscript{151} Id. S. 58(3).
\textsuperscript{152} Id. S. 59(1).
\textsuperscript{153} Id. S. 59(2).
\textsuperscript{154} Id. S. 86(1).
\textsuperscript{155} The NCC Act states that a ‘decision’ of the Commission “includes any action, order, report, direction.” S. 86(4).
into account in making the decision.”156 The aggrieved person has 30 days within which he/she may seek for review of the Commission’s decision and the Commission should within sixty days of the receipt of such submission finish the review of the earlier decision and inform the aggrieved person in writing of its final decision.157 However, the Commission is not obligated to divulge information that is of confidential nature, may prejudice fair trial, or involves personal information of any individual.158

Judicial review is made available subject to exhausting the Commission’s review159 in which case the aggrieved person may file action with the Federal High Court which has “exclusive jurisdiction over all matters, suits, cases, howsoever arising out of or pursuant to or consequent upon”160

The Commission was given the power for gathering information161 and the responsibility of disseminating of information including a requirement that the Commission publish information regarding its licensing procedures stating persons eligible for license, selection process, tender, auction, competitive bidding, etc.162 Also made mandatory upon the NCC is the publication of an annual report on matters relating to administration of the Act, industry indicators and statistics, availability, adequacy, and quality of service, and tariff rates and

156 Id. S. 86(2).
157 Id. S. 87(4).
158 Id. S. 86(3a-c).
159 Id. S. 88(1-3)
160 Id. S. 138.
161 Id. S. 64(1)(a-b). (providing that the Commission has the power to demand from any relevant person “information including but not limited to accounts and records or any document that is relevant to the exercise of the Commission’s powers and functions…or any evidence which the Commission has reason to believe is relevant to the exercise of the Commission’s powers and functions under this Act or its subsidiary legislation”).
162 Id. S. 33(1-2).
charges. The Commission shall publish such reports “in the manner it deems appropriate, provided that it is made publicly available.” The Commission must maintain registers in electronic and physical formats on matters requiring registration and publish guidelines in regard to the registers stating among other things access processes and procedures for members of the public. Members of public may access and make copies from the register upon payment of any fees set by the Commission.

Section 17 of the Act empowers the commission to “establish and maintain a fund from which all expenditures incurred by the Commission shall be defrayed.” Sources of monies for the fund include appropriations from the National Assembly, fees charged by the Commission, assets of the Commission, loans, grants and gifts. The only fee that is not paid into the Commission’s fund is “all monies accruing from the sale of spectrum,” which has to be remitted into the nation’s Consolidated Revenue Fund. The commission is empowered to apply the proceeds of its Fund for the payment of its administrative and operating costs, salaries, wages, fees and other financial entitlements of its staff and Commissioners; meeting capital

163 Id. S. 89(1-3).
164 Id. S. 89(4).
165 Id. S. 68.
166 Id. S. 69.
167 Id. S. 17(2a).
168 Id. S. 17(2b).
169 Id. S. 17(2d).
170 Id. S. 17(2c).
171 Id. S. 17(3).
172 Id. S. 17(3).
173 Id. S. 19(3)(a-b).
expenditure such as acquisition or maintenance of property or equipment;\textsuperscript{174} making investment;\textsuperscript{175} and expending for any other functions of the Commission.\textsuperscript{176} Annually, the Commission is required to “prepare and present to the National Assembly through the President for approval, a statement of estimated income and expenditure for the following financial year.”\textsuperscript{177}

**NCC Decree vs. Nigerian Communications Act**

At this juncture, it is apt to examine the provisions of the Act in order to compare and contrast it with the provisions of the NCC Decree as well as see the extent to which the Act responds to and or incorporates the recommendations of the new National Telecommunications Policy. A quick comparison of the provisions the erstwhile law (the Decree) with the new Act indicates that there are about four major differences with regards to the structural nature of the Commission. These four major differences are with regards to appointment and removal of commissioners; who the Commission is answerable to; Commission’s adjudicative and enforcement powers; and access to and transparency of the Commission’s rulemaking and other procedures. Whereas the Decree confers on the president the power to appoint and remove Commissioners “at any time” if the president is satisfied that it is in the interest of either the Commission or the public to do so, but the new Act restricts the president from such whimsical action not only by providing that the appointment of Commissioners is “subject to the confirmation of the Senate” but by also specifying the exact bases upon which a Commissioner may be removed and even further requiring that such a Commissioner be given notice of the

\textsuperscript{174} Id. S. 19(3)(c).

\textsuperscript{175} Id. S. 19(3)(d).

\textsuperscript{176} Id. S. 19(3)(e).

\textsuperscript{177} Id. S. 19(1).
president’s intention in writing and an opportunity to respond. These new provisions seem to have secured the tenure of the Commissioners as recommended by the NTP.

A second major departure from the Decree in the Act concerns who the Commission is answerable to. In the Decree the Commissioner was firmly under the Minister’s directive but the Act requires the Commission to prepare and submit the reports of its activities, anticipated budgetary expenditure, and audited accounts to the National Assembly through the President. Even on the broader issue of formulating national policies for the telecommunications sector for which the Minister is given responsibility, the new Act requires him to seek and consider the input of the Commission and to avoid doing anything in the process that will undermine the independence of the Commission. By making the Commission answerable to the National Assembly, the independence of the Commission has been greatly enhanced and the potential political influence that may be exerted through the Minister may be minimized.

The third major difference between the Decree and the Act is on the adjudicative and enforcement powers of the Commission. In the Decree, the Commission only conducts investigations on activities of regulatees but the High Court grants injunctions and other orders to enforce the findings of the Commission. However, under the Act, the Commission can make rules and stipulate penalties for offenses and Section 90 vested the Commission exclusively with the enforcement of compliance by “all persons” with such regulations and other competitive laws and regulations relating to the Nigerian communications market. Further, the Commission is empowered to resolve disputes between parties that are subject to the provisions of the Act on matters relating thereto. This also indicates the greater autonomy granted the Commission in line with recommendations of the NTP.
Finally, a major departure from the Decree and in what is apparently an attempt to make
the Commission’s activities transparent and accessible to stakeholders, the Act requires the
Commission to hold public hearings before making a rule and to give members of the public an
opportunity to make submissions that the Commission is required to take into cognizance in
enacting the rules. Further, the Commission is required to publish the evidence which formed the
bases for the rulemaking. By making these provisions in the new Act in addition to retaining the
right of those aggrieved to seek judicial of the Commission from the Decree, it may be
concluded that a high level of transparency and judicial oversight have been brought to the
activities of the Commission. In general, it may be safe to say that the new Communications Act
was influenced by the recommendations of the National Telecommunications Policy in similar,
though not necessarily the ways that the National Mass Communication Policy influenced the
National Broadcasting Commission Decree.

**Agencies’ Organizational Structure**

But beyond the letters of the law, there is the need to understand the organizational
structure of these regulatory agencies not only because bureaucratic structure indicates the
capacity and influences the organization’s institutionalization in the larger polity\(^{178}\) but also
because in developing countries like Nigeria, bureaucratic structure has been found to be a major
determinant of the performance of agencies in such countries.\(^{179}\) First, let us consider the
organizational structure of the NCC.


\(^{179}\) See e.g., James E. Rauch and Peter Evans, *Bureaucratic Structure and Bureaucratic Performance in Less Developed Countries*, 75 J. OF PUB. ECONOMICS 49, 49 (2000).
NCC’s Organizational Structure

The Nigerian Communication Commission, which was inaugurated in July 1993, has its head office in Abuja, the nation’s capital. The organizational structure of the agency shows that the Board, which comprises the Chairman, Executive Vice Chairman/CEO, and the commissioners, sits atop the hierarchy. Ironically, the Chairman, Alhaji Ahmed Joda, is a seasoned technocrat, who started his career as a journalist. The Executive Vice Chairman/CEO, Ernest Ndukwe, is an engineer and so also are four other commissioners. The two other commissioners are a distinguished banker and a lawyer. The two statutory executive commissioners are both engineers; one of them is responsible for licensing and consumer affairs while the other is in charge of engineering and standards.

The commission has five directorates, namely: (a) Engineering – responsible for frequency planning, allocation, and monitoring; (b) Technical Research and Standards – responsible for standards and codes, network planning, and enforcement; (c) Legal Affairs – responsible for license documentation and registry, dispute resolution and litigation, and laws and regulations; (d) Licensing Directorate – responsible for licensing, zonal operations and tariffs and charges; and finally (e) Support Services Directorate – responsible for finance, administration, human resources, and information technology.

The Commission has five zonal offices in Enugu (Southeast), Ibadan (Southwest), Kano (Northwest), Lagos (Southwest) and Port Harcourt (Southsouth). There are other special units under the Chief Executive's Office including consumer affairs, corporate planning and research, audit, and public affairs and media relations. By April 2000, the Commission’s professional

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staffs were only about 39 including attorneys, engineers, accountants, technicians/technologists, and management other professions.\textsuperscript{182} The Commission added 23 new staff at the beginning of 2004.\textsuperscript{183} The Commission has also initiated and established the Digital Bridge Institute, which provides hands-on technical, engineering, and policy education on telecommunications and IT and is aimed as serving “as a focal point for human resource development and workforce capacity building, as well as, research drive on matters relating to telecommunications in Nigeria, and Africa in general.”\textsuperscript{184} The DBI is based in Abuja, the nation’s capital.

**NBC’s Organizational Structure**

The NBC organizational structure shows that the Board of Commissioners is atop the agency’s hierarchy and, as statutorily required, the Commission’s head office is located in Abuja, the Federal Capital. The pioneer Board, which was inaugurated on October 6, 1992, had a seasoned journalist/editor, Mr. Peter Enahoro, as chairman.\textsuperscript{185} Dr. Tom Adaba, a broadcaster and ex-academic served as the first and longest serving Director General/CEO of the Commission. Currently, the Commission has no Board of Commissioners but Mr. Yomi Bolarinwa, who is an engineer, is the Acting Director General.\textsuperscript{186} Unlike the NCC, the NBC has no executive commissioners. The commission has six directorates, the heads of which together with the DG

\begin{itemize}
  \item ID., at 7 (NCC, Benue Plaza, Abuja, 2003).
  \item NIGERIAN COMMUNICATIONS COMMISSION, NCC NEWSLETTER 4 (March/April 2004) (bimonthly publication covering the activities and news within the Commission); available at http://www.ncc.gov.ng/newsletter.htm
  \item Digital Bridge Institute, About Us: Mission Statement, available online at: http://www.dbieducation.org/about.htm (last accessed February 02, 2008).
  \item ID.
\end{itemize}

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and the Secretary to the Commission comprise the Management. The Commission has, on average, a staff strength of about 350.\textsuperscript{187}

The six directorates of the commission are: (a) Office of the Secretary to the Commission/Legal Department – responsible for official records, Board meetings, and litigation involving the Commission; (b) Directorate of Monitoring & Operations – responsible for monitoring programming and ensuring compliance with the provisions of Nigeria Broadcasting Code such as the right-of-reply, etc; (c) Directorate of Human Resources Management – responsible for personnel matters and building/facilities procurement and maintenance; (d) Directorate of Finance – responsible for managing the commission’s finances including assets and liabilities; (e) Directorate of Research, Planning, Policy & Standards – responsible for “conducting research for the development of the industry, developing mass communication curricular and promoting authenticated radio and television audience measurement. This directorate also sets the framework for broadcast engineering policies and standards for all operators;”\textsuperscript{188} and finally, (f) Directorate of Technology and Information and Communications Technology – responsible for managing the broadcast spectrum, setting up standards for broadcast technology and IT applicable to the broadcast industry. Two special units, the Internal Audit and Public Affairs, responsible for financial control and image management respectively, are under the office of the Director General.

Another major component of the NBC structure is the zonal and state offices. According to the commission, “for effective monitoring and regulation of broadcasting,” it has ten zonal

\textsuperscript{187} Id.

These zonal offices are located in Abuja, Benin, Enugu, Ibadan, Jos, Kaduna, Lagos, Maiduguri, Sokoto, and Uyo. In line with its policy of “no station should be more than two hours drive from a zonal office,” the commission has ten state offices in addition to the zonal office for “effective monitoring and station audit.” These state offices are in Bauchi, Calabar, Gombe, Ilorin, Jalingo, Kano, Kebbi, Port Harcourt, and Umuahia.

**Conclusion**

This chapter examined the legal instruments establishing the two communication regulatory agencies in Nigeria. The chapter identified the extent to which the National Mass Communication Policy and National Telecommunications Policy influenced the legislation on broadcasting and telecommunications respectively. Further, the chapter discussed the organization structure of the two agencies identifying their organization hierarchy, the units within each agency, their staff strengths, as well as their national presence in terms of their zonal offices. Atop the hierarchy of each agency is a Board of Commissioners, mostly accomplished professionals and technocrats. Both agencies have directorates responsible for various aspects of their regulatory functions and units that provide administrative and logistic support services to the commissions.

The structure of the Commissions, especially the establishment of a “Board of Directors,” is clearly an indication of the continuing politics of patronage for there was no reason for a “Board” since the commissions are not a public corporations expected to provide services and be managed like a company. Moreover, the number of the members of the board seems unwieldy having regards to the logistics and cost of convening meetings of such a large number of

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190 *Id.*
members of the Board. Thus, the constitution of boards for the commissions, especially their unwarranted large sizes, vindicates the argument that part of the objective of the privatization program is to incorporate more members of the bourgeoisies and even the petty bourgeoisies into the ruling class.  

Further, the lack of telecommunications policy before the passage of the NCC Decree underscores Hyden’s thesis regarding ‘policy deficit’ in many decisions by governments of African countries. The consequence of the ‘policy deficit’ in this regard is seen not only from the shortcomings of the NCC Decree but also from the Communications Act, which is an improved legislation that is based on the National Telecommunications Policy.

Finally, this chapter culminated the discussion of the evolution of communication regulatory policy reform that was begun in the chapter three. It is clear from the commencement of the reforms to date there had been at least four different administrations in Nigeria none of which sort to reverse the reforms initiated by the preceding administration. This may be interpreted as evidence of the global triumphalism of capitalism theorized by Fukuyama’s ‘end of history’ thesis.

The next chapter will present an overview of the current structure of the Nigerian broadcasting and telecommunications environment and discuss the findings of this study and, thus, answer the research question of the dissertation.

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CHAPTER 5
A DECADE OF DUAL DEREGULATION AND THE CHANGED STRUCTURE OF COMMUNICATION SECTOR: A DISCUSSION AND ANALYSIS

This chapter will provide an overall assessment of the current communications sector in Nigeria by presenting an overview of the post-deregulation changes in the structure of both the telecommunications and broadcasting sectors with a view to answering the research questions of the dissertation. In attempting to answer the research questions, the chapter will apply the theoretical framework and rely on the literature review and the discussions in chapters three and four. This chapter will end by describing the challenges that the NBC and NCC currently face in regulating Nigerian communications sector in order to achieve polices aimed at making services more widely available to the citizenry. This chapter will be followed by the conclusion to the dissertation that will be suggesting policy reforms for the NCC and NBC and the communications regulatory environment in general and by identifying areas for further inquiry.

The Changed Structure of Communications Sector

There is no doubt that since the commencement of regulatory reforms in 1992 many changes have marked the communications environment in Nigeria ranging from increased number of telecommunication service providers to a vigorous private broadcasting industry. To fully appreciate the changes it may be more comprehensible if the two sectors are examined separately. First, we shall examine the changes in broadcasting landscape and then look at the environment of the telecommunications sector.

It was shown in chapter three that by the time the military regime commenced regulatory reforms in 1992, the structure of broadcasting in Nigeria comprised federal government-owned radio and television stations that were broadcasting on VHF and SW/FM respectively; radio and television stations owned by state governments that broadcast on AM/FM/MW and UHF respectively; and the largely illegal DBS providers. At that time, the Nigerian Television
Authority and the Federal Radio Corporation of Nigeria respectively had the only television and radio networks in the country. There was no regulatory agency other than the federal ministry of communications whose only responsibility was the assignment of frequencies to federal and states’ radio and television stations. Finally, and may be needless to say, there were no private broadcasters at the time.

But since the 1992 promulgation of NBC Decree No. 38, a lot has changed in the broadcasting landscape. On June 10, 1993, on the recommendation of the NBC, the new regulatory agency, then military president, Ibrahim Babangida, “signed and personally handed out licenses to the first set of broadcast entrepreneurs in Nigeria.”

Twenty seven licenses were granted: 14 for broadcasting and 13 for cable/MMDS transmission. More stations were subsequently licensed by the NBC such that by December, 2003, in addition to the four national radio SW stations and about 20 FM owned by the federal government, the following had also been licensed: 66 NTA television stations; 48 state government-owned television stations; 37 state government-owned radio stations; 60 private radio stations; 14 private television stations; 12 DTH providers; and 60 MMDS cable providers.

Many more stations have been licensed since then; but, some of these licenses have been canceled as the current numbers on the NBC website shows that operational at the moment are 100 radio stations, 147 television stations, 35 cable providers, 4 DTH and 4 DBS stations on air.

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2 Id.

3 Id. at 7.

In addition to licensing the various broadcast stations and cable providers, the NBC has, in consultation with stakeholders in the broadcasting industry, enacted and published the *National Broadcasting Code* (hereafter the Code) first in 1993 then revised it in 1996 and 2002.\(^5\) The Code, according to NBC, was “designed to ensure a free and responsible broadcasting service to Nigeria, and to stimulate the contribution expected of broadcasting in a truly democratic society.”\(^6\) The Code outlined the social, cultural, economic, political, technological, and professional objectives of broadcasting in Nigeria.\(^7\)

The Code provided detailed guidelines for licensing applications and procedures\(^8\) as well as procedures for lodging complaints and holding public hearings by the NBC.\(^9\) The Code also outlined the categories of licenses (community, campus, DBS, and other broadcasting)\(^10\) and provided guidelines for various programming from children’s programs to political campaign coverage\(^11\) as well as the regulations on all kinds of advertising – children’s, political, religious, and alcohol and tobacco advertising.\(^12\) Finally, the Code also made provision for a right of reply\(^13\) and prohibited the local terrestrial stations from live re-broadcasting of news by foreign

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\(^5\) See generally NATIONAL BROADCASTING COMMISSION, NATIONAL BROADCASTING CODE (2002).

\(^6\) Id. S.1.4.0.

\(^7\) Id. S. 1.5.1.—1.5.6 (these objectives are respectively: promoting generally accepted social values and norms; identifying and promoting Nigeria’s diverse cultures; building a self-reliant, strong, and egalitarian society with a great dynamic economy; creating political awareness and inculcating the tolerance of divergent opinions in order to achieve a democratic society; promoting the study of science and technology; and the recruitment and training of personnel and guaranteeing job security respectively).

\(^8\) Id. S. 2.0.0.

\(^9\) Id. S. 2.13.0

\(^10\) Id. S. 2.0.0.

\(^11\) Id. S. 5.4.0.

\(^12\) Id. S. 8.0.0.

\(^13\) Id. S. 3.4.4.
media. As it shall subsequently be discussed, the Commission’s procedure for granting of licenses and the attempt to enforce the last provision were to prove controversial.

Thus, by 2004, the structure of broadcasting sector in Nigeria has changed from what it used to be in the early 1990s because the new structure comprises the Ministry of Information – responsible for the implementation of the National Mass Communication Policy, supervising the regulatory agency, the NBC, and managing and operating the two federal government owned radio and television networks, the NTA and FRCN; the NBC – responsible for regulating broadcasting and assisting the Ministry with formulating and implementing mass communication policies relating to broadcasting; the state radio and television stations; and the private radio, television, DTH, and DBS, and cable providers.

These changes in the broadcasting sector similarly resulted in the telecommunications sector within the same period of regulatory reform. After its inauguration in 1993, the Nigerian Communications Commission (NCC) embarked on licensing of private telecommunications service providers by ratifying the license that was awarded in principle by the Ministry of Communications in 1992 to a company called EM-International Systems Nigeria Limited (EMIS) but it was in 1994 that the company was assigned a frequency to operate a national Global System for Mobile Communications (GSM) network. Although by December 1996, i.e. about four years after the commencement of commercialization and privatization, no less than forty-five private telecommunications companies have been granted licenses to provide various services, many did not commence operations as indicated by the fact that the incumbent government monopoly, NITEL, remained the key, if not the only player and the congestion of

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14 Id. S. 5.1.4.

lines continue to affect the quality of services evidenced by poor call completion rates and high call drop rates.\textsuperscript{16} There was also continuing capacity underutilization because by December of 1996 only 396,962 lines have been connected out of the 603,452 installed capacity of NITEL and even in Lagos, the nation’s commercial capital, only 119,810 lines were connected out of the installed capacity of 137,713; while in Abuja, the nation’s capital, only 12,506 lines were connected out of 21,000 installed capacity.\textsuperscript{17} It has been observed that most of the licensed private companies were only into providing private network links through VSAT, especially to commercial and banking corporations.\textsuperscript{18} By the year 2000, the situation had slightly improved due to the commencement of operations by fixed cellular telephone companies such as Intercellular and Multi-Links.\textsuperscript{19} But by the situation was about to change that same year when the NCC commenced preparations for the auctioning of three GSM licenses that eventually took place in January 2001 in the nation’s capital, Abuja.\textsuperscript{20} It has been argued that telecommunications policymakers and regulators should note the Nigerian GSM auction because it is the first time in such auction that a variation of the so-called ‘Anglo-Dutch’ format – which combines elements of ascending and sealed bid formats – had been used.\textsuperscript{21} Moreover, the auction was deemed a great success based on the revenue of $285 million per license, which was not

\textsuperscript{16} \textsc{Afeikhena Jerome}, \textit{Public enterprise reform in Nigeria: evidence from the telecommunications industry} 25 (2003).

\textsuperscript{17} \textsc{Ministry of Communications}, \textit{Digest of statistics, 5th Edition} 23-24 (1997).

\textsuperscript{18} \textsc{Modupe}, \textit{Technological response to telecommunications development}, supra note 15, at 31-36.

\textsuperscript{19} \textsc{Chris Doyle and Paul McShane}, \textit{On the design and implementation of the GSM auction in Nigeria — the world’s first ascending clock spectrum auction}, 27 \textit{Telecomms. Policy} 383, 389 (2003).


\textsuperscript{21} \textit{Id.} at 407-8. Lee also observed that the Nigerian GSM auction was the first time in auctioning spectrum that used the “clock auction” format - one in which the price ‘ticks’ up and bidders merely choose to accept or reject the price - of bidding has been used.” \textit{Id.} at 408).
only substantially more than the government and everyone had expected but is also perhaps the highest per capita revenue raised from spectrum auction until that time.\footnote{Id. at 414.}

Since the auctioning of GSM licenses, Nigeria’s telecommunications sector has witnessed exponential growth because within two years (i.e., the end of 2003) there were 853,000 main (wired fixed) lines; 3,149,000 million mobile lines; and the total telephone lines estimated to be 4,038,000.\footnote{INTERNATIONAL TELECOMMUNICATIONS UNION, WORLD TELECOMMUNICATIONS INDICATORS (BASIC INDICATORS) 1 (2004).} This growth continued as indicated by the end of 2004 when the main lines increased to 1,027,500 (0.81 per 100 inhabitants), and the number of mobile lines almost tripled to 9,147,200 (7.20 per 100 inhabitants) and thus bringing the total number of lines to 10, 147, 700, which translates into 8.0 per 100 inhabitants.\footnote{INTERNATIONAL TELECOMMUNICATIONS UNION, WORLD TELECOMMUNICATIONS INDICATORS (BASIC INDICATORS) 1 (2005).} There are, however, questions regarding how the number of mobile lines can be translated into the teledensity of a country since in the case of Nigeria many subscribers have more than one line largely because of the poor interconnection between the service providers. Further, the lines purchased for short-term use by visitors are not accounted for in the calculation of the teledensity. Finally, while the rural populace as part of the overall national population is included in the computation of teledensity, nothing in the provision of service by mobile phone service companies indicate they are actively providing these services to the rural areas.\footnote{Nigerian Communication Commission website, available at www.ncc.gov.ng (last accessed December 20, 2006).}

Not only has the number of lines grown rapidly and with it the teledensity, but many new telecommunication service providers have now entered the market to provide complimentary and
supplementary services. The number of national carriers increased from one to two in 2002 with the licensing of Glo Mobile as the second national carrier thereby breaking the monopoly of NITEL. While the number of GSM providers remains the initial four that were licensed in 2001 (largely of the exclusivity period), the number of fixed telephony providers has increased from nine in 1999 to 17 in 2002 and to 24 by 2004. The number of Internet service providers has doubled from eighteen in 1999 to 36 in 2004; moreover, there are now about 51 VSAT Network providers, which were virtually nonexistent before 2003.

In conclusion, the current structure of Nigeria’s telecommunications sector has four main components: the Ministry of Communications (formulating broad telecommunications policy and monitoring implementation and hosting the National Frequency Management Council, NFMC), the NCC, the incumbent NITEL, and the private telecommunications service providers. In view of the foregoing discussions about the changes in broadcasting landscape and telecommunications environment and the changed structure of both sectors in the wake of regulatory reforms, the dissertation will now attempt to answer the research questions.

Answering the Research Questions

After the discussion of the dissertation’s theoretical framework in chapter one, the following research questions were identified as the ones this dissertation will attempt to answer:

- What specific communication regulatory reforms occurred during 1994-2004 in Nigeria? What were the outcomes of these reforms on Nigeria’s communications sector?

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27 Id.

28 Id.
• How may the Nigerian communications regulatory reform be explained by Horwitz’s theories of communication regulation? How do these theories of regulation shed light on the policy process involved in deregulating the Nigerian communications sector?

• Because policy making in developing countries like Nigeria is influenced by international actors but nation states remain the ‘engine room’ for communication policies, which international factors influenced Nigeria’s communication deregulation and how did Nigeria’s national interests moderate those international influences?

• What is the nature of the regulatory agencies created in the process of deregulating Nigeria’s communications sector? Specifically, to what extent are the NCC and NBC independent regulatory agencies based on the ITU’s best practices guidelines?

**First Research Question**

In answering the first research question, it should first be noted that the regulatory reforms that occurred between 1994-2004 were the outcome of the legislation that was enacted in 1992, that is the Decrees that established the National Broadcasting Commission and the Nigerian Communications Commission, which were empowered to initiate and manage the entrance of private broadcasters and telecommunications service providers into the communications sectors that were hitherto government monopolies. It was found that the communications regulatory reforms that occurred in the period examined began with the commercialization or corporatization of Nigeria’s telecommunications services provider, NITEL, and the introduction of limited commercialization of NTA and FRCN, the federal government’s owned television and radio networks respectively. In the policy arena, the government adopted a new National Telecommunications Policy on the basis of which the legislature passed a new Communications Act which repealed the existent (1992) decree that established the NCC.

The cumulative effects of these regulatory reforms to the communications sector is the transformation of the sector into a more diverse and vigorous segment of the Nigerian polity and economy with the multitudes of broadcasters and competitive telecommunications service
providers. Politically, the public sphere has been expanded with the entrance of new, private
broadcasters, thereby furthering the enthronement of democratic values of freedom of expression
and freedom of the press. Economically, the new trends in telecommunications helped to bring
foreign direct investments and generate revenue for the government while both broadcasting and
telecommunications have created thousands of jobs. Socially, more broadcasters now provide
entertainment while the telecommunication service providers give more people means of
reaching out to loved ones and friends and colleagues. Finally, the regulatory reforms introduced
a new apparatus in Nigeria’s bureaucratic structure in the form of independent regulatory
agencies while the subsequent adoption of the National Telecommunications Policy coupled with
the 2003 enactment of the Communications Act strengthened the independence of one the
agencies, the NCC.

Second Research Question

The second question this dissertation sought to answer is how may the theories of
communications regulation outlined by Horwitz explain Nigeria’s communications regulatory
reform and or how do these theories of regulation shed light on the policy process involved in
deregulating the Nigerian communications sector? Answering this question requires the
understanding that telecommunications and broadcasting in the United States (Horwitz’s
constituency) and Nigeria emerged through diametrically different paths: private entrepreneurs in
the former and (colonial) government in the latter. However, a major similarity is that in both
cases the initial telephone service provider was a monopoly, i.e. AT&T in PT&T in the United
State and Nigeria respectively. Also, in answering this question, it should be recalled that the five
theories Robert Horwitz outlined include public interest, regulatory failure, conspiracy-capture,
organizational behavior, and capitalist state theory.29 First, an analysis of how the public interest theory may explain Nigeria’s communication regulatory policy reform.

Public interest theory is generally derived from legislative intent of regulations that are enacted in response to the failure of the free market to protect the interest of the general public, especially where the market is dominated by a monopoly.30 In such a situation, state intervention to correct the workings of the market, such as the creation of regulatory agency, which is viewed as “the concrete expression of the spirit of democratic reform [and] …as the victorious result of the people’s struggle with corporate interest,”31 and deregulation is viewed as the dismantling of cartels and monopolies or oligopolies in order to pave the way for competition in the interest of consumers.32

There is no doubt that at the beginning of Nigeria’s regulatory reforms the telecommunications sector was monopolized by NITEL while the broadcasting sector was at best a duopoly characterized by the state and federal broadcasting stations. It has been discussed earlier that Nigerians were dissatisfied with the inefficiencies of telecommunication services and had also been complaining about the government monopoly of broadcasting in some cases they resorted to illegal reception of foreign broadcast via satellite. In both cases, Nigerians have expressed their desires to have more providers, a desire that was articulated by the intelligentsia and entrepreneurs at separate conferences on mass communications and telecommunications policy. Thus, it may be concluded that public interest was the genesis of the creation of the


30 Id.

31 Id. at 24.

32 Id. at 17.
regulatory agencies charged with ushering in private broadcasters and telecommunication service providers into the Nigerian communications environment. Further, to a large extent, the resultant increase in the number of broadcasters and telecommunication service providers, which offers the general public multiple forums for public expression and competitive options for telecommunications services, may viewed as serving the interest of the consumers.

The second theory Horwitz identified in explaining communications regulation is regulatory failure theory. Unlike the public interest theory that emphasizes the circumstances of the emergence of regulatory agencies, the regulatory failure theory focuses on the operations of regulatory agencies. It concludes that the attempt to regulate businesses is a failure largely because the regulators may lack the willingness or the capacity to enforce regulations in the interest of the public partly because of the influence of the industry on the agency and the reliance on the industry for information by regulators.\(^3^3\) First of all, without even examining the operations of agencies to ascertain the influence of the regulatees, an examination of the statutes that established the agencies indicates that the appointment of representatives of the regulatees is required in the composition of both the broadcast and telecommunications regulator. For example, the NBC Decree requires that the members of the Commission be “appointed to represent the following interests…law, business…media,” among other interests.\(^3^4\) Similarly, the NCC Decree requires that the commissioners to be appointed should have “requisite experience in any one or more of the following fields” commerce, consumer affairs, financial matters, industry, law, management, public administration, technology, and telecommunications

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\(^3^3\) *Id.* at 27 (further pointing out that the influence is either because the regulators’ appointment was influenced by the industry, they were drawn from the industry, are looking forward to a career in the industry, or because the agencies lack resources for gathering the information necessary for policymaking, they rely too much on the industries for such vital information and end up not only getting too close to the industry that they regulate but seeing things from the perspective of the industry).

\(^3^4\) NATIONAL BROADCASTING COMMISSION DECREE S.3(1)(b).
Although the NCC Decree’s wording is not as explicit as that of NBC, those to be appointed with “requisite experience” in “industry” are mostly going to come from the telecommunications industry. While one or two members of a 9-member commission may not have the final say on a commission’s decision, suffice it to point out that the regulatees exercise at least some influence on the agencies’ decisions resulting from the presence of their representatives.

In their first decade of operations, Nigeria’s communications regulators have not exhibited the influence of the regulatees in terms of relying on the regulatees for assistance with information needed for the purposes of rulemaking in part because the laws made it mandatory for the industry to provide any information requested by the agencies and, in the case of NCC, non-compliance and providing an incomplete or false information is a punishable offense. However, there is slight indication that regulators may be interested in going to work for the industry they are regulating, which according to regulatory failure theory, could influence the regulators. The lead evidence here is the pioneer Director General of the NBC, Dr. Tom Adaba, who now serves on the Board of DAAR Communications, the company which owns African Independent Television and RayPower FM, both being among the most popular television and radio stations in the country. Further, NCC’s current Vice Chairman and CEO, Ernest Ndukwe, came to the job after holding “several senior management positions in leading telecommunications companies.” Therefore, we may be witnessing the revolving-door

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35 [Nigerian Communications Commission Decree S. 3(1a-c).](#)

36 [Nigerian Communications Act S.65(1-2).](#)


phenomenon in both broadcasting and telecommunications industry-agency staff movement, which influences regulators not to act in ways that will be harmful to the regulated industry’s interests.\textsuperscript{39}

In other words, the findings of this dissertation may not provide strong evidence to support regulatory failure theory in the case of Nigeria’s communications regulatory reforms. However, the findings about the agencies' statutes requirement of appointment of representatives of the media and telecommunications industry into the commissions and the entrance and exit of the chief executives of the agencies to and from the sectors they regulate, provide some evidence pointing in the direction of possible regulatory failure marked by increasing influence of the regulatees.

The third theory, conspiracy-capture theory, similar to the regulatory failure theory, is concerned with industry’s influence on the regulatory process. But conspiracy-capture theory goes further than regulatory failure theory’s assertion about industry’s influence to postulate that even the enactment of regulation is the result of the request by the industry that seeks to prevent competition through price and entry restriction; and, where the industry did not initiate regulation, subsequent actions of the regulatory agency are at the behest of the regulated businesses. In short, the concerned industries either ‘conspire’ to initiate regulation or the establishment of a regulatory agency and where the agency was established by popular demand, the industry then schemes to ‘capture’ the regulatory agency.\textsuperscript{40}

In examining the genesis of Nigeria’s communications regulatory reforms in chapter three, it was shown that entrepreneurs interested in investing in the media and

\begin{itemize}
  \item[40] HORWITZ, THE IRONY OF REGULATORY REFORM, supra note 27, at 23.
\end{itemize}
telecommunications market joined the agitation for regulatory reforms but there is no evidence that their agitation, by itself, was decisive in the government’s policy outcome. Secondly, because Nigeria’s regulatory reforms ended the monopolization in the broadcasting and telecommunications sector, it is inconceivable that the incumbents influenced the legislation that opened up, rather than restricted, competition.

On the other hand, in their regulatory operations, the NCC and NBC have acted in ways that, *prima facie*, privileged an incumbent or a market leader. For example, private broadcasters have complained about the lack of level-playing field in the broadcasting sector because while the NBC charges government stations about half a million naira (approximately $4600) for a license they (private broadcasters) are charged about 20 million naira (approximately $184,600).\(^{41}\) This disparity was described as “shocking” by no less a person than Atiku Abubakar, then the Vice President of Nigeria, who also observed that “such a situation will not encourage the growth of private broadcast stations…without a level-playing field, privately-owned broadcast stations may not be able to survive.”\(^{42}\) In this context, it may be insinuated that the high license price is used as entry barrier against private broadcasters to the advantage of the ‘incumbent’ government broadcasters thus confirming conspiracy-capture theorists’ earlier postulation.


\(^{42}\) Id.
In response to the charges of disparity in license fee, the NBC has responded by saying the allegation that it charges discriminatory fees against private broadcasters is “erroneous”.\textsuperscript{43}

The Commission’s Director General, Dr. Silas Babajiya Yisa, at a press conference stated that:

In comparative terms, a public station covers a state and is required to pay N2.5million for a five year period. A private station that covers a minimum of four states pay[s] a commercial license fee of N15 million for television and N20million for radio at the maximum. The lower rung for this category is N7.5million for television and N10million for radio also for five years.\textsuperscript{44}

Plausible as this NBC explanation may sound, the question remains why must private broadcasters’ license cover more than one state?

In telecommunications regulation, it may be argued that a high price was used as entry barrier by the NCC to advantage the incumbent NITEL when it was decided that one of the four GSM licenses to be issued will be reserved for NITEL while the remaining three will be auctioned.\textsuperscript{45} However, NITEL, as well as the winners of the three auctioned licenses, will be required to pay the final fee that the auction determined for a license.\textsuperscript{46} Further, it is doubtful if NITEL was required to pay the upfront deposit of $20 million required of all bidders. Finally, it is also doubtful that NITEL was required to pay the license fee within 15 business days or lose the license, forfeit the deposit, as well as be “prohibited from any telecommunications licence process in Nigeria for 5 years,” all penalties that could have applied to other applicants for the auctioned GSM license.\textsuperscript{47}


\textsuperscript{44} \textit{Id}.

\textsuperscript{45} Doyle and Paul McShane, \textit{On the design and implementation of the GSM auction in Nigeria — the world's first ascending clock spectrum auction}, supra note 19, at 390.

\textsuperscript{46} \textit{Id}.

\textsuperscript{47} \textit{Id.} at 392.
In concluding the discussion on conspiracy-capture theory, it may be argued that there is no evidence indicating that a ‘conspiracy’ by communications industries resulted in the Nigerian communications regulatory reform, especially the establishment of the regulatory agencies. However, the broadcast license fees, and the process of GSM license auction, seemed to lend credence to the conspiracy-capture theorists’ thesis that agencies price and entry regulations privilege the incumbents, though in this case it is not necessarily resulting from the ‘capture’ of the agencies by the incumbents.

The fourth theory Horwitz identified in explaining communications regulation is organizational behavior theory which posits that regulatory agencies, such as other organizations, are concerned or preoccupied with their integrity and survival more than the interest of the public. Therefore, their actions, rather than serving public’s interest, are aimed at appeasing the most powerful contending party or reaching a compromise between the contending parties, whichever of the two will serve the agency’s well-being. In their first decade of operations, which is the focus of this study, the NBC and NCC have perhaps not fully matured as mainstream bureaucracies to exhibit the organizational behavior characterized by obsession with self-preservation. The remotest indication of concern with organizational self-interest rather than public’s interest would have been the high cost of GSM license and broadcast license if such monies were to accrue to the agencies. However, the NCC is required to deposit monies from spectrum sale into the consolidated revenue fund of the nation while the NBC is only entitled...

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48 Horwitz, The Irony of Regulatory Reform, supra note 27, at 38.

49 Id.

50 Nigerian Communications Act, S.17(3) (2003).
to a “percentage of fees and levy to be charged by the commission on the annual income of licensed broadcasting stations.”\footnote{\textsc{National Broadcasting Commission Decree}, S.14(2)(a).}

Moreover, there is no evidence to support even the ‘principal-agent perspective,’ a variant of organizational behavior theory, which argues that elected officials (principals) seeking to maximize electoral votes, regularly control the actions of regulators (agents) in order to alter policies that will maximize their votes.\footnote{\textsc{Marc Allen Eisner, Jeff Worsham, Evan J. Ringquist, Contemporary Regulatory Policy} 27 (Second edition, 2006).} According to this perspective, the agents accede and, in return, the legislators maximize the regulators’ budgetary allocation.\footnote{\textit{Id}.} From the findings of this dissertation, there is no support for the organization behavior theory of communications regulation within the context of Nigeria’s communication regulatory reforms. The relevance of revenue generation could be stretched to argue that the exorbitant license fees were an attempt to demonstrate the agencies’ self-relevance and prove the worth of their budgetary expenditures.

Finally, the fifth theory identified by Horwitz in explaining communication regulation is the capitalist state theory. The theory argues that regulatory agencies operate as part of the structures of the capitalist system whose overall aim and objective is to protect private property and the system of capitalism. The agencies therefore regulate with the sole aim of ensuring the survival and continuity of the capitalist system regardless of whose individual interest may be hindered.\footnote{\textit{Id}.} Within the period under study, two cases indicate that the NCC may intervene not necessarily for the interest of the citizens but to save the system from itself. The first case concerns the tariffs for calls that Nigerians complained about because it was exorbitant and some
characterized it as exploitative to charge subscribers fifty naira (about $0.36) per minute for service that is generally poor quality. The two companies that dominated the GSM market at that time, MTN and VMobile, “dismissed pressure to introduce per second billing (PSB), saying it was not immediately feasible.”\textsuperscript{55} Meanwhile NCC stood by, doing nothing, continuing to proclaim that competition will solve the problem. This exploitation went on for two years until a Nigerian company, GloMobile, entered the market in August 2003 and commenced operations with per-second billing from the start.\textsuperscript{56} The other providers, who for two years claimed the unfeasibility of per-second billing, commenced the same within four months.\textsuperscript{57}

Why did NCC buy into the argument of the two dominant providers that per-second billing was impossible and allowed subscribers to be exploited for two years? Perhaps because there was no threat to the system otherwise contrast this case with the second case which is about the interconnection rates. It may be recalled that in the literature review, network externalities were identified as the benefits of the network effects to a subscriber that is dependent on who else subscribes to the same network.\textsuperscript{58} In other words, the larger the network, the greater the benefits to subscribers. Therefore, network externalities are advanced as regulatory justification for requiring equal and non discriminatory interconnection by all service providers.\textsuperscript{59}

Consequently, the Nigerian Communications Act, and the licensing agreement signed by the


\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at p. 15.


\textsuperscript{59} See e.g., 47 U.S.C. § 251 which provides, inter alia, that a “telecommunications carrier has the duty— (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.
GSM providers, requires them to interconnect with other providers under such terms that are non-discriminatory, neutral, and which provide equality of access. Further, the NCC is empowered not only to make guidelines for such interconnection but to also intervene and make binding rulings at the instance of either or both parties or, “if the Commission considers it in the public interest for it to so intervene at its own instance and without any invitation from either or both parties to the agreement.” Since the rolling out of services by the GSM providers there had been what NCC itself admitted to be “protracted interconnectivity disagreement” among the providers. But it took a year before the NCC intervened to direct NITEL to interconnect its mobile network with those of other operators. Even then, not much changed as poor quality of service and very high rates remained while repeated calls by the federal authorities on the GSM companies to have efficient and effective interconnectivity were not heeded. Finally, the situation seemed unbearable to the subscribers, so, as Ebenezer Obadare, a scholar of Nigerian civil society stated:

On 19 September 2003, mobile phone subscribers in Nigeria took the unprecedented step of switching off their handsets en masse. The subscribers took this symbolic step in protest against perceived exploitation by the existing mobile phone companies. Among other things, they were angered by allegedly exorbitant tariffs, poor reception, …and arbitrary reduction of credits. …the boycott ought to be appraised, first, in the context of existing mistrust between citizens and transnational big business in Nigeria; and second, against the

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61 NIGERIAN COMMUNICATIONS ACT, S.97(2)

62 Id. S.97(2c).


64 Ebenezer Obadare, Playing Politics with the Mobile Phone in Nigeria: Civil Society, Big Business and the State, 33 REV. OF AFRICAN POL. ECONOMY 93, 108.
background of difficult state-society intercourse which has mostly been characterised by the latter's suspicion of the state's connivance with the corporate establishment.\footnote{Id. at 93.}

It was the consumers’ revolt, with its potential for larger negative ramifications on the industry, that alerted the NCC about the possible self-destructive tendency of the unregulated so-called market competition and thus it expedited action to reign in the providers on interconnection rates by considering a June 2003 report on the cost of interconnection and issuing a ruling.\footnote{NIGERIAN COMMUNICATIONS COMMISSION, JOINING THE DIGITAL REVOLUTION: NIGERIAN TELECOM INDUSTRY REPORT, supra note 61 at 23.} In its December 2003 ruling, the NCC fixed connection rates that saw an average of 45% reduction in the cost of interconnection effective March 2004.\footnote{NIGERIAN COMMUNICATIONS COMMISSION, TRENDS IN TELECOMMUNICATIONS MARKETS IN NIGERIA, 2003-2004, supra note 26, at 38-39.} Unhappy with the ruling, the two leading GSM providers, MTN and V-Mobile went sued the Commission and lost.\footnote{Id. at 39.}

In conclusion, while there is no evidence regarding broadcast regulation that shows the NBC acting in the interest of the capitalist system, in the telecommunications sector, which is riddled with the mantra of free market competition, the NCC interventions are mostly a last resort aimed at saving the capitalist system from its vagaries rather than to serve the public interest.

**Third Research Question**

The third research question asks how communication policy making in Nigeria, as in other developing countries, was influenced by international actors and, in view of the findings that nation states remain the ‘engine room’ for communication policies, how did Nigeria’s national interests moderate those international influences? As discussed in chapter three, the communications regulatory policy reform was partly undertaken as part of the overall national

\footnote{Id. at 39.}
economic restructuring under the auspices of the IMF/World Bank induced Structural Adjustment Program (SAP). As stated in the same chapter three, in the case of Nigeria, a 1990 World Bank decision to suspend a $225 million telecommunications loan was said to be critical to the commencement of major reforms and the deregulation of the telecommunications sector because the Bank cited the need to strengthen the country’s policy framework, commercialize NITEL, and ensuring improved access to services as part of the reasons for its action. While agreeing with these international bodies to commence regulatory policy reforms in the form of privatization and commercialization, Nigeria sought to protect certain national interests both in the reform instruments and practice. For example, there is hardly any talk of privatizing the NTA and FRCN, the nation’s only radio and television networks, notwithstanding their efficiencies. And, as discussed earlier, when the GSM licenses were to be auctioned, one license was reserved for NITEL, the incumbent government-owned national carrier, thereby ensuring that even if all the other three licenses were won by foreign companies, at least one license is to be held by the nation’s telecommunications company. Further, as discussed in chapter four, NCC’s realization of lack of adequate qualified manpower has led it to set up a world-class telecommunications training center called the Digital Bridge Institute, which not only builds indigenous human capital but also saves the nation hard-earned foreign currency that would otherwise have been in sending people for training overseas.

In terms of using the legal and policy instruments to protect Nigeria’s national interest, the NBC Decree, far more than the NCC Decree and Nigerian Communications Act, does that because it requires that applicants for broadcast license must be corporations whose “whose

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majority shares are owned by citizens of Nigeria.” The NBC Decree also requires all broadcasters to carry a large local content in their programming; specifically, radio and television must carry not less than 60% local content while cable and satellite broadcasters must carry not more than 80% foreign content.

In concluding the answering of the fourth research question, suffice it to say that while Nigeria acceded to the global bodies’ pressure in terms of general restructuring of the economy by instituting the Structural Adjustment Program (SAP), the country moderated some of the programs by infusing its national interests in the communications regulatory policy reform. The country did so both in practice and by using the regulatory policy instruments especially in broadcasting, and, to some extent, even in telecommunications.

**Fourth Research Question**

The final research question asks what is the nature of the regulatory agencies created in the process of deregulating Nigeria’s communications sector and, specifically, to what extent are the NCC and NBC independent regulatory agencies based on the ITU’s best practices guidelines? Based on their establishing instrument, i.e. the NBC and NCC Decrees, the agencies were setup separate entities from their mother ministries and each was granted a mandate that was hitherto partly the function of the agency’s supervising ministry. By providing in their decrees that they are established as ‘corporate’ bodies that can sue and be sued, the agencies have been granted some fundamental autonomy from their mother ministries. Therefore, to a very large extent, it may be said that the agencies are independent regulatory bureaucratic entities. However, to understand the extent to which they can be regarded as independent regulatory agencies.

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70 NATIONAL BROADCASTING COMMISSION DECREE S.9(1a).

71 Id. Third Schedule, S. 12(5b).
communication regulatory agencies, we shall be employing the ITU guideline discussed in chapter as analytical framework.

In the detailed discussion of the ITU guidelines presented in chapter two, it was concluded that the major indicators of a regulatory agency’s independence are the security of the leadership’s tenure, financial independence, and fair, transparent and accountable decision making procedures. For the purposes of this analysis, the NBC Decree and Nigerian Communications Act, as the extant laws of agencies shall be used. First, an analysis of the recommendations of the ITU guideline that there should be a guaranteed secured tenure for members of the regulatory body; this is usually indicated by the manner they are appointed and removed. Perhaps, NCC has attained that requirement following the passage of the 2003 Communications Act unlike in the 1992 NCC and NBC decrees where the president is vested with the power to appoint and remove commissioners on his/her conviction alone, under the 2003 Communications Act appointment of commissioners is subject to the confirmation of the Senate and removal of a commissioner can only be done for reasons clearly provided in the Act and such a commissioner shall first be given the right to fair hearing. Moreover, the term of the commissioners under the Act is 5 years unlike the four-year term under the Decree. The implication of this is that the Commissioners have no ‘incentive’ to act at the pleasure of the president due to the desire for re-appointment since their tenure would outlive the president’s four-year term therefore they are more likely to act independent of the president.

One aspect of the ITU guideline not reflected by the Act in this regard is the appointment of Commissioners in staggered term. Staggered terms ensure organizational learning and furthers the independence of the agency because hardly would all the commissioners have been appointed by the same president. The current situation where all Commissioners are appointed at
the same term for same 5-year tenure (barring retirements, death, removal), does not augur well for extending experiences of the old(er) members to the new(er) ones thereby ensuring some continuity and dynamism respectively.

The second major recommendation of ITU guidelines for independent regulatory agencies is independent funding. While both the NBC Decree and the Communications Act made provisions for establishment of an independent fund for the NBC and NCC respectively. But the NBC fund, into which the only money deposited is a “percentage of fees and levy to be charged by the commission on the annual income of licensed broadcasting stations” in addition to grants, differs from the NCC fund, which has in addition to the same budgetary grants “fees charged by the Commission under this Act or its subsidiary legislation or under any licence issued pursuant to this Act” except money from spectrum sale which is to be deposited into the consolidated revenue fund of the nation. Finally, while the NBC Decree requires the NBC to submit to the Minister of Information audited reports of its accounts and report about its activities, the Communications Act provides that the NCC shall submit annual report of its activities and audited account to the National Assembly, though through the president.

Finally, the ITU guidelines noted that an indication of an independent regulatory agency is that the agency has a fair, transparent and accountable decision making procedures. The Communications Act requires the NCC to “at all times carry out its functions and duties and exercise its powers in a …transparent manner,” including its formulation of licensing

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73 Nigerian Communications Act, S.17(3) (2003).
74 Id. S.21(1) (2003).
75 Id. S.4(2) (2003).
procedures and issuance of communications licenses.\textsuperscript{76} The NCC is also required to hold inquiries before making regulations and to take into consideration the findings of the inquiry in making the regulation.\textsuperscript{77} Unfortunately, no such provisions exist in the NBC Decree and therefore most of its decisions are hardly transparent. Although it is impossible to question the transparency of NBC with regards to the granting of broadcast licenses since unlike the NCC, which has the power to grant telecommunications licenses, NBC only recommends license applications to the president, through the minister, for his approval and grant of licenses.\textsuperscript{78}

In conclusion, using the ITU guidelines as criteria, the evidence from the existent statutes strongly indication while the independence of the NCC has been greatly enhanced by the passage of the 2003 Communications Act, the NBC can hardly be described as an independent agency based on the 1992 decree that established it, which made it virtually completely subservient to the supervising minister and the president.

Current Regulatory Challenges for the Agencies

Since their establishment over a decade ago, the two communications regulatory agencies have come a long way and the impact of their activities is felt by virtually every Nigerian. There are however challenges confronting both the NBC and the NCC foremost among which is how to ensure that broadcasting and telecommunications are not only accessible to the urban elites as is currently the case. Secondly, while the NBC needs its own version of new statute in the spirit of the Communications Act that may enhance its independence also, the NCC needs to more highly trained professional staff to enable it cope with the ever-changing telecommunications technology.

\textsuperscript{76} \textit{Id.} S.33(3) (2003).

\textsuperscript{77} \textit{Id.} S.71 (2003).

\textsuperscript{78} \textsc{National Broadcasting Commission Decree}, S.2(1c).
CHAPTER 6
SUMMARY, CONCLUSIONS, POLICY RECOMMENDATIONS, AND SUGGESTIONS FOR FURTHER STUDIES

Summary and Conclusions

This dissertation examined the communications regulatory policy reforms that took place in Nigeria between 1994 and 2004. It analyzed the regulatory policy changes in the light of five communications regulation theories identified by Robert Horwitz in his book, *The Irony of Regulatory Reform*. Also examined in the dissertation is the international influence on Nigeria’s regulatory reform and how Nigeria modified the communications regulatory reforms to incorporate its national interests. The dissertation concluded by examining the extent to which the two communication regulatory agencies of Nigeria, the NBC and NCC, may be regarded as independent agencies based on the guidelines for creating independent regulatory agencies created by the International Telecommunications Union.

It was found that the Nigerian communications environment have changed significantly during the period under study. The decade witnessed not only the enactments that established the Nigerian Communications Commission and National Broadcasting Commission as regulatory agencies responsible for midwifing the entrance into the communications sector of private broadcasters and telecommunications service providers respectively but also the commencement of operations by the two agencies. The licensing and commencement of operations by many private broadcasters and telecommunications service providers not only altered the structure of broadcasting and telecommunications sectors, but provided multiple sources of news and information to the citizenry as well as numerous means of communicating.

The study found that there is some evidence – though in some cases very weak – in Nigeria’s communications regulatory policy reform to support each of the five theories identified by Robert Horwitz. In the case of public interest theory, it was found that the interest of the
public was the genesis of the creation of the regulatory agencies (NBC and NCC) that ushered in private broadcasters and telecommunication service providers into the Nigerian communications environment. On regulatory failure theory, the findings of this dissertation did not provide strong evidence to support regulatory failure theory; but the agencies’ statutes requirement of appointment of representatives of the media and telecommunications industry into the commissions and the entrance and exit of the chief executives of the agencies to and from the sectors they regulate provide some evidence pointing in the direction of possible regulatory failure marked by increasing influence of the regulatees. There is no evidence from the findings of the dissertation to support the conspiracy-capture theory because there was no obvious ‘conspiracy’ by communications industries that led to the establishment of the regulatory agencies. The only seeming evidence in this regard is the alleged discriminatory broadcast license fees and the process of GSM license auction, which indicate that agencies price and entry regulations gave undue advantage to the incumbents. The fourth theory, organizational behavior theory, which posits that regulatory agencies are more concerned with their integrity and survival than the interest of the public was found not be quite applicable to the Nigerian scenario; even its variant, the ‘principal-agent perspective,’ which argues that elected officials (principals) seeking to maximize electoral votes, regularly control the actions of regulators (agents) in order to alter policies that will maximize their votes, was not supported by the findings of the dissertation. Finally, there is no evidence regarding broadcast regulation that shows the NBC had acted in the interest of the capitalist system. But in the telecommunication sector, with its touted primacy of free market competition, the NCC interventions are mostly a last resort aimed at saving the capitalist system from its vagaries rather than to serve the public interest.
Consequently, no single theory can adequately explain the first decade of Nigeria’s regulatory policy reforms. Therefore, in general, the findings tend to agree with the conclusions of Horowitz that each of the theories of regulation only emphasizes certain aspect of regulation – the origins, structures, processes or the operations of the agencies – and therefore each theory has “something to offer to the understanding of regulation;” while each theory also has its shortcomings. Consequently, it is often problematic to speak of a single exclusive regulatory theory.

Perhaps, in view of the inadequacy of the existent theories to explain Nigeria’s regulatory policy reforms, there is the need to consider employing another theoretical framework. One of the fundamental differences between the United States, the context of Horwitz’s theorizing, and the Nigerian case is whereas in the United States it is a case of market failure (private entrepreneurs pursuing their self-interest that did not serve the public interest), in Nigeria it was the case of a government parastatal or public corporation that failed to serve the public interest. Thus, the theoretical implication here is there is the need to theorize about the case of government failure in relation to communications regulation in developing countries, such as Nigeria, whose governments were the providers of broadcasting and telecommunications services. While there has been theorizing about government failure relating to certain sectors of the economy such as social services, not much has been done in terms of the application of the theory as analytical framework for examining the communications sector.

This study also found that although Nigeria caved in to the pressures of IMF/World Bank to commercialize and privatize corporations and or services as part of the structural adjustment

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738 Id. at 46.
program, the country ensured that national interests are preserved by refusing to sell the nation’s only television and radio networks, reserving one of the four lucrative GSM licenses for the nation’s incumbent telecommunications service provider, requiring that Nigerian citizens have majority shares in corporation seeking broadcast licenses and requiring broadcasters to provide high amount of local content in their programming.

The final finding in the dissertation is that the National Telecommunications Policy combined with the new Communications Act which was passed in 2003 have created a better regulatory environment in telecommunications sector by enhancing the independence of the NCC than the regulatory environment in broadcasting where the NBC’s independence is still overshadowed by the overarching role of the Minister of Information and the President in its licensing and other operational matters.

**Policy Recommendations**

The need for reforming the NBC laws cannot be overemphasized having regards to the imperative of agency independence in ensuring transparent regulatory activities. But first there is the need to review the current National Mass Communication Policy which was adopted nearly two decades ago. After adopting a new National Mass Communication Policy, its philosophy and principle can then be the basis of a new legislation for NBC in a similar fashion that the NTP informed many provisions of the new Communications Act that was passed in 2003. One major area that needs attention is the granting of broadcast licenses about which the Commission is handicapped by a constitutional provision and amending the constitution, needless to say, is a herculean task. However, there seemed to be an interim measure that can enhance NBC’s licensing power based on the Constitutional provision which said: “no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall
own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever,” (emphasis mine). What the national assembly could do in the process of amending the current NBC Decree is to require that any applicant who fulfills the condition laid down must be granted license within 90 days subject to the availability of frequency and where the president does not give express approval to the NBC recommendation within 90 days he would be deemed to have given the approval. Also, the new NBC Act should expressly provide the only conditions under which the president may withhold approval of the NBC recommendations.

A broadcast regulatory area that needs some revision is the local content requirement. Currently, the requirement for 60% local content in radio and television is too vague and open to wide interpretation to encompass any program produced in Nigeria. Thus, all that broadcasters do is show lousy entertainment and engage in program length commercials and paid-for political talk shows. It would be more meaningful if the NBC will provide additional criteria within the local content to require development communication that addresses the specific developmental needs of an agrarian nation like Nigeria. Similarly, the 20% local content requirement for cable and satellite service providers is not only too low but also does not serve any good purpose other than provide cheap Nigerian-produced entertainment. The NBC should borrow from United States “must carry” rules and impose similar requirements that Nigerian cable and satellite providers must also broadcast the signals of the leading local broadcaster in the vicinity of the cable/satellite provider’s operations.

There is the need for both NBC and NCC to be more proactive regarding rural broadcasting and rural telephony. A nation where 70% or more of its citizens dwell in the rural areas cannot afford to neglect the informational and communications needs of those rural dwellers. Communications regulation may borrow from the Nigerian banking reforms of the late
1980s and early 1990s that among other things required major banks to have a certain percentage of rural presence among their branches. For example, NCC may mandate the leading telecom service providers to dedicate a certain percentage of their subscription for servicing rural areas. Similarly, since only two broadcast licenses can be granted to a person, NBC Decree should be amended to allow the granting of a third license to those holding two licenses provided the third license is going to be used for rural broadcasting.

Finally, the convergence of media and communication technologies is increasingly necessitating what some experts call “convergence regulation;” which, among other things, suggests that all communication regulatory agencies should be merged. The imperative of such merger is obvious to any policy observer not only because of the convergence argument but also because of the efficiency and pooling of expertise working on similar issues. However, the way and manner it has been pursued by the last administration is undoubtedly one of the unnoticed criminalities of Obasanjo: how can the government commence the merger of two separate agencies created by different laws, with different mandates, without an enabling legislation to that effect?

**Suggestions for Further Studies**

This dissertation employed legal and policy research methodology to examine Nigeria’s communications policy regulatory reforms of the 1990s and early 21st century. Since the dissertation relied a lot on documentary research, a further study may be needed that will examine the independence of NBC and NCC based on their regulatory interventions, their actions and inactions, rather than based on the policy instruments establishing the agencies.

Further, another study may also help to illuminate the constraints encountered by the agencies in their operations. Relatedly, there is need to examine the relationship between
regulators and regulatees, i.e., in general is it cordial or adversarial? Which regulations do the industry find burdensome? And which provisions are the regulators finding flaunted?

There is also the need to examine the few but increasing revolving door phenomenon of movement of personnel between agencies and the regulated industry. It will be interesting to uncover which way has the higher traffic: industry staff to moving to regulatory agency or vice versa? In the same vein, it will be useful to uncover the differences in the perception of the industry among the regulators between those who have worked in the industry and those who did not.
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BIOGRAPHICAL SKETCH

Abubakar Danlami Alhassan received his Bachelor of Arts degree in mass communications from Bayero University, Kano, Nigeria and a Master of Arts in communication studies from Western Michigan University, Kalamazoo, before completing his PhD in mass communication at the University of Florida. In addition to the PhD in mass communication, Abubakar Alhassan also completed a graduate certificate in African studies. His research interests broadly encompasses communication law, policy, and regulation as well as international communication and public broadcasting.