

EVALUATING REGULATORY LEGITIMACY: A STUDY OF POLICY AND RULE-MAKING IN THE
REGULATION OF INDEPENDENT LOCAL RADIO BY THE INDEPENDENT BROADCASTING
AUTHORITY.

A Thesis submitted for the degree of Doctor of Philosophy

by

TIMOTHY H JONES

Department of Law, Brunel University

January 1989

ABSTRACT

This thesis presents a detailed study of the regulation of Independent Local Radio by the Independent Broadcasting Authority. The I.B.A. is an independent regulatory agency established to decide questions affecting both public and private rights. Two key functions performed by regulatory agencies are identified: law-elaboration and law-application. Law-elaboration is a quasi-legislative power which involves both the making of policy and the subsequent articulation of that policy through rule-making. Law-application entails the application of those rules in individual decisions.

It is argued that the exercise of such powers can usefully be analysed in terms of legitimacy. What can validate the exercise of legislative powers by an unelected and largely unaccountable agency? In addressing this question, use is made of four ideal-type models of regulatory legitimacy: (1) legislative; (2) accountability; (3) due process; and (4) expertise.

The general conclusion drawn is that it would be problematical for the I.B.A. to claim legitimacy for its policies and rules on the basis of its legislative mandate, its accountability, its respect for due process or its expertise. In particular, it is argued that there is little direct correlation between the I.B.A.'s activities and its legislative mandate. This is stated to be a problem inherent in the nature of the relationship between the legislature and a regulatory agency.

It is argued that the present system of regulating I.L.R. is in need of reform if it is to make out a more convincing case for its legitimacy. The two main approaches to reform are deregulation and procedural innovation. Administrative lawyers have tended to focus on the latter type of reform. It is argued that administrative lawyers should widen their horizons beyond the procedural and become concerned with the outcome of the regulatory process: the concern should be with substantive as well as procedural legitimacy

CONTENTS

Title Page	i
Abstract	ii
Contents	iii
Acknowledgments and Declaration	v
<u>Part One - Regulation and Legitimacy</u>	1
<u>1. Introduction</u>	1
Regulation: General Issues	1
Regulatory Agencies	6
Discretion, Law-elaboration and Legitimacy	8
References	13
<u>2. Regulation and Legitimacy</u>	15
Introduction	15
The Theoretical Basis of Legitimacy	17
Socio-Legal Values	21
Evaluating Regulatory Legitimacy	27
Conclusion	32
References	33
<u>Part Two - The Independent Broadcasting Authority and Independent Local Radio</u>	36
<u>3. The Independent Broadcasting Authority</u>	36
Introduction	36
Functions of the I.B.A.	40
Conclusion: Independence and Accountability	45
References	49
<u>4. The Development of Independent Local Radio</u>	51
Origins of I.L.R.	51
The Sound Broadcasting Act 1972	55
The Report of the Committee on the Future of Broadcasting and the 1978 White Paper	56
The Broadcasting Acts of 1980 and 1981	58
I.L.R. in the 1980s: Decline and Deregulation	59
Report of the Committee on Financing the B.B.C.	64
The 1987 Green Paper	65
The 1988 White Paper	71
Conclusion	71
References	73

<u>5</u>	<u>The Franchising Process</u>	76
	Introduction	76
	Statutory Requirements	77
	The I.B.A.'s Franchising Procedures	79
	Conclusion	87
	References	94
	 <u>Part Three - The Legal and Regulatory Framework</u>	 96
<u>6</u>	<u>The Legal Parameters</u>	96
	The Formal Framework	96
	Informal Regulatory Activity	101
	Conclusion	104
	References	106
<u>7</u>	<u>The Legal Mandate and Discretionary Powers</u>	108
	Introduction	108
	Discretionary Powers	113
	Legal Accountability	118
	References	124
	 <u>Part Four - The Law-Elaboration Function</u>	 128
<u>8</u>	<u>Policy-Making and Rule-Making</u>	128
	Introduction	128
	Policy-Making	129
	Rule-Making	134
	Conclusion	141
	References	144
<u>9</u>	<u>Law-Elaboration and the I.B.A.</u>	148
	Introduction	148
	Programming	150
	Advertising	156
	Conclusion	162
	References	164
<u>10</u>	<u>The Institutions & Procedures of Law-Elaboration</u>	165
	Introduction	165
	Institutions and Procedures	165
	Explaining I.B.A. Policies	170
	Conclusion	173
	References	175
	 <u>Part Five - Conclusion</u>	 176
<u>11</u>	<u>Evaluating Regulatory Legitimacy</u>	176
	Introduction	176
	Deconstructing & Reconstructing Regulatory Legitimacy	177
	Conclusion	188
	References	190

ACKNOWLEDGMENTS

In the course of a research project extending over four years one incurs a debt of gratitude to a large number of people and it seems unfair to single out particular individuals. Nevertheless, a special word of thanks is due to Dr. Robert Baldwin, who first suggested the research topic and who supervised the early stages of this thesis.

I would also like to express my appreciation to the numerous officials of the I.B.A. and to those working in the I.L.R. industry who agreed to be interviewed by me. For the normal reasons of research confidentiality they must remain anonymous.

Thanks are also due to my two typists, Mrs. Angela Duncan, of Brunel University, and Mrs. May MacPhail, of the University of Dundee.

DECLARATION

The account of the 1987 Green Paper in Chapter 4 was published in a slightly different form at [1988] Public Law 24 under the title, "The Deregulation of Independent Radio?"

Chapter 5 draws upon an article written jointly with Robert Baldwin and Martin Cave which was published at (1987) 7 International Review of Law and Economics 177 under the title, "The Regulation of Independent Local Radio and its Reform." The analytical framework outlined in Part One has its origins in this same article.

PART ONE - REGULATION AND LEGITIMACY

CHAPTER ONE - INTRODUCTION

This study presents a detailed examination of the regulation of Independent Local Radio (I.L.R.) by the Independent Broadcasting Authority (I.B.A.). The main foci of the research are the making of regulatory policy by the Authority and the subsequent articulation of that policy in the form of administrative rules. Three areas of I.B.A. policy-making are considered in detail: the award of I.L.R. programme contracts; the supervision of programming; and the control of advertising.

What follows is not simply a descriptive account of the regulation of I.L.R. There is an examination of the problems of evaluating regulatory regimes and a possible method of assessment is put forward. This method is then applied to the regulation of I.L.R.

The regulation of I.L.R. is a topical and contentious area. It is a sphere of regulation which has been subject to unusually harsh criticism. Indeed, it is a regulatory regime which is commonly regarded as a failure. It appears that the responsibility for regulating I.L.R. is to be taken away from the I.B.A. by the Government.¹ In this context, it would seem that the regulation of I.L.R. offers an interesting example for an exercise in regulatory evaluation. The remainder of Part One sets out in detail the analytical framework which is to be utilised.

Regulation: General Issues

Government control of economic activity by means of legislation is both varied and pervasive in contemporary society. Indeed, regulation is now so widespread that it would be difficult to maintain that the organising premise of our economy is one of laissez-faire. It is probable that governmental

regulation of industry will continue to play an important part in our social organisation. Nevertheless, there continues to be ambivalence in attitudes towards regulatory activity by governments. These attitudes will vary depending upon the area concerned. In one situation regulation may be perceived as an undue infringement of individual freedom and in another situation as an unjustified interference with private enterprise and the operation of the market economy. Moreover, even where there is a relative consensus over the appropriateness of regulation, there may still be controversy over the mechanisms or procedures to be employed. One method of analysing regulation is to view it as an attempt to solve various problems of 'market failure'.² Regulation can be justified on the basis that the market has failed to protect or to represent consumer or public interests adequately. This view, which is popular with economists, treats the unregulated marketplace as the norm and holds that consumer interests will be best satisfied as the result of competition. The onus is placed on those who advocate regulation to demonstrate that it is necessary to protect an important public interest that an unregulated market cannot. The literature on regulation identifies a number of different market 'defects' upon which demands for regulation have been based:

- (1) The need to control monopoly power.
- (2) The need to control 'windfall' profits.
- (3) The need to correct for 'spillover' costs.
- (4) The need to compensate for inadequate information.
- (5) The need to eliminate 'excessive' competition.
- (6) The need to alleviate scarcity.
- (7) The need to overcome conservative business practices.

- (8) The need to equalise bargaining power.
- (9) The need to protect individuals from their own irresponsibility.
- (10) The need to conserve scarce resources.

An economic rationale for government regulation can thus be found in the need to supply 'the elements of responsibility'³ which are missing in an unregulated market. The question of whether a particular programme or system is necessary can only be answered on an individual basis and will give rise to differing interpretations.

A number of political and social factors also have to be taken into account when considering the need for regulation. The fact that regulation operates within a legal framework goes some way towards ensuring that important public decisions are not the result of 'bargaining between the powerful'⁴ and that both public and private interests are properly protected.

An example of a respectable case for regulation can be found in the field of broadcasting. A number of different justifications for the regulation of broadcasting⁵ can be put forward. These include the arguments that broadcasting frequencies are a limited resource and that broadcasting is a powerful medium which has a great potential to influence or offend people. Further, radio broadcasting possesses three features which may lead to market failure. First, entry into the market is restricted and as a consequence of this the market structure is non-competitive. Second, radio can be seen as a public good. This means that once the service is available, it can be made more widely available at little or no additional cost and without diminishing the supply. Thirdly, the market place cannot deal adequately with non-economic social costs and benefits such as a value in diversity and in having an informed populace.

As Garnham has pointed out:

...[I]ts [public regulation of broadcasting] justification lies in its superiority to the market as a means of providing all citizens, whatever their wealth or geographical location, equal access to a wide range of high quality entertainment, information and education, and as a means of ensuring that the aim of the programme producer is the satisfaction of a range of audience taste rather than only those tastes that show the largest profit.

Arguments such as these would not be accepted by those who favour a more market-based approach to broadcasting regulation. They would argue that regulation interferes with the market place's ability to achieve consumer satisfaction and to increase social utility.⁷ In particular, it could be argued that radio spectrum scarcity does not provide a sufficient rationale for government regulation. If one were to accept the view that the airwaves are no different from any other scarce commodity, then it would be the function of the marketplace to allocate such limited resources to their most highly valued uses. Moreover, technological advance and the development of alternative methods of broadcasting, including cable and satellite, may alleviate spectrum scarcity.

Thus there is nothing inevitable about a strict system of broadcast regulation based on a system of licences or franchise contracts and control of programming. In economic terms, either the creation of transferable property rights in the spectrum or the auctioning of contracts to broadcast⁸ could be adequate alternative means of allocating frequencies. In political terms, either of these two alternatives could be preferred on the basis that they would avoid government control of programming.

There are, however, important social concerns that can only be served adequately by a system of regulation, quite apart from any economic considerations of allocational efficiency. In other words, even if one were able to demonstrate satisfactorily that a free market in broadcasting would be efficient, then one could still argue that regulation is in the

public interest on social grounds. Both radio and television can have a considerable impact on public attitudes and the shaping of its preferences. This is particularly true in the case of children. Further, the limitation in the possible number of channels can lead to a 'bunching' effect, which means that the content of programmes is limited to areas desired by large groups with congruent interests. As a result, minority groups do not receive an adequate service.

Even where, as in broadcasting, a reasonable case can be made out for regulation, there can still be debate as to the precise balance to be struck between regulation and market-based alternatives. The precise scope, degree and direction of regulation can also be matters for analysis and debate. Among the various alternative approaches to regulatory reform to be considered in any one area are the identification of regulatory mismatches, deregulation and the improvement of administrative procedures.

These and other strategies for the reform of regulation have appeared on the political agenda in recent years as the result of a growing disenchantment with regulation. This is partly the result of the growth and expansion of regulation and partly the realisation that the costs as well as the benefits of regulation need to be more carefully assessed. This is at a time when the finite nature of the country's economic resources has become sharply apparent. Regulation in practice is not always as attractive as regulation in theory, especially where a regulated industry is in a financial crisis.

As yet, however, it is impossible to detect a coherent and consistent programme for regulatory reform either in general or in broadcasting. An examination of the various proposals for reform would seem to show that:

The response to regulatory failure has been confused and contradictory as commentators, regulators and other political leaders grope for a theory and rely in the meantime on pet nostrums to solve systemic failures.

Regulatory Agencies

Criticisms of regulation per se are closely linked to those of the institutions established to enforce it. A common theme in the literature on regulation is that a regulatory authority can become subverted by pressures from those it regulates, that is, 'captured'. Alternatively, the human and financial resources of the regulatory agency may be inadequate. A pervasive problem confronting regulators is that the statute conferring authority on them will be vague, ambiguous and perhaps even contain conflicting or impossible goals. All these factors can lead to an agency performing in an unexpected or undesirable manner. A further possibility is that the regulation has been introduced to be more symbolic than effective, to persuade the public that a problem is being dealt with.

The present study is concerned with one government agency involved in regulation (the I.B.A) and with one particular sphere of regulation, I.L.R. The I.B.A is but one example of an increasing number of regulatory agencies which have been established to decide questions affecting both public and private rights independently of government departments and the courts. In addition to the I.B.A., among the better known contemporary examples of independent regulatory agencies are the Equal Opportunities Commission, the Commission for Racial Equality, the Civil Aviation Authority and the Office of Telecommunications.

At first, such a disparate group of agencies may not appear to have much in common, but Baldwin has identified six properties that they each possess. These are that, 'they are non-departmental; act in some sense on behalf of government; make rules that are backed up by force of law;

exercise continuing control over an industry, trade or practice; differ from courts or tribunals in employing a substantial number of expert staff and in expending considerable resources; decide issues between parties or enforce a particular body of law'.¹² To this list could be added the observation that such agencies play a key role in the making of policy.

There are a number of reasons why the creation of independent regulatory agencies has been an attractive option for governments. First, there has been perceived to be a need for specialised bodies to manage particular fields of regulation. Second, there has been the desire to depoliticise certain sensitive issues and to relieve politicians of responsibility for them. Third, the agency model enables a number of governmental functions (including management, adjudication, policy making and rule making) to be combined in a single institution.

These arguments would seem to militate strongly in favour of the establishment of an independent agency, such as the I.B.A., for the regulation of broadcasting. Janisch has made the point that:¹³

Political realism and political idealism ... both favour an independent regulatory authority for broadcasting. From a realistic point of view broadcasting simply throws up too many hot potatoes for the politicians, while from an idealistic viewpoint it can be said that broadcasting is too sensitive an area for direct government regulation.

Despite their apparent usefulness, a number of difficulties do beset the existence of independent regulatory agencies. Firstly there is the public lawyer's traditional concern that agencies make decisions affecting individual and property rights. Agencies are deemed to be in need of careful oversight in order to prevent arbitrary and unfair decision-making. It is not too much of a caricature to say that the more that agency procedures approach those of a court, the happier the administrative lawyer

will be. The importance of judicial review of regulatory decision-making will also be stressed.

The main weakness of this legalistic and judicial approach is that it serves to emphasise the importance of adjudication and the strict application of law at the expense of the regulators' concern with long-term planning and efficiency. Furthermore, an emphasis on judicial review and strictly legal procedures can divert attention from the need for wider participation in agency policy making and for better mechanisms of political and public accountability.

A further problem besetting independent regulatory agencies is that they are not easily situated within our traditional constitutional theory of responsible government. According to this theory of government, executive actions are performed by ministers who are answerable to Parliament for their actions. In contrast, the very notion of an agency being 'independent' implies the exclusion of governmental control and of ministerial responsibility for an agency's activities. To the purist, therefore, independent regulatory agencies can appear to be, "structural heretics" which do violence to the constituted system of ministerial responsibility'.¹⁴

It would be a mistake, however, to exaggerate the degree of independence enjoyed by regulatory agencies. They are created by Parliament and can be reformed or abolished by it. They receive their statutory mandate from Parliament and judicial review will be available in the courts to ensure that an agency does not act outside its terms. In addition, a government can affect an agency by its appointments.

Discretion, Law-elaboration and Legitimacy

Nevertheless, in its classical form an independent regulatory agency will possess a considerable degree of structural independence in the

performance of essentially governmental functions. This independence will be enhanced by the fact that agencies commonly have a statutory mandate which is expressed in broad terms. Indeed, some agencies are given a mandate so vague that it is, as K.C. Davis noted, 'the practical equivalent
15
of instructing an agency, "Here is the problem. Deal with it"'.
15

In reality it is impossible for an agency's statutory mandate to be so precise that the agency need not interpret it. This process of interpretation will inevitably leave an agency considerable room for the exercise of discretion, in the sense of, 'autonomy and finality in settling the standards on which decisions are to be based and on their application
16
to specific situations'.
16

The formulation of these standards can usefully be described as 'law-
17
elaboration'. Law-elaboration amounts to a quasi-legislative power and involves both the making of policy by an agency and the articulation of that policy through rule-making. The ensuing rules and standards will represent the agency's own interpretation of its parent statute. They will be used to guide and structure the agency's regulatory decision-making. The rules can also have an extra-statutory origin in judicial decisions, established administrative practice and commercial custom or usage.
17

The subsidiary function to that of law-elaboration is law-
18
application. This entails the application of the agency's rules in individual decisions. Inevitably there is an overlap between the two functions, with experience gained in law-application being reflected in further attempts at law-elaboration.
18

The process of law-elaboration provides the main focus for the present study. It is important not to understate the importance and significance of the law-elaboration function of regulatory agencies. An examination of

an agency's own rules and standards will often be far more revealing of the regulatory process than a reading of the statutory provisions.

A central question on law-elaboration concerns the source of an agency's authority to exercise what are essentially legislative powers. The issue can be seen as one of legitimacy. The concept of legitimacy is discussed in the next chapter. It is sufficient for the present to say that legitimacy is concerned with popular attitudes towards governmental power and whether this power is being exercised on an acceptable basis. The identification of a basis for the legitimacy of the law-elaboration function is problematic. Firstly, independent regulatory agencies lack the validation of democratic election. Secondly, their statutory mandates will be too broadly phrased to lend legitimacy to many of their regulatory activities. There are, however, a number of other sources of regulatory legitimacy and these are outlined in the next chapter.

It is important to realise that, in practice, many of the rules and policies made by an agency are not publicly available and exist as what K.C. Davis condemned as 'secret law'.¹⁹ This secrecy, which generally surrounds the regulatory process, raises in a crucial form the issue of legitimacy. Without openness in the processes of law-elaboration and law-application it becomes difficult to examine whether a regulatory agency is acting arbitrarily or improperly. In such circumstances, the very legitimacy of an agency's activities can be brought into question.

To some extent the duty of the student of regulatory legitimacy must be to attempt to pierce the veil of secrecy surrounding the regulatory process. Such is one aim of the present study of the I.B.A. and the regulation of I.L.R. The I.B.A. is a good example of a regulatory agency with a broad statutory mandate and which engages in the processes of law-elaboration and law-application. Furthermore, the I.B.A.'s regulatory

methods have been subject to severe enough criticism to make it a potentially fruitful case for the application of the concept of legitimacy.

The ensuing analysis of the I.B.A. in terms of its regulatory legitimacy can be broken down into a number of separate issues:

- (1) From what source does the I.B.A. derive the legitimacy for its role as law-elaborator?
- (2) Are the powers exercised by the I.B.A. kept within well-articulated and reasonable limits?
- (3) To whom is the I.B.A. accountable for its policies and decisions?
- (4) Do the procedures adopted by the I.B.A. result in informed and fair regulatory decision-making?
- (5) Does the I.B.A. perform its functions in an efficient manner?
- (6) Is adequate consideration given by the I.B.A. to the interests of those affected by its policies and decisions?

Implicit in this catalogue of the principal concerns of the present study is a particular view of the regulatory process and of the socio-legal values to which it should conform. These values are set forth explicitly in the next chapter. By now it should be clear to the reader that the approach to be taken to the issue of regulatory reform is that of the introduction of political and procedural safeguards. Such an approach is not necessarily incompatible with some measure of deregulation, but the primary concern here will be the construction of a legal and political framework for assessing the regulatory legitimacy of the I.B.A. Emphasis will be placed on the control and validation of the I.B.A.'s exercise of quasi-legislative powers. A recurring theme will be that of whether the I.B.A. is accountable sufficiently to the public, Parliament, the government and the courts for its decisions. At the same time, however,

there will be an awareness, 'of the dangers of arbitrarily imposed legal structures causing institutional dysfunctions, and of too stringent procedural safeguards bringing decision-making to a grinding halt'.²⁰

References

1. See Broadcasting in the '90s: Competition, Choice and Quality, Cm. 517, (1988).
2. For a discussion of 'market failure', see Utton, The Economics of Regulating Industry (1986), Chapter 1.
3. Gellhorn and Pierce, Regulated Industries (1982), at 3.
4. Lewis and Harden, 'Deregulation, Privatisation and Constitutionality' (1983) 34 Northern Ireland Law Quarterly 207, at 215.
5. See Campbell, 'The F.C.C.'s Proposal to Deregulate Radio: Is it Permissible Under the Communications Act of 1934?' (1980) 32 Federal Communications Law Journal 233 and Brennan, 'Economic Efficiency and Broadcast Content Regulation' (1983) 35 Federal Communications Law Journal 117.
6. Garnham, 'Public Service versus the Market' (1983) 24 Screen 1.
7. See, in particular, Fowler and Brenner, 'A Marketplace Approach to Broadcast Regulation' (1982) 60 Texas Law Review 207.
8. See Veljanowski and Bishop, Choice by Cable: The Economics of a New Era in Television (1983), Chapter 3.
9. Note, 'Administrative Law - Communications - Developing Standards for Diversification of Broadcasting Formats' (1974) 52 Texas Law Review 558
10. Breyer, Regulation and its Reform (1982).
11. Gellhorn and Pierce, op. cit., at 388.
12. Baldwin, Regulating the Airlines (1985), at 4.
13. Janisch, 'The Role of the Independent Regulatory Agency in Canada' (1978) 27 University of New Brunswick Law Journal 83, at 93.
14. Janisch, 'Policy Making in Regulation' (1979) 17 Osgoode Hall Law Journal 46, at 50.
15. Davis, Administrative Law Treatise (1958) Vol. 1, at 82.
16. Galligan, 'Arbitrariness and Formal Justice in Discretionary Decisions' in Galligan (ed), Essays in Legal Theory (1984), at 146.
17. This term of description is adopted from the Law Reform Commission of Canada, Independent Administrative Agencies, Working Paper 25, (1980). The phrase 'law-in-action' is used to describe this same regulatory function by Hawkins and Thomas, 'The Enforcement Process in Regulating Bureaucracies' in Hawkins and Thomas (eds.), Enforcing Regulation (1984), at 10.

18. See Law Reform Commission of Canada, op. cit., and Levin, 'Identifying Questions of Law in Administrative Law' (1985) 74 Georgetown Law Journal 1, at 10.
19. Davis, Discretionary Justice (1969), at 110 and Administrative Law Treatise (2nd ed., 1978), Vol. I, at 364.
20. Law Reform Commission of Canada, op. cit., at 13.

CHAPTER TWO - REGULATION AND LEGITIMACY

Introduction

Legitimacy is a familiar concept in legal and political theory.¹ Like most theoretical terms, however, a number of very different interpretations can be found in the literature. The sense in which it is most commonly used defines legitimacy as involving, 'the capacity of the system to engender the belief that the existing political institutions are the most appropriate ones for society'.² The corollary of this belief in 'the quality of rightness'³ of the social order is that the actions and decisions of those in authority ought to be recognised as binding.

An alternative use of the concept of legitimacy is as a simple term of legal description, under which one could speak of a particular statutory provision or judicial decision lending legitimacy to the acts of either state officials or individuals.⁴ This use of term does not imply that there need be a popular belief in the rightness of the particular activity. In other words, legitimacy can be used simply as a positivist term of legal description.

A third use of the term is as an explicitly evaluative concept. One may describe a particular law or procedure as lacking legitimacy and be arguing that it really is morally wrong, inappropriate and not worthy of support. This normative usage of the concept does not refer to popular belief in legitimacy, but there is the implication that describing an institution as illegitimate is to do something more than to assert one's own subjective political viewpoint.⁵

A fourth use of the concept of legitimacy is that employed by Habermas, discussed below. Habermas uses the term to represent the orders that he argues would be found to be rational in discursive will-formation

by an ideal community. This critical use of the concept of legitimacy, 'asserts that standards can be developed for the assessment and evaluation of social institutions which are not arbitrary but are rooted in inherent elements of the human condition'⁶.

The value of an evaluative concept of legitimacy to a study of a regulatory institution such as the I.B.A. is that it can provide a starting point for assessment, critique and evaluation. In fact, there are a number of different ways in which the concept of legitimacy can be applied to the study of a regulatory agency. First, one might argue that the regulation of I.L.R., for example, is illegitimate because it is inefficient, unnecessary, unpredictable or too expensive.⁷ Second, one could claim that the I.B.A., as the institution entrusted with the task of regulation, lacks legitimacy because it is an unelected bureaucracy making important political decisions and performing legislative functions.⁸ A third issue could relate to the legitimacy of a particular regulatory decision, given that most or many of those affected by it may find it unacceptable.⁹

The purpose of the present study is to assess the legitimacy of the regulation of I.L.R. by examining the validity of these types of criticisms. This testing of the I.B.A.'s legitimacy will be achieved partly by assessing the extent to which its regulatory processes reflect a number of important socio-legal values and partly by an examination of the principal potential sources of legitimacy for its activities of law-elaboration and law-application. As was pointed out in the previous chapter, the function of law-elaboration results from the fact that most economic regulation is legislated in 'evasive generalities',¹⁰ leaving it to the regulators themselves to formulate regulatory policies and rules.¹¹ Freedman has pointed out that:

The simplification implicit in such broad delegations of legislative power is to make administrative agencies ... the arena for debate and decision on complex policy questions This consequence has had distressing implications for the legitimacy of the administrative process.

Freedman is not using legitimacy in an evaluative sense, but it will be argued here that a critical concept of legitimacy can be usefully employed in a study of the regulatory processes of law-elaboration and law-application.

In a positivist approach to legitimacy, the important issues would be the control and validation of the exercise of the powers of law-elaboration and law-application by a regulatory agency lacking either a firm statutory mandate or the legitimation of democratic election. These are valid concerns and will be addressed further. In contrast, an evaluative concept of legitimacy would take the analysis one necessary stage further and address the, 'worthiness to be recognised'¹² of the regulatory agency's policies and rules.

The Theoretical Basis of Legitimacy

It would be inappropriate to indulge here in an extended discussion of various theories of legitimacy, but an attempt will be made to outline the contrasting concepts of legitimacy employed by Weber and Habermas. Any discussion of legitimacy must include Weber since most contemporary usages of the word legitimacy are playing to some extent on the sense in which he uses it.¹³ Weber argued that the authority of an institution rests ultimately upon a popular belief in its legitimacy.¹⁴ The work of Habermas is relevant because it provides a philosophical basis for an evaluative concept of legitimacy. Furthermore, it is increasingly being recognised that the writings of Habermas have a particular relevance to public lawyers.¹⁵

Weber identified legitimacy as one of a number of possible motives for social action, closely associating the concept with the stability of the

political order:¹⁶

Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order. The probability that action will actually be so governed will be called the 'validity' ... of the order in question. Thus the validity of an order means more than the mere existence of a uniformity of social action determined by custom or self-interest. ... Only ... will an order be called 'valid' if it's in some appreciable way regarded by the actor as in some way obligatory or exemplary for him. Naturally, in concrete cases, the orientation of action to an order involves a wide variety of motives. But the circumstances that, along with the other sources of conformity, the order is also held by at least part of the actors to define a model or to be binding, naturally increases the probability that action will in fact conform to it, often to a very considerable degree.

Weber identified several possible reasons for attributing legitimacy to an order. These included belief in the sanctity of tradition, affectual ties, natural law, rational belief in its absolute value and belief in legality. Weber maintained that, 'the most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and have been made in the accustomed manner'.¹⁷

Weber's concept of legitimacy is thus based on the premise that a belief in the obligatory or exemplary nature of an order provides a reason for action, quite apart from any considerations of self-interest or custom. He uses legitimacy in a non-evaluative sense, in that there is no absolute need for a political order to be legitimate in order to command obligation. There is no requirement that the reasons for belief in the legitimacy of an order be valid ones.

A very different idea of legitimacy can be found in the work of Habermas. Its utility to the present study is that, whereas Weber's main concern is with the legitimacy of a particular social order or state, Habermas provides a concept of legitimacy which can be used to assess the individual institutions and methods of government. Habermas argues that in a rationally formed society it is possible to elaborate valid criteria

of legitimacy against which to assess the acts of those who hold political authority. He rejects the Weberian theory of legitimacy, under which 'belief in legitimacy is conceived as an empirical phenomenon without an immanent relation to truth'.¹⁸ Habermas maintains that in the Weberian¹⁹ definition of legitimacy:

[T]he connection between reasons and motives that exist in communicative action is screened out of the analysis. At least any independent evaluation of reasons is methodically excluded - the researcher himself refrains from any systematic judgment of the reasons on which the claim to legitimacy is based. Since the days of Max Weber this has been regarded as a virtue; however, even if one adopts this interpretation, the suspicion remains that legitimacy, the belief in legitimacy, and the willingness to comply with a legitimate order have something to do with motivation through 'good reasons'. But whether reasons are 'good reasons' can be ascertained only in the performative attitude of a participant in argumentation, and not through the neutral observation of what this or that participant in a discourse holds to be good reasons.

Having rejected the Weberian approach, Habermas adopts what he calls a²⁰ 'reconstructive' concept of legitimacy:

Legitimacy means that there are good arguments for a political order's claim to be recognised as right and just; a legitimate order deserves recognition. Legitimacy means a political order's worthiness to be recognised. The definition highlights the fact that legitimacy is a contestable validity claim

According to Habermas's epistemology of contestable validity claims: 'It is a question of finding arrangements which can ground the assumption that the basic institutions of society and the basic political decisions would meet with the unforced agreement of all those involved, if they could²¹ participate as free and equal, in discursive will-formation'.

It is through this critical device of the 'ideal speech situation' that the validity of claims to legitimacy can be assessed. In an 'ideal speech situation' all parties suppose that genuine agreement is possible, 'that terminates in the intersubjective mutuality of reciprocal understanding, shared knowledge, mutual trust, and accord with one²² another'.

Habermas's theory can quite accurately be described as 'wildly utopian',²³ but it does present a valuable potential for critique of existing institutions and an objective base for assessing legitimacy claims. If one accepts a critical conception of legitimacy along the lines of Habermas, the problem then becomes one of translating the criteria of the 'ideal speech situation' into practical legal and political concepts. According to Prosser, it is possible to do so and the three concepts he identifies are participation, accountability and openness.²⁴ It is arguable, however, whether these concepts are sufficiently expansive to reflect all the socio-legal values that should be present in the regulatory process. The values against which the I.B.A. will be assessed are outlined in the next section.

Prosser argues that participation and accountability are necessary aspects of efficiency and effectiveness, since, 'participation is the only means by which input from the changing environment can reach planners and the only way in which representation can take place of other interests on whom implementation depends'. Similarly, he maintains that, 'it is only through accountability that it is possible to bring different viewpoints to bear on experience and so increase the opportunities for learning from it'.²⁵ There is clearly some force in these arguments, but the problem with making efficiency a subsidiary or consequential value is that it tends to suggest that demands for participation and accountability should be considered independently of their cost.²⁶ In many cases, however, a judgment has to be made between on the one hand furthering the values that Prosser outlines and on the other conserving human and material resources. This is a recurrent theme in the literature on regulation.

Socio-Legal Values

Any coherent framework for assessing the legitimacy of a particular regulatory agency or process must be based on assumptions concerning the socio-legal values to which it should conform. That is, to maintain that a regulatory agency's act, decision or policy lacks legitimacy is to assert that a number of values have been left unsatisfied. For the sake of clarity, it will be useful at this stage to state explicitly the values which should be reflected in the policies and procedures of the I.B.A. in its regulation of I.L.R.

(1) Accountability

Few people would argue with the general principle that the I.B.A. should be accountable for its actions and decisions in the exercise of its legislative mandate. Put simply, accountability requires that there be a legal and political framework through which the I.B.A. can be made answerable for its activities. The contentious question concerns the way in which to achieve this, as well as to whom the accountability is due.

The traditional view is that accountability can best be achieved by ministerial responsibility to Parliament. In practice, however, the theory of ministerial responsibility does not necessarily apply in any clear way to independent regulatory agencies, including the I.B.A. Such expert agencies are designed to be to some extent independent of government departments in order to allow them freedom from political interference in the conduct of their regulatory functions.

Two other important sources of accountability to consider are those of the courts and of the public. The I.B.A. is accountable to the courts if it exceeds or abuses its legal powers. It can be argued that it should be accountable to the public by basing its decisions, 'on the inclusive

representation of relevant interests and on appropriate consideration and weighing of those interests'.³⁰ More will be said about these aspects of accountability in later chapters.

(2) Participation

Participation is one of the basic principles of democracy. It is concerned with, 'the creation of opportunities for widening debate to encompass a range of affected interests and a fuller range of information'.³¹ In considering its implications for a regulatory agency, two types of participation should be mentioned. These are participation by the public and participation by the regulated.

In general it could be said that public participation in an agency's procedures will be favoured by those observers who place a premium on the democratic tradition of popular participation in government. Their intention in advocating public participation will be to ensure that, for example, the regulation of I.L.R. is conducted in the 'public interest'.³² it is possible to identify a number of reasons for favouring public participation in the regulatory process:³³

- (i) Public involvement will tend to lessen regulator 'capture' by regulatees, and will therefore produce more 'balanced' decisions.
- (ii) Since the regulatory agency must take an objective position, it is necessary for the public or public interest groups to become involved so that some voice apart from the industry's will be heard and therefore the traditionally unrepresented interests will have an influence on the decision-makers.
- (iii) A greater ability on the part of an individual or group to participate in the process will have an immediate effect on the

amelioration of public confidence, both in the process itself and the regulator involved.

- (iv) Public presence in the regulatory process provides a form of oversight in that the regulatory agency, if subjected to public scrutiny, will become more efficient and produce policies and decisions more responsive to the needs of the public.
- (v) An open agency will be required to provide well-reasoned and complete decisions, and therefore justify its actions via established, identifiable policy, which should also be subject to public comment and evaluation.
- (iv) The presence of alternative critics will provide what Lenny refers to as a 'double-check'³⁴ on the standards set by regulatory agencies.
- (vii) Public intervention will produce greater regulator accountability.
- (viii) The capacity of an individual or group to intervene in the regulatory process can serve to reduce both the amount of distrust generated by closed proceedings and grievances and frustrations. Public participation also allows for challenge of illegal, ineffective or inappropriate actions before they come into force.

Public participation on anything other than a minor scale may well be opposed, however, by those whose primary concern is the efficiency of the regulatory process. From this viewpoint, participation should be limited to those who can provide an informed insight on the way that an agency should go about the performance of its statutory role. In the case of the I.B.A. this would mean that the primary concern should be with the participation of the regulatees - the programme companies.

This kind of limited participation can promote the fairness of the regulatory process in two major ways. ³⁵ Firstly, participation can increase confidence that the views of the regulated have been made known to the regulators. Secondly, it can produce greater understanding of the reasons for a particular decision.

In fact, both kinds of participation could have benefits for the I.B.A. in the formulation and articulation of its policies. Participation by interested parties would allow the I.B.A. to expand its information base and thereby improve the quality of its decisions. More significantly, participation could add to the legitimacy of the regulation of I.L.R. by satisfying any desire for involvement on the part of constituent interests.

(3) Efficiency

An efficient regulatory agency is one that achieves its goals and in doing so exploits its human and material resources so as to maximise ³⁶ 'value'. Regulatory activities should be organised economically, avoiding the waste of resources.

It should not be thought, however, that an open regulatory agency will always be less efficient than one that discourages accountability and participation. It will cost more to run an open regulatory process in the short term, but in the long term it could prove very expensive to have to change policies because they are subsequently found to be unacceptable or incorrect. This would not be an efficient way to proceed.

(4) Fairness ³⁷

By tradition public lawyers have been concerned primarily with the fairness of the regulatory process. Fairness requires that those affected by the decision of a regulatory agency should be given an opportunity to

put their case. If a regulatory agency operates fairly, the result will be the trust and credibility that can lend legitimacy to the policy making process.

The value of fairness can be furthered both by the structure of agency procedures and by the supervision of the courts.

38

(5) Authoritativeness and Integrity

Authoritativeness implies that the decisions of a regulatory agency should possess the quality of finality, subject to any appeal or review procedures. It requires that the regulatory functions delegated to an agency should in fact be performed by that agency, and not by either the courts or by politicians.

Likewise, integrity requires that an agency act with full commitment to further its statutory objectives and in doing so be free from hidden government pressures. Governments should respect the integrity of the regulatory process and refrain from 'pulling strings'.

39

(6) Comprehensibility

Comprehensibility requires that the regulatory process be understandable to those it affects. Attempts should be made to make an agency's policies and procedures known and understood by interested parties. In particular, those affected by particular decisions should know whom to approach and what the relevant issues are.

40

(7) Principled Decision Making

The notion that decision making be principled requires that regulatory agencies should base their rules and decisions on policies which are identified and articulated clearly. Stewart points out that a, 'requirement that agencies articulate and consistently pursue policy choices can serve as a useful tool to force agency

reconsideration of questionable decisions and to direct attention to factors that may have been disregarded'.⁴¹ In other words, agency decision making should be guided by a rational assessment of the information at its disposal.

42

Openness

Openness provides a window onto the regulatory process and makes it accessible to interested parties. Openness would seem to require both that a large amount of information be made publicly available and that reasons for decisions be given.

The value of openness also supports the other socio-legal values outlined above. An open process encourages participation and is more accessible than a closed one. It is more comprehensible and encourages fairness. More accurate decisions are produced, thereby promoting an agency's efficiency. Openness also encourages the articulation of the policies and standards guiding decision making.

Openness is thus a vital aspect of the regulatory process. Without it, public and politicians alike will be unable to exercise any democratic right of control.

Evaluating Regulatory Legitimacy

The significance of the eight socio-legal values outlined above is that they provide some standards against which to assess the legitimacy of the I.B.A.'s regulatory policies and procedures. It is possible that they may conflict with one another in any given situation, but they should normally be supportive or compatible. The relative weighting to be given to any particular value is a matter of political judgment, but a regulatory process with pretensions to legitimacy should reflect all of these values

in one way or another.

When evaluating the legitimacy of a particular agency activity or policy in terms of the satisfaction or otherwise of these values, it is helpful to make reference to a number of different models of regulatory legitimacy.⁴³ Four such models are utilised here. These are:

- (1) The Legislative Model
- (2) The Due Process Model
- (3) The Accountability and Control Model
- (4) The Efficiency and Expertise Model

These four models of regulatory legitimacy are ideal-types. As such, they extract different ways of understanding the regulatory process, 'from a myriad of particular legal doctrines and works of legal scholarship.'⁴⁴ The main weakness of these models is undoubtedly oversimplification, but this weakness need not be fatal. The potential utility of such models is indicated clearly in the following passage by Frug:⁴⁵

Rather than pretending to be objective, they are designed to appeal to you, the reader, as a convincing way to understand the phenomenon of...legitimation in administrative...law...[T]hey are designed to allow us to grasp the theory...without being overwhelmed by the very richness of detail that they omit.

(1) The Legislative Model

Regulatory agencies wield considerable power over private economic rights. They formulate rules and standards and enforce sanctions for non-compliance. They choose between competing societal interests and values. To a large extent, their legitimacy in exercising these powers derives from the fact that the source of their power is a grant of authority from Parliament.⁴⁶ The role of Parliament as a legitimiser is an important one.

The legislative model asserts that agency actions are legitimate because the agency is acting, 'as a mere transmission belt for implementing legislative directives in particular cases'.⁴⁷ It justifies regulatory action on the basis that as citizens control the legislature through the democratic process, so the legislature in turn controls the activities of regulators. Thus the legitimacy of any particular agency decision can be established by determining to what extent it carries forward legislative prescriptions.⁴⁸ The more specific the legislative prescriptions, the stronger will be the regulators' claim to legitimacy. Conversely, a broad statutory mandate conferring discretionary powers will provide a weak basis for claiming that legitimacy.

In practice, it is well-nigh impossible to legitimate the actions of regulatory agencies by the 'transmission belt' theory. Clearly there is some importance in a legislative connection as a basis for regulatory legitimacy, but the legislative model fails to mirror the realities of the regulatory process. When the I.B.A. is instructed by Parliament to provide services, 'of high quality' and to ensure that broadcasts, 'maintain a high general standard in all respects',⁴⁹ the legislature could not be said to have given crystal clear instructions. We will see in Part Three just how capacious and vague the I.B.A.'s statutory mandate is. The I.B.A. possesses more than a mere discretion over the implementation of statutory provisions.⁵⁰ As Mashaw points out:

A search for the relationship between [a regulatory agency's] exercise of discretion and the democratic expression of public policy in a statute can begin and end in a verbal haze.

The 'transmission belt' theory fails because broad statutory provisions will fail to provide a solution to most of the situations confronting a regulatory agency. Furthermore, most regulatory decision making involves not just the implementation of legislative policy, but also

setting the priorities to be given to competing social interests and values. Even the 'straightforward' application of legislative instructions will require that an agency, in Stewart's words, 'reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests.'⁵¹ This procedure is 'inherently⁵² discretionary' and 'necessarily political'.

In short, the legislative model poorly describes the reality of the tasks given to regulatory agencies. The I.B.A. will thus find it difficult to argue that its actions are legitimate because they are in accordance with Parliament's instructions.

(2) The Due Process Basis

The fundamental principle supporting the due process basis is that the legitimacy of the regulatory process can be enhanced by a popular perception that its decision making procedures are fair in that they allow the participation of affected interests. Procedures for consultation and participation render the regulator directly accountable to those parties concerned in the relevant issue.

There are, however, a number of problems with the due process model.⁵³ First, there are questions concerning who is to be held to be eligible to participate and the extent of that participation. Second, there can be no guarantee that fair and open procedures will result in efficient or rational decision making. Third, an interest representation model of legitimacy will be challenged if a regulatory agency proves to be biased in favour of regulated and client groups. Fourth, there is the problem of making an agency responsive to unorganised interests.

(3) The Accountability and Control Model

The accountability and control model is based on the premise that the actions of regulatory agencies may further be accepted as legitimate to the extent that the regulatory process embodies significant elements of political accountability and control. It involves a direct appeal to the public, but not through the voice of Parliament as reflected in legislation. Legitimacy on this basis derives from the existence of various mechanisms to ensure the accountability of agency policies and performance.

The major problem with this model is that the very label 'independent regulatory agency' implies a considerable degree of independence from outside control. Two subsidiary problems concern to whom the agency is to be made accountable, or by whom it will be controlled, and how to make the system of accountability or control effective.

In practice an agency will become ineffective if it is cut off from political power centres. A regulatory agency will only survive in the long term where the legislature and government agree with its policies and where the courts approve of the way it interprets its mandate. An agency under attack from either politicians or the judiciary will lose the public support that is essential to its effective operation.

Where accountability and control are not exercised by elected representatives, however, problems of unrepresentativeness will undermine claims to legitimacy. This is particularly true of the potential influence of the courts in affecting the policies to which regulatory agencies adhere. In general, the courts can, at the behest of a person aggrieved, review an agency's decision to determine whether it has exceeded its statutory powers, erred in law or failed to observe standards of fairness in making a decision. Although the main function of the courts

in applying the principles of judicial review is to police the limits of an agency's legal authority and not to substitute the judges' view of the merits of a decision, a court's authority to interpret the law will have important policy implications, not only with respect to any particular decision but on the broader application of the agency's mandate.

(4) The Efficiency and Expertise Model

This model asserts that the legitimacy of regulatory agencies may be enhanced by their effectiveness in meeting their statutory responsibilities. On this view, the particular strengths of the regulatory process are expertise and specialisation. In his classic discussion of the regulatory process written in 1938, Landis argued that, 'the art of regulating an industry requires knowledge of the details of its operation, 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 realise conclusions as to policy'.⁵⁵

The expertise model is attractive because it promises to provide a solution to the problem of granting discretionary powers to regulators. Landis argued that an agency can only achieve its goals through the acquisition of the knowledge that comes from specialised experience. The discretion given to formulation of policy being simply a reresult of the goal to be achieved and the state of the agency's environment.⁵⁶

Yet there are a number of weaknesses in an expertise basis for regulatory legitimacy. First, it relies on continuous success to sustain legitimacy when it is impossible to measure the result of much regulatory activity.⁵⁷ Claims to regulatory success will always be contentious and

open to different interpretations. Expertise also has anti-egalitarian connotations and can lead to regulators neglecting the impact of their decisions on other values in society.

Conclusion

From the discussion thus far it should be clear that any attempt to test the legitimacy of the I.B.A.'s regulation of I.L.R. will involve, in Freedman's words, 'an intricate and perplexing inquiry, filled with theoretical and practical subtleties'.⁵⁸ The student of the regulator process must confront these subtleties in any attempt to assess the responsiveness of regulatory institutions to democratic principles and the degree to which their procedures are efficient and fair.

It is certainly not the case, however, that the legitimacy of the regulatory process can turn simply upon its lack of direct accountability to the public through the majoritarian democratic process. The other potential bases for regulatory legitimacy have been outlined above.

In fact, the significance of legitimacy in providing a reason for the popular acceptance of a regulatory institution can be over-estimated. An equally important factor may be rational calculation, including evaluation of self-interest.⁵⁹ Legitimacy must therefore be tested pragmatically, with an awareness of the problematic nature of the concept.

References

1. See, generally, Connolly (ed), Legitimacy and the State (1984).
2. Lipset, Political Man: The Social Bases of Politics (1981),
3. Merelman, 'Learning and Legitimacy' (1966) 60 American Political Science Review 548.
4. Hyde, 'The Concept of Legitimation in the Sociology of Law' [1983] Wisconsin Law Review 379, at 381 n.1.
5. Id.
6. Prosser, Nationalised Industries and Public Control (1986), at 7.
7. Breyer, 'Two Models of Regulatory Reform' (1983) 34 South Carolina Law Review 629.
8. Id.
9. Mashaw, Due Process in the Administrative State (1985), at 15.
10. Freedman, 'Crisis and Legitimacy in the Administrative Process' (1975) 27 Stanford Law Review 1041, at 1054.
11. Id.
12. Habermas, Communication and the Evolution of Society (1979), at 178.
13. See Hyde, op cit., supra n. 4, at 381 n. 1.
14. See Weber, The Theory of Social and Economic Organisation (1947), at 130-132. See also Bendix, Max Weber: An Intellectual Portrait (1960), at 412-417. For a critical account of Weber's concept of legitimacy, see Campbell, 'Truth Claims and Value-Freedom in the Treatment of Legitimacy' (1986) Journal of Law and Society 207.
15. See, e.g., Hyde, supra n. 13, and Prosser, supra n. 6.
16. Weber, 'Economy and Society' (1968), at 31.
17. Ibid., at 37.
18. Habermas, Legitimation Crisis (1975), at 101. On Habermas see McCarthy, The Critical Theory of Jurgen Habermas (1978).
19. Habermas, op. cit., supra n. 12, at 200.
20. Id., at 178.
21. Ibid., at 186.
22. Ibid., at 3.

23. Hyde, 'Is Liberalism Possible?' (1982) 57 New York University Law Review 1031, at 1035.
24. Prosser, op. cit., supra n. 6, at 12-13.
25. Ibid.
26. See Posner, The Economic Analysis of Law (1977), at 23.
27. See Franson, Access to Information: Independent Administrative Agencies (1979), at 5-8; Law Reform Commission of Canada, Independent Administrative Agencies (Working Paper 25, 1980), at 13-15, and Report on Independent Administrative Agencies: A Framework for Decision Making (Report 26, 1985), at 8-10.
28. See Prosser, op. cit., supra n. 6, at 12.
29. See Turpin, 'Ministerial Responsibility: Myth or Reality' in Jowell and Oliver (eds.), The Changing Constitution (1985).
30. Law Reform Commission of Canada, Working Paper, op. cit., supra n. 27, at 13.
31. Prosser, op. cit., supra note 6, at 12.
32. Fox, Public Participation in the Administrative Process (1979), at 138.
33. See Lenny, 'The Case for Funding Citizen Participation in the Administrative Process' (1976) 28 Administrative Law Review 483 and Gellhorn, 'Public Participation in Administrative Proceedings' (1972) Yale Law Journal 369.
34. Lenny, op. cit., supra n. 33.
35. See Mashaw, Bureaucratic Justice (1983), at 90-91 and 140.
36. Posner, op. cit., supra n. 26, at 10.
37. See Franson, op. cit., supra n. 27, and Craig Administrative Law (1983), at 261-290.
38. Law Reform Commission of Canada, op. cit., supra note 27.
39. Ibid.
40. Ibid.
41. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667, at 1702.
42. Prosser, op. cit., supra n. 6, and Franson, op. cit., supra n. 27.
43. See Stewart, op. cit., supra n. 41; Freedman, Crisis and Legitimacy (1978) at 11; Mashaw, op. cit., supra n. 9, at 16-24; Baldwin and McCrudden, Regulation and Public Law (1987), Chapter 3. For an

- earlier application of these models to the I.B.A., see Baldwin, Cave and Jones, 'The Regulation of Independent Local Radio and its Reform' (1987) 7 International Review of Law and Economics 177.
44. Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard Law Review 1277, at 1281-2.
 45. Ibid., at 1282.
 46. Cutler and Johnson, 'Regulation and the Political Process' (1975) 84 Yale Law Journal 1395, at 1401.
 47. Stewart, op. cit., supra n. 41, at 1675.
 48. Mashaw, op. cit., supra n. 9, at 16.
 49. Broadcasting Act 1981, s.2.
 50. Mashaw, op. cit., supra n. 9, at 17.
 51. Stewart, op. cit., supra n. 41, at 1684.
 52. Id.
 53. Id., at 1712.
 54. Freedman, op. cit., supra n. 43, at 11.
 55. Landis, The Administrative Process (1938), at 23-4.
 56. Ibid., at 10-17, 33, 39 and 98-99.
 57. Mashaw, op. cit., supra n. 9, at 19.
 58. Freedman, op. cit. supra n. 43, at 11-12.
 59. Hyde, op. cit., supra n.4, at 391.

PART TWO - THE INDEPENDENT BROADCASTING AUTHORITY AND INDEPENDENT
LOCAL RADIO

CHAPTER THREE - THE INDEPENDENT BROADCASTING AUTHORITY

Introduction

The Independent Broadcasting Authority is the public body authorised by Parliament to organise and supervise the Independent Broadcasting System. This system consists of Independent Television (I.T.V.) in addition to I.L.R. Both I.L.R. and I.T.V. have been established as a two-tier system comprising the I.B.A. and a number of private companies. The radio and television stations are owned by these private companies who enter into contracts with the I.B.A. to provide local radio or television services.¹ Both are financed by the sale of advertising time. In fact, the Independent Broadcasting system is almost wholly dependent upon advertising revenue for its financing. The broadcast services are paid for by the sale of 'spot' advertising time by the programme companies. The I.B.A. obtains its income from rentals paid by the programme companies under the terms of their contracts with the Authority.

The I.L.R. companies are subject to the financial conditions imposed by the Broadcasting Act and their contracts with the I.B.A., in addition to those which flow from company law. The initial funds required by the companies are found in the normal way, by the issue of shares or acceptance of loans from third parties. The I.L.R. companies must therefore seek to secure an income from the sale of advertising time which is sufficient to meet the cost of their operations and to provide a reasonable return for their share holders.

The I.B.A. consists of the Chairman, Deputy Chairman and ten other Members. At present its existence is guaranteed by statute until 1996, subject to extension by statutory order. All the Members are appointed

by the Home Secretary. Three of the Members are specifically appointed to make the interests of Scotland, Wales and Northern Ireland, respectively, their special responsibility. A Member holds office for a fixed period at the time of his appointment, not exceeding five years.³

The I.B.A. has a staff of approximately 1,500, two thirds of whom are concerned with engineering matters. I.L.R. is the specific responsibility of the Radio Division, assisted by the I.B.A.'s other department and its various regional offices. At present, some 15% of Regional Office time is spent on I.L.R.⁴

With regard to I.L.R., four main functions for the I.B.A. are laid down in the relevant legislation, now consolidated in the Broadcasting Act 1981: selection and appointment of the programme companies; supervision of the programming; control of the amount and content of the advertising; and transmission of all the programmes and services. The functions of the programme contractors are to provide the programme material and to raise revenue from the sale of advertising time in order to provide the finance on which the system depends.

One major role of the I.B.A. is to attempt to reconcile the commercial interests of the broadcasting companies with the public interest. The main aspect of this role is to make sure that the pursuit of commercial objectives does not become the companies' dominant activity to the detriment of programme standards. Equally, of course, it has a responsibility to make sure that any requirements which it imposes on the broadcasting companies' output of programmes remain compatible with a successful appeal to substantial numbers of the audience. In short, the I.B.A. represents an example of the traditional British compromise between tight state control and unfettered commercial activity.

The I.B.A. became responsible for the development of I.L.R. as a result of the Sound Broadcasting Act 1972, which first introduced local commercial radio to the United Kingdom. This Act renamed the Independent Television Authority as the I.B.A. and gave to it the powers to establish, 'local sound broadcasting services',⁵ now known as I.L.R. There are at present 48 I.L.R. stations which serve 51 locations in the United Kingdom.

I.L.R. is part of the public service broadcasting system of the United Kingdom. The precise meaning of the 'public service' concept of broadcasting has proved to be a fruitful topic for debate, but, in essence, it means that broadcasting, 'is not determined simply by market forces, in terms either of programming or of access to the broadcast services'.⁶ Two further aspects of the public service concept are that broadcasting is to be used for the benefit of the public as a whole, rather than for the benefit of a minority, and that the broadcast service should be of a high standard.

Various implications as regards the regulation of broadcasting flow from this concept of public service. In the case of the I.B.A., it means that its responsibility for broadcasting is that of a trustee for the public interest and that it is independent of Government in its decision-making. The relationship between the I.B.A. and the Government should be at arms' length, with the independence and integrity of the Authority being respected. There are also positive duties imposed on the I.B.A. to provide a certain type and standard of service.

The report of the Committee on Financing the B.B.C. suggested that, 'the best operational definition of public service is simply any major⁷ modification of purely commercial provision resulting from public policy'. When defined in this way, the Committee noted that the scope of public service would vary with the state of broadcasting itself. In fact, this

limited concept of public service is far from helpful if an attempt is to be made to clarify what the present implications of the concept are. Public service broadcasting is perhaps better understood as, 'imposing requirements on broadcasters not simply to refrain from transmitting material which is inaccurate, misleading or unsuitable, but positively to provide wide-ranging programmes of quality'.⁸

This definition of the concept of public service broadcasting makes it clear that various consequences must flow from this in terms of the regulation of broadcasting and is closer to present day realities, as reflected in the Broadcasting Act. In fact, the Broadcasting Act 1981 does attempt to incorporate the essence of public service broadcasting into the functions and duties of the I.B.A. Section 2 states:

The function of the Authority shall be to provide, in accordance with this Act ... television and local sound broadcasting services, additional in each case to those of the B.B.C. and of high quality (both as to the transmission and as to the matter transmitted), for so much of the United Kingdom ... as may from time be reasonably practicable.

It shall be the duty of the Authority -

- (a) to provide the television and local sound broadcasting services as a public service for disseminating information, education and entertainment,
- (b) to ensure that the programmes broadcast by the Authority in each area maintain a high general standard in all respects (and in particular in respect of their content and quality), and a proper balance and wide range in their subject matter, having regard both to the programmes as a whole and also to the days of the week on which, and the times of the day at which, the programmes are broadcast; and
- (c) to secure a wide showing or (as the case may be) hearing for programmes of merit.

Requirements such as these reflect what is known as the 'principle of universality',⁹ which is an important aspect of public service broadcasting. According to this principle, broadcast service should attempt to provide some programming of appeal to every member of the

listening or viewing public, because the fact of spectrum scarcity means that services are restricted in number. The principle also requires that news and coverage of socially controversial topics be politically impartial in character. Certain material, for example that would be an incitement to crime or highly offensive, cannot be broadcast. It may also be necessary, as in the case of I.L.R., to broadcast a proportion of programmes in minority languages.

Functions of the I.B.A.

(1) Selection and appointment of the programme companies

In practice, the I.B.A.'s most important function is that of choosing the programme contractor. This fact was recognised by the Annan Committee when it stated that, 'the most important way in which they [the I.B.A.] exercise their watching brief is by selecting the company which in their belief will give the best service to its region ... and then by awarding it the franchise'¹⁰. The selection of a particular contractor from competing applicants is entirely a matter for the Authority. Among the relevant considerations are financial strength, the extent of local support¹¹ and past performance or future potential.

Other important decisions within the discretion of the I.B.A. are the determination of the areas to be advertised and the requirements of the service to be provided by contractors. Among the relevant factors in this context are financial circumstances, technical requirements and the character of the region to be served.

(2) Supervision of programming

Although not itself involved in programme making, the I.B.A. is answerable to Parliament and to the public for everything it transmits. The I.B.A.'s function under the Broadcasting Act is to provide local sound broadcasting services of high quality, 'both as to transmission and as to

The matter transmitted'.¹² The Act imposes a statutory duty on the I.B.A. to ensure that the programmes provide a proper balance of information education and entertainment; a high general standard in all respects; and, so far as possible, accuracy in news, due impartiality in matters of political and industrial controversy, and the avoidance of offence to good taste and decency. The programmes have to be made available to as much of the United Kingdom as possible.

Each I.L.R. company has to observe the requirements of the Broadcasting Act, the terms of its contract with the I.B.A. and the I.B.A. requirements that stem from these sources. The I.B.A. examines programme schedules in advance of broadcasting and monitors the output. This monitoring process includes audience research. The public also participate in the regulation of I.L.R. through General Advisory Committees in Scotland, Wales and Northern Ireland and Local Advisory Committees in each I.L.R. area.

The I.B.A.'s role in the supervision of programming is, however, considerably more expansive than that of simply imposing statutory and contractual duties on the I.L.R. companies. The I.B.A. is closely involved in the formulation of programme policy and in the processes of programme planning. In this way, the Authority has a much more positive, pro-active involvement than that of a programme censor. Similarly, the I.B.A. has a greater responsibility for the strategy of the Independent Broadcasting system than its description as a 'regulatory agency' might suggest.

The I.B.A.'s powers of direction over the I.L.R. companies are undoubtedly considerable, but, of course, the mere exercise of such powers will not lead in themselves to the desired end result of high quality programmes. To this end, the I.B.A.'s concern must be as much with the

creation of the conditions in which a good service will be produced and to encourage quality in the variety of ways available to it. This encouragement takes the form of a dialogue between the I.B.A. and the I.L.R. companies. The Authority makes known to the companies its general views on the quality of companies' output and effectiveness. The I.B.A.'s view emerges from a continuing assessment of programmes, in the light of audience research, comments and complaints from the listening public and judgments made by the staff and Members of the Authority.

There are factors other than those within the influence of the I.B.A.'s powers and responsibilities which can affect the broadcast output. Most importantly in terms of the quality of their programming, they are in competition with the B.B.C.

The more negative aspects of the I.B.A.'s control of programme content derive from the particular duties which the Authority is given under the Broadcasting Act. The specific rules relating to programme standards are to be found in the I.L.R. Notes of Guidance. The Notes of Guidance assemble the outcome of discussions between the I.B.A. and the companies on many programme matters over the years, including possible offence to good taste and decency, accuracy, privacy, fairness, impartiality, crime, politics and so on.

The Notes of Guidance cover highly controversial issues about which there are strong disagreements within society. Moreover, it is within these areas of possible controversy that the programme companies tend to be most jealous of their own editorial role alongside the statutory responsibility of the I.B.A. The Authority must therefore perform a neat balancing act if it is not to act as a purely negative and restrictive influence on programme companies. This is an example of the dilemma between what Kagan has called 'stringency' and 'accommodation' in the

implementation of a statutory mandate. The Notes of Guidance are intended to give the programme companies the greatest possible freedom of action within the Authority's interpretation of the terms of the Act. The Notes of Guidance stress the preparedness of the I.B.A. to discuss individual problems on an ad hoc basis, and this dialogue is one of the more important functions fulfilled by the Authority.

(3) Control of the Advertising

The I.B.A. controls all the advertising transmitted on I.L.R. It checks that the frequency, amount and nature of the advertisements are in accordance with the Broadcasting Act and with the rules and standards laid down by the I.B.A. itself. The Authority also regulates the frequency and duration of the advertising intervals in order that they do not detract from the statutory requirement that the medium be one of information,
14
education and entertainment.

All advertisements have to comply with the I.B.A.'s Code of Advertising Standards and Practice, which is drawn up in consultation with the I.B.A.'s Advertising Advisory Committee. Specialist staff at the I.B.A. and the Independent Television Companies Association (I.T.C.A.), which acts in this respect on behalf of the radio companies also, have to satisfy themselves that advertisements comply with the law, meet all the provisions contained in the Code and that advertisers' claims have been substantiated.

The I.B.A. and, on occasion, Government have responsibility for changes to the Code and to matters of taste and truthfulness. Under the Broadcasting Act, the I.B.A. is required to consult from time to time with the Home Secretary as to the classes and designation of advertisements which must not be broadcast, and to carry out any directions he may give

them in those respects. The I.B.A. also has the responsibility to regulate programmes funded by non-broadcasters (that is, sponsorship).¹⁶

(4) Transmission of the programmes

Responsibility for transmission of programme services has long been recognised as an essential part of the Authority's functions. In the White Paper published in November 1953 on Television Policy, before the setting up of the I.T.A., the then Government recognised that the body regulating the new service would need to own and operate the transmitting stations. The I.B.A.'s continued responsibility for transmission gives it ultimate control over what is broadcast and enables it to plan the transmitter network so as to achieve the Broadcasting Act's requirement of bringing the services to as much of the country as is reasonably practicable.

The I.B.A.'s main engineering functions are:

- (i) to plan the transmitter networks, their frequencies, assignments and the distribution networks;
- (ii) to plan and build all transmitting stations radiating I.T.V. and I.L.R. programmes;
- (iii) to operate and maintain these transmitting stations;
- (iv) to ensure transmissions of a high quality;
- (v) to maintain a specialised programme of engineering research in order to keep the Independent Broadcasting system up-to-date in terms of technological development;

The I.B.A. has drawn up an Engineering Code of Practice and Technical Regulations for I.L.R. which set out the minimum technical standards for the performance and operation of the I.L.R. companies' equipment. The companies are required to meet the standards laid down in the Code and any

revised standards that may be agreed from time to time.

Conclusion - Independence and Accountability

Given the broad range of the duties, the I.B.A. can quite safely be described as a multi-functional regulatory agency. This means that a variety of functions are represented by the shorthand term, 'regulator'. In the performance of the functions outlined above, the I.B.A. is of necessity engaged in the process of law-elaboration, which entails both policy-making and rule-making. This latent power to make its own policy or expand on government policy manifests itself in the Authority's power to award contracts to programme companies, to make regulations to control programming, advertising and technical standards, to exercise its discretion in a number of different contexts and, most significantly, to interpret its statutory mandate.

It may be, of course, that the I.B.A.'s ability to make policy is the result of accident rather than design or delegation. It arises most clearly when one considers that the statutory mandate of the I.B.A. is expressed in terms of the 'public interest'¹⁷ and contains a number of vague criteria that have had to be given content by the I.B.A. before it could proceed with its specific duties. Inevitably, policy-making of this sort raises in a crucial form the issue of accountability.

The issue of accountability is also raised by the I.B.A.'s function of rule-making. Rule-making, in the sense of the ability to formulate policies in the form of rules and standards, is a highly significant and important function. This ability to make rules such as the I.L.R. Notes of Guidance that can apply to a number of cases has advantages both for the I.B.A. and for the I.L.R. companies, for whom the existence of rules and standards can serve to provide a degree of predictability in their affairs. The existence of rules can also further the values of

consistency and fairness by the application of the same standards to different parties. The main disadvantage of rules is that they can lead to inflexibility by the regulatory agency and to a lessening of the opportunity to argue an individual case before the agency's policy is applied.

One major dilemma raised by the I.B.A.'s performance of its various statutory functions is that of reconciling the value of maintaining the Authority's independence with that of making it accountable. The independence of the I.B.A. is perhaps its most crucial characteristic. Slatter has written of independent regulatory agencies that, 'the medium through which the government function is performed can be said in a very real sense to be itself a part of the message'¹⁸. In the field of broadcasting government has always felt it necessary to maintain an arms-length relationship with the regulators. No doubt a government department could fulfil the statutory duties of the I.B.A., but it would not be able to provide this added independence. In this sense, the I.B.A. serves an important function as an 'insulator'¹⁹ between the listening public and the government.

As was mentioned in Chapter One a possible reason for the creation of an independent regulatory agency is to deal with a political 'hot potato'. Such agencies have indeed been established when, 'public feeling was intense but its drift was obscure'²⁰. In circumstances such as these, the establishment of an agency can give an opportunity to government to formulate a more coherent policy and to deflect unwanted criticism. In addition, the creation of a regulatory agency relieves the Government of direct responsibility for any decisions or policies made and hence for any ensuing criticism or controversy.

There are, however, more legitimate reasons for the use of an independent regulatory agency. In the case of the I.B.A. and the allocation of I.L.R. contracts, the fact that the Authority is independent of government serves to minimise political lobbying and the invocation of political favours. The power to allocate these contracts is quite clearly outwith the control of government and politicians. This is not to say, of course, that the I.B.A. itself is not subject to lobbying and political pressure, but the intention is that such arguments be evaluated independently and on their merits.

In a similar vein, it has generally been felt desirable to keep the day-to-day regulation of broadcasting free from partisan political influence. The independence of the Authority provides this necessary impartiality. It is arguable that decisions made independently of party politics are more readily accepted as legitimate both by the public and by those directly affected by the regulatory regime.

It may be, however, that this faith in 'de-politicised' regulation is somewhat naive and misplaced.²¹ In order to, 'make significant headway²² against the opposition of the regulated interests', a regulatory agency will inevitably be reliant upon political support. Furthermore, the very process of regulation can itself be seen to be political. As Cutler and Johnson²³ have pointed out:

Regulatory agencies are deeply involved in the making of 'political' decisions in the highest sense of that term - choices between competing social and economic values and competing alternatives for government action - decisions delegated to them by politically accountable officials.

The emphasis in the discussion thus far has been on the desirability of maintaining regulatory agency independence, but an equally, if not more important value in a democratic system of government is that of accountability. The possible tension between these two values is

reflected in the fact that a gain in independence will lead to a loss of accountability. Any increase in accountability will result in less room for manoeuvre on the part of the agency and less flexibility in the application of its expertise to the problems confronting it. Too much emphasis on accountability would tend to defeat the purpose of creating an independent agency in the first place.

The trite solution to this dilemma is to attempt to strike a balance between the competing values and not to choose to emphasise one at the expense of another. Striking such a balance is no easy task, of course, and there are a number of complicating factors. First, agencies such as the I.B.A. habitually have a wide range of functions to perform and it may be that each function calls for a different degree of accountability. Second, there is the great diversity among regulatory agencies and there can be no guarantee that the best possible solution for the I.B.A. will be applicable to other agencies. Each regulatory agency needs to be treated as a separate case.

It should be pointed out, however, that there is in fact considerable scope for the Government direction and control of the I.B.A. through reserve powers given to the Home Secretary under the Broadcasting Act.²⁴ These powers include the ability to limit the amount of broadcasting time, to require the broadcasting of Government announcements, to prevent the broadcasting of any matter or classes of matter, to prevent exclusive arrangements for broadcasting sporting or other events of national interest. Admittedly there have been few occasions on which any of these powers have been exercised, but they do indicate that the I.B.A. cannot act²⁵ independently of Government wishes in all circumstances.

References

1. These contain the contractors' basic broadcasting obligations as well as some administrative detail. The basic contractual requirements repeat the main elements of the Broadcasting Act 1981.
2. Broadcasting Act 1981, s.2(1).
3. Ibid., Schedule 1.
4. Interview with I.B.A. Officer.
5. See now Broadcasting Act 1981, s.2(2)(a).
6. Baldwin, Cave and Jones, 'The Regulation of Independent Local Radio and its Reform', Brunel Discussion Paper in Economics, (1986) at 2.
7. Report of the Committee on Financing the B.B.C., Cmnd 9824 (1986) at para. 580.
8. Radio: Choices and Opportunities, Cm.92 (1987), at para. 1.16.
9. Ibid.
10. Report of the Committee on the Future of Broadcasting, Cmnd. 6753 (1977) at 192.
11. See Chapter 5, post.
12. Broadcasting Act 1981, s.2(1).
13. Kagan, Regulatory Justice: Implementing a Price Freeze (1978).
14. Broadcasting Act 1981, Schedule 2.
15. Ibid.
16. Ibid.
17. See Chapter 5, post.
18. Slatter, Parliament and Administrative Agencies (1982), at 19.
19. Ibid., at 18.
20. Abel, 'The Dramatis Personae of Administrative Law', (1972) 10 Osgoode Hall Law Journal 61, at 75.
21. See Janisch, 'The Role of the Independent Regulatory Agency in Canada', (1978) 27 University of New Brunswick Law Journal 83, at 104-108.
22. Bernstein, Regulating Business by Independent Commission (1955), at 284.

23. Cutler and Johnson, 'Regulation and the Political Process', (1975) 84 Yale Law Journal 1395, at 1399.
24. Broadcasting Act 1981, ss. 28-30.
25. In October 1988 The Home Secretary exercised his power under s.29 to prevent the broadcasting of interviews with members or supporters of certain paramilitary and political groups based in Northern Ireland. See Michael, 'Attacking the easy platform ' (1988) 138 New Law Journal 786.

CHAPTER FOUR - THE DEVELOPMENT OF INDEPENDENT LOCAL RADIO

Origins of I.L.R.

Before looking in detail at the history of I.L.R., it is necessary to outline the early days of radio broadcasting and the role played by the B.B.C. Prior to the grant of its first Royal Charter in 1926, the B.B.C. had been a limited company, formed in 1922 by the manufacturers of wirelesses in order to promote the sales of their equipment. As Burns has pointed out, the transition to a public corporation marked the acceptance of the view that because the social and political possibilities of broadcasting were as great as its technical potential, the new form of communication should be run in the interests of the whole nation and not just to promote the financial interests of commercial companies.¹ Accordingly, the B.B.C. was to be run as a public service.

This view that broadcasting should be run as a public service owes much to the early political and social environment of the B.B.C. Among the factors described by Coase in his seminal work, 'British Broadcasting: A Study in Monopoly', are: 'widespread dissatisfaction with the ad hoc nature of industrial competition' in early part of the century; the growth of public corporations exercising governmental control over utilities in these same years; and the desire of government not to be seen to be acting unfairly by giving a monopoly to a single commercial company.²

It was felt that a monopoly in broadcasting was essential if high standards were to be maintained and that the only alternative to a public monopoly was the broadcasting chaos which had reigned in the U.S.A., where, according to Coase, there was, 'no co-ordination, no standard, no guiding policy'.³ Furthermore, it was believed that a radio service financed by advertising was incompatible with a wide ranging broadcasting system

operating in the public interest.

There were, of course, those who held very different views about the aims of broadcasting and were attracted by the commercial opportunities that it presented. The origins of commercial broadcasting reflect this divergence of views about the purposes of broadcasting. Should broadcasting be treated as a public resource or as a private commercial enterprise?

According to Briggs, the reason why the B.B.C.'s monopoly (over television broadcasting) was finally broken in 1954 was that the commercial lobby saw in broadcasting, 'a potential for profit and power which encouraged them to struggle against any continuation of the institutional status quo'⁵. The lobby for commercial television was an amalgam of advertising, industrial and political interests.⁶ It was a similar alignment of economic and political interests which succeeded in the introduction of commercial radio in the form of I.L.R. in 1972.

The advertising industry quite naturally was associated with moves to commercialise radio broadcasting. It was impressed by the medium's ability to make money, as demonstrated by experience in Europe and the U.S.A. Various other industrial and financial organisations brought their considerable influence to the lobby for commercial radio. The pirates, who broadcast a mix of pop music and advertisements from off-shore locations, were able to exploit a genuine demand which was not adequately catered for by the B.B.C. at that time.

Thus, during the 1960s there was a powerful, if loosely aligned lobby who supported the introduction of commercial radio into the U.K. They were helped by the existence of the pirates and also by the willingness of British companies to use radio to advertise their products.

The natural political allies of this lobby for commercial radio were the Conservative Party. It was a Conservative government which had introduced commercial television in 1954 and an influential section of the party believed that the commercial opportunities in radio would further industrial interests and the market economy.⁷ Wilson points out, however, that support for commercial broadcasting within the Conservative Party was by no means unanimous in the 1950s and that the introduction of commercial television marked a shift away from 'philosophic' and towards opportunistic or practical Conservatism in the post-war period.⁸

But whatever the internal debates within the party, by 1970 Conservative support for commercial radio was overt. The Conservative manifesto of that year pledged to introduce 'private enterprise radio closely linked with the local community'.⁹

It is interesting to examine the various arguments used to support commercial radio and which created the atmosphere which enabled its introduction. Similar arguments can still be heard in contemporary debates about broadcasting policy. In 1959, supporters of commercial radio were contending that the B.B.C.'s monopoly in radio broadcasting was, 'contrary to the best interests of the large listening public' and that, 'independent sound broadcasting organisations' would improve the situation.¹⁰ Perhaps the most cogent argument put forward was that which associated commercial radio with other forms of free enterprise in communications. In 1971, for example, the Conservative Minister for Posts and Telecommunications stated that the Labour Party was unable, 'to think of any reason why commercial radio was wrong in principle if commercial television was right'.¹¹

Another frequently aired argument was that commercial radio would be a local form of broadcasting, in contrast to the B.B.C.'s national and

regional services. Localism proved to be an attractive and fruitful concept to the commercial radio lobby. Significantly, perhaps, the concept has public service implications. Also, there was no such existing service implying that the 'job description' for a local radio service was a matter for debate. The adroit use made of the local radio concept is demonstrated by the fact that when commercial radio was introduced in 1972, it was in fact called 'local sound broadcasting'.¹²

Doubts were expressed at the time, however, about what was meant by the term 'local'. As 'The Economist' put it:¹³

Local radio must be clearly shown to have greater intrinsic virtues than national commercial stations. That would be far from the case if all the government did was to set up a number of stations which were local only in so far as their transmitters covered a local area, while stations were virtually indistinguishable from one another in their output.

Powerful though the lobby for commercial radio may have been, there was also considerable opposition which both delayed the arrival of I.L.R. and ensured that it was a regulated system of broadcasting within a public service framework.

The B.B.C. were forceful opponents of the introduction of commercial radio and were able to bring considerable pressure to bear on governments. It attempted to demonstrate that local radio could be run on a public service basis by establishing a number of local radio stations in the late 1960s.

Another consistent source of opposition was the Labour Party, which had already opposed the introduction of I.T.V. in 1954. In a debate in the House of Lords in 1959 over proposals for commercial radio, the Labour peer Lord Shackleton claimed that its supporters were, 'firing the first shot in a new campaign to extend the range of commercial and advertising interests into radio.'¹⁴

The Labour governments of 1964 and 1970 supported the B.B.C.'s attempts to undermine the case for commercial radio by allowing the B.B.C. to experiment with local stations and to create Radio 1 to cater for demands for pop music. The Government also acted strongly against pirate radio stations with the passage of the 1967 Maritime Offences Act. When in opposition, the Labour Party vigorously opposed the 1971 Sound Broadcasting Bill. The Labour Party's attitude was summed up well by Wedgwood-Benn, who wrote in 1971 that there was a need to oppose those who would, 'put commerce before communication, profits before programmes'.¹⁵

The Sound Broadcasting Act 1972

It has already been seen that the Conservative Party came into government in 1970 promising to introduce commercial radio. In order to carry out its manifesto commitment it had to contend with the British tradition of public service broadcasting and with the considerable opposition to commercial radio. The resultant compromise was the Sound Broadcasting Act of 1972. Phillips claims that:¹⁶

In Britain commercial radio is local because of a [n]...accident of history... The desire to compromise with radio's non-commercial heritage...led the Heath Government to settle for a new service of advertisement-financed local broadcasting.

Not too surprisingly, perhaps, there was no precise definition in the Act of a 'local sound broadcast'.¹⁷ Section 2(3) of the Act stated that:¹⁸

In this Act 'local sound broadcast' means a programme which is broadcast...from a station so constructed and operated as to have a range of transmission limited to that which is sufficient, in normal circumstances, to ensure adequate reception throughout a particular locality.

In response, the Minister for Posts and Telecommunications agreed that the Bill did not contain a definition of a 'locality' and that the task of defining the concept was to be left entirely to the discretion and expertise of the I.B.A.

20

The definition of what constitutes a 'local' programme was left similarly vague in the Act:

21

In the case of local sound broadcasting services...the programmes broadcast from different stations for reception in different localities [should] not consist of identical or similar material to an extent inconsistent with the character of the services as local sound broadcasting services.

The 1972 Act placed the new local sound broadcasting services under broadly the same framework as I.T.V. and by doing so paid service to the ideas of public service broadcasting. Admittedly the public service obligations were very loosely defined but, had it not been for the strength of the public service tradition and the opposition to commercial radio, a much more loosely regulated system of broadcasting could have been introduced.

The Report of the Committee on the Future of Broadcasting and the 1978

White Paper

The newly elected Labour Government of 1974 acted quickly to stop any further expansion of I.L.R. In April 1974 they established the Committee on the Future of Broadcasting under the chairmanship of Lord Annan. The task set the Committee was:

22

To consider the future of the broadcasting services in the United Kingdom...; to consider the implications for present or any recommended additional services...; and to propose what constitutional, organisational and financial arrangements and what conditions should apply to the conduct of all these services.

Much of the evidence to the Committee on the quality of service provided by I.L.R. was highly critical. A great deal of criticism was

directed at the perceived failure of I.B.A. to hold I.L.R. contractors to
the terms of their original applications. ²³ Despite such evidence,
however, the Annan Committee itself gave a cautious approval both of the
performance of the service provided by I.L.R. stations and of the role of
the I.B.A. ²⁴ The Report concludes that:

Most of us, however, approved of the way in which the I.B.A. had
handled the matter....Too many fearsome regulations in the initial
stages can cripple commercial enterprises. We agreed with the I.B.A.
that rigid adherence to the terms of the franchise application was not
necessarily the right policy, the stations' programming policies
should develop in the light of experience...It was up to the Authority
to ensure that the programming was varied and gave a good service to
the locality.

Yet again one sees here the desire, already evident in the 1972 Act,
to leave the discretion of the I.B.A. largely untrammelled. There is a
reliance on the expertise of the I.B.A. to legitimate its policies.

Somewhat inconsistently, the Annan Committee took a critical line on
whether the I.B.A. should continue to be responsible for the development
and regulation of I.L.R. The Committee observed that, 'the I.B.A. had
tended to transpose a system of supervision devised for network television
services into local radio' and concluded that the I.B.A. had not,
'developed quite the right touch for supervising a very large number of
disparate radio stations'. ²⁵ The Committee recommended the establishment
of a Local Broadcasting Authority to take the responsibility for all local
radio services. ²⁶

Subsequent to the publication of the Report in March 1977, the Labour
Government produced a White Paper in July 1978. ²⁷ It rejected many of the
Annan Committee's recommendations and proposed that expansion of I.L.R.
should be allowed under certain guidelines, which included that, 'the
initial phase of expansion should include, if practicable, a station run by
a non-profit-making trust'. ²⁸ This White Paper never reached the

legislative stage, however, owing to the Labour Government's fall from office in May 1979.

The Broadcasting Acts of 1980 and 1981

The newly elected Conservative Government published their Broadcasting Bill in February 1980. This Bill was intended primarily to extend the life of the I.B.A. and to give the Authority the responsibility of supervising a fourth television channel. The Bill also contained a provision requiring the I.B.A. to terminate I.L.R. contracts after an eight year period and to test public opinion in the areas concerned before awarding new contracts. The Authority's initial response to the draft legislation was that it would permit them to continue with existing contract procedures.²⁹ This would have meant the continuation of the 'rolling' contract procedures under which the termination and renewal of contracts would have been a privately conducted formality.

During the passage of the Bill, however, a number of M.P.s pressed for the public re-advertisement of contracts at these eight year periods and for the I.B.A. to hold public hearings during the re-advertisement process. The concept of re-advertisement had earlier been proposed by both the Annan Committee in 1977 and the Select Committee on Nationalised Industries in 1978. It was also in line with the Government's commitment to the promotion of competition policy. Consequently, and against the wishes of the I.B.A., the 1980 Broadcasting Act carried a clause requiring the I.B.A. to terminate and re-advertise I.L.R. contracts at fixed intervals.³⁰

I.L.R. in the 1980s: Decline and Deregulation

The 1980s have witnessed a gradual decline in the expansion of I.L.R., largely as a result of mounting economic pressures on the industry. There has been increasing concern about the financial basis of I.L.R. and about the difficult financial situation of many of the programme companies. In particular, I.L.R. has not been successful at attracting advertising revenue, even though total advertising expenditure by industry has been expanding rapidly. By early 1987, only 27 I.L.R. companies were in profit and the pattern of the industry was of a small number of large companies producing healthy profits and a large number of small companies facing growing financial difficulties through a failure to attract sufficient advertising. In fact, 6 I.L.R. companies accounted for £2.6 million out of a total profit of £3.7 million in 1986 and the two I.L.R. contractors for London together attracted more advertising revenue than the 36 smallest contractors in total.

I.L.R. has also been facing increased competition from other media. In particular the introduction of breakfast television had a clear impact on the audience figures for radio at what had been traditionally the peak period for radio listening. Other developments which may also work to the detriment of I.L.R. include day-time television and satellite and cable services.

As a result of such pressures, there has been an increasing trend towards concentration of ownership in the industry, with failing I.L.R. stations being acquired by more profitable contractors. Thus far, two I.L.R. stations (Gwent Broadcasting and Centre Radio) have gone out of business and these were taken over by Red Rose Radio and Radio Trent respectively. Red Rose had already acquired a major holding in Radio Aire in Leeds and has subsequently acquired a controlling interest in Cardiff

Broadcasting. Such developments have been permitted by the I.B.A. which, it should be remembered, has an obligation under the Broadcasting Act for ensuring that services maintain their local character. The I.B.A. has also sanctioned the building up of shareholdings by foreign investors.

The difficult financial status of the industry has led to growing complaints from the I.L.R. contractors that the regulation being imposed upon them is excessively burdensome. In particular, they have targetted their fire on the public service duties to maintain a certain quality of output and balance of programmes. This campaign achieved partial success when, in November 1984 the I.B.A. announced a number of important changes in the administration and regulation of I.L.R. ³¹ Although the I.B.A. took the opportunity to stress its continuing commitments to the requirements of public service broadcasting under the Broadcasting Act 1981, these 'deregulation' measures did represent a considerable change in emphasis by the Authority.

This change was the result of persistent lobbying by the Association of Independent Radio Contractors (A.I.R.C.) - an organisation to which the I.L.R. programme contractors belong - and the Home Office putting its weight behind the A.I.R.C. The intention was to make savings in I.B.A. costs which can be passed on to the I.L.R. companies through a reduction in the level of rentals paid by the companies to the I.B.A. for transmitters and administration.

As part of the economy measures, I.L.R. development on the present basis was limited to the 51 areas for which contract arrangements had already been made. Services for future new separate contract areas, as well as extensions to existing contract areas, were to be achieved by 'forward funding'. Previously, both the capital and running costs of stations - including I.B.A. regulation - had been met by the I.B.A. and

recouped by the annual rentals charged to the companies. This has continued for existing contracts. For future new contract areas or extensions to present areas offered by the I.B.A., contractors would be expected to meet the full costs, including an advance payment to cover the initial capital outlay, without support from the rest of the I.L.R system. Running costs have continued to be met by an annual rental to the I.B.A.

The A.I.R.C. based its arguments for less regulation by the I.B.A. on Government moves to deregulate telecommunications, the upsurge in pirate activity and the prospect of community and cable radio in the 1990s, as well as the forthcoming national commercial stations. I.L.R. contractors submit to I.B.A. regulation as a quid pro quo to protect their advertising monopoly and if that monopoly is to be eroded, then, it could be argued, the regulations should be relaxed accordingly.

The I.B.A. did emphasise, however, that the changes arose from the poor financial state of the I.L.R. network - two stations had collapsed and as many as twenty were trading either at a loss or too low a profit to pay a dividend - and did not herald a shift towards deregulation.³² In fact, a close examination of the measures announced by the Authority demonstrated that they could not be viewed as anything other than 'deregulatory' in both intent and effect.

Perhaps the most significant change announced by the I.B.A. was that mid-term contract reviews of the programme companies were to be introduced in place of the existing biennial 'roll' of contracts. The system of 'rolling' was originally devised instead of fixed term contracts. However, under the terms of the Broadcasting Act 1981 the I.B.A. was obliged to re-³³advertise all I.L.R. contracts at fixed periods. The new review procedure has considerably reduced the Authority's regulatory role.

Within the discipline of this mid-term review system and terms of the

Broadcasting Act, I.L.R. companies were to be allowed to diversify their business activities without seeking I.B.A. permission. For example, the I.B.A. withdrew the guidelines to I.L.R. stations on involvement in publications and contractors could now publish newspapers and magazines. These guidelines³⁴ laid down that I.L.R. publications should deal 'wholly or predominantly' with I.L.R. or the arts and should not come out more than six times a year. Advertising space in publications had to be sold separately from the selling of radio air-time and they could only carry enough advertising to pay their way, but, by implication, should not be treated as profit-making. With the withdrawal of these guidelines, I.L.R. publishing was deregulated.

One change very welcome to the I.L.R. companies was that they were to have greater freedom to raise money from shareholders outside their own areas, and over their share structure generally. This was an important aspect of I.L.R. at a time when many companies were declaring no dividends, which was discouraging potential investors. At the time approximately seventy-five per cent of investment in I.L.R. was in the hands of local companies or local people, but there was nothing in the Broadcasting Act 1981 which says that this must be so. The Act³⁵ merely lists the sorts of bodies or individuals who cannot have a 'controlling' - fifty-one percent or more - interest in any station because of a conflict of interest, for example, those involved in the music industry. At a time when money was tight, it appeared increasingly unrealistic to insist that shareholding should be local. In one legendary case, a shareholder died and left about one hundred shares to his son, but the I.B.A. refused permission for him³⁶ to become a shareholder because he did not live in the area. In Leicester the I.B.A. rules held up the start of a replacement station for the failed Centre Radio.³⁷ Local investors were not eager to come forward

after witnessing the collapse of Centre Radio with debts of over £400,000. Clearly it made sense to try and avoid such difficulties, but one cannot help wondering whether this might not have been achieved by more judicious applications of the existing rules. Any relaxation of the regulation of ownership must inhere the risk of a reduction of the 'local' element in I.L.R.

Among the other measures announced by the I.B.A. were that extensions and reductions in broadcasting hours were to be at the I.L.R. companies' own discretion. The I.B.A.'s regional offices would in future be concerned with public response to the services rather than with day-to-day programme monitoring. The work of the Local Advisory Committees - which are intended to act as a channel for local opinion in each area - would be 'streamlined' and each committee would meet three, not four, times a year. Two specialist posts of the I.B.A. concerned with education and religion on radio were merged with television.

Subsequent to these changes in 1984, rental payments were reduced in April 1985 and by at least 26% in April 1986. But despite the I.B.A.'s best efforts, the financial squeeze on I.L.R. has continued and this has been reflected in programme standards. The drama and education output has largely disappeared and economies in local news coverage have been effected. There has been an increasing questioning of the realism of expecting each small I.L.R. service to fulfil public service broadcasting obligations. Consequently, it has been argued increasingly that fresh legislation is needed to relieve the I.L.R. companies of their statutory obligations and the I.B.A. of its statutory responsibilities. The A.I.R.C. supports deregulation in areas such as programming, advertising and technical standards, hours of broadcasting, news services and ownership of stations.

Certainly, it would seem unlikely that the I.B.A. will be able to go any further along the 'deregulation' route within the requirements of the Broadcasting Act. A fresh legislative initiative would be required to effect any major change.

38

Report of the Committee on Financing the B.B.C.

Such a legislative initiative was recommended by the Committee on Financing the B.B.C. (the Peacock Committee) in 1986. The Committee although clearly not focussing specifically on the Independent Broadcasting sector, did make some important recommendations in relation to both I.T.V. and I.L.R. The basic conclusion of the Committee was that broadcasting in the United Kingdom, 'should move towards a sophisticated market system based on consumer sovereignty'³⁹. Under such a system the public would have, 'the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible'⁴⁰. The overall vision of the Committee was thus of a world where broadcasting, as a result of technological developments, could be like publishing. It identified 'the fundamental aim of broadcasting policy' as being, 'to enlarge both the freedom of choice of the consumer and the opportunities available to programme makers to offer alternative wares to the public'⁴¹.

The Committee was clearly of the view that technological developments held the key to the abandonment of the current model of 'strict' regulation of broadcasting, including pre-broadcast vetting of programmes. Yet by advocating a 'consumer sovereignty' model of broadcasting, the Peacock Committee was able to reject a free market. The Committee noted that a laissez-faire approach to broadcasting would not meet, 'British standards of public accountability for the private use of public assets'⁴².

In relation to I.L.R. the Committee advocated a looser regulatory

regime in line with its philosophy as outlined above. It emphasised the need for reform in order to allow the industry to attain some basis of profitability.⁴³ The Committee accepted the proposals of the A.I.R.C. as to what revisions to the Broadcasting Act 1981 would be needed to bring about the 'looser regime' it envisaged.⁴⁴ Under the A.I.R.C.'s proposals the I.B.A. would retain control over the allocation of frequencies and transmitter power and would continue to formulate guidelines for programming and advertising, but the I.L.R. stations would henceforth:⁴⁵

- (i) own their own transmitters and be responsible for broadcasting in their franchise area;
- (ii) be permitted to accept any advertising currently acceptable for the print media;
- (iii) decide their own hours of broadcasting, sources of programme material, manning levels, news-services, ownership and technical standards;
- (iv) be free to carry sponsored programmes;
- (v) be released from the obligation to:
 - achieve a certain quality of output
 - maintain 'proper balance' in programming
 - provide a service of information, education and entertainment.

The Peacock Committee's conclusion was that:⁴⁶ 'Regulation of the (commercially hard-pressed) commercial sector does little for the listener.'

A further recommendation of a majority of the Committee was that I.L.R franchises should in future be auctioned to the highest bidder.⁴⁷

The 1987 Green Paper⁴⁸

The Government's response to the Peacock Committee's proposals in relation to I.L.R. had reached a stage of 'stagnation' and that, 'the prognosis for the financial well-being of I.L.R. under the present

statutory framework is poor'⁴⁹. It identified the cause of the financial difficulties in, increasing competitive pressures, both for audiences and for advertising revenue'.⁵⁰ The Government's recommended 'cure' was unsurprising:⁵¹

The I.L.R. companies believe that a lighter and less expensive regulatory framework is possible. A development along these lines would be consistent with the Government's general policy of encouraging enterprise by enhancing competition and minimising regulation, while retaining essential protections.

This last caveat is significant, for the Green Paper still envisages a continuing role for regulation, albeit a much less rigorous system of regulation than now governs I.L.R. The Government clearly rejects any idea of a free market in radio services, based on the principle of consumer sovereignty.⁵² The traditional justification for government regulation of broadcasting is reasserted:⁵³

The frequency spectrum is a finite public resource. For this reason, and...considerations about frequency planning and frequency management..., control of the spectrum used for broadcasting must remain with the Government or a public authority acting on behalf of the Government.

In relation to the regulation of I.L.R., the proposals in the Green Paper centre around a relaxation of the public service requirements currently imposed on the industry.⁵⁴ The argument put forward is that only the local services of the B.B.C. should have such requirements imposed and that the I.L.R. companies should be freed from such constraints and be put in a better position to overcome their financial difficulties. This change in the current structure is justified on the basis of the increased competition the I.L.R. companies would face as a result of the additional commercial radio services (at both national and community level) proposed in the Green Paper.

The Green Paper envisages that the administration of both national and local (including community) independent radio services would be

entrusted to a single authority within a 'light' framework of regulation. Some limited regulation of programme content, technical standards and ownership of broadcasting companies would continue, although the companies would generally have independence in making their own programming, financial and transmission arrangements. This last change would represent a major deregulatory move away from the current system in I.L.R., where transmission is organised by the I.B.A.

One issue left unresolved in the Green Paper is whether the I.B.A., subject to amending legislation, is the appropriate authority to be responsible for the system of independent radio at both the national and local levels. In favour of the I.B.A. is its experience of developing I.L.R. and, 'of balancing the competing considerations of regulation in a creative field'.⁵⁵ On balance, however, the conclusion drawn in the Green Paper is that the I.B.A. is not the appropriate authority and that the functions might be better exercised by a body distinct from the I.B.A.:⁵⁶

But, despite the real achievements which stand to its credit, there would be some awkwardness in combining the I.B.A.'s responsibilities as a broadcasting authority for television within a public service framework with a separate role as a regulatory authority for radio under different and lighter rules. ... There is also a view ... that an authority which can devote all its attention to radio - and the I.B.A. manifestly cannot - would best serve the interests of the medium. On this argument a new authority should be created.

Another suggested possibility is that the role of the Cable Authority could be expanded, since this Authority, 'has experience of the sort of regulatory regime which would be appropriate to independent national and local radio.'⁵⁷

A further proposal in the Green Paper is that there should no longer be a contractual relationship between the independent radio authority and the radio companies. The radio authority would instead issue licences to stations for a renewable period of a maximum of eight years. The⁵⁸

significance of such a change will be discussed further in the next chapter, but it is worth noting that, unlike a contractual relationship, a relationship based on a licence would be more justiciable, that is, subject to the supervision of the courts. Whether the possible involvement of the courts in the continuing relationship between radio authority and radio stations is compatible with the 'light' regulation envisaged in the Green Paper is clearly an open question. It is possible that a justiciable licensing system might result in legal proceedings and be just as 'cumbersome' as the present public service regulatory regime.⁵⁹

The programming requirements suggested in the Green Paper do not meet the full requirements of public service broadcasting as defined under the 1981 Broadcasting Act, but certain programming standards are proposed:⁶⁰

- (i) to ensure that any news given in whatever form in programmes is presented with accuracy and impartiality;
- (ii) to exclude from the programmes all expressions of the views and opinions of the persons providing the service on religious matters or on matters which are of political or industrial controversy or relate to current public policy;
- (iii) to avoid allowing the views and opinions of particular persons or bodies on such matters to predominate;
- (iv) to ensure that nothing is included in programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; and
- (v) to deliver the kind of services which they had promised when applying to use the frequency.

It is debatable quite how 'light' these requirements would prove to be in practice, if enforced effectively. Programming requirement (iv) is in the 1981 Broadcasting Act⁶¹ and requirements (i), (ii), (iii) and (v) have their equivalents in the present legislation. Their application in practice would entail similarly complex judgments to those currently made by the I.B.A. It would also involve considerable resources. For example, reserve

the principle of due impartiality in news broadcasts is difficult to assess. In contrast to a judgment on 'incitement to crime' which may be made by considering a programme in isolation, a judgment as to whether a radio station is being impartial needs to be built up over a period of time. Similar considerations would apply in assessing whether the views and opinions of the people providing the radio service are predominating and with the other criteria mentioned above.

62

The Green Paper also envisages that the radio authority would be under an obligation to regulate the ownership of radio stations coming within its supervision. It would not be permitted to issue licences to stations which were, 'owned or financed in whole or in part by political parties or public authorities, or by a body whose objects are wholly or mainly of a political nature, or which is affiliated to such bodies'.

Again it must be debateable how far a requirement such as this is consistent with the avowed 'light' regulatory touch of the Green Paper. A prohibition such as this would cause difficulties of interpretation and might well be held to include trade unions. In fact, trade unions have invested in I.L.R. since its earliest days. It is difficult to see why as a matter of principle why they should not be permitted to continue to do so on a modest scale nor why modest loans and grants from public (local) authorities should be disallowed.

64

The Government does, however, propose a relaxation of controls on the concentration of editorial control, ownership and the accumulation of newspaper shareholdings in I.L.R. stations which are contained in the 1981 Broadcasting Act. At present the I.B.A. has the power to prevent changes in ownership. The proposal in the Green Paper that the radio authority would have no power to prevent such changes (except where they would conflict with programming and ownership requirements), but would have, 'a

65

reserve power enabling it to withdraw and re-advertise a licence where a failure to maintain the promised performance resulted in a reduction in consumer choice in the area concerned.'⁶⁶ Under the proposed system of licensing, decisions of this nature would be justiciable, unlike the I.B.A.'s decisions in relation to its contractors.

The Green Paper envisages a 're-active' rather than a 'pro-active' regulatory regime. Only selective monitoring is proposed, with the main trigger for enforcement action being complaints, whether from listeners or other radio stations.⁶⁷ Radio stations would, however, be required by the terms of their licences to keep tape recordings in order to facilitate the investigation of any alleged breaches of licence conditions on programme content.

The ultimate sanction available to the radio authority would be withdrawal of a licence to broadcast and it would also have the, 'power to issue informal and formal warnings; to insist that transcription of its recorded output be submitted for a period on a routine basis; and to suspend the licence or to shorten the period for which the licence runs'.⁶⁸

Advertising would be regulated on lines similar to these existing at present, with the radio authority required to draw up a code regulating advertising.⁶⁹ There would continue to be a ban on political advertising. It is suggested, however, that it may be possible to loosen restrictions on the sponsorship of radio programmes, given that the services are not to be run on a public service basis.⁷⁰

From the proposals put forward in the Green Paper, it is clear that the Government believes that all independent national and local services should be more lightly regulated than at present. The case for a new radio authority to regulate all national commercial, independent local and miscellaneous radio services within a statutory framework is put forward.

The regulatory system would be self-financing. The Government proposes a limited range of statutory requirements relating to programme content, ownership and funding of services. The function of the radio authority would be to regulate the services within this statutory framework and it would have available a number of sanctions, including withdrawal of licences.

In fact, the Green Paper's proposed statutory requirements are not as limited as the Government appears to suggest. They will involve the radio authority in complex judgments if they are to be taken seriously and enforced effectively. It is arguable that the Government will have to make a more decisive choice between two options: first, a relatively expensive regulatory system to enforce stringent requirements; or second, allowing broadcasters greater freedom than the Green Paper suggests.

71

The 1988 White Paper

The White Paper published in November 1988 adds little to the proposals put forward in the Green Paper, other than representing a firm commitment to legislate. The premise underlying these proposals is that; 'The case for substantial deregulation of independent local radio is compelling'.⁷² The White Paper makes it clear a new authority will be established to regulate all independent radio services.⁷³

Conclusion

The I.B.A.'s experience of regulating I.L.R. has been far from easy. The I.B.A.'s effectiveness as a regulatory agency has been called into question on numerous occasions. To a considerable extent, however, many of the problems currently dogging the I.L.R. are the result of its origins and development over the past seventeen years.

The criticisms which have been made of the I.B.A. over the years take two general forms. First, there are the critics who accuse the I.B.A. of interpreting its statutory mandate too strictly and of imposing overly stringent regulations on the I.L.R. companies, as a consequence of which the industry has found itself in financial difficulties. Second, there have been critics who accuse the I.B.A. of being too lax in applying the legislative requirements and of being overly accommodative to the I.L.R. companies, thereby failing to impose sufficiently stringent regulations. A more realistic criticism might be that the I.B.A. has failed to strike the right regulatory balance.

The validity of such criticisms is a question of judgment, but those criticisms are sometimes misdirected at the I.B.A. They would perhaps be better aimed at the architects of the statutory framework which has left the crucial decisions on which the development of I.L.R. has depended to a largely unaccountable I.B.A. It should also be pointed out that little coherent thought on broadcasting policy has been forthcoming from Government, with the 1987 Green Paper representing a welcome break from tradition.

The criticisms made of the I.B.A. do demonstrate the problems inherent in basing claim to regulatory legitimacy on expertise. Efficient regulation must strike a balance between the values of stringency and accommodation. The I.B.A. will always be liable to accusations of inefficiency. This is partly because radio broadcasting is a specialist area requiring judgment and it is difficult for the I.B.A. to give convincing justifications for adopting a particular strategy. Further, it is always difficult to measure regulatory success and impossible to silence the critics. Who can say what would have happened in the absence of regulation or if a different regulatory

strategy had been adopted?

References

1. Burns, The B.B.C.: Public Institution and Private World (1977), at 35. See also Briggs, The Birth of Broadcasting (1961).
2. Coase, British Broadcasting: A Study in Monopoly (1950), at 46-7.
3. Ibid., at 49.
4. Burns, op. cit., n. 1 supra, at 6; Curran and Seaton, Power Without Responsibility (1981) at 138-145.
5. Briggs, Sound and Vision (1979), at 4.
6. Wilson, Pressure Group (1961).
7. Ibid.
8. Ibid. at 15.
9. Conservative Party Manifesto (1970).
10. The Times, November 26, 1959.
11. Hansard, November 11, 1961 at col. 1251.
12. Sound Broadcasting Act 1972, s. 2(1).
13. The Economist, April 4, 1964.
14. Reported in Daily Telegraph, November 27, 1959.
15. Wedgwood-Benn, 'A Socialist Policy for Radio', New Statesman, August 8, 1970.
16. Phillips, 'The Frozen Waves: Radio in 1982', ADMAP July, 1982.
17. Sound Broadcasting Act 1972, s. 2(3).
18. Ibid.
19. Hansard, op. cit., n.11 supra, at col. 1258.
20. Ibid., at col. 1266.
21. Sound Broadcasting Act 1972, Schedule 1, s.3.
22. Report of the Committee on the Future of Broadcasting, Cmnd. 6753, (1977), at para. 1.1.
23. Ibid., at para. 11.30.
24. Ibid., at para. 11.33.
25. Ibid., at para. 11.38.

26. Ibid., at Chapter 14.
27. Broadcasting, Cmnd. 7294, (1978).
28. Ibid.
29. 'The Broadcasting Bill and Accountability', Time Out, February 15-21, 1980.
30. Broadcasting Act 1980, s. 33.
31. I.B.A. News Release, November 12, 1984.
32. See Lord Thomson, 'A New Role for Regulation,' Air Waves, Winter 1984/5.
33. Broadcasting Act 1981, s.19.
34. See U.K. Press Gazette, November 19, 1984.
35. Broadcasting Act 1981, s.20.
36. The Guardian, July 3, 1984.
37. Ibid.
38. Report of the Committee on Financing the B.B.C., Cmnd 9824 (1986).
39. Ibid. at para. 592.
40. Id.
41. Ibid., at para 547.
42. Ibid., at para. 596.
43. Ibid., at 20.
44. Ibid., at para. 637 ff.
45. Ibid., at para. 639.
46. Ibid., at para. 640.
47. Ibid., at para. 637.
48. Radio: Choice and Opportunities, Cm. 92, 91987).
49. Ibid., at para. 3.1.
50. Ibid., at p. 1.
51. Id.
52. Ibid., at para. 4.2.

53. Ibid., at para. 3.3.
54. Ibid., at para. 6.1.- 6.16.
55. Ibid., at para. 7.3.
56. Id.
57. Id.
58. Ibid., at para. 7.6.
59. Independent Broadcasting Authority, The Future of U.K. Independent Radio (1987), at paras. 28-29.
60. Radio: Choice and Opportunities, at para. 7.7.
61. Broadcasting Act 1981, s.4
62. I.B.A., supra n. 59, at para. 48.
63. Radio: Choice and Opportunities, at para. 7.10.
64. I.B.A. op. cit., at para. 59.
65. Radio: Choice and Opportunities, at para. 7.13.
66. Id.
67. Ibid., at para. 7.18.
68. Ibid., at para. 7.19.
69. Ibid., at para. 7.15.
70. Ibid., at para. 7.17.
71. Broadcasting in the 90s: Competition, Choice and Quality, Cm. 517, (1988).
72. Ibid., at para 8.1.
73. Ibid., at para. 8.5.

CHAPTER FIVE - THE FRANCHISING PROCESS

Introduction

Since the start of commercial television in Britain in 1954 contracts have been used as a means of allocating broadcasting frequencies. The same technique has been applied to I.L.R. since its inception in 1972. The task of allocating these contracts has been assigned to the I.B.A. under what can be called a 'public interest' standard.¹ This means that the I.B.A.'s task is to allocate a scarce resource (broadcasting frequencies) to those best qualified to use them in accordance with public interest standards. In doing so, the I.B.A. has to decide three main substantive issues: what exactly to give away; what threshold standards will weed out unqualified applicants; and which of the applicants is 'best' by these standards.² In short, the focus is on the applicant itself, rather than, for example, the price which it intends to charge for its product or service.

The regulatory approach exemplified by the award of I.L.R. contracts is an alternative to allocating a valuable resource by use of a market price, that is, an auction, or other simple objective measure, such as a lottery. The difficulty with this method of allocation is that since the contract is in effect being awarded below the market price, there are nearly always more applicants that meet the threshold standards than possible allocations. As a consequence, the I.B.A. is required to make a judgment as to which among the various applicants is 'best' qualified. Not too surprisingly, the development of the appropriate criteria by which to make such a judgment and their application under a public interest standard remains vague and undefined. As Breyer has noted, the 'problem is the tension between a desire to find standards that will "objectively" select the winner ... and a belief that the exercise of subjective

judgment is inevitable because no set of standards exists that will work uniformly to select the "best" applicants in terms of the objective of the regulatory programme'.³

This idea of subjectively choosing the 'best' applicant raises particular problems in the case of broadcasting. It would be virtually impossible, for example, to achieve any consensus about what constitutes 'good' or 'bad' broadcasting by an I.L.R. station. Such a state of affairs serves only to increase the discretion exercised by the I.B.A. in the allocation process.

Statutory Requirements

The Broadcasting Act gives remarkably little guide as to the standards to be applied in the allocation process or as to the procedures to be adopted. The broad discretionary nature of the powers granted to the I.B.A. has already been stressed. This fact can be illustrated by once again considering the general duties of the I.B.A. as stipulated in the Act:

(1) Section 2(1) requires the Authority to provide local sound broadcasting services, 'of high quality (both as to the transmission and as to the matter transmitted)'.⁴

(2) Section 2(2) requires the Authority to provide, 'a public service disseminating information, education and entertainment'. Broadcasts in each area are required to 'maintain a high general standard in all respects and in particular in respect of their content and quality, and a proper balance and wide range in their subject matter'.⁵

The meaning to be given to concepts such as 'quality' or 'balance' gives considerable room for the exercise of discretion on the part of the IBA.

The difficulty in interpreting precisely what is the I.B.A.'s legislative mandate is of central relevance to any discussion of the I.L.R. franchising process. For, in assessing the relative merits of the applicant groups, the main consideration of the Authority must be to determine which of the applicants is most capable of fulfilling the various

obligations imposed by the relevant legislation.

There are in fact, only a small number of positive requirements imposed on the allocation process by the Broadcasting Act.

First, the Authority is under a duty to ensure that no-one who is ineligible is awarded a contract. To this end, the Act contains a number of restrictions as to who may be awarded a contract.⁵ Those ineligible include, for example: individuals not ordinarily resident, or corporations not incorporated, in the U.K. or E.E.C.; companies or individuals connected with advertising agencies or record manufacturers; and those with a controlling interest in a local television company in the area.

Second, the Authority is obliged to ensure, 'that there is adequate competition to supply programmes between a number of programme contractors independent of each other both as to finance and as to control'.⁶ This provision has been interpreted to mean only that contractors should be chosen competitively; the Authority has never opted for a process of competitive tendering.

Third, the Authority is under a duty 'to take such steps as appear to them to be appropriate (including if they think fit the holding of public meetings) -

(a) to ascertain the opinions of the public about the service proposed to be provided there ...

(b) to encourage the making of comments and suggestions about that service by members of the public ...

and shall take into account those options...comments and suggestions...'⁷
This provision cannot be said to go very far and, in any case, does 'little more than statutorily approve the I.B.A.'s existing practice'.⁸

Fourth, the authority is obliged to publicise the fact that a contract

is about to be awarded, along with details of the contract, and also to
9
invite applications.

Fifth, the Authority must make the contract itself available to the
public (although it can charge for this) and also issue a statement of the
10
number of applications. The Applications themselves need not be made
11
public until after transmission has started.

It can be seen how little the Broadcasting Act 1981 says about the
procedures to be adopted by the I.B.A. in its consideration of franchise
applicants. Thus any attempt by the I.B.A. to justify its policies in the
award of contracts on the basis of a legislative mandate must be open to
serious doubt. The very nature of the legislative scheme (which is to
impose broad discretionary duties) will almost always cause problems of
legitimacy for the Authority. In this context, it is interesting to note
that in two important respects (discussed further in the next section), the
I.B.A. has gone further in pursuit of openness and due process than a close
reading of the Act would seem to require. First, the I.B.A. always holds
at least one public meeting as part of the allocation process and, second,
the applications are made publicly available at an early stage. One can
surmise, therefore, that the Authority itself is aware of the weakness of
the legislative basis for its activities in this area.

The I.B.A.'s Franchising Procedures

Contracts are awarded on the basis of applications submitted to the
I.B.A. The Broadcasting Act 1981 sets a maximum limit on the length of
12
the contracts. This is at present 8 years, with the exception of the
first contract in a new local radio area, where the limit is 10 years.
The 1981 Act imposes a mandatory requirement on the I.B.A. to readvertise
the contracts for I.L.R. The Act's intention was to provide a break-point

in the succession of short-term 'rolling' contracts that the I.B.A. had used previously.

By late 1988 fifty I.L.R. contracts had been awarded. The first nineteen contracts were awarded between October 1973 and April 1976. Further expansion then ceased until the Annan Committee had reported in 1977 and its recommendations had been considered. Government approval for nine new areas was given in 1978. In November 1979 approval was given for a further fifteen localities, bringing the authorised total to forty four. A further twenty five localities were approved following recommendations in the Third Report of the Local Radio Working Party, making an authorised total to date of sixty nine areas. This number has, however, been reduced as the result of amalgamation of some of the designated areas.

As previously noted, in November 1984 the I.B.A. announced that I.L.R. development on the present basis would be limited to the areas for which contract arrangements had already been made. Only one new contract has been awarded since then, although a number of extensions to contract areas have been permitted on the basis of 'forward funding'.

Where the contract to be awarded was for a new area, the formal process would begin with notices placed by the I.B.A. in local papers announcing the contract and inviting applications. By this stage, however, the Authority would have already issued a press statement announcing that applications were about to be sought and preparatory work would have been done by the I.B.A. and by the groups hoping to be awarded the contract. These groups would know, in general terms, the requirements they would be expected to meet from the specifications issued by the I.B.A. for earlier contracts. But until the contract was advertised and the related contract specification became simultaneously available, the prospective applicants would not know the details of such matters as the

population coverage for their particular area and the rental payable to the I.B.A.

Since November 1983, the I.B.A. has employed a different procedure for re-advertised I.L.R. contracts. ¹⁵ Under this procedure, an advertisement is placed in the local press in three consecutive weeks inviting groups to indicate to the I.B.A. within one month of the first advertisement if they intend to apply for the contract. Where a bona fide letter of intent is submitted, the I.B.A. carries out its normal procedures and a new advertisement giving the usual three months' notice for applications will be placed locally. If no letter of intent is received (except from the incumbent), the I.B.A. writes to the company calling for a shorter form of application, directing attention to any special areas for discussion.

The Contract Specification indicates to prospective applicants the main statutory and contractual requirements to be met by programme contractors, and the sort of information that applicants need to supply in their applications. The application itself is in reality no more than a print manifesto. The applicant group is required to present, in written form, answers and proposals on the following areas: directors and staff; composition of the company; applicant's other interests; finance; recruitment, training and staff relations; advertising; studios; consultants; and readiness date.

Three or four months are normally allowed between the date of the contract advertisement and the deadline by which applications must reach the I.B.A. The I.B.A. then studies, compares and analyses the applications in all their various aspects, 'looking for a combination of practical realism with the ability to provide an imaginative and steadily ¹⁶ developing radio service'.

The I.B.A. has never issued a formal list of criteria used in

assessing contract applications. It is therefore probably better to talk of 'relevant factors' being taken into account. Among the 'relevant factors' used in assessing the general quality of applications are: 'the applicant's capacity to run a lively and distinctive radio station; their approach to the provision of such a service; the realism of the plans submitted and the likelihood of these standing up to the tests of time and practical application; and the financial soundness of the proposals'.¹⁷ Other 'relevant considerations include 'the extent of local support' and 'past performance and future promise'.¹⁸

In particular, it should be noted that the financial problems of TV-am and certain ILR companies have made the I.B.A. more concerned that applicants have sufficient capital and show a reasonable prospect of reaching profitability in the near future. This concern has manifested itself in the introduction of forward funding.

A more intangible 'relevant factor' is the emphasis placed by the I.B.A. on the need for each applicant to identify with the character and interests of the area to be served. The I.B.A. seeks contractors capable of providing, in the words of the 1971 White Paper, 'a truly public service ... combining popular programming with fostering a greater awareness of local affairs and involvement in the community'.¹⁹ On a practical level, the I.B.A. requires plans to include community service material within the company's broadcast output and significant elements of local ownership and knowledge in the composition of applicant groups and companies. Not that local participation in the ownership of a commercial radio station is necessarily of particular significance: it must be open to doubt how much influence over programming a local shareholder would have.

Quite clearly, therefore, the I.B.A. has articulated a number of standards over the years which applies when allocating contracts. Indeed, one might want to argue that the I.B.A. has too many standards. Breyer's

pithy comment on the F.C.C. seems equally appropriate for the I.B.A.

The effect of many standards ... is virtually the same as having none at all. There is no clear indication of which standards are more important, how they are to be individually applied, or how varying degrees of conformity are to be balanced. The existence of so many standards effectively allows the agency near-total discretion in making a selection.

Within three to four weeks of applications being received, preliminary interviews are held with the applicant groups in the main town or city of the area. The I.B.A. party for the preliminary interviews consists of a sub-committee of three members of the Authority, supported by three or four senior staff including the Regional Officer. After the interviews they report back to the full Authority. Short-listed groups are then invited to the I.B.A.'s headquarters for a further interview, this time with the full Authority.

The preliminary interviews are preceded by a public meeting at which the I.B.A. can, in theory at least, gauge the wants and needs of the people who live there. Members of the public are invited to comment on the applications and to give their views on the needs of the area and on what could be provided by an I.L.R. service in the future.

These public meetings, which were put on a statutory basis by the Broadcasting Act 1981, are not designed as public hearings and are in no way comparable to road or town planning inquiries. There is no opportunity to question the applicants. Questions can only be directed at the Authority itself, although people can comment on the Applications. Since December 1980 the full Applications have been made available for public scrutiny prior to the public meeting. Copies of summaries of the application are made readily available by the I.B.A.

In addition to the public meeting, the I.B.A.'s Regional Office will have sought the views of a wide spectrum of local individuals and

organisations, both political and voluntary. The I.B.A. also conducts audience research in each of the areas as part of the selection process and a summary of the results is made available at the public meeting.

The final decision as to which applicant is thought most suitable is taken in private by the I.B.A. There is no legal obligation on the Authority to specify the reasons for its decisions and usually very little clarification or explanation is forthcoming. For example, when, in October 1985, Radio Victory of Portsmouth became the first I.L.R. station not to have its contract renewed, the I.B.A.'s Chairman made only the following statement:

21

The decision to offer Ocean Sound Limited the franchise for the new combined area of Portsmouth and Southampton is accompanied by regret that Radio Victory cannot ... continue as the I.L.R. contractor for Portsmouth. The present system ... of statutory readvertisement of radio franchises ... has meant that such position could always arise. The Authority is now required to make a choice between the track record of an existing contractor and the plans and aspirations of a new contestant.

On this occasion the Authority concluded, after careful deliberation, that the proposals submitted by Ocean Sound seemed to offer the likelihood of achieving the best service for listeners ... In reaching this decision, the Members of the Authority recognised Radio Victory's significant accomplishments ... [but] only one applicant can ultimately be successful and, on balance, the Authority considered that the Ocean Sound group had more convincingly approached the programming and commercial challenges of serving the combined Franchise area in the period ahead.

Thus the publicly given reason was that Ocean Sound had a better conception of what the extended area needed. This seems to have been an entirely subjective decision and to have been taken against the advice of the I.B.A.'s own officials. The private nature of decisions such as this is a cause for concern for three main reasons.

22

First, there is the question of fairness to both the incumbent contractor and to other applicants. As Lewis points out, 'fairness demands the twin virtues of open and clear standards and reasons for

decisions unless an overwhelming case can be made out to the contrary'.

Prima facie, of course, there seems to be no reason why the I.B.A. should not give their reasons as to why the successful applicant group was successful and why the others were unsuccessful. The I.B.A. has always justified its failure to give reasons for its decisions on the basis of an analogy between the applicants for an I.L.R. contract and job applicants. This is a doubtful analogy, however, given the public interest present in the allocation of such a contract. The decision as to which job applicant to appoint is commonly made on the basis of intuition and subjective judgment. Such a mode of decision-making is not obviously consistent with formal legal or administrative decision-making. In particular, such a subjective approach leads to largely unchecked discretion,²⁴ although this is perhaps inevitable given the task which the I.B.A. has to perform. In practice, the main method by which the Authority can maintain a high quality broadcast service is by appointing companies who will broadcast good programmes. Thus the selection of the 'best' broadcasters is generally regarded as lying at the heart of the I.B.A.'s mission.²⁵ Given their unwillingness to devise objective criteria to use in the selection of the 'best' broadcasters, the I.B.A.'s officials tends to see the need for the exercise of subjective judgment as a both necessary and significant part of what they have been appointed to do.²⁶

Second, without explicit criteria for the award of contracts it is difficult for applicants to form accurate judgments of the expectations of the I.B.A. and to put forward an application of which the Authority will approve. This results in reduced competition for I.L.R. contracts by giving incumbent contractors important informational advantages over prospective applicants. As Domberger and Middleton point out (in relation to I.T.V. franchises):²⁷

[T]he incumbent knows more about the objectives of the I.B.A. than a potential bidder does and will have acquired intimate knowledge of the regulatory authorities preferences and personalities ... The former will have had many opportunities, during the lifetime of their contracts, of receiving comments and signals of various kinds from the I.B.A. regarding its attitude to their programmes.

That this is so in the case of I.L.R. contracts is evidenced by the fact that, since the introduction of the mandatory readvertisement of contracts in 1980, only one contractor, Radio Victory of Portsmouth, has failed to be reappointed. Moreover, a number of incumbent contractors have been reappointed without any competitors having come forward.

This apparent tendency to favour incumbent contractors should not be too surprising. If a regulatee has performed reasonably well, this fact can act as what Breyer calls, 'a steady beacon in a storm'²⁸ to the Authority. Furthermore, reasons of fairness and consistency may tend to sway subjective judgment in favour of a reasonably proficient contractor.

Third, there is the important factor of the ability of members of the public, as parties affected by broadcasting, to participate in contract allocation procedures. At present the I.B.A. provides minimal information on the reasons why a decision has been made in favour of one applicant rather than of another and the little information which it does give is so vague as to be of little use. Although one might in theory be able to trust the I.B.A. to apply valid and appropriate selection criteria in the franchising process, there is plainly no guarantee that this happens in practice. Without the giving of reasons for its decisions, it becomes virtually impossible for outsiders to evaluate the merits of the I.B.A.'s procedures.

In other words, the I.B.A. can be seen to rely on an expertise model of legitimacy to the detriment of due process considerations. Thus the

I.B.A. seeks to justify its failure to give reasons for decisions and its closed procedures on the basis of effective results. Such an approach is inevitably problematic, for it is always difficult to demonstrate claims to expertise. Regulatory agencies such as the I.B.A. are always liable to accusations of inefficiency. As we have seen, because radio broadcasting is a specialist area requiring the exercise of judgment and discretion, it is difficult to give convincing justifications for action. This is one reason why the I.B.A. is reluctant to give open reasons for its decisions. Furthermore, as we shall see in the Conclusion, it is very difficult to measure regulatory success. The I.B.A. has to steer a very difficult course between the opposing values of stringency and accommodation. If I.L.R. companies face financial difficulties, the I.B.A. will be accused of imposing too stringent regulation of inefficiently handicapping the industry. At other times, however, the I.B.A. will be accused of accommodating too readily to the requirements of the I.L.R. companies and of protecting inefficient operators.

Conclusion

This chapter has examined some of the problems associated with the current system of allocating I.L.R. contracts. One possible conclusion is that these problems are inherent in any attempt to allocate a commodity in scarce supply by administrative process and that public interest allocation should be abandoned in favour of market-based procedures. In contrast, one could argue that the present system is preferable to the possible alternatives and that the way to increase the legitimacy of the contract allocation process is to make it more open and fair.

It is not necessarily the case, however, that the two types of reform are mutually exclusive. A market-based system of allocation would allow the costs of performance to be assessed by the applicants, who are best

placed to make such assessments. A greater emphasis on due process would allow greater public debate and further the principle of 'procedural fairness'.

The market could be used to allocate I.L.R. contracts by conducting an auction among the competing applicants and allowing the contracts to be treated as assignable property rights. ²⁹ Under such a system, the market would allocate the contract to the applicant who placed the greatest monetary value on it, thereby maximising the aggregate consumer welfare. The monetary value placed on the contract by the applicant would reflect the amount of money it expected to earn during the period of the contract, which should, in turn, reflect the aggregate value consumers place on the use each applicant makes of the contract. ³⁰

There are a number of variants on the 'crude' auction system which could be adopted in Independent Broadcasting. These include the Chadwick/demsetz ³¹ variant and the 'menu' ³² auction. In a Chadwick/Demsetz auction the contract would be allocated to the applicant offering the lowest price or highest quality of broadcast service (or an efficient combination of the two). In the case of I.L.R., the price variable would be the proportion of broadcasting time devoted to commercials. In addition, bids could vary in quality terms in the range and cost of broadcasts that were offered.

Under a 'menu' auction competing applicants would submit one or more bids which could differ in several aspects simultaneously. A bid might consist of a price (possibly negative) offered for the contract together with a statement of programming, financial and other intentions. By comparing such bids, the I.B.A. would be able to explore a wide variety of options and possible balances between different aspects of the applications.

Compared with the I.B.A.'s current allocation procedures, an auction would have the advantage of being comparatively cheaper and quicker. A further advantage of 'menu' auctions in particular is flexibility. The I.B.A. could impose minimum requirements in respect of particular aspects of the bid where statutory provisions obliged it to. The I.B.A. would be able to choose the application which most fully met its preferences over a range of aspects.

It should not be thought that an auction-based system of allocation would necessarily represent a great break with current practice. To some extent the current application process can be seen as a type of 'bidding' auction with applicants vying to outpromise each other, with little actual likelihood that their programming will be significantly different from the bulk of the programming presented by other I.L.R. stations.³³

It should be remembered, however, the current system of I.L.R. contract allocation does reflect at least implicit dissatisfaction with the expected results of using the market as an allocational device. It is, therefore, worth examining the reasons why regulatory allocation could be preferable to the market.³⁴ First, there can be no guarantee that the market will function as theory suggests. One of the assumed conditions underlying effective operation of the market may be absent. For example, in theory, an applicant's bid for an I.L.R. contract would be based on its desire to maximise the return on its investment. The amount of money bid would depend on the applicant's expected income from operating an I.L.R. station. If however, an applicant based its bid on some aim other than profit maximisation, such as a desire to broadcast a particular political or religious philosophy, the allocation of I.L.R. contracts produced by the

market would not necessarily maximise the aggregate welfare of I.L.R. listeners.

Second, regulatory allocation of a scarce resource, such as a right to broadcast, if done at less than market value can act as a means of redistributing wealth. Such an aim would be desirable if it were to be concluded that the current distribution of wealth among consumers is in some sense wrong.

Third, use of the market as an allocational device might interfere with a possible goal of limiting the revenues of the I.L.R. companies.

A number of the deficiencies in I.B.A. contract allocation procedures that have already been noted would seem to indicate that considerably increased legitimacy could be derived on the due process front.

As has been shown there are a number of reasons why the due process rationale for legitimacy is difficult to sustain. The I.B.A. makes its decisions in private and no meaningful reasons for decisions are given. Applicants have limited information on the expectations of the I.B.A. as a result of its failure to publish meaningful criteria in relation to its franchising policies. In general it can be suggested that any changes should aim to further the 'procedural fairness' of the allocation process. This principle, 'requires that all affected parties have an equal opportunity to convince the decision maker'.³⁵ To this end, the I.B.A. could seek to clarify the basis for its decisions. This clarification could be achieved by articulating and publishing the criteria used in allocating contracts and by producing decision documents describing its policies.

The public meetings held by the I.B.A. are largely ineffective and do little to enhance the procedural fairness of the allocation process. Members of the public are allowed their say but they will know little of

the issues at stake and, in any case, the most important parts of the process are conducted in private by the I.B.A. One possible reform would be the institution of a system of trial-type public hearings, in which applicants could be publicly questioned as to the merits of their applications.

One indefensible aspect of the I.B.A.'s current procedures is its failure to give meaningful reasons for its decisions. There are a number of beneficial consequences which could flow from a requirement to give reasons:

- (a) It would encourage the Authority to give careful thought to the facts, the issues and the effects of a decision.
- (b) It would decrease the likelihood of its basing a decision on extraneous matters.
- (c) It would increase the appearance of fairness in the allocation process.
- (d) It would assist in the elaboration of the Authority's policy, in the promotion of coherence and consistency, and in the identification of legislative or policy difficulties.
- (e) It would facilitate the exercise of any rights of review available to applicants.
- (f) It would provide an important basis upon which to realise greater accountability.
- (g) It would give greater visibility to the approach the I.B.A. takes to its legislative mandate.

One potentially unavoidable flaw in any system of public interest allocation is that of inconsistency. ³⁶ This would seem to be a particular danger in the case of the I.B.A. with its emphasis on subjective judgment at the expense of objectively verifiable standards. There are a number of

problems associated with inconsistency. First, it can allow the regulatory agency to hide the real reasons for its decisions, thereby permitting a factor not envisaged by the legislature to creep in to the allocation decision. Second, inconsistency may in fact reflect a change in policy, such change not having been discussed openly. As such, it can amount to an abuse of power if the agency does not keep within the bounds of its legislated discretion. Third, inconsistency leads to unpredictability and uncertainty in the allocation process. This results in unfairness where one applicant has 'inside knowledge' or if equally qualified applicants are treated differently.

Such inconsistency would appear to be an inevitable aspect of a system of contract allocation which relies on the exercise of subjective judgment. The subjective judgment of the I.B.A. as to which applicant who meets their threshold criteria is 'best' is likely to differ over time. Further, there is no consensus about what constitutes good or bad programming. The obvious solution to the problem of inconsistency is to impose a requirement to adhere to objective standards, yet to do so might compromise the goal of good programming. It would seem to be impossible to specify the content of broadcasts through detailed standards, but good programming is certainly too important an objective to ignore in the allocation process.

Another approach to this dilemma would be for the I.B.A. to rely explicitly upon subjective judgment, but, as Breyer points out, such a tactic, 'would neither prevent inconsistent decisions in practice, nor cure the other vices of inconsistent decision making. In sum, the public interest allocation process cannot readily avoid this significant defect'.³⁷

The difficulty in formulating objective standards thus casts the I.B.A. in the unenviable role of censor with the task of comparing

programming proposals and of making subjective qualitative judgments. Having to perform such a function makes the I.B.A. an easy target for critics who can call into question the legitimacy of its decisions. The argument here is that the present system is in need of reform if it is to make out a more convincing case for its legitimacy.

References

1. Breyer. Regulation and Its Reform (1982), Chapter 4.
2. Ibid., at 72.
3. Breyer, 'Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform' (1979) 92 Harvard Law Review 547, at 567.
4. Broadcasting Act 1981, s. 20(2)(a).
5. Ibid., ss. 20(1), (3), (6), (7), (8). See also s.23 (newspaper shareholdings in programme contractors) and s.26 (accumulation of interests in sound programme contracts).
6. Ibid., s.20(2)(b).
7. Ibid., s. 19(3).
8. Elliot: 'Chasing the Receding Bus: The Broadcasting Act 1980' (1981) 44 Modern Law Review 683, at 689.
9. Broadcasting Act 1981, s.19(4).
10. Ibid., s.27(1).
11. Ibid., s.27(2).
12. Ibid., s.19.
13. See I.B.A. News Release, 12 November 1984.
14. Oxford and Banbury in 1988.
15. See I.B.A. News Release, 18 November 1983.
16. I.L.R. Contract Specification: Wolverhampton and Black Country with Shrewsbury and Telford, October 1985, para. 2.2, p.6.
17. Ibid., p.29.
18. I.B.A. Evidence to the Committee on Financing the BBC, September 1985, p.8.
19. Cmnd. 4636.
20. Breyer, op. cit., supra n.1, at 79. See also Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale Law Journal 65, at 100.
21. I.B.A. News Release, 17 October 1985.
22. Interview with I.B.A. Officer.

23. Lewis, 'I.B.A. Programme Contract Awards' [1976] Public Law 317 at 324.
24. Breyer op. cit., supra n.1, at 81.
25. Interview with I.B.A. Officer.
26. Id.
27. Domberger and Middleton, 'Franchising in Practice: The Case of Independent Television in the U.K.' (1985) 6 Fiscal Studies 17 at 22.
28. Breyer, op. cit., supra n.1, at 93.
29. See Baldwin, Cave and Jones, 'The Regulation of Independent Local Radio and its Reform', (1987) 7 International Review of Law and Economics 177.
30. Gellhorn and Pierce, Regulated Industries (1982), at 309.
31. Chadwick, 'Results of Different Principles of Legislation and Administration in Europe; of Competition for the Field as compared with the Competition within the Field of Service' (1859) 22 Journal of the Royal Statistical Society 22; Demsetz, 'Why Regulate Utilities' (1968) 11 Journal of Law and Economics 55.
32. See Bernheim and Whinston, 'Menu Auctions, Resource Allocation and Economic Influence' (1986) 101 Quarterly Journal of Economics 1.
33. Zuckman and Gaynes, Mass Communications Law (1983), at 379.
34. See Gellhorn and Pierce, op. cit., supra n. 30, at 310-311.
35. Breyer, op. cit., supra n.1, at 75.
36. Ibid., at 86-89.
37. Ibid., at 88.

PART III - THE LEGAL AND REGULATORY FRAMEWORK

CHAPTER SIX - THE LEGAL PARAMETERS

The Formal Framework

The present operations of Independent Local Radio are governed by the Broadcasting Act 1981. The 1981 Act is a codification of the legal framework for Independent Broadcasting in the United Kingdom. The I.B.A.'s predecessor, the Independent Television Authority, was set up for an initial period by the Television Act 1954 to provide television broadcasting services additional to those of the B.B.C., and was continued in existence under the Television Act 1964. As described in Chapters Three and Four, by the Sound Broadcasting Act 1972 the Authority was empowered to provide local sound broadcasting services and its name was changed to the Independent Broadcasting Authority, and the Authority was further continued in existence by the Independent Broadcasting Authority Act 1973.

Thus the principal statute now governing the I.B.A. is the Broadcasting Act 1981, which consolidated the repealed Acts of 1973 and 1974, as well as the Independent Broadcasting Authority Act 1978 and the Broadcasting Act 1980.

The 1981 Act is divided into four parts. Parts One and Four contain the provisions relevant to I.L.R. Under Part One (ss. 1-45) the constitution, functions, duties and powers of the Authority are specified (ss. 1-3) and general provision is made concerning the content and balance of programmes and advertisements. Contracts for programmes and programme contractors are the subject of ss. 19-27, 32-35, and government controls are contained in ss. 28-31. Part Four contains general provisions.

The Cable and Broadcasting Act 1984 empowered the Authority to equip themselves for the future transmission of a national sound broadcasting service. A short Broadcasting Act which affected I.T.V. only was passed in 1987 to amend s. 19 of the 1981 Act.

The 'key' regulatory provisions of the 1981 Act set out below:

- (1) Section 2(1) requires the Authority to provide local sound broadcasting service of "high quality (both as to the transmission and as to the matter transmitted)".
- (2) Section 2(2) requires the Authority to provide "a public service disseminating information, education and entertainment". Broadcasts in each area are required to "maintain a high general standard in all respects and in particular in respect of their content and quality, and a proper balance and wide range in their subject", having regard to the programmes as a whole and also to the days of the week on which, and the times of day at which, the programmes are broadcast.
- (3) Section 4(1) requires the Authority to satisfy themselves that the programmes comply with the following requirements:
 - "(a) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite the crime or lead to disorder or be offensive to public feeling;
 - (b) that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality;
 - (c) that proper proportions of the recorded and other matter included in the programmes are of British origin and of British performance;

- (d) that the programmes broadcast from any station or stations contain a suitable proportion of matter calculated to appeal specially to the tastes and outlook of persons served by the station or stations and, where another language as well as English is in common use among those so served, a suitable proportion of matter is in that language;
- (e) in the case of local sound broadcasting services, that the programmes broadcast from different stations for reception in different localities do not consist of indetical or similar material to an extent inconsistent with the character of the services as local sound broadcasting services; and
- (f) that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy."
(In applying this requirement, series of programmes may be considered as a whole).
- (4) Section 6 of the 1981 Act provides that, if the Authority so desires, programmes in a local sound broadcasting service may be broadcast only when they form part of a programme schedule previously approved by the I.B.A. (Provisions enabling the I.B.A. to exercise this power are included in the programme contract. A contractor's initial schedules and any subsequent changes of continuing significance will require prior IBA approval.)
- (5) Section 8(6) forbids sponsorship of programmes, as qualified by some limited exceptions.

The I.L.R. companies are obliged to abide by the legislative requirements under the terms of their contract with the I.B.A. It would be a mistake to underestimate the centrality of the contract to the relationship between the Authority and the I.L.R. companies. It is the contract that lays down the ground rules for the relationship and gives the I.B.A. the power to impose sanctions for 'breach of contract' if appropriate. But it should not be thought the contract is the outcome of contractual negotiations between the I.B.A. and the relevant I.L.R. company. It is not: it is a standard form contract and, apart from one or two minor differences, pertaining to detailed technical matters, all the companies operate under the same contractual terms. The contractual relationship is, therefore, somewhat one-sided.

It is Part II of the contract which incorporates the main statutory provisions relating to programming. For example, clauses 2 and 3 correlate closely to sections 2 and 4 of the Broadcasting Act as detailed above:

2. The programmes provided by the Contractor shall at all times be such as in the opinion of the Authority:-

(1) are of a high general standard in all respects and in particular in respect of their content and quality;

(2) are capable of high quality transmission by the Authority;

(3) contain a suitable proportion of matter calculated to appeal specially to the tastes and outlook of persons served by the stations and where another language as well as English is in common use among those so served a suitable proportion of matter in that language;

(4) include nothing which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; and

(5) maintain a proper balance and wide range in their subject matter having regard both to the programmes as a whole and also to the days of the week on which and the times of day at which the programmes are broadcast.

3. The programmes provided by the Contractor shall be such that in the opinion of the Authority:-

(1) due impartiality is preserved on the part of the Contractor as respects matters of political or industrial controversy or relating to current public policy;

(2) proper proportions of the recorded and other matter included therein are of British origin and of British performance; and

(3) they do not consist of material identical or similar to that used by other sound programme contractors to an extent which in the opinion of the Authority is inconsistent with the character of its services as local sound broadcasting services.

For the purposes of paragraph (1) of this Condition a series of programmes may be considered as a whole and to ensure compliance by the Contractor with paragraphs (2) or (3) of this Condition the Authority may from time to time by notice require the Contractor to observe such restrictions or qualifications in respect of the programmes to be provided by it or any class of such programmes as the Authority may consider necessary.

The procedure to be followed in the case of breach is outlined in the contract. Clause 9 of Part I provides (in part) that:

8. (1) If in view of any breaches of this Agreement by the Contractor the Authority after giving the Contractor a reasonable opportunity of making representations with respect to the matter thinks it necessary so to do the authority may serve on the Contractor a written notice taking effect forthwith or on a date stated in the notice to determine or suspend for such period as may be specified in the notice or until a further notice is given the Authority's obligation to broadcast the programmes supplied by the Contractor (without prejudice to the Contractor's obligations as to the supply of programmes under this Agreement up to the date when the notice takes effect) PROVIDED that no such notice shall be given

(i) unless the Contractor has broken this Agreement on at least three occasions and in respect of each of those breaches has received from the Authority written particulars of the breach within one month from the time when the breach came to the notice of the Authority

or

(ii) in a case where the circumstances are such that there is a continuing breach of this Agreement by the Contractor unless the Contractor has received from the Authority written particulars of the breach within one month of the time when the breach came to the notice of the Authority and thereafter on at least two further occasions a copy of such particulars.

In fact, the power of termination has never been used, although warning notices have been issued, particularly in the early days of I.L.R. It is impossible to get any clear picture of the details of such occurrences, since such information is regarded as confidential to the contractual relationship by the Authority. It is clear, however, that the issue of a warning notice is in itself regarded as a major step and will be the culmination of a number of informal warnings.² In other words, the I.B.A. possesses more expansive powers in relation to its contractors than it has found to be necessary. Perhaps this is because of the public and media uproar which would ensue, similar to that which occurred when Radio Victory of Portsmouth failed to obtain a renewal of its contract³ or has occurred when I.T.V. franchises have not been renewed.⁴ Thus any description of the broad powers and capabilities associated with the contract has to acknowledge the importance of the policy context and whether their exercise could be viewed as legitimate.⁵

It has already been noted that, in addition to the statutory provisions and the contract, policy and guidance is set down in somewhat greater detail in the I.B.A.'s guidelines and codes of practice. It is these four sources taken together which form what are generally recognised as the sources of the parameters of the regulatory framework of I.L.R. They can also be seen as laying down the desirable objectives of public service broadcasting.⁶ A succinct summary of the situation would be that, in effect, the statute controls the I.B.A., whereas the I.L.R. companies are controlled by the terms of their contracts.

Informal Regulatory Activity

This is the outline of the formal regulatory framework, but it almost goes without saying that the informal regulatory processes are equally

important. The I.B.A. and the I.L.R. companies are in continuous contact and dialogue with each other. They are constantly re-negotiating the boundaries of what the companies will be permitted to do. The Authority is continually re-assessing its policy and its interpretation of the Broadcasting Act. To a large extent the Authority sees its role as a 'facilitative' one; assisting the industry to push forward the boundaries of what is permissible under the terms of the legislation.⁷ It is also true to say that the 'understandings' reached by the I.B.A. and the companies do to a large extent form the real 'rules' controlling the relationship: more will be said on this in Part IV.

Indeed, the activity of negotiation is pervasive through all of the I.B.A.'s regulatory activities. Some negotiation is formal, in the context of matters such as policy-making, rule-making or the processing of contract applications. Formal negotiations are conducted within a long-established, quasi-legal framework. Other negotiations are informal and can occur at any point.

Negotiation is in fact central to both the formal and informal regulatory processes of the Authority. To a large extent this relationship based on negotiation results from the fact that both the I.B.A. and the I.L.R. companies share a number of common goals including, for example, the minimisation of economic costs and interferences with the established routines. Vaughn has observed how in order to attain goals such as these, negotiation defines a process where compliance is a mutually beneficial outcome for both the regulatory agency and the regulated industry: 'compliance emerges as a product of the power-mediating efforts of both parties, as compliance demands fewer resources from both agencies and business firms than do adversarial activities....'⁸ Negotiation can also contribute to the implementation of regulatory objectives in that it can

help reduce what Bardoch describes as, 'the delays, misunderstandings, and the confusion attending the implementation process'.⁹

Negotiation in the regulatory process does, however, create problems 10 of accountability and control.¹⁰ The maintenance of the legitimacy of negotiation in the regulatory process is vital to any solution of the stringency versus accommodation dilemma.¹¹ An excessively stringent approach by the regulatory authority would preclude effective negotiation, while an overly accommodative relationship could lead to the negotiation taking place outside the public interest. Hawkins and Thomas further note that:¹²

[Negotiation] suffers a loss of legitimacy if it occurs by default as a response to resource constraints, unclear policy objectives, agency conflict, or inadequate incentives.

But much negotiation would appear to be inevitable, given that regulators must attempt to balance the potentially conflicting objectives of stringency and accommodation. They must be flexible in the performance of their regulatory functions. As Daneceau puts it, 'it is both desirable and possible for [regulators] to respond to the concerns and anxieties of both business and industry without jeopardising either the goals of the programs they represent or their own positions as [regulators]'.¹³

Thus there is a wide range of activity by a regulatory agency outside of the formal functions and discretionary decision-making powers which are stated formally in statutes or other regulations. The regulatory process cannot accurately be defined solely in terms of these functions and powers. There is a wide range of informal regulatory activity. Regulatory agencies, such as the I.B.A., are involved continually in the giving of informal advice and the interpretation of statutory provisions and their own regulations to provide policy guidance for that advice. This guidance will commonly be given

described by the agency's parent statute. Yet this is the level at which much of the interaction between the regulators and the regulated will take place. From one perspective this represents a more realistic view of the nature of regulatory activity than, for example, functions such as awarding programme contracts or approving programme schedules.

Conclusion

The contract is, therefore, the main instrument through which the I.B.A. implements its policies in relation to programming, advertising and other areas of regulation. The use of contracts in the regulation of Independent Broadcasting makes the system unique. In other countries use has been made of licences rather than contracts. ¹⁴ Although there can be similarities between the two, the fundamental distinction is that contracts derive from private law whereas governmental licensing systems are usually set up in public law. The holder of a licence to broadcast can expect that regulatory action associated with it will involve formal and elaborate procedural protections deriving from public law. No such benefits accrue to a party to a contract with the I.B.A. The courts have refused to impose the procedural trappings appropriate to a system of licensing on the I.B.A., precisely because the relationship between the Authority and the broadcaster is that of parties to a contract.

In the allocation of I.L.R. contracts, however, the I.B.A. is performing a public law function, but the legal mechanism employed in the 'contract simpliciter'. ¹⁵ This has been described as a, 'separation of function from form.' ¹⁶ This separation has clear implications for the legal accountability of the Authority. Harden and Lewis argue that: 'The contractual nature of the legal framework encourages the private and unaccountable exercise of the I.B.A.'s powers and there are strong

indications that even the limited canons of administrative law procedural
17
requirements could not be imposed on the I.B.A. through the courts'.

Thus the fact that, in its relationship with a broadcasting company, the I.B.A. will be exercising private contractual rights will severely limit the role of the courts in ensuring some degree of accountability. Accordingly, judicial review will give negligible procedural protection to affected parties. Indeed, Lord Denning has said of the award of I.B.A. programme contracts that, 'a hearing does not have to be given to those who
18
may be disappointed'.

It is arguable that the use of a system of contracts has given the I.B.A. better control over the broadcasters than would a licensing system. A contract clearly carries no right of renewal, whereas if a licensee has a 'legitimate expectation' of renewal, public law will protect that
19
expectation. In fact, it has been argued that it was to escape the expectations of the licensee that the proponents of the Independent Television Act of 1954 chose to establish a system of regulation based on
20
contract. It was considered that a contractor who performed badly would be more easily disposed of than a licensee.

In brief, the contract represents the authorisation of the I.B.A. to the broadcasting company for a specified time. Provided the company complies with the terms of the contract, it is free to pursue the activity of broadcasting. Legally, the broadcaster has no right to contract renewal or to tenure in the contract. Since the relationship is governed by the private law of contract, contractors are unable to call upon the courts to offer safeguards deriving from public law.

References

1. I.B.A. Agreement for Appointment of Programme Contractor for Local Sound Broadcasts (June 1984).
2. Interview with I.B.A. Officer.
3. See Chapter 5, supra/
4. See Briggs and Spicer, The Franchise Affair (1986).
5. Law Reform Commission of Canada, Policy Implementation, Compliance and Administrative Law, Working Paper 51, (1986).
6. Interview with I.B.A. Officer.
7. Id.
8. Hawkins and Thomas, 'The Enforcement Process in Regulatory Bureaucracies' in Hawkins and Thomas (eds.), Enforcing Regulation (1984) at 15. The ensuing discussion draws on this piece.
9. Vaughn, 'Toward Understanding Organisational Behaviour' (1982) 80 Michigan Law Review 377 and 384.
10. Bardach, 'Reason, Responsibility and the New Social Regulation' in Burnham and Weinberg (eds.), American Politics and Public Policy (1979) at 416.
11. See Kagan, Regulatory Justice (1978).
12. Hawkins and Thomas, op. cit., n.1 supra, at 16.
13. DancEAU, 'Developing Successful Enforcement Programmes' in Bardach and Kagan (eds.), Social Regulation: Strategies for Reform (1982) at 143.
14. See Law Reform Commission of Canada, op. cit., n. 5 supra at 40-44; Johnston, The Canadian Radio-television and Telecommunications Commission 1980; Kaufman, Broadcasting Law in Canada: Fairness in the Administrative Process (1987).

15. Lewis, 'Who Controls Quangos and the Nationalised Industries?' in Jowell and Oliver (eds.) The Changing Constitution (1985), 190 at 203.
16. Id.
17. Harden and Lewis, The Noble Lie: The British Constitution and the Rule of Law (1986) at 170.
18. Cinnamond v British Airports Authority [1980] 2 All E.R. 368 at 374, per Lord Denning, M.R.
19. See Baldwin and Horne, 'Expectations in a Joyless Landscape' (1986) 49 Modern Law Review 685.
20. Baldwin, Cave and Jones, 'The Regulation of Independent Local Radio and its Reform' (1987) 7 International Review of Law and Economics 177

CHAPTER SEVEN

THE LEGAL MANDATE AND DISCRETIONARY POWERS

Introduction

It is a fundamental principle of a system of Parliamentary democracy that the activities of a regulatory agency must be founded on Parliamentary authority. This authority should have its source in the statute that sets up and gives instructions to the agency. These instructions can be fairly specific, where an agency is given adjudicative functions, for example. Where the function is of a regulatory nature, however, the instructions given to the agency commonly will be very broad indeed and may indeed amount to no more than requiring the agency to decide matters 'in the public interest'.

It is, therefore, a problem common to many regulatory agencies, particularly those having the duty to regulate economic activity, that they are asked effectively to function as subordinate legislative bodies with broad statutory mandates, vague goals and priorities which need not necessarily be consistent with one another. H.L.A. Hart has observed that legislators suffer from relative ignorance of fact and indeterminacy of aim. This frequently leads to regulatory legislation being too broad in its scope, covering activities that are not germane to the legislature's primary (if indeterminate) aim. Alternatively, but less likely, the language used by the legislature may be too limited, leaving beyond the literal words of the legislation some occurrence which the legislature would have wished to control or prohibit.

The problematic nature of legislative mandates means that they have to be elaborated upon by the regulators. It has already been noted how regulatory authorities are most commonly established when the legislature

defines the existence of a particular socio-economic problem in broad terms and responds by creating an agency to do something about it. It is left to the discretion of the regulatory agency precisely how the 'problem' is to be solved. This reliance upon the discretion and expertise of the regulators is based upon the recognition that it would be impossible to formulate precise legislative rules which would cover all the potential contingencies. The legislative mandate will, as Hawkins has pointed out, be, 'translated and crystallised into a series of agency objectives and practices that comprise the policy which ostensibly informs the exercise of discretion in some (as yet imperfectly understood) way'.³ That is, the agency will have to perform the function of law-elaboration.

The design and characteristics of a regulatory agency's legislative mandate are such crucial issues because the legislation that an agency is called upon to implement is without doubt the most vital legal influence upon it. The specific terms of the legislation can be described as acting as a 'prism' through which the agency's interpretation of the law is 'refracted'.⁴ The legislation can also offer a simplified 'definition of the situation'⁵ to a regulatory agency which is confronted with uncertainties and potentially conflicting goals and which needs to reduce these problems into a coherent and manageable set of categories. The relevant enabling legislation would appear to provide readily available and authoritative definitions of the situation. If an agency sticks closely to the definitions provided by the legislation, it will be both provided with much needed guidance and given a shield against legal and political attack.

The obvious weakness of such an approach is that the statute will not always provide clear definitions. Much legislation is vague and even relatively precise statutes provide some leeway for interpretation in relation to some cases. Although the actual words of a statute can be

defined in different ways and legislative intentions debated, not all statutory interpretations are plausible. In any scheme of regulation, therefore, 'the rough boundaries of policy are likely to be charted by the legal arguments that can plausibly be linked to the authorising legislation.'⁶

A lack of specificity in the expression of statutory mandates is probably inevitable. There are a number of factors responsible for this measure of vagueness.⁷ It would be unrealistic to expect Parliament to specify at the outset the details of the policies to be implemented by the agency. For, as the Law Reform Commission of Canada has pointed out, 'it would be...antithetical to the purpose of creating agencies to expect Parliament to resolve in advance the very issues the agency is created to address.'⁸ It is only realistic to note also that legislators may wish to avoid having to resolve controversial policy issues and that the presence of 'constructive ambiguities'⁹ in the statutory instructions to the agency may be, 'the price to be paid to ensure the passing of legislation.'¹⁰ Fuchs has described how broad delegations avoid stalemate by providing a 'means for acting without making final choices'.¹¹ This means that in exercising the delegated powers the agency is going to be confronted by the same problems as the legislature in attempting to formulate consistent and successful policies. There is no reason why the regulators should be any more successful in their attempts than were the legislators.

The existence of a broad statutory mandate inevitably causes difficulties for the regulatory authority. The 'abstract' and 'terse' statements of Parliament have to be given form and purpose by the regulators.¹² The agency will be forced to engage in what Unger has called 'ad hoc balancings'.¹³ The balance will have to be between a literal application of the statutory provisions or a 'relaxation' where the agency

feels that strict implementation is not vital for the success of the legislative programme.¹⁴ This balancing act will not normally be reducible to general rules.¹⁵ As a consequence, a degree of confusion about a regulatory agency's aims and policies is only to be expected. There can be no guarantee that the priorities set by the agency will be consistent with the earlier expectation of either legislature or executive. Where the confusion and inconsistency is great this can bring into question the legitimacy of the actions of the regulators. If the relevant legislative provisions are applied unpredictably, this will lead to a degree of cynicism or skepticism about agency methods and objectives.

Confusion about agency priorities can also lead to a lack of accountability. Uncertainty over objectives makes it difficult for interested parties to evaluate how effectively the agency is operating.

The foregoing comments are clearly apposite in the case of the I.B.A. As well as being conveniently vague, most of the provisions of the Broadcasting Act are permissive rather than mandatory. The Act gives the I.B.A. very broad discretionary powers. One M.P. made the following comment on the original Sound Broadcasting Bill in 1971:¹⁶

What the bill does in essence...is to provide a legislative and legal framework within which the I.B.A. will exercise its discretions. Its discretions are wide; and its discretions are virtually unlimited.

As far as this legislator was concerned, 'the Minister has clear ideas as to how he wishes the Authority to behave. But he has not set them out in the Bill, nor has he told the House of Commons how he wishes it to be done.'¹⁷ In his opinion the Sound Broadcasting Bill was, 'one of the worst pieces of legislative nonsense that I have seen for a long time.'¹⁸ Some fifteen years later an I.B.A. Officer was still able to observe that: 'The Act is so wonderfully widely phrased that you can read anything into it'.^{18a}

The difficulty in interpreting precisely what is the I.B.A.'s legislative mandate is of central relevance to any discussion of legitimacy. The giving of form and purpose to concepts such as 'quality' or 'balance' must, of necessity, be contentious. One commentator made the following observation on the style of drafting of the Television Act 1954,¹⁹ the original source of the principal provisions of the present Act:

It is difficult to take very seriously this solemn enactment of the legislator's own doubts about the possible implications of injecting the system of commercial [broadcasting] into the national life. Certainly this pompous asseveration of the need for proper standards without any hint of what they are or as to how they are to be judged, would appear on the face of it to confer [on the I.B.A.] a kind of overall censorship.

It could be said, therefore, that the apparent 'regulatory failure' of the I.B.A. is the consequence of defectively designed legislation. Indeed, Nonet and Selznick have observed that many instances of 'regulatory failure' are in fact a failure to achieve a legislative mandate which a regulatory agency was never given.²⁰ As the Managing Director of one I.L.R. station remarked, 'The I.B.A. can only interpret what it's got'.^{20a}

In other words, a programme of regulation can only be as strong as the relevant legislation allows it to be. If the legislative scheme is defective, then the regulatory agency will be unable to meet popular perceptions of adequate and appropriate enforcement, the regulated may be able to avoid its full impact and those who are supposed to benefit may not do so.²¹

When Parliament created a regulatory agency such as the I.B.A. ideally it would state as clearly as possible and in plain and unambiguous language the broad objectives the agency is to pursue. This ideal may not be realistic in practice, but it should be the aim of legislators. As Landis wrote some fifty years ago, 'wisdom in the formulation of standards, in the grant of powers, is the first step toward realization of those hopes

now so definitely held of the administrative process.' Landis is not saying here that there could ever be an exhaustive description of an agency mandate. But the constituent Act is the legal linchpin for the regulatory agency's activities and should seek to provide a coherent framework. Legislation cannot, of course, cater adequately for all the complexities of the issues which the agency must inevitably confront. Many questions of policy will only come to light once the regulatory programme is under way. An agency mandate that was too specific could have the equally undesirable effect of stifling an agency and saddling it with inappropriate restrictions. Any regulatory agency needs to be able to adopt to changing circumstance.

Discretionary Powers

The term 'discretion' is typically used to indicate the granting to the regulatory agency by the legislature of a mandate to complete a job begun by it. The term is used where legislation establishing the agency contains only generalised instructions.²⁵ This use of the term 'discretion' clearly indicates that a fundamental aspect of regulatory agencies is the role of 'fleshing out' the details of the legislative programme. Descriptions of the nature of this power of regulatory agencies are not difficult to find in the relevant literature. Friendly suggests the agency function as to general statutory language is, 'to define and clarify it - to canalise the broad stream into a number of narrower ones'.²⁶ Stewart notes that, 'discretion is most evident when agencies adopt regulations in order to implement open-ended statutes'.²⁷

It is quite clear that the regulatory functions performed by the I.B.A. consist of a mixture of both duties and discretionary powers.²⁸ For example, the authority has a statutory function to ensure that programmes

broadcast by it meet certain legislative standards as to balance, quality and decency. This function entails both a duty to do what is necessary gain information about a programme, and a discretionary power to determine whether the programme complies with the statutory requirements. A vague, general and ambiguous statute, such as the 1981 Broadcasting Act, serves only to enlarge this discretionary power. The existence of such discretionary powers obviously threatens the legitimacy of the I.B.A.'s actions under the 'transmission belt' theory of administrative law.²⁹ For, in implementing the legislation, the Authority is itself acting as a law-maker when it clarifies and elaborates legislative policies.³⁰

Discretion of the kind exercised by the I.B.A. can be said to have two main sources.³¹ First, a regulatory agency can be endowed by the legislature with plenary responsibilities in a certain area of activity and told that within that area it has a free choice. Second, the relevant legislation may include directions that are designed to constrain the agency's choices but that, because of their generality, do not serve to determine choices in particular cases.

The I.B.A. would appear to have discretion deriving from both these sources. In the regulation of programme content, for example, the I.B.A.'s discretionary powers are of the second type. But in the selection of programme companies and the general development of I.L.R., the discretion granted to the I.B.A. approaches the first type outlined above.

A more difficult task than describing the sources of discretion is that of finding an adequate definition of the concept. It is possible to become engaged in a rather pointless semantic discussion of, 'which aspects of decision-making and judgment can properly be described a discretion'.³²

In Dworkin's famous analogy, 'discretion, like the hole in the doughnut,

does not exist except as an area left open by a surrounding belt of
restriction. It is therefore a relative concept',³³ while according to
Davis, 'a public officer has discretion whenever the effective limits on
his power leave him free to make a choice among possible courses of action
or inaction'.³⁴ Both these definitions see discretion in terms of
'restriction' or 'effective limits' and do not see it as merely choice. In
fact, it is important to distinguish the lawful scope of choice available
to the regulatory agency from any de facto freedom of choice which it
possesses. Discretion would seem to imply a sense of legitimate decision
and a decision reached within the confines of certain restrictions.³⁵

Discretion is, therefore, perhaps best seen as merely the room for
manoeuvre passed by a regulator in making decisions.³⁶ It is rarely
absolute and is a matter of degree. It may well vary from one regulatory
context to another. A regulatory agency such as the I.B.A. will have a
high level of discretion when it is guided by such a vague standard as the
'public interest'. It is possible for discretion to be constrained by non-
legal factors: 'The doughnut ring may comprise many factors'.³⁷ Among the
most important non-legal factors would be the resources available to the
regulatory agency and the political pressures to which it may be subjected.

Discretion is thus a necessary and inevitable aspect of the
regulatory process. As Hawkins notes:³⁸

Discretion enables legal rules and mandates to be interpreted and
given purpose and form. It enables judgments to be made about the
application, reach and impact of the law.

Not all observers of the regulatory process have viewed the existence and
exercise of wide discretion quite as benevolently as this.³⁹ Regulatory
agencies such as the I.B.A. have often been criticised for their failure to
clarify the vague statutory standards under which they operate. It should
be clear, for example, from the account of the I.B.A.'s franchising

procedures in Chapter Five, that the Authority has some considerable way to go before its attempts to interpret the Broadcasting Act would attain Hawkins' ideal.

A further criticism of wide discretion is that it makes regulatory agencies more exposed to influence from the regulated, since, as Lowi has pointed out, the regulators and regulated will have to reach some understanding over where the boundaries of permissible conduct are to be drawn up in practice.⁴⁰ Fuller suggested that the tendency of regulatory agencies identifying with the regulated, 'may lie in a desire to escape from the frustration of trying to act as a judge in a situation affording no standard of decision. To escape from a moral vacuum one has to identify oneself with something, and the most obvious object of identification lies in the regulated industry.'⁴¹

Wide discretion can also lead to uncertainty, since those to whom a legislative provision is addressed will not know what precisely is expected of them. It may also result in unfairness if a standard applied to one of the regulated is not applied to others in similar circumstances. Furthermore, democratic theory requires that primacy should be given to the intention of the legislature, so wide discretion is undesirable if it allows regulatory agencies to substitute different goals from those envisaged by the legislature.⁴²

Despite such problems, it should not be thought that granting regulatory decision-makers discretion will produce inconsistency and arbitrariness. A regulatory agency can guide the exercise of discretion through the formulation of policy and its articulation through rules. As Davis has long argued, the issue is not whether discretion does nor should exist, but how it should be guided, checked and reviewed.⁴³ Davis recommends confining the discretionary

closely than has been the case in the past. He admits that some discretion is necessary, but is concerned with the amount of 'unnecessary discretion' which allows regulators to depart from official policy. Davis suggests that where discretion cannot be confined, it should be 'checked' or 'structured'.⁴⁹ Thus, Davis argues that, 'one officer should check another, as a protection against arbitrariness'.⁴⁵ By 'checking', he means, 'both administrative and judicial supervision and review'.⁴⁶

Davis is perhaps best known for urging the use of precise rules to confine discretion, by setting the boundaries for its exercise and limiting it to the minimum necessary for the effective performance of the particular regulatory function. He also emphasises the structuring of discretion, by which he means that agencies should justify their decisions by relating them publicly to other decisions, rules, standards, principles or policy statements.⁴⁷ Davis asserts that the ultimate objective is, 'to locate the optimum degree of structuring in each respect for each discretionary power'.⁴⁸

Both the merits and disadvantages of agency rule-making will be addressed further in the next chapter. It is sufficient for the present to outline the kind of problems confronting the I.B.A. in the exercise of its wide discretionary powers. The problem of finding a principled and coherent basis for the exercise of the I.B.A.'s discretionary powers can be seen as being inextricably linked to the substantive problem of balancing the conflicting values of stringency and accommodation.⁴⁹ An emphasis on regulation in accordance with precise rules may lead to unreasonable and unjust results if applied to I.L.R. companies in financial difficulties. Alternatively, the application of the rules may be overly accommodative if the companies could afford to comply with more stringent requirements.

The dilemma confronting regulatory agencies such as the I.B.A. in

their search for a legitimate basis for the exercise of their discretionary powers is an unenviable one. Kagan aptly describes the problem as finding, 'an acceptable path between the Scylla of legalism and the Charybdis of uncontrolled discretion, a method by which decisions are made both promptly and consistently and rules are applied and adjusted in light of their actual consequences'.⁵⁰ But as Koch so aptly states, 'all types of discretion are characterised by some sense that the agency needs a degree of freedom to make mistakes'.⁵¹

The question then becomes one of how to give legitimacy to discretionary decisions. In general terms, this may come to depend on procedures for accountability and participation rather than with the achievement of specified goals.⁵² The ensuing discussion focusses on legal accountability; participation and other forms of accountability will be addressed further in later chapters.

Legal Accountability

It has been stressed throughout the discussion of the I.B.A. so far that the Authority relies to a considerable extent on an expertise model of legitimacy. This model relies heavily on the good judgement of the I.B.A.'s officials and on informal procedures and negotiations. The traditional administrative lawyer would, however, mistrust such arrangements. Administrative legal doctrine would call for formal controls as a protection against inaccurate or arbitrary decision-making. This legal approach would emphasise the importance of the accountability and control basis for agency legitimacy. The accountability model would emphasise the answerability of regulatory officials to the courts. The ideals supported by such an approach are outlined clearly by Kagan: 'predictability of decision and equality of treatment; decision according

to systematized fact-finding procedures, such as court-like hearings, and according to explicit, known rules; and finally, fixed procedures for public participation in the agency['s] decision processes'.⁵³

These ideals described by Kagan are to a large extent reflected in the doctrines of administrative law under which the decision of a regulatory agency can be contested in the courts. Under these doctrines a court can reverse an agency decision if it is illegal (that is, outside the terms of the authorising statute), irrational or the result of procedural impropriety.⁵⁴

In general terms, therefore, the I.B.A. is subject to the principles of administrative law and is subject to legal accountability. However, given the vagueness of its statutory mandate and the broad nature of its discretionary powers, it would be very difficult successfully to challenge the I.B.A. on any of these grounds.⁵⁵ A further factor limiting the potential role of the courts is that, in its relationship with an I.L.R. company, the I.B.A. will be exercising private contractual rights.⁵⁶

This is not to say, of course, that the courts will not on occasion take a 'hard look' at the procedures adopted by the I.B.A. On a number of occasions such judicial scrutiny has taken place, but it has been made clear that the courts will only intervene if the Authority and its members had failed to fulfil the duty to establish a sound system of administration and adhere to it.⁵⁷ A court would have to be persuaded that the action taken was one that no reasonable regulator could have adopted in the light of his statutory duties.⁵⁸ This would be a hard test to satisfy. One view would be that the courts have in effect placed a 'hands off' sign on the I.B.A. directed at would-be litigants. For example, the Court of Appeal has stated in the leading case concerning a challenge to the I.B.A.'s television programming supervision that:⁵⁹

good taste or decency would not inevitably mean that the system was impeachable, or that it was not being operated. Such an occurrence might certainly call for a review of the system itself, and of any safeguards designed to ensure its proper operation, but that would be a matter for the Authority. This 'thoroughly practical approach to the problem'⁶⁰ shows a clear reliance on the perceived expertise of the I.B.A.

One can, therefore detect a reluctance on the part of the judiciary to interfere with the judgements of an expert body such as the I.B.A. For example, in an earlier judicial decision concerning a challenge to the Authority's procedures for the supervision of television programming it was said that:⁶¹

The authority were the people who mattered. ...The Courts had no right to interfere with their decisions so long as they were in accordance with the law.

Thus, a court can certainly be expected to defer to a policy judgement made by the Authority, provided that it meets the minimum standards of legality, rationality and procedural propriety. In other words, 'the kernel of the expert model is incorporated in administrative legal doctrine'.⁶²

Nevertheless, the doctrines of administrative law and the availability of judicial review do have a limited potential to influence Authority decisions. Most importantly, administrative law provides a set of standards against which a regulatory agency can be assessed by the Courts. And the court's interpretation of the Authority's constituent legislation have had an effect upon the mandate of the Authority. Questions relating to the Authority's jurisdiction have raised fundamental issues about how much room for manoeuvre it should have in defining its own role through the interpretation of its statutory mandate.

This is just one example of the difficult questions affecting the institutional relationship because regulatory agencies and courts. Another would be as to the point at which a court should be able to decide that an agency has stretched the terms of its constituent Act beyond the bands of a reasonable interpretation. As Hammond has put it:⁶³

The role of the courts...is to assist in articulating the integrity of the legislation, in seeing that that integrity is maintained, and in ensuring agencies stay within the four corners of the legislative scheme as conceived. [It] is a complex one and extends much further than the traditional models of delegated legislation. As a method of ordering, it does not rest on fiat in the traditional, hierarchial, linear sense. It explicitly recognises the symbolic relationship among all organs of modern government and makes all those organs responsible for the legislative health of an organic whole.

In reality, of course, each participant in the business of governmental regulation is unlikely to share without reservation the other's view as to how the different role should be played. There appears to be a perennial tension between the advocates of strong legal accountability and those who perceive as unwarranted judicial intrusion into areas of decision-making that really belong to regulators.

The root of this tension lies in the fact that, as Verkuil notes, 'the role assigned to administrative agencies is in many ways different from that assigned the judicial'.⁶⁴ The two major differences would seem to be that:

- (1) Agencies act prospectively to plan, organise and set standards
- (2) Courts intervene on an ex post facto basis and rely on a highly structured adjudicatory process.

The potential of the courts to intervene in the procedures of the I.B.A. is severely restricted. Only a minute proportion of the Authority's decisions have been subject to litigation and all of these have concerned I.T.V. rather than I.L.R. The impact of court decisions on the Authority

is debatable. Court decisions have been viewed as impediments by the Authority resulting sometimes in attempts to bypass them. For example, the reason why the Authority has not made the I.L.R. Notes of Guidance publicly available is to avoid a legal challenge based on non-compliance with them.⁶⁵

It would only be exaggerating slightly to observe that the I.B.A. lies within a policy space which is largely invisible to the administrative legal order.⁶⁶ The doctrines of administrative law are of limited use in this no-man's-land of justiciability. Of course, placing too much emphasis on legal accountability can lead to one acquiring, 'a distorted view of the performance of agencies, one focussed more on their "pathology" than on their normal operations'.⁶⁷ Danger also lies in placing too much emphasis on legal values, when a more appropriate system of accountability would recognise the significance of 'moral, political, organisational and economic values.'⁶⁸

In other words, the I.B.A. must not be addressed purely in terms of legal values and accountability. The resources given to a regulatory agency are necessarily limited and the imposition of legal values, such as fairness, may have too high a cost. The dangers of judicialising the regulatory process must be kept in mind. For, although judicialisation can lead to an increased impression of fairness, it can, if excessive, result in delay and inflexibility, and generate division rather than compromise. After all, regulatory agencies are not courts. Their responsibilities as governmental bodies go beyond mere dispute resolution and embrace the formulation, development and implementation of rules and policies. This function of law-elaboration forms the subject matter of Part IV.

References

1. Jowell, Law and Bureaucracy (1975) at 6. See also Unger, Law in Modern Society (1976) at 193 ff.
2. Hart, The Concept of Law (1961), Chapter VII.
3. Hawkins, 'On Legal Decision-Making' (1986) 43 Washington and Lee Law Review 1161 at 1194.
4. Law Reform Commission of Canada, Independent Administrative Agencies, Report No. 26, (1985) at 49.
5. Kagan, Regulatory Justice: Implementing a Price Freeze (1978) at 17 ff
6. Id
7. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667 at 1695-6.
8. Law Reform Commission of Canada, op. cit., n.4 supra, at 15.
9. Hammond, 'Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence' (1982) 5 Hastings International and Comparative Law Review 323 at 329.
10. Law Reform Commission of Canada, op cit., n.4 supra, at 15.
11. Fuchs, 'Introduction: Administrative Agencies and the Energy Problem' (1972) 47 Indiana Law Journal 606 at 608.
12. Hawkins, op cit., n. 3 supra. at 1163.
13. Unger, op cit., n. 1 supra at 197.
14. Kagan, op. cit., n. 2 supra at 49.
15. Unger, op. cit., n. 1 supra, at 197.
16. Mr Ivor Richards, M.P., Hansard, November 11, 1971, col 1265

17. Ibid., col. 1267
18. Ibid., col. 1268
- 18a. Interview with I.B.A. Officer
19. Lloyd, 'Some Comments on the British Television Act 1954' [1957] Law and Contemporary Problems 165 at 167.
20. Nonet and Selznick, Law and Society in Transition (1978) at 113.
- 20a. Interview with M.D. of I.L.R. station.
21. Cranston, 'Regulation and Deregulation: General Issues' (1982) 5 University of New South Wales Law Journal 1 at 11.
22. Landis, The Administrative Process (1938) at 88.
24. See, generally, Friendly, 'Indiscretion about Discretion' (1982) 31 Emory Law Journal 747 and Shapiro, 'Administrative Discretion: The Next Stage' (1983) 92 Yale Law Journal 1487.
25. Koch, 'Judicial Review of Administrative Discretion' (1986) 54 George Washington Law Review 469 at 479.
26. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards (1962) at 14.
27. Stewart, 'The Limits of Administrative Law' in Goulet (ed) The Courts: Separation of Powers (1983) at 78.
28. Cane, An Introduction to Administrative Law (1986) at 125.
29. See Chapter 2, supra
30. Id and Jowell, op. cit., n.1 supra, at 14.
31. Stewart, op. cit., n. 7 supra, at 1676.

32. Richardson, Ogus and Burrows, Policing Pollution: A Study of Regulation and Enforcement (1982) at 20.
33. Dworkin, Taking Rights Seriously (1977) at 31.
34. Davis, Discretionary Justice: A Preliminary Inquiry (1969) at 4.
35. See Galligan, Discretionary Powers: A Legal Study of Official Discretion (1986).
36. Jowell, op. cit., n. 1 supra, at 156.
37. Richardson, Ogus and Burrows, op. cit., n. 32 supra, at 21.
38. Hawkins, op. cit., n. 3 supra at 1164.
39. See e.g. Friendly, op. cit., n. 26 supra and Henderson and Pearson, 'Implementing Federal Environmental Policies: The Limits of Aspirational Commands' (1978) 78 Columbia Law Review 1420.
40. Lowi, The End of Liberalism (1969) at 153. See also Jowell, 'The Legal Control of Administrative Discretion' [1973] Public Law 178.
41. Fuller 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353 at 375.
42. Jowell, op. cit., n.1 supra at 22-24.
43. See Davis, op. cit., n. 34 supra
44. Ibid., at 54-55.
45. Ibid., at 142.
46. Ibid., at 55.
47. Ibid., at 97-141.

48. Ibid., at 99.
49. See Kagan, op. cit., n. 2 supra at 6-18.
50. Ibid., at 15.
51. Koch, op. cit., n. 25 supra, at 470.
52. Galligan, op. cit., n. 35 supra., at 72.
53. Kagan, op. cit., n. 5 supra, at 14.
54. The classic judicial statement remains the judgement of Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374 For general account of the role of the courts in reviewing regulatory agencies, see Melnick, Regulation and the Courts: The Case of the Clean Air Act (1983); Baldwin and McCrudden, Regulation and Public Law (1987), Chapter 4.
55. See Munro, 'The I.B.A. in Court,' (1980) New Law Journal 131.
56. See Chapter 6, supra.
57. R v I.B.A., ex parte Whitehouse, The Times, April 4, 1985.
58. Id.
59. Id.
60. Justinian, '"Growth industry" limited by appeal court', Financial Times, 15 April 1985.
61. R v I.B.A., ex parte McWhirter, The Times, February 5, 1973.
62. Kagan, op. cit., n. 5 supra, at 15.
63. Hammond, op. cit., n. 9 supra, at 327.
64. Verkuil, 'Judicial Review of Informal Rulemaking' (1974) Virginia Law Review 185, at 186.

65. Interview with I.B.A. Officer.
66. Mashaw, Bureaucratic Justice (1983) at 9.
67. Law Reform Commission of Canada, op. cit., n. 4 supra, at 41.
68. Baldwin and Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] Public Law 570 at 580.
69. Robinson, 'The F.C.C.: An Essay on Regulatory Watchdogs' (1978) 64 Virginia Law Review 169 at 231.

PART IV - THE LAW - ELABORATION FUNCTION

CHAPTER EIGHT - POLICY-MAKING AND RULE-MAKING

Introduction

It has been reiterated throughout the preceding chapters that law-elaboration is a major function of independent regulatory agencies. Law-elaboration involves the translation of a vague and aspirational legislative mandate into specific policies and rules of conduct for those to be regulated. It has been suggested that in many instances the delegation to the regulatory agency is broad enough to amount to a quasi-legislative power to interpret or expand on the statutory mandate. Shapiro is only exaggerating slightly when he notes that, 'the agency is placed very much in the position of a legislative body with a limited capacity to make laws and an almost infinite range of law-making options'¹. Under this model of the regulatory process, the detailed formulation and articulation of administrative policies and rules is left to the regulators who are allocated substantial discretion both to make and apply policy. The explanation which can be given for this state of affairs is that the legislature does not want to become involved in deciding the complex issues surrounding particular regulatory decisions.² As Walker has said (in the context of penal law): 'The silence of the statutes is deliberate'.³ Or as K.C. Davis has explained:⁴

What happens over and over is that a legislative body sees a problem but does not know how to solve it; accordingly it delegates the power to work on the problem, telling the delegate that what it wants is the true, the good and the beautiful - or just and reasonable results, or furtherance of the public interest.

Thus a regulatory agency charged with the implementation of a (deliberately) vague legislative mandate will of necessity have to clarify and elaborate legislative policies. In this sense, regulators are, as

Shapiro suggests, de facto law-makers.

To control the exercise of their discretionary powers, regulatory agencies have to make decisions about the procedures they will follow in performing regulatory acts. Rules, guidelines or standards will be established to help to structure the law relating to regulatory procedures. In turn, these rules can provide a means of ensuring that 'lower level' regulators act in accordance with agency policy, whether that policy be defined by the legislature or by the agency itself.

It would be appropriate to point out here that throughout this essay the term 'rule' is used, following Diver's formulation, 'to refer to the linguistic formula used by an administrative agency to express its governing policy'⁵. In other words, a rule represents the articulation in a relatively precise form of the agency's policy. There is, of course, a large jurisprudential literature on what amounts to a 'rule'. An extended discussion of this issue would not be appropriate, but it is fair to point out that the definition adopted here is somewhat more flexible than many and would include within its scope guidelines and other less formal policy statements. Two examples of more orthodox definitions should suffice to illustrate the different approach adopted by Diver and utilised here. The first definition is that of Pound⁶; the second that of Jowell⁷:

- (1) [A] legal precept attaching a definite legal consequence to a definite detailed state of fact.
- (2) [A] concrete general direction in which legal consequences are appended to the happening or nonhappening of an event or the occurrence of a situation.

More will be said about rule-types later in this chapter and those utilised by the I.B.A. in Chapter Nine. The meaning to be attributed to the term 'policy' is discussed in the next section.

Policy-Making

The making of policy is often considered to be particularly appropriate for regulatory agencies. It can be seen as representing the zenith of administrative authority and expertise. As has already been observed, the legislature cannot perform all or even the major part of this governmental function.

'Policy' is an imprecise and flexible word. This imprecision has its source in the original Greek root 'politeia', which means 'government'. Policy has been defined as the sum of those, 'considerations which a governing body has in mind in legislating, deciding on a course of action or otherwise acting'.⁸ In other words, making of policy involves, 'making decisions about how to decide particular classes of case'.⁹ In general terms, one might say that policy includes those decisions that advance some collective goal of the community as a whole, rather than those decisions which secure some individual or group right.¹⁰ The 'considerations which a governing body has in mind' would include the advancement or protection of the public interest and of private rights and freedoms. Policy-making can be said to involve, in Diver's words, 'the reconciliation and elaboration of lofty values into operational guidelines'.¹¹

Different meanings can, of course, be attributed to 'policy'. Smith¹² has argued there are three major types of governmental policy:

- (1) Normative policy: this corresponds to what ought to be done.
- (2) Operational policy: this is what actually is done.
- (3) Strategic policy: this is what can be done.

In terms of this classification, the discussion of the I.B.A.'s policy-making will be focussing on normative and operational policy. Discussion of strategic policy will be adjourned until the Conclusion.

It is clear that regulatory agencies are concerned with the formulation of normative policy. For, as Levin points out, 'the typical statutory provision empowering an agency to promulgate regulations indicates a desire by the legislature to place certain norm-setting decisions in administrative hands.'¹³ It is self-evident that regulatory agencies are concerned with operational policy.

This role of policy-maker is, nevertheless, one of the most controversial which a regulatory agency has to play. This power to make policy can manifest itself in a variety of different forms. It includes the power to award contracts or licences, to make regulations, to exercise discretionary powers and to interpret the agency's parent statute. Policy-making involves the ability to interpret and shape the role the agency is to play. This may be achieved by making broad general rules, by issuing guidelines and codes of practice, or even by the way particular problems are resolved. Hawkins and Thomas accurately describe 'policy formulation' as, 'a process whereby the agency interprets and translates legislative goals into rules, standards and plans of action'.¹⁴

By no means, of course, is the making of policy by a regulator agency a straightforward task. Many areas of policy will give rise to a 'polycentric' array of problems.¹⁵ Among the issues to be decided in the formation of regulatory policy will be the following:¹⁶

- (1) The subjects to be on the regulatory agenda.
- (2) The priorities to be accorded to these subjects.
- (3) The criteria by which rules are to be formulated.
- (4) The exceptions to the rules which will be permitted.
- (5) The corrective actions or remedies to be prescribed in the event of violation of the rules.

The answers which the regulatory agency finds to these problems will

reflect once more the dilemma between what Kagan has called 'stringency'¹⁷ and 'accommodation' and will express the ways in which it has adapted to these conflicting values. This dilemma between stringency and accommodation is played out actively in the formulation and articulation of regulatory policy by the agency.

Kagan goes on to identify four main sources of influence which can affect an agency's regulatory policy and determine whether it is stringent or accommodative: the ideology of regulatory officials; the legal and political mandate of the regulatory programme; the social and political organisation of the regulatory process; and the economic effects of the regulations.¹⁸ These explanations of regulatory policy will be addressed further in the context of the I.B.A. in Chapter Ten.

The power to make policy possessed by a regulatory agency should not be seen merely as a power to 'fill in the gaps' in the relevant legislation. In policy-making, a regulatory agency is performing a role which is more commonly attributed to the legislature itself, rather than simply building on the earlier work of the legislators. In general terms, of course, the decision as to what the legislation requires is matter of statutory interpretation. But as Diver so rightly points out, 'this¹⁹ suggestion provides only the roughest of road maps'.

Given that much legislative guidance consists of a number of different considerations which the agency must take into account the agency will be obliged, as Levin points, to:²⁰ '...use its own creativity in determining what weight to attach to these various [considerations] under the circumstances of the particular regulatory program. In doing so, the agency is not interpreting the legislative will but, instead, responding to a legislative invitation to make law'. An active policy-making role by a regulatory agency immediately raises fundamental issues

about accountability and the legitimacy of non-elected regulatory officials making major policy decisions. ²¹ Indeed, the policy-making model perhaps represents the ultimate in reliance on the expertise of the regulatory agency. As Freedman stresses, an agency is assigned or created to bring expert judgment to a particular problem. ²² On one level this expertise lies merely in the possession of specialist knowledge, but it must also include the ability to analyse the relevant information and reach an accurate decision. To a large extent, regulatory policy-making represents this 'higher' level of expertise. This apparent expertise can serve to legitimate the making of regulatory policy by agencies independent of the elected government. This expertise is, perhaps, the reason why the legislature consents to the function being performed by an independent agency. The requirement that policy-making be guided by the 'public interest' gives rise to a number of observations in relation to regulatory agencies. It would seem to require that regulatory decisions should be made with attention to public opinion. For, although policy-making has been assigned to an 'expert' body, this does not mean that public opinion should be regarded as of no relevance. In effect, the responsibility for ascertaining and taking account of the public interest has been assigned to the agency. In practice, however, the regulatory agency must be in a far inferior position to that of legislators to discern public opinion. It is also quite possible that the allocation of the policy-making functions is ²³ the result of less noble reasons.

It is arguable that the policy-making function is allocated to an independent agency so that policy can be formulated in an atmosphere of expertise and objectivity. A more cynical view would be that the assignment ensures that agency officials, rather than legislators, will ²⁴ bear the brunt of the inevitable dissatisfaction with the balance struck,

'between competing interests which vary in weight from case to case' and which may appear equally valid to the outside observer.

Rule-Making

The power to fix procedures, criteria or policies in the form of rules is one of the most important and significant powers given to a regulatory agency. It is both inevitable and desirable that an agency should articulate its policy and this will commonly be done by the making of rules, in the broad sense of the term utilised here. The necessity to make rules can come to a regulatory agency more by default than design, where the mandate given by the legislature is so vague that it needs to be clarified and given content before it can be implemented. On other occasions, the relevant legislation may require the agency to make rules to govern certain types of activity. Examples of rules deriving from both of these sources can be found in the regulation of I.L.R. They are discussed in detail in the next chapter.

Various attempts at classifying administrative rules can be found in the literature. These vary from the philosophical and abstract to the practical and functional. It is debatable however, whether much is to be gained by attempting to classify the varieties of rule made by regulatory agencies. For, as Levin points out:

The agency may simply announce that a given policy is the course of action it intends to pursue, or that regulated parties should pursue. Such a pronouncement may leave the rest of the world in doubt as to whether the agency is to rely on a perceived [legislative] mandate or its own policy preference or both.

It is important to distinguish both primary legislation and delegated legislation, but beyond that it is questionable whether any very specific distinctions can be drawn. Baldwin and Houghton distinguish between sub-delegated legislation, 'where it may not be clear whether Parliament has delegated a power to an individual, nor is it always plain whether the

authorisation runs to making prescriptions of full legal force' and 'unsanctioned administrative rules' which, 'is the huge group comprising all those rules, guides or other statements of general applicability that are promulgated by administrators or others without express legislative mandate'.²⁹ In practice, such a distinction can disappear, it being unclear whether a rule is 'sanctioned' or not and it is quite possible for a rule or a body of rules to have both 'sanctioned' and 'unsanctioned' elements in it.

To be fair to Baldwin and Houghton, however, they do stress that, 'the form in which a rule emerges is not necessarily related to its status'.³⁰ They go on to adopt a functionalist approach, identifying eight models of administrative rules:³¹

- (1) Procedural Rules
- (2) Interpretative Guides
- (3) Instructions to Officials
- (4) Prespective/Evidential Rules
- (5) Commendatory Rules
- (6) Voluntary Codes
- (7) Rule of Practice, Management or Operation
- (8) Consultative Decisions and Administrative Pronouncements

What Baldwin and Houghton classify as sub-delegated legislation and unsanctioned administrative rules could correspond to any of these eight categories. Baldwin and Houghton are concerned with the legal status of rules and their typology is no doubt appropriate for discussion of that issue, but an approach to the subject of rules which is more suitable to a study of law-elaboration is the well-known one of K.C. Davis.

Davis uses the term 'rule' in a sense similar to that of Diver,

mentioned above, to refer to plans, policy statements, guidelines or formal rules. Davis distinguishes between 'legislative' and 'interpretative' rules. He defines 'legislative' rules as those issued by an agency exercising delegated power to make rules having the force of law; all other rules are defined as 'interpretative'.³² Adopting this classification, the present study of the I.B.A. is primarily concerned with interpretative rules.

Davis's definition of an interpretative rule as any rule that is not 'legislative' would appear to extend to general statements of policy, that is, 'nonbinding statements whereby an agency explains how it uses or intends to use its discretionary power'.³³ According to Jowell, 'an agency makes interpretative rules when it "fills in the gaps" of clear policy, rules or decision or specifies the means of procedure for their application.'³⁴

Again, however, there may be occasions when it will be difficult to classify the rule of a regulatory agency as legislative or interpretative. Nevertheless, a classification along the lines propounded by Davis does allow for the fact that not everything an agency says is 'law', in the sense of having legal force and effect. Many agency rules will not possess these legal characteristics. Rules falling within this category will be interpretative rules (including policy statements), as well as expressions of policy prepared for use internally by the regulatory agency. Statements by an agency of this nature are not necessarily designed to create rights or obligations and they do not constrain an agency in the same imperative way that a piece of primary legislation would.³⁵

A theme which prevades much of the administrative legal literature on rule-making is that of the relationship between discretion and rules.³⁶ On the one hand, it is felt that regulators need some room for manoeuvre in

applying a policy to individual circumstances. On the other, there is the requirement of both regulators and regulated for the certainty and guidance which flow from having established standards and procedures. Interpretative rules can perform a valuable role in structuring the discretion which typifies much regulatory legislation. Legislative rules are the legislature's own way of attempting to resolve the dilemma by requiring the agency to articulate policy decisions in the form of rules.

The best known advocate of the proposal that agency rule-making may provide a means of narrowing the discretion given to regulators by broadly phrased statutes is K.C. Davis.³⁷ Davis's arguments have already been averted to briefly in the previous chapter. His intention is to reconcile the inevitability of generous delegations of power to regulatory agencies with the desire for predictability and consistency in regulatory policies.³⁸ Davis firmly believes that rule-making is an excellent policy-making mechanism,³⁹ but he also recognises that the value of formal justice may often be out-weighted by the need for flexible and effective administration.⁴⁰ In short, he states that the ultimate objective is, in his classic phrase, 'to locate the optimum degree of structuring in respect of each discretionary power.'⁴¹

Davis is aware, however, that if agency rules are unduly specific they may create loopholes and invite circumvention and may not take account of the need for flexibility to deal with particular circumstances.⁴² Accordingly, his conclusion is that:

Even when rules can be written discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases.

It is somewhat simplistic, therefore, to pose the issue in terms of one general problem of achieving the right balance of rules and discretion.⁴³ When an agency has engaged in rule-making it will still

possess discretion within the framework of the rules and in determining their applicability to any given situation. Furthermore, the general problem of rules versus ⁴⁴ can be broken down into three separate matters which need to be resolved:

- (1) Should the agency attempt in the first instance to formulate a comprehensive set of rules?
- (2) Should the agency begin incrementally but rapidly develop a set of precise rules through extrapolation of precedents?
- (3) In what circumstances should departure from the rules be accepted?

As Galligan notes, these are question of, 'policy and strategy, and it is difficult to conceive of any master plan as to how they are to be resolved.' ⁴⁵ Likewise, 'it is necessary to be wary of any question which is put simply in terms of the merits of choosing between rules and discretion.' ⁴⁶

Davis does acknowledge that legislative bodies will often find it impractical to formulate precise standards to be employed by regulatory officials. ⁴⁷ He argues that since legislators are, 'often unable or unwilling to supply' standards the emphasis should be on the protection of, 'private parties against injustice on account of unnecessary and uncontrolled discretionary power,' rather than on the prevention of the, 'delegation of legislative power or to require meaningful statutory standards' ⁴⁸. Davis urges that in the absence of legislated standards regulatory bodies should create their own standards as a result of their ⁴⁹ experience over time.

Implicit within Davis's writings is the suggestion that the experience of regulation itself aids agencies in narrowing the extent of

their discretionary powers. Indeed, he envisages a process whereby initially wide discretion is narrowed - first by standards, second by principles, and finally by rules.⁵⁰ Davis recommends that, '[w]hen legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules'.⁵¹ Another writer who has advocated such a process is Friendly:⁵²

[W]here the initial standard [provided by the legislature] is thus general, it is imperative that steps be taken over the years to define and clarify it - to canalize the broad stream into a number of narrower ones. I do not suggest this process can be so carried out that all cases can be determined by computers; I do suggest it ought to be carried to the point of affording a fair degree of predictability of decision in the great majority of cases and of intelligibility in all.

It is possible to suggest a number of benefits which flow from such an emphasis on rule-making in the regulatory process.⁵³ Firstly, rule-making enables a regulatory agency to formulate and articulate criteria to resolve a whole class of 'cases'. In this way, an investment in rule-making can lessen the number of decisions which the agency would otherwise have to make if each of the cases to which the rules applies had to be resolved individually. Secondly, rule-making is an effective way of communicating the agency's policy preferences and promote compliance with agency requirements. Thirdly, it is arguable that an agency can improve the quality of its policy decisions by concentrating its decision-making resources in the making of rules. An approach based on rule-making can give an agency the opportunity to explore the underlying regulatory problem in greater depth than would otherwise be the case. In this way, the regulators can develop a set of solutions that are more effective than those that the agency could derive from a series of cases involving only

one or a few parties. Finally, once rules have been issued, they provide the regulated with the opportunity to comply with them, thereby reducing the need for further action by the agency.

Not all verdicts on administrative rule-making have been as positive as this. In the first instance, one has to be aware of the fallacy noted⁵⁴ by Goodin:

Logically, the opposite of enjoying discretion is being bound by a rule. So, logically, the natural response to finding that certain problems are inherent in discretion is to impose rules in place of those discretions. The assumption that that will automatically solve the problem of discretion, however, entails an unwarranted presumption that every problem necessarily has a solution.

Other criticisms of administrative rule-making relate to its costs and the perception that it imposes unnecessary restrictions on administrators. In a well-known article, Ehrlich and Posner identify a number of the 'costs' of rule-making.⁵⁵ Like Goodin, they note that rules are not necessarily the most rational means for achieving given purposes. They argue that the process of rule-making can be too selective and reflect an oversimplistic view of the regulatory process. There can be no guarantee that the gains in certainty will be sufficient to outweigh any reduced effectiveness. Ehrlich and Posner also refer to the, 'necessarily imperfect fit between the convergence of a rule and the conduct sought to be regulated.'⁵⁶ This is the problem of the inevitable imprecision of rules. A rule may have consequences which are not germane to the aims of its formulator, when situations which he did intend to come within its scope may in fact be excluded.

A second strand of criticisms, made by Ehrlich and Posner and others, is that rules may place unwarranted obstacles in the way of a regulator. These arguments have been well summarised by Galligan and it is worth quoting at length from his account:⁵⁷

[R]ules by nature impose restrictions on the considerations that may be taken into account in decision-making. To formulate a rule is to select in advance the relatively few factors that are relevant to the decision; the greater the number and complexity of these, the less clearly rule-governed the decision becomes. Accordingly, rules narrowly drawn and strictly applied impose a rigidity and an inability to accommodate new, unforeseen, complex or unusual situations...[R]ules restrict consideration of wider factors, and may prevent the making of decisions in a way which provides the best accommodation of values and purposes, and which achieves the best result in the particular case.

Conclusion

To some extent, the debate concerning the merits of administrative rule-making is a fairly sterile one. In practice, regulatory agencies do make rules which, even if not dispositive of particular issues because of their imprecision, do at least give some indication of what the policy of the agency is. Regulatory agencies are involved in policy-making and it is both inevitable and desirable that their policies are articulated in the form of 'rules'. There may well be debate about the 'optimal precision' of a given rule or body of rules, ⁵⁸ but to condemn administrative rule-making, as traditional administrative legal doctrine does, would be to show a misunderstanding of the nature of the administrative process. It is simply impractical to expect regulators to proceed on a 'case by case' basis, applying the relevant statutory provisions in all the situations that confront them. This is not to say that a regulatory agency should not make provision for, 'changing circumstances and for changing official ⁵⁹ attitudes.' This is a necessary part of the role played by regulatory agencies and is one that the I.B.A. has fulfilled. This calls for a broad view of what a 'rule' is and has been the perspective adopted in the discussion thus far. This need for flexibility, as Galligan rightly points

out, 'might best be accommodated in an environment of open standards rather than precise rules'.⁶⁰

It is in this context that one needs to be aware of the tension between what Nonet and Selznick describe as 'openness' and 'fidelity'.⁶² By 'openness' they mean the ability to make decisions according to an underlying framework of broad principles free from the constraining influence of precise or detailed rules. By 'fidelity' they mean that the existing rules are applied consistently and to all affected parties in the same way.

Which of these two values is favoured, however, would seem to depend upon one's position in the regulatory order. It would seem quite natural for someone on the receiving end of regulation to stress the importance of fidelity and precise rules. On the other hand, it would appear sensible for a regulator to favour the value of openness and to view precise rules as an insupportable obstacle.

The fundamental principle informing the discussion of law-elaboration in this chapter is that rarely will a provision of a regulatory agency's constituent Act be so precise that the agency need not interpret it. In many cases an agency will have to exercise discretion when applying statutory provisions in specific circumstances. It is, therefore, inevitable that regulatory agencies will continue to play a key role in the formulation of regulatory policy. By establishing an independent agency, Parliament inevitably authorises them to make policy even where no explicit statutory authorisation is granted. It is desirable that an agency should articulate the criteria upon which their decisions are to be based, so that interested parties can plan their activities with knowledge of the agency's policy preferences and requirements. There is also an important

value in providing an opportunity for these interested parties to participate in the policy-making process.

A regulatory agency has to play a normative role. Unlike a common law court, it is not expected to rely on an evolutionary method of decision-making. The emphasis is upon administration rather than adjudication or dispute resolution.

On a broader front, there does seem to be an increasing recognition among public lawyers that administrative rule-making indicates a new direction which the law should take in the modern regulatory state.⁶² The law should not just be concerned with vested rights before the ordinary courts or set limits to the exercise of power through parliamentary action. It should focus upon planned and principled action and upon participation in the policy-making process. Above all, administrative law should ensure that regulation is carried out in the public interest.

References

1. Shapiro, 'Administrative Discretion: The Next Stage' (1983) 92 Yale Law Journal 1487 at 1510.
2. Hawkins, 'On Legal Decision-Making' (1986) 43 Washington and Lee Law Review 1161 at 1173.
3. Walker, Sentencing in Theory, Law and Practice (1985) at 105.
4. Davis, Administrative Law Treatise, 1970 Supplement (1971) at 12.
5. Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale Law Journal 65 at n. 5.
6. Pound, Jurisprudence, vol. 2, (1959) at 124.
7. Jowell, Law and Bureaucracy (1975) at 134.
8. Walker, The Oxford Companion to Law (1980) at 965.
9. Hawkins, op. cit., n. 2 supra, at 1171.
10. Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057 at 1058.
11. Diver, 'Policymaking Paradigms in Administrative Law' (1981) 95 Harvard Law Review 393.
12. Smith, 'Mechanisms for Public Participation at a Normative Planning Level in Canada' (1982) 8 Canadian Public Policy 561.
13. Levin, 'Identifying Questions of Law in Administrative Law' (1985) 74 Georgetown Law Journal 1 at 30.
14. Hawkins and Thomas, 'The Enforcement Process in Regulatory Bureaucracies' in Hawkins and Thomas (eds.), Enforcing Regulation (1984) at 10.
15. Fuller, 'Adjudication and the Rule of Law' (1960) Proceedings of the American Society of International Law.

16. See Mashaw, 'Prodelegation: Why Adminsitrators Should Make Political Decisions' (1985) 1 Journal Of Law, Economics and Organisation 81 at 96.
17. Kagan, Regulatory Justice: Implementing a Price Freeze (1978).
18. Ibid, at 65.
19. Diver, op. cit., n. 11 supra, at 399.
20. Levin, op. cit., n. 13 supra, at 22.
21. Janisch, 'Policy Making in Regulation' (1979) 17 Osgoode Hall Law Journal 46 at 50.
22. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (1978) at 44-46.
23. cf Mashaw, op. cit., n. 14 supra.
24. Freedman, op. cit., n. 20 supra, at 34-35.
25. Hart, The Concept of Law (1961) at 132 .
26. See Hood, Administrative Analysis: An Introduction to Rules, Enforcement and Organisations (1986) at Chapter 2.
27. e.g. Baldwin and Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] Public Law 239.
28. Levin, op. cit., n. 13 supra, at 36.
29. Baldwin and Houghton, op. cit., n. 27 supra, at 240.
30. Id.
31. Ibid., at 241-245.

32. Davis, Administrative Law Treatise, Volume 2, (2nd ed. 1984), at Chapter 7.
33. Levin, op. cit., n. 13 supra, at 35.
34. Jowell, op. cit., n. 7 supra, at 160.
35. Swift, 'Interpretive Rules and the Legal Opinions of Government Attorneys' (1981) 33 Administrative Law Review 425 at 434-38.
36. See, inter alia, Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958); Jowell, 'The Legal Control of Administrative Discretion' [1973] Public Law 178; Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 University of Toronto Law Journal 193; Craig, Administrative Law (1983); Galligan, op. cit., n. 43 infra.
37. Davis, op. cit., n. 4 supra, at paras. 2.00 - 5.
38. Davis, Discretionary Justice (1969), at 45-50.
39. Davis, Administrative Law Treatise, Volume 1, (2d ed. 1978), at para.6.38.
40. Davis, op. cit., n. 38 supra, at 15-21.
41. Ibid., at 99.
42. Ibid., at 17.
43. Galligan, Discretionary Powers: A Legal Study of Official Discretion (1986), at 164-5.
44. Id.
45. Id.
46. Id.
47. Davis, op. cit., n. 39 supra, at 211.

48. Ibid., at 208, 211-12.
49. Ibid., at 211-12.
50. Davis, op. cit., n. 32 supra, at 168.
51. Davis, op. cit., n. 4 supra, at 213.
52. Friendly, The Federal Administrative Agencies (1962) at 14.
53. See e.g. Jowell, op. cit., n. 7 supra, Chapter 1.
54. Goodin, 'Welfare, Rights and Discretion' (1986) 2 Oxford Journal of Legal Studies 232 at 250.
55. Ehrlich and Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 4 Journal of Legal Studies 257.
56. Ibid., at 268.
57. Galligan, op. cit., n 43 supra, at 131-132.
58. Diver, op. cit., n. 5 supra.
59. Galligan, op. cit., n. 43 supra, at 173.
60. Id.
61. Nonet and Selznick, Law and Society in Transition (1969), at 76.
62. See Harden and Lewis, The Noble Lie: The British Constitution and the Rule of Law (1986), Chapter 8.

CHAPTER NINE - LAW-ELABORATION AND THE I.B.A.

Introduction

According to traditional administrative legal theory, the source of the I.B.A.'s authority to formulate policies and make rules should originate in its parent statute, the 1981 Broadcasting Act. It has been repeatedly stressed, however, that this 'transmission belt' theory is inaccurate as a description of the role played by independent regulatory agencies. The aim of this chapter is to examine in detail the policies and rules made by the I.B.A. in order to determine the 'types' of rule employed in the regulation of I.L.R. and from where the power to formulate these rules derives. In particular, the areas of programming and advertising will be examined. Another major area of I.B.A. policy-making is, of course, the award of programme contracts. This topic was examined in detail in Chapter Five and it is not intended to add to that discussion here. There is also the matter of the regulation of technical standards, a subject mentioned in Chapter Three. This is an area of little controversy and it is not thought worthy of an extended discussion here.

The fields of programming and advertising should be seen as case studies of the law-elaboration function described in the preceding pages. In essence, when making rules for the regulation of I.L.R., the I.B.A. is in the business of policy making. In general terms, it is only to the good if the I.B.A. articulates its policies in the form of rules. For as Hart and Sacks pointed out some thirty years ago: 'The utility of policies as guides without the help of implementing rules and standards is obviously minimal'.¹

In terms of the distinctions outlined in the previous chapter, the rule-types employed by the Authority include those which are 'sanctioned'

as well as those which are 'unsanctioned'; and those which are 'legislative' as well as those which are 'interpretative'. It bears repeating that a very flexible definition of the term rule is necessitated by the subject matter of the present study. It is debatable whether the officials of the Authority would see all of their 'rules' as fitting a legalistic definition of the term. Here, for example, are three similar views of the I.L.R. Programming Notes of Guidance put forward by I.B.A. Officers:

- (1) 'We are very careful not to say that they are rules, because rules are something that are either broken or adhered to absolutely strictly and in our interpretation of the guidelines we do try as far as possible to get a certain uniformity, but allow in that for differing circumstances.'
- (2) 'They are the gentlemen's agreement under which the companies will provide programmes.'
- (3) 'They are what they say they are - guidelines.'

On the other hand, a somewhat different perspective was forthcoming from the Managing Director of an I.L.R. station: 'This quasi -law is extremely important. Virtually all of our activities are related back in a structured form quite regularly to the codes of practice that arise out of the Broadcasting Act.'

There remains to be redrawn the fundamental distinction between 'legislative' and 'interpretative' rules. Legislative rules are made pursuant to some kind of delegated legislative authority and are thus 'sanctioned' (even if indirectly) by the legislature. By way of contrast, interpretative rules represent the regulatory agency's view of the meaning of the law and generally remain 'unsanctioned' by the legislature.

The regulatory function of interpretation is a vital one. It consists of clarifying the meaning of statutes, previous regulations and of other materials which are declaratory of the law. The issuing by a regulatory

agency of interpretative rules of general application is perhaps the most important technique of interpretation. Interpretation can also occur in the making of legislative rules, as well as less formally through the giving of advice.

The resultant interpretative rules and policy statements are of great importance in clarifying and articulating the regulatory agency's position on substantive matters. They can have a significant impact on the behaviour both of the regulators and of the regulated. In practice, interpretative rules may differ little in their impact from legislative rules. The main difference between the two types of rule being that legislative rules are those that are issued pursuant to a specific statutory delegation of rule-making power.

It almost goes without saying that interpretative rules, or at least some kinds of policy statement, are indispensable to proper administration. Regulatory agencies cannot perform effectively unless they clarify the law through interpretative rules and channel their discretion through the formulation and articulation of policy. Both legislative and interpretative rulemaking are needed to guide regulatory officials in administering the statutory provisions and in assisting the regulated to comply with the law.

The ensuing discussion will demonstrate that the I.B.A. is involved in the promulgation of both legislative and interpretative rules. The discussion will consider programming first, followed by advertising.

Programming

The main body of administrative rules issued by the Authority relating to I.L.R. programming are the Notes of Guidance. In essence they are a 'means of explanation of the Broadcasting Act,'² but not all in fact derive from the Act. The stated intention of the Notes of Guidance is, 'not to

fetter normal editorial discretion, but to give guidance on a basis either of proven I.L.R. experience or of the requirements of relevant legislation and the contracts.³ The Notes of Guidance cover only some of the programming matters with which the programme companies and the Authority are concerned. Not all relevant aspects of the Broadcasting Act or of the companies' contracts dealing with programming matters are referred to. This is not because the aspects not referred to are unimportant, but only because the Authority has not seen fit to issue Notes of Guidance in relation to them. Thus the Notes of Guidance are at best only a partial guide to the regulation of I.L.R. programming: they provide guidance only in those areas with which they are concerned.

The nature of the guidance given/^{varies} from topic to topic. Some Notes describe specific requirements that have to be met; others point to areas where careful local judgment is needed, and indicate the general considerations which should be taken into account. Several of the Notes of Guidance emphasise the need for prior consultation with I.B.A. staff.

The range of topics covered in the Notes of Guidance is notably wide and covers some fields which do not feature in the Broadcasting Act. Examples of the latter category would include Note 12.1 on 'Obituary Procedures' and Note 5.2 on 'Election Broadcasting' which outlines the relevant provisions of the Representation of the People Act 1969. Among the matters covered in the Notes of Guidance which can be related (if indirectly) to the relevant provisions of the Broadcasting Act are possible offence to good taste and decency, indirect advertising and sponsorship, accuracy, privacy, fairness and impartiality, crime, politics, and so on.

The Notes of Guidance include a number of good examples of interpretative rules. Three examples should suffice to illustrate how the bare statutory provisions have been amplified by the Authority. Section 4

(1) (c) of the 1981 Act requires that, 'proper proportions of the recorded and other matter included in the programmes are of British origin and of British performance.' Such a provision clearly leaves considerable discretion to the I.B.A. in determining what amounts to a 'proper' proportion. Some indication of how this discretion will be interpreted in practice is given in Note 2.3, 'The Use of Non-British Material.' This rule provides (in part) that :

The authority does not lay down percentage limits, but expects that it is individual items of foreign material, such as a record or interview, that will constitute the main 'non-British' element in the broadcast output. Contractors must seek prior approval from the I.B.A. for the use of foreign material on any significant scale... The I.B.A. is likely to restrict the number of any lengthy or regular programmes of exclusively foreign material that an I.L.R. company may wish to broadcast.

The requirement in section 4(1)(f) of the Broadcasting Act that the Authority should ensure that, so far as possible, 'due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy' has already been referred to.⁴ Likewise is the requirement that all news given in the programmes is presented with due accuracy and impartiality. The I.B.A.'s guidance on, 'Fairness Impartiality and Accuracy is contained in Note 3.1. A number of different possible 'problem' areas are covered by this rule. They are:

- (1) Conduct of interviews
- (2) Editing of interviews
- (3) 'Trial by broadcasting'
- (4) Defamation
- (5) Reconstruction
- (6) Simulated news broadcasts
- (7) Right of reply

None of these areas is referred to in the Broadcasting Act, but guidance on them has proved necessary to the I.B.A.'s ensuring that the requirements of section 4 are complied with. It will always be debatable however,

whether the I.B.A.'s guidance is an accurate interpretation of the legislation, or goes further than is really necessary. It is an inevitable feature of an interpretative rule that its legitimacy can be called into question, given that the legislative provision will only give the most general of guidance to the regulatory agency. The task facing the regulators is that of making their guidance to the regulated more meaningful and effective than that of the legislators.

The final example of an interpretative rule to consider is Note 7.3, relating to, 'Programmes Funded by Non-Broadcasters'. This Note is concerned with the safeguarding of broadcasters' editorial independence and with their legal responsibility for the content of programmes. The basic rule is stated as being: 'In all instances, programmes broadcast by the I.B.A. or its contractors should not comprise an undue element of advertisements.'

The statutory basis of Note 7.3 is section 8 of the Broadcasting Act. Section 8(6) lays down that - with important exceptions - 'nothing shall be included in any programmes broadcast by the authority, whether in an advertisement or not, which states, suggests or implies (or could reasonably be taken to state, suggest or imply) that any part of any programme broadcast by the Authority which is not an advertisement has been supplied or suggested by any advertisers: and, except as an advertisement, nothing shall be included in any programme broadcast by the Authority which could reasonably be supposed to have included in the programme in return for payment or other valuable consideration to the relevant programme contractor or the Authority'.

Exceptions to this 'no-sponsorship' rule are set out in Section 8(7). The exception related to the guidelines is for 'items consisting of factual portrayals of doings, happenings, places or things, being items which in

the opinion of the Authority are proper for inclusion by reason of their intrinsic interest or instructiveness and do not comprise an undue element of advertisement'. However, as previously noted, Section 4(1) (f) of the Broadcasting Act demands 'that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy'.

Section 8 (7)(c) of the Act emphasises that the types of programmes where funding by non-broadcasters may be permitted are, 'factual portrayals of doings, happenings, places or things.' The Authority gives the following interpretation of this provision:

This implies that fictional programmes are unlikely to be acceptable for funding by non-broadcasters although dramatic reconstructions of factual events or circumstances may be permissible and every proposal will be judged on its merits. 'Of intrinsic interest or instructiveness' suggests that only projects that will enhance the existing service should be considered. The I.B.A. may wish to limit the number of such projects undertaken at any one time.

Note 7.3. also contains a number of detailed procedural requirements that have to be followed by the I.L.R. companies. The Authority retains a 'veto' over the type of organisation which will be permitted to fund broadcasts:

The I.B.A. reserves the right to approve the participation of all suggested non-broadcasters, particularly with regard to the subject matter of the programme and also to organisations prohibited from purchasing advertising time. In all instances the I.L.R. companies must maintain absolute editorial control and independence. When a programme is funded in whole or in part by a commercial organisation, the editorial content of the programme must not include any element of advertisement on behalf of the funder, and must not be directly related to the funder's commercial activities.

To a large extent, therefore, the rule-making power of the I.B.A. derives from the necessity to interpret the provisions of the Broadcasting Act. But Parliament has conferred on the I.B.A. a de jure power to make legislative rules as well as a de facto power to issue interpretative

rules. Section 5 of the 1981 Act provides that:

5. (1) The Authority shall draw up, and from to time review, a code giving guidance -

(a) as to the rules to be observed in regard to the showing of violence and in regard to the inclusion in local sound broadcasts of sounds suggestive of violence, particularly when large numbers of children and young persons may be expected to be watching or listening to the programmes, and

(b) as to such other matters concerning standards and practice for programmes (other than advertisements) broadcast by the Authority as the Authority may consider suitable for inclusion in the code;

and, in considering what other matters ought to be included in the code in pursuance of paragraph (b), the Authority shall have special regard to programmes broadcast when large numbers of children and young persons may be expected to be watching or listening.

(2) The Authority shall secure that the provisions of the code and under this section are observed in relation to all programmes (other than advertisements) broadcast by them.

(3) The Authority may, in the discharge of their general responsibility for programmes other than advertisements, impose requirement as to standards and practice for such programmes which go beyond, or relate to matters not covered by, the provisions of the code under this section.

(4) The methods of control exercisable by the Authority for the purpose of securing that the provisions of the code under this section are observed, and for the purpose of securing compliance with requirements imposed under subsection (3) which go beyond, or relate to matters not covered by, the code, shall include a power to give directions to a programme contractor (or any other person providing programmes other than advertisements) imposing prohibitions or restrictions as respects items of a specified class or description or as respects a particular item.

In practice this power to issue legislative rules has remained largely dormant. The Notes of Guidance (with one exception) do not constitute a Code drawn up under s.5(1) of the Broadcasting Act 1981. Nor do the Notes represent formal requirements under s.5(3) of the Broadcasting Act. The Authority has, however, drawn up a code of practice on the portrayal of violence on Independent Television and the I.L.R. companies are required to comply with its requirements under the terms of their contracts with the Authority. This Code is included in the Notes of Guidance. Note 8.1

contains the following preamble by way of explanation:

In any radio production that includes scenes of violence, the considerations that need to be borne in mind are similar to those contained in the I.T.V. Code on Violence... The wording of the Code is in terms of visual portrayal, but the same principles apply to sound representation also.

Given that the I.B.A. has found it unnecessary to utilise its full panoply of legislative rule-making powers, one is drawn to the conclusion that the combination of the Notes of Guidance and the terms of the contract have proved effective from the Authority's point of view. The terms of the contract represent the 'bottom line', whereas the Notes of Guidance are noticeably more flexible. Indeed, the Notes of Guidance most certainly are not intended to be the last word on the matters to which they refer. And as will be shown in greater detail later in the next chapter, the Notes of Guidance are subject to interpretation in the light of changing circumstances and on occasion it has proved necessary to provide fresh or reviewed notes.

Advertising

A clear example of a body of legislative rules is to be found in the regulation of advertising by the I.B.A. Section 9 of the Broadcasting Act 1981 makes it the statutory duty of the Authority:

(a) to draw up, and from time to time review, a Code governing standards and practice in advertising and prescribing the advertisements and methods of advertising to be prohibited or prohibited in particular circumstances; and

(b) to secure compliance with the Code.

The rules promulgated by the I.B.A. under the authority of this statutory provision govern all advertising on both I.T.V. and I.L.R.

It should also be noted that s.9(2) of the Broadcasting Act, like its predecessors, expressly reserves the right of the Authority to impose

requirements as to advertisements and methods of advertising which go beyond the requirements imposed by the Code of Advertising Standards and Practice. The powers of control open to the Authority would include such measures as the giving of directions as to the exclusion of either classes and descriptions of advertisements or of individual advertisements - either in general or in particular circumstances. This power is a considerable one and has been exercised with restraint by the Authority. On the rare occasions when the Authority has issued such a direction, it has done so in close consultation with the I.T.C.A. and A.I.R.C. before doing so. An example of the exercise of this power is the banning of any advertisements⁶ designed to encourage children to buy air rifles, even though no rule in the Code specifically prevents them.

In addition to the Code of Advertising Standards and Practice, the I.B.A. has issued I.L.R. Advertising Guidelines. There have been prepared to assist advertisers, their agents and other interested parties in the interpretation of the Code and of the relevant statutory provisions. The avowed intent of these interpretative rules is not to be, 'fully comprehensive but [to] deal with some of the more difficult and problem areas'⁷.

The general rules concerning all advertisements are contained in Schedule 2 of the Broadcasting Act. It is a requirement that advertisements be clearly distinguishable as such and recognisably separate from the rest of the programme; be recognisably separate, in the case of successive advertisements; not be arranged or presented in such a way that any separate advertisement appears to be part of a continuous feature; not be excessively noisy or strident; may only be inserted at the beginning or ends of programmes or in natural breaks. It is also provided that the amount of time given to advertising must not be so great as to detract from

the value of the programmes as a medium of education, information and entertainment. Rules are also made as to those broadcasts (particularly religious services) which may not contain advertisements, and the interval which must elapse between any such broadcast and any previous or subsequent period given over to advertisements.

The Schedule further provides that in accepting advertisements there must be no unreasonable discrimination either against or in favour of any particular advertiser. No advertisement may be inserted by or on behalf of any body whose objects are wholly or mainly of a religious or political nature, and no advertisement is permitted which is directed towards any religious or political and or has any relation to any industrial dispute.

Even a quick perusal of the Code of Advertising Standards and Practice will demonstrate that much of Schedule 2 is contained in it. This examination of the Code will also demonstrate that it goes beyond what a strictly legalistic reading of the Broadcasting Act would require. In fact⁸ the Code can accurately be described as, 'a detailed body of standards'. It runs to thirty seven paragraphs and four appendices. Some of the statutory rules are repeated in the Code (for the convenience of its users, no doubt), but the Code also legislates for matters not mentioned in the Act. Such a legislative function is, of course, formally legitimated by the terms of s.9 of the Broadcasting Act. The function delegated to the I.B.A. in this area is a clear example of an instruction along with lines⁹ of: 'Here is the problem. Deal with it.'

Thus the I.B.A., 'might, perfectly legally, have gone little further¹⁰ than the statutory rules,' but it has not, of course, done so. To have followed such a course of action would have been an abdication of responsibility and not in keeping with the regulatory ethos of the I.B.A.

The I.B.A.'s Code of Advertising Standards and Practice is a

comprehensive document. The general rules which it contains range from the prohibition of 'subliminal' advertising, the exclusion of advertisements of breath-testing devices, matrimonial agencies, undertakers, betting tipsters and bookmakers, private investigation agencies, or for cigarettes, through conditions for the offer of guarantees, mail ordering and the sale of goods direct to the public to restraints on trade descriptions and claims. The three main appendices deal in detail with advertising in relation to children, financial advertising and the advertising of medicines and treatments.

The I.L.R. companies are obliged by the terms of their contracts with the Authority to follow the requirements of the Code of Advertising Standards and Practice. Schedule 3 of the standard contract requires compliance with the Code and with the statutory provisions in relation to advertising. The key provisions of the Broadcasting Act are, in fact, repeated in the schedule. For example, clause 5 (2) of Schedule 3 repeats the requirements originally contained in paragraph 8 of Schedule 2 of the Broadcasting Act that:

No advertisement shall be permitted which is inserted by or on behalf of anybody whose objects are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial disputes.

This statutory requirement is similarly repeated in paragraphs 9 and 10 of the Code of Advertising Standards and Practice. In the Code there is an additional sentence (which seems to add nothing of substance to the statutory requirement) to the effect that advertisements should not, 'show partiality as respects matters of political or industrial controversy or relating to current public policy'.

appears to have been to avoid television advertising being used to influence public opinion about matters of controversy. An examination of the way that the I.B.A. has gone about implementing this legislation requirement supplies a good example of the interpretative and policy making functions of the authority.

It appears that in 1957 the Authority sought counsel's opinion on the interpretation of the statutory provision. The Authority was advised that:

[F]or the purpose of paragraph 8 of the Second Schedule a 'political' end would mean the purpose of affecting in some respect (whether by altering it or maintaining it) the manner in which a community is governed or organised, or in which the power of government (central or local) is exercised, and would include any purpose which would lead to a result which affected members of the community as members of that community in general or members of a class within the community. Advertisements which would have this purpose or effect are, therefore, prohibited by paragraph 8, including advertisements which would have the effect or would have the purpose of affecting opinion on such matters mentioned above and advertisements which attempted to influence Government policy whether or not they reflected the views of any political party.

This: intpretation has been affirmed over the years. In relation to political advertising, the I.B.A.'s current attitude is that:¹²

The legislation does not prevent central Government or local authorities from placing particular advertisements in the capacity of an executive carrying out the law (e.g. the availability of supplementary and child benefits, advice about road saftey, fire prevention, family planning services, cheap fares, travel cards etc.), but in considering advertising proposals Advertising Control staff must ensure that the advertisements themselves contain no reference to the merits of (central or local) Government policies on the matters to which they relate.

It has already been mentioned that in addition to the Code of Advertising Standards and Practice, Advertising Guidelines which interpret the Code have been produced. Not surprisingly, these have a considerable amount to say on paragraph 9 of the Code on political, industrial and public controversy. Paragraph 9 is interpreted as 'expressly' prohibiting four types of advertisement:¹³

- (a) an advertisement of any kind - even an advertisement for office staff - by or on behalf of any political party or body whose objects are wholly or mainly of a political nature;
- (b) an advertisement from any source which is directed towards any political end, local or national;
- (c) an advertisement which has any relation to any industrial dispute;
- (d) an advertisement from any source which is not impartial about matters of political or industrial controversy or current public policy, local or national.

Further guidance is given on types (c) and (d). All kinds of industrial disputes (official or unofficial) are covered by (c). The only exception permitted is, 'where the safety of the public is concerned':

For example, during a dispute where gas supplies are affected, announcements can be accepted which merely inform radio listeners of the safety precautions they should take in the event of gas pressure variations in their areas. Such exceptions need to be worded with the greatest care in order to avoid giving the impression that a point of view is being expressed on the industrial issue involved.

Prohibition (d) is interpreted as requiring that, 'there may not be broadcast in an advertisement any words or phrases which could themselves create or reinforce public opinion on controversial political, industrial or public policy questions.'

Thus the I.B.A.'s interpretation of paragraph 9 of the Code of Advertising Standards and Practice is made fairly clear in the Advertising Guidelines. The Authority's interpretation is not the only one possible, of course, and views as to what amounts to 'controversial' issue of politics and public policy will differ. For example, some listeners (and viewers) would place advertisements connected with the privatisation of state owned industries in this category. The I.B.A.'s interpretation is that once a 'controversial' issue has been made the subject of legislation, it ceases to be covered by paragraph 9. In legal terms, this is a perfectly 'reasonable' view to take, but critics of the Authority will

certainly not accept the substantive legitimacy of such an interpretation.

Conclusion

The regulation of I.L.R. programming and advertising provide two classic examples of the employment of 'quasi-law' by a regulatory agency. The rules used by the I.B.A. constitute a heady mixture of statutory provisions, codes of practice, contractual clauses and interpretative guidelines. As has been demonstrated, the same rule can derive from all or any of these four sources. It is hardly surprising that, in practice, both the officers of the I.B.A. and the management of I.L.R. stations demonstrate a certain amount of confusion about the precise status of particular rules. Two partially accurate observations by I.B.A. Officers should suffice to illustrate the point:

- (1) 'It is written in to the contract with the company that it must abide by the requirements of the Broadcasting Act and the I.B.A. Notes of Guidance'.
- (2) 'If they breach the [Notes of Guidance] then in essence they are breaking a section of the Act'.

It has been shown that the Notes of Guidance contain statutory provisions, legislative rules (the Code on Violence), interpretative rules and some matters completely outside the terms of the Broadcasting Act, or of any other legislation (for example, the rules on obituaries). Such a confused and confusing mass of rules may lead one to the view that any attempt at distinguishing between legislative and interpretative rules is doomed to failure in relation to a study of the I.B.A. On the other hand, it can be argued with some force that it is precisely in a context such as that of the regulation of I.L.R. that the distinction should be drawn. There is a need to identify those rules which it is 'obligatory' for the regulated to follow in the sense that they do derive directly from the provisions of the Broadcasting Act. In fact, very few of the rules

employed are legislative rather than interpretative and interpretations are often open to question. In other words, the rules employed by the I.B.A. must derive their legitimacy from something other than a legislative basis. To a large extent one is thrown back yet again on the expertise of the I.B.A. They are the specialist regulatory body, so their interpretative rules necessarily carry a lot of weight. The Authority also has the ultimate sanction if a contractor fails to comply with its requirements: non-renewal of the franchise. And as will be discussed in the next chapter, the rules also acquire much legitimacy from the fact that they derive typically from an extensive consultation process with those affected by them: the I.L.R. companies.

References

1. Hart and Sacks, The Legal Process (1958), at 252.
2. Interview with I.B.A. Officer.
3. I.B.A. I.L.R. Programming Notes of Guidance, Foreword.
4. See Chapter 6, supra.
5. I.B.A., Agreement for Appointment of Programme Contractor for Local Sound Broadcasts (1984), Part Two, Clause 9.
6. Munro, 'The Control of Advertising on British Television' [1980] Journal of Media Law and Practice 24, at 32.
7. I.B.A., I.L.R. Advertising Guidelines, at 1.
8. Munro, op. cit., n. 6 supra at 31.
9. See Chapter 1, supra.
10. Munro, op. cit., at 31.
11. Theobalds, 'The I.B.A. and Political Advertising', Independent Broadcasting, February 1984.
12. Id.
13. I.B.A., op. cit., n.7 supra at 3.
14. Id.
15. Id., at 4.
16. Interview with I.B.A. Officer.

CHAPTER TEN - THE INSTITUTIONS AND PROCEDURES OF LAW-ELABORATION

Introduction

The previous chapter examined in detail the ways in which the I.B.A. articulates its policies in the form of rules. The aim of this chapter is to describe the institutions and procedures utilised by the Authority when performing this function of law-elaboration. An attempt will also be made to analyse the factors which influence the Authority in its policy decisions. That is, what forces lead the I.B.A. to adopt either 'stringent' or 'accommodative' policies in relation to I.L.R.?

As has already been mentioned, Kagan identifies four factors on which explanations of regulatory policy typically focus. These are:

- (1) the ideology or philosophy of the regulators;
- (2) the legislative mandate of the regulatory programme;
- (3) the social and political organisation of the regulatory process;
- (4) the economic effects of the regulatory programme.

These policy influences will be examined in greater detail in relation to I.L.R. once the policy-making procedures of the Authority have been described. It will suffice for the present to state the obvious: that the four explanatory factors outlined above are not mutually exclusive, but neither are they necessarily of equal importance in a given policy area. Rather, as Kagan has it: 'Each directs our attention to variables that undoubtedly influence an agency's relative stress on stringency or accommodation...'

Institutions and Procedures

The ensuing discussion will focus once again on the areas of

programming and advertising.

(1) Programming

The first thing to say about the I.B.A.'s policies in relation to I.L.R. programming is that they are the outcome of discussions, both formal and informal, with the I.L.R. companies. The authority consults with the industry on a regular basis. The main institutional forum for consultation is the Radio Consultative Committee (R.C.C.), chaired by the Director - General of the Authority, which meets four times a year. Meetings of the R.C.C. are attended by senior I.B.A. staff and by the Managing Directors of the I.L.R. companies.

The R.C.C. has an impact on the articulation of programming policies into the form of Notes of Guidance. A sub-committee of the R.C.C. discusses and comments upon Notes of Guidance before their issue. As one senior I.B.A. Officer remarked: 'Policy issues are thrashed out with them there'⁴. It appears that the Members of the Authority have little input into the making of programming policy. Normally, 'they would not be troubled with'⁵ the minutiae of I.L.R. regulation, given their wide responsibilities.

It would also be fair to point out that after fifteen years the parameters of I.B.A. policy in relation to I.L.R. programming are fairly well defined. It is unlikely that the Authority could be persuaded to issue a Note of Guidance which represented a radical change of policy. There have, of course, been changes of 'interpretation' by the Authority, but these have not been a reflection of changes in the underlying regulatory philosophy.

The main changes of interpretation in recent years as indicated in the Notes of Guidance are in the area of 'Indirect Advertising' (Note 7.1), 'Competitions and Prizes' (Note 7.2) and 'Programmes Funded by Non-

Broadcasters' (Note 7.3). These policy changes have been held to be necessary by the I.B.A. to alleviate the financial hardships faced by the I.L.R. companies. The new Note on Indirect Advertising issued in November 1984 illustrates how a subtle change in wording can reflect a new interpretation of the Broadcasting Act and a significant policy change. Section 8(6) of the Act requires the exclusion from I.L.R. programmes of anything which:

- (a) could reasonably be taken to state, suggest or imply that any part of any programme has been supplied or suggested by any advertiser; or
- (b) could reasonably be supposed to have been included in return for payment or other valuable consideration to the contractor.

Under the heading, 'Independently produced programmes funded by non-broadcasters,' Note 7.1 gives the following 'guidance':

There is an increasing range of material, some of it attractive and intrinsically worthwhile, where the production is financed or underwritten by commercial concerns and the programmes are compiled and offered to I.L.R. In this event there is no payment or valuable consideration to the programme company. They are only acceptable, however, provided that:

- (a) they do not contain an undue element of advertising;
- (b) their broadcast could not reasonably be supposed to give rise to 'impressions of sponsorship';
- (c) no advertising connected with the programme is currently being broadcast on the station.

What is revealing of a policy change is the fact that the previous version of Note 7.1 (dated April 1980) includes an additional sentence to the effect that: "'Sponsored programmes" in the normal sense of the term are not allowed on Independent Broadcasting'. The previous heading for this section was, 'Sponsored programmes'. There was also an additional requirement that 'sponsored programmes' were only permissible if, 'they are purchased by the programme company at a rate commensurate with normal

programming costs'.

It would seem that this change in wording has considerable financial implications and the new, generous interpretation of s.8(6) has been well received by the I.L.R. companies. It is worth pointing out, however, that this change in policy was not made in a public forum and the I.B.A. was not accountable in any meaningful sense for this exercise of its expertise and judgement. In particular, there was no opportunity for participation by the listening public. Rather, the view taken by the Authority was that, 'it had to get detailed guidance agreed with the companies.'

(2) Advertising

The main institutional forum for the making of advertising policy is the Advertising Advisory Committee (A.A.C.) Under section 16 (2) (b) of the Broadcasting Act 1981 the Authority is required to appoint:

[A] committee so constituted to be representative of both -

(i) organisations, authorities and persons concerned with standards of conduct in the advertising of goods and services (including in particular the advertising of goods or services for medical or surgical purposes), and

(ii) the public as consumers, to give advice to the Authority with a view to the exclusion of misleading advertising...and otherwise as to the principles to be followed in connection with the advertisements...

Section 16 (3) provides that:

The functions of the committee...shall include the duty of keeping under review the [Code of Advertising Standards and Practice]... and submitting to the Authority recommendations as to any alterations which appear to them to be desirable.

The Broadcasting Act requires that the Chairman of the A.A.C. be independent of any financial or business interests in advertising. On the A.A.C. there are, therefore, representatives of consumers, the advertising industry and the medical profession. Recommendations from the Committee are usually accepted by the Authority, although there is no statutory

obligation to do so.

An additional factor in the policy-making process is that Government has imposed on the Authority in section 8 (5) a duty to:

- (a) ...consult...with the Secretary of State as to the classes and descriptions of advertisements which must not be broadcast and the methods of advertising which must not be employed; and
- (b) ...carry out any directions which he may give them in those respects.

This means, in practice, that the Authority is normally required to obtain approval from the Home Secretary for any significant change to the Code of Advertising Standards and Practice. The reserve power to direct the Authority has been utilised on two occasions only since the inception of Independent Broadcasting services in 1955. The first occasion was to ban so-called 'advertising magazines' in 1964 and the second to prohibit the advertising of cigarettes and cigarette tobaccos in 1965.

There are also some areas of advertising policy which are outside the jurisdiction of the A.A.C. Perhaps the most notable relates to the control of the amount of advertising. The Broadcasting Act does not lay down precisely the amount of advertising that may be allowed. It simply places on the Authority a duty to ensure that, 'the amount of time given to advertising in the programme shall not be so great as to detract from the value of the programmes as a medium of information, education and entertainment.'⁹ The Act confers upon the Authority a power to give directions to the programme contractors, 'with respect to the times that advertisements are to be allowed'¹⁰ and it also says that the Authority may stipulate the maximum time for advertising in any hour, and the minimum interval between advertisements.¹¹

In fact, since the beginning of I.L.R., the Authority's policy has been to allow a maximum of nine minutes of advertisements in any one clock-

hour. This rule provides a clear example of legislative policy-making by the I.B.A. The relevant statutory provisions are permissive rather than mandatory. The actual ground rules have been formulated by the Authority in line with its own judgment of what is acceptable and appropriate.

12

Explaining I.B.A. Policies

There can be little doubt that the parent statute of a regulatory agency is, 'a primary determinant' of its 'policy-making style'.¹³ But as has been shown, the precise relationship between the provisions of the Broadcasting Act and the policies pursued by the I.B.A. is a problematic one. If the policies implemented by the Authority are viewed as overly accommodative to the interests of the I.L.R. companies, the explanation could lie in the ambiguity and vagueness of the Broadcasting Act, which in turn could reflect a lack of resolution on the part of Parliament about the goals of the regulatory programme. Conversely, if the I.B.A.'s policies are viewed as too stringent in a particular area of regulation, this could be explained as the result of a too specific or too stringent provision in the Broadcasting Act.

Accommodative policies could also be the result of the nature of the relationship between the regulators and the regulated. In practice, the I.B.A. frequently appears to act as a shield for the I.L.R. companies, deflecting rather than responding to public criticism. In particular, the Authority has treated the 'failure' of I.L.R. stations as something to be avoided at almost any cost.¹⁴ This can be seen as partly due to the Authority's perception of the interests of the consumer in having a local radio station, but it has to be pointed out that the I.B.A. relies on revenues from the stations to fund the system and any further expansion of it, and to pay for its own administrative costs. The following comment of

Kagan is clearly appropriate to the I.B.A.: 'Accommodative regulatory policies are often explained by reference to regulatory officials' personal concern for the stability and growth of the regulated industry or of particular firms in it.'¹⁵ Such a perspective is apparent in the following comment by a senior I.B.A. official: 'If you're wondering whether a station is going to close down next week because it can't pay its bills then you're inclined not to be making too many programme judgments'.¹⁶

One is again drawn back to the weaknesses of the Broadcasting Act which allows the Authority large discretionary powers (leaving the drawing of the boundaries of appropriate behaviour to subsequent negotiations), imposes too few concrete obligations and does not provide sufficiently for the accountability of the Authority's policies. These weaknesses are reflected in the closed and hierarchial way in which the I.B.A. conducts its affairs and its unwillingness to distance itself from the companies it regulates.

A common theme among writers on regulation is that of the 'capture' of the regulators by those whom they are supposed to be regulating. Following Quirk, Baldwin lists three criteria for establishing the degree of capture of a regulatory agency:¹⁷

- (1) Agency decisions are based on information supplied by the industry and only industrial interests are represented at formal proceedings.
- (2) Individuals appointed to high regulatory office identify industry interests with a view to past or future employment.
- (3) Industry control over agencies' policies is exerted by threat.

Even the sternest critic of the I.B.A. would, however, be hard-pressed to argue that these three criteria apply in more than a highly limited way to the Authority. Criterion (1) is true of some of the areas of policy-making described in this chapter. Criterion (2) is largely unquantifiable, but it is not a criticism that has often been made of the

Authority. Rather, a criticism which is sometimes voiced is that too few of the I.B.A.'s Officers have direct experience of broadcasting. Nothing quite so crude as criterion (3) applies in the regulation of I.L.R. A more accurate description would be along the lines that, 'agency policy is molded by the interactions between the agency and relevant interest group...'¹⁸ What one cannot fail to notice is, however, the tremendous community of interest that exists between the I.B.A. and the I.L.R. companies. It has not been a case of a regulatory agency being captured by a pre-existing industry it was established to regulate. The I.B.A. is responsible for the very existence of I.L.R. and the interests of the two must often be indistinguishable.

Given this state of affairs, it is not very surprising that the policy and rule-making procedures of the Authority appear to conflict with values such as clarity, openness, formality and predictability. Much of the regulation of I.L.R. is done on a relatively informal and discretionary basis. The rules and guidelines are applied with a great deal of flexibility. It is not necessarily the case that this is either undesirable or against the public interest. The intention may be to establish a protected framework for the pursuit of profit, but at least the I.L.R. companies are restrained from the excesses of commercialism and, more ~~debatable~~ a reasonably high standard of programming is maintained.

In recent years, however, the commercial imperative has become more influential in Authority policy-making. The financial problems confronting I.L.R. have been discussed in Part Two. As a consequence of these pressures, more consideration has been given by the Authority to the costs imposed on I.L.R. companies by regulation and the effect upon their competitive position. Programming policies have certainly moved in an accommodative direction as part of the attempt to increase industry

profitability. The authority has been forced to change its interpretation of the Broadcasting Act by economic circumstances. These changes can be described as, 'by force majeure... reactive all the time'¹⁹ Experiences in the regulation of I.L.R. would thus seem to lend some support to Kagan's thesis that:²⁰

[T]he outer limits of regulatory stringency are likely to be set out by the economic impact of stringent regulations, and hence at bottom, by the primacy of values of economic continuity. If there is no 'slack' in the regulated firms with which to absorb the costs of compliance with stringent regulations, significant accommodative modifications are likely regardless of the ideology of the regulators, their legal mandate, or the social organization of the regulatory process.

Conclusion

The legitimacy of the of policy-making procedures detailed above can only be derived in part from the terms of the Broadcasting Act. Part of their legitimacy derives once more from the expertise of the Authority. There is also some emphasis on 'due process', in the form of extensive consultation with the regulated I.L.R. companies. The authority is largely unaccountable for the policy decisions it makes and there is precious little opportunity for public participation in the formulation of the Authority's statements of objectives.

Although there are certainly dangers in the relationship between the I.B.A. and the I.L.R. companies becoming too close, there are a number of advantages which flow from the participation of the I.L.R. companies in the law-elaboration process.²¹ First, the Authority derives much needed information from the regulated companies. It does not possess all the relevant information and cannot anticipate the consequences and problems that will flow from the adoption of a new rule. This sort of information can only be derived from those working in the industry. It is also more likely that the I.L.R. companies will abide by the terms of a rule if they

have been allowed to participate in its formulation. Participation in rule-making also has values which transcend these pragmatic ones. In a democratic system of government, participation in governmental decision-making by affected persons represents an important value in itself.²² This is particularly true in the case of independent regulatory agencies, which are not as immediately responsive to political pressures as Parliament or the Government. As has been seen in the case of the I.B.A., most agency policy and rule-making is not supervised at all.²³ Regulatory agencies make laws behind closed doors. Participation by those who will be affected by an agency policy can help to increase the responsiveness of the agency to democratic pressures. Finally, it should not be thought that participation in the formulation of interpretative rules is any less necessary than in legislative rule-making. A regulatory agency is as much in need of information when it interprets a statutory provision or a regulation, or when it articulates guidelines for the exercise of its discretion, as when it issues a legislative rule. It has been seen in the case of the I.B.A. that the impact of an interpretative rule can be as great as that of a legislative rule. Participation in the making of either type produces better rules and enhances the acceptability of the rules to the regulated.

References

1. See Chapter 8, supra .
2. Kagan, Regulatory Justice: Implementing a Price (1978).
3. Ibid., at 69.
4. Interview with I.B.A. Officer. Id. Id. Broadcasting Act 1981, s. 16(4)
5. Id.
6. Id.
7. Broadcasting Act 1981, s. 16(4)
8. Theobalds, 'The Rules Governing Advertising on Television and Independent Local Radio' in Bullmore and Waterson (eds.), The Advertising Association Handbook (1983), at 342
9. Broadcasting Act 1981, Schedule 2, s.3.
10. Ibid., s. 9 (4).
11. Ibid., s. 9 (5).
12. This section draws heavily upon the explanatory analysis of Kagan, op. cit., n. 2 supra.
13. Ibid., at 66.
14. See Chapter 4, supra.
15. Kagan, op. cit., n. 2 supra., at 66.
16. Interview with I.B.A. Officer.
17. Baldwin, Regulating the Airlines: Administrative Justice and Agency Discretion (1985), at 220-231.
18. Kagan, op. cit. n. 2 supra., at 67.
19. Interview with I.B.A Officer.
20. Kagan, op. cit., n. 2 supra, at 69.
21. See Cramton, 'The Why, Where and How of Broadened Public Participation in the Administrative Process' (1972) 60 Georgetown Law Journal 525.
22. See Chapter 2, supra.
23. See Cutler and Johnston, 'Regulation and the Political Process' (1975) 84 Yale Law Journal 1395.

PART FIVE - CONCLUSION

CHAPTER ELEVEN - EVALUATING REGULATORY LEGITIMACY

Introduction

The range of administrative powers exercised by a regulatory agency such as the I.B.A. are of great variety. What have been in question in this study are powers of policy formulation by means of administrative rule-making, powers of law-elaboration by way of general statutory interpretation and powers of law-application by way of adjudication in particular cases. The basic theoretical premise has been that an understanding of the nature of legitimacy is critical to an adequate normative analysis of policy formulation.¹

In particular, there has been an attempt to address, in relation to the I.B.A., Freedman's general question about regulatory agencies: 'What justifies the exercise of such extensive lawmaking powers by groups that lack the political accountability of the legislature?'² In similar vein, Stewart has written that: 'The ultimate problem is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.'³

Two potential critiques of the I.B.A.'s regulatory procedures have been identified.⁴ First, they are closed and undemocratic, which implies the need to expand public access and participation. The idea that, as a sub-unit of a democratic government, the Authority itself should be democratic is an attractive one. The philosophy of public accountability underlying the current system is that it is the Members of the Authority who provide, 'the means by which Independent Broadcasting is responsible to the public'.⁵ The corollary of this principle is that, as far as the

I.B.A. itself is concerned, there is no place for, 'public accountability, with the implication that accountability to the public can be exercised somehow more directly than by accounting to [Parliament]'.⁶

The second critique of the I.B.A. is technocratic rather than democratic and represents a more accurate representation of much current thought about regulatory agencies. According to this perspective, regulatory agencies are not democratic institutions and their inherent nature as unelected bureaucracies precludes their acting like mini-legislatures. That is, the I.B.A. can and should take account of public sentiment, but it must do so with the awareness that its legitimacy is based on the exercise of expertise within the bounds set by, and under the control of, the truly democratic institutions of society.⁷

Deconstructing and Reconstructing Regulatory Legitimacy

The concept of legitimacy has been invoked in a number of studies of regulatory agencies. A common theme in this literature is that a regulatory agency functions most effectively when its actions are perceived to be legitimate and entitled to compliance. This legitimacy is perceived to be derived from the agency's effectiveness in fulfilling its statutory mandate.⁸

Legitimacy does, however, possess connotations which go beyond considerations of 'effectiveness'. Selznick has described how the idea of legitimacy in our legal culture has increasingly come to require not merely formal legal justification but, 'legitimacy in depth'.⁹ That is, rather than a decision of the I.B.A. being in accordance with a valid rule, promulgated by lawfully appointed officials, the contention would be that the decision, or at least the rule itself, must be substantively justified.

In the assessment of the legitimacy of the regulation of I.L.R.

presented here, use has been made of four 'models'. It should not be thought that these models, 'are being presented as determinative of legitimacy'¹⁰. Rather, they are indicative of the considerations which an enquiry into regulatory legitimacy must take into account and of the values which should be reflected in the regulatory process. It is not the intention to be able to give a conclusive answer as to the legitimacy or illegitimacy of the regulation of I.L.R. by the I.B.A.

The evidence presented thus far has indicated the problems inherent in any claim to legitimacy by the I.B.A. on the basis of its legislative mandate, its accountability, its respect for due process or its expertise. It is perhaps not too surprising, therefore, that the regulation of I.L.R. has been running into difficulty. In other words, the legitimacy of the regulation can certainly be questioned.

Before making a number of concluding comments about each of the four models of regulatory legitimacy in turn, it is necessary to enter a final caveat. There is considerable attraction in the thought that the four models could be combined, 'to cure the defects of each one considered separately'¹¹. Indeed, it is not uncommon for the models to be merged together. Thus an administrative lawyer might say that, 'a regulatory agency can, pursuant to its delegated power, exercise its own expert discretion as long as anyone affected by its action can, when appropriate, intervene in its decision making and subject the decision, once made, to judicial review'¹². Elements of each of the four models can be detected in this statement. The weakness of combining the models in this way is that to do so, 'only shifts the problem ... away from any particular model and locates it instead in the boundaries between different models'¹³. It is, therefore, more useful to examine each of the criteria of regulatory legitimacy individually, although it is important to be aware of possible

interrelationships between them.

(1) Legislative Mandate. The key question here relates to how complex or detailed a skeleton can be described in advance by Parliament when creating a regulatory agency such as the I.B.A. How narrow can the 'gaps' properly be made? Even in the most comprehensive legislative scheme, agency application inevitably makes new law. As Diver has pointed out: 'Experience has taught that the statutory command is an exceedingly blunt instrument for regulating the policymaking process'.¹⁴ Moreover, rarely will the legislature have in mind the specific situation confronted by the regulators. It is more likely that the legislators envisaged some much more general conditions or ideas.¹⁵

In other words, it would be unrealistic to expect that Parliament, when passing the 1981 Broadcasting Act and its predecessors, would have framed its decisions in such specific terms that their implementation would not entail the exercise of broad policy-making powers by the Authority. Kagan makes the general point that:¹⁶

[A]uthorizing statutes are often devoid of explicit rules or guides to decision of the hard issues. They merely transfer the problem of choice, and hence of contending with conflicting political interests, to the regulatory body.

The evidence presented in earlier chapters would support this contention. Parliament has legislated for Independent Broadcasting in broad terms and it has relied upon the Authority to fill in the necessary details. The enabling legislation confers considerable administrative powers upon the Authority. These include the power to make policy and to articulate that policy in the form of legislative and interpretative rules. Some of this power is intended, but some appears to have been granted inadvertently by Parliament leaving questions for the Authority to answer.

A further criticism of this method of legislating is that the legislature's failure to make its preferences clear results in the failure of the regulatory agency to develop coherent policy. Law will be replaced by ad hoc bargaining and regulators will lose their legitimacy.¹⁷ These views are particularly associated with Lowi in The End of Liberalism. Lowi argues that more use of legislatively specified rules would produce regulation whose legitimacy was more widely recognised by the public. An echo of Lowi's perspective can be found in Ely's Democracy and Distrust. Ely argues that the failure of, 'legislators to legislate [i.e. to decide policy questions]' is one of the major obstacles to a truly representative democracy.¹⁸

There can be no guarantee, however, that a more authoritative use of law would produce better regulatory policy. Nor is it clear how a regulatory regime reconstructed along these lines would operate in practice. Some generality and vagueness in a statutory mandate seem inevitable. Legislators tend to be pragmatists rather than idealists.

The main difficulty confronting the I.B.A. in the implementation of its legislative mandate is that of determining the statutory 'intent'. This concept of 'legislative intent' masks profound conceptual difficulties.¹⁹ It is nearly always artificial to attribute a single goal to a group legislators who cast votes with divergent objectives and degrees of awareness. Some of the divergence of opinion surrounding the terms of the Broadcasting Act and its predecessors has been illustrated in earlier chapters. Thus the legislative mandate of the I.B.A. probably masks rather than resolves conflicts both among and within individual legislators. Indeed, it is unlikely that the legislators had made up their minds at all, either individually or collectively, on any details of the Authority's exercise of power.²⁰ This lack of clear statutory authority deeply

compromises the Authority's legitimacy and efficacy.

It could be argued that the analysis of legislative mandates adopted here is too simplistic. For, as Mashaw points out: 'In theory, at least, legitimacy may flow from general statutory principles as well as from precise statutory rules.'²¹ From a purely legalistic perspective, this statement is unexceptionable. If the concern is with substantive legitimacy, however, the evidence derived from a study of the I.B.A. would not seem to offer support to Mashaw.

2. Accountability The potential value of a broad statutory mandate as a source of legitimacy might be enhanced if it could be demonstrated that the regulatory agency was accountable for its exercise. Of particular significance in this context is accountability to Parliament.²²

Once a regulatory programme has been approved and established by Parliament and implemented by the agency, the application of the statutory provisions should be controlled in order to ensure that it remains appropriate and effective. Parliament should retain an effective review function concerning agency law and activities. To this end, Parliament should be kept informed of any subsequent developments of policy by the agency.

It should be apparent that the regulation of I.L.R. is a long way removed from this ideal. It has been seen in relation to the award of I.L.R. programme contracts how little accountability to Parliament is present.²³ In relation to the supervision of I.L.R. programming, one would have to question the pre-eminence of the Broadcasting Act.²⁴

The main form of communication between the I.B.A. and Parliament is the Annual Report. These tend to be 'what' rather than 'why' reports.²⁵ They convey far too little detailed information to be an effective means of

keeping the Authority accountable to Parliament. For the Annual Report to become an effective instrument of Parliamentary accountability it would need to be reconstructed along very different lines to those which exist at present. Some idea of what would be required has been provided by
26
Slatter:

The ... report should do several things. It should first of all identify the mandate of the agency, and set out any objectives specified for the agency in the statute. It should then contain a discussion by the ... agency on how they interpret those objectives, especially where they are stated in vague or contradictory terms. This exposition should reveal the philosophy the agency brings to its task... Also included should be a summary of the major policy-making, rule-making and decision-making activities of the year...The basis on which any discretionary powers are exercised should also be outlined.

The I.B.A. is largely independent of Parliamentary supervision and control in its day-to-day business. There are only limited opportunities for Members of Parliament to voice their opinions of the Authority. Out of a concern to protect the political independence of the Authority there has arisen a tradition of not discussing its current management. Furthermore, since the I.B.A. normally acts free from Government direction or control, Ministers are not obliged to defend or discuss the actions of the Authority in Parliament.

One possible key to strengthening accountability to Parliament lies in the role of the Select Committee system. The supervising role of these committees has, however, tended to be sporadic and largely ineffective in relation to Independent Broadcasting. The frequently shifting membership of Parliamentary committees together with a lack of adequate staffing have served to undermine their potential effectiveness as regulatory scrutineers.

In addition, a number of governmental committees have been instituted. These have played a similarly limited role in the development
27
of Independent Broadcasting. As Heller has pointed out:

The[ir] record...does not indicate that they have been particularly effective...Few of their recommendations have been adopted and the major changes [including the introduction of I.L.R.]...have been made independently, without reference to committee investigations.

Political control over Independent Broadcasting is thus largely confined to determining the overall structure of the system, rather than the continuing policies and procedures of the Authority. This lack of political control over the I.B.A. depends to a large extent on prevalent attitudes regarding the Authority's place in the machinery of government and the degree of independence it should have. The Authority can be conceived as operating under an original mandate given by statute, whose policy decisions are limited only by its own expert norms or by the threat of judicial review.

The spectre of judicial review immediately raises that perennial question of administrative lawyers as to, 'whether administrative agencies or courts should exercise greater authority over statutory interpretation.'²⁸ As Diver further points out, 'most statutes are...delegations to administrative agencies to issue and enforce [commands]'.²⁹ The task is to achieve, 'an appropriate allocation of interpretive authority between agencies and courts'.³⁰ This task of drawing an appropriate line between the role of the agency and the role of the courts is not one that can be achieved by using a ruler.³¹

The issue can be seen as one of institutional competence. The courts will usually recognise the practical significance of the regulatory agency's primary responsibility and will hesitate, when controversies come before them, to overturn any well-considered decision which the agency has reached. It is unrealistic to expect the courts to redress every administrative failure.³²

The difficulty lies in achieving a proper balance between 'too little' and 'too much' judicial review. As Frug points out:³³

Too little judicial intervention would render the bureaucracy uncontrolled and allow it to exercise arbitrary power. But too much intervention would prevent the bureaucracy from adequately performing its functions...The boundary between courts and bureaucracy must therefore enable the judiciary to deter bureaucratic abuse while permitting the bureaucracy to exercise necessary freedom of action.

In relation to the I.B.A., it can safely be stated that there has been too little judicial intervention. This has had serious implications for the accountability of the Authority. It also goes some way to explaining the somewhat cavalier attitude to due process values displayed by the Authority. The main obstruction to judicial intervention has been the fact that the source of many of the powers is contractual rather than statutory and therefore substantially outside the public law domain.³⁴ Even when judicial review has been possible, the courts have tended to display a somewhat deferential attitude to the expertise of the Authority.³⁵

The argument here is far from being that judicial review is a panacea for all administrative ills. According to Landis:³⁶

The positive reason for declining judicial review over administrative findings of fact is the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges. If so, it is only delay that results from insistence upon independent judicial examination of the administrative's conclusion.

Nevertheless, Landis is quite well aware of the variable quality of decision-making in different regulatory agencies:³⁷

If the extent of judicial review is being shaped...by reference to an appreciation of the quality of expertness for decision that the administrative may possess, important consequences follow. The constitution of the administrative and the procedure employed by it become of great importance...Different agencies receive different treatment from the courts.

If this analysis is correct, the I.B.A. must display a quite exceptional 'quality of expertness.'

Certainly a regulatory agency will possess greater expertise in policy-making than a court. This will be one reason why the legislature assigned the task to the agency in the first place. Courts should be meticulous in avoiding circumvention of this choice. If a broad policy perspective is desirable, the dominant role should be played by the agency rather than the court. It can be argued that an, 'agency's policymaking is superior to the court's both in obtaining information and making judgments based on that information.'³⁸ Furthermore, as Koch points out:³⁹

Because any policymaking involves substantial uncertainty, it is important that courts do not inadvertently assume authority they are neither intended to have nor capable of exercising. In the context of policymaking, courts should not evaluate the decision too critically lest judicial policymaking judgment replace administrative policymaking.

Despite such misgivings, judicial review is essential to regulatory legitimacy. It is essential for the very simple reason that self-policing is no more credible when practised by regulatory officials than when it is practised by anyone else in society.⁴⁰ It is the function of the courts to serve, in Jaffe's terms, as, 'a constant reminder to the administration and a constant source of assurance and security to the citizen'.⁴¹

3. Due Process The administrative lawyer's answer to most regulatory problems tends to be, 'more respect for due process' or 'better procedure'. Some of these proceduralists place their faith in formalising the informal rule-making process.⁴² While it cannot be denied that this might represent an improvement and make at least some difference, it is difficult to believe that changes in agency procedure alone could bring about any major change in government regulation. A more realistic view is that the cause of regulatory failure lies in a lack of adequate control and supervision of the relevant agency.

Nevertheless, there is a degree of validity in the argument that, 'if a policy is to be credible, it must be the product of a credible process.'⁴³ One significant aspect of this credibility test is the extent to which those affected by a policy decision are consulted before it is made. As Stewart notes: 'Agency decisions made after consideration of all affected interests would have, in microcosm, legitimacy based on the same principles as legislation and therefore the fact that statutes cannot control agency discretion would become largely irrelevant.'⁴⁴

Where such a pluralist theory of legitimacy falls down in practice, however, is the fact that regulatory agencies, such as the I.B.A., tend only to take account of the interests of the regulated and not of unorganised groups.⁴⁵ Certainly the I.L.R. companies are closely involved in the formulation of I.B.A. policy, but scant attention is paid to other viewpoints.⁴⁶ If the I.B.A. wished to claim legitimacy for its regulatory decisions on the basis of well-designed procedures, it would have to go much further to ensure the representation of conflicting opinions and the examination of a wide range of alternatives. Some indication of the possible form of these reconstructed procedures has already been given in the account of the franchising process in Chapter Five.

In general terms, it is desirable that the policies and procedures of any regulatory agency should be readily accessible to both the regulated and to members of the general public. This is a straightforward question of fairness and accountability. The general public should be enabled to assert their democratic right to assess the performance of the agency and cause their representatives to make any necessary amendments to the agency's legislative mandate.

4. Expertise The ideal underlying the expertise model of regulatory legitimacy is government by expert judgment rather than formal law. The regulator should engage in what Weber described as 'substantively rational' decision-making.⁴⁸ That is, decision-making which is oriented to the individual requirements of each case, unrestrained by formal or legal procedures.⁴⁹ Kagan describes the expertise model as follows:

Because the appropriate balance between stringency and accommodation is dependent upon the facts of specific cases, regulatory decisions should not be prescribed in advance either by legislation or fixed legal rules. Regulatory officials must be free to formulate policies in response to the problems at hand, adapting decisions to varied and changing situations on the basis of their accumulating knowledge, making intuitive judgments as to what result will maximise the public interest.

From this perspective, regulatory agencies commend themselves because they offer, 'the possibility of achieving expertise in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration, and expeditiousness in their disposition.'⁵⁰ As Landis further notes:⁵¹

The demand for expertise, for a continuity of concern, naturally leads to the creation of authorities limited in their sphere of action to the new tasks that government may conclude to undertake...[T]he need for expertness...requires knowledge of [regulating an industry], ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures...and the power through enforcement to realize conclusions as to policy.

It has been stressed that the I.B.A. does rely upon such an ideology of expertise to legitimate many of its regulatory activities. It would, however, take a brave observer to idealise the Authority as an embodiment of Weberian Zweckrationalitat.⁵² There has been increasing discontent both with the Authority's inability to alter its requirements to suit the poor financial condition of I.L.R. and with its diffident attitude to policy-making and implementation.⁵³

The utility of the ideology of expertise to the Authority has been that of providing comfort and reassurance in the face of the critical

uncertainties of policy-making. It enabled Parliament to assume that once the broad policy objectives had been stated in legislation, the I.B.A. could be left to determine the appropriate means for their accomplishment through the exercise of expertise. It has allowed the Authority to create the impression that its policy decisions flow directly from the expert judgment of its officials, even where the conceptual basis of these decisions has been uncertain and controversial.⁵⁴ The courts, too, have found the ideology useful in allocating institutional responsibility between the judiciary and the Authority - crediting to regulatory expertise what they were unable to justify in terms of the authorising statute,⁵⁵ rationality or procedural propriety.

Conclusion

The regulation of I.L.R. by the I.B.A. faces a crisis of legitimacy. There are two main approaches which could be adopted as possible solutions to the crisis. The first, which would be strongly advocated by many economists, is deregulation. Their concern would be with the efficiency of the outcomes of the regulatory policies adopted by the Authority. Thirty years ago, Coase felt able to state that: '[T]he belief that broadcasting is unique and requires regulation of a kind which would be unthinkable in other media...is now so firmly held as perhaps to be beyond the reach of critical examination.'⁵⁶ This assertion is no longer a truism so far as I.L.R. concerned. There are many who would justify deregulation on the basis of the inefficiency of regulation when measured by the standards of an economic optimum.

By way of contrast, administrative lawyers would tend to be less impressed by the evidence of regulatory failure. They would instead rely upon procedural innovations to improve the way in which the Authority examines the evidence, analyses a wide range of alternatives and takes

conflicting opinions and interests into account in its decision-making.

The approach adopted here has been broadly within this second tradition of scholarship. There has, however, been somewhat more emphasis on the outcome of the regulatory process than would be typical of most administrative lawyers. There has also been an emphasis on the fact that legislation can provide only a hazy background for what really occurs. Regulation is a relational process, involving interaction between agency and regulated entity. The argument is that administrative law should be called upon not simply to address defects in decision-making, but to become that branch of the law which provides structure and guidance for the formulation, articulation and implementation of regulatory policy.

References

1. Breyer, Regulation and its Reform (1982), at 350-4.
2. Freedman, Crisis and Legitimacy (1978), at 6.
3. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667, at 1688.
4. See Reich, 'Warring Critiques of Regulation' Regulation, Jan/Feb. 1979, at 37; Freedman, op. cit., n. 2 supra, at 31-78.
5. I.B.A., Evidence to the Committee of Inquiry into the Future of Broadcasting (1978) at para. 206.
6. Ibid at para. 205.
7. See Freedman, op. cit., at 15-115.
8. Ibid., at 103-4.
9. Selznick, Law, Society and Industrial Justice (1969).
10. Richardson, 'Review of Baldwin and McCrudden, Regulation and Public Law' [1988] Public Law 478, at 479.
11. Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard Law Review 1276, at 1378.
12. This passage is adapted from Frug, ibid., at 1284.
13. Ibid., at 1378.
14. Diver, 'Policymaking Paradigms in Administrative Law' (1981) 95 Harvard Law Review 393, at 433.
15. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, at 627.
16. Kagan, Regulatory Justice: Implementing a Price Freeze (1978), at 66.
17. Lowi, The End of Liberalism (1969), at 92.
18. Ely, Democracy and Distrust (1980), at 132.
19. See Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 Columbia Law Review 527, at 538-9; Radin, 'Statutory Interpretation' (1930) 43 Harvard Law Review 863, at 866-7; Dickerson, 'Statutory Interpretation: A Peak Into the Mind and Will of a Legislature' (1975) Indiana Law Journal 206.
20. See Note, 'Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court' (1982) 95 Harvard Law Review 892, at 904-7.

21. Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985) 1 Journal of Law, Economics and Organizations 81, at 91.
22. See, generally, Slatter, Parliament and Administrative Agencies (1982).
23. See Chapter 5, supra.
24. See Chapter 9, supra.
25. Slatter, op. cit., n. 22 supra., at 124.
26. Id.
27. Heller, Broadcasting and Accountability (1978).
28. Diver, 'Statutory Interpretation in the Administrative State' (1985) 133 University of Pennsylvania Law Review 549, at 551.
29. Id.
30. Id.
31. Jaffe, Judicial Control of Administrative Action (1965), at 324.
32. Ibid., at 325.
33. Frug op. cit., n. 11 supra., at 1335.
34. See Graham and Prosser, 'Golden Shares: Industrial Policy by Stealth?' [1988] Public Law 413, at 430-1.
35. See Chapter 7, supra.
36. Landis, The Administrative Process (1938), at 142.
37. Id.
38. Koch, 'Judicial Review of Administrative Discretion' (1986) 54 George Washington Law Review 469, at 485.
39. Ibid., at 486.
40. Frug, op. cit., n. 11 supra., at 1334.
41. Jaffe, op. cit., n. 31 supra., at 325.
42. See, e.g., Harden and Lewis, The Noble Lie: The British Constitution and the Rule of Law (1986).
43. Janisch, 'The Role of the Independent Regulatory Agency in Canada' (1978) 27 University of New Brunswick Law Journal 83, at 120.
44. Stewart, op. cit., n. 3 supra., at 172.

45. Id.
46. See Chapter 10, supra.
47. See, generally, Frug, op. cit., n. 11 supra., at 1282-3; Freedman, op. cit., n. 2 supra., at 47 ff.
48. Rheinstein (ed.), Max Weber on Law in Economy and Society (1969).
49. Kagan, op. cit., n. 16 supra., at 13.
50. Landis, op. cit., n. 36 supra., at 25-6.
51. Id.
52. Rheinstein (ed.), op. cit., n. 48 supra.
53. See Chapter 4, supra.
54. see Chapter 9, supra.
55. See Chapter 7, supra.
56. Coase, 'The Federal Communications Commission' (1959) 2 Journal Of Law and Economics 1, at 40.

BIBLIOGRAPHY

Articles and Books

Abel, R., "The Dramatis Personae of Administrative Law" (1972) 10 Osgoode Hall L.J. 61.

Baldwin, R., Regulating the Airlines: Administrative Justice and Agency Discretion (1985).

Baldwin, R., Cave, M., and Jones, T., "The Regulation of Independent Local Radio and its Reform" (1987) 7 International Review of Law and Economics 177.

Baldwin, R., and Hawkins, K., "Discretionary Justice: Davis Reconsidered" [1984] Public Law 570.

Baldwin, R., and Horne, D., "Expectations in a Joyless Landscape" (1986) 49 M.L.R. 685.

Baldwin, R., and Houghton, J., "Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] Public Law 239.

Baldwin, R., and McCrudden, C., Regulation and Public Law (1987).

Bardach, E., and Kagan, R., (eds.), Social Regulation: Strategies for Reform (1982).

Bendix, R., Max Weber: An Intellectual Portrait (1960).

Benn, A., "A Socialist Policy for Radio" (1970) 80 New Statesman 168.

Bernheim and Whinston, "Menu Auctions, Resource Allocation and Economic Influence" (1986) 101 Quarterly Journal of Economics 1.

Bernstein, M., Regulating Business by Independent Commission (1955).

Brennan, T., "Economic Efficiency and Broadcast Content Regulation" (1983) 35 Federal Communications L.J. 117.

Breyer, S., "Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform" (1979) 92 Harvard L.R. 547.

Breyer, S., Regulation and its Reform (1982).

Breyer, S., "Two Models of Regulatory Reform" (1983) 34 South Carolina L.R. 629.

Briggs, A., Sound and Vision (1979).

Briggs, A., and Spicer, J., The Franchise Affair (1986).

- Burns, T., The B.B.C.: Public Institution and Private World (1977).
- Campbell, "The F.C.C.'s Proposal to Deregulate Radio: Is it Permissible Under the Communications Act of 1934?" (1980) 32 Federal Communications L.J. 233.
- Campbell, D., "Truth Claims and Value Freedom in the Treatment of Legitimacy" (1986) 13 Journal of Law and Society 207.
- Cane, P., An Introduction to Administrative Law (1986).
- Chadwick, J., "Results of Different Principles of Legislation and Administration in Europe; of Competition for the Field as compared with the Competition within the Field of Service" (1859) 22 Journal of the Royal Statistical Society 22.
- Coase, R., British Broadcasting: A Study in Monopoly (1950).
- Coase, R., "The Federal Communications Commission" (1959) 2 Journal of Law and Economics 1.
- Connolly, W., (ed.), Legitimacy and the State (1984).
- Craig, P., Administrative Law (1st ed., 1983).
- Cramton, R., "The Why, Where and How of Broadened Public Participation in the Administrative Process" (1972) 60 Georgetown L.J. 525.
- Cranston, R., "Regulation and Deregulation: General Issues" (1982) 5 University of New South Wales L.J. 1.
- Curran, J., and Seaton, J., Power Without Responsibility (1st ed.), (1981).
- Cutler, L., and Johnson, D., "Regulation and the Political Process" (1975) 84 Yale L.J. 1395.
- Davis, K.C., Administrative Law Treatise (1st ed., 1958; 2nd ed., 1978).
- Davis, K.C., Discretionary Justice: A Preliminary Inquiry (1969).
- Demsetz, H., "Why Regulate Utilities?" (1968) 11 Journal of Law and Economics 55.
- Dickerson, R., "Statutory Interpretation: A Peak Into the Mind and Will of a Legislature" (1975) 50 Indiana L.J. 206.
- Diver, C., "Policymaking Paradigms in Administrative Law" (1981) 95 Harvard L.R. 393.
- Diver, C., "Statutory Interpretation in the Administrative State" (1985) 133 University of Pennsylvania L.R. 549.

Diver, C., "The Optimal Precision of Administrative Rules" (1983) 93 Yale L.J. 65.

Domberger, S., and Middleton, J., "Franchising in Practice: The Case of Independent Television in the U.K." (1985) 6 Fiscal Studies 17.

Dworkin, R., "Hard Cases" (1975) 88 Harvard L.R. 1057.

Dworkin, R., Taking Rights Seriously (1977).

Ehrlich, E., and Posner, R., "An Economic Analysis of Legal Rulemaking" (1974) 4 Journal of Legal Studies 257.

Elliott, M., "Chasing the Receding Bus: The Broadcasting Act 1980" (1981) 44 M.L.R. 683.

Ely, J., Democracy and Distrust (1980).

Fowler M., and Brenner "A Marketplace Approach to Broadcast Regulation" (1980) 60 Texas L.R. 207.

Fox, D., Public Participation in the Administrative Process (1979).

Frankfurter, F., "Some Reflections on the Reading of Statutes" (1947) 47 Columbia L.R. 527.

Franson, R., Access to Information: Independent Administrative Agencies (1979).

Freedman, J., "Crisis and Legitimacy in the Administrative Process" (1975) 27 Stanford L.R. 1041.

Freedman, J., Crisis and Legitimacy: The Administrative Process and American Government (1978).

Friendly, H., The Federal Administrative Agencies: The Need for Better Definition of Standards (1962).

Friendly, H., "Indiscretion about Discretion" (1982) 31 Emory L.J. 747.

Frug, G., "The Ideology of Bureaucracy in American Law" (1984) 97 Harvard L.R. 1277.

Fuchs, R., "Introduction: Administrative Agencies and the Energy Problem" (1972) 47 Indiana L.J. 606.

Fuller, L., "Adjudication and the Rule of Law" (1960) Proceedings of the American Society of International Law.

Fuller, L., "The Forms and Limits of Adjudication" (1978) Harvard L.R. 353.

Galligan D., (ed.), Essays in Legal Theory (1984).

- Galligan, D., Discretionary Powers: A Legal Study of Official Discretion (1986).
- Garnham, N., "Public Service versus the Market" (1983) 24 Screen 1.
- Gellhorn, E., "Public Participation in Administrative Proceedings" (1972) 81 Yale L.J. 369.
- Gellhorn, E., and Pierce, R., Regulated Industries (1982).
- Goodin, R., "Welfare Rights and Discretion" (1986) 2 Oxford Journal of Legal Studies 232.
- Goulet, B., (ed.), The Courts: Separation of Powers (1983).
- Graham, C., and Prosser, T., "Golden Shares: Industrial Policy by Stealth" [1988] Public Law 413.
- Habermas, J., Legitimation Crisis (1975).
- Habermas, J., Communication and the Evolution of Society (1979).
- Hammond, G., "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence" (1982) Hastings International and Comparative L.R. 323.
- Harden, I., and Lewis, N., The Noble Lie: The British Constitution and the Rule of Law (1986).
- Hart, H., and Sacks, The Legal Process: Basic Problems in the Making and Application of Law, unpublished mimeo, (1958).
- Hart, H., "Positivism and the Separation of Law and Morals" (1958) 71 Harvard L.R. 593.
- Hart, H., The Concept of Law (1961).
- Hawkins, K., "On Legal Decision-Making" (1983) 43 Washington and Lee L.R. 1161.
- Hawkins, K., and Thomas, J., (eds.), Enforcing Regulation (1984).
- Hood, C., Administrative Analysis: An Introduction to Rules, Enforcement and Organisations (1986).
- Hyde, A., "Is Liberalism Possible?" (1982) 57 New York University L.R. 1031.
- Hyde, A., "The Concept of Legitimation in the Sociology of Law" [1983] Wisconsin L.R. 379.
- I.B.A., The Future of U.K. Independent Radio (1987).
- Jaffe, L., Judicial Control of Administrative Action (1965).

- Janisch, H., "The Role of the Independent Regulatory Agency in Canada" (1978) 27 University of New Brunswick L.J. 83.
- Janisch, H., "Policy Making in Regulation" (1979) 17 Osgoode Hall L.J. 46.
- Johnstone, C., The Canadian Radio-television and Telecommunications Commission (1980).
- Jowell, J., Law and Bureaucracy (1975).
- Jowell, J., "The Legal Control of Administrative Discretion" [1973] Public Law 178.
- Jowell, J., and Oliver, D., (eds.), The Changing Constitution (1985).
- Kagan, R., Regulatory Justice: Implementing a Price Freeze (1978).
- Kaufman, D., Broadcasting Law in Canada: Fairness in the Administrative Process (1987).
- Koch, C., "Judicial Review of Administrative Discretion" (1986) 54 George Washington L.R. 469.
- Landis, J., The Administrative Process (1938).
- Law Reform Commission of Canada (L.R.C.C.), Independent Administrative Agencies, Working Paper 25, (1980).
- L.R.C.C., Report on Independent Administrative Agencies: A Framework for Decision Making, Report 26, (1985).
- L.R.C.C., Policy Implementation, Compliance and Administrative Law, Working Paper 51, (1986).
- Lenny, D., "The Case for Funding Citizen Participation in the Administrative Process" (1976) 28 Administrative L.R. 483.
- Levin, R., "Identifying Questions of Law in Administrative Law" (1985) 74 Georgetown L.J. 1.
- Lewis, N., "I.B.A. Programme Contract Awards" [1976] Public Law 317.
- Lewis, N., and Harden, I., "Deregulation, Privatisation and Constitutionality" (1983) 34 N.I.L.Q. 207.
- Lipset, S., Political Man: The Social Bases of Politics (2nd ed., 1981).
- Lloyd, D., "Some Comments on the British Television Act 1954" [1957] Law and Contemporary Problems 165.
- Lowi, T., The End of Liberalism (1969).
- McCarthy, T., The Critical Theory of Jurgen Habermas (1978).

- Mashaw, J., Bureaucratic Justice (1983).
- Mashaw, J., Due Process in the Administrative State (1985).
- Mashaw, J., "Prodelegation: Why Administrators Should Make Political Decisions" (1985) 1 Journal of Law, Economics and Organisations 81.
- Melnick, R., Regulation and the Courts: The Case of the Clean Air Act (1983).
- Merelman, R., "Learning and Legitimacy" (1966) American Political Science Review 548.
- Michael, J., "Attacking the Easy Platform" (1988) 138 N.L.J. 786.
- Munro, C., "The Control of Advertising on British Television" [1980] Journal of Media Law and Practice 24.
- Nonet, P., and Selznick, P., Law and Society in Transition (1978).
- Note, "Administrative Law - Communications - Developing Standards for Diversification of Broadcasting Formats" (1974) 54 Texas L.R. 558.
- Note, "Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court" (1982) 95 Harvard L.R. 892.
- Phillips, W., "The Frozen Waves: Radio in 1982" ADMAP, July, (1982).
- Posner, R., The Economic Analysis of Law (1977).
- Pound, R., Jurisprudence (1959).
- Prosser, T., Nationalised Industries and Public Control (1986).
- Radin, G., "Statutory Interpretation" (1930) 43 Harvard L.R. 863.
- Reich, R., "Warring Critiques of Regulation" Regulation, Jan./Feb., (1979).
- Rheinstein, M., (ed.), Max Weber on Law in Economy and Society (1969).
- Richardson, G., Ogus, A., and Burrows, P., Policing Pollution: A Study of Regulation and Enforcement (1982).
- Robinson, G., "The F.C.C.: An Essay on Regulatory Watchdogs" (1978) 64 Virginia L.R. 169.
- Selznick, P., Law, Society and Industrial Justice (1969).

Shapiro, M., "Administrative Discretion: The Next Stage" (1983) 92 Yale L.J. 1487.

Slatter, F., Parliament and Administrative Agencies (1982).

Smith, D., "Mechanisms for Public Participation at a Normative Planning Level in Canada" (1982) 8 Canadian Public Policy 561.

Stewart, R., "The Reformation of American Administrative Law" (1975) 88 Harvard L.R. 1667.

Swift, B., "Interpretive Rules and the Legal Opinions of Government Attorneys" (1981) 33 Administrative L.R. 425.

Theobalds, H., "The I.B.A. and Political Advertising" Independent Broadcasting, February, (1984).

Lord Thomson, "A New Role for Regulation" Air Waves, Winter, (1984-5).

Unger, R., Law and Modern Society (1976).

Utton, M., The Economics of Regulating Industry (1986).

Weber, M., The Theory of Social and Economic Organisation (1947).

Vaughan, D., "Toward Understanding Unlawful Organisational Behaviour" (1982) 80 Michigan L.R. 377.

Veljanowski, C., and Bishop, W., Choice by Cable: The Economics of a New Era in Television (1983).

Verkuil, P., "Judicial Review of Informal Rulemaking" (1974) 60 Virginia L.R. 185.

Walker, D., The Oxford Companion to Law (1980).

Walker, N., Sentencing in Theory, Law and Practice (1985).

Wexler, H., "Discretion: The Unacknowledged Side of Law" (1975) 25 University of Toronto L.J. 193.

Wilson, H., Pressure Group (1961).

Official Publications

Report of the Committee on the Future of Broadcasting, Cmnd. 6753, (1977).

Report of the Committee on Financing the B.B.C., Cmnd. 9824, (1986).

Radio: Choices and Opportunities, Cm. 92, (1987).

Broadcasting in the '90s: Competition, Choice and Quality, Cm.
517, (1988).

APPENDIX ONE: EMPIRICAL RESEARCH

(1) Interviews

A number of interviews were conducted with officials of the I.B.A. and with those working in the I.L.R. industry. As the reader will have gathered, this thesis does not purport to be an implementation study. As a consequence, these interviews were intended to provide background information on the regulatory practices of the Authority rather than as part of any structured fieldwork. Nevertheless, it has been possible to incorporate a number of quotations from these interviews in the preceding pages. Some of the interviewees were guaranteed anonymity, but as full details as possible are given in this appendix.

I.B.A. Officials

Officials in the following regional offices were interviewed: East of England (Norwich); Midlands (Birmingham and Nottingham); North West England (Manchester); Yorkshire (Leeds); South of England (Southampton); Wales and West of England (Bristol).

Interviews were also conducted with two officials of the Radio Division of the Authority in London.

Employees of I.L.R. Companies

Two programme controllers, one chief executive and one managing director were interviewed.

Others

Professor Aubrey Diamond, Chairman of the Advertising Advisory Committee.

Mr. Brian West, Director of the Association of Independent Radio Companies.

(2) Access to information

Access was readily given by the Radio Division of the I.B.A. to the Notes of Guidance. Relevant extracts are included in Appendix 2. All the other information sources utilised in this thesis are available to the general public (although a visit to the Authority's own library might be necessary).

APPENDIX TWO: EXTRACTS FROM THE I.L.R. PROGRAMMING NOTES OF GUIDANCE

ILR Programming Notes of Guidance - Foreword.

Purpose of the notes.

1. From time to time, following discussions with ILR companies, the Authority has produced notes of guidance on certain radio programming matters. These notes have normally been presented as Radio Papers to the Radio Consultative Committee. It would be to the benefit both of the existing companies and of new companies as they prepare to come on air to have this guidance available in readily accessible form. Relevant notes, revised where necessary, have therefore been brought together in this folder.

2. The intention of these notes is to reinforce the guidance that companies themselves provide for their staffs. Companies' own responsibility for their output remains undiminished. These notes are not designed to fetter normal editorial discretion, but to give guidance on a basis either of proven ILR experience or of the requirements of relevant legislation and the contracts.

Their scope

3. These notes cover only some of the programming matters with which the Authority, and companies, are concerned. Not all aspects of the IBA Act, of the companies' contracts, dealing with programming matters are referred to. This is not because those aspects are unimportant, but only because they happen not to have been the occasion so far for notes of guidance. Notes contained in this folder are therefore not a complete guide to good practice in ILR: they provide guidance only on those matters with which they deal. No one should seek to defend the indefensible by arguing that nothing in these notes forbade it.

4. It is essential that everyone connected with programming matters in ILR is familiar with the statutory requirements. The main terms of Sections 2 (1), 2 (2), 4 (1) and 8 (6) of the Act are set out in the first of these notes.

Nature of the guidance.

5. Guidance given in these notes varies from topic to topic. Some notes describe specific requirements that have to be met; others point to areas where careful local judgement is needed, and indicate the general considerations which should be taken into account. Several notes emphasise the need for prior consultation with the IBA staff: such consultation is essential if guidelines are to combine flexibility in local broadcasting with the precision necessary on certain matters.

Need for revision

6. These notes are not necessarily the last word on the matters to which they refer. Quite apart from any changes that may be required as a result of new legislation, any guidance needs updating and checking at regular intervals: this will normally be done through the Radio Consultative Committee. On some matters it may be necessary to provide additional or revised guidelines from time to time.

(April 1980).

ILR Note 2.1.

Hours of Broadcasting

1. Under the terms of their contracts, companies must give the IBA 28 days notice of any proposed departure from previously agreed hours of broadcasting. In exceptional circumstances, the IBA may be prepared to waive the requirement to give the full 28 days' notice: in a genuine local crisis or emergency, approval may even be given over the telephone, to be confirmed later in writing. Advance approval must, however, be sought in every instance; and no announcement or promotion of extra hours may be made before approval has been obtained.

2. In instances of genuine urgency or emergency out of normal office hours, companies should telephone the Duty Clerk at IBA headquarters, who will arrange for IBA Radio staff to contact the company direct. (Clerk available each weekday except between 23.45 and 9.00). (Sept. 1982).

ILR Note 2.2.

Advance Hearing of Programmes

Under the terms of their contracts, companies may be required to arrange for the IBA to hear a recording of a programme in advance of its being broadcast. Normally this is not necessary: the immediacy of ILR is one of its strengths, and there is no wish to restrict this unreasonably. From time to time, however, advance hearing may be needed, for statutory or other legal reasons. Senior programming staff need to be aware of the contractual obligation and of the practical need, so that they can comply promptly with any such requests.

(April 1980).

ILR Note 2.3.

The Act requires that 'proper proportions of the recorded and other matter included in the programmes are of British origin and of British performance'. The Authority does not lay down percentage limits, but expects that it is individual items of foreign material, such as a record or interview, that will constitute the main 'non-British' element in the broadcast output. Contractors must seek prior approval from the IBA for the use of foreign material on any significant scale, i.e. for the use of other than short individual items. The IBA is likely to restrict the number of any lengthy or regular programmes of exclusively foreign material that an ILR company may wish to broadcast. The Authority requires companies' stations identification material to be British based, and use of library music should be focused on material of British origin.

(Amended June 1985).

CONFIDENTIAL

113 A

INDEPENDENT
BROADCASTING
AUTHORITY

REPRODUCTION
NOT
PERMITTED

FAIRNESS, IMPARTIALITY AND ACCURACY

1. The following paragraphs indicate areas in which care may be particularly needed in order to ensure fair dealing. There are in addition the specific requirements in the Act that the Authority should ensure that, so far as possible, 'due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy'; and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality.

Conduct of interviews

2. In addition to the normal general requirements about fairness and impartiality, it is important in normal circumstances to ensure:

- (a) that an interviewee chosen as a representative of an organised group is in a position to speak on behalf of others involved;
- (b) that, whether the interview is recorded or live, the interviewee has been made adequately aware of the way in which his contribution is likely to be used;
- (c) that he has been told the identity and intended role of any other participants in a programme.

If exceptional circumstances require departure from these normal practices, there should be consultation with the Authority in advance.

Editing of interviews

3. Subject to agreement to the contrary, it is proper to edit an interview to present the views of an interviewee in shortened form; or to compress consistent questions or replies from a number of people. Material should not be presented to suggest falsely that people are in conversation with one another or commenting on each other's views; to omit significant qualifications advanced by contributors in the course of an interview; to associate contributors with views not held by them; or otherwise to misrepresent materially the import of the full interview. Care should also be taken over stock or library material; it cannot be taken for granted that the views expressed by an interviewee on a

/particular

particular subject and previously recorded are still held when it is proposed to re-broadcast an extract. Steps should be taken if necessary to seek new recordings or to identify and announce the date and context of the original.

'Trial by broadcasting'

4. Likely to be a rarity in radio, but to attract particular attention when it is arranged and presented, is the programme in which a man is answering charges of alleged criminal wrongdoing. There is an obvious need for the company to be aware in planning such a programme of the legal risks of defamation (see paragraph 5 below) and contempt of court (see Note 4.2 and the Attachment to it). In addition every effort should be made in the conduct of the programme to ensure fairness and the appearance of fairness. The subject of any accusations which are to be made must, for example, be disclosed in detail to the person who is to defend himself against them, and sufficiently in advance to allow himself to prepare his answers. He must know from whom the accusations are to come; and, if he wishes, he must be allowed to have present witnesses prepared to support him. There must be no verdict, for even were it thought proper for a verdict to be reached through the processes of broadcasting, the time available is insufficient for the necessary sifting or completion of evidence.

Defamation

5. All relevant staff need to be aware of the law on defamation and of what may constitute a defamatory statement. If a broadcast is planned that does include what may constitute such a statement, then the Authority, before deciding whether it may be broadcast, will require the company concerned to seek competent legal advice on whether the statement is actionable and if so whether a successful defence might be made. If the advice is that the statement is not actionable or that a successful defence could be made, this does not itself mean that the programme or programme item then has an automatic right to be broadcast, since the Authority will need to take into account wider considerations, such as those of fairness and impartiality, that lie outside the law of defamation. Legal advice on the defamatory aspects of the statement will, however, be required. A brief guide to the law of defamation in England and Wales is attached to this note.

Reconstructions

6. The use of 'reconstructions' in documentary and dramatised documentary programmes for the purposes of greater authenticity or dramatic verisimilitude, as opposed to mere effect, is legitimate, so long as they do not distort reality. Wherever a reconstruction is used in a documentary, it should be clearly identifiable as such so that the listener is not misled.

Simulated news broadcasts

7. In no circumstances should a simulation of a news bulletin or news flash be broadcast without the prior approval of the Authority.

/This

This will only be given in exceptional circumstances and when there is no appreciable risk that listeners will be led to believe that the news broadcast is a genuine one.

Right of reply

8. Despite all the efforts which are made by the companies and the Authority to observe fairness, accuracy and due impartiality, there may be occasions when an individual or organisation is misrepresented in a programme. A mis-statement of fact can sometimes be simply corrected, particularly if the programme is live, since there is then the opportunity for a correction to be made within the programme itself. If this is not possible, then, unless the need for correction is urgent, it may be best, if the error has occurred in a regular news programme, for example, to wait until the next bulletin from the station in question. Corrections of factual errors should in any event be broadcast as soon as is sensibly possible after the original error.

9. Calls for a right of reply may also come from those who feel that a programme as a whole or in part has been misleading and unfair in a more general sense than that resulting from straightforward mis-statement of fact. Requests for such a reply may come either direct to the IBA or to the company itself. In both situations the IBA will normally need to be involved in discussion with the company before a decision is taken whether to grant a reply, and if so what form it should take. In some circumstances, it may be appropriate for a statement to appear instead in print. When a complainant refers a matter to the Authority's Complaints Review Board, for example, and it is decided that it is not appropriate that an on-air statement should be broadcast, the Board's conclusions may be printed in the IBA quarterly 'Independent Broadcasting'. As recorded in the separate note on the Handling of Complaints, the Broadcasting Bill now before Parliament contains proposals for a Broadcasting Complaints Commission, and fresh guidance will be given when this comes into effect.

/ATTACHMENT

April 1980

CONFIDENTIAL

INDEPENDENT
BROADCASTING
AUTHORITY

ILR PROGRAMMING
NOTES OF
GUIDANCE

PRIVACY, GATHERING OF INFORMATION, ETC.

1. The broadcasters' freedom of access to information, and freedom to publish, are subject to certain limitations. These limitations arise not only from considerations of national security, and from the laws of libel, contempt and trespass, and the IBA Act itself, but also from the individual's right to privacy. Though it is not a legal right, it has moral force, and it is not necessarily abandoned when an individual leaves his home or office. There will be occasions when the individual's right to privacy must be balanced against the public interest. The IBA is concerned that this right should be protected from unwarranted intrusion.

Recording members of the public

2. Most recordings made in public comprise material which may be considered to be in the public domain. However, care should be taken when, for example, recordings are made in circumstances where the reporter would not gain access or opportunity without permission. A refusal in such circumstances to allow the recording to be broadcast should normally be respected: any proposed departure from this practice should be discussed with the Authority to ensure that the entitlement to reasonable privacy is not abused. It cannot always be taken for granted that apparently willing co-operation in a recorded interview automatically implies agreement to unspecified use in a broadcast.

Interviewing of children

3. Any interviewing of children requires care. Children should not be interrogated to elicit views on private family matters.

Recorded telephone interviews

4. Interviews or conversations conducted by telephone should normally not be recorded for broadcasting unless the interviewer has identified himself as speaking on behalf of the ILR company seeking information to be broadcast, and the interviewee has given his consent to the use of the conversation. The Authority

/recognises

recognises, however, that there may be very rare cases, such as those involving investigation of allegedly criminal or otherwise disreputable behaviour, in which these normal requirements may need to be waived. When in the considered judgment of the producer and his company management such a case arises, there should be consultation with IBA staff before such material is recorded. In exceptional circumstances, advance consultation with company management and IBA staff before recording may be impossible; but in any event the Authority's approval for the transmission of such material is required, and it will need to be convinced that the purposes of the broadcast will be better served by transmission of the actual conversation than by incorporation of the information obtained from it.

Hidden microphones

5. The use of hidden microphones to record individuals who are unaware that they are being recorded is acceptable only when it is clear that the evidence so acquired is essential to establish the credibility and authority of the story, and where the story itself is equally clearly of important public interest. When in the considered judgement of the producer and his company management such a case arises, there needs to be consultation with the Authority, and approval at the level of Chairman or Director General, before such material is recorded. In exceptional circumstances, advance consultation with company management and the Authority may not be possible; but in any event the Authority's approval is required for the transmission of such material.

Wireless Telegraphy Act 1949

6. Under Section 5 of the Wireless Telegraphy Act 1949, it is an offence for anyone to use a wireless receiver with intent to obtain information about any message which he is not authorised to receive. It is also an offence for anyone to pass on any information about an intercepted message, whoever did the intercepting. These provisions are not affected by the regulations made in 1970 which did away with the necessity for a licence for the reception of sound as distinct from vision. That exemption is confined to the use of a wireless set for the reception of messages sent from authorised broadcasting stations for general reception, and messages sent from licensed amateur stations.

Official Secrets Acts and 'D' Notices

7. In recent years there has been increased public discussion of some matters which would previously have been considered forbidden territory. Nevertheless, all sections of the Official Secrets Acts remain in force, and there are pitfalls for broadcasters who come upon matters covered by the provisions of the Acts. They would be prudent to check carefully on the nature and status of any information about affairs of state generally in order to be confident that it has not reached them through unauthorised channels.

8. From time to time 'D' Notices covering security matters are issued to the press and the broadcasters. The Secretary of the 'D' Notice Committee may sometimes also be prepared to give advice (but without commitment) on a specific matter. There should be a named person in each company to whom reference can be made in respect of 'D' Notices covering any matter likely to be the subject of programming, and the Authority should be kept informed who this person is.

April 1980

I.L.R. Note 4.1. Crime Reporting, Etc.

Interviews with criminals

1. The Authority is required to satisfy itself that, so far as possible, 'nothing is included in the programme which offends against good taste or decency or is likely to be offensive to public feeling' (Section 4 (1) (a) of the I.B.A. Act). Interviews with criminals are likely to run the risk of infringing this section of the Act, and there needs always to be careful consideration whether or not such an interview is justified in the public interest. Any programme item which on any reasonable judgement would be said to encourage or incite crime or lead to disorder is unacceptable.

2. Apart from the requirements of the I.B.A. Act, other legal considerations also need to be borne in mind. When an interviewee is known to be wanted by the police or on the run from prison, there are two statutes which may be relevant. The Criminal Justice Act 1961 s.22 (2) states broadly that it is an offence for anyone to give to a person who is unlawfully at large any assistance with intent to prevent, hinder or interfere with his being taken into custody. The Criminal Law Act 1967 s. 4 (1) states 'where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence'. To be held guilty of an offence under the above, it would have to be shown that the person charged either misled the police or gave the criminal some assistance. Assistance is difficult to define, but it would only be necessary to prove some element of encouragement. In the case of an ordinary criminal who has escaped from jail, considerable risks would be run by employees of a

programme company or of IRN who conducted an interview unless everything possible was done to secure the criminal's arrest.

3. In Northern Ireland, Section 5 (1) of the Criminal Law Act (Northern Ireland) 1967 imposes a duty to give a constable information which is likely to secure or assist in securing the apprehension of any person who has committed an arrestable offence. Unlike under English Law, therefore, an offence is committed in Northern Ireland simply by the withholding of information, and the act of either misleading the police or actively assisting the criminal does not have to be proved to obtain conviction on indictment.

4. Political dissidents from foreign countries who are guilty of offences under the laws of their own countries may be interviewed, subject to the normal requirements of impartiality.

Interviews with people who use or advocate violence or other criminal measures

5. Any plans for a programme item which explores and exposes the views of people who within the British Isles use or advocate violence or other criminal measures for the achievement of political ends must be referred to the Authority before any arrangements for recording are made. No member of a station's staff should plan to interview members of proscribed organisations, for example members of the Provisional IRA or other para-military organisations, without previous discussion with his company's top management. The management, if they think the item may be justified, will then consult the Authority.

6. In exceptional and unforeseen circumstances, it may be impossible for members of staff to consult before recording such an item. Consultation with the Authority is still essential to determine whether the item can be transmitted.

7. Where a programme gives the views of people who use violence outside the British Isles to attain political ends, companies may go ahead without consultation with the Authority only if there is no possibility either of the law being broken or of there being incitement to crime or significant offence to public feeling. Nevertheless, companies are strongly advised to consult with the IBA whenever possible in such circumstances.

Exposition of criminal techniques

8. In broadcasts dealing with criminal activities, in news, fictional or documentary form, there may be conflict between the demands of accurate realism and the risk of unintentionally assisting the criminally inclined. Careful thought should be given and, where appropriate, advice taken from the police, before items are included which give detailed information about criminal methods and techniques: a public-spirited warning to the general public against novel or ingenious criminal methods, for example, may defeat its own aims by giving those methods wider currency than they might otherwise have. Similar caution is needed in the representation of police techniques of crime prevention and detection.

Relations with the police

9. Most companies regularly broadcast material designed to solicit public support in the prevention and detection of crime. There is also a variety of other messages to the public which police forces may from time to time request broadcasters to transmit. These include, for example, warnings to stay away from a crash or motorway pile-up; information about road hazards for motorists; warnings of missing drugs; requests for help in tracing missing persons; and so on. There is normally no need for prior

/consultation

consultation with the Authority on such broadcasts. Companies should be aware, however, of the need to ensure that information about persons or objects suspected of association with crime is not broadcast in contempt of court (see Note 4.2 on Contempt of Court). Police requests for, or authorisation of, such broadcasts do not necessarily legitimize them. Companies are asked to consult in advance with IBA staff whenever such matters may arise.

Reporting demonstrations and scenes of public disturbance

10. Companies will be conscious of the need to be on guard against attempts to exploit radio. The aim of any public meeting or demonstration is to attract public attention, but there is always the possibility that the presence of radio reporters may provoke incidents that would not otherwise have occurred, especially where coverage is live. Every effort must be made to place what is being broadcast in context, so that listeners can properly evaluate the significance of activities that have arisen from the hope of radio coverage.

Reports on young offenders

11. Under the Children and Young Persons Acts 1933 and 1969, it is an offence to publish the names or addresses of persons aged 17 or under who are involved in court proceedings, or to publish any information calculated to reveal their identity unless the court, or Secretary of State, has given specific permission for this to be done.

Hijacking and kidnapping reports

12. Information about criminal activities such as hijacks can on occasion be picked up by monitoring communications between aircraft and the ground, or between police radio cars and their base control. It is an offence under Section 5 of the Wireless Telegraphy Act 1949 to use a wireless receiver to obtain information about any message which the user is not authorised to receive, and it is also an offence to pass on any information obtained by the interceptions of such a message. Quite apart from these formal legal requirements, it would almost invariably be wrong to broadcast any information, whether derived from monitoring of communications or from any other source, that could endanger lives or prejudice the success of attempts to deal with the criminal activity or hijack. Similar considerations apply to all other forms of kidnapping. (See also paragraphs 13-14 below.)

Requests to withhold news or information when human lives are at risk

13. On some past occasions there have been requests for an item of news or information to be withheld in order to preserve the lives of innocent people - for example, during the Spaghetti House and the Balcombe Street sieges. Such instances pose complex editorial problems. Each case has to be viewed individually. The IBA has no wish to lay down rules to pre-determine the decisions to be taken in all the unpredictable circumstances in which a broadcast might put a human life at risk.

CONFIDENTIAL



INDEPENDENT
BROADCASTING
AUTHORITY

ILR PROGRAMMING
NOTES OF
GUIDANCE

PHONE-IN PROGRAMMES

1. The following paragraphs offer guidance on some of the problems and practical points which may arise in phone-in programmes.

Due impartiality of presenters

2. A member of a station's staff taking part in a phone-in programme is free to act as a neutral chairman, to provide information, ask stimulating questions, and play devil's advocate, but should not editorialise on 'matters of political or industrial controversy or relating to current public policy'. An outsider, possibly even as a guest presenter, may sometimes appropriately act in this way, but only if due impartiality is sought over a series of programmes.

3. This guidance on the role of presenters in phone-in programmes will not be affected if the changes to Section 4(2) of the present Act that are proposed in the the new Broadcasting Bill are implemented. The guidance is based on the requirements in Section 4(1)(f) about due impartiality, and does not rely upon the present wording of Section 4(2)

Due impartiality of contributors

4. When impartiality is required in a phone-in programme, it is not always sufficient to rely upon the presence of a neutral chairman to act, if necessary, as advocate for points of view not being expressed by those who phone in. In phone-ins during the pending period of a Parliamentary or local government election, it may be necessary to seek a balance in the range of contributions. This may be done not simply through the selection of studio guests, but also by discovering from callers in advance of broadcasting their calls the tenor of what they intend to say. (See also Note 5.2 and Attachments on Election broadcasting).

5. If it is ever felt appropriate to hold a phone-in on a subject of especial sensitivity, such as Northern Ireland or race relations, then the same course will need to be adopted. Other considerations apart from due impartiality will arise, as indicated in the following paragraphs.

/ Safeguards

Safeguards against defamatory remarks, obscenity, etc.

6. The main safeguards against the broadcasting of defamatory remarks, obscenities, etc, is the use of the delay mechanism which all companies are required to have. Other safeguards which it may be appropriate to use at certain times include: (i) finding out in some detail what callers are likely to say before putting them on air; (ii) cautioning callers in advance about their legal liabilities; (iii) taking the name and telephone number of each caller, and returning the call if there is any doubt about it; (iv) retaining for a period the name and telephone number of the caller for every call which is broadcast, in case there is a need later, for legal or other reasons, to get in touch with a caller at a later date.

7. It should be noted that under the Race Relations Act 1976 it is an offence to publish, distribute or use threatening, abusive or insulting language in circumstances likely to stir up racial hatred: for a prosecution to be successful it is no longer necessary, as it was under the 1965 Act, to prove an intention to stir up racial hatred.

8. Particular problems arise if calls are received from persons who claim to be criminals. The considerations that need to be borne in mind are set out in Note 4.1 on Crime Reporting.

CONFIDENTIAL



INDEPENDENT
BROADCASTING
AUTHORITY

ILR PROGRAMMING
NOTES OF
GUIDANCE

PERSONAL ADVICE PROGRAMMING

1. Programming in which advice is given on emotional, sexual and other personal problems is heavily dependent upon the judgement and skill of the person giving the advice, and the editorial supervision given by the station. The following notes do not attempt to lay down precise rules, but to indicate some of the factors which companies undertaking such programming need to bear in mind.

Selection of subject matter

2. In determining possible causes of offence against "good taste and decency" (see Section 4(1)(b) of the IBA Act), it is necessary to consider not only the subject matter but also the timing, the context, and the manner in which the programming is presented. Under the IBA Act there can be no case for causing offence for its own sake. Any decision to broadcast something which will shock or offend listeners needs specific justification on other editorial grounds as part of the public service 'maintaining a high general standard in all respects' which it is the IBA's statutory duty to provide.

3. There is no overriding objection to the broadcasting of advice on sexual matters, provided that it is scheduled at an appropriate time, and the aim is genuinely to help and not to seek an audience through sensationalism. Specific discussion of any unlawful sexual activity - especially that associated with violence - is unlikely to be acceptable at any time.

4. In accordance with the requirements of Section 4(1)(a) of the Act, care should be taken to ensure that contributors, if advocating a particular point of view about drugs, for example, or about sexual behaviour, do not encourage the commission of any criminal offence. Contributors are free to express the view that some aspect of the law should be changed, but the discussion as a whole must be duly impartial.

Scheduling

5. The IBA would not normally agree to the scheduling of programmes designed for adults and young adults at times when there is a particularly large audience of young children. Each proposal will be examined on its merits, but companies should bear in mind that many young children are usually listening during the daytime at weekends and during the school holidays, and during the following hours on weekdays in school terms: 7.00-9.00 a.m. and 4.00-6.00 p.m. It is

/necessary

necessary to consider carefully for what audience a particular programme is designed and who is likely to be listening at any particular time. A programme designed for adults might appropriately be broadcast at 10.00 a.m. during school term time but be inappropriate at that hour, unless the content is altered, during the school holidays or half-term breaks.

6. It may on rare occasions be necessary for some programmes to give a warning at the beginning that some people may find the subject matter unsuitable for children or be offended by it. Such warnings should be phrased and voiced in a manner which respects the sensitivities of those for whose benefit they are designed.

Context and manner of presentation

7. The main need is for advice programming to be handled skilfully, and with integrity. Each programme has to be judged by the attitudes it demonstrates towards its participants, its subject matter and its audience. The aim must be to help callers and not to exploit them, and there is a responsibility to ensure that this aim is achieved. Care has to be taken over the expectations aroused in callers by the way the programme is described and the 'adviser' presented, as well as through what the adviser actually says. Stations also have an obligation to ensure, through the way in which calls are handled, that radio does not supplant individual consultation of the family doctor or appropriate specialist. Indeed, in many cases it will be appropriate to advise such consultation. Stations need to consider also their responsibilities towards those callers whose calls it is not possible to deal with fully on air.

Qualifications of presenters

(i) General advice

8. The selection of presenters and contributors is a matter for the judgement of individual programme companies. The IBA recommends, however, that while presenters will no doubt come from a variety of backgrounds, relevant experience or recognised training in an appropriate field should be part of their qualifications. It is also suggested that their appointment should be the direct responsibility of the programme controller or managing director, and approved after a trial period, when the quality of the advice given has been adequately monitored.

(ii) Specialist advice

9. In some specialist fields, companies will need to refer listeners' personal queries to a qualified practitioner invited to take part in the programme, or else state that they are not qualified to give an answer. This would apply in the case of medical and legal matters, for example, and could well apply also in cases where psychological training and expertise are required. It is important to bear this in mind when devising, and when publicising, a programme likely to venture into such areas. When a programme sets out to answer specific questions requiring specialist opinion, this should be provided by appropriately qualified experts.

Note: Broadcasters with regular advice spots who are connected with outside organisations with a relevant interest of some kind should not take advantage of their broadcasting position to mention their organisations in a way that would seem to constitute an advertisement for it.

Inclusion of a range of views

10. Advice programmes, like other programmes, must observe due impartiality on 'matters of political or industrial controversy or relating to current public policy' as required under Section 4(1)(f) of the IBA Act. In dealing with topics which are outside this category but which involve moral judgements or social attitudes that are likely to be controversial, a range of views should be included, over a period of time, in the station's output as a whole. It would not be serving the public fully if, in dealing with topics involving controversial moral judgements, a station drew only upon a single, extreme strand of opinion and failed to take reasonable account of opposing views. Among the practical steps which stations can take to ensure the airing of a range of views on controversial subjects are the occasional inclusion in an appropriate context of programme guests of differing attitudes and, where feasible, the brief paraphrasing by the presenter of opposing points of view.

April 1980

CONFIDENTIAL


 IBA

 INDEPENDENT
 BROADCASTING
 AUTHORITY

 ILR PROGRAMMING
 NOTES OF
 GUIDANCE
INDIRECT ADVERTISING

1. In accordance with Section 8(6) of the IBA Act (see Note 1.1, paragraph 4), companies are required to exclude from programmes anything which:

- (a) could reasonably be taken to state, suggest or imply that any part of any programme has been supplied or suggested by any advertiser; or
- (b) could reasonably be supposed to have been included in return for payment or other valuable consideration to the contractor.

As stated in Section 8(7), this requirement does not prohibit the inclusion of reviews, for example, of literary, artistic or other publications or productions, including current entertainments, or the inclusion of items consisting of factual portrayals of 'doings, happenings, places or things, being items which in the opinion of the Authority are proper for inclusion by reason of their intrinsic interest or instructiveness' and do not comprise an undue element of advertisement.

2. Companies should consult IBA Radio staff in advance about any project which involves outside commercial interests and/or which might involve 'impressions of sponsorship'.

Sponsored records

3. It is a recognized marketing ploy to use records featuring or relating to other products or services to try to gain indirect (and free) advertising. Records produced in connection with an advertising campaign therefore need careful consideration before being included in programming. They should not in any event 'comprise an undue element of advertisement' for any products or services. A record issued as part of a product marketing campaign, using material from an advertisement, and mentioning a product brand name, is unlikely to be acceptable under the terms of the Act. Such records should not be broadcast on ILR, unless special circumstances apply.

/Promotional

Promotional tapes

4. Section 8(6) of the Act also governs the use of programme material supplied to stations by outside companies. Some of the material which is on offer for programming purposes has as its underlying aim to publicise products, goods or services. Examples of such material include brief interviews produced directly or indirectly by publishing firms with the authors of current books; short features on particular products or processes courtesy of the manufacturer; and taped interviews with pop stars in which gaps are left in the tape for each station's presenter to 'ask' his own questions. As purely promotional materials, these are unacceptable under the Act. It is possible, however, that some items may have an intrinsic interest and provide a worthwhile element in programming. If this is so, then their use is not necessarily ruled out. They must not, however, contain an undue element of advertising, and must not give an impression of sponsorship. Moreover, in considering the possibility of using any such material, companies should bear in mind their obligations under the IBA Act, not only as regards Section 8 but also for example as regards Section 4(1), and the need clearly to be preserving their editorial independence (and critical faculty).

5. Any programme material which is offered to a company in relation to a current advertising campaign is likely to be a prima facie breach of the Act. If in doubt, companies should consult with IBA Radio staff.

Independently produced programmes funded by non-broadcasters
(For programmes funded by non-broadcasters but produced by companies, please see Note 7.3).

6. There is an increasing range of material, some of it attractive and intrinsically worthwhile, where the production is financed or underwritten by commercial concerns and the programmes are compiled and offered to ILR. In this event there is no payment or valuable consideration to the programme company. They are only acceptable, however, provided that:

- (a) they do not contain an undue element of advertising;
- (b) their broadcast could not reasonably be supposed to give rise to 'impressions of sponsorship';
- (c) no advertising connected with the programme is currently being broadcast on the station.

7. If companies, in genuine exercise of their editorial discretion, wish to use such programmes, they are asked to keep IBA Radio staff informed, as part of the schedule consultation process.

/Offers

Offers of free services, facilities, etc.

8. Many organisations (not all of them commercial) and official bodies are prepared to offer programme-makers free services in return for the presumed commercial or public relations advantages thought to accrue from the presentation of their organisation and its activities on radio. Although in the majority of instances such arrangements are justifiable, all such offers should be treated with circumspection. Nothing should be done that might give rise to doubts about the independence, impartiality and integrity of the programme. No commercial organisation that provides services should be allowed to engage before the broadcast in any advertising campaign, in the press or elsewhere, linked to the programme in question.

Records in programmes and advertisements

9. Care must be exercised by companies to ensure that there is a reasonable separation between record plays in programmes, and commercials for the same record or tracks from the record. Where a record is being advertised, plays in programming should be kept as far away from the advertisement as possible. Pre-planning is therefore necessary to avoid any conflict with programming formats. Where the need arises companies should re-schedule commercials in order to ensure reasonable separation from a record which has already been played in programming. In any event a record in programming should never be broadcast less than a break away from its most recent exposure in an advertisement. There must be a similar separation between an advertisement for an LP and a playing of a track from that LP during a programme.

PROMOTIONS AND OUTSIDE BROADCASTS

Promotion of radio companies' own products or services

10. Under their contracts with the IBA, companies are prohibited from promoting on-air their own products or business (apart from programme promotion or programme journals) without the Authority's approval.

11. Approval of the promotion of programme companies' merchandising and other activities is governed by the extent to which the promotion can reasonably be deemed to be related closely to the functions of the companies as broadcasters, or to be positively promoting Independent Local Radio. Promotion on-air should not give undue advantage to the programme company compared with competitors in the same field. Announcements about the availability of free or low-cost wall-stickers, posters, programme company mobiles and T-shirts are likely to be acceptable. The promotion of goods and services which would appear to compete with outside commercial interests or to be extending the functions of the contractors into the retail and other fields would not be approved.

12. Companies should consult with IBA Advertising Control staff, at an early stage, before embarking on promotional campaigns which require Authority approval. Where approval is given, particular care must be exercised in the amount of promotion, because the general effect of these promotional items will be governed by the frequency with which they are mentioned on-air.

Joint promotional activities involving commercial interests

13. Too close an association between on-air programme material and the promotion of advertisers' goods and services may blur the necessary distinction between programming and advertisements. This may arise when a commercial enterprise joins with a programme contractor in activities designed to promote the interests of both and involving on-air publicity either in programme time or in an advertisement. The impression may be given that part of the company's programming has been supplied or suggested by an advertiser, contrary to Section 8(6) of the Act. Companies should consult in advance with IBA Radio and Advertising Control staff whenever such joint promotional activity is contemplated.

14. A company may have involvement with local events provided that they are of 'intrinsic interest' to listeners and that the programme does not include an undue element of advertising. For example, where Ideal Home, Motor Car or Do-It-Yourself Exhibitions are well-established annual events, it is possible for programmes to be broadcast from them, provided that the object of the programme is not to promote the commercial interests involved but is designed to bring to the listeners items of interest to them. Even so, it is important to exclude any material which includes any undue element of advertising, such as the gratuitous naming of product brands.

Choosing locations for outside broadcasts

15. Wherever possible, non-commercial rather than commercial venues should be chosen for outside broadcasts. The venue must never be chosen for commercial considerations; furthermore the company shall receive no payment or benefit in kind in respect of staging an outside broadcast.

16. Managing Directors are personally responsible for deciding whether a broadcast from named commercial premises is warranted on editorial grounds. The requirements of Section 8(6) of the Broadcasting Act 1981 must be met. It is essential that broadcasts from named commercial premises are not seen as vehicles for advertising. Advertisements for the commercial premises involved may not be transmitted during or immediately around the programme.

I.L.R. Note 9.1

Expressions of Opinion By Programme Companies.

Section 31 of the Broadcasting Act 1980 removed the restrictions that had previously existed under Section 4 (2) of the I.B.A. Act upon expressions of opinion in ITV or ILR programmes by the directors or officers of programme companies (and by persons or companies controlling programme companies). Under these previous restrictions, people in the proscribed categories were prohibited from expressing their opinion on matters of political or industrial controversy or of current public policy. Now they are subject only to the same regulations and requirements as apply under the 1973 and 1980 Acts to anyone who takes part in a broadcast on ITV or ILR.

There are, however, still constraints upon the expressions of opinion by programme companies themselves: expressions of opinion by them on matters other than broadcasting which are of political or industrial controversy or relate to current public policy must be excluded from programmes broadcast by the IBA. If a director or officer of a programme company expresses an opinion on such matters in a broadcast on ITV or ILR, it must be in a context which makes clear that he or she is not expressing the opinion of the company.

The restrictions in relation to programme companies apply to broadcasts both on ITV and ILR, irrespective of which company the medium serves. It also applies to broadcasts which take place outside the coverage area of the company concerned. For example, an opinion of a Scottish ITV company on the prescribed matters could not be broadcast or reported in an ILR

programme in the South of England.

Under Section 2 (1) of the I.B.A. Act 1978, as amended by Section 31 of the Broadcasting Act 1980, the restrictions do not apply to broadcast of proceedings in either House of Parliament, or of proceedings of local authorities. Expressions of programme company opinion on the proscribed matters therefore do not have to be excluded from broadcasts of such proceedings.

The revised provisions of the 1980 Act apply within the overall requirements of due impartiality under Section 4 (1) (f) of the 1973 Act and of due accuracy and impartiality of news under Section 4 (1) (b). These wider requirements must be borne in mind when any question arises of the inclusion of permitted expressions of opinion by programme companies or those associated with them.

(May 1981).

CONFIDENTIAL



INDEPENDENT
BROADCASTING
AUTHORITY

ILR PROGRAMMING
NOTES OF
GUIDANCE

CHARITABLE APPEALS AND PUBLICITY FOR CHARITIES

1. Under the Act, the Authority's previous approval is required for any item 'which gives or is designed to give publicity to the needs or objects of any association or organisation conducted for charitable or benevolent purposes'. One purpose of that requirement is to ensure that broadcast appeals for funds by charitable organisations are carefully controlled. Most charities are, necessarily, registered with the Charity Commission; but registration means only that their aims have been accepted as legally charitable, and does not indicate that the Commissioners have investigated and approved their conduct of their affairs. Care therefore needs to be taken to protect the public and ensure as far as possible that their money will be well spent. It is desirable also to ensure that appeals are fairly allocated among a variety of charities, and that other types of publicity for charities, in addition to overt appeals for funds, should also be subject to controls.

Appeals for funds

(i) Basic principles

2. Appeals should be on behalf of local charitable causes, with the proceeds normally being distributed through recognised charities. Appeals should not normally provide an outlet for national charities that could be expected to apply for ITV appeals, nor for local branches of such charities, unless they are appealing for funds to meet some specific local need.

3. While most appeals are likely to be concerned with the relief of human suffering and distress, appeals for other charitable purposes are not ruled out. It is desirable that a wide range of causes should benefit: while attention must be paid to the particular needs of the area, it is hoped that no station will concentrate all its appeals on one narrow field of need.

4. A wide spread of charities should benefit: there should not be charities with a special relationship with the station which get an undue share of any appeal time. (This does not apply to a Trust which the station itself has set up as a means of distributing funds to a range of local charitable purposes.)

/ The

(ii) Particular types of appeal

5. Major fund-raising projects, radiothons, etc, should not be on behalf of specific named charities, but for a particular field of need, with the proceeds subsequently being distributed to a number of charities on the basis of local advice.

6. Shorter appeals on behalf of specific named charities are permissible so long as the station has assured itself that there is some particular local need which the funds collected would help to meet. (NOTE: the IBA may want to specify the maximum number of appeals permissible in any period).

7. Emergency appeals for funds to help meet some local disaster should normally only be broadcast if a separate appeal fund has already been established. This does not rule out the possibility of a station itself taking the initiative to set up such a fund, but care needs to be taken to ensure its charitable status, and it will normally be desirable for the appeal fund to be organised in conjunction with other local interests.

Procedures

8. Approval for appeals must be obtained in advance from the IBA. After the appeal, a letter signed by the company's Managing Director should be sent to the IBA, detailing the amounts received and distributed and the recipient charities. Once a year a report on all ILR appeals will be presented to the Central Appeals Advisory Committee (where appropriate, the Scottish Appeals Advisory Committee and Northern Ireland Appeals Advisory Committee), and subsequently to the Authority.

9. The funds collected must be distributed for the purposes for which they were sought. None of the funds collected should be used to meet programming expenses or other costs incurred by the station. The only exceptional circumstances in which it would be legitimate for a station to deduct part of the proceeds to meet its own expenses, of any kind, would be if it made clear throughout the appeal that it was going to do so. A different matter would be a fund-raising event such as a gala concert for which tickets are sold in aid of some charity. In such an event it is usually only the profits that go to the charity, after expenses have been deducted; this is perfectly legitimate so long as the position is made clear and there is no suggestion that the full price of each ticket is going to the charity.

10. Where regular charity appeals are undertaken, it is strongly recommended that a trust, registered with the charity commissioners, be established. Trustees will wish to assure themselves that proper procedures are followed, for handling funds. It would be proper and desirable for an audit to be conducted, with expenses deducted from trust funds. If no trust

is established, it is essential that funds received by stations as agents for charities should be paid into a separate account and disbursed as rapidly as possible. Figures should be available for audit, if requested.

Appeals for non-monetary purposes

11. In addition to appeals for money, there may be appeals for goods, toys etc. (These have been particularly common at Christmas and Easter). Where the appeal is conducted in association with a particular charitable organisation, IBA approval should be sought. A record of the total amount of goods, etc, received, and how they were distributed should be kept. This will be included in the IBA's annual summary of charitable activity on ILR.

Other publicity for charities

12. There is no objection to mention being made of the objects of a charity when this is justified by the intrinsic interest of the charity's work, as opposed for example to its public relations activities. An account of the Royal National Lifeboat Institution, for instance, could hardly be required to avoid mentioning the fact that the Institution's object was to save life at sea.

13. Mention of a charity's needs runs the risk of being a covert appeal, and references to a charity's financial state or fund-raising activities need to be considered with care. This does not rule out, of course, reports in news programmes of, for example, the launching of a national or local appeal of special significance (e.g. a Cathedral Restoration Fund) or of events organised by charitable bodies, when these events are themselves of news interest or warrant inclusion in a local "what's on" report. Neither does it rule out the reporting of other events of obvious newsworthiness, such as a well-known charity becoming insolvent. Care should be taken, however, to avoid any such reports constituting an appeal, and donations should not be solicited. "Collecting organisations", i.e. charities which exist primarily or solely to raise funds for subsequent distribution to other bodies, vary in their standards and practices: especial care needs to be taken to consider whether or not mention of their activities is justified or is a form of unpaid-for advertisement or indirect appeal. Mention of charitable events, such as fetes or gymkhanas, flag days and other activities, should concentrate on the events themselves, as items of local interest. Any such coverage should not constitute an endorsement of the purposes of the lottery.

14. Programme items that set out to describe certain areas of need or distress may, if necessary, give an account of the work of charities active in those areas, but they should not give undue publicity to the names of the charities.

15. When a programme item seeks to inform listeners about particular services that are available, the names of charities providing such services may be mentioned in addition to those of statutory organisations. Emphasis should be on the specific services that can be provided, rather than on general publicity for the charities concerned.

16. When a programme item seeks to inform listeners about the opportunity to take part in voluntary work, care needs to be taken to avoid the item being an advertisement for one particular charity. There is no objection to specific charities being mentioned by name, but a wide range of charities should be included over time, and listeners should, if possible, be given an indication of ways in which they might pursue opportunities for voluntary service other than through the particular charities mentioned.

January 1986

I.L.R. Note 13.1 The Handling of Complaints.

1. It is important to ensure that members of the public who wish to contact their local ILR company have no difficulty in doing so. Every company should therefore ensure that, in addition to information that is given on-air, its address and telephone number are easily found in all telephone directories within its coverage area.

2. The handling of complaints from listeners needs careful attention. Set out below are notes of guidance drawn up by the Authority's Complaints Review Board, which reviews complaints about programme matters on ILR and ITV. Companies will need to have their own procedures, for sifting the trivial from the important, and for responding to criticisms and suggestions. The following notes constitute a general 'code of best practice', adaptable to individual circumstances, which, if followed throughout the Independent Broadcasting System, would ensure that our handling of complaints was seen to be rapid, courteous, fair and comprehensive.

(i) Companies should be equipped to receive calls throughout the hours of transmission. Where an 'answer-phone' service is used during the night hours, it should provide facilities for listeners to record their name and address and the reason for their call.

(ii) Telephoned and written complaints should, if possible, be handled by one office in the company. The practice of transferring an angry listener to the producer or someone else intimately involved in a programme just transmitted is likely to lead

to further acrimony, although at times there will probably be no-one else in the station to speak to. Where it is the practice for letters addressed to the Managing Director or to other senior officers to be replied to personally by the addressee it should continue.

- (iii) The temptation to answer complaints off the cuff should be resisted. If there is a known and reasonable answer to a complaint, it should be given and an attempt made to satisfy the complainant there and then; if this fails, an offer should be made to investigate and reply later. It may be advisable in certain circumstances to ask the caller to put the complaint in writing.
- (iv) Switchboard operators should be fully briefed on the handling of complaints. They should not normally be expected themselves to answer complaints, other than those of a routine nature, and should know to whom complaints should be referred. If for any reason there happens to be nobody available for referral, and the caller wants a reply, switchboard operators should invite the caller to put the complaint in writing to the company (or, if the substance of the complaint is clear, to leave his or her name and address), and should say that the complaint will be investigated and a reply sent as soon as possible.
- (v) Calls and letters from listeners are important as an indication of the public's response to programmes. Records should be kept of the number of calls and letters received, and of the programmes to which they relate. Regular summaries showing the general trend of complaints, and indicating any programme attracting a large number of complaints, should be drawn to the attention of the Managing Director and senior management staff, together with information about any case of substance where a complaint has been shown to be justified, and about complaints from MPs, local councillors, etc. This information should also be provided, as appropriate, to the Authority's Regional Officer or headquarters staff. This will be valuable as a means of informing the Authority of matters dealt with locally which might raise points of wider significance.
- (vi) Delays in investigating complaints are sometimes inevitable (staff absent on leave or other duties, etc.). It is therefore important that when a full reply cannot be sent immediately, written acknowledgement should be sent.
- (vii) Complaints addressed to individual members of the company and replied to by them directly should nonetheless be recorded and copies of the correspondence held by the central office responsible for handling complaints.

/(viii) It

- (viii) It is inevitable that mistakes and errors of judgement will be made from time to time. When investigation shows that this has happened, appropriate acknowledgement and apologies should be made. If possible, an indication should be given that steps are being taken to avoid a recurrence.
- (ix) Certain complaints may not be considered to be well-founded or reasonable; but they may represent strongly held beliefs on the part of the complainant. If it is felt necessary to make clear that the company does not agree with the complainant's views, it may still be appropriate to express regret that he or she personally felt offended.
- (x) In general, the aim of the procedure for the handling of complaints should not be only to 'satisfy the complainant'. If a fault or mistake is revealed, action should also be taken to remedy it and prevent it from happening again.

The Complaints Review Board.

3. When a complainant expresses dissatisfaction after correspondence with the company about a complaint, attention should be drawn to the Authority's function in relation to complaints, and the complainant be sent a copy of the leaflet 'The Independent Broadcasting Authority and the Public: the Handling of Complaints'. (Copies are available from the IBA.) The text of the leaflet, which also gives the composition of the Complaints Review Board, is as follows:

"The Authority is the body charged by Parliament with the supervision of the Independent Broadcasting services of television and local radio. The conduct of the services is governed by the Independent Broadcasting Authority Act of 1973.

The programmes which the Authority broadcasts are provided to it by the programme companies. Complaints to the Authority that any programme has not complied with the required standards are investigated by its staff, and a reply is then sent to the complainant.

If a complainant is dissatisfied after such investigation and reply, and remains so after further correspondence on the subject, the matter may, if the complainant so wishes, be referred to the Authority's Complaints Review Board, none of whose members is concerned with the day-to-day control of programmes. The Board will then investigate and report to the Authority. After that a full further reply will be sent.

/Under

Under its terms of reference, the Board is concerned with complaints from the public or from persons appearing in programmes about the content of programmes transmitted or the preparation of programmes for transmission. It does not deal with advertising matters, with the business relations between programme companies and those appearing in programmes, or with matters which a complainant wishes to make the subject of legal action. In addition to considering specific complaints when a complainant remains dissatisfied after investigation and reply by the Authority's staff, the Board keeps under review regular reports of complaints investigated by the staff, and considers specific complaints referred to it by the Chairman of the Authority."

The establishment of an independent Broadcasting Complaints Commission is proposed in the new Broadcasting Bill. When this proposal is put into effect, revised guidance will be issued.

Programme transcripts and recordings

(i) Provision to the Authority

4. Under the terms of the programme contracts, the Authority can require a company to provide it with a script or recording of broadcast material at any time up to three months after the broadcast was made.

(ii) Provision to others

5. When a person or organisation can establish a reasonable claim that something derogatory has been said about them on Independent Local Radio, or that they are affected by alleged strictures, unfairness or inaccuracies in matter broadcast by an ILR station, and request a transcript or recording, the request should normally be met.

6. This does not imply the automatic and immediate despatch of transcripts or recordings to applicants where the company feels that it is more appropriate, as a first step, to attempt to satisfy them in some other way, for example by a letter of explanation or apology; or where it is felt necessary to ask them to establish that they have a proper interest in the matter at issue; or where there is clear legal advice that, in the circumstances of a particular request, it is inadvisable that a transcript or recording should be provided at that stage.

7. When requests are made on any of the grounds listed in paragraph 5, the Authority should be informed not only when the company concerned proposes to withhold a transcript or recording, but also whenever it agrees to provide one. Occasions can arise when withholding it on legal advice in an attempt to protect a company against the possibility of legal action clashes with the need to be fair to a complainant: on such occasions, discussion between the company and the Authority is necessary.