

REGULATING RELIGIOUS BROADCASTING

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The broadcasting world is currently undergoing a revolution. The new technologies of cable and, more importantly, satellite broadcasting have brought within reach an enormous potential expansion and diversity in broadcasting. The Broadcasting Act 1990 is the government's response to the challenge, creating a mostly new regulatory framework. Alongside technological advance there has been a growing concern with regulating programme quality, as the creation of the Broadcasting Standards Commission (placed by Pt. V of the Act on a statutory footing) bears witness. A minor, but not insignificant, place in these cross-currents of ferment is occupied by religious broadcasting. This article seeks to place the controls and duties relating to religious broadcasting under the new regime within the context of its history in the UK and to consider the extent to which the new legal and administrative controls achieve an acceptable balance between religious expression and control of standards.¹

1. RELIGIOUS BROADCASTING IN CONTEXT

The history of religious broadcasting in the United Kingdom is intimately connected with the approach adopted here to the regulation of broadcasting in general. From its inception in 1927² under the legendary Lord Reith, the BBC has devoted part of its programme coverage to religious broadcasting. This was seen as a part of the 'public service' ethic which dominated the corporation and gave rise to its peculiar constitutional status³ as an independent corporation⁴ acting under Royal Charter (as such the BBC remains outside the scope of the 1990 Act). The licence (granted by the Home Secretary under the Wireless Telegraphy Act 1949) to the BBC reflects this emphasis to this day. The later arrival in 1954 of commercial broadcasting overseen by a statutory corporation⁵ did little to alter the public service ethic, although it introduced an alternative outlet.

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1. On broadcasting, the law and censorship generally see: G. Robertson, *Freedom, the Individual and the Law*, (Penguin, 6th ed., 1989), ch. 6; C. Munro, *Television, Censorship and the Law*, (Saxon House, 1979); T. Gibbons, *Regulating the Media*, (Sweet and Maxwell, 1991).
2. The British Broadcasting Company was formed in 1922 and became the present Corporation in 1927 on the recommendation of a committee of inquiry: *Report of the Broadcasting Committee*, Cmnd. 2599 (1925).
3. See *British Broadcasting Corp. v John* [1965] Ch. 32. The text of the BBC's Charter and Licence may be found respectively in Cmnd. 8313 and Cmnd. 8233.
4. The sole attempt at government interference in religious broadcasting occurred when a direction was given to the BBC by the Home Secretary in 1927 following the General Strike under the terms of its licence. This direction required it not to broadcast matters of political, industrial or religious controversy; however, the direction was withdrawn in 1928: *Report of the Committee on the Future of Broadcasting*, Cmnd. 6783 (1977), para. 5.10.
5. The statutory history of the Independent Broadcasting Authority (under the name of the Independent Television Authority) begins with the Television Act 1954, runs through the Television Act 1964, the Independent Broadcasting Authority Act 1973 and Broadcasting Act 1981 and ends with the 1990 Act. Whereas the IBA was responsible for the *provision* of broadcasting (achieved in practice through the award of contracts to regional companies), the ITC under the 1990 Act is to *license* service provision in conventional television, cable and satellite TV. For discussion prior to the passing of the Act see: Alan E. Boyle, 'Do Broadcasters Need Free Speech?', in D. Kingsford-Smith and D. Oliver (eds.), *Economical with the Truth: The Law and Media in a Democratic Society*, (ESC, 1990).

The reason was that commercialism was reined in by requiring the independent companies to conform to the public service ethic⁶ by statutory 'must carry' provisions. Religion was not in fact one of the areas required by statute to be covered (unlike news⁷), but, as in the BBC, it was nevertheless regarded as part of public service broadcasting. The special status of religious broadcasting was, however, legally recognised in provisions designed to avoid so far as possible controversial or offensive treatment. Advertising by or on behalf of religious bodies or directed towards religious ends was prohibited.⁸ The newly created Independent Television Authority was required to give express approval to all programmes dealing with religious matters⁹ (suggesting more direct programming control than in other areas) and to establish an advisory committee representative of the main streams of religious thought in the UK¹⁰ to assist it for this purpose. The practical power of this committee was demonstrated by the requirement that the Authority was to secure compliance with its advice (from individual programme contractors) subject to any exceptions or modifications it considered necessary for complying with the Authority's other statutory duties. These provisions were successively re-enacted from the inception of the ITA until the abolition of its heir the IBA; however, as independent television matured, the statutory injunction to follow the advice of the advisory committee was omitted.¹¹ Although the 1990 Act fails to reproduce a statutory place for the religious advisory committee, it is unlikely to disappear in practice as a source of advice for the newly created ITC.

The history of such committees extends virtually as long as the BBC itself, although their constitution and legal basis has varied considerably over time.¹² The first such committee – 'The Sunday Committee' – was established in 1923 to advise on choice of religious broadcasters on radio. The Sunday Committee included representatives from the Church of England, the National Council for Evangelical Free Churches, the Presbyterian and the Roman Catholic Churches. Following the incorporation of the BBC in 1927, the Sunday Committee became the Central Religious Advisory Committee (CRAC), and such it has remained. Consultation with the public on broadcasting has been a requirement of the BBC's Charter since 1952¹³ and CRAC is one of a network of advisory committees which continues to operate beneath the umbrella of the General Advisory Council. When similar arrangements arose in independent television, rather than create a duplicate body to shadow the work of CRAC, the ITA looked to it to satisfy the statutory requirements. Thus CRAC became a uniquely powerful body in the position of giving advice on religious broadcasting to both corporations. Considering these arrangements from a more competitive age and with the luxury

6. See e.g. Television Act 1964, s. 1(4).

7. See e.g. Television Act 1964, s.3(1)(b).

8. Television Act 1954, Schedule 2, para. 6.

9. Television Act 1954, s.3(4).

10. *Ibid.*, s.8(2)(a).

11. See Television Act 1964, s.9(2), Independent Broadcasting Authority Act 1973, s.10(2), Broadcasting Act 1981, s.4(5)(a).

12. See generally: K. M. Wolfe, *The Churches and the British Broadcasting Corporation 1922-1956*, (SCM, 1984).

13. See Munro, *op. cit.*, p. 25.

of hindsight, they seem hardly likely to encourage a range of creative and innovative programmes vying with each other for religious viewers.¹⁴ In the case of independent television, a non-statutory Panel of Religious Advisers was also created to give day to day advice to programme planning on a closer and more practical basis.¹⁵ The Corporations also each have Directors of Religious Broadcasting on their staff. In addition, periodically attempts have been made to test a wider range of opinion about religious television by holding 'consultations' with religious groups and to assess viewer attitudes to religious broadcasting.¹⁶

The duty to consult advisory committees has not been replicated in the 1990 Act. Many of the parliamentary debates on the religious broadcasting provisions of the Act reflected the fear of evangelicals that the multi-faith approach adopted by CRAC had influenced the broadcasting corporations to censor an evangelical presentation of Christianity. Such groups were not unhappy to see CRAC banished from the legislation and pursued a campaign to ensure that the liberalising measures on religious broadcasting contained elsewhere in the Act were not subsequently sabotaged by the non-statutory influence of CRAC: in this, as we shall see, they were not wholly successful. Nevertheless, attempts to introduce into the Bill a statutory committee corresponding to CRAC (most notably through an unsuccessful amendment moved by the chairman of CRAC, the Bishop of Liverpool¹⁷) failed: opponents pointed to the absence of a similar body from the Cable and Broadcasting Act 1984, to the confusion over whether the committee was intended to act as a censor or merely as a sounding board on matters of policy, and to the fact that CRAC was appointed by the IBA and BBC in any event. The government's attitude was that the ITC and Radio Authority would not be prevented from consulting such a body if they so chose but should not be statutorily required to do so. In practice the new Commissions have made clear that they will consult CRAC, although technically its status has now reverted to that of an advisory committee to the BBC. While such consultation is legally permissible, the principle that statutory bodies should not fetter their discretion by acting under the dictation of another,¹⁸ should in practice ensure independence of mind on the part of the new corporations.

One of the significant roles of the advisory committee has been in advising upon the proper place and limits of acceptable religious broadcasting; this guidance has found its way into the programme codes and producers' handbooks used by broadcasters. The public pronouncements of CRAC demonstrate a clear shift in views on this issue. CRAC gave evidence to the Pilkington

14. CRAC does not, though, meet both corporations simultaneously: consecutive meetings are held on the same occasion with each (see the account by its Chairman, the Bishop of Liverpool, H. L. Debs., vol. 521, cols. 46ff. (9 July 1990)). A further example of the public service attitude to religious broadcasting lies in the practice (abandoned only comparatively recently amid protests from CRAC) of a 'closed period' on Sundays when the two main channels would programme their religious programmes opposite each other. This practice was designed to guarantee a minimum audience by restricting other viewer choices. Religion is not the only area to have benefited from such arrangements. Similar practices have been adopted over current affairs.

15. Independent Television Authority, *Religion in Television*, (1964), p. 7; Gibbons, op. cit., p. 177.

16. see e.g. M. Svennevig, I. Haldane, S. Spiers and B. Gunter *Godwatching: Viewers, Religion and Television* (IBA, 1988).

17. House of Lords Committee stage, H. L. Debs., vol. 521, cols. 46-74 (9 July 1990).

18. *Ellis v Dubrowski* [1921] 3 K.B. 621; *Lavender and Sons v Minister of Housing and Local Government* [1970] 1 W.L.R. 1231.

Committee¹⁹ in 1960 that the purpose of religious broadcasting was: 'to reflect the worship, thought and action of those Churches that represent the mainstream of Christian tradition in Britain, to stress what is most relevant in the Christian faith for the modern world and to try to reach those outside the Churches.' The exclusive emphasis on Christianity and the *apologetic* and *evangelical* nature of the task are transparent. However, by 1977 these certainties had given way to a rationale that reflected cultural change through its emphasis on a multi-faith approach; CRAC's composition had similarly been amended to include representatives of other religions. CRAC told the Annan Committee²⁰ that religious broadcasting should:

i seek to present and reflect the worship, thought and actions of the principal religious traditions represented in Britain, recognising that these traditions are mainly but not exclusively Christian;

ii seek to present to viewers and listeners those beliefs, ideas, issues and experiences in the contemporary world which are related to a religious interpretation or dimension of life;

iii seek also to meet the religious interests, concerns and needs of those on the fringe of, or outside the organised life of, the Churches.

Although the latter approach does not forbid attempting to persuade viewers to come to faith, it is no longer overtly stated as an objective. As we shall see below it is religious broadcasting in this mould which has achieved ascendancy in the UK through being enshrined in the ITC Code of Practice made under the 1990 Act.

It is interesting at this point to reflect on the different trajectory which treatment of religion has taken in education and in broadcasting. Whereas the privileged status of religion in education law in the UK stems in part from the history of religious groups' involvement in school provision, no such equivalent existed in broadcasting. Accordingly religion is very much tolerated in British broadcasting. Apart perhaps from the early history of the BBC,²¹ there has been no comparable experiment at establishing a broadcasting service with a distinctively religious ethos similar to church schools.²² The 1990 Act erects considerable hurdles in the way of such an approach: it assumes that religious broadcasting will remain a guest in a largely secular host environment. In addition to their historical position as service providers, religious groups receive recognition in education law for *educational* reasons. This is the professed rationale for the dominance of Christianity in the provisions dealing with religious education in the Education Reform Act 1988.²³ Arguably the same rationale underlies the treatment of religious broadcasting as an aspect of public service broadcasting, although in this case Christianity receives no statutory recognition.²⁴

19. Cmnd. 1753 (1962).

20. Cmnd. 6573 (1977); for discussion see Munro and Sullivan, (1977) 40 M.L.R. 460.

21. As late as 1973 the General Advisory Council of the BBC claimed that the Corporation was affected by a Christian ethos not only in the predominance of Christianity in its religious broadcasting but also in relation to its non-religious output: *Tastes and Standards in BBC Programmes: A Study by the BBC for its General Advisory Council* (BBC, 1973), p. 4.

22. But see the text to note 45 below.

23. Education Reform Act 1988, ss. 7(1) and 84(2). See further J. D. C. Harte, 'The Religious Dimension of the Education Reform Act 1988', (1989) 1 Ecc. L. J. (5) 32.

24. And see note 41 below.

A variation on the public service ideal, which sees broadcasting as a community resource which should be accessible to those who wish to use it to make a point in a more partisan way than the customary neutrality of broadcasters in the UK allows²⁵, has made no headway in religious (and little in political) broadcasting. This is because of the stringent requirements of editorial neutrality operative in those areas. In the case of the treatment of politics the longstanding ban on direct expressions of editorial opinion by the broadcasters,²⁶ prohibitions on political advertising,²⁷ and the requirements of strict impartiality in coverage of political issues²⁸ are, however, offset by arrangements enabling partisan access for the purpose of party political broadcasts.²⁹ Religious broadcasting on the other hand labours under similar impediments but without comparable provisions allowing partisan access to air time.

In some respects the regulatory regime has been progressively softened with successive developments broadening the range of broadcast services. The launching of BBC 2, the expansion of BBC local radio stations, the introduction of commercial radio, the licensing of cable TV, the introduction of Channel 4, then of satellite TV, Radio 5 and in not the too distant prospect Channel 5 are the milestones along the way. This profusion of choice has been accompanied by selective abandonment of the public service ideal in favour of consumer and advertiser oriented market responsiveness. However, as we shall see, it is arguable that the treatment of religious broadcasting runs directly counter to some of these trends, although conforming in other respects: strenuous attempts have been made to prevent the kind of religious broadcasting that it is feared the public might most want, largely to avert the introduction in the UK of American-style tele-evangelists.

The United States by contrast has had market-dominated broadcasting from the start and, as a result, a very different approach to religious broadcasting. Although attempts were made by the Federal Communications Commission to regulate US broadcasting companies to include something similar to a public service broadcasting requirement including religion,³⁰ this did not prevent other forms of religious broadcasting flourishing. They were 'market-orientated' to the extent that they were facilitated by the simple expedient of buying time on the air. Religious broadcasting in this mode tended to be more evangelistic (Billy Graham and Oral Roberts were early pioneers). However, later developments transformed the genre into what has been called 'the electronic church': a network of viewers in touch with the broadcasters by telephone, mailing lists, support

25. As epitomised in 'Punters' on BBC radio, 'Comment' on Channel 4 and 'Brass Tracks' on BBC2; and see Gibbons, *op. cit.*, pp. 117-120. Italian law has recognised a right of access to television broadcasting for religious groups: E. Barendt, 'The Influence of German and Italian Constitutional Courts on their National Broadcasting Systems', [1991] P. L. 93, 109.

26. Broadcasting Act 1990, s.6(4).

27. Broadcasting Act 1990, s.8(2).

28. Broadcasting Act 1990, ss.6(1) (c), (3), (5) and (6).

29. Broadcasting Act 1990, s.36.

30. The Federal Communications Commission used its rule-making power to create a requirement for public service programmes through its fairness doctrine, which was initially upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367 (1969). However, later Supreme Court decisions have retrenched from this position resulting in the repeal by the FCC of the fairness doctrine; see Boyle, *op. cit.*, p.64. On the consequences of the FCC's policies for religious broadcasting see: Lynda Jo Lacey, 'The Electric Church: An FCC-'Established' Institution?', (1979) 31 *Federal Communications Law Journal* 235-275.

groups, fund raising and subscription, prayer and special events.³¹ Not content with leasing time on secular channels, American religious groups have bought satellites and channels of their own. Types of religious programme mushroomed also: from quizzes, soap operas and talk shows to news programmes with a religious slant. All this became possible because of a largely non-interventionist regulatory regime. However, as is well known, it led by the 1980's to increasing public concern over the financial and political influence of some tele-evangelists³² and to public scandal involving some of the most prominent, the Bakkers and Jimmy Swaggart. This experience of free market religious broadcasting did little to encourage a similar experiment in the United Kingdom as part of the general process of broadcasting deregulation. Consequently, the religious broadcasting provisions of the 1990 Act were passed against a frequently explicit cross-party parliamentary consensus against tele-evangelists.

By the time the Bill completed its parliamentary passage the Minister of State at the Home Office, David Mellor, was able to claim that it was: 'carefully drawn to permit the expansion of responsible Christian Broadcasting while at the same time preventing irresponsible or exploitative broadcasting.'³³ This analysis rested in part on concessions the government had made (largely to evangelical lobbyists) on access to broadcasting and partly to controls on programme content: each will be considered in turn.

2. ACCESS TO CHANNELS AND OWNERSHIP

Access to broadcasting depends, as the American experience demonstrates, on two alternatives: religious use of secular channels or ownership of channels specifically by religious groups. Although religious broadcasting has been a familiar part of the regular output of both the BBC and independent broadcasters in the UK, this has not hitherto been because it was required by statute. The Television Act 1954 omitted such a requirement; likewise, when Channel 4 was established³⁴ and the regulation of cable TV introduced, there were no 'must carry' provisions relating to religion. Nevertheless, in practice any successful franchise bid for regional independent television would inevitably have included religious broadcasting. With the introduction of a system of franchising based overtly on the principle of the highest cash bid,³⁵ the government came under pressure to include more overt guarantees of programme quality on the part of potential broadcasters bidding for national TV franchises.³⁶ Although the published Bill did not contain any requirement for religious programming on Channels 3 and 5, the government later introduced one by amendment at the Report stage in the Commons.³⁷ The resulting provision³⁸ states that in

31. For general accounts see: S. Hoover, *Mass Media Religion: the Social Sources of the Electronic Church*, (Sage, 1988), chs. 3 and 4; Ben Armstrong, *The Electric Church*, (Thomas Nelson, 1979); Jeffrey K. Hadden and Charles E. Swann, *Prime Time Preachers*, (Mass.: Addison Wesley, 1981).

32. See Robert S. Alley, 'The Television Church' in B. G. Rose (ed.) *TV Genres*, (Greenwood, 1985).

33. Commons' consideration of Lords' amendments: H. C. Debs., vol. 178, col. 601 (25 July 1990).

34. See Broadcasting Act 1981, ss. 10-13.

35. See 1990 Act, s.17.

36. The ITC considered franchises for Channel 3 in October 1991.

37. H. C. Debs., vol 172, col. 291 (8 May 1990); and see the Minister's remarks in Standing Committee F, H. C. Debs., 6 February 1990, col. 643.

38. S.16(2)(e).

considering bids for franchises for Channel 3 the ITC must be satisfied that the application fulfils the requirement that 'a sufficient amount of time is given in the programmes included in the service to religious programmes. . .'. No such obligation appears in the provisions governing Channel 4,³⁹ although the requirements are extended in anticipation to Channel 5 licences, subject to variation in the case of licences being awarded for specific days only.⁴⁰

However, attempts in the Lords to include in the Act a requirement for independent television to carry specifically Christian religious broadcasts were unsuccessful.⁴¹ Their Lordships were unprepared to write an overt statement of religious discrimination into the Act and the government argued that in practice the same result would be achieved through the guidelines on religious broadcasting to be included in the ITC's programme code.

On the other method of access to outlets for religious broadcasting (ownership of channels) the Bill underwent even more radical transformation during its parliamentary passage. When it was introduced, ownership by religious bodies was prohibited, except in the case of independent radio. However, under pressure, the government conceded also the possibility of such ownership of cable and non-domestic satellite TV stations.⁴² Ownership of channels by religious groups is a familiar phenomenon in the United States but, although not expressly forbidden until the 1990 Act, little was heard of it until recently in the UK, partly because of domination of broadcasting by commercial interests⁴³ and partly because restrictions on editorial conduct have prevented using an outlet to present the views of the licence holder on religious issues in an unduly prominent way. However, one significant deviation from this pattern deserves mention – the realm of cable broadcasting. Following the recommendations of the Hunt Committee⁴⁴, regulation of the burgeoning media of cable broadcasting was introduced in the Cable and Broadcasting Act 1984.⁴⁵ The regime of licensing for cable amounted in many respects to minimal regulation. Especially important were the weak public service requirements for licence holders. Although section 7 of the 1984 Act contained a list of programme types which would be taken into account in considering licence applications, religious programmes were not included. However, the Act contained no prohibition on religious groups owning a cable channel, holding a licence and using the channel to propagate its own views. One such channel (Vision Channel based in Swindon) succeeded in obtaining a licence and began broadcasting in the Swindon area for two hours a week on Sunday

39. S.25.

40. Ss.29 and 28(3). Presumably this would allow the ITC to relieve the 'must carry' requirement for religious broadcasts in the case of the holder of a weekday only licence.

41. The Earl of Halsbury introduced an amendment at the Committee stage that 'the quality hurdle' should include a requirement for religious broadcasting which had 'respect to the immemorial Christian traditions in Britain': H. L. Debs., vol. 521, col. 958. At the Report stage he introduced an amendment that religious programmes should 'maintain the centrality of the Christian faith, while still allowing opportunities for the views of other religious groups to be expressed': H. L. Debs., vol. 522, col. 244 ff. (9 October 1990). Both amendments were withdrawn.

42. See Standing Committee F, H. C. Debs., 25 January 1990, cols. 322-324; amendments were introduced at the Report stage: H. C. Debs., vol. 172, col. 158 (8 May 1990).

43. Although a group including evangelical Christians did bid for a regional television franchise in 1980.

44. *Report of the Inquiry into Cable Expansion and Broadcasting*, Cmnd. 8679 (1982).

45. See C. Veljanovski, 'Cable Television: Agency Franchising and Economics' in R. Baldwin and C. McCrudden, *Regulation and Public Law*, (Weidenfeld and Nicolson, 1987).

morning in 1986. The subsequent incorporation of the cable licensing system under the remit of the ITC and the general rules on religious ownership under the 1990 Act threatened the continued existence of this rare species, which had become for many parliamentarians the benchmark of acceptable domestic Christian broadcasting.

The 1990 Act imposes limitations on the ownership of broadcasting companies by religious groups, which operate by debarring companies under the control of religious groups from holding a national TV licence to run a broadcast service. This is a direct attempt to counter the United States trend towards ownership of entire channels by church groups. Although the government presented the restriction as necessary to prevent channels falling into the hands of cults,⁴⁶ it also limits possible outlets for Christian broadcasting by restricting religious broadcasting on terrestrial television to secular owned and operated stations. In this medium, religious broadcasters will therefore be unable to break away from the programming constraints dictated by audience ratings performance; in short the prime early and mid-evening programme slots with mass audiences are likely to remain closed to religious programmes, because such programmes do not have popular appeal among the socio-economic groups advertisers are keenest to reach.⁴⁷

Schedule 2, paragraph 2 of the Act prohibits from holding licences bodies 'whose objects are wholly or mainly of a religious nature' and a wide variety of holding, subsidiary and associated companies and individuals involved in such companies. However, the ITC and the Radio Authority are able to waive the disqualification if they are satisfied that it is appropriate. The waiver of the disqualification lasts only as long as they remain so satisfied. This somewhat circuitous route for the licensing of religious bodies appears to have been taken in an attempt to make the discretion to grant a licence more difficult to challenge. It certainly makes the position of religious licence holders more precarious than others, since by declaring that they are no longer 'satisfied' that it is appropriate for the licence to be held, the ITC or the Radio Authority may summarily revive the disqualification on holding the licence without the necessity of taking formal steps to invoke penalties for breach of licence conditions. The large discretion conferred by these provisions on the regulatory bodies is only slightly tempered by the duty imposed on each of them to publish guidelines for licence applicants of the principles which will be applied in assessing 'appropriateness'.⁴⁸

Guidelines have now been issued by both regulatory bodies.⁴⁹ Those issued by the ITC stress the need for the ITC to be satisfied in accordance with s.3(3) of the Act that the applicant is a 'fit and proper person' to hold a licence and that the applicant must comply with s.6(1) (on which see below). It continues:

46. See e.g. the comments of Earl Ferrers at the House of Lords' Committee stage: H. L. Debs., vol. 521, col. 70 (9 July 1990).

47. It might be thought that non-commercial broadcasting would be free to break away from this pattern; however the BBC has been equally pre-occupied with capturing a market share of viewers, if for the slightly different reason that it needs mass audiences in order to justify continuing public funding. See Veljanovski, *op. cit.*, pp. 277-278.

48. Sched. 2, Part 2, para. 2(3).

49. *ITC Religious Ownership Guidelines; Guidance To Religious Bodies of Persons (As Defined in Part II of Schedule 2 of the Broadcasting Act 1990) Who Wish to Apply To Hold A Radio Authority Licence Which Is Not a National Licence.*

In addition, the ITC will need to be satisfied that the aims and practices of the applicant, or of the body of which the applicant is an officer, are consistent with adherence to the ITC codes concerning programmes, advertising and sponsorship. Without prejudice to the generality of that requirement, the ITC will not consider it appropriate to grant a licence . . . if any of the bodies in question practises or advocates illegal behaviour or has rites or other forms of collective observance which are not normally directly accessible to members of the general public.

These guidelines are consistent with the desire to prevent cults successfully obtaining control of licensed services. The guidelines issued by the Radio Authority are similar but less detailed and omit express mention of the 'fit and proper person' test and of the statutory requirements for licensed services, although presumably the Authority will have regard to these in any event in considering licence applications. As the guidelines make clear, even where religious bodies are enabled to hold licences, their freedom to use their channels for religious purposes will be subject to other restrictions arising from controls on programme content,⁵⁰ on advertising and on fund raising. The latter are particularly significant because in practice religious stations are likely to be heavily dependent on voluntary donations for continuing funding⁵¹.

The United States' experience of religious broadcasting has shown that, in the absence of commercial viability, the ability to appeal for donations is critical,⁵² although this also carries with it dangers of abuse.⁵³ However, over the air fund raising takes place in American broadcasting in a cultural climate more attuned to such practices: appeals form a regular part of public (non-commercial) broadcasting on matters of non-religious interest also. In Britain certain categories of advertisement were prohibited from the inception of independent broadcasting and religion was included. Hence the Television Act 1954 prohibited advertisements: 'by or on behalf of any body the objects whereof are wholly or mainly of a religious . . . nature . . . or directed to a religious end'.⁵⁴ The 1990 Act removes this restriction by allowing for the first time religious advertising on television and independent radio.

The move aroused some controversy, with opponents raising the prospect of tasteless or manipulative advertising following. The Bishop of Liverpool moved amendments in the Lords' Committee stage to restrict religious advertising to 'spot announcements' of events and to prevent the presentation of any matter of faith or dogma.⁵⁵ These were withdrawn in the face of the government's insistence that the substance of religious advertising was better regulated by Code

50. Michael Alison, M.P. (and Second Church Commissioner) introduced an unsuccessful amendment designed to free designated Christian broadcasters from 'no editorialising' restraints in exchange for other limitations including that they would carry predominantly European material and abstain from broadcasting appeals for donations: H. C. Debs., vol. 172, cols. 154ff. (8 May 1990)

51. Religious broadcasters are not the only group singled out for licence disqualifications; prohibitions also operate against non-EC Nationals: Sched. 2, Part 2, para. 1. These were widely believed to have been introduced to prevent further market domination by Murdoch-owned companies but they will have the incidental effect of preventing United States Christian broadcasters such as the Christian Broadcasting Corporation from holding licences. The provisions would not appear, however, to prevent companies whose shares were owned on trust by European trustees for American beneficiaries (and in effect financial backers) from holding licences. This expedient is under consideration in at least one instance known to the author.

52. See notes 31 and 32 above.

53. See Hoover, *op. cit.*, pp. 61-62.

54. Sched. 2, para. 6. (The prohibition was re-enacted in the Independent Broadcasting Authority Act 1973 and the Broadcasting Act 1981.)

55. H. L. Debs., vol. 521, cols. 401 ff. (11 July 1990).

of Practice than by statutory provisions.⁵⁶ Both the ITC⁵⁷ and the Radio Authority⁵⁸ are required to draw up and publish codes governing standards and practices in advertising and the sponsorship of programmes. In addition, the more general duty to prepare programme codes refers specifically to the inclusion in them 'as to the rules to be observed with respect to the inclusion in such programmes of appeals for donations'.⁵⁹

The programme code subsequently adopted by the ITC prohibits licensees from broadcasting appeals for funds to make programmes.⁶⁰ A further provision governs appeals for donations by religious charities specifically: these are only permitted where it can be shown that the funds so raised will be applied for 'disadvantaged third parties and that the conveying of such benefit will not be associated with any other objective (e.g. proselytizing).' The Radio Authority code likewise prevents licence holders appealing for funds on their own behalf and undue prominence being given to any particular charity.⁶¹ However, it does permit the deduction from funds raised by the licence holder of part of the proceeds to meet expenses or to meet programming costs provided this is made clear.⁶² The result is that although the intention to liberalise religious advertising is carried through some way into the codes, it still remains fairly closely prescribed (and subject additionally to the general rules and licence conditions governing advertisements).

There is an important connection at this point between fund raising rules and the provision of religious programming in general. The United States' phenomenon of the 'electronic church' is effectively prevented by these rules. Denied such sources of funding, the development of choice of religious programmes after the 1990 Act may well follow what are fairly conventional and familiar routes. It is to the legal regime governing religious programme content that we now turn.

3. THE ITC AND RELIGIOUS BROADCASTING

The ITC is established⁶³ as an independent statutory corporation with responsibility for regulating the provision of commercial television programmes and local delivery services. It is to achieve the objectives specified in the Act through a combination of its power as a licensing authority and through exhortation in codes, which it is required to produce. A statutory Radio Authority is created to fulfil a similar role in relation to independent radio.⁶⁴ Three distinct

56. *Ibid.*, cols. 408-409 (Earl Ferrers).

57. See section 9.

58. S.93.

59. Ss. 7(1)(b) and 91(1)(b) respectively.

60. Section 9.1.

61. Section 6.2.

62. Section 6.3. However it is submitted that this is in a different category to appealing for funds to make *other* programmes as is commonly the case in the United States.

63. 1990 Act, sections 1 and 2 and Schedule 1.

64. Ss. 83 and 84.

sources of norms affect religious broadcasting – the Act itself and codes and licence conditions drawn up by the ITC and the Radio Authority on statutory authority. The relationship between them is complex and in order to understand it it is first necessary to explain the statutory basis for each. We shall then consider the substance of the codes and licence conditions as they apply to programme content.

Although the powers granted to the ITC and the Radio Authority are wide, they are nevertheless constrained by several factors. At some places in the Act general duties are imposed on the ITC and the Authority – clearly these have the effect of limiting the exercise of otherwise wide discretionary powers. The over-riding duty of the ITC under the Act is by s.2(2) to discharge their functions as regards the licensing of television programme services: ‘in the manner which they consider is best calculated to ensure the provision of such services which (taken as a whole) are of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests.’⁶⁵

This subsection creates an over-riding duty in favour of quality and variety against which the execution of all the other functions of the ITC is to be measured. This accords with the general philosophy stated in the Government’s White Paper *Broadcasting in the ‘90’s: Competition, Choice and Quality*.⁶⁶ All the other provisions we are concerned with must be interpreted against that duty, which requires the ITC to adopt policies which abstain from interfering with programming which will add a new dimension to the services available to viewers, unless that interference is clearly required by another provision in the Act. In other words the ITC must start with a presumption that programmes which add to the diversity of television are to be permitted but the presumption may only be rebutted on the basis of express statutory authority.

The words ‘which they consider’ do not, however, create an open ended discretion. The courts will, under the normal principles of judicial review, require that the ITC does not behave with illegality, irrationality or procedural impropriety.⁶⁷ Even apparently widely worded discretionary powers are not unfettered and will be construed subject to these limits.⁶⁸ Licensing powers and procedures in particular will attract protection at common law to ensure that the ITC and the Authority stay strictly within the statutory regime, do not abuse their powers, do not use them otherwise than for the purpose for which they were granted, and behave with fairness towards proposed licensees.

65. The equivalent provision for the Radio Authority (s.85) requires it to promote diversity of national services including at least one channel comprising mainly spoken material and another wholly or mainly of music ‘which in the opinion of the Authority, is not pop music’. There is an analogy in the effect of these subsections with the Race Relations Act 1976, s. 71 which imposes a general duty on local authorities in the discharge of their other functions to promote good race relations and equality of opportunity; this duty has been given a wide but not unlimited interpretation by the courts: see *Wheeler v Leicester City Council* [1985] A.C. 1054 and *R v London Borough of Lewisham ex p. Shell* [1988] 1 All E.R. 938.

66. Cm. 517, November 1988.

67. *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

68. *Padfield v MAFF* [1968] A.C. 997.

Section 4 of the Act contains general provisions governing licences issued by the ITC.⁶⁹ and gives a wide power to impose licence conditions. However, the inclusion and enforcement by the ITC of any particular condition must be subject to the general and over-riding duty in section 2. The application of section 4 to the draft licence conditions for Channel 3 services produced by the ITC is discussed below, as are specific licence disqualifications affecting religious bodies.

The powers of exhortation of the ITC are scattered throughout sections 6-9 of the Act. Religious broadcasting is treated explicitly in section 6:

s.6(1) The Commission shall do all they can to secure that every licensed service complies with the following requirements, namely –
 (d) that due responsibility is exercised with respect to the content of any of its programmes which are religious programmes, and that in particular any such programmes do not involve –
 (i) any improper exploitation of any susceptibilities of those watching the programmes, or
 (ii) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

There are also various provisions requiring the ITC to make codes of differing kinds. Under section 7 the Commission is to draw up, publish and periodically revise a 'code giving guidance' on 'rules to be observed' with respect to the showing of violence and appeals for donations in programmes included in licensed services together with such other matters concerning standards and practice for such programmes as the Commission may consider suitable for inclusion in the code.' The ITC are to do 'all they can to secure that the provisions of the code are observed in the provision of licensed services'.⁷⁰

The status of this code is problematic, but it is apparent from the terminology used both in section 7 and in other provisions relating to codes⁷¹ that Parliament did not intend that all the codes promulgated by the ITC would either by legally binding or enforceable in the same way. Thus, the codes made under sections 6(3) and 7 are 'codes giving guidance'; but both these sections also refer to 'rules to be observed' on various matters (none of which is applicable here). However, in section 7(1)(c) (the general provision cited above) the code is not concerned with rules but rather with '*other matters concerning standards and practice*'. This suggests that it was not intended that the parts of the code made on

69. In this context the following are relevant:

(1) A licence may include

(a) such conditions as appear to the Commission to be appropriate having regard to any duties which are or may be imposed on them, or on the licence holder, by or under this Act;

... (d) conditions providing for such incidental and supplemental matters as appear to the Commission to be appropriate.

(2) A licence may in particular include conditions requiring the licence holder –

(a) to comply with any direction given by the Commission as to such matters as are specified in the licence or are of a description so specified; or

(b) (except to the extent that the commission consent to his doing or not doing them) not to do or to do such things as are specified in the licence or are of a description so specified.

(6) Nothing in this Act which authorises or requires the inclusion in a licence of conditions relating to any particular matter or having effect for any particular purpose shall be taken as derogating from the generality of subsection(1).

70. S.7 (1).

71. Notably S.6(3), which deals with a code on political impartiality, and S.9, which deals with advertising.

the authority of s.7(1)(c) (which is in fact the case with regard to religious programmes) should create binding rules whose breach could lead directly to adverse sanctions at the hands of the ITC. Since the ITC programme code and licence conditions appear to suggest otherwise it is worth rehearsing the reasons which support this conclusion.

First, codes 'giving guidance' cannot by definition do more than guide (even where the guidance is as to 'rules to be observed'). In other areas in which legislation provides for codes of guidance the courts have taken the view that guidance means just that, and does not create an obligation to follow the code.⁷² Secondly, unlike rules, 'standards and practices' have a more elusive and variable quality – they represent aspirations and targets rather than rigid minimum criteria which must be fulfilled. Thirdly, no specific power of enforcement is given for failure to follow the code made under section 7. There is a marked contrast here with the provisions relating to the programme code under the legislation which the 1990 Act replaces – the Broadcasting Act 1981, s. 5. Under the 1981 Act the equivalent code could be enforced by specific *directions* given by the IBA. The provisions in the 1990 Act omit this power, except in the sole case of the advertising code under s.9(7). The clear implication is that Parliament intended codes made under s.7 to have a different status to those under the 1981 Act or indeed the advertising code. This is understandable given that the purpose of the 1990 Act (expressed in the White Paper) was to create a 'lighter' regulatory regime.

The text of section 6(1)(d) has been quoted above. The section is a deliberate attempt to balance freedom of religious expression on the one hand, and protection of religious feelings and susceptibilities on the other. The sub-section was introduced by the government in the House of Lords⁷³ to honour a promise made at the report stage⁷⁴ that religious broadcasters would be set free from the constraints of a ban on editorial comment. Hence Section 6 establishes quite separate specific criteria by which to judge the acceptability of religious programmes, which the ITC is to do all that it can to ensure are followed. One would therefore expect that the obligation on the ITC would in turn be passed on by a licence condition requiring the licensee to adhere to the same test and this is in fact the case.⁷⁵

The ITC is required to distinguish between programmes which are a responsible treatment of religious matters and those which are not (the subsection talks of 'due responsibility'). The Minister of State indicated the government's thinking on the interpretation of s.6(1)(d) as regards direct persuasion to faith when in the Third Reading Debate he said: 'There are also unscrupulous television evangelists in the United States who we do not want to see here. Certainly people such as Billy Graham are responsible, but others have besmirched the principles of religion. One must consider the exploitive power of the media when coupled to unscrupulous messages. We are striking a balance which will permit the former, responsible people, while keeping out the latter.'⁷⁶ As this passage

72. Cf. *De Falco v Crawley Borough Council* [1980] Q.B. 460.

73. H. L. Debs., vol. 521, cols. 69 and 391 (11 July 1990).

74. H. C. Debs., vol. 172, col. 158 (8 May 1990).

75. Channel 3 licence condition 7(1)(d).

76. H. C. Debs., vol. 172, col. 416 (10 May 1990).

demonstrates, the intention was not by section 6(1)(d) to prohibit, or to allow or require the ITC to prohibit, responsible television evangelism: promotion of or recruitment to a particular religious faith is not prohibited by (or mentioned at all in) the subsection. However, as we shall see, the ITC appears to have interpreted its powers quite differently in framing its programme code and licence conditions.

The subsection does not prevent expression of religious disagreement or controversy (for instances claims of the truth or uniqueness of one religion or the misguidedness of another), provided that the claims are made with 'due responsibility' and do not amount to 'abusive treatment' of another religion. The purpose of the subsection is not to prevent religious debate or to require broadcasters to adopt a position of religious neutrality or balance⁷⁷ – rather it is to prevent offence. Moreover, the standard adopted as to whether a particular approach is 'abusive' is not stated to be the subjective attitude of an adherent of the religious faith attacked, who may feel abused or offended by the claim that another religion is uniquely true. It is to be presumed that the ITC is to take an objective view as to whether a particular treatment or approach is 'abusive'.

It is improper exploitation of the *susceptibilities* of those watching which is prohibited by s.6(1)(d)(i). This does not prohibit direct preaching on issues which many people are disturbed by (for instance the Christian doctrines of sin, forgiveness, death and judgement) provided they are sufficiently generally controversial to not be confined to a 'susceptibility'.

4. THE ITC PROGRAMME CODE AND LICENCE CONDITIONS

The ITC has now published a programme code, which covers, inter alia, the inclusion of religious programmes in licensed services. The Code is an example of the increasing tendency in modern legislation to resort to what has been described as 'quasi-legislation' to ink in principles at a later date without the rigidity of resorting to delegated legislation. The use of quasi-legislation has attracted academic criticism because it circumvents the parliamentary process and may involve the creation of important rules of discretion by administrative bodies acting in private.⁷⁸ The provisions of the ITC programme code touching religious broadcasting demonstrate the pitfalls particularly clearly, since, arguably they have been drafted in such a way that they contradict the assumptions behind section 6(1)(d).⁷⁹

The attitude of the courts to statutory guidance or codes is clearly that they are subordinate to the statute authorising their creation. It is *ultra vires* a public body for it to attempt to use a statutory power in effect to overrule the clear policy expressed in an Act of Parliament.⁸⁰ The reason for this is plain: it is both objectionable and undemocratic for legislation to be re-written in this way, rather than through the proper process of parliamentary debate and amendment.

77. Contrast for instance the quite detailed provisions on political balance in subsections 6(3)-(6).

78. R. Baldwin and J. Houghton, 'Circular Arguments: the Status and Legitimacy of Administrative Rules', [1986] P. L. 239; G. Granz, *Quasi-Legislation* (London: Sweet and Maxwell, 1987), esp. chs. 1-3.

79. Even before the Bill was given the Royal Assent peers and M.P.s were expressing concern that the then draft programme code had been drafted so as to undermine the statutory scheme: H. L. Debs., vol. 522, col. 1215 (Earl of Halsbury), cols. 1218-1219 (Lord Ashbourne) and cols. 1221-1222 where Viscount Buckmaster complained of '... a handful of religious advisers trying to overrule the clear wishes of the Government and of both Houses of Parliament with regard to religious broadcasting as contained in the Bill.'; see also H. C. Debs., vol. 178, cols. 596-597 (25 October 1990).

80. See *Laker Airways v Dept. of Trade* [1977] A.C. 234.

It would be objectionable for a Minister of the Crown to do so,⁸¹ it is more so when it is done by a body like the ITC which is accountable neither to the legislature nor to the electorate.⁸²

In order to understand how the draft code proposed by the ITC offends these principles it is necessary to consider the differences between it and what is required by s.6(1)(d). Some provisions of the code could be justified on interpretation of what constitutes 'due responsibility' in religious broadcasting; for instance: the requirement that religious bodies featured in programmes should be clearly identified⁸³ and that representations of views must be fair and accurate.⁸⁴ The code also prevents the making of undemonstrable claims of miraculous properties relating to a living individual.⁸⁵

However, in particular para. 10.7 goes wider than the subsection: 'Although religious programmes may quite properly be used to propound, propagate and proclaim religious belief, religious programmes on non-specialist channels may not be designed for the purpose of recruiting viewers to any particular religious faith or denomination. Nor must programmes or follow-up material be used to denigrate the beliefs of other people.'

The ban on programmes designed for 'recruitment' to faith – for instance, Christian evangelism – would prevent the televising of a sermon aimed specifically at viewers with the opportunity for them to respond by a prayer of dedication or commitment at the conclusion. This prohibition could only be consistent with s.6(1)(d) if all such approaches to 'recruitment' could be said to be irresponsible, improperly exploitive or abusive of other religions. Since it can be argued (to put the argument at its lowest) that at least some direct evangelism is capable of being responsible, non-exploitive and non-abusive, the ITC must have misinterpreted s.6(1)(d) in framing the code to include a total prohibition. This opinion is in accordance with the Minister of State's understanding of the position, when he said in the Third Reading Debate on the Bill⁸⁶ that Billy Graham (who uses exactly this format) was 'responsible'. If direct evangelism is to be regulated, then s.6(1)(d) requires the ITC to differentiate between that which is responsible etc. and that which is not. If Parliament had intended an indiscriminate outright ban on recruitment it could easily have included one in the Act in s.6(1)(d), but it did not.

Furthermore the Code weakens the language of the Act as regards the treatment of other religious views. Section 6(1)(d) prohibits 'abusive' treatment, but in the Code this has been diluted to a requirement not to 'denigrate' other religious views. Responsible and serious condemnation of the beliefs of Satanists, for instance, might well denigrate them by portraying them in a negative light and pronouncing them mistaken, but without being abusive. The code prevents broadcasters from straightforwardly stating their opinion that other religious

81. As was the case in *Laker*.

82. The Minister of State refused to intervene in the making of the ITC code but referred instead to the availability of judicial review to keep the Commission within its statutory jurisdiction: H. C. Debs., vol. 178, cols. 602-603 (25 October 1990).

83. para. 10.3.

84. H. C. Debs., vol. 172, col. 158 (8 May 1990).

85. The ITC has already taken informal action relying on the religious programmes provisions in the programme code in one instance: the broadcast on a satellite television channel of a programme involving Morris Cerrulo of World Evangelism featuring healing (see *The Times*, 8 August 1991; *Daily Telegraph*, 8 August 1991). Programmes were withdrawn by the channel following receipt of a letter from the ITC drawing attention to possible infringements of the programme code. As this instance demonstrates at the very least the imposition of the code is likely to mean that programmes prepared initially for viewing by American audiences will require considerable editing before screening for British audiences.

86. see note 76 above.

views are misguided. There is no indication that this is what Parliament intended and it seems at odds with the professed intention to relax the 'no editorialising' rule.

The purported legal basis for the inclusion of provisions relating to religious programmes in section 10 of the code is unclear but there are two possibilities. Either the ITC has acted relying on its duty under s.6(1)(d)⁸⁷ or upon the general power to include other matters in the code under s.7(1)(c) of the Act.

However, it should be noted that neither section 6 nor section 7 of the Act makes any reference at all to the inclusion of provisions relating to religious programmes in the code. This is in marked contrast to the treatment of other topics, which are explicitly mentioned in those sections: political impartiality,⁸⁸ violence⁸⁹ and donations.⁹⁰ One possible conclusion is that s.6(1)(d) was meant to be sufficient of itself. The further difficulty with relying on s.6(1)(d) as justification for these parts of the code is that they go very considerably further in constraining religious broadcasting than the subsection would require or authorise. These differences have already been discussed.

Alternatively if the purported basis for the inclusion of these paragraphs lies in section 7(1)(c) a similar difficulty arises: since Parliament had already legislated for religious broadcasting in s.6(1)(d), the ITC has no authority on the basis of a general 'sweeping up' section, to undermine the balance stated in that statutory provision by adding its own more onerous conditions in a code. Furthermore, section 2 of the Act requires the ITC generally to favour width of choice in programming, unless there are clear indications to the contrary elsewhere in the Act. The exercise of wide discretion such as that in s.7(1)(c) is subject to this overriding duty. Hence it may be argued that there is no authority for the ITC to use s.7(1)(c) to frame a programme code which has the effect of cutting down the choice of available types of religious programmes to a greater extent than that required by s.6(1)(d).

Further support for the view that the ITC code is *ultra vires* can be found in the way the Radio Authority has interpreted the identical provision regulating radio programmes⁹¹ in framing the parts of its programme code covering religious programmes. Para. 7.7 of the draft radio programme code states: 'neither the programmes themselves, nor any follow up material may be used to recruit members for any religious faith or denomination *in a way contrary to the requirements of section 90(2)(c) of the Broadcasting Act 1990*' (emphasis added). The emphasised words make clear that it is only irresponsible, abusive or exploitive methods of recruitment which are to be prohibited.

The ITC has also attempted indirect enforcement of the code through inclusion of licence conditions relating to it. As one might expect the ITC has incorporated the text of s.6(1)(d) of the Act as a licence condition (condition

87. This may be inferred from a reference to the subsection in paragraph 10.1 of the Code, which seems to suggest the ITC's view is that the religious programme provisions of the programme code will change in status when the subsection becomes applicable to ITV, Channel 4 and DBS in 1993.

88. S.6(3).

89. S.7(1)(a).

90. S.7(1)(b).

91. S.90(2)(c).

7(1)(d)). However, the conditions also refer to the Code. Condition 7.2 reads: 'The Licensee shall ensure that the provisions of the Programme Code are observed in the provision of the Licensed Service'. Condition 23 includes the following:

- (1) The Licensee shall comply with any direction given to him by the Commission in respect of any matter which direction is in the opinion of the Commission, appropriate, having regard to any duties which are or may be imposed on it, or on the Licensee by or under the Act.
- (2) The Licensee shall adopt procedures and ensure that such procedures are observed by those involved in providing the Licensed Service for the purpose of ensuring that programmes included in the Licensed Service comply in all respects with the provisions of this Licence, the Act, and any codes or guidelines herein or therein. . .

When Conditions 7.2 and 23 are read together with the section 10 of the programme code, they appear to make the ITC's guidance on religious broadcasting absolutely binding and enforceable by specific direction. However, it is submitted that the incorporation of the Code, via the licence conditions, into a rigid body of enforceable rules is directly contrary to the scheme of the Act, which differentiates between those parts of the code which are to be enforceable by direction and those parts which are to be for guidance.⁹² If it had been intended that the code was to have been enforced in this way, one would have expected to find it stated either in section 7 or in section 4, dealing with licence conditions. No such reference appears. Instead, section 7 omits the power which existed under the 1981 Act⁹³ generally to enforce the code by directions, and section 4 gives only a generalised discretion for what should be included in the licence conditions. Indeed, if Parliament had intended that the code would be incorporated as licence conditions, sections 6-9 of the Act would have been unnecessary in the first place. They would instead have appeared as more specific conditions to be included in licences, following the general ones set out in section 4. Arguably to convert all of the carefully differentiated layers of guidance into hard and fast licence conditions in the way the ITC has done is to violate the rationale of the regulatory scheme.

5. CONCLUSION

In some respects the Broadcasting Act 1990 carries the aspiration of liberalising the regulatory regime through into religious broadcasting: religious advertising will now be permitted on television and radio, and the hold of the broadcasting 'establishment' has been weakened in theory by the removal from the legislation of a statutory advisory committee. In so far as form and content are inter-related, we may expect to see some experiments at broadcasting channels owned by religious broadcasters within the rather unfavourable climate created under the legislation. However, controls imposed elsewhere – particularly in the ITC Programme Code – mean that whatever the liberalising intention of the primary legislation, there is unlikely to be a sudden profusion of exotic and

92. See text to notes 70-72 above.

93. Broadcasting Act 1981, s.5.

unfamiliar types of religious broadcasting in the UK. Religious broadcasting still appears closely tied to a public service broadcasting model in a regulatory and economic climate which in most other areas has moved on. After only partly winning the parliamentary battle, those seeking greater freedom for religious broadcasters may now carry the conflict into the courts for judicial determination of the validity of the quasi-legislation: as has been argued above, the provisions of the ITC Programme Code on religious programmes look vulnerable to a claim of *ultra vires*.

If greater liberalisation does not arrive from that route, it may, perhaps, from the international context in which broadcasting now occurs. Due to technological advance, trans-frontier television is an increasingly important broadcasting medium which will influence the future form of domestic broadcasting. Tele-evangelists may have suffered a rebuff in domestic law, but there is every possibility of them utilising a less restrictive regime elsewhere in continental Europe to broadcast to the UK. The right to transmit and receive programmes across borders is now protected in two European legal texts: the Council of Europe Convention on Trans-Frontier Television⁹⁴ and the EC Directive 'Television Without Frontiers'.⁹⁵ Each exists to create a free market in transmission, subject to the imposition of common minimum standards, among the member states, although neither prevents a state from imposing more onerous standards on domestic broadcasters.⁹⁶ As in the *Spycatcher* litigation,⁹⁷ Anglo-Saxon attitudes may ultimately fall prey to the international trade in ideas – but then that was how Christianity began.

94. European Treaty Series No. 132. The European Convention on Human Rights may also be relevant; however, Art. 10 (protecting freedom of expression) expressly permits licensing of national television systems.

95. Directive 298/23, *Official Journal of the European Communities*, October 17, 1989.

96. Directive, Art. 3; Convention, Art. 28. See N. Reville, *Broadcasting – The New Law* (Butterworths, 1991), pp. 7-9.

97. *Attorney-General v Guardian Newspapers (No. 1)* [1987] 1 W.L.R. 1248; *Attorney-General v Guardian Newspapers (No. 2)* [1988] 3 W.L.R. 776.