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THE ITALIAN BROADCASTING SYSTEM LEGAL (AND POLITICAL) ASPECTS

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Massimo Verdoja era un ragazzo che credeva in nobili ideali. Ha sempre cercato di reagire alle grandi difficolta' con coraggio.
Troppo presto ci ha lasciati. Da lui e dalla sua famiglia molto ho imparato.

Massimo Verdoja was a young man that believed in noble ideals. He always faced great difficulties with courage.-
All too soon he left us. I have learned much from him and his family.

Summary:

1. The Origins of Broadcast Regulation.

In Italy, the first radio law was passed in 1910[1]. The law gave the State a monopoly on all matters concerning radio broadcasting. The State preferred to issue licenses to private companies rather than to be directly involved itself.

During the first two decades of the century radio broadcasting was very limited. Only a few licenses were issued; all were relatively unimportant because of their experimental nature.

Fascism brought with it an enormous amount of new legislation[2]. In 1923 a new law confirmed the State monopoly over radio communications and re-affirmed the power of the Executive to issue licenses[3].

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1. L. 30 Giugno 1910, n. 395, norme sulla radiofototelegrafia e radiotelefonia; all the laws regarding broadcasting approved in Italy are reprinted in Codice dell'informazione e della comunicazione (S. Fois, A. Vignudelli, eds), Rimini, 1986. On the history of broadcasting regulation see E. Santoro, L'evoluzione legislativa in materia di radiodiffusioni circolari: notizie e spunti, in Diritto delle radiodiffusioni e telecomunicazioni, 1969, p. 3 ff.; R. Zaccaria, Radiotelevisione e Costituzione, Milano, 1977, p. 19 ff..

2. On the history of radio during fascism see P. Cannistraro, La fabbrica del consenso, Bari, 1975; F. Monteleone, La radio italiana nel periodo fascista, Padova, 1976.

3. R.D.L. 8 febbraio 1923, n. 1067, norme per il servizio delle comunicazioni senza filo.

In 1924, a private company, the "URI" ("Unione Radiofonica Italiana") was given an exclusive right for radio broadcasting[4]. However, the Fascist regime imposed severe limitations on the content of programs and on the transmission of news. In addition, the law also gave the Executive the right to use radio to directly transmit news of public interest.

In 1927, a new law changed the name of "URI" to "EIAR" ("Ente Italiano Audizioni Radiofoniche") and gave the Fascist government the right to appoint four members of the new company[5]. The "EIAR" had to submit an annual plan of programs for the approval of the "Ministero delle Comunicazioni" (Minister of Communications). This plan, even if approved, could be modified by the "Ministero degli Interni" (Minister of Home Affairs) for reasons of "public interest". Effectively this meant that the "EIAR" became one of the principal instruments of Fascist propaganda.

The legal rules regarding radio activities were systematized

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4. R.D. 14 dicembre 1924, n. 2191, concessione dei servizi radioauditivi circolari alla societa' anonima Unione Radiofonica Italiana.

5. R.D. 29 dicembre 1927, n. 2526, approvazione della convenzione tra il Ministero delle Comunicazioni e la societa' anonima "Ente Italiano per le Audizioni Radiofoniche" (E.I.A.R.) per il servizio delle radiodiffusioni circolari.

in 1936 with the approval of the "Postal Code"[6], which confirmed the State monopoly over all radio services and reaffirmed the position of the "EIAR".

The system of public monopoly over broadcasting remained in place until the '70s.

2. The New Constitution. The Growth of the Public Broadcasting Service.

At the end of the Second World War an "Assemblea Costituente" (Constituent Assembly) was elected with the task of preparing a new Constitution for Italy.

It is difficult to provide a detailed analysis of the proceedings of the "Assembly" because only part of the debates that led to the approval of the new Constitution was recorded. Nevertheless, it is known that the "Assembly" spent only a very limited amount of time debating the problems of radio broadcasting. This is not easy to explain. The members of the "Assembly" must have known the important role played by radio during the Fascist period and the effectiveness of the B.B.C.

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6. R.D. 27 febbraio 1936, n. 645, approvazione del codice postale e delle telecomunicazioni.

programs (and those of some clandestine broadcasting stations) during the war. However, one possible explanation is that the importance of radio broadcasting in a modern society was still not fully understood. Nevertheless it is surprising that the Constitution makes only indirect references to broadcasting in art. 21 which guarantees citizens the right of freedom of expression through "speeches, writing or any other means"[7]. Probably the Representatives elected in the "Assembly" were afraid to make private broadcasting a constitutional right because it could be open to abuse. On the other hand, they were equally afraid of conferring on the State a constitutional right to a public monopoly that could likewise be abused.

The consequence of the lack of constitutional norms was that the assembly effectively left the future of broadcasting regulation to the will of Parliament.

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7. On freedom of expression see generally S. Fois, Principi costituzionali e libera manifestazione del pensiero, Milano, 1957; P. Barile, Liberta' di manifestazione del pensiero, in Enciclopedia del diritto, Milano, vol. XXIV, 1958, p. 424 ff.; C. Esposito, La liberta' di manifestazione del pensiero nell'ordinamento giuridico italiano, Milano, 1958; V. Crisafulli, Problematica della "liberta' d'informazione", in Il politico, 1964, p. 296 ff.; A. Loiodice, Contributo allo studio sulla liberta' d'informazione, Napoli, 1969; P. Barile, Liberta' di manifestazione del pensiero, Milano, 1975; C. Mortati, Istituzioni di diritto pubblico, Padova, IX ed. 1975, vol. II, p. 1066 ff.; P. Barile, Diritti dell'uomo e liberta' fondamentali, Bologna, 1984, p. 227 ff..

In practice, the solution adopted maintained the State monopoly of the airwaves.

It must be emphasized that in the period immediately before the discussion of art. 21 of the Constitution, the Executive approved a new radio law that reaffirmed the State monopoly and forbade broadcasting without a state license[8]. The law also aimed towards providing some control over the activities of the "RAI" ("Radio Audizioni Italia", the private company owned by the State that in the meantime had replaced the "EIAR"). For these purposes the law set up two bodies: the "Comitato per la determinazione delle direttive di massima culturali, artistiche, educative, etc." (Committee for the determination of general directives regarding cultural, artistic, education etc.) and the "Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi" (Parliamentary Commission Responsible for Control of Broadcasting Services).

The "Committee" was made up of 19 members representing the general public, experts and listeners. The "Committee" advised the Minister responsible for Post and Telecommunications on the

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8. D. Lgt. C.P.S. 3 aprile 1947, n. 428, nuove norme in materia di vigilanza e controllo sulle radiodiffusioni circolari.

appropriateness of the quarterly plan proposed by the "RAI"[9].

The "Parliamentary Commission" instead was made up of 17 members appointed by the President of the "Camera dei Deputati" in proportion to the representation of the parties in Parliament. This body was responsible for monitoring the political independence and objectivity of the "RAI". The "Parliamentary Commission" was duty bound to report its activities to the Minister for Post and Telecommunications who in turn reported the findings to the President of the "RAI"[10].

As we have noted, the two organs had different responsibilities according to their different compositions. The first consisted of a cross section of society that was close to the needs of listeners and advised on the quality of broadcasting. The second consisted of representatives of political parties and ensured the political impartiality of the "RAI". Thus, by appointing these bodies, the law sought to guarantee the democratic use of broadcasting consistent with the new Constitution that sought to protect the rights of individuals within social groups).

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9. On the "Committee" see A. Valletti Borgnini, Radiodiffusioni, in Novissimo Digesto Italiano, vol. XIV, Torino, 1967, p. 745, 748.

10. On the "Commission" see F. Pierandrei, Radio, televisione e Costituzione, in Scritti di diritto costituzionale, Torino, vol. II, 1964, p. 524 ff..

In 1944, as previously noted, the State withdrew the license of the "EIAR" in favor of "RAI"[11] (which in 1952 was renamed "RAI-Radiotelevisione Italiana"[12]).

The experience of these early years was characterized by strong Executive control over the activities of the public broadcasting service[13]. The Executive was able to exert such a strong influence because the two bodies that were set up to supervise broadcasting activities failed in their duty. Above all, the "Parliamentary Commission" failed to ensure the political independence and impartiality of the "RAI"[14]. This was partly due to political reasons, namely, that the major parties forming the Executive had no interest in sharing control with the opposition parties, and that the "Parliamentary Commission" had no direct control over "RAI" and had to give its annual report to the Minister for Post and Telecommunications who was far from

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11. D.L. Lgt. 21 dicembre 1944, n. 458, norme per il servizio delle radioaudizioni circolari. The RAI started the first television channel in 1954.

12. D.P.R. 26 gennaio 1952, n. 180.

13. On the functioning of RAI during that period see C. Mannucci, Lo spettatore senza liberta', Bari, 1962; F. Monteleone, Storia della RAI dagli alleati alla DC. 1944-1954, Bari, 1980.

14. See S. Tosi, La Commissione Parlamentare per l'Indirizzo Generale e la Vigilanza dei Servizi Radiotelevisivi, in Il servizio pubblico radiotelevisivo. Convegno organizzato dal Centro di Iniziativa Giuridica P. Calamandrei, Roma, Marzo 1982, Napoli, 1983, p. 93 ff..

impartial in controlling the activities of the public broadcasting service.

3. The "Corte Costituzionale" Judgement n. 59 of 1960.

In December 1956 the publishing company "Il Tempo TV" asked the Minister for Post and Telecommunications to grant a license to operate television stations in the Regions of Lazio, Campania and Toscana. The Minister refused to grant a license on the ground that the Postal Code had conferred an exclusive right on only one company. As a result "Tempo TV" sued the Minister before an ordinary judge. During the discussion of the case, "Tempo TV" requested the intervention of the Constitutional Court to declare the State monopoly of the airwaves unconstitutional because it was in conflict with art. 21, which guarantees freedom of expression by "any other means" and also with art. 41 that affirms the right of citizens to freedom of economic initiative.

The Constitutional Court on July 6, 1960[15], upheld the State monopoly on the grounds that art. 43 of the Constitution gave the

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15. Sentenza (6 luglio) 13 luglio 1960 n. 59, in Giurisprudenza costituzionale, 1960, I, p. 759 ff. and in Rivista di diritto commerciale, 1960, II, p. 161 ff., with comment by F. Pierandrei, La televisione in giudizio davanti alla Corte Costituzionale.

State the right to exercise a monopoly over "certain activities or categories of activities" that have the "nature of prominent general interest". The Court underlined the important role played by television in satisfying the needs of individuals and society in the entire field of information, culture and entertainment. According to the Court this role would be undermined if State control was handed over to individuals or groups within society that would pursue their own interests rather than those of society in general. The Court believed that the State could provide a better service with "more objectivity, impartiality, completeness and continuity for the country"[16].

Similar statements were made about art. 21. In the Court's view even freedom of expression could be better guaranteed by a State monopoly. However, the Court recognized the need for a new law to regulate the public broadcasting service in order to ensure impartiality and some form of access to individuals to express their views on the airwaves.

Parliament did not take up the Court's invitation to enact such a new law, however[17].

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16. Giurisprudenza costituzionale, 1960, I, p. 759, 781.

17. See P. Caretti, R. Zaccaria, Diritto di accesso e legittimita' costituzionale del monopolio radiotelevisivo alla luce del discorso sulla riforma della R.a.i.-TV, in Foro italiano, 1970, I, col. 2163 ff..

The only reform introduced was made in 1961 when the "RAI", with the support of the government led by Prime Minister A. Fanfani, decided to start two television programs, "Tribuna Politica" and "Tribuna Sindacale". These programs gave political parties and trade unions the right to express and to argue their views on the airwaves[18].

4. The First Radio "Pirate" Stations. The "Corte Costituzionale" Judgements n. 225 and n. 226 of 1974.

In 1973, a new Postal Code was issued[19]. The Code re-affirmed State control of the airwaves and the Executive's right to issue licenses[20].

The new Code was heavily criticised[21] because of the approval of art. 195 requiring private cable operators to request licenses. This was seen as an unjustifiable limitation on cable

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18. See infra, par. 11.

19. D.P.R. 29 marzo 1973, n. 156.

20. The owners of private stations could henceforth be imprisoned for 3-6 months for illegal broadcasting.

21. Cf. A. Pace, La radiotelevisione in Italia con particolare riguardo all'emittenza privata, in Rivista trimestrale di diritto pubblico, 1987, p. 615, 619.

television that was considered to be the best means of ordinary private broadcasting[22]. The Code was also criticized for prohibiting the installation of transmitters to broadcast foreign programs. Some commentators also argued that the State monopoly was no longer justifiable because the availability of a wide range of broadcasting frequencies could prevent the emergence of private monopolies.

The Constitutional Court intervened again in 1974 with judgments n. 225 and n. 226 of that year.

In judgment n. 225[23] the Court reaffirmed the State monopoly using the same reasoning that had been applied in 1960. However, this time the Court made the monopoly conditional upon the passing of a new law governing the public service. To this end the Court set out the minimum conditions necessary before the

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22. The first private television station in Italy, called "TeleBiella", set up in 1971, was a cable television station. See R. Duiz, Le tappe della tv commerciale in Italia. Dal cavo artigianale di Biella al dominio di Berlusconi, in Problemi dell' informazione, 1986, p. 543 ff..

23. Sentenza (9 luglio) 10 luglio 1974 n. 225, in Giurisprudenza costituzionale, 1974, I, p. 1775 ff.; on this decision see R. Zaccaria, L'alternativa posta dalla Corte: monopolio "pluralistico" della radiotelevisione o liberalizzazione del servizio, in Giurisprudenza costituzionale, 1974, II, p. 2169 ff.; C. Chiola, I comandamenti della Corte per il settore radiotelevisivo, in Giurisprudenza costituzionale, 1974, p. 2191 ff..

monopoly can be considered to conform to the principles of the constitution.

First of all, control of "RAI" had to pass from the Executive to a Parliamentary body. This body would guarantee impartiality of programming and ensure that the transmission of cultural programs contained a wide variety of different opinions and means of expression, necessary to guarantee the independence of the "RAI". The Court stated that journalists had a responsibility to be objective and impartial in their reporting and that to this end, the "RAI" should provide the environment necessary for them to do this. The Court also referred to other necessities in its judgement, these being the need for a new law to limit the amount of advertising on television so as to avoid the risk of the printed press losing an important source of revenue, the need to permit access for political, religious and cultural groups which themselves expressed the different ideologies present in society, the need for individuals or groups to have a right of access to the airwaves and a right to rectify any incorrect material.

In judgement n. 226[24], the Court declared the State monopoly over local cable television unconstitutional. The Court noted that there was a big difference between broadcasting on the

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24. Sentenza (9 luglio) 10 luglio 1974 n. 226, in Giurisprudenza costituzionale, 1974, I, p. 1791 ff..

airwaves, which is a limited resource, and broadcasting via a cable network to which no such limits applied. In addition, the Court's view was that, operating at the local level, cable television involved relatively low costs and therefore did not entail a risk of developing into a monopoly[25]. However, at the national level, the State monopoly was maintained because the risk of private concentration could not be ignored due to the high level of the required investments.

4.1. The Reform of "RAI".

This time the Parliament reacted immediately to the Court's "suggestions" passing, in 1975, law n. 103 which reformed the public broadcasting service[26].

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25. Despite the fact that the first private television stations used cable systems, the possibility of using the airwaves and the tecnical difficulties of installing cables, meant that the cable television systems did not grow.

26. L. 14 aprile 1975, n. 103, nuove norme in materia di diffusione radiofonica e televisiva. On this law see generally, S. Zingale, L. Gotti Porcinari, La legge di riforma della RAI (Legge 14 aprile 1975 - n. 103), Roma, 1976; R. Zaccaria, Radiotelevisione e Costituzione, cit., p. 76 ff.; Radiotelevisione pubblica e privata in Italia (P. Barile, E. Cheli, R. Zaccaria, eds), Bologna, 1980; P. Barile, Servizio pubblico ed emittenza privata, in Rapporto annuale sui problemi giuridici dell'informazione. 1986-1987 (P. Barile, P. Caretti, R. Zaccaria eds), Padova, 1988, p. 169 ff..

The law considered broadcasting to be a service of public interest because it involved the right of citizens to participate in the social and cultural development of the country. As such, the service should be kept under the control of the State. Then the law stated that independence, objectivity and openness to different political, social and cultural tendencies were fundamental principles that should govern the public broadcasting service.

This law transferred the responsibility for supervising the "RAI" from the Executive to a new "Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi" (Parliamentary Commission Responsible for Control of Broadcasting Services)[27]. This Commission was made up of 20 members of each House, appointed by the Chairmen of the two "Houses". The composition was to be determined in accordance with the political representation of the parties in Parliament.

The Parliamentary Commission was set up to ensure that the public broadcasting service conformed to the principles established in the new law. The Commission also had to provide

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27. For an analysis of the functions of the new Commission see Il servizio pubblico radiotelevisivo, cit., containing articles by S. Tosi; P.A. Capotosti; F. Pizzetti; C. Chiola; C. Chimenti; G. Volpe; B. D'Amario, M. Pallottino.

general guidelines, monitor applications and supervise their implementation.

The law also gave political parties, trade unions, religious movements, political and cultural associations, ethnic and linguistic groups and other relevant social bodies the right of access to the public broadcasting service. The Parliamentary Commission was made responsible for determining which groups in society should be allowed access to the airwaves[28]. This power of the Commission provoked a big debate, because, if a group was denied access by a sub-committee of the Parliamentary Commission it had a right of appeal only to the Commission. There was no right of appeal to a judge. This situation exists because in the

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28. The bibliography concerning "right of access" is extensive. Among others see C. Chiola, L'accesso dei gruppi alle trasmissioni televisive, in Diritto delle radiodiffusioni e telecomunicazioni, 1976, p. 218 ff.; M.C. Grisolia, Sulla natura dell'accesso al mezzo radiotelevisivo, in Diritto delle radiodiffusioni e telecomunicazioni, 1976, p. 226 ff.; P. Barile, L'accesso nella radiotelevisione di Stato: una situazione soggettiva non protetta? in Diritto delle radiodiffusioni e telecomunicazioni, 1977, p. 269 ff.; M.A. Sandulli, Sulla sindacabilita' degli atti della Commissione parlamentare per la RAI, in Giurisprudenza costituzionale, 1977, I, p. 1822; C.A. Nicoletti, Il diritto d'accesso e l'accesso al diritto: sull'art. 21 Cost. e sul diritto alla manifestazione - trasmissione - acquisizione del pensiero, in Il servizio pubblico radiotelevisivo, cit. p. 275 ff.; M. Manetti, L'accesso al mezzo radiotelevisivo pubblico come situazione giuridicamente protetta, in Giurisprudenza costituzionale, 1984, I, p. 176 ff..
Although the right of access to these groupings was considered an important democratic right, in fact these broadcasts rarely attract many viewers.

Italian legal system decisions taken by a Parliamentary Commission are considered to be "atti politici" (political acts). These acts, because of their discretionary nature, cannot be subjected to the scrutiny of a judge. Many commentators have criticised the fact that the Parliamentary Commission decisions cannot be revised by a judge because they consider them to be in reality administrative acts to which the right of appeal to a judge exists, rather than political acts[29].

Law n. 103 (with the amendments of law n. 10 of 1985[30]) also determined the new structure of the "RAI"[31].

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29. For more on this opinion see F. D'Onofrio, Riforma dei servizi radiotelevisivi e sistema di governo, cit., p. 29 ff.; C. Chiola, Il pluralismo nella gestione dei servizi radiotelevisivi, in Diritto delle radiodiffusioni e telecomunicazioni, 1975, p. 15 ff.; A. Reposo, La natura giuridica della Commissione parlamentare per i servizi radiotelevisivi, in Diritto delle radiodiffusioni e telecomunicazioni, 1976, p. 552 ff..
P. Barile, L'accesso nella radiotelevisione di Stato, cit., argues that the decisions of the "Commissioni Parlamentari" should not be subject to judicial review because the Constitutional Court clearly stated that the Parliament has control over the aspects of state monopoly dealing with the guarantees of freedom of expression.

30. L. 4 febbraio 1985, n. 10, conversione in legge con modificazioni, del D.L. 6 dicembre, 1984, n. 807, concernente disposizioni urgenti in materia di tramissioni radiotelevisive.

31. See in general A. Borgioli, La natura giuridica della concessionaria, in Rapporto annuale sui problemi giuridici dell'informazione. 1985 (P. Barile, R. Zaccaria, eds), Padova, p. 149 ff..

First of all it must be emphasized that the "RAI" is a company limited by shares and about 99% of the shares are owned by a State company, the "IRI" ("Istituto Ricostruzione Industriale") and the remaining 1% by the "SIAE" ("Societa' Italiana Autori and Editori"). The "RAI"'s main source of revenue derives from user-license fees, but another important source derives from advertising[32].

The "RAI" is governed by two bodies : the "Consiglio di Amministrazione" (Board of Directors) and the "Direttore Generale" (General Director).

The Board of Directors is made up of 16 members, all of whom are appointed by the Parliamentary Commission. The former body has the duty to give general guidelines, to determine the financial structure of the "RAI" and to give general directives on programs. The Board of Directors is not directly involved in the management of the "RAI" and is limited to the role of providing a set of underlying principles governing the "RAI"'s activities.

The Director General is appointed by the I.R.I.. Since the I.R.I. Board of Directors is appointed by the Executive, the Director General is effectively the representative of the parliamentary majority. The Director General, whose management

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32. See infra par. 12.

powers were enlarged by law n. 10 of 1985, is responsible for the direct administration of the "RAI". (The Parliament, in 1985, decided to entrust direct power to the Director General so as to ensure a more efficient implementation of the directives given by the Parliamentary Commission and by the Board of Directors).

5. The "Corte Costituzionale" Judgement n. 202 of 1976 and the Liberalization of Private Local Broadcasting.

Many commentators felt that the reform of the "RAI" did not go far enough in guaranteeing the right of freedom of expression due to the failure to legalize local broadcasting.

Since the mid-70's many private broadcasting stations started to operate outside of the law. When taken to Court the pirate stations asked the Constitutional Court to affirm that a State monopoly at the national level could co-exist with a plurality of private broadcasting at the local level, a plurality which was insured by the relatively low cost of setting up a station at that level.

In 1976, with judgement n. 202, the Court modified the

judgement of 1974[33]. According to the Court, the free availability of a wide range of frequencies and low set-up costs at the local level would prevent the emergence of a private broadcasting oligopoly. For these reasons, the Court determined that prohibiting private broadcasting on the airwaves, while allowing it via the cable network, was inconsistent with art. 3 of the Constitution which guaranteed the principle of equality before the law and with art. 21 which guaranteed freedom of expression and also with art. 41 that affirmed the right of citizens to freedom of economic initiative.

All the same, the State monopoly at national network level was declared constitutional because the high costs of set up involved the risk of a private oligopoly or monopoly.

Nevertheless, the Court emphasized that citizens did not have an unconditional right to the airwaves. Legislators should appoint a public body to issue licenses and to ensure that such broadcasting would not be against the general public interest.

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33. Sentenza (15 luglio) 25 luglio 1976 n. 202, in Giurisprudenza costituzionale, 1976, I, p. 1267, with comments by a) C. Chiola, Il pluralismo spontaneo per la radiotelevisione locale (p. 1418 ff.); b) F. D'Onofrio, Groviglio nell'etere: la Corte "apre" ai privati "locali" (p. 1424 ff.); and note of F. Gabriele, Riserva allo Stato a livello nazionale e privatizzazione condizionata a livello locale in materia di diffusione radiofonica e televisiva via etere: una coesistenza (costituzionalmente) compatibile? (p. 1489 ff.).

6. The Growth of National Broadcasting Private Networks and the "Corte Costituzionale" Judgement n. 148 of 1981.

After the judgement of 1976, there was an explosion of private broadcasting stations. In 1980, a publishing company, "Rizzoli", founded a national network, called "PIN". The "RAI" immediately requested a Court order to stop the activities of "PIN" During the discussion of the case the judge accepted "PIN"'s request for the intervention of the Constitutional Court in order to declare the State monopoly of national broadcasting unconstitutional since it violated art. 3, 21 and 41 of the Constitution.

The Constitutional Court decided the case in 1981 with judgement n. 148[34].

The Court substantially repeated the arguments previously put forward in 1976. It emphasized the important role of broadcasting in society and its capacity to influence public opinion and social tendencies.

The Court stated that private broadcasting could take place

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34. Sentenza (14 luglio) 21 luglio 1981 n. 148, in Giurisprudenza costituzionale, 1981, I, p. 1379 ff., with comment by C. Chiola, L'alternativa alla riserva statale dell'attivita' radiotelevisiva nazionale. See also V. Meli, Commento a Corte Costituzionale 21 luglio 1981, n. 148, in Leggi civili commentate, 1982, p. 976 ff..

"without ...dangerous consequences ...only at the local level"[35] where, because of the low cost, a sufficient plurality of stations could co-exist. At the national level this plurality was not guaranteed and consequently there was the risk that private individuals would have the potential to develop an oligopolistic or monopolistic situation. This would enable people to exert an undue influence in society which would contradict article 21 of the Constitution, which guarantees freedom of expression. In fact, an oligopolistic or monopolistic situation would crush the freedom of other citizens who, lacking the economic and technical resources, would suffer a progressive reduction of their liberties. Here the Court affirmed that if the legislator were to prepare some guarantees to effectively block the realization of an oligopolistic or monopolistic situation, the constitutionality of the State monopoly would be called into question. This latter statement is very important because the Court affirmed that the constitutionality was due to the absence of an effective anti-trust law, if, however, a comprehensive law were to be enacted the State monopoly would have no reason to exist.

Despite the decision the P.I.N. continued to operate because the Minister for Post and Telecommunications did not enforce its

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35. Giurisprudenza costituzionale, 1981, I, p. 1379, 1408.

power to prevent P.I.N.'s operation[36].

Parliament's failure to enact a law that dealt with the explosion of private broadcasting, meant that ordinary judges were left to determine the legal principles to be applied in cases of judicial conflicts between private stations and the State, between private broadcasters and the "RAI" and among private stations[37].

7. The Legal Status of Private Broadcasting.

7.1. The Need for Private Broadcasters to Obtain State Authorization and the Legal Status of Broadcasters Requiring an Authorization.

The majority of judges applied art. 195 of the Postal Code which gave the power to the Minister for Post and Telecommunications to issue broadcasting licenses. Most scholars also agreed that the State should, even in the absence of a law

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36. Cf. A. Pace, La radiotelevisione in Italia, cit., p. 630.

37. M. Dogliotti, La Corte di Cassazione e le emittenti locali. Un caso di supplenza giurisdizionale?, in Giurisprudenza italiana, 1981, col. 764 ff..

regulating private broadcasting, be responsible for issuing licenses so as to ensure that private broadcasters at least fulfilled the minimum requirements set up by the Constitutional Court[38].

The judiciary was also responsible for determining the legal status of private broadcasters who applied for a license.

Some judges ruled that private citizens who wished to use the airspace had the full right to obtain exclusive authorisation to use a given frequency[39]. In their view, this right derived from the judgement of the Constitutional Court in 1976 that recognised the right of citizens to operate as local broadcasters.

This approach was not shared by the highest civil and administrative courts. Indeed the "Corte di Cassazione" and the "Consiglio di Stato" both ruled that a citizen only has an "interesse legittimo" (legitimate interest), that in this case is a right to expect the receipt of a license only when there is an available space on the frequencies and when the new station has provided satisfactory guarantees of non-interference with the

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38. See, among others, A. Pace, Liceita' "condizionata" delle emittenti locali e disciplina pubblica dell'impresa radiotelevisiva privata, in Diritto delle radiodiffusioni e telecomunicazioni, 1979, p. 23 ff..

39. E.g., Pretura di Roma, I sezione civile, ordinanza 7 e 13 dicembre 1977, in Foro italiano, 1978, col. 239 ff..

public broadcasting service[40]. In cases where the State refused to grant a license, the prospective private broadcaster would have the right to ask for the protection of his "interesse legittimo" before the administrative judges. In such circumstances, the prospective private broadcaster would have to demonstrate that his proposed activities did not conflict with the principles set out by the Constitutional Court. (It must be re-emphasized that the State could only refuse to grant a license if it could prove that there was an absence of available frequencies and/or that the new station would interfere with the "RAI".)

Those judgements that have, on the one hand, confirmed the dominance of the public broadcasting service and, on the other, recognised the rights of private broadcasters, have led to a lethargy on the part of legislators and the Executive with respect to resolving the problem of the chaos of the airwaves[41]. As a result, in practice, private broadcasters have felt completely free to use the airwaves as they please, because only

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40. Corte di Cassazione, sezioni unite civili, sentenza 1 ottobre 1980, n. 5335 e n. 5336 in Giurisprudenza italiana, 1980, I, col. 1831 ff., with note of M. Berri, Diritto di antenna: questioni di giurisdizione; Consiglio di Stato, sezione VI, sentenza 14 luglio 1982, n. 361, in Foro amministrativo, 1982, I, p. 1520 ff..

41. See A. Pace, La radiotelevisione in Italia, cit., p. 626.

in extreme cases of interference judges have ordered the dismantling of a private station[42].

7.2. Judicial Conflicts Between Private Broadcasters and the "RAI".

In 1979 the "RAI" set up a third television channel. For this purpose the Minister for Post and Telecommunications assigned frequencies that in some cases caused interference with private stations. Some of the affected private stations asked for the intervention of an ordinary judge to protect their air space. After some judgments in favor of the requests of the private stations[43], the "RAI" asked the "Corte di Cassazione" to declare this to be a matter for the administrative courts rather than the ordinary courts. The "Corte di Cassazione" agreed with the "RAI"

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42. See infra par. 7.2., 7.3.

43. E.g., Pretura di Lucca, ordinanza 8 gennaio 1980, in Rivista di diritto industriale, 1982, II, p. 70 ff.; Tribunale Amministrativo Regionale Toscana, sentenza 29 gennaio 1981, n. 53, in Foro amministrativo, 1981, I, p. 919 ff.. It is important to note that both the decisions were overruled, respectively by the Corte di Cassazione, sezioni unite civili, sentenza 3 dicembre 1984, n. 6324, in Giurisprudenza costituzionale, 1985, I, p. 765 ff. and by the Consiglio di Stato, sezione VI, sentenza 14 luglio 1982, n. 361, in Foro amministrativo, 1982, I, p. 1520 ff.. See also A. Pace, La radiotelevisione in Italia, cit., p. 625.

and reaffirmed that a private broadcaster has only a legitimate interest to the frequencies, this interest being within the exclusive jurisdiction of an administrative judge[44]. The ruling has meant that an ordinary judge cannot interfere with an authorization given by the public administration. However a further consequence has been that the interests of the "RAI", before an administrative judge, are almost always considered to be of prevalent public interest[45].

It is interesting to note that the "RAI" has a full right ("diritto soggettivo") to operate on its assigned frequencies. This right can be protected before an ordinary judge in cases of conflicts with private broadcasters[46].

7.3. Conflicts Between Private Stations.

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44. Corte di Cassazione, sezioni unite civili, 1 ott. 1980, n. 5335 e n. 5336 in Giurisprudenza italiana, 1980, I, col. 1831 ff..

45. In fact the Consiglio di Stato, with sentence n. 361 of 1982, cit., confirmed that RAI had precedence in the distribution of frequencies.

46. Corte di Cassazione, sezioni unite civili, sentenza 3 dicembre 1984, n. 6338 in Foro italiano, 1984, I, col. 2954 ff.. and in Giurisprudenza italiana, 1981, col. 764 ff. with note of M. Dogliotti, Vox clamans in deserto (ancora sull'autorizzazione alle emittenti private radiotelevisive inventata dalla Cassazione).

When a private broadcaster obtains an authorisation it has an exclusive right to the frequencies vis-a-vis other private broadcasters.

After 1976, there were many judicial conflicts between private broadcasters over the right to frequencies. In all the cases in which a private station invaded a previously occupied airspace, the "Corte di Cassazione" has ruled that private broadcasters can ask for the protection of ordinary judges, using "judicial action to protect the possession of a good" ("azione possessoria")[47]. Such judicial proceedings have the advantage of permitting an immediate ruling by the judges.

In such cases, the "Corte di Cassazione" generally upheld the rulings of the ordinary judges, in that, even in the absence of an authorization, the right to use the frequency generally rested with the broadcaster who first used the frequency[48].

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47. Corte di Cassazione, II sezione civile, 12 aprile 1979, n. 2168, in Giurisprudenza italiana, 1979, I, col. 1464. See also L. D'Atti, Tutela giurisdizionale delle emissioni radiotelevisive, in Liberta' di antenna. Aspetti tecnici e giuridici della emittenza radiotelevisiva (V.A. Monaco, M. Bernardini, A. Vignudelli eds), Rimini, 1986, p. 195, 196 ff..

48. Corte di Cassazione, sezioni unite civili, sentenza 3 dicembre 1984, n. 6339, in Giurisprudenza costituzionale, 1985, I, p. 784 ff., with note of R. Borrello, Verso la fine dell'era della "supplenza"? Luci ed ombre nel processo di normalizzazione del sistema radiotelevisivo, in ibid., p. 830 ff.; Corte di

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In cases where the owner of a station did not have a license the "Corte di Cassazione" gave that owner the right of appeal to an Administrative judge against a decision by the public administration to grant his frequency to another broadcaster. In fact, the judges have tended to operate a first come/first serve system, and uphold the rights of broadcasters who first use a given frequency, even in cases were the public administration had granted a license to another broadcaster[49].

7.4. The Definition of "Local Broadcasting".

Another important issue concerns the definition of local

(Footnote continued from previous page)

Cassazione, sezioni unite civili, sentenza 3 dicembre 1984, n. 6340, in Foro italiano, 1984, I, col. 2953, with comment by R. Pardolesi. See also A. Carullo, Emissioni radiotelevisive e regime delle autorizzazioni, in Liberta' di antenna, cit., p. 177, 191. It is important to note that in the absence of precise legislation the possession of a frequency does not imply a property right. This means that when a broadcaster stops transmitting on a frequency that frequency is made available to others wishing to broadcast.

49. Ibid. p. 191.

broadcasting[50]. The Constitutional Court, in judgement n. 202 of 1976, left to legislators the duty to determine the "exact definition of the area that a station can serve". According to the Court, a local station should be based upon a "reasonable geographical, social and economic sphere, while giving the opportunity to operate in well defined and homogenous areas..."

Again in the absence of a legislative intervention, ordinary judges had to determine the standards to be applied in specific cases.

The judiciary[51] appears to have interpreted the notion of local sphere within the territory of a "Regione". In some cases, however, judges have enlarged the notion of a Region[52] taking into account the homogeneity of ethnic, social, cultural, political and economic identity[53]. However, giving judges such discretionary power has in practice often led to different rulings in similar cases.

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50. On this matter see D. Giacobbe, L'emittenza televisiva privata, in Giustizia civile, 1986, p. 25, 29 ff..

51. E.g. Pretura di Lagonegro, sentenza 10 ottobre 1980, in Foro italiano, 1980, II, col. 705 ff., with note of R. Pardolesi.

52. As is known, Italy is formed by 20 Regions which have forms of autonomy guaranted by the Constitution and by the law.

53. E.g. Pretura di Bibbiena, sentenza 11 aprile 1980, in Foro italiano, II, col. 706 ff., with note of R. Pardolesi.

8. Law n. 10 of 1985.

Since 1980, there has been a phenomenal growth of national networks that infringed upon the requirements established by the Constitutional Court.

In 1984, some judges decided to block the signals of certain stations (mostly owned by the "Berlusconi" group) that transmitted pre-recorded programmes simultaneously in different Regions[54]. In October 1984, the Executive, led by the Secretary of the "Partito Socialista Italiano", Bettino Craxi, urgently approved a "decreto legge"[55] (called "decreto Berlusconi" because it was clearly aimed at defending the interests of the broadcasting company most affected by the judicial decisions) that had as its main objective the reopening of the blocked stations.

The "decreto legge" failed to achieve Parliamentary approval

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54. Pretura di Pescara, decreto 16 ottobre 1984, in Foro italiano, 1984, col. 545; Pretura di Roma, decreto 15 ottobre 1984, in ibid., 508; Pretura di Torino, decreto 13 ottobre 1984, in ibid., col. 545.

55. D.L. 20 ottobre 1984, n. 694, misure urgenti in materia di trasmissioni radiotelevisive. The "decreto legge" is a provision with the force of law that the Government can enact in cases of necessity and urgency and that has to be converted into law by Parliament within 60 days (Art. 77 Constitution).

but, two months later a further "decreto legge" was issued[56] and, with some modifications, became law n. 10 of 1985[57]. This law was not comprehensive because there was insufficient agreement between the parties that formed the coalition government to enact a complete regulation.

The law was concerned with three areas: 1) the declaration of general principles with regard to the broadcasting activities, 2) some norms regarding private broadcasting and 3) some norms regarding public broadcasting.

Art. 1 states that national broadcasting is an activity of general interest and should remain the exclusive domain of the State. However, the same article openly recognised the possibility of private national broadcasting when it stated that "the control over private stations at the national level, the norms directed at preventing a private monopoly and the norms aimed at regulating local and national advertising should be set up in a general law with regard to broadcasting". In this article, the legislators recognized for the first time the possibility of private national broadcasting. This recognition is

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56. D.L. 6 dicembre 1984, n. 807, disposizioni urgenti in materia di trasmissioni radiotelevisive.

57. L. 4 febbraio 1985, n. 10, conversione in legge con modificazioni, del D.L. 6 dicembre, 1984, n. 807, concernente disposizioni urgenti in materia di tramissioni radiotelevisive.

also implicit in art. 3 which gives the right to all local private stations to transmit the same pre-recorded programmes at the time of their choosing. An important point that should be emphasized is that this provision prohibits local stations that are affiliated with a network from broadcasting "live" programs simultaneously. (This norm has provoked strong reaction from private stations that are forbidden to broadcast "live" news and sports events).

Art. 4 requested all private stations to inform the Ministe for Post and Telecommunications of all the important details o the stations (name, ownership, frequencies used, area served...) within 90 days of the law's enactment. This article was very important because when the requested details were communicated to the Minister, it rendered unpunishable all violations of the Postal Code committed before the enactment of the law. In other words, this has acted as a formal amnesty as well as providing formal authorisation to all stations that fulfilled the requirements established in article 4.

The law also recognized the right of national private networks, upon the issuing of an authorisation, to use radio waves to transmit programmes internally from one station to another. Similarly, the law required private broadcasters to obtain authorisation from the Post Office to use satellites.

Law n. 10 also contains some other limitations on private broadcasting. First of all, advertising transmitted by private

stations could not exceed 16% of total weekly broadcasting, while for any given hour advertising could not exceed 20% (art. 3 bis). The law does not set limits on the duration of any given commercial or number of commercials that may be transmitted within these limits.

Also, as of july 1st 1986, broadcasting stations were required to reserve at least 40% of the time dedicated to broadcasting films, for films produced in the countries of the European Community (art. 3.4).

In addition art. 9 bis forbids the broadcasting of electoral propaganda the day before and the day of an election[58].

The major feature of the law is that it did not provide any legal sanctions against operators who did not comply with these legal requirements[59].

The law was perceived to be clearly unconstitutional because it permitted private national networks to exist without any of the anti-trust provisions required by the Constitutional Court. In light of this, Parliament put a six month time limit on the

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58. Violation of this norm is punishable because of a previous penal law (art. 9, legge 4 aprile 1956 n. 212).

59. Cf. R. Zaccaria, Brevi note sull'attuazione della legge n. 10 del 1985: una legge inutile, in Rapporto annuale sui problemi giuridici dell'informazione, 1986/87, cit., p. 231, 250 ff..

law, at which stage it was to expire (art. 3). The six month period was extended for a further six months in order to allow Parliament to include anti-trust provisions in a new law[60], but Parliament did not achieve its purpose.

However, on January 3, 1986 the "Sottosegretario alla Presidenza del Consiglio", G. Amato, signed a directive declaring that the law was to be considered valid even without its further extension[61]. Some judges thought that this directive was not legally enforceable and ordered certain stations to stop broadcasting[62]. However the "Corte di Cassazione" declared that national networks using pre-recorded programmes were not considered illegal even before the 1985 law was issued[63].

Nevertheless, some judges have raised the question of the constitutionality of law n. 10 of 1985[64]. As a first step the

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60. D.L. 1 giugno 1985, n. 223, Proroga di termini in materia di trasmissioni radiotelevisive; L. 2 agosto 1985, n. 397, Conversione in legge del decreto-legge 1 giugno 1985, n. 223, concernente proroga di termini in materia di trasmissioni radiotelevisive.

61. Cf. A. Pace, La radiotelevisione in Italia, cit., p. 635.

62. E.g. Pretura di Torino, decreto 22 gennaio 1986, in Foro italiano, 1986, II, col. 228, 230 ff., whith note of R. Pardolesi, "Networks": 'buio e ritorno'.

63. See Corte di Cassazione, sentenza 3 febbraio 1987, in Foro italiano, 1987, II, col. 345 ff., whith commnent by R. Pardolesi.

64. E.g. Tribunale di Genova, ordinanza 4 febbraio 1986, in Foro italiano, 1986, II, col. 303 ff..

Constitutional Court issued an order to the Government requiring it to present global information on the position of broadcasting in Italy[65].

8.1 The "Corte Costituzionale" Judgement n. 826 of 1988.

In July of 1988 the Constitutional Court finally decided on the constitutionality of Law n. 10 of 1985[66].

As a premise, the Court reconfirmed that pluralism in broadcasting is a decisive factor for a democracy. According to the Court, pluralism meant the possibility of a private broadcasting system in which several subjects with diverse opinions could express themselves without the danger of being outcast because of the concentration of technical and economical resources in the hands of one or few broadcasters.

Secondly, the Court recognized the constitutional legitimacy of arts. 3 and 4 of Law n. 10 of 1985. The Court recognized that the law did not follow the ruling of the previous case n. 148 of 1981. Nevertheless, the Court affirmed that the law could be

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65. Corte Costituzionale, ordinanza 13 luglio 1987.

66. Corte Costituzionale, sentenza 13-14 luglio 1988 n. 826, in Gazzetta Ufficiale, July 20, 1988, p. 67 ff..

considered constitutional because it had "a clearly provisionary nature"[67], and so was destined to be replaced by a new general law. The Court stated that if the approval of a new law would be unreasonably delayed, it would have had the power to intervene and to declare these provisions of law n. 10 unconstitutional.

Finally, the Court promulgated some guidelines for the Parliament to follow in drafting a new law. These guidelines included the suggestion of creating a system guaranteeing effective obstacles to the formation of monopolistic concentrations and oligopolies.

In reality, the only new input by the Court regarding the future of broadcasting regulation is contained in the last sentence of its opinion in which the Court requests the introduction of a high level of ownership and budget visibility of information enterprises and other enterprises related to them; this visibility would have an impact on pluralism and would therefore be constitutionally relevant[68].

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67. Gazzetta ufficiale, July 20, 1988, p. 67, 91.

68. The Constitutional Court also made a general statement in which it recognized the necessity of a new law that would maintain an equilibrium of advertising resources between different information enterprises so as to guarantee the maximum of information pluralism. The Court then affirmed the necessity of a law directed toward protecting consumers from

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9. The Growth of Private Broadcasting.

After judgement no. 206 of 1976, when the Minister for Post and Telecommunications failed to enforce his power to dismantle pirate stations, there was an explosion of local private broadcasting[69].

Between July 1976 and 1980 there was an unruly scramble for frequencies. Often, it was the more underhanded operators who gained access to the best frequencies while more reticent operators awaited a new law[70].

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advertisements, not only from the amount of advertising time, but also from certain types of advertisements. In this respect, "of course", consumers should be protected from advertisements that threaten constitutionally protected rights and values, "like health, minors, the dignity of the person, etc". See Ibid., p. 89.

69. All the information about the situation of private broadcasting is taken from R. Duiz, Le tappe della tv commerciale in Italia, cit., and from a bi-weekly publication of RAI, Servizio Pubblico. Tribune e accesso. Quaderni di documentazione, which reports the most important articles on broadcasting which have appeared in the press.

70. See A. Pace, Stampa, giornalismo, radiotelevisione. Problemi costituzionali e indirizzi di giurisprudenza, Padova, 1983, p. 381.

Even the political parties gave credence to the existence of private stations by using them for campaigning purposes during the elections[71].

Since 1980, there has been a rapid growth of private national networks.

It is interesting to note that the first broadcasting network was in fact a radio network, "Radio Radicale", owned by the "Partito Radicale". This network started broadcasting live programs, capable of being received in most of the country, in 1978. The Minister for Post and Telecommunications, afraid of a strong political reaction from the "Partito Radicale", decided to sue the "Radio Radicale" only after years of broadcasting. A final judgment of the "Consiglio di Stato", made on May 5, 1983, ordered the dismantelling of the network, but the Public Administration has never enforced the order[72]. This seems to be due to the fact that the implementation of the order would provoke a strong political reaction within the country. In fact "Radio Radicale" is popular because, despite the fact that it is partisan, it often transmits "live" debates, party congresses, trials, and other news events.

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71. Ibid..

72. Cf. A. Pace, La radiotelevisione in Italia, cit., p. 630 ff..

In 1980 Silvio Berlusconi, owner of "Fininvest", originally a construction company[73], founded "Canale 5". Thereafter several publishing companies founded networks; "Rizzoli" set up "PIN" ("Primo Network Indipendente") (this network will soon be barred from broadcasting due to the judicial infringements of its owner); "Mondadori" set up "Rete 4" and "Rusconi" founded "Italia 1".

The absence of a law meant an uncontrolled "war" between the networks.

In March 1982, A. Tanzi, owner of a dairy company, "Parmalat", founded "Euro TV". In the same year the press reported Berlusconi had started a campaign with the aim of eliminating rival networks. As a first step, at the end of 1982, he bought "Italia 1". Equipped with two networks he has been in a better position to challenge the "Mondadori" group. "Fininvest"'s policy encouraged advertisers to advertise only on its channels in return for discounted rates.

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73. The "Fininvest", owned by Silvio Berlusconi, is a giant company made up of 114 subsidiaries split up into 6 divisions: broadcasting, publishing, entertainment (cinema), finance and insurances, construction and real estate. See Rapporto sullo stato dell'informazione in Italia (edited by the Presidenza del Consiglio), Roma, 1987, p. 58. On the activities of Mr. Berlusconi see G. Ruggeri, M. Guarino, Berlusconi. Inchiesta sul signor TV, Roma, 1986.

"Fininvest" challenged also the "RAI" by buying many american programmes and even poaching some of the leading television stars of the "RAI". The result was the extraordinary bidding up of the cost of foreign programs and the contracts of television stars.

Simultaneously, there was a major battle for the audiences. Using the "Istel" rating system, based on telephone calls "Fininvest" won in the television ratings and as a consequence was able to charge premium advertising rates.

In January 1983, "Rete A" network was founded.

In August 1984, Berlusconi achieved is main objective: "Mondadori", which had enormous financial problems with "Rete 4", was obliged to sell the network to its rival. This effectively made "Fininvest" a near monopoly controller of private broadcasting.

During May 1987 a split occurred in the "Euro TV" network. A. Tanzi founded "Odeon TV" network that has declared the objective of obtaining 5% of viewers (and a similar share of advertising). Mr. Peruzzi founded "Italia 7" network closely affiliated with the Berlusconi group. Indeed, Mr. Peruzzi disclosed that "Fininvest" distributes programmes and advertising to "Italia 7".

In February 1988, "Odeon TV" requested the intervention of the E.E.C. Commission against "Fininvest", accusing the rival company of violating art. 86 of the EEC. treaty (abuse of dominant position). "Odeon TV" argues that "Fininvest" provoked the split of the "Euro TV" network, by promising stations leaving the

network, program and advertising concessions. "Odeon TV" has further argued that the "Berlusconi" group has offered free advertising plus huge discounts to advertisers as well as free advertising on "Italia 7" (even without the advertisers knowledge !) in order to convince the companies not to buy advertising time with "Odeon TV".

In the opinion of "Odeon TV" lawyers the abuse of a dominant position by "Fininvest" is beyond doubt, especially since "Publitalia", the advertising branch of the group, controls 93,5% of the private broadcasting advertising market.

The following figures illustrate the present situation. In Italy, there are presently 4.204 private radio stations (almost all FM), and 1.397 television stations[74].

There are 17 private networks: "Canale 5", "Italia 1", "Rete 4", "Italia 7", "TivuItalia", "Junior TV", (the last three have signed agreements with "Fininvest" whereby the latter supplies them with programs and advertising), "Odeon TV", "Elefante TV", "TV Port", "Rete A", "Rete Capri", "Video Music", "Pan TV", "Italia Nord", "Cinque Stelle", "Retemia", "Supersix".

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74. These data came from the Minister for Post & Telecommunications and are reported in Corte Costituzionale, sentenza 13-14 luglio 1988 n. 826, in Gazzetta Ufficiale, July 20, 1988, p. 67, 74 ff..

In four cases - "Canale 5", "Italia I", "Rete 4", and "Odeon TV" - the networks reach almost the entire country; another four networks - "Elefante TV", "Rete Capri", "Videomusic" and "Rete A" reach almost half of the country (according to another source, "Italia 7", "TivuItalia", and "Junior TV", reach more than half of the country)[75].

It is interesting to observe that the electronic "Auditel" rating system in February 1987 revealed that the audience of the three "RAI" channels was 45.2% and that the three "Fininvest" channels stood at 44.6%[76]. This means that other stations have only 10% of average viewing.

10. The Problem of Foreign Broadcasting.

Until 1974, it was forbidden to install transmitters to receive foreign broadcasts.

In 1974, the Constitutional Court, in judgement n. 225, ruled this limitation to be unconstitutional since it prevented the free circulation of ideas, thereby compromising a fundamental

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75. See ibid., p. 75 ff..

76. See ibid., p. 76 ff..

value of a democratic society[77].

This declaration of unconstitutionality provoked an intervention by the legislators who in 1975, in art. 38 of the law which reformed the "RAI", ruled that the installation of transmitters of foreign programs required the authorization of the Minister for Posts and Telecommunications"[78]. One of the major provisions of the law stated that the transmitters could be used only to transmit foreign programmes as they were originally broadcast and in their entirety (art. 38). The law also required that the foreign station itself should be legitimately recognised in its own country (art. 38). Another important requirement was that the foreign stations should not have as their prime objective broadcasting in Italy (art. 38). The law also forbade the retransmission of foreign advertising (art. 40).

In practice, the Minister for Post and Telecommunications has refused for many years to grant authorization for the transmission of foreign programmes because it has been waiting for an "imminent" law covering the whole broadcasting system. Meanwhile, private stations have nevertheless been set up to

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77. Sentenza (9 luglio) 10 luglio 1974 n. 225, in Giurisprudenza costituzionale, 1974, I, p. 1775 ff..

78. See L. 14 aprile 1975, n. 103, cit..

transmit foreign programmes, often inserting local advertising in place of foreign advertising.

Some ordinary judges have tried to block these illegal transmissions, but the Public Administration has never enforced those decisions[79].

In Italy, during the 1980's, it has been possible to receive programmes from France ("Antenne 2"), from Switzerland ("Svizzera Italiana"), from Montecarlo ("Tele Montecarlo") and from Yugoslavia ("Tele Capodistria").

The last two are especially important because their principal objective is broadcasting in Italy. In September 1987, the "Rizzoli" group (that in reality is now controlled by "Fiat", which controls three national newspaper, "La Stampa", "Il Corriere delle Sera" and "La Gazzetta dello Sport") has reached an agreement with the brasilian network "Globo", owner of "Tele Montecarlo", to share the control of the station. This agreement was later declared void. In november 1987 "Fininvest" reached an agreement with "Tele Capodistria" concerning the provision of advertising and programmes.

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79. E.g. Pretura di Palestrina, sentenza 7 giugno 1982, in Foro italiano, 1984, II, col. 476 ff..

In October 1985, the Constitutional Court declared unconstitutional the law forbidding the transmission of foreign advertising. The Court stated that the legislature could impose limits on advertising but it could not forbid it completely because the advertising revenues were seen as necessary for the survival of the "transmitting" stations[80]. After this ruling, finally, in January 1988, the Minister for Post and Telecommunications gave an authorisation for the installation of transmitters for the purposes of broadcasting the programmes of "Tele Montecarlo". This authorisation, that was later extended to "Tele Capodistria", obliged the owners of these transmitters to broadcast all their programmes and advertising entirely and simultaneously. This stipulation was aimed at preventing the insertion of local advertising which could take away an important source of revenue from local stations which would endanger their survival.

The resulting situation is that "Tele Montecarlo" and "Tele Capodistria" have become very important networks mostly used for the diffusion of live news and live sports events. The two networks in fact circumvented the law forbidding live transmission of private broadcasting programmes in Italy.

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80. Sentenza 11 ottobre 1985, n. 231, in Foro italiano, 1985, I, col. 2829 ff..

11. Political Broadcasting Programmes.

The right of access of political parties to the television was introduced in 1961 when the "RAI", in agreement with the Government, began to transmit programmes involving the participation of political parties[81].

In the beginning, each party had the right of direct access, but a representative of the coalition Government had the additional right to broadcast two pre-election programmes, one at the beginning and one at the end of the campaign. This undoubtedly gave the parties forming the coalition a clear advantage over the opposition parties.

The rules regarding political broadcasting were reformed by the Parliamentary Commission, and now all parties represented in

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81. See supra, par. 3. See also P. Barile, Riflessioni di un giurista su "Tribuna politica", in Diritto delle radiodiffusioni e telecomunicazioni, 1970, p. 143 ff.. For an analysis of political broadcasting see E. Cheli, Pubblicita' e politica: il caso italiano, in Diritto delle radiodiffusioni e telecomunicazioni, 1981, 229 ff.; C. Chiola, Disciplina della propaganda elettorale delle emittenti televisive private, in Diritto delle radiodiffusioni e telecomunicazioni, 1984, p. 1 ff.; C. Chiola, La disciplina delle trasmissioni radiotelevisive preelettorali, in Il diritto delle comunicazioni di massa. Problemi e tendenze. Atti del Convegno (Genova, 8-9 giugno 1984) (E. Roppo ed.), 1985, p. 79 ff..
It has to be remembered than in the Italian Parliament more than ten political parties are represented and that the actual Government is formed by five parties.

the Parliament have an "equal time" right of access to the "RAI"[82].

The Commission required the "RAI" to be objective and impartial during elections. To this end the Commission prohibited the "RAI" from including any political candidates in entertainment shows. Their presence even in discussion programmes needed to be justified by their specific competence to speak on the topic under discussion[83].

At present, the political broadcasting rules of the public broadcasting service can be considered to be based on the principles of objectivity and impartiality[84].

However, this cannot be said for private broadcasting where the contrast is dramatic. During elections some political parties spend enormous sums of money to advertise their political symbols

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82. The right of access is guaranteed also to parties competing in at least 2/3rds of constituencies.
The Commission also permitted regional political broadcasting for Parties participating in "all" the regional constituencies.

83. Testo della delibera del 17-18 maggio 1984 contenente gli indirizzi alla concessionaria in ordine alle trasmissioni durante il periodo della campagna elettorale, in Diritto delle radiodiffusioni e telecomunicazioni, 1985, p. 292 ff..

84. Neverthless the opposition parties often affirms that news coverage is too favourable to the parties forming the government coalition.

on private stations[85]. Moreover, some private stations or networks clearly demonstrate where their political sympathies lie. This situation creates a clear advantage for some political parties.

Since the elections to the "Camera dei Deputati" determine which candidates within each party are elected, access to private broadcasting has been used by wealthy candidates to favor their position over less wealthy candidates from the same party.

There are no limits placed on election expenditures by parties or individual candidates. There is also no law requiring private broadcasting stations to exhibit objectivity and impartiality during election times. There is no obligation for them to reveal the advertising rates they offer to different political parties and candidates.

12. The Regulation of Broadcast Advertising.

85. On the development of political broadcasting see G. Mazzoleni, M. Boneschi, Televisioni private ed elezioni. Un'indagine-pilota sul ruolo delle emittenti televisive private nell'ultima campagna elettorale, in Problemi dell'Informazione, 1980, p. 397 ff.; E. Cheli, Pubblicita' e politica: il caso italiano, in Diritto delle radiodiffusioni e telecomunicazioni, 1981, 229 ff.; P. Mancini, La "prima volta" degli spots politici, in Problemi dell'Informazione, 1984, p. 7 ff..

Advertising first made its appearance on Italian radio in 1924[86]; in 1927 the law specified that advertising could not exceed 10% of the total time devoted to programmes[87].

In 1952, the State ruled that commercial time "had to be presented in a reasonable manner and not compromise the quality of programmes"[88]. This law lowered the amount of commercial advertising to 5%.

During the 1970's the "RAI" announced an increase in advertising prices. This move was criticised because it might reduce the advertising fees received by the press.

The Constitutional Court adopted this position in judgement n. 225 of 1974[89], when it stated that the new law reforming the "RAI" should have placed some limitations on broadcasting advertising "so as not to compromise a traditionally important

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86. See P. Cannistraro, La fabbrica del consenso, cit., p. 254.

87. R.D. 29 dicembre 1927, n. 2526, approvazione della convenzione tra il Ministero delle comunicazioni e la societa' anonima "Ente Italiano per le Audizioni Radiofoniche (E.I.A.R.) per il servizio delle radiodiffusioni circolari.

88. D.P.R. 26 gennaio 1952, n. 180, approvazione ed esecutorieta' della convenzione per la concessione alla Radio Audizioni Italia, Societa' per azioni, del servizio di radioaudizioni e televisione circolare e del servizio di telediffusione su filo.

89. Sentenza (9 luglio) 10 luglio 1974 n. 225, in Giurisprudenza costituzionale, 1974, I, p. 1775 ff..

source of income for the printed press..."[90] The legislators accepted the Court suggestions and in the 1975 law reforming the "RAI" confirmed the 5% limit[91].

The law also set another important limit: every year the Parliamentary Commission could determine the maximum revenue that the "RAI" could gain from advertising activities[92].

Since 1980, mainly due to the explosion of private broadcasting, expenditure on advertising has greatly increased.

In 1987 the turnover of advertising revenue was 1550 billion lire for "Fininvest"[93]; 718.4 billion for "RAI", 360 billion for other private stations, compared with 1140 billion for newspaper, 990 billion for magazines, 110 billion for radio broadcasting, 180 billion for postal and bill boards advertising, and 15

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90. Ibid. p. 1789.

91. L. 14 aprile 1975, n. 103, nuove norme in materia di diffusione radiofonica e televisiva. Only exceptional cases this could reach 8%.

92. In 1982 this limit was set at 345 billion lire equal to 16.6% of total advertising expenditure in Italy); in 1983, 432 billion = 16%; in 1984, 498 = 15,3%; in 1985, 619 = 16.2; in 1986, 667.6 = 15%; 1987 718.4 = 14.2.

93. In reality "Publitalia", the "Fininvest" advertising branch, controls also a big percentage of other stations advertising.

billion for cinema[94].

If we consider the general budget of the networks (including listener taxes received by "RAI") we can see that "RAI" has an income of 2.117 billion lire; "Fininvest", 1.698; others 275 (including "Odeon TV", 39; foreign networks, 36; "Italia 7", 16; other national networks, 74; local televisions, 110)[95].

An analysis of the statistics of 1980-87, shows that advertising expenditure greatly exceeded the growth rate of GNP. The statistics also reveal that while the advertising earnings of the press have grown strongly[96], they have nevertheless decreased relative to the receipts of broadcasters.

13. The Problem of Italian Stations Which Broadcast in Other Countries.

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94. These data came from the budgets of RAI, Fininvest, printing press companies, and from the magazines Media Key, Il Millimetro, and have been elaborated by F. De Vescovi. For other data see F. De Vescovi, Economia dell'informazione televisiva, Roma, 1986.

95. These data come from Corte Costituzionale, sentenza 13-14 luglio 1988 n. 826, in Gazzetta Ufficiale, July 20, 1988, p. 67, 78.

96. In 1980 the print press had an advertising income of 717 billion lire (compared with 419 billion for broadcasting). In 1987 the print press income was 2300 billion (compared with 2815 billion for broadcasting).

Art. 2 of Law n. 103 of 1975 reserved to the State the right to broadcast "either within the country or directed to foreign nations". The Constitutional Court, in judgment n. 153 of 1987[97] has declared this article unconstitutional in so far as it seeks to prevent citizens broadcasting to foreign countries. This judgment did not confer an automatic right for private broadcasters to transmit their programs abroad, this right being subject to obtaining an authorization by the Minister for Post and Telecommunications.

This ruling seems to have been made in order to give the Public Administration the discretionary power to prohibit private broadcasting where there was a possibility of conflict with foreign countries not wishing to receive private broadcasting.

14. Proposals for a New Law.

14.1. The Government Proposal of 1985.

The Parliament had to wait until 1985 to receive a proposal of

97. Sentenza 13 maggio 1987, n. 153, in Foro italiano, 1987, I, col. 1965 ff., whith comment by R. Pardolesi.

law from the Government[98]. The legislative proposal prohibited an individual controlling more than two national networks and partial interests in both newspapers and television networks. A person controlling more than 20% of the newspapers circulating in Italy could not also own a network.

The proposed legislation also set out rules governing advertising. A person who owned both a television network and at the same time a group of advertising agencies (e.g. Berlusconi who controls "Fininvest" and "Publitalia", and "RAI" which controls "Sipra") would be compelled to ensure that the advertising agency gave at least 80% of its advertising business to the associated television network. This provision was made to try to ensure that an owner could not use his advertising agency to exert undue pressure on other rival television networks. An advertising limit of 16% of total broadcasting time was also proposed. Subliminal advertising was also banned.

In addition, each network has to produce at least 20% of its broadcast programmes itself. Or at least 40% of the production costs of these programmes would have to be spent within the E.E.C. member States.

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98. See Disegno di legge (n. 2508) presentato dal Ministro delle Poste e Telecomunicazioni, Disciplina organica del sistema radiotelevisivo nazionale, presentato alla Camera dei Deputati il 1 febbraio 1985.

The implementation of the proposed legislation was to be insured by a body of five guarantors, two of whom were to be appointed by the President of the Republic, and three by the Chairmen of the two Houses of Parliament. These guarantors were to be chosen from former Constitutional Court judges, ordinary High Court judges and University professors.

14.2. The Government Proposal of 1988 and the Proposal of the Major Opposition Party, the "Partito Comunista Italiano", of 1988.

In April 1988, a new 5 party coalition government led by C. De Mita (leader of the "Democrazia Cristiana") was formed. For the first time, the problem of forming a new law to govern broadcasting was an important issue on the agenda of the pre-coalition talks.

On June 20, 1988 the Government presented a bill for the regulation of broadcasting[99]. Four days later, some Representatives of the major Opposition party, the "Partito

99. See Disegno di legge (n. 1138) presentato dal Ministro delle Poste e Telecomunicazioni, Disciplina del sistema radiotelevisivo pubblico e privato, presentato al Senato il 28 giugno 1988.

Comunista Italiano" (PCI) presented a different proposal[100]. The following is a comparison of the principal provisions of the two bills. It is necessary to note in advance that the Government proposal is substantially different from the bill presented in 1985 and that the PCI proposal is more detailed because it attempted to disciplin the sector in a more exhaustive way in order to prevent possible transgressions from the spirit of the law.

Introductory Remarks. The introductory remarks of the Government concentrated on the necessity of approving a new law to regulate broadcasting and focussed particularly on one of the major proposals of the Government: the prohibition of cross-ownership between broadcasting and print media.

The introduction to the bill of the PCI is more political. The bill is introduced with an analysis of the recent trends in the mass media market in Italy. The PCI members of Parliament proposing the law, noted that after 1975 many industrialists

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100. See Disegno di legge (n. 1159) d'iniziativa dei Senatori Macaluso, Fiori, Pecchioli, et al., Disposizioni generali per la regolamentazione del sistema delle comunicazioni di massa e norme per la garanzia delle liberta' di concorrenza e del pluralismo dell'informazione, presentato al Senato il 24 giugno 1988 (hereinafter cited as PCI Proposal).

(and they cited Agnelli, Romiti, Schimberni, De Benedetti) had bought interests in several mass media companies (newspapers, magazines, broadcasting), and they emphasised four major characteristics of this phenomenon:

The first element is that investors are really interested in gaining profits from these interests. Even if this investment is more of a political, rather than industrial nature (as we will see), the investors want the controlled enterprises to be well managed so as to produce profits and to reach major markets. Therefore these investors tend to directly administrate the mass media companies.

The second element is the integration of the mass media companies into the strategy and control of the already existing "group" or mother company. In this sense the mass media is an instrument for reaching new clients and for promoting the products and activities of the "group".

The third element is the use of the media as an instrument to obtain a cultural and political consensus as to the goals, projects, and financial and political strategies of the big companies. The companies need to use the media as a tool for the "legitimation" of their financial and economic activities.

The fourth element is the use of the media as an instrument of persuasion, power and control of politics and politicians. In Italy, politics have a strong influence on the development and reorganization of big enterprises (i.e. approval of financing

laws, special loan rates, sales of public companies (i.e. "Alfa Romeo" sold from the State to "FIAT"), creation of joint ventures between public and private enterprises). To obtain economic results "few instruments are as effective as the control of the mass media, and the promise (or the threat) to use it as a pressure tool or merchandise of exchange"[101].

Licenses. Both bills provide that television broadcasting stations must obtain a license from the Minister of Post and Telecommunications to operate (art. 1., 7. Gov.; art. 19. PCI).

According to the Government bill each license lasts 9 years and is non-transferable (art. 7.2.). The PCI bill provides that radio licenses expire after 7 years (art. 18.9.) and television licenses expire after 10 years (art. 19.6.).

The license can be released to Italian or EEC citizens or companies (art. 7.4. Gov.; art. 3. PCI). Both the bills allow a minority participation for countries outside the EEC) (art. 7.6. Gov.; art. 3.5. PCI specifies the limit of 10%). The governmental proposal requires that national networks (those reaching at least 70% of the national territory (art. 2.11.a. Gov.) must have at least 1 billion lire of capital to operate (art. 7.6.).

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101. PCI Proposal, p. 6.

The license can be released only to an enterprise that has as its objective broadcasting, printing press, or entertainment activities and cannot be released to a public entity, a bank (art. 7.7. Gov.; art. 17.3. PCI), persons convicted of certain crimes (art. 7.9. Gov.), or advertising companies (or distributors of advertising) (art. 17.3. PCI).

Requirements to Obtain a License. The Government bill is very general regarding the criteria for granting a license. Article 7.12. affirms that: "the release of a license is based on objective criteria that takes account of the market, the economic potential, and the quality of the proposed programming. For requests from those that are presently broadcasting, the Minister must take account of the hours of transmission or of the percentage of entertainment and information services self-produced."

The PCI bill distinguishes between radio and television licenses. Radio licenses are released by Regions (art. 18.) giving consideration to a) number of persons in charge of information; b) foreseen investments; c) percentage of self-produced programs; d) spaces for access; e) spaces for information; f) quantity and quality of services for the served community; g) and experience in the field. On the other hand, television licenses are released by the Minister for Post and

Telecommunications, which must guarantee (art. 19.1.): a) pluralism and a free marketplace; b) the right of citizens to complete, objective and impartial information; c) development of national and local culture; d) technological progress, e) and jobs.

Anti-trust. The two bills have substantial differences in their anti-trust provisions.

The Government norms are contained in art. 8.. One person cannot be entitled to contemporaneous licenses in the national and local sector. The article then specifies that the same person cannot posses more than 25% of the total national networks nor more than 3 networks. It is obvious that this norm confirms the existing situation in Italy (where Berlusconi owns already three national networks) and cannot be considered as an anti-trust provision.

The bill recalls art. 2358 of the civil code to determine the definition of "control" of a company. The civil code provides that in order to be controlled by another company it is sufficient to be "under the dominant influence... in relation to the shares or participations owned... or because of particular contractual relations".

Another anti-trust limit is contained in art. 12. which forbids cross-ownership between national networks and national newspapers "to prevent dominant positions in the mass media".

This is the so called "option zero", which was one of the most important norms of the bill. As a consequence of this provision "FIAT" would have to renounce "Tele Montecarlo" and Berlusconi would have to renounce "Il Giornale", but, as we will see, afterwords the Government declared its intention to abandon the norm.

The PCI bill is more detailed and concerns all the mass media. The substance is also very different. The proposed bill has as its main objective the guarantee of the maximum possible freedom of expression and of information (art. 1.). Some of the instruments that are conducive to these objectives are transparency of ownership (art. 4., 5.) and the preparation of a detailed annual budget (art. 7.). The bill is also very detailed in its definition of control over a mass media company. The most relevant part of art. 10. states that there is control in any "situation that gives the opportunity to exercise, either indirectly or together with other subjects, a determinant influence, either positive or negative, over choices relating to the management of the controlled company or the information policies of the mass media".

The bill forbids any dominant position in the mass media (art. 9.) A dominant position is considered a) the control of more than 20% of the total advertising of broadcasting, print press, and periodicals (art. 9.4.); b) the control of more than 20% of the

total number of newspapers edited daily in Italy[102] (art. 12.1.); c) the control of more than 25% of the copies of periodicals edited in Italy[103] (art. 12.2.). These limits are reduced to 1/5 for companies with a cross-ownership controlling at least 10% of a newspaper and 10% of the periodicals in Italy (art. 12.3.). The same reduction is provided for companies or groups of companies with interests in other economic activities that are superior to the interests in the mass media sector (art. 13.).

The bill then deals directly with the problem of concentration in broadcasting. It affirms that the State can release broadcasting licenses to private parties "to respect the general interest and to avoid monopolies or oligopolies, to guarantee pluralism of cultural, political and social trends, to render effective the right to information and to freedom of expression..."(art. 14.1.).

The bill also proposes anti-trust measures: the most relevant prohibit the control, at the same time, of national networks and local stations and limit the same property to the control of a maximum of two national networks (arts 20., 25.). This bill

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102. This prevision confirms art. 3. comma 1, of L. 25 febbraio 1987, n. 67, rinnovo della legge 5 agosto 1981, n. 416 recante disciplina delle imprese editrici e provvidenze per l'editoria.

103. Actually in Italy there are no limits on the control of periodicals).

rejects the "option zero" but puts limits on cross-ownership between medias: a person controlling two national networks can also control a maximum of 5% of the newspaper market, 10% of the periodical market, 15% of the cinemas (because this control can provoke distortions in the market of the right to retransmit new movies on television) and cannot collect broadcasting for other broadcasting stations (art. 25.). A company controlling one network (and that provides advertising or programs to local stations) can extend its control to 10% of the newspaper market, 15% of the periodical market and 20% of the cinemas (art. 26.). Finally, an industrial or financial company controlling a national network can control a maximum of 12% of the newspaper market and 16% of the periodical market.

It is important to note that advertising companies or program producers also have to limit their activities to a maximum of two networks.

Another norm prohibits activities directed toward "alterating, distorting, or restricting the market" between mass media enterprises (art. 24.). In particular, the practice of setting prices in order to provoke artificial alterations in the market and directed toward damaging or eliminating a concurrent station's budget, are forbidden (art. 24.3.).

Station's budgets. The two bills provide that every station has to present an annual budget (prepared according to a model

approved by the Government). The budget has to describe all the economical information relating to each program (producer, cost) and to advertising transmitted by the station. It also has to contain the names of all the station subscribers (art. 14. Gov.; art. 7. PCI). The principle difference between the two bills is that the one presented by the Opposition provides for the withdrawal of a license (plus the application of art. 2621 of the penal code) from companies that refuse to present a copy of the annual budget (art. 7.9.). The Government proposal, instead, provides only penal consequences (art. 2621 of the civil code) in cases of false budgets.

Program Obligations. According to both the bills (art. 9. Gov.; 21. PCI), the stations are obligated to broadcast a minimum number of hours (local stations 8 hours a day and not less than 64 a week and national networks 12 hours a day and not less than 90 hours a week). They must tape each transmission and must save these tapes for two months.

The PCI's bill (art. 21.1.) provides a minimum quota of self-produced programs: for national networks those programs cannot be less than 30% of the programs transmitted from 7 p.m. to 10 p.m., and 25% of the total programming (in case of co-productions the amount is given by the percentage of the network participation).

Both the bills provide that the networks must invest in national or EEC productions a determined percentage of the money destined for productions in the following amounts: 30% the first year, 40% the successive year, and 50% in the following years (art. 9.8. Gov.); the PCI bill requires a quota of 40% of the investments, and requires that 50% of time dedicated to films has to be filled with films produced in EEC countries (art. 21.6.).

Only the Government bill requires the national stations to transmit daily information programs (art. 9.7.).

Advertising. The two bills impose different limits on advertising: in the Government proposal (art. 5.) "RAI" cannot transmit advertising for more than 12% of each hour and not during more than 4% of the weekly programming. The PCI bill (art. 23.) proposes a maximum of 10% of each hour and 5% of the weekly programming. Private national networks have a limit of 18% per hour and 16% per week (PCI allows 12% and 10% respectively); local stations have only a limit of 20% per hour (and 16% in the PCI bill).

Only the PCI proposal considers advertising during sponsored programs: they are evaluated as advertising for 2% of the total time of sponsored programs (art. 23.6.).

Both the bills (art. 5.4. Gov.; art. 23.5. PCI) provide that the national networks cannot transmit local advertising

(therefore the national networks must transmit the same advertising in all its territories). This norm has the clear intent of protecting the local stations.

Both bills provide for the annulment of advertising contracts that require the stations to transmit determined programs (art. 5.5. Gov.; art. 23.7. PCI). The intent of this norm is clearly that of attempting to avoid interference by advertisers in the stations programming.

The private stations are also forbidden to transmit coded, conventional or subliminal messages (art. 6.2. Gov.; art. 21.8. PCI); films that are prohibited to minors under 18 years of age must be transmitted after 10:30 p.m. (art. 6.3. Gov.). Penal Code (art. 15. Gov.) is applicable for obscene programs.

Another important norm contained only in the PCI proposal and directed towards protecting the rights of authors and viewers, authorizes the transmission of advertising only at the beginning, end, or during natural intervals of movies, plays, or musical programs (art. 23.8.). In order to protect cinemas, the same bill provides that all movies, except those produced or co-produced by the network, can be broadcast only after two years from its first public projection in Italy (art. 21.7.)

Political Broadcasting. The Government proposal (art. 9.6.) requires broadcasters to charge the same spot price for all participants in an election. Instead, the PCI proposal (art.

21.10.) requires that broadcasters "practice conditions of equal treatment to parties... participants to the elections." The last proposal seems to offer more guarantees to all parties: "equal treatment" means not only the same price, but also equal free space to all parties and equal right to buy air time.

Controls and Sanctions. The two bills propose different organs to control the broadcasting system.

The control of the application of the law is given by the Government (art. 3.) to an independent organ, the "Garante per la radiodiffusione" (Guarantee for radiodiffusion), which is a person of high qualification chosen by the Presidents of the Senate and of the "Camera dei Deputati"[104]. His term expires after seven years and is not renewable (art. 3.3.). The control of the technical norms (related to the use of frequencies) and political broadcasting is instead vested in the Minister for Post and Telecommunications (art. 16.).

The PCI proposal is inspired by the model of the USA Federal Communications Commission. Art. 28. provides for the creation of a "Commissione nazionale per le comunicazioni" (National

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104. This organ was previously introduced, with analogues powers in the law of 1981 regulating print-press. See L. 5 agosto 1981, n. 416, Disciplina delle imprese e provvidenze per l'editoria.

Commission for Communications)[105]. It is composed of five members appointed by the "Presidente della Repubblica" on a proposal of the Presidents of the Senate and of the "Camera dei Deputati". Each member is a person of high qualification. The term of the five Commissioners is five years and can be renewed once.

The major duties of the "Garante" are: a) to keep a national register of the private broadcasting stations (arts 3.10.a., 11.); b) to examine the budgets of the stations (arts 3.10.b., 14.); c) to release a "cease and desist" order to broadcasters violating the norms related to advertising, and anti-trust violations (arts 3.10.d., 16.). In case of resistence the "Garante" can impose a pecuniary sanction, or a short suspension of the license and in extreme cases the revocation of the license. Analogous powers are vested in the Minister for Post and Telecommunications for violations of technical norms, violations of the duty to transmit short communications in case of public necessity (provided in art. 4.5.), and violations of the norms related to the minimum hours of programming, of EEC investments and of political broadcasting (art. 16.). The Minister can also revoke the license for penal convictions that

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105. This Commission would absorb all the functions of the "Garante per l'attuazione della legge sull'editoria".

the law determines as just cause for losing a license or for the subsequent loss of one of the requirements necessary to obtain a license (art. 16.11.).

The Minister, with the agreement of the "Garante", can suspend the license for a short period for violations of the norms concerning subliminal advertising and on the transmission of movies forbidden to minors of 18 before 10.30 p.m. (art. 6.4.).

The PCI proposal, instead, gives the Commission all power of control over infringements of the law (arts 28., 29., 30.). In case of violation of the law the Commission, after a hearing, can issue a "cease and desist" order. In cases in which this order is not respected, the Commission can suspend the license for a minimum of three months to a maximum of twelve months. In case of further violations in the next year, the Commission can revoke the license.

Finally, according to both proposals, the licensees have the right of appeal against these administrative actions; the Government bill allows this appeal to be brought before a "Tribunale Amministrativo Regionale"[106] (Regional Administrative

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106. In the Italian system the "Tribunali Amministrativi Regionali" (present in all the Regions) are usually the first grade court for administrative actions (L. 6 dicembre 1971, n. 1034).

Tribunal) (art. 18.). The PCI proposal (art. 32.1.), instead, gives exclusive competence to the "Tribunale Amministrativo Regionale" del Lazio. This is due to the fact that the TAR of Lazio (the Region which includes Rome) would be the territorial forum for the decisions of the Commission, which would be located in Rome.

15. Conclusions.

Since the 1970's Italy has experienced a growth in the concentration of mass media ownership.

As it has been noted in this work, the private broadcasting sector is largely controlled by one entrepreneur who owns three stations (and exercises a great influence over other networks).

The print press has also experienced increasing concentration: the "Garante per l'editoria", the organ which controls the application of the laws that regulate the sector[107], in its

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107. In 1981 Parliament approved a law (L. 5 agosto 1981, n. 416, cit., subsequently amended by L. 25 febbraio 1987, n. 67 cit.) regulating print press that contained an anti-trust norm (the first approved in Italy). In fact each person or company can control a maximum of 20% of the copies of newspaper daily published in Italy. On the norms regulating print press see,

(Footnote continues on next page)

report of 1988 to the Parliament[108], has noted that the three major groups ("FIAT-Rizzoli", "Mondadori" (now controlled by De Benedetti), "Monti") control 42.5% of the total number of newspapers published annually. In addition, four major groups ("Mondadori", "Espresso", "FIAT-Rizzoli", "Fininvest") control 61.44% of the annual magazine publications. Finally, five major advertising companies, that are tied to television and print press companies ("Publitalia"-"Fininvest", "SIPRA"-"RAI", "RCS Editori" and "Publikompass"-"FIAT", "A. Manzoni"-"Mondadori" and "Espresso", "SPE"-"Monti") control 78.6% of the advertising.

The most urgent problem at this time is the promulgation of a law that regulates broadcasting. It is extremely difficult to predict when such a law will be passed because there are many

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(Footnote continued from previous page)

among others, G. Corasaniti, Trasparenza delle imprese editrici e concentrazione delle fonti informative nella prima applicazione della disciplina antitrust sull' editoria, in Rapporto annuale sui problemi giuridici dell'informazione. 1986-1987, cit., p. 85 ff.; A. Gentili, Bilancio e prospettive del primo quadriennio delle norme sulle concentrazioni nella stampa quotidiana e riflessi sulle radiodiffusioni private, in ibid., p. 117 ff.; U. De Siervo, Prime considerazioni sulla nuova legge per l'Editoria, in ibid., p. 151 ff..

108. See G. Santaniello, Relazione al Parlamento del Garante della legge per l'editoria. Relazione semestrale al 30 novembre 1988, in Vita italiana speciale. Istituzione e comunicazione, n. 4, 1988, p. 7 ff..

differences among the parties. The provisions that are still under discussion are those regarding the number of networks that can be controlled by the same company, the possibility of cross-ownership between broadcasting and the print press, limits on the amount of advertising that each company can distribute to the networks and the quantity of advertising allowed during programs (on this point it important to emphasize that in the print press sector there are frequent complaints because the broadcasting industry absorbs a great part of the advertising market).

One of the phenomenon of the 70s was the continual "ping pong" between the Constitutional Court and the Parliament-Government. In 1974 the Constitutional Court, with judgment n. 225, affirmed that the state monopoly over frequencies could be considered constitutional if the control of public broadcasting ("RAI") passed from the Government to Parliament. Parliament reacted with the approval of a law that reformed "RAI". In judgment n. 202 of 1976 (confirmed in sentence n. 148 of 1981), the Constitutional Court changed its orientation and allowed private broadcasting stations to operate on a local level. The legislature failed to respond to this judgment with the approval of a law. This inertia has caused great chaos among the broadcast frequencies. When the first national networks started, the Government did not use its power to close the stations. Some judges attempted to respect the existing laws (that prohibited national networks) and the Government reacted with the approval of a "decreto legge" (a law

approved by the Government to cover an urgent situation that must be approved by Parliament within 60 days to remain in effect), which was later transformed into law by Parliament (Law n. 10, 1985). This law allowed the existing national networks to continue until a law was passed concerning their status. With sentence n. 826 of 1988 the Constitutional Court gave an ultimatum to the Government/Parliament in which it declared that law n. 10 of 1985 is constitutional only because of its provisory nature and that the approval of a new law containing anti-trust norms is required.

In the meantime the networks of Berlusconi, that have a big income coming, above all, from advertising, have entered the live of the Country. Their existence seems to be legitimized by large sectors of the existing political power and also by their large television public. It is evident that a great political battle is in course. Within the parties that form the coalition government, many politicians are worried about the excessive power accumulated by the Berlusconi group. The parties of the opposition have proposed the promulgation of an anti-trust law that limits the control by one person (or company) to two networks and one newspaper. Even in the intellectual strata of the country, there are many voices levelled against the existing situation, and this opinion is largely shared by others.

Fundamental interests of the democratic regime are in play, first of all the right of citizens to have access to pluralistic

sources of information. It is therefore absolutely necessary that a law with important anti-trust measures be approved by Parliament.

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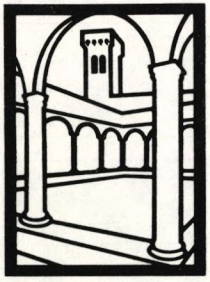

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