The Requirements for the Independence of Public Service Television

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Sometimes the title of a speech already tells its own story. By what it includes and what it does not include.

Why only public television, why not also public radio?

I shall be speaking about public broadcasting, which covers both television and radio. Independence is vital for both. But it is also true, given that independence may come under threat from politicians, from those who are in power, that politicians seem to care only about television. Is it because they consider television to be the all-powerful medium for influencing public opinion? Is it perhaps also because they love to see themselves on television? Or perhaps a combination of these motives? Strangely enough, they want to control and influence the editorial line of public television even when it has only a relatively small market share, and therefore considerably less influence on public opinion than the - often virtually uncontrolled - commercial competitors. Sometimes the “justification” given for their particular attention to public television is that unlike commercial television it is financed through public funds. That is correct, of course, but public funds are not there to finance the political well-being and future careers of those in power.

But let us go step by step.

Allow me to start with a brief personal note. My first visit to Budapest, on a mission to assist with legislation aimed at transforming the then state broadcasting system into independent public service broadcasting, was in 1990. That same year already, Hungarian State Radio and State Television applied for EBU associate membership. They were accepted as associate members in July 1990, before becoming full active members as of 1 January 1993.

Back in 1990, the Director General of Hungarian Television was a certain Professor Hankiss. Among the various moves undertaken by him to achieve a speedy transformation of his organization was the creation of a high-level international advisory board, chaired by the then President of the EBU, Professor Albert Scharf. I personally was honoured to be one of the members of that distinguished group. Alas, over the years which followed the advisory board was obliged to realize its own helplessness, not least - but not only - because of the two-thirds majority requirement for broadcast legislation.

I shall close this nostalgic look backwards by recalling one declaration which Mr. Hankiss made at the time to the international advisory board, and which left a deep impression on all of us. "After my appointment", he told us, "I informed the President and the Prime Minister of Hungary that for the next six months I would not take any phone calls from them." A courageous man! Did his successors play by the same rules?
I hope that the fact that I am here today, sixteen years later, and that I have been here on a number of similar missions in the interim, shows you that I am an irredeemable optimist.

But let me move away from Hungary now and look at the requirements for the independence of public service broadcasting from a more general standpoint.

As it happens, only five weeks ago the Committee of Ministers of the Council of Europe adopted a Declaration on the guarantee of the independence of public service broadcasting in the Member states. While I recommend everyone to read the Declaration very carefully, here I shall merely quote the main grounds for the Ministers seeing a concrete need to speak up:

"In a number of Council of Europe member states, legal frameworks for public service broadcasting organisations are unclear or incomplete. In some cases, the applicable regulations are not capable of guaranteeing editorial independence and institutional autonomy of public service broadcasters, whether as a result of the tenor of substantive provisions or of the weakness or absence of mechanisms designed to ensure their application.

Reportedly, in some cases, while relevant provisions may be adequate, they are disregarded in practice, leaving the public service broadcasting organisation under the effective control of the government or political bodies or formations, serving the interests of those bodies rather than society at large."

Although this finding could be interpreted as indicating that true independence is simply impossible, a more positive approach would be to postulate that every effort should be made to come as close as possible to the ideal of genuine independence, on paper (in the Broadcasting Act) first and then in a continuous struggle to defend it against all kinds of overt and - more often - covert attacks. However, before we look at mechanisms for the safeguarding of the independence of public service broadcasting, it appears legitimate to ask why independence is so important to begin with.

The Preamble to the famous Amsterdam Protocol on the system of public broadcasting in the EU Member States (2 October 1997) recalls that

"... the system of public broadcasting ... is directly related to the democratic ... needs of each society and to the need to preserve media pluralism."

The democratic needs of each society can be condensed into one single requirement: informed citizenship. For democracy to function, there need to be informed citizens who, when exercising their fundamental right to vote, make their choice on the basis of solid information. Information on everything which may be relevant, starting with close observation and critical analysis of the daily activities of those elected or appointed to public office. Information also on future plans and challenges, including aspects which those in power may not wish to see addressed or highlighted.
There is yet another important aspect which is referred to in the quote I gave from the Amsterdam Protocol: the system of public broadcasting is directly related to the need to preserve media pluralism. In the extreme, it could be argued that any media outlet, even the most one-sided or polemical one, including a pure state broadcasting channel, contributes to media pluralism. However, if public broadcasting is singled out in connexion with the need to preserve media pluralism, it must clearly be for reasons other than its mere addition of another facet to the multitude of published information and ideas. The real reason can only be that public broadcasting ensures unbiased, objective and comprehensive information and, because of that, is an "oasis of credibility" within the total media landscape of its country. In fact, the German Constitutional Court went so far as to hold that commercial broadcasting is permissible only because of the existence of independent public broadcasting. Without enjoying full editorial independence, public broadcasting could not fulfil this vital role in the overall context of media pluralism.

How can this independence be guaranteed, and what are the risks and dangers of the independence being undermined?

The threat to independence does not come from censorship (which, fortunately, is a thing of the past) but from self-censorship, exercised under political pressure which the Broadcasting Act may directly or indirectly allow, or which in any case it does not preclude.

It must be recalled, in this context, and this point cannot be over-stressed, that each country has its own legal culture, based on tradition. Thus, in some countries, laws may simply not be fully respected, and such disrespect may even come from the government or the president of the country. At the same time, it may be impossible to enforce respect, or the correct application, of the law through court action, either because the very act of launching court proceedings might produce even worse consequences for the public broadcaster, or perhaps because the court system itself is not sufficiently independent or self-confident to take decisions against the government or the president of the country. Furthermore, laws may be applied and abided by in good faith, by respecting, in particular, their legislative purpose and spirit or, on the contrary, by exploiting whatever their wording may permit but which may not have been the intention of the legislator. For this reason alone, extreme caution is required before a foreign legal text is adopted as a model for one's own legislation.

The best illustration of this point may be the Constitution of the United Kingdom. To all appearances, that Constitution functions quite well. However, it does not exist in written form, and which other country could opt for an unwritten Constitution today by adopting the "UK model"?

Another model from the UK is the BBC, and not least with regard to its universally-recognized independence. And yet, the BBC has 12 Governors, appointed by the Queen on advice from the Government, and these Governors in turn appoint the Director General. Similarly, the Danish Minister of Culture appoints the Board of DR (ten
members) which, in turn, appoints the Director General of DR. Or, again, Finland, where the Administrative Council of YLE (21 members), elected by Parliament, appoints the Director General of YLE. Indeed, the Slovenian legislator did not fail to invoke these precedents to justify the recent legislative reform in Slovenia.

In reality, in the field of broadcast legislation, and more specifically when it comes to the appointment of the members of an independent regulatory/supervisory board or of the Director General of the public broadcasting organization, those entitled to appoint may honestly choose the best qualified candidate or candidates, not infrequently even from the ranks of the opposition, but they may also let themselves be guided by entirely different considerations, such as party political allegiance or even nepotism.

But even where a positive political culture exists, with a long-standing record of stability, can it be relied upon that those in power at any given time will not break the rule? Some may claim that that is precisely what has happened, for instance, in Denmark in the recent past.

Rather than hiding behind the excuse that "the same model also exists in country X or Y", legislators (and especially those in countries which do not have a confirmed positive political culture in this respect) should therefore ensure from the outset that the law cannot be circumvented or applied in a manner which is contrary to the declared legislative purpose. A piece of advice often given to them in this context is: "You will, of course, behave in the spirit of the law. But are you sure that the present opposition, whenever it comes to power again, will behave in the same responsible manner?"

In concrete terms, this would mean for the regulatory/supervisory board that there need to be positive requirements (such as experience) and, in particular, clear grounds for non-qualification (such as holding party political office, being a member of the government or parliament, own or close family members' conflict of interests, etc.). It then needs to be ensured that whoever appoints the members of the board is prevented from choosing people who are from the same party political spectrum or to whom political or other favours are owed. A combination of measures may ensure that the desired result is more or less achieved:

- The board members could be appointed direct by various civil society groups which are expressly listed in the law. Where there are two or more such groups from the same sector (e.g. farmers' associations), the one with the highest number of registered members has the right of appointment.

- Where such a solution is not feasible, and where the power of appointment is entrusted instead to a political body or bodies, one solution would be to have the Parliament itself appoint the members, but by a two-thirds or - better still - a three-quarters majority. Another solution would be to have one-third of the membership each appointed by, for example, the President, the Prime Minister and the leader of the parliamentary opposition.

- The duration of the mandate should be a fixed term which does not coincide with the duration of the legislature (six years, for example).
• Every so often (perhaps every two years, or every 18 months) one-third of the membership is replaced. This makes the whole board less dependent on a given political configuration at a given time, but it also ensures the necessary continuity in the work of the board.

Once such legislative safeguards are in place, it is then again a question of political culture as to how those appointed will actually behave.

Will they be guided by professional considerations only, or even go out of their way to prove their independence, or will they instead feel obliged to show their gratitude to whoever appointed them, knowing, or believing at least, that this is tacitly expected of them?

When it comes to the appointment of the Director General (as well as of the editor-in-chief, if the latter's appointment is neither made direct by the Director General nor made subject to the Director General's approval), the only real solution would appear to be appointment by the supervisory/regulatory board (rather than, for example, by the President or the Prime Minister or Minister of Culture or, indeed, the Parliament), preferably by a qualified majority (e.g. two-thirds). Dismissal should be possible only by the same majority. Where Directors General feel obliged, in order to be re-elected, to please a given political majority which put them in office in the first place, their behaviour - with direct repercussions on programming - is more than predictable.

The second major area where ensuring the independence of the public broadcaster is a key legal issue is funding. Where the broadcaster depends on the goodwill of the Government for obtaining its annual allocation from the State budget, it is obvious that there cannot be editorial independence (including the right to criticize the Government). The same applies, though at longer intervals, whenever the parliamentary majority is called upon to vote on an increase in the amount of the receiving licence fee. He who wants money has to buy the favours of the donor in the first place, and "he who pays the piper calls the tune".

A satisfactory legislative answer to this inherent problem is not easy to find, if it can be found at all. That being the case, the first priority should be to limit such possibilities of political interference by having a decision taken at intervals of several years only. Where there is a licence fee system (doubtless still the best solution), the amount should be fixed for as long a period as possible (such as six years), with automatic inflation indexation plus an additional small percentage (to take account of the fact that prices in the broadcasting sector rise more quickly than the average national inflation). Where the money comes in the form of an annual allocation from the State budget, the amount should ideally be fixed by Parliament, projected over several years in the same manner as I have just described in relation to the licence fee.

There remains the question of how the amount of the annual allocation or of the monthly licence fee is fixed in the first place.
In the Prague Resolution of 1994 - a provision which was repeated and reconfirmed thereafter on several occasions - the Ministers of the States which participated in the 4th European Ministerial Conference on Mass Media Policy (Council of Europe) undertook "to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions".

A funding system which is secure and which guarantees the means necessary to accomplish the public service broadcasting mission cannot be subject to the goodwill of politicians. The financial needs of the public broadcaster should be established in an objective and transparent manner and then endorsed - as far as their correctness is concerned - by an expert panel. The experts' final word should then - ideally - be more or less "binding" on Parliament.

Furthermore, there needs to be a mechanism which ensures that any loss of income due to evasion by people who under the law would be liable to pay, or due to the collecting agency's inability to collect, will automatically and fully be compensated from the State budget.

Whatever the final solution, however, 100% financial - and thus also editorial - independence may be well nigh impossible to achieve. However, the closer the solution comes to the ideal, the better it is for the independence of the public service broadcaster.

Let me now come back to the Council of Europe and the European Union and all those solemn Declarations and Resolutions which deal with the independence of public service broadcasting and which call on the Member States to implement a whole range of safeguards. What happens if a given Member State simply ignores on the national level what it subscribed to on the international level? Are there any sanctions, or is there at least a system for monitoring of compliance by the European Commission or by the Council of Europe?

The Amsterdam Protocol, whose Preamble refers to the importance of public service broadcasting, contains "merely" interpretative provisions. There is no express, formal obligation on EU Member States actually to have public service broadcasting. The sole practical application of the Protocol is thus limited to the issue of State aid granted by Member States to public broadcasters for the fulfilment of their public service broadcasting remit.

As regards more specifically the ten new Member States of the European Union, one of the three criteria (as established in Copenhagen in 1993) which had to be fulfilled by the candidate countries was the existence of "Political stable institutions guaranteeing democracy, the rule of law, human rights and respect for minorities". Even if this had been intended to include the existence of an independent public service broadcasting system, which is rather doubtful, the Commission appears to have no mandate for monitoring the continued compliance with the Copenhagen criteria once a country has been admitted as a Member of the EU; still less are there any sanctions foreseen in case of non-compliance.
For its part, the Council of Europe appears to limit itself to responding to official requests for comments on draft legislation, rather than monitoring the compliance of existing legislation with Council of Europe requirements and standards and, where deemed necessary, requiring a Member State to bring its regulation into conformity. In any event, no sanctions are foreseen in the organization's statutes (the London Treaty of 1949) for non-compliance with Council of Europe recommendations or resolutions.

Finally, for the sake of completeness I should perhaps add here that the European Audiovisual Observatory, which currently has 36 member states, plus the European Community, is confined to the role of gathering and circulating information on the audiovisual industry in Europe.

All this signifies that in the end there is only one means of defence: self-defence.

However, there is unfortunately a vicious circle here: the more dependent a public broadcasting organization is, the less it will feel inclined to challenge its Government or Parliament over executive or legislative acts which impinge upon its "independence". The same will also be true when it comes to challenging the existing Broadcasting Act as such, on the grounds that it does not guarantee the independence of the public service broadcasting organization. Courageous management is required here. This, in turn, presupposes that the country's own court system is sufficiently independent and strong and can be trusted to take decisions which may displease or hurt the Government.

In the case of Hungary, how is it to be explained that the system of public funding, via the broadcast receiving fee, which was introduced by the 1996 Radio and Television Broadcasting Act could have been abolished a few years later by a simple Act of Parliament (i.e. without a two-thirds majority), without Hungarian Radio or Hungarian Television challenging this in the courts?

In contrast to this, let me quote just two very recent examples. In Norway, the public broadcaster NRK went all the way to the national Supreme Court against a lower court decision which had ordered it not to broadcast a certain documentary. It won the case on the grounds that the lower court's decision had violated Article 10 of the European Human Rights Convention. In Switzerland, a journalist of the public broadcaster SSR obtained a positive ruling from the Strasbourg Human Rights Court, which held that the Swiss Federal Court decision objecting to the broadcast of a documentary on Swiss history had violated Article 10 of the European Human Rights Convention.

Where editorial independence, journalistic freedom as such, is affected by an administrative act or a national court ruling, the ultimate recourse - statistically with good chances of success - is an appeal to the Strasbourg Human Rights Court. Under Article 10, the test is whether the act which restricted freedom of information was prescribed by law and was necessary in a democratic society.

Another vital pre-condition for the successful defence of the independence of public service broadcasting is public awareness of the crucial importance of this principle. The broadcaster's own publications (e.g. a chapter in the annual report), its own radio and television programmes devoted to this matter, press interviews, "placed" articles, etc.,
are just some of the communication tools which a public broadcaster can employ for this purpose. Comparisons with the situation in other (selected) countries may be a distinct advantage.

Finally, international organizations (such as the Council of Europe, the OSCE, the Open Society, the International Federation of Journalists, SEEMO and the EBU) not only provide rich background material but are also prepared to intervene, especially by commenting on draft legislation, or openly criticizing violations of the public broadcaster's independence. But normally - and that is true not only for the EBU - they need to be asked to intervene in the first place.

In conclusion, the independence of public service broadcasting needs to be fought for actively and, once obtained, rigorously defended against any overt or covert attempt to undermine it.