

A Comparative Analysis of the Issue of the Status of Regulatory Authorities in the Legislature of the Transition Countries and the Broadcasting Law in the Republic of Serbia

(Picture of the Situation and A Draft Solution to the Problems in Serbia)

A comparative analysis of the laws regulating broadcasting, which encompassed the legal regulations in Montenegro, Bosnia and Herzegovina, Macedonia, Croatia, Slovenia, Bulgaria, Hungary, Poland, Slovakia, and the Czech Republic, had the objective to compare the laws of those countries with the Broadcasting Law of the Republic of Serbia. The focus of the analysis are provisions referring to members of the regulatory body: from the structure of the authorized proposers, through the method of election and duration of terms of office, to the method of revocation of members of those bodies and election of new members as replacements for the vacated seats. Those problems were chosen because it turned out that they cause most negative attention and debate in the Serbian Broadcasting Law.

1. Basis for analysis: events accompanying constitution of the Republic Broadcasting Agency Council in Serbia and recommendation REC(2000)23 of the Committee of Ministers of the Council of Europe, with the «Explanatory Memorandum».

When the National Parliament of Serbia began the process of appointment of the Republic Broadcasting Agency Council in April 2003 (completed in June of the same year), a part of professional associations and NGOs protested the election of two Council members because the National Parliament failed to abide by its obligation stipulated in Art. 24, para. 12, of the Broadcasting Law, specifying the obligation of the National Parliament to inform the public of the candidates' CVs «in an appropriate manner». After that, the two Council members who belong to so-called «civil sector» submitted their resignations. Following those events, the following picture was formed in the public:

- 1) Violation of the above mentioned provision of the Law requires a new vote in the National Parliament, that is, «repetition of the procedure» (this was the subject of analysis in the text titled «Interpretation of the Broadcasting Law»).
- 2) Participation of the «civil sector» in all stages of constitution and work of the Council is a «European experience» and recommendation that must be considered binding.
- 3) Demission of the «civil sector» representatives automatically means «de-legitimization of the Council».

The above point 1), as we mentioned, has already been analyzed in detail in the text entitled «Interpretation of the Broadcasting Law». Since any new vote in the Parliament would constitute effective dismissal of Council members for whom the vote is cast (again), we only stress here that in the **Appendix to Recommendation Rec(2000)23** entitled *Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector*, point 6 reads: «Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.» In point 7, this view is defined in detail, namely: “In particular, dismissal should only be possible in case of non-respect of the rules of

incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal.” Finally, in the Explanatory Memorandum to Recommendation REC(2000)23, point 22 clearly says: «It is understood, though not spelt out in the Recommendation, that dismissal can only apply to individual members of regulatory bodies and never to the body as a whole.»

Let us now consider point 2), very widespread in Serbian public, which suggests that «civil sector» must have an unavoidable, if not decisive role in the work of any regulatory authority. Judging by the text of the *Explanatory Memorandum*, this simply is not true. Let us quote only the essential points. In points 14 and 15, it reads:

14. «...nomination procedures *may vary widely from country to country*, although they fall into *two main categories*. In some countries, it is considered that regulatory bodies should represent the various interests, currents of thought and political and socio-occupational groups in society. In these cases, they will be fairly large bodies, whose members – nominated in many cases by NGOs or local authorities - are normally part-time and are not necessarily experts in the field.
15. In other countries, *it is not deemed necessary* for members of regulatory authorities to represent the full spectrum of society, as they tend to be regarded as independent “judges”. In most such cases, the regulatory authority will be a collegial body including a limited number of professional experts, appointed by the legislative or executive authorities on a full-time basis for a reasonably long term of office, and enjoying some degree of decision-making power. (...)

In the following parts of this explanation, it is clearly stated that regulatory authorities must be subject to a system of public control in both cases. However, this is not at all the issue about which there is an ongoing dispute in Serbia. No one claims that the Republic Broadcasting Agency Council ought to work away from the public eye or that Council members ought not to be independent. (Judges are also supposed to be independent and are elected by the Parliament, without any participation of NGOs.) What causes misunderstandings are repeated but unsubstantiated claims on the necessary participation of so-called «civil sector» in the procedure of candidate nomination and election, and afterwards, naturally, also in the work of the Council. As can be clearly seen from the quoted text, that is *not* what Europe has recommended as binding.

From all this, there follows the view presented in point 3) that non-participation of the «civil sector» in the Council election automatically means its illegitimacy. No one, actually, presented any argument in support of such a claim. And, as we will see, the practices of most countries with which Serbia may be compared disprove this thesis: in most transition countries, the procedure of nomination and election of regulatory authorities is done by *state bodies*! It is obvious that the creators of the Serbian Broadcasting Law have mixed up two things: 1) mandatory independence of the regulatory body (which indeed is a necessary prerequisite and a binding recommendation) and 2) the idea that such an independence is necessarily achieved through as little participation of the state as possible in the process of candidate nomination and election (for which no arguments have been given). The independence of the regulatory authorities can be seen in their *work* and *not* through the *method of election* of such bodies. The authorities nominated and elected by the Parliament can also be completely independent, just as the bodies made of NGO activists can also be corrupt. There is no logical nor factual relation between the method of election and method of behavior of the members of regulatory bodies. Nor do European recommendations suggest existence of any such relation.

Let us now look into concrete problems that the Serbian Broadcasting Law has encountered as well as into the comparative practice of transition countries.

2. Authorized proposers

Contrary to the ingrained belief widespread in so-called «domestic expert public», in most countries whose legislature has been analyzed here, the laws stipulate that members of the regulatory bodies are to be proposed by *state institutions* (parliament, government or head of state). For the sake of truth, it is necessary to say that representatives of so-called «civil sector», on which the idea of «European experiences» has been built in the public here, have a certain role in some countries, but the role is rarely so significant as to be decisive. In other words, the absence of representatives of the «civil sector» from the procedure of nomination/election/work of the regulatory authority *does not mean* illegitimacy of this body, regardless of the reasons.

Thus, in the Czech Republic, 13 members of the regulatory body are proposed by the lower house of the parliament; in Bulgaria, the Parliament proposes five and the President of the Republic four members of the Council of electronic media; in Croatia, the Government proposes all seven members to the Council of Electronic Media; in Romania, the Senate, the Council of Deputies and the Government propose three members each of the National Audiovisual Council; in Poland, the *Sejm* proposes four members and the Senate two, whereas Polish President proposes three members of the National Broadcasting Council; in Slovakia, members of the Broadcasting and Re-Transmission Council are proposed by the Parliament; in Hungary, the MP groups in the parliament propose a candidate each whereas the Council President is nominated jointly by Hungarian President and Prime Minister; in Bosnia and Herzegovina, all candidates are proposed by the Council of Ministers; in Macedonia, all nine members are proposed by the Parliamentary Board for Appointments.

A different approach is present in a marked minority of analyzed laws. In Slovenia, members of the Agency are proposed by the university, chamber of culture, chamber of commerce, association of journalists, and parliament; in Montenegro, NGOs from the field of media, NGOs from the field of human rights, Government, university and associations of broadcasters, propose a member each.

There is nowhere, however, *such a broad list* of authorized proposers defined by law, as is the case in the Broadcasting Law of the Republic of Serbia, where nine members of the Republic Broadcasting Agency Council are proposed by nine different proposers, namely: Government of Serbia, Serbian Parliament, Executive Council of Voivodina, Parliament of Voivodina, professional associations, university, NGOs, religious communities, and the Council itself, which proposes the candidate from Kosovo and Metohia.

In no other law except in Serbian and Montenegrin ones, do NGOs propose their own candidate for the regulatory authority.

3. Method of Election

In all laws encompassed by this analysis, proposed candidates are elected in the Parliament, by simple majority, except in the Czech Republic, where their Prime Minister appoints Council members based on such proposal by the lower house, and in Hungary, where candidates are confirmed by a qualified majority. In case of the Broadcasting Law of the

Republic of Serbia, all members of the Republic Broadcasting Agency Council must get a qualified majority in the Parliament, that is, half of the total number of MPs plus one (i.e., 126 of the total 250 MPs) must vote for them. Beside the Council members, only Prime Minister goes through such a procedure, the only difference being that he has *no* counter-candidate, whereas the Council members must each have one!

Except for the law regulating broadcasting in Bosnia and Herzegovina and Serbia, no other law among the analyzed ones stipulates proposing *two* candidates for each of the Council seats. Parliaments, thus, only confirm, or not, the proposals of the authorized proposers.

In the laws of Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Montenegro, Poland, Romania, Slovakia, and Slovenia, council members elect among themselves the chairman of the body; whereas, in Hungary, the Parliament confirms the candidate nominated by the President of the Republic and Prime Minister.

4. Period for availability of CVs to the public (the «30-days problem»)

In contrast to the Broadcasting Law of the Republic of Serbia, the analyzed legal regulations *do not stipulate* any publishing of the candidates' CVs at the internet sites of their parliaments for a 30-day period or any other form of public presentation of CVs.

The interval of time between nomination and the parliamentary vote is not specified *at all* in most cases, which means that vote ought to be done at the next parliament session, possibly even the very same day when they are nominated. In Bosnia and Herzegovina solely, the period is 30 days; and in Hungary it is 15 days. (But there is no obligation of public announcement of candidacies.)

5. Method of Recall and Filling of Vacated Seats

In all the analyzed laws, the term of office of regulatory authority members ends with death, resignation, non-participation in the work of the regulatory authority, or in case of conflict of interest, which is a direct implementation of Recommendation REC(2000)23. All those laws stipulate very short periods of only eight to 15 days for filling of any vacated seats in the regulatory body.

Those procedures stipulate that the authorized proposer is to propose, within the period, a new member of the regulatory authority who, according to all laws, performs his duties until the end of term of office of the former member (the member whose seat he/she has taken over). This procedure ensures the regularity of substitution of a number of Council members, i.e., prevents or at least decreases procedurally the influence of single legislative or executive authorities on the election of Council members. (Council members are not all elected at the same time, but a number of members are replaced each two years as a rule.) It is an utter curiosity that Serbian Broadcasting Law takes this principle into account, but *does not* provide any mechanism to ensure it is respected! The first formation of the Council is elected in such a way that a third of the Council is elected for two, a third for four and a third for six years. (And all the others except for the first formation are elected for a period of six years..) However, there is no procedural guarantee of regularity of substitution of one third of the Council each two years (which indeed was the initial idea). In the event of termination of a term of office of a member, the person replacing him or her does not «inherit» his term of

office but is elected for a full period of six years! It is therefore theoretically possible that, in the event of resignation of the entire Council for instance (hypothetical scenarios may be worse than resignation!), *one session of the Parliament would elect all nine members* (or, at least, most of members). The situation in the Serbian Council is similar: two seats are vacated, and they ought to be filled with members with full terms of office according to the Law, although the resigned members have not been elected for a full term of office in the first formation. With this alone, the regular rhythm of replacement of a third of the Council has already been broken!

Another thing: *only* the Serbian Law here gives a rather unusually long period for submission of candidate lists for the vacated seats in the Council (up to 3 months).

6. Method of Decision-Making of Regulatory Authorities

For very obscure reasons, Serbian Broadcasting Law stipulates qualified majorities for any decision-making within the Council in a large number of instances. Two-third majority is required for election of the Council Chairman, approval of the Statute (and its modifications and amendments), Budget and Internal Agency Organization Decision. An absolute majority of the total number of members is required for granting and revocation of licenses. It seems that the requirement for two-third majority in operating matter such as the approval of the Statute and Budget may lead to an internal blockade of the Agency functioning. The institute of two-third majority has no mention in the comparatively analyzed legislatures.

7. Renewal of the Term of Office of Members of Regulatory Bodies

In this regard, practices are very varied. To avoid going into detailed examples: «renewal of term of office» is *allowed in some, forbidden in others*. The fact is that the possibility of renewal of term of office does not constitute any threat in itself but can be if in combination with other factors (e.g. through long-term rule of the same political group). No such development is probable in Serbia. Besides, it is indeed the impossibility of «renewal of terms of office» that has blocked the easiest way out of situation in Serbia. The Council members whose elections had procedural defects would be willing to resign provided that they are able to submit their candidacies again. But the present Law forbids it.

8. Conclusion

The Broadcasting Law of the Republic of Serbia certainly has the most complicated procedure of election of regulatory authority members than any among the compared ones – beginning from the broadest spectrum of authorized proposers (nine different ones), through including NGOs, professional organizations, University and Church, for whom there is no definition of *procedure of decision-making* on candidate lists, among authorized proposers. True, in case of NGOs and professional organizations, the process of «harmonization» is mentioned, but what if any of the authorized institutions disagrees with the position of the majority? This potentially complicated, even un-implementable, process of «harmonization» of proposed candidates slows down the process of election of the regulatory authority additionally and opens the possibility of dispute by individuals from a broad spectrum of authorized proposers. Since the Law requires only that the NGOs and professional organizations participating in the candidate nominations be «registered», those ambiguities open a wide field for dangerous machinations. Namely, according to Serbian legislature, an «association of citizens» (i.e.

NGO) may be registered by as few as *ten* citizens, and a «business association» - by *two* companies. Moreover, there is no obstacle for the same individuals and same companies to create several different NGOs, associations of citizens (even journalists), and business associations. Or, in the briefest possible formulation: a possibility is opened of *virtual multiplication* of the number of «authorized proposers» from the ranks of the «civil sector». Yet, according to the Law, even those virtual creations must participate in the harmonization process, which opens a possibility of further blockade. Finally, Serbia does not have a classical law on NGOs which would clearly specify the status of those organizations. There are still in effect the anachronous regulations on citizen associations dating back to early 1990s, which do not take into account the status of NGOs in their present form.

It is obvious that the creators of Serbian Broadcasting Law wished to reduce the role of the state in the constitution of the regulatory authority to a bare minimum. However, it seems that they have gone too far in their efforts: out of fear of «state patronage» a Law that is almost impossible to implement has been created. As stipulated by the Broadcasting Law of the Republic of Serbia, the method of election of members of the regulatory authority is, *procedurally, the most complicated possible* parliamentary process. In its form as it is stipulated in Serbian Broadcasting Law, there is no parallel to it anywhere else. It was not enough to the creators of the Law that they introduced *two* candidates for each Council seat in the procedure, but also stipulated a *qualified majority* (the majority of the *total number* of MPs, i.e.. 126 out of 250) as necessary for election of any member of the regulatory authority. The stipulated majority is, by the way, *contrary to the Constitution*, which is surely a professionally unallowable omission of the legal «experts» who were involved in the technical creation of the Law. Namely, Art. 80, para. 1, of the Constitution of the Republic of Serbia reads:

«National Parliament shall decide with a majority vote of MPs present at a session attended by a majority of the total number of MPs, unless a special majority has been stipulated by the Constitution.»

The present Constitution was adopted much earlier than there was any thought of the Broadcasting Law (in 1991), hence it never stipulated any possibility that the Republic Broadcasting Agency Council members were to be elected by an absolute majority of the total number of MPs. The only cases when this majority is specified are in Arts. 92 and 93 of the Constitution regulating the *election of Prime Minister* and *recall of Government* and in Art 134, which specifies the procedure of *approval of a constitutional law*. Not a single of those articles, naturally, is applicable to the process of election of the Council members.

In the majority of analyzed laws, there is no period for submission of candidate CVs for inspection to the public. When compared to legislatures where such a period does exist (and there are only three of them), the Serbian 30-day period is the longest among them all.

Legal deadlines for filling the vacated seats, which is three months in Serbian Broadcasting Law, are much shorter in other legislatures, whereas a simpler range of authorized proposes and much simpler procedures for election of members enable the process to be really carried out within the stipulated period.

From the above, it results that the Broadcasting Law of the Republic of Serbia is very difficult to implement in practice, as well as that modifications of the Law are necessary to simplify the procedure of the Council election. Based on the analysis of legislatures of similar

countries, and quite in harmony with the relevant recommendations of the Council of Europe, those changes could include the following:

- *Simplification and clarification of the candidate nomination procedure.* It is inadmissible that in certain situations (such as, for instance, in case of NGOs and professional organizations) the Law does not stipulate the procedure for resolution of potential disputes among the institutions participating in the nomination process. That causes not only a potential but an acute blockade of the Council members' election.
- *Re-composition of the structure of authorized proposers.* It seems that some things must be changed: It does not seem logical that the same Law forbids conflict of interest to individuals (candidates for Council members and Council members) and almost imposes it in case of nomination of certain candidates (business associations). It is a big question whether *business associations* (associations of *companies*, i.e. *broadcasters*) can at all be included in the candidate nomination process because they protect *narrow* rather than general interests by their very definition. (Their work ought to be controlled, but they have the right to propose their controllers!) There is no business association that gathers *all* broadcasters, and it is quite logical to assume that a Council member nominated by *a* business association will be more in favor of stations which are members of that association than of other stations. This, it seems, is a «conflict of interest». As to the association of journalists and NGOs in Serbia: both kinds of those associations in Serbia fall into the category of «*citizen association*». Those associations are practically outside of modern legal regulations (regulations from 1990s are applied) because the Law on NGOs was stopped in the Parliament at the beginning of 2003 upon request of the very NGOs! There is no accurate evidence of the NGOs membership, nor any decision-making quorum stipulated by the law in their top bodies, nor even their scope of activity. (For instance, at its last members meeting, NUNS has removed its own provision requiring a 200-member quorum, so that now decisions are made by «those present »!) *Only 10* signatures are required for registration of a citizen association! Because of all that, it is probably best that those associations participate in the candidacy process indirectly – through the institution of public invitation (i.e. that their opinion be «taken into account», but to avoid the possibility of blockade of the candidate nomination process), and to regulate the definitive election as in the majority of other countries: to have the Government or a relevant parliamentary body propose a Council candidate list to the Parliament, followed by a vote in the Parliament. (Due to the specificity of Serbian situation, the fact that it is probably necessary to include the bodies of AP Voivodina as authorized proposers in the nomination procedure ought to be taken into account as well.) No «harmonization» among the conflicted associations is currently possible; just as any pre-set list of authorized professional associations and NGOs would be arbitrary. Anyway, this is nothing new in Serbian legislature either. The election of the regulatory authority for telecommunications is stipulated in the Law on Telecommunications in this very manner and that Law was also publicly praised as «harmonized with European standards». Finally, the question is whether a person who, as the Law says, must «live and work in Kosovo» ought to be in the Council at all when the Council has no competence whatsoever over that province. And, if the answer is affirmative, another question is who is authorized to propose that person.
- *Elimination of counter-constitutional provision on the absolute majority in the Parliament.* If the legislator fails to do this – the Constitutional Court will not.

- Elimination of the counter-candidate institution. It is totally unclear what the purpose of having a counter-candidate is, when it is quite clear that the MP majority will decide whom to support in consultations preceding their vote. What is the function of the institution of a counter-candidate when it is clear that one candidate is a «real» one, whereas the other one is «false»? Is it a simulation of erroneously understood democracy or deliberate complication and dragging out of the procedure?
- Elimination of the 30-day period. This provision is not only absent from the analyzed legislatures, but it can cause very serious legal problems. What if some authorized proposer decides to obstruct the Parliament and the Council in such a manner as to withdraw its proposal from the Parliament each 29 days and then form a new one? Does this mean that the 30-day period is always counted from the beginning, i.e. lasts infinitely? Furthermore, reasons for *non-election are simultaneously* the reasons for *dismissal*. If information is subsequently obtained that a Council member, for instance, has a «conflict of interest», there is a clear legal procedure for his dismissal. That information may be obtained in 30 days, but also in three months or three years. And it is up to the proposer and the Parliament to obtain information about the CVs of their candidates on time. Since there is no legal mechanism for verification of candidates' CVs, it is not evident what the actual purpose of this period is: to establish the truth about the candidates or to provide possibility for the media and secret campaigns to be led?
- Increase in the Council operability. Experience shows that too large a number of Council members may hinder or even block the work of this institution. Legal provisions regulating the behavior of the Council members are very lenient: as long as six months of absences from the Council meetings is necessary to initiate the recall procedure. Sometimes, even such an «incomplete» Council (as we have in Serbia today) finds it impossible to meet because the Council members have their own different professions (and obligations), different places of residence, etc. (Council members are not professionals.) That is why a regulatory authority should not have more than seven members (even five is quite enough, if the members are expert enough). In addition, a two-third majority for decision-making should be incorporated in the Law only very cautiously and, even then, only when it is really necessary. (Certainly not in the case of «technical» decisions such as those on the Statute or Budget.) In the event of a decrease in the number of Council members to seven or five, the issue of the two-third majority becomes pointless.
- Procedural guarantees for regular substitution of a certain number of Council members. A mechanism of «inheritance of term of office» in the event of anyone's premature departure from the Council needs to be incorporated because the regular rhythm of substitution (or at least re-election, should it be allowed) is disturbed otherwise and the risk of excessive influence of certain political groups is increased.
- Permission of re-election, along with the shortening of the term of office to five years. This seems like a rational solution because the piled-up problems require continuity in the work of the Council. Furthermore, even in politically less turbulent countries, there is a very small probability that the initial election and any re-election of any Council member (after five full years) will be done by *the very same political group*. Hence, the risk of establishment of any « political patronage» is almost non-existent.

- *Better definition of «conflict of interest».* In Serbian law, conflict of interest is only characterized, but incompletely defined. However, there is an element that the writers of the law completely lost sight of: as it is, the law practically excludes the possibility of any highly qualified experts having seats in the Council! Namely, by definition, broadcasting is best known by those who work in it. And they are practically banned from membership in the council by Serbian Broadcasting Law. A very large group of experts, employees of the national television, is banned from potential membership in the Council. Namely, after its transformation into a «public service», the RTS (i.e. the institution that will inherit it) will operate on the same principles as the Council itself. Moreover, the RTS is not granted any licenses, but is guaranteed the license by the Law. What is the reason then for not involving at least some profiles of the RTS experts in the Council?

Finally: based on those observations, it is possible to quickly formulate amendments to the law that would enable fast and efficient election of this regulatory authority. Although that is not the best political practice (Council members are dismissed by means of amendments to the Law, although the Law guarantees them their status), it seems that it is now the best way out of the current crisis. This time, no worthiness-related or ideological polemics based on impression on the worthiness superiority of some social «sectors» over others ought to be present in the discussion, rather, legal arguments and political reality ought to be kept in mind. European recommendations and analysis of practices in similar countries quite clearly leave sufficient room for reasonable solution of all problems created needlessly in broadcasting.

NOTE: This analysis refers only to legal problems related to the position of the regulatory body. An additional analysis would indicate more deficiencies of Serbian Broadcasting Law. Its preparation is underway.

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