

香港人權監察

HONG KONG HUMAN RIGHTS MONITOR

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Submission on the Telecommunications (Amendment) Bill 2009

The Bill and Beyond: Sound Broadcasting Licencing Regime Requires Thorough Improvements

Broadcasting as a basic human right

1. The Telecommunications (Amendment) Bill 2009 is introduced to prescribe the licensing criteria for the grant of sound broadcasting licenses and to enable the Broadcasting Authority to issue guidelines indicating how it proposes to perform its function of making recommendations on sound broadcasting licence applications to the Chief Executive in Council (CE in C). The Hong Kong Human Rights Monitor is concerned that the reforms are not restrictive in scope and therefore fails to address the problems under Hong Kong's sound broadcasting regime. We are also disappointed that the current amendments have a number of defects which fail to help promote freedom of expression by allowing more diversity in radio broadcasting.
2. The right to broadcast is a basic freedom. Article 27 of the Basic Law stipulates that, "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."
Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) also enshrines that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."
As such, freedom of expression should not be arbitrary restricted by any means including any arbitrary licensing and regulatory regime.
3. There are various reasons (e.g. the possibility of interference of radio signals) for placing certain restrictions. These restrictions, however, cannot be arbitrarily placed and it is stipulated in the Article 19(3) of ICCPR that the only valid reasons for such restrictions are:
 - (a) to protect other's rights;
 - (b) to protect others' reputations;
 - (c) national security;
 - (d) public order (ordre public);
 - (e) public health or morals.It also requires that any restrictions have to be "prescribed by law", i.e. stated in clear and precise terms and would not give the authority unfettered discretion and allowed for arbitrary decisions. Such restrictions also have to be "necessary" in a democratic society, which means that must be a demonstrable need that falls within the above category and that the restrictions placed are the minimum ones possible to fulfill the need (i.e. proportional).
4. The airwaves are a public resource which are an important element to enhance our freedom of expression. Any regulatory regime should be implemented only for the purpose of an efficient

allocation of airwaves to safeguard the freedom of expression and promote media diversity, but not unreasonably prevent any broadcasters from entering the industry.

Current licensing regime

5. The Monitor is gravely concerned that the Hong Kong Government is not doing its best to increase and to open up the airwaves to the fullest possible extent. And we have yet to formulate a community radio policy to encourage diversity and public access to airwaves.
6. According to the Legislative Council research report on the regulation of radio broadcasting services in selected places, all the 4 selected places, i.e. Canada, UK, Australia and USA already have a well developed community radio policy. The current licensing regime is designed with large scale commercial broadcasting in mind and has absolutely no provision for community radios set up by non-profit organizations. As mentioned above, the proposed amendments are biased against smaller radio broadcasters and community radio.
7. The consultation on “The New Radio Television Hong Kong: Fulfilling its Mission as a Public Service Broadcaster” claims that “the new RTHK should be tasked to devote part of its airtime and resources within the development of its digital services to provide a platform for community participation in broadcasting. This should include the dedication of more airtime for programmes that allow individuals and community groups to express and exchange their views, with RTHK’s programme hosts moderating the programmes; allowing community groups to produce their own programmes for broadcast on RTHK’s channels, with different levels of support to be provided by RTHK; and commissioning of projects from community groups to produce their own programmes on specific themes or topics”.¹ It is only one of the possibilities for the community to participate in RTHK’s programme. We do not think the Government should dictate the programme choices of any Public Service Broadcaster. Nor do we think that such kinds of programmes are community broadcasting. It cannot replace comprehensive community channels. The Monitor urges the Government to open up the airwaves by making available more channels and to develop, based on genuine public consultation, a community radio policy, which clearly provides for and specifies the proportions of channels to be allocated to PSB, commercial and community broadcasters to further safeguard the freedom of expression and media diversity in Hong Kong.
8. Technological advancements in sound broadcasting, especially Digital Audio Broadcasting (DAB), allows for more channels with higher quality for sound broadcasters to operate their programmes. The Government has the obligation to increase the number of channels available for broadcasting to the fullest extent from time to time in the light of the rapid advancement of communication technologies² without unnecessary delay. After reserving adequate number of channels for the public service broadcaster RTHK, the Government should allocate all remaining channels for and commercial and community radios. The ratio should be fixed through public consultation.
9. Some people have voiced that there are currently viable technological means (e.g. DAB, short range low power AM/FM stations, or even merely optimizing the current AM/FM arrangement) to increase the publicly available channels for broadcasting. We believe that if it can be proven that the means are available to make more channels available, all the channels MUST be opened in the earliest date possible. Unless with strong justification, not to do so would constitute an artificial barrier to the freedom of expression and violate the Article 19(3) of ICCPR. In this regard, we urge the government look at all the technical options available now and produce a

¹ Paragraph 7.7, “Public Consultation Paper on The New Radio Television Hong Kong: Fulfilling its Mission as a Public Service Broadcaster”, October 2009.

² Besides DAB, developments in Software Defined Radio (SDR), Cognitive Radio and Mesh Networks may also make it possible for us to increase the channels available in the future.

report on whether the current arrangements have already maximized the availability of channels for public scrutiny. If the answer is in the negative, the government should set out a plan and timetable for implementing the technological changes to maximize publicly available broadcasting channels at an earliest date possible. If any inefficiencies are due to the current negotiated arrangements with the ITU, the government should provide plans for participating in the next round of negotiations to solve these issues.

10. As seen from the experience of other countries, we cannot rely solely upon commercial interests in the development of Digital Audio Broadcasting (DAB), the government and / or the Public Service Broadcaster (PSB) has to play an active role for this technology to become a reality. These include:
 - a. Choosing and unifying standard communication protocols, in order to maximize the number of available channels, ensure signal quality, stability and user friendliness, increase compatibility and interoperability of hardware pieces (e.g. receivers) and thus reduce manufacturing cost of receiver sets.
 - b. Coordinating the geographical setup of transmitters, while maintaining active cooperation with the International Telecommunication Union (ITU), in order to reduce interference and reduce redundancy of development.
 - c. Possibly provide signal transmission / processing as centralized infrastructure to reduce operation cost and entry barrier for interested broadcasters.
 - d. Active role of the PSB in pioneering DAB services.
11. Taking note that the government has recently adopted a spectrum auction policy, we are very concerned with this development. We believe that the electromagnetic spectrum, like air and water, are essential resources that belong to the public and cannot be privatized. Although the frequency range being auctioned off is currently for telecom use and not related to broadcasting, we feel that with the progress of technology, the old association of different frequency ranges for different uses may well become obsolete in the future. The idea of spectrum privatization is currently a vehemently debated topic around the world, while other alternative models are being proposed like the “spectrum commons” model that may equally promote innovation of spectrum use. More importantly, once the spectrum resources become private property, it may not be possible to recover them for public use. If the theory of those economists advocating spectrum auction prove to be wrong in the future, there may be no return path. Therefore, we urge the government to put a halt to all spectrum auctions or restrict the period of usage to a limited time period no more than say ten years. On the other hand, we encourage the government to look into alternative models for the freeing up of spectrum usage, like those proposed by the Open Spectrum advocates.
12. In the case involving Citizens’ Radio, Magistrate Douglas Yau criticized Hong Kong’s current sound broadcasting licensing regime citing that the recommending and the deciding bodies, i.e. the Broadcasting Authority and the Chief Executive in Council (CE in C) respectively, lack independence. He was also concerned about the lack of an independent appeal mechanism against any adverse decisions made by the CE in C. He was critical of the “sole unfettered discretion” given to the CE in C in the sound broadcasting licensing regime under the current Telecommunications Ordinance. He held that the regime fails to meet the “prescribed by law” requirement in the Hong Kong Basic Law and the Bill of Rights.
13. Whether the licensing regime has failed to meet the “prescribed by law” requirement in law or not, the Monitor considers it important that the Government addresses such weaknesses in the licensing regime through thorough and timely reforms.
14. An independent body consisting of members nominated by the public and approved by the Legislative Council should be established to make decisions on sound broadcasting applications

and deal with any appeal cases. An independent mechanism should also be set up with powers to handle applicants' appeal in both procedural matters and merits against any adverse decisions against them. The criteria for sound broadcasting licensing in line with freedom of expression should be fairly and clearly spelt out. The procedures for processing application and appeal should be expedient, efficient and meet a high degree of fairness. The Government should distance itself from the licensing decisions and should focus its role to make the maximum number of channels available for broadcasting in the light of technological developments without unnecessary delay and to adopt measures to protect and promote free broadcasting and expression.

15. These reforms are justified simply in the light of the serious problems of self-censorship in the media and the sensitive political situation of Hong Kong.
16. The amendments in the current Telecommunications (Amendment) Bill 2009 are far too inadequate in addressing the problems in Hong Kong's sound broadcasting licensing regime. It will instead create further problems in the system.

Amendments in the Bill

17. Section 13C(4) is proposed to be added into the Telecommunications Ordinance to specify the sound broadcasting criteria. The Monitor is of the view that the proposed criteria lack safeguards on the freedom of expression and media diversity. They are imprecise and arbitrary. They unreasonably favour the rich and large scale commercial broadcasters. Too much discretionary power is left to the licensing authority.
18. The criteria are imprecise and arbitrary. For example, section 13C(4)(a) requires the applicant and all persons exercising control of the applicants to be "fit and proper persons". Section 13C(5) spelt out some factors the authorities must be taken into account in deciding whether a person is "fit and proper". These factors include "the business record of the person". These provisions do not give a clear picture on what elements in the business record are exactly looking for and how to evaluate them objectively. Moreover, the factors listed in section 13C(5) are not exhaustive. Therefore the concept of "fit and proper persons" is still quite vague and can be used in a very subjective and arbitrary manners.
19. In *Glas Nadezhda EOOD & Elenkov v Bulgaria* [2007] ECtHR (no. 14134/02), the vagueness in certain criteria for programmes together with the lack of a proper appeal mechanism, have been held to deny the applicants legal protection against arbitrary interference with their freedom of expression.
20. In the guidelines adopted by the Council of Europe's Committee of Ministers on broadcasting regulation domain stipulates that "All decisions taken ... by the regulatory authorities ... be ... duly reasoned [and] open to review by the competent jurisdictions".
21. There is another criterion in Section 13C(4)(b) that "the applicant's financial soundness and ability to maintain, throughout the period for which the licence would be in force, the proposed broadcasting service". The Monitor is concerned that this criterion, and those in subsections 13C(4)(a) and 13C(5), on financial ability and business background, would be used by the licensing authority to prefer big commercial broadcasters than small scale or non-profit sound broadcasters. Smaller sound broadcasters can contribute significantly to media diversity and freedom of expression in Hong Kong. However they may be excluded from granting any channels and licences under the amendment proposals.
22. The proposed amendments do not prevent it from applying other "hidden" criteria not listed in the legislation, because according to Section 13C(4)(h), the criteria includes any prescribe

additional matters the CE in C must have regard. What “additional matters” consist of are unknown to the public at this moment and thus the licensing authority can have a very large discretionary power in licensing. The CE in C should clearly list out the additional matters in advance and to avoid setting any additional requirements during the process of application.

23. Subsections 13C(4)(j) & 13C(6) further provide an administrative means to prescribe additional criteria. We feel that this opens up a “backdoor” for reducing proper legislative scrutiny when instituting changes. This special power should only be triggered only when important public interest requires and this triggering requirement should be clearly spelt out in the Ordinance. During the enactment of the subsidiary legislation for providing for any additional criterion, proper consultation should be conducted again by the Government and the relevant LegCo Bills Committee.
24. “The variety, quantity and quality of programmes to be provided” in Section 13C (4)(d) and “the benefits to the local broadcasting industry, the audience and the community as a whole” in Section 13C (4)(h) are two of the criteria related to the programme of the broadcasting applicants. The Monitor opines that the requirements of these two criteria are unclear and again allow the licensing authority to abuse the mechanism to exclude small scale sound broadcaster targeting a narrower audience.
25. Moreover these are not enough to ensure the freedom of expression. Sound broadcasting applicants are not required to implement any internal measures to prevent self-censorship and ensure an open platform for the free exchange of views. The Monitor suggests that the licensing criteria should include such as “commitment and past records on freedom of expression” and “internal mechanisms to ensure freedom of expression” to protect the freedom of expression, and “diversity” should be include in Section 13C(4)(d).
26. A transparent licensing process would be helpful to prevent the abuse of the discretionary power by the licensing authority. The transparency of the current application is unacceptable. The Monitor also urges the Government to take every necessary measure to enhance the transparency of the licensing process. A proper and fair point system should be adopted in assessing any application. Moreover, at least three rounds of public hearings on Hong Kong Island, in Kowloon and in the New Territories must be held to for the public to discuss the content of the applications. The licensing authority should be required to give explanations upon any rejection of an application. The reports on the applications should be disclosed to public once the application process is completed.