

Second Authority for Television and Radio on Draft Bill (Temporary Provision for Iron Swords War: Expansion of Regional Radio Broadcasts Beyond Current Franchise Area), 2023

by Prof. Amit Schejter and Attorney Adi Shay

Executive Summary

The following position paper was submitted to the legal counsel of the Ministry of Communications via the government legislation website at www.tazkirim.gov.il on 14 December 2023.

The draft amendment to the Second Authority for Television and Radio Law-2023 (Temporary Provision for Iron Swords War: Expansion of Regional Radio Broadcasts Beyond Current Franchise Area) proposes that a regional radio station wishing to do so may expand broadcasts beyond its franchise area. The explanatory notes attached to the draft bill state that the purpose of the proposal is to provide a response to security and social needs in the event that the population is forced to stay in bomb shelters for extended periods of time, during which "they may be unable to receive alerts from the Home Front Command... or to receive certain stations." Below is a brief summary of the problems arising from the proposed plan.

1. The plan lacks a factual basis.

a) No factual basis is presented indicating the existence of a security need or otherwise to which the proposed plan may provide a response.

b) From the technological point of view, the plan is inapplicable at best and wreaks havoc on the radio landscape at worst due to the fact that it eschews the procedures established in the Wireless Telegraph Ordinance and the high cost associated with its implementation.

c) The plan conflicts with emergency needs and might endanger lives. As most dangers are regional, turning regional radio stations into quasi-national ones will not only not contribute to their ability to alert to these threats but will actually harm it.

2. The plan is unconstitutional and disproportionately infringes on Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.

a) The proposed expansion of a regional radio station's license to broadcast nationwide amounts to a new franchise awarded without due process and in a way that harms competition, equal opportunity, and freedom of occupation.

b) The proposed plan is disproportionate, might wreak technological chaos, and does not meet the limitations clause in Basic Law: Freedom of Occupation: [I] There is no rational link between the means (option offered to radio stations) and the end (response to a totally unfounded security/social need); [II] The harm to those unable to compete for such a license is severe and disproportionate; [III] Not only does the plan show no benefit, but quite the opposite: technologically, it will wreak havoc on the frequency map, while the ditching of the regional focus will cause serious damage. In such emergencies as rocket attacks, terrorist infiltrations, fires, or train/truck collisions, the proposed plan will harm the role of the regional station and its ability to broadcast regionally-targeted alerts.

3. The plan smacks of corruption, as it awards a benefit to owners of regional radio franchisees and is yet another step in the government's takeover of the Fourth Estate.

a) The purpose of the plan is evident from its beneficiaries: Regional radio franchisees able to broadcast nationwide and expand their audiences and influence, and the Minister of Communications and government at large who will strengthen their grip on broadcasters and on the diffusion of government-serving content.

b) Among the definitions of corruption, the one that best describes the plan is "politicians awarding contracts to their benefactors." Unashamed corruption that takes place in broad daylight is exactly what we have here, and which is often described as Kleptocracy: The government putting public resources in the hands of its benefactors under the guise of legislative proposals.

c) Our position is that the plan is yet another step in the continued looting of public resources. It should be shelved altogether, or else we will pay the well-known price that corruption exacts: damage to democracy and exacerbation of inequality and social division.

4. In conclusion, Zulat's position is that this plan lacks a factual basis, is unconstitutional, violates freedom of occupation and human dignity, is harmful to the media industry and goals of local radio, and is yet another step in the continuous looting of public resources being pursued even more vigorously at a time when the air is filled with the smoke of war and pain pierces the heart of Israeli society.

Full Position Paper

The following is a position paper on behalf of Zulat for Equality and Human Rights in response to the proposed amendment to the Second Authority for Television and Radio Law-2023 (Temporary Provision for Iron Swords War: Expansion of Regional Radio Broadcasts Beyond Current Franchise Area), posted for public comments on 30 November 2023 (hereinafter: "the draft bill").

Lack of Factual Basis

1. Under the draft, the franchisee of a regional radio station **who wishes to do so** may expand broadcasts nationwide, beyond the franchise area, for the duration of the temporary provision and/or one year, whichever comes first.
2. The explanatory notes attached to the draft bill state that the purpose of the plan is to provide a response to security and social needs in the event that the population is forced to stay in bomb shelters for extended periods of time, during which "they may be unable to receive alerts from the Home Front Command via most platforms or to receive regional and national stations on site."
3. All aspects of the plan attest to the disconnect between the factual reality and the explanatory notes. First, there is a fundamental technological problem: radio station owners were assigned regional frequencies, and in order to switch to broadcasting on a national network they must be allocated national frequencies. The proposal circumvents the allocation procedure, thus making it inapplicable. Second, the eschewal of the technological aspects gives significant cause to fear that the benefits extended by the state might include purchasing transmitters and assigning valuable frequencies to current franchisees free of charge, which is outrageous and a totally unjustified benefit.

Third, the Ministry of Communications is supposedly proposing this plan due to security reasons, but its implementation is up to commercial entities that may or may not agree to provide such an emergency service. Subjecting the process to the goodwill of franchise owners only proves that the Ministry is unable to provide a response to an emergency situation, nor is it its intent to do so.

Our opinion is that the plan lacks a factual basis, is unconstitutional, contravenes existing regulation about frequencies, defeats the purpose of regional radio, in particular its role during emergencies (which are local) and is an outrageous and totally unjustified benefit to license holders under the cover of the war in Gaza. We will elaborate on this point below.

4. The sloppiness of the proposed plan stands out even more in the technological sense. First, the claim that expanding broadcast areas will provide some response to a need in times of war lacks any factual basis. The Ministry does not present a field study, a technical document, a frequency coverage chart, a paper about the regulatory impact, or complaints by citizens about locations that do not receive alerts or where alerts might be cut off. Neither is any elaboration presented to substantiate the claim that in the event of a total collapse of internet, television, and radio frequencies the regional franchisee with expanded broadcasting reach would be able to provide a solution.

Second, the lack of a factual basis for the existence of a security need is substituted by a host of contradictions. The plan claims to provide a solution to the dearth of broadcasters on the one hand, while on the other hand, the explanatory notes list all the means and methods used by the IDF Home Front Command (the authorized entity other than the Ministry of Communications) to provide a response at all places or times: the public sphere, home computers, mobile phones, radio stations (on more than 15 "silent wave" frequencies), which proves there is no need for additional warning measures.

Third, changing the radio frequency allocation map is a recipe for technological chaos. Radio stations cannot possibly increase their power range from one minute to the next in a flash procedure nor be switched on temporarily, given that such changes require purchasing transmitters with specific power ranges and involve complex coordination between different frequencies, in accordance with the Wireless Telegraph Ordinance-1972 [New Version]. Such intricate and costly moves cannot be done hastily, which at best makes the plan inapplicable and bound to be shelved even before undergoing legislation, and at

worst is a sure-fire recipe for technological chaos and disruption of the existing broadcasting system.

Fourth, given that most dangers are regional/local, the plan harms the role played by regional stations in an emergency and endangers lives. Be it security threats such as rocket/missile fire or terrorist infiltrations, or other dangers such as floods, fires, collisions of trains/trucks carrying toxic materials, implementation of the plan will specifically harm the emergency role of regional radio stations because entire areas will not be able to receive regionally-targeted alerts.

5. The obvious conclusion is that the proposed plan is yet another step in the reform promoted by the Minister of Communications to strengthen the influence of broadcasters airing content that is deferential to the government's agenda as well as to destroy the Fourth Estate.

Illegality of Plan: Violation of Rights to Freedom of Occupation/Human Dignity

6. The proposal to expand the coverage area of regional radio stations means that franchisees will be granted national franchises without a bidding process and/or any other procedure aimed at ensuring an equitable distribution of a limited public resource, thus harming competition, the equal opportunity requirement, and freedom of occupation.

7. The right to freedom of occupation is a fundamental constitutional right. Supreme Court Ruling H CJ 1030/99 MK Oron v. Speaker of the Knesset states on page 658:

"Freedom of competition is a fundamental principle within the right to freedom of occupation protected by Basic Law: Freedom of Occupation. Harming freedom of competition through such interference as granting benefits to one competitor or favoring him over others violates freedom of occupation.... Indeed, the principle of equality between competitors is the mainstay of freedom of occupation. Government intervention that gives to one that which is not given to the other or that restricts him in a way that is not applied to a competitor interferes with free competition in a way that harms freedom of occupation."

8. According to Israel's Basic Laws, if a law provision infringes on a fundamental right, then this provision will be applicable only if it meets the requirements of the limitations clause in Article 4 of Basic Law: Freedom of Occupation and Article 8 of Basic Law: Human Dignity and Liberty.

9. The topmost requisite is that the purpose of the plan should be worthy. The explanatory notes attached to the draft bill state that "the wide spread of the transmitters" will achieve two purposes: to relay and receive the Home Front Command's alerts and at the same time "allow people who wish to do so... to continue listening to the station that suits their lifestyles and tastes."

10. Our position is that even if the declared purpose is worthy, the means to achieve it - expanding regional radio franchises and turning franchisees into national broadcasters should they wish so - is disproportionate.

11. The subtests of proportionality examine the compatibility between the means and the end, the means that is less harmful, and benefit versus harm. We hereby affirm outright that all three of them together and each of them separately justify the rejection of the proposed plan:

a) Subtest of compatibility between means and end: No rational correlation whatsoever exists between the expansion of franchise areas and security, neither with regard to security alerts nor with respect to broadcasts suited to the lifestyles of different audiences.

I) The security rationale: The lack of a factual basis for the claim that expanding the range of regional radio broadcasters will solve a security need is detailed above. A host of methods used by the Home Front Command not only points to the absence of such a need, but shows that the proposed plan may even damage the existing regional alert system to the point of endangering lives.

II) Compatibility with lifestyles: The establishment of regional radio stations was intended to "contribute to community life and strengthen ties to the region" (Introduction and Articles 33-34 of the explanatory notes of the Regional Radio Stations Law-1992). Contrary to the explanatory notes in the draft bill, upon becoming national radios, these stations will cease to suit a specific broadcasting area, as their audience, geographical connection, and content/commercial profile will change.

b) Subtest of the less harmful means: Our position is that even if it proves to be a worthy purpose and the means chosen to achieve it are indeed suitable, the goals could be achieved by means that are less harmful to freedom of competition and the equal opportunity requirement under Basic Law: Human Dignity and Liberty. The fact that the plan sweepingly blocks any new party from competing for a nationwide radio franchise, even one that is time-limited, without presenting any evidence to corroborate the need for urgent legislation, constitutes severe and disproportionate harm; in other words, it does not meet the terms of the limitations clause.

c) Subtest of benefit versus harm: Although in our opinion it is an ill-advised plan that does not meet the aforementioned proportionality tests, the real problem is revealed when the benefit arising from it is weighed against the extent of the violation of the constitutional right: major harm to potential competitors' blocked entry into the field as well as total chaos in the electromagnetic spectrum versus dubious benefit to the public. As described above, there is absolutely no evidence of a security or social need that the plan would address, but quite the opposite. Unlike previous regulatory processes, this plan does not take into account availability of frequencies, efficient allocation of frequency profiles, the map of radiowave transmissions, and the placement of new frequencies on the electromagnetic spectrum in order to ensure optimal use of a public resource. This being the case, it is greatly feared that existing broadcasts that are mostly used for security alerts, to save lives, and/or to meet other social needs will be disrupted.

12. In conclusion, transforming regional radio franchises into national ones is tantamount to allocating new franchises, since it avails the possibility to broadcast in new regions where the broadcaster had not been active before. To repeat, such a designation without a bidding process or another procedure ensuring equal distribution constitutes a benefit infringing on the freedom of occupation and the right to equal opportunity stemming from Basic Law: Human Dignity and Liberty. In the absence of a rational link and/or correlation between the stated purpose and the proposed plan, it amounts to a plan that does not meet the terms of the limitations clause.

Plan Favors Regional Radio Franchisees, Yet Another Step in Takeover of Fourth Estate

13. The purpose of the plan becomes clear when its beneficiaries are examined. Upon the expansion of their geographical reach, regional radio stations will gain national or almost national distribution and increase their exposure, consequently increasing the revenues and influence of the stations and their owners.

14. This expansion is tantamount to a new franchise. It's not for nothing that the current regulator, the Second Authority for Television and Radio Council, was left out of the process and relegated to the rank of "consultant" under Article 109a(b) of the draft amendment. Its exclusion means that such public considerations as competition, regulatory impact, broadcast quality, transparency, cross-ownerships, and technical aspects are ignored. Thus, bit by bit, the Minister of Communications is promoting a reform that is all about politicization and about crushing the status of the Fourth Estate.

15. A kleptocracy is a system where government corruption is so deep that even the pretense of integrity is abandoned. What we have here is a draft amendment submitted by the Ministry of Communications on behalf of the government that will change the radio landscape in Israel with fast-track legislation lacking any factual basis. With 64 MKs voting in favor of this regulatory chaos, the judiciary will be the last line of defense to protect the public from the ministers in this government.

16. Super-corruption is defined by Transparency International as the abuse of government power for private gain, which eventually harms democracy and exacerbates inequality and social division. One of the definitions of corruption that best describes the plan is "politicians awarding contracts to benefactors." In our case, the government and the franchise owners joined forces to do as they please with public resources, the former to strengthen their hold on the media and the latter to increase financial gains in yet another step in their campaign of looting public funds.

17. In conclusion, as detailed above, there is no connection whatsoever between the stated purpose and the proposed plan, and it would have been best if the draft bill had never been written at all. Zulat's position is that this plan defeats the purpose of the Second Authority for Radio and Television Law, wrecks havoc on the electromagnetic spectrum and debased the procedures of spectrum allocation without any professional and technical review, violates Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, does not meet the conditions of the limitations clause, and merely hijacks public

resources under the cover of the war in Gaza and abuses the label "emergency" so that the government may remunerate its supporters: the regional radio franchisees who are forever licking its boots. It is yet another step in the looting campaign that has been waged even more fiercely at a time when the air is filled with the smoke of war and pain pierces the heart of Israeli society.

18. Zulat can elaborate on the arguments cited in this paper and assist with the drafting of a regulatory plan that better meets current needs and forms part of a broad broadcasting map that has the best interests of the Israeli public in mind.

19. The information included/omitted in this paper does not exhaust our arguments on the matter.

English Translation: Shoshana Michkin