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People Shall Dwell Alone: The Effect of Transfrontier Broadcasting on Freedom of Speech and Information in Israel

Amit M. Schejter

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People Shall Dwell Alone: The Effect of Transfrontier Broadcasting on Freedom of Speech and Information in Israel

Cover Page Footnote

International Law; Commercial Law; Law

**“The people shall dwell alone”*:
The Effect of Transfrontier Broadcasting on Freedom
of Speech and Information in Israel**

Amit M. Schejter†

ABSTRACT

The regulation of transfrontier broadcasting in Israel has served a system of information and cultural control motivated by a nationalistic-protectionist ideology ever since the 1960s. Although the policies regulating Israeli broadcasting have at times shown greater openness to Western values and international influences, this article demonstrates through an analysis of legal documents how regulators have reverted in recent years to a more restrictive policy regarding the free flow of transborder communications. This reversion has occurred in a changing technological world combining new cultural goals with “old school” fear of propaganda. For decades, lawmakers and regulators have been devising and re-devising ways to prevent foreign channels from broadcasting in Israel. At first such actions were attempts to avoid the influence of hostile propaganda and later were efforts to protect heavily regulated government licensed channels, whose remit serves the government’s ideology. Using a critical interpretive methodology, the study describes and analyzes the evolution of Israeli regulatory policy over the past four decades.

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* *Numbers* 23:9.

† Assistant professor of communications, College of Communications, Pennsylvania State University (Ph.D. Rutgers).

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I. Introduction

When the Moabite prophet Balak stood overlooking the encampment of the Israelites about to enter Canaan some three-and-a-half millennia ago, he observed that they were a people dwelling alone, and he blessed them for being such.¹ Technological advances of media since then and the wide acceptance that the free flow of information benefits society raise the question whether the heirs of the ancient Israelites can continue striving to dwell alone.

A. *Television in Service of National Goals*

To what extent television shapes public opinion has yet to be fully ascertained. Nonetheless, governments tend to attribute a powerful effect to this medium and treat it accordingly.² In developing nations, this concept of the power of television has led governments to assign it roles in national development and to

¹ *Numbers* 23:9.

² See EVA ETZIONI-HALEVY, NATIONAL BROADCASTING UNDER SIEGE: A COMPARATIVE STUDY OF AUSTRALIA, BRITAIN, ISRAEL, AND WEST GERMANY (1987).

maintain controls over its content.³ Transfrontier broadcasting may weaken these controls by introducing unplanned messages into systems rooted in strong ideological convictions and at times meticulously planned.⁴ The introduction of digital multi-channel platforms distributed by both cable and satellite has created the potential for more foreign channels to be offered to subscribers. This technological change offers new challenges to regulatory systems bent on maintaining old controls.

A case in point is Israel, a developing nation often described as a free country, where political rights and civil liberties receive high marks.⁵ Over the past forty years, however, Israel has maintained strict controls over its broadcast media and has been embroiled in an ongoing struggle with outside intruders it fears might undermine its communications and information program. An analysis of three recent decisions by the Israeli Supreme Court, *Media Most v. Cable & Satellite Council*,⁶ *Musawa Ctr. for the Rights of Arab Citizens of Isr. v. Prime Minister*,⁷ and *Kirsch v. Chief of Staff of the Israeli Def. Forces*,⁸ demonstrates to what extent control of news and programming are ingrained in the system. In addition, they show that the traditional motives influencing Israeli media policy—a fear of external propaganda and a desire for social uniformity—remain intact as the underlying motivation for media regulation. The fear of external propaganda manifests itself in the control of news, and the desire for social uniformity manifests itself in the high government involvement in programming decisions. A byproduct of all this has been the marginalization of the Palestinian minority living within Israel and its depiction as a “fifth column.” More than anything else,

³ See ELIHU KATZ & GEORGE WEDELL, *BROADCASTING IN THE THIRD WORLD* (1977).

⁴ Amos Owen Thomas, *Regulating Access to Transnational Satellite Television: Shifting Government Policies in Northeast Asia*, 61 *GAZETTE* 243 (1999).

⁵ See, e.g., FREEDOM HOUSE, *FREEDOM IN THE MIDDLE EAST AND NORTH AFRICA* (2005).

⁶ HCJ 6962/03, 10338/03 [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

⁷ HCJ 375/03 [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/750/003/108/03003750.108.pdf>.

⁸ HCJ 2753/03, 2791/03 [2003] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

perhaps, this outcome demonstrates the extent of the harmful effects of policies aimed at closing a society.

*B. How Transborder Television May Destabilize a
"Planned" Order*

This study identifies three arenas in which transborder broadcasting may interfere with national planning by Israeli regulators. Two are specifically content-based: news and culture. The third is more market-structure based: advertising. However, all three are intertwined, and ultimately their regulation serves the same goals.

Control of news flow, often associated with government propaganda efforts, is not a practice undertaken exclusively by undemocratic or totalitarian regimes—Israel being a prime example. Control takes place through a variety of techniques ranging from censorship that limits information flow to sophisticated public relations efforts aimed at framing the news in a "positive" manner.⁹ News from across the borders can potentially undermine the public's trust in information controlled by government sources; such news often prompts government controls.

Governments, however, do not limit the regulation of information flow to limitations set on "hard news."¹⁰ The media are often assigned the role of integrating national culture in developing nations,¹¹ or, alternatively, preserving national values in more mature societies.¹² The media aid governments in creating a cultural code or "national identity,"¹³ and even in mature societies they help perpetuate the existing cultural *status quo* by supporting the conservative-capitalist hegemony,¹⁴ adhering to

⁹ See, e.g., Ray E. Hiebert, *Public Relations and Propaganda in Framing the Iraq War: A Preliminary Review*, 29 PUB. REL. REV. 243 (2003).

¹⁰ See Michael Schudson, *Culture and the Integration of National Societies in THE SOCIOLOGY OF CULTURE* 21 (Diana Crane, ed., 1994).

¹¹ *Id.*

¹² See Jay G. Blumler, *TELEVISION AND THE PUBLIC INTEREST: VULNERABLE VALUES IN WESTERN EUROPEAN BROADCASTING* (1992).

¹³ See John Hartley, *Television, Nation, and Indigenous News*, 5 TV & NEWS MEDIA 7 (2004).

¹⁴ See generally TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE LEFT* (1980).

strict content regulations,¹⁵ and supporting the production of indigenous content.¹⁶

The introduction of commercial media in countries formerly dominated by a national or public broadcaster may also interfere with a government's cultural agenda in broadcasting. This is largely due to the fact that transnational corporations own many commercial media sources.¹⁷ While these externally owned broadcasters could be subject to control if they were licensed in the country where their broadcasts are received, the intrusion of unregulated transborder broadcasting thus has the potential of undermining government efforts in this arena.

Israel is unique among nations thought to espouse freedom of speech and other civil liberties. First, it has been in a constant state of conflict with at least some of its neighboring nations for more than fifty years.¹⁸ Second, it actively promotes the absorption of large numbers of immigrants.¹⁹ These unique attributes render it virtually impossible to compare Israel with countries with otherwise similar legal and communications systems. Hence, although a type of transfrontier broadcasting discussed in this paper—the practice of circumventing national broadcasting laws by stationing a broadcaster beyond national borders of its targeted audience and financing its broadcasts through local advertising—has existed in Europe for at least three decades, it defies comparison with Israel.²⁰ Because a comparison of policies would be hard to justify methodologically, this paper focuses on Israeli policies and describes Western European policies briefly for the sake of providing context.

¹⁵ For example, growing indecency standards.

¹⁶ For example, in the neo-liberal regime of New Zealand. See Avril Bell, *An Endangered Species: Local Programming in the New Zealand Programming Market*, 17 MEDIA, CULTURE & SOC'Y 181 (1995).

¹⁷ See generally Herbert Schiller, *Transnational Media: Creating Consumers Worldwide*, 47 J. INT'L AFF. 47 (1993).

¹⁸ See generally BEN-YEHUDA, HEMDA & SHMUEL SANDLER, *THE ARAB-ISRAELI CONFLICT TRANSFORMED: FIFTY YEARS OF INTERSTATE AND ETHNIC CRISES* (State Univ. of New York 2002).

¹⁹ Allan C. Brownfeld, *Israel's Aggressive Promotion of Aliyah a Rejection of Jewish Life Outside Israel*, THE WASHINGTON REPORT ON MIDDLE EAST AFFAIRS 72 (Nov. 2004).

²⁰ See *infra* section I.D.

C. Regulating Israeli Media: Open or Closed?

Although it lacks a formal constitution, Israel has been awarded high grades in international comparative studies of political rights and civil liberties.²¹ However, beneath this facade lies a system bent on restricting the rules of freedom of information, freedom of the press and, in particular, freedom of broadcasting. Electronic media in Israel are governed by a plethora of regulators: public broadcasting is overseen by the Israel Broadcasting Authority²² ("IBA"); commercial over-the-air broadcasting is regulated by the Second Authority for Television and Radio,²³ and cable and satellite services are administered by the Cable and Satellite Broadcasting Council²⁴ (the "Cable Council"), all politically appointed bodies that maintain strong ties with the political apparatus.

Lacking a constitutional guarantee of freedom of speech, Israel adopted the principle of freedom of speech through judicial interpretation.²⁵ The Israeli Supreme Court has often cited this principle and implemented it while defending hate speech on television,²⁶ commercial speech on both radio²⁷ and television,²⁸ speech for perceived enemies of the state on public broadcasting,²⁹ and speech in reporting on wrongdoings in the security forces.³⁰

At the same time, however, Israel still maintains severe restrictions on media, both print and electronic. The publication of a newspaper requires a license³¹ and Article 19 of the Press Ordinance authorizes the Minister of the Interior to shut down

²¹ Freedom House, *supra* note 5.

²² Broadcasting Authority Law, 5725-1965, 19 LSI 103, art. 3 (1964-1965) (Isr).

²³ The Second Authority for Radio & Television Law, 1990, S.H. 59.

²⁴ The Telecommunications (amend. 4) Law, 1986, S.H. 224.

²⁵ HCJ 73/53 Kol Ha'am v. Minister of the Interior [1953] IsrSC 7(2) 871, 876.

²⁶ HCJ 399/85 Kahane v. IBA [1987] IsrSC 41(3) 255, 281.

²⁷ HCJ 606/93 Kidum Entrepreneurship & Publ'g Ltd. v. IBA [1994] IsrSC 48(2) 1, 17.

²⁸ HCJ 5118/95 Mayo Simon Mktg & PR Ltd. v. Second Auth. for Radio & Television [1996] IsrSC 49(5) 751, 757.

²⁹ See HCJ 243/82 Zichroni v. IBA [1983] IsrSC 37(1) 757.

³⁰ See, e.g., HCJ 680/88 Schnitzer v. Chief Military Censor [1989] IsrSC 42(4) 617.

³¹ Press ordinance, 1933, Palestine Gazette, 56.

unlicensed newspapers.³² This ordinance has been widely used even years after it was limited in scope,³³ particularly against newspapers serving Palestinians that reside within Israel. The Supreme Court has on occasion approved the practice,³⁴ as well as use of the Defence Regulations, which grant the authorities similar powers to take sanctions against the media³⁵ while citing the limitations on government power to restrict freedom of the press.³⁶ News can only be broadcast through government-controlled public broadcasting,³⁷ government-supervised news corporations in which government-appointed officials sit on the board of directors,³⁸ or through two types of government-licensed channels awarded in competitive tenders on the cable platform, neither of which exist.³⁹

Both broadcast and cable television in Israel have been assigned numerous cultural obligations that reflect the needs of different interest groups who enjoy positions of power within society.⁴⁰ These cultural obligations reflect a desire by the government to create a melting pot in which the dominant culture

³² *Id.*

³³ See H CJ 73/53 Kol Ha'am v. Minister of the Interior [1953] IsrSC 7(2) 871, 876.

³⁴ See, e.g., H CJ 644/81 Omar Int'l, Inc. v. Minister of the Interior [1982] IsrSC 36(1) 227.

³⁵ Defence (Emergency) Regulations (1945), 1945, Palestine Gazette, 855.

³⁶ See, e.g., H CJ 541/83 Asli v. Superintendent of Jerusalem [1983] IsrSC 37(4) 837.

³⁷ Broadcasting Authority Law, 5725-1965, 19 LSI 103, art.3 (1964-1965) (Isr).

³⁸ The Second Authority for Radio & Television Law, 1990, S.H. 59, arts. 63-71. Note that the government-supervised news corporations are a branch of commercial media, not of public broadcasting.

³⁹ This can be done by one of two mechanisms: a "thematic channel" under Article 47 of the Telecommunications Law, 2001 or a "news channel" under Article 1 of the Law to Boost Economic Growth, Employment and Achieve the Goals of the National Budget, 1998. See also Amit Schejter, *Less News Is Good News: Fifty Years of Communication Policy in a Volatile Democracy*, a paper presented at the 27th Telecommunication Policy Research Conference (TPRC), Alexandria, Va. (Sept. 1999) (discussing the limitations of broadcast news in Israel).

⁴⁰ See Amit Schejter, *The Cultural Obligations of Broadcast Television in Israel*, 56 GAZETTE 183 (2000) [hereinafter Schejter, *Cultural Obligations in Broadcast*]; Amit Schejter, *From a Tool for National Cohesion to a Manifestation of National Conflict: The Evolution of Cable Television Policy in Israel, 1986-98*, 4 COMM. L. & POL'Y 177, 177-200 (1999) [hereinafter Schejter, *Evolution of Cable TV Policy in Israel*].

would be nurtured at the expense of the indigenous cultures of immigrant groups. This goal is achieved through the detailed cultural obligations prescribed by law,⁴¹ license requirements,⁴² or rules of government-initiated tenders when new cable channels are established.⁴³

D. Transborder Broadcasting in European Law

The practice of financing transfrontier broadcasting through advertising has existed in Europe for at least three decades.⁴⁴ As of January 2004, there were 218 channels in Europe originating in one country and targeting others with 162 of those channels targeting specific countries.⁴⁵ The economic impact of cross-border television, however, is virtually impossible to assess, as neither the broadcasters nor their competitors supply, or even maintain, records that distinguish between the local and cross-border ends of the business.⁴⁶ This enormous scope of activity may explain why the most comprehensive jurisprudence on the matter was developed in Europe, where the ideology of "television without frontiers," dictated by the European Union, was not always welcome by national legislation. Indeed, the Television Without Frontiers Directive⁴⁷ is often cited for its role in safeguarding European culture against American cultural imperialism, but it has nonetheless influenced the flow of audiovisual content between Member States as well.⁴⁸ Responding to

⁴¹ This is the case in both public and commercial over-the-air broadcasting.

⁴² The Telecommunications Law (amend. 25), 2001, S.H. 530.

⁴³ *Id.* art. 47.

⁴⁴ George Wedell & Andre Lang, *Regulatory and Financial Issues in Transfrontier Television in Europe*, in *BROADCASTING FINANCE IN TRANSITION* 382, 387 (Jay G. Blumler & T.J. Nossiter eds., 1991).

⁴⁵ *TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT AND SELECTED LEGAL ASPECTS* 6 (Mar. 2004), http://www.obs.coe.int/online_publication/transfrontier_tv.pdf.

⁴⁶ *Id.* at 13.

⁴⁷ Council Directive 89/552, 1989 O.J. (L 298) (EC) (on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities) *amended by* Council Directive 97/36 1997 O.J. (L 202) (EC).

⁴⁸ See, e.g., Joe Middleton, *The Effect of Audiovisual Regulation Inside the European Union: The Television Without Frontiers Directive and Cultural Protectionism*, 31 *DENV. J. INT'L L. & POL'Y* 607, 607-27 (2003).

the fear of American media influence, the Directive has created a quota system that ensures a minimum level of original European content on European channels.⁴⁹ However, with regard to the flow of content across European borders, the Directive advocates openness and minimal cross-border constraints as it established that Member States could not restrict re-transmission of television signals from other Member States⁵⁰ except within a closed list of forbidden broadcasts that include broadcasts harmful to minors⁵¹ or broadcasts that incite hatred.⁵²

In at least two cases, the Court of Justice of the European Communities was asked to decide whether transfrontier broadcasting could be blocked by the receiving state. In *TV10 SA v. Commissariaat voor de Media*⁵³—a case that discusses a ban on a channel aimed at the Netherlands—the Court references a national court holding, which states:

[a] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by [the Treaty] for the purpose of avoiding the [rules] which would be applicable to him if he were established within that State.⁵⁴

Under these circumstances, the fact that the broadcast was a transborder broadcast was not deemed relevant, since at the heart of the decision lay the issue of circumvention, and the outcome would have been no different had the broadcaster been Dutch.⁵⁵

A different case involving this issue emerged with VT4, a Flemish language channel owned by Scandinavian shareholders and incorporated and licensed in the United Kingdom as a non-

⁴⁹ Council Directive 89/552, *supra* note 47, art. 4.

⁵⁰ Article 2 in the original version of the Directive; Article 2a in the amended version.

⁵¹ Council Directive 89/552, *supra* note 47, art. 22

⁵² Council Directive 89/552, *supra* note 47, art. 22a (added in 1997).

⁵³ Case C-23/93, *TV10 SA v. Commissariaat voor de media*, 1994 E.C.R. I-4795, 1995 2 C.M.L.R. 284.

⁵⁴ *Id.* (citing Case 33/74, *Van Binsbergen v. Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid*, 1974 E.C.R. 1299, 1975 1 C.M.L.R. 299).

⁵⁵ See G. Staetmans & C. Goemans, *Case Law: TV10 v. Commissariaat voor de Media (C-23/93)*, 1 COLUM. J. EUR. L. 319, 325 (1995).

domestic satellite service.⁵⁶ The Flemish Minister for Culture and Brussels Affairs refused to allow the VT4 television channel to have access to the cable distribution network in Belgium.⁵⁷ He did this because of a monopoly on Flemish language broadcasting required by law at that time, and because he regarded VT4 as a Flemish entity trying to circumvent Flemish law.⁵⁸ The European Court of Justice sided with VT4, ruling that it was indeed a British entity, and that no justification existed under Article 2 of the Television Without Frontiers Directive to block VT4's signal from being re-transmitted on Belgian soil.⁵⁹

How can the contradiction between the two decisions be explained? It seems that one possible explanation lies in the motivation behind the ban on the re-transmission. While the Dutch rule was made because TV10 threatened a rule aimed at protecting the pluralism of Dutch broadcasting, the Belgian court initially ruled against VT4 in order to safeguard a monopoly of a single Flemish language commercial broadcaster in Belgium.⁶⁰

In a third case, the criminal case of Paul Denuit,⁶¹ brought before the European Court of Justice, the mere fact that the "circumvention" attempted by a British-based company whose feed was retransmitted into Belgium was the result of different standards used to apply the TVWF Directive, was not seen as a justification to ban the broadcast.⁶² Hence, the standard set by the European Court was that the justification for the ban within the receiving market was very limited, and interpretation—let alone implementation of cultural decisions—was not seen as sufficient justification.⁶³ In other cases, even avoidance of a tax as

⁵⁶ Case C-56/96, *VT4 Ltd. v. Vlaamse Gemeenschap*, 1997 E.C.R., 1997 3 C.M.L.R. 1225.

⁵⁷ *Id.* at I-3148.

⁵⁸ *Id.* at I-3148.

⁵⁹ *Id.* at I-3154-3158.

⁶⁰ See Press Release, European Commission, European Commission Requests Flemish Government to End VTM Advertising Monopoly (June 26, 1999), <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/97/569&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶¹ Case C-14/96, *Criminal Proceedings Against Paul Denuit*, [1997] E.C.R. I-2785.

⁶² *Id.* at 23.

⁶³ Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 ECR I-1459; 1999 2 C.M.L.R. 551.

justification for “circumvention” was rendered a legitimate construct in light of the goals of a common European community. In the words of *Centros Ltd.*:

the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.⁶⁴

The *TV10*, *Paul Denuit*, and *VT4* decisions were made before the TVWF Directive was amended in 1997. The 1997 amendment adopted in principle the different court decisions regarding its interpretation prior to the revision, and set a stricter standard that limited Member States’ capability to block transfrontier broadcasts thereon.⁶⁵ The 1997 amendment in recital 14 states that:

[t]he Court of Justice has constantly held that a Member State retains the right to take measures against a television broadcasting organization that is established in another Member State but directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the organization had it been established on the territory of the first Member State.⁶⁶

Thus, “circumvention” as a justification for banning re-transmission has been “vindicated,” even in Europe, where the “without frontiers” ethos is fundamental.⁶⁷ The limited jurisprudence that exists regarding this subject suggests that it is only possible to uphold this standard on the rare occasions when it supports the underlying philosophy of pan-European legislation, which is to maintain a competitive and varied market.

E. The Plan of the Study

The preceding overview of media law in Israel emphasizes

⁶⁴ *Id.* at I-1493.

⁶⁵ Council Directive 97/36, 1997 O.J. (L 202) 14 (EC) (amending Council Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities).

⁶⁶ *Id.*

⁶⁷ Mark Wheeler, *Supranational Regulation: Television and the European Union*, 19 EUR. J. OF COMM. 349, 351-52 (2004).

elements of government control and sets the background for comparison with the European standards of regulating transborder broadcasts. The main part of this study describes specific regulation of transborder broadcasts discussed in recent Israeli Supreme Court decisions and demonstrates that these decisions are effectively new takes on old policies. The study begins with a discussion of the control of news flow in times of war and is followed by a discussion on the targeting of national audiences with local transfrontier channels whose original target audience are the citizens of neighboring countries. It continues with a look at the protection enjoyed by government-sanctioned channels delegated with a cultural mission of immigrant absorption. The study concludes with a discussion of transborder information flow policy and an analysis of whether it can be justified within the underlying assumptions on which the Israeli legal system is based. This final analysis uses Frank Fischer's four stages for critical analysis of public policy: describing the program, questioning the program's success, identifying the program's belief system, and testing the legitimacy of the program and the belief system in the present social order.⁶⁸

II. The Cases

A. *Media as a Controlled and Closed System: From the Launch of Television to the Iraq War*

1. *The Launching of Public and Commercial Over the Air Broadcasting*

Fear of a negative effect from transfrontier broadcasts motivated the creation of a television service in Israel and continues to influence many decisions pertaining to the development of television broadcasting. This was demonstrated most recently in the Cable Council decisions regarding the retransmission of CNN⁶⁹ and BBC World,⁷⁰ and in the Supreme

⁶⁸ See generally FRANK FISCHER, *POLITICS, VALUES AND PUBLIC POLICY: THE PROBLEM OF METHODOLOGY* (1980).

⁶⁹ Council decision of Aug. 1, 2002, http://www.moc.gov.il/new/documents/council1/dec_11.8.02.pdf.

⁷⁰ Council decision of Apr. 3, 2003, <http://www.moc.gov.il/new/documents/>

Court's decision in the *Kirsch*⁷¹ case.

Television broadcasts launched in Israel for the first time in 1968 after an extended consultation process with international and local committees who convinced the Israeli government that a television service could serve its national goals.⁷² The stated goal of this venture was to reduce the destructive cultural and political influence of foreign television, with the premise that the less educated the people, the more vulnerable the population, and consequently the greater the inclination to watch television and be affected by its content.⁷³

In addition to its national- and cultural-protectionist missions, Israeli television, particularly its broadcasts in Arabic, was meant to serve as a propaganda and information tool for Arabic-speaking audiences in both Israel and neighboring countries.⁷⁴ In fact, the eventual decision to create a television service immediately after the June 1967 war⁷⁵—a war that ended with the occupation of neighboring territories and eventual installation of military rule over the vast Palestinian population within those territories—was based on a need to communicate to the Palestinian inhabitants of the occupied territories.⁷⁶

Throughout the period of escalating tensions that led up to the June 1967 war, many Israeli Jews were tuned in to the “Voice of the United Arab Republic,” which broadcast false information from Cairo in Hebrew with the explicit purpose of demoralizing

council1/dec_13.4.03.pdf.

⁷¹ HCJ 2753/03, 2791/03 *Kirsch v. Chief of Staff of the Israeli Def. Forces* [2003] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

⁷² See Schejter, *Cultural Obligations in Broadcast*, *supra* note 40, at 180, 185; see also Schejter, *Evolution of Cable TV Policy in Israel*, *supra* note 40, at 180.

⁷³ Schejter, *Evolution of Cable TV Policy in Israel*, *supra* note 40, at 180-81.

⁷⁴ See Schejter, *Cultural Obligations in Broadcast*, *supra* note 40, at 187.

⁷⁵ See DAN CASPI & YECHIEL LIMOR, *THE IN/OUTSIDERS: MASS MEDIA IN ISRAEL* 147 (1999).

⁷⁶ In June 1967, Israel occupied the West Bank of the Jordan River from Jordan and other territories populated by Palestinian Arabs from Egypt, as well as Syrian territory, in what came to be known in Israel as the “Six Day War.” See MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002).

the Jews.⁷⁷ In response, Israeli television's first broadcast in May 1968 featured "a proud display of Israel's powerful army marching in its newly conquered capital – the cherished center of Jewish religious identity."⁷⁸ Since only a few Israelis owned television sets at the time, the government's message was clearly aimed at viewers from neighboring countries and newly-occupied territories.

This propaganda-focused approach to television is also apparent in the Broadcasting Authority Law enacted in 1965.⁷⁹ This law ordered the newly created public radio⁸⁰ to provide "broadcasts in the Arabic language for the [needs] of the Arab-speaking population" and for the advancement of "understanding and peace with the neighboring countries according to the basic course set by the state."⁸¹ Thus, the local Arabic-speaking population was, along with the population of neighboring states, perceived as an enemy to which broadcasts should be targeted in order to convey the state's message.

A short episode in Israeli broadcasting in the 1980s serves to again demonstrate the motivation for establishing broadcasts. In 1986, under the auspices of the "launching administration" formed shortly after the first reading of the Second Authority Law passed in the Knesset, a new government-financed television channel began broadcasting.⁸² Administrators cited the need to "seize the frequencies" for fear it might be overtaken by neighboring countries, although no such attempts were documented.⁸³

2. *The BBC and CNN Boycott*

The Israeli government's innate distrust in the content of foreign broadcasts—even those originating in countries known to

⁷⁷ The acronym "UAR" in Hebrew translates to "thunder," thus the "Voice of Thunder."

⁷⁸ TASHA G. OREN, *DEMON IN THE BOX: JEWS, ARABS, POLITICS AND CULTURE IN THE MAKING OF ISRAELI TELEVISION* 132 (2004).

⁷⁹ Broadcasting Authority Law, 5725-1965, 19 LSI 103, art.3 (1964-1965) (Isr).

⁸⁰ Television came under the same law in 1969. *Id.*

⁸¹ *Id.*

⁸² The Second Authority for Radio & Television Law, 1990, S.H. 59, art.134.

⁸³ CASPI & LIMOR, *supra* note 75, at 153; OREN TOKATLY, *COMMUNICATION POLICY IN ISRAEL* 89 (2000).

be allies—was most recently demonstrated during the Palestinian uprising of 2000 and preparations for the American invasion of Iraq in 2003. The government was concerned with how foreign news channels transmitted abroad and re-transmitted locally on cable and satellite were portraying the violent events of the Palestinian uprising. In August 2002, the Cable and Satellite Council allowed the three cable operators to drop CNN from their menus, provided they replaced it with the Fox News channel, so as not to reduce the number of foreign channels offered to consumers.⁸⁴ The Cable and Satellite Council refused to publish the minutes of the debate leading up to their decision, specifically refusing to publish the public debate surrounding the “anti-Israeli” slant that CNN was supposedly broadcasting.⁸⁵ This left the public to speculate whether it was, in fact, the content of CNN broadcasts that prompted the decision.

In April 2003, this scenario repeated itself when the Cable and Satellite Council allowed the operators to remove BBC World from their offering.⁸⁶ A press release cited a commercial dispute between the BBC and the cable operators, rather than the content of the broadcasts, as the reason for BBC removal.⁸⁷ Whether commercial justifications were the reason behind the ad hoc coalition of operators and regulators remains in question. What is certain is that the government believed both CNN and BBC World broadcasts were anti-Israeli, as demonstrated clearly in July 2003 when the government announced its decision to boycott the BBC, citing the broadcasters’ “anti-Israeli approach” to coverage of the conflict⁸⁸ and its portrayal of Palestinian leader Yasser Arafat as a hero.⁸⁹ Neither CNN nor the BBC remained indifferent to the

⁸⁴ Council decision of Aug. 1, 2002, http://www.moc.gov.il/new/documents/council1/dec_11.8.02.pdf.

⁸⁵ Anat Balint, *Cable and Satellite Council Refuses to Expose Minutes of Debate on Discontinuance of CNN Broadcasts*, HAARETZ (ISRAEL), Sept. 19, 2002.

⁸⁶ Council decision of Apr. 3, 2003, http://www.moc.gov.il/new/documents/council1/dec_13.4.03.pdf.

⁸⁷ Anat Balint, *Cable Council Authorises Removal of BBC World*, HAARETZ (ISRAEL), Apr. 7, 2003.

⁸⁸ Sharon Sade, *Ambassador in London and Jewish Leaders Criticize Boycott of BBC*, HAARETZ (ISRAEL), July 14, 2003.

⁸⁹ Sharon Sade, *Arafat Determines the BBC Is a Hero Made from the Materials of Which Legends Are Made*, HAARETZ (ISRAEL), July 1, 2003.

official Israel outcry. During a June 2002 visit to Israel by a senior CNN official, CNN “admitted mistakes,” and the station began broadcasting special programs that portrayed Israeli victims of Palestinian violence.⁹⁰ The BBC appointed a senior official to examine its editorial policies regarding the Middle East conflict.⁹¹ Both CNN⁹² and BBC World⁹³ eventually remained part of the Israeli cable offering.

3. *The Kirsch Case*

After being subjected to Iraqi missile attacks during the previous American-led invasion in 1991, and amid speculation in 2003 that Iraq had since obtained the capability to bomb Israel with weapons of mass destruction, the Israeli military sought ways to control the flow of information in case of future Iraqi attacks.⁹⁴ In January 1991, only a handful of Israelis subscribed to the newly-launched cable television.⁹⁵ The commercial channel was still in its “establishment” stage and run by the government.⁹⁶ The only “pluralism” offered to Israelis were the two competing public radio services, IBA and military radio, whose broadcasts the government had no difficulty uniting in order to maintain full control of content.⁹⁷

By 2003, however, cable and satellite penetration reached seventy-eight percent of households and the cable offering consisted of dozens of foreign channels, at least three of which⁹⁸

⁹⁰ Yair Ettinger, *CNN Admits Mistakes and Attempts to Outdo Damage*, HAARETZ (ISRAEL), June 24, 2002.

⁹¹ Sharon Sade, *Not Broadcasting Black and White Anymore*, HAARETZ (ISRAEL), May 31, 2004.

⁹² Anat Balint, *Cable Companies Will Continue Broadcasting CNN*, HAARETZ (ISRAEL), Oct. 24, 2002.

⁹³ Anat Balint, *Cable Companies Will Resume BBC World Broadcasts*, HAARETZ (ISRAEL), Apr. 15, 2003.

⁹⁴ See generally H CJ 2753/03, 2791/03 *Kirsch v. Chief of Staff of the Israeli Def. Forces* (2003), <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

⁹⁵ Sam Lehman Wilzig & Amit Schejter, “*Israel*,” in *MASS MEDIA IN THE MIDDLE EAST: A COMPREHENSIVE HANDBOOK* 109-25, 117 (Yahya Kamalipour & Hamid Mowlana 1994).

⁹⁶ OREN TOKATLY, *COMMUNICATION POLICY IN ISRAEL* 258 (2000).

⁹⁷ *Id.* at 262.

⁹⁸ Fox News, CNN, and BBC.

were international news channels.⁹⁹ The military devised a plan that in the event of an Iraqi missile attack, all broadcasting would cease on both radio and television—including the foreign networks—and in their place a five-minute video prepared by the military press office would broadcast, followed by fifteen minutes of instructions and explanations, as the army would deem fit.¹⁰⁰ The Supreme Court struck down these extreme measures in *Kirsch*, but only by a vote of 2-1.¹⁰¹ The majority justices, Daliah Dorner and Eliezer Rivlin, said that blocking foreign channels during a time of emergency was “extreme, unreasonable, and unjustifiable” under the Israeli constitutional framework.¹⁰² The government’s paternalistic assumption that it knows better than its citizens what information they need is at best far-fetched, said Dorner, adding that when it acts under such assumptions, it should do so with more humility.¹⁰³ Hence, government policies to date aimed at controlling the free flow of news at times of national emergency have been put on hold due to being described as unjustifiable within existing values.¹⁰⁴

B. The Enemy Within: The Public Broadcasting Remit of Internal Propaganda

As noted, since its inception, the goal of IBA has been “broadcasts in the Arabic language for the needs of the Arab-speaking population and for the advancement of understanding and peace with the neighboring countries according to the basic course set by the state.”¹⁰⁵ In fact, wording that banded citizens and enemies together into one uniform audience was the only phrase repeated verbatim in the law that established commercial

⁹⁹ Based on presentation by Director General of MOC, Dec. 2002, http://www.moc.gov.il/new/documents/about/presentations/lect_9.12.02.ppt.

¹⁰⁰ HCJ 2753/03, 2791/03 *Kirsch v. Chief of Staff of the Israeli Def. Forces* (2003), <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

¹⁰¹ *Id.*

¹⁰² *Id.* at 8, 21.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Schejter, *Cultural Obligations in Broadcast*, *supra* note 40 (analyzing the Broadcasting Authority Law and the uniform reference to Palestinian citizens of the Israel and Arab citizens of neighboring states, as far as the goals of broadcasting are concerned).

television in 1990,¹⁰⁶ as illustrated in earlier research.¹⁰⁷ This deeply engrained view of the Palestinian-Arab minority citizens as enemies of the state was also maintained through the 1990s and beyond by other government institutions. In 2003, a national investigative committee headed by Supreme Court Justice Theodore Orr called for the re-education of the national police force to stop it from approaching Palestinian-Israelis as enemies.¹⁰⁸ The events leading to *Musawa Center* indicate that, as far as broadcasting is concerned, the Supreme Court itself condones this policy.¹⁰⁹

The optimism that characterized Israeli geopolitics during the second premiership of Yitzhak Rabin from 1992 until his assassination on November 4, 1995 was also the backdrop for the launching of "Channel 3," an IBA-operated satellite channel targeting the whole Middle East.¹¹⁰ The channel started broadcasting in 1993 and in 1995 developed into a daily service with programs in Hebrew and Arabic.¹¹¹ At the same time, IBA started lowering the number of hours of television broadcasts on its terrestrial channel that targeted the Israeli-Palestinian population.¹¹²

The eventual breakdown of negotiations between Israel and the Palestinian Authority in October 2000 led to a renewed outbreak of violence in Israel and in the occupied territories reminiscent of that seen in 1967.¹¹³ In June 2002, IBA launched yet another satellite channel targeting both Israeli-Palestinians and citizens in neighboring Arab countries.¹¹⁴ Soon thereafter, IBA's

¹⁰⁶ The Second Authority for Radio & Television Law, 1990, S.H. 59, art. 5

¹⁰⁷ See Schejter, *Cultural Obligations in Broadcast*, *supra* note 40, at 196.

¹⁰⁸ Report of the 2003 Investigative Committee headed by Justice Theodore Orr, http://or.barak.net.il/inside_index.htm [hereinafter Orr Report].

¹⁰⁹ H CJ 375/03 *Musawa Ctr. for the Rights of Arab Citizens of Isr. v. Prime Minister* (2004), <http://elyon1.court.gov.il/files/03/750/003/108/03003750.108.pdf>.

¹¹⁰ Shachar Abiri, *The New Middle East*, 39 THE SEVENTH EYE JOURNAL (ISRAEL) 36-37 (2002).

¹¹¹ Irit Rosenblum, *Channel 3 Starts Working in Full Format; Will Broadcast Programs in Hebrew and Arabic*, HAARETZ (ISRAEL), Jan. 22, 1995.

¹¹² Ehud Asheri, *Stop the Viewers' Decline*, HAARETZ (ISRAEL), Apr. 24, 1996.

¹¹³ DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 730 (2005).

¹¹⁴ See IBA Freedom of Information Report, <http://dover.iba.org.il/dover/html>

management announced its plans to eliminate programming in Arabic altogether from its terrestrial channel and to divert all programs to the new channel.¹¹⁵ In June 2003, a decision was made to unite both satellite channels and converge all existing Arabic language broadcasting that would target both local and foreign audiences.¹¹⁶ This decision to deny Israeli-Palestinian audiences the terrestrial offering of public television was soon challenged in court.¹¹⁷

In mid-July 2003, the Supreme Court issued an *order nisi* to the government and IBA demanding that they explain their reasons for eliminating broadcasting in Arabic from public broadcasting's main terrestrial channel.¹¹⁸ In January 2004, the Supreme Court announced that it had been informed by the state that as of that month, the satellite channel's broadcasts would be re-broadcast terrestrially for one hour a day and a few more hours on weekends.¹¹⁹ As a result, the petition was rescinded and the petitioners were deemed victors.¹²⁰ However, the actual outcome of this decision was that IBA began re-transmitting a propaganda channel aimed at enemy countries into Israel in order to abide by the legal requirement to provide a public service to Israeli-Palestinians. Neither the Israeli-Palestinian petitioners nor the courts commented on this paradoxical outcome, which had citizens of the state all but officially categorized as enemies.

C. Culture or Advertising? The Banning of Transborder Advertising

Israeli cultural-defensive policies are not limited to the Arab-Israeli conflict. The dominant cultural paradigm lies at the heart

/DoverFreedomOfInfo.html.

¹¹⁵ Anat Balint, *Demand to Resume Broadcasting in Arabic on Channel 1*, HAARETZ (ISRAEL), Oct. 17, 2002.

¹¹⁶ Anat Balint, *The Middle East Channel Will Be United with Channel 33*, HAARETZ (ISRAEL), June 11, 2003.

¹¹⁷ HCJ 375/03 *Musawa Ctr. for the Rights of Arab Citizens of Isr. v. Prime Minister* (2004), <http://elyon1.court.gov.il/files/03/750/003/108/03003750.108.pdf>.

¹¹⁸ Interim Decision [2003], HCJ 375/03 *Musawa Ctr. for the Rights of Arab Citizens of Isr. v. Prime Minister* [2004] (unpublished interim decision on file with author), <http://elyon1.court.gov.il/files/03/750/003/104/03003750.104.pdf>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

of the extreme efforts to block transfrontier broadcasting, which culminated in the *Media Most* decision.¹²¹

Israeli law divides channels transmitted on cable and satellite platforms into several categories.¹²² The difference in the rules regarding these different channel groups is particularly relevant to broadcast financing, because the right to advertise is restricted. While advertising is permitted on the commercial channels operating under the Second Authority Law,¹²³ cable television franchisees cannot include advertisements in their "own broadcasts,"¹²⁴ but the Minister of Communications can grant them permission to do so in a prescribed procedure.¹²⁵ It is the definition of "own broadcasts" that lies at the heart of this most recent legal battle.

1. *The Story of the "Odellia"*¹²⁶

It was not until 1990 that commercial television became an option under Israeli law, with broadcasts commencing in late 1993.¹²⁷ However, Israeli lawmakers and regulators were forced to confront the issue of transborder advertising as far back as the early 1980s, as private entrepreneurs planned to broadcast commercial television to Israeli audiences from the Mediterranean Sea¹²⁸ in order to circumvent the monopoly Israel Television enjoyed and the commensurate ban imposed on television advertising.¹²⁹ Owners of a ship named "Odellia" planned to

¹²¹ HCJ 6962/03, 10338/03 *Media Most Inc. v. Cable & Satellite Council* (2004), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

¹²² The Communications (Telecommunications & Broadcasting) Law, 1982, S.H. 1060, 218 (as amended) at ch. B1.

¹²³ The Second Authority for Radio & Television Law, 1990, S.H. 59, art. 81

¹²⁴ The Telecommunications (amend. 4) Law, 1986, S.H. 224, art. 6(24)(a).

¹²⁵ *Id.* art. 6(24)(b).

¹²⁶ YEHIEL LIMOR, *PIRATE RADIO IN ISRAEL: STATUS REPORT 20* (Hebrew University of Jerusalem, Smart Family Communication Institute 1998), <http://www.amalnet.k12.il/sites/commun/library/radio/comi0477.htm>.

¹²⁷ See The Second Authority for Radio & Television Law, 1990, S.H. 59.

¹²⁸ D.K. (1981) 2745; YEHIEL LIMOR, *PIRATE RADIO IN ISRAEL: STATUS REPORT 20*, (Hebrew University of Jerusalem, Smart Family Communication Institute 1998); <http://www.amalnet.k12.il/sites/commun/library/radio/comi0477.htm>.

¹²⁹ D.K. (1981) 2745.

launch a commercial television channel from the sea.¹³⁰ The government responded by initiating an amendment to the Wireless Telegraphy Ordinance that prohibited broadcasting from the seas.¹³¹ The Minister of Communications explained that the law was initiated because of a “particular ship” planning to commence commercial broadcasts aimed at Israel.¹³² The law forbade assisting such broadcasts by selling advertising time in Israel on their behalf.¹³³ To determine whether such broadcasts were in fact “aimed at Israel,” the law required “usage of the Hebrew language”—a step up from the proposed bill requiring that the whole broadcast be carried in Hebrew¹³⁴—“advertisements for products or services marketed in Israel.”¹³⁵ The practice of outlawing broadcasts from ships was not conceived in Israel, it already existed in the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, enacted in Strasbourg in 1965.¹³⁶

There is no evidence in the Knesset records that any direct or indirect effect on the media outlets existing at the time was even discussed, leaving the Knesset actions open to interpretation. The *Odellia* case represented the first attempt by television broadcasters not originating in a neighboring Arab country to target Israeli television audiences, other than for propaganda purposes. Israeli regulators’ and legislators’ prompt action to end the foreign broadcasts and maintain IBA’s monopoly on broadcasting was both impressive and successful. Why, however,

¹³⁰ *Id.*

¹³¹ The Wireless Telegraphy Ordinance, 1981, S.H. 2, art. 2 (which added art. 5A-5C to the Ordinance).

¹³² D.K. (1981) 2745.

¹³³ The Wireless Telegraphy Ordinance, 1981, S.H. 2, art. 2 (which added art. 5A-5C to the Ordinance).

¹³⁴ The Wireless Telegraphy (amend.) Ordinance, Proposed Bill, 1981, H.H. 1541, 389.

¹³⁵ At the time the *Odellia* was planning to launch its television broadcasts, a radio service broadcasting from a ship sailing the Mediterranean and operated by peace activist Abe Nathan was actively selling advertising time in Israel. The *Odellia* law thus specifically targeted television broadcasts, as the government saw apparently no threat in the “peace” message of the lone seaman. D.K. (1981) 2745.

¹³⁶ See Council of Europe, European Treaty Series, no. 53, <http://www.conventions.coe.int/Treaty/en/Treaties/Word/053>.

were they in such a hurry to stop the broadcasts?

2. *The Development of Policy Regarding Re-transmission of Foreign Broadcasts*

Cable television planning in Israel started back in the mid-1970s, but the issue of transfrontier broadcasts via cable was only addressed implicitly at first. A 1979 report commissioned to design the first commercial terrestrial channel proposed setting up a very limited cable service.¹³⁷ While offering a favorable view of the introduction of cable television into Israel, the report said it should carry only existing broadcast channels instead of becoming a basis for creating new channels, which would necessarily include foreign broadcasts.¹³⁸ A 1982 report on cable television, however, became the basis for the cable television policy eventually implemented.¹³⁹ This report recommended creating regional cable franchises immediately, taking into account the cultural and social impact of a television barrage on a country not yet familiar with the concept of choice in television fare and, particularly, with the effects of foreign television.¹⁴⁰ The report described the possible negative effects of television, weighing them against its acculturating potential and society's need for entertainment.¹⁴¹ In particular, the report expressed concern about the potential effect of foreign channels being re-transmitted on the cable system, noting that the "multiplicity of foreign programming will have the effect of a foreign culture that will enter the individual's home and reside with him as part of his culture."¹⁴² It therefore recommended the allowance of only a very limited number of channels.¹⁴³

Although the Telecommunications Law adopted these recommendations, in general, it disregarded the recommendations

¹³⁷ See Haim Kubersky, A Report of the Committee Clarifying the Issue of a Second Television Channel in Israel (1979) (unpublished report on file with author).

¹³⁸ *Id.* at 29.

¹³⁹ See Yoram Barsela, Report of the Committee on Cable Television (1982) (unpublished report on file with author).

¹⁴⁰ *Id.* at 38, 43.

¹⁴¹ *Id.* at 37.

¹⁴² *Id.* at 6.

¹⁴³ *Id.* at 20-21.

limiting the number of television channels, and most notably, the recommendation regarding foreign satellite channels.¹⁴⁴ The law also noted that the franchise holders may re-broadcast foreign channels, including satellite channels, with no restrictions.¹⁴⁵ No documentation has been found to explain this change in position.¹⁴⁶ Seven years later, when petitioned to use her ministerial powers and allow advertising on cable operators “own channels,” then-presiding Communications Minister Shulamit Aloni argued in an affidavit submitted to the Supreme Court that she adopted the recommendations of a committee she formed to study the issue, according to which advertising on foreign channels re-transmitted into Israel is the *status quo*, is allowed, and should be maintained.¹⁴⁷ A previous committee appointed by one of Aloni’s predecessors, Raphael Pinhasi, reached a similar conclusion.¹⁴⁸ When asked to address the issue of advertising on foreign channels, the deputy attorney general ruled on July 13, 1995, that the law does not prohibit advertising on re-transmitted satellite channels.¹⁴⁹

One of the first acts of the right-wing coalition that took power in 1996 following the assassination of Prime Minister Yitzhak Rabin was to appoint a committee to study the restructuring of the Israeli radio and television market.¹⁵⁰ The commission proposed a new policy based on the principle of “open skies,” which rendered

¹⁴⁴ The Telecommunications (amend. 4) Law, 1986, S.H. 224.

¹⁴⁵ *Id.* art. 6(21)(3).

¹⁴⁶ CASPI & LIMOR *supra* note 75, at 156; OREN TOKATLY, COMMUNICATION POLICY IN ISRAEL 89 (2000). The authors contend that: “legislators did not interpret correctly the Amendment’s political, social and economic significance.”

¹⁴⁷ HCJ 1413/93 Cable Television Corps. Ass’n in Isr. v. Minister of Comm, *retracted*. The committee report is on file with the author along with an affidavit by the then Chairperson of the Cable Council affirming that the Minister had adopted the policy.

¹⁴⁸ See Yitzhak Ish-Horowitz, Report of the Public Committee on the Issue of Advertising on Cable Channels (1992) (unpublished report on file with author).

¹⁴⁹ Letter of the deputy attorney general dated July 13, 1995 (on file with the author).

¹⁵⁰ See Eli Nisan, Report of the Committee on Extending and Reforming of Broadcasting Choice (1997) (unpublished report on file with author), English summary of the report at <http://www.moc.gov.il/new/documents/peled/peled.pdf> www.moc.gov.il/new/documents/peled/peled.pdf.

transfrontier broadcasting virtually inevitable.¹⁵¹ The Israeli government adopted the report and started practicing a policy of openness, or at least indifference, to the televised re-transmission of transfrontier channels.¹⁵² Paradoxically, the 1998 legislation of the committee's recommendations, the climax of the "open skies" ideology, ushered in a re-closing of the skies and construction of new barriers to the free flow of transborder information.¹⁵³ The legislation included restrictions on Israelis and on those operating from within Israel, aimed at preventing the deployment of unlicensed direct-to-home satellite services.¹⁵⁴ The law forbade Israelis or persons residing in Israel from launching a satellite service aimed at Israel, both from within Israel and from outside its borders without a license.¹⁵⁵ The law deviated from the definitions for such broadcasts set in *Odellia* and defined broadcasts as "aimed at Israel" if they met at least one of the following three criteria: (1) they regularly broadcast a majority of their programming in Hebrew; (2) they regularly broadcast programs in Hebrew on prime time; or (3) they regularly broadcast advertising for products that are predominantly aimed at the Israeli market.¹⁵⁶

3. *The METV Cases*

The series of cases involving Middle East Television in 1998 and 1999¹⁵⁷ were the first cases regarding transfrontier

¹⁵¹ *Id.*

¹⁵² See Decision no. 2444 of the Israeli government, adopted on Aug. 8, 1997, <http://www.moc.gov.il/new/documents/peled/government.pdf> www.moc.gov.il/new/documents/peled/government.pdf.

¹⁵³ See The Law to Boost Economic Growth, Employment and Achieve the Goals of the 1998 National Budget (legislative amendments), 1998, S.H. 73.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* art. 27.

¹⁵⁶ The law refrained from defining "prime time" or "products predominantly aimed at the Israeli market."

¹⁵⁷ They included H CJ 7051/98 Tel'Ad Jerusalem Studios, Ltd. v. Minister of Comm. [1999], *retracted*, <http://elyon1.court.gov.il/files/98/510/070/e08/98070510.e08.pdf>; H CJ 474/99, [1999] M.E. Television Servs. Ltd. v. Minister of Comm., *retracted*, (unpublished decision on file with author); H CJ 388/99 Netanel Gal-Er v. Minister of Comm., *petition denied on May 10, 1999*, (unpublished decision on file with author), <http://elyon1.court.gov.il/files/99/880/003/109/99003880.109.pdf> [hereinafter collectively "METV Cases"].

broadcasting following the enactment of the new law. These cases were not directly related to the new law because they involved the re-transmission of a Christian-American owned station that had been broadcasting from Southern Lebanon since 1982¹⁵⁸ and from Cyprus as of 2000,¹⁵⁹ while the law itself referred to signals that were owned by Israelis or being broadcast from Israel. The METV signal was transmitted from terrestrial stations and was one of the first five foreign stations whose re-transmission was permitted as a “foreign broadcast” under the regulations introduced back in 1987.¹⁶⁰ In 1996, the METV signal began to broadcast on the Israeli communications satellite “Amos,” thus creating—perhaps a bit ahead of its time—a transnational “superstation” received all over the Middle East.¹⁶¹

Cross-frontier financing of channels through advertisement sales is a developed practice in Europe,¹⁶² but certainly not in the tumultuous Middle East. As recently as January 2005, even the transnational *Al-Jazeera* Arab network that originates in Doha and is received by thirty to fifty million viewers, needed government subsidies to finance operations.¹⁶³

Back in the early 1990s, METV’s broadcasts drew regulatory attention because of their Christian message, and calls to remove them from cable television’s offering were approved by the court when it was established that they were transmitted to the cable operators via a microwave link—hence, not “over the air.”¹⁶⁴

¹⁵⁸ DOUGLAS BOYD, *BROADCASTING IN THE ARAB WORLD: A SURVEY OF THE ELECTRONIC MEDIA IN THE MIDDLE EAST* 79 (1993). See also A.R. Badran & Christian Badran, *Broadcasting in the Eastern Mediterranean: The Case of Middle East Television*, 47 *GAZETTE: INT’L J. FOR COMM. STUD.*, 33, 33-46 (1991); Douglas Boyd, *Lebanese Broadcasting: Unofficial Electronic Media During a Prolonged Civil War*, 35 *J. BROADCASTING & ELECTRONIC MEDIA* 269, 269-87 (1991).

¹⁵⁹ Some of the station’s history can be accessed on its website. See Middle East Television, <http://www.metv.org>.

¹⁶⁰ Telecommunications Regulations (Broadcasts by a Franchise Holder), 1987, KT 5640, 138.

¹⁶¹ See METV Cases; see also *supra* note 157 and accompanying text.

¹⁶² George Weddel & Andre Lange, *Regulatory and Financial Issues in Transfrontier Television in Europe*, in *BROADCASTING FINANCE IN TRANSITION* 382, 387 (Jay G. Blumler & T.J. Nossiter 1991).

¹⁶³ Steven R. Weisman, *Under Pressure, Qatar May Sell Jazeera Station*, *N.Y. TIMES*, Jan. 30, 2005, at A1.

¹⁶⁴ HCJ 5950/94 Yisrael Ben David v. Minister of Comm. [1995] (unpublished

However, when transmission was launched on the "Amos," broadcasts once again became part of the cable offering.¹⁶⁵ In the summer of 1998, the "Channel 2" franchises campaigned to remove METV from the cable channel offering, arguing that the foreign-owned station threatened their commercial interests by targeting Israeli audiences with advertising. They filed a petition with the Supreme Court urging the Cable Council to remove the channel.¹⁶⁶ The petition prompted the Cable Council to make a series of decisions creating a new category of channels called "Satellite Channels Aimed At Israel"—popularly dubbed at the time as "converted"¹⁶⁷ channels.¹⁶⁸ The Council adopted the criteria created by the 1998 law of prohibited satellite channels, but extended them to channels not necessarily owned by Israelis or broadcasting from Israel.¹⁶⁹ METV filed a petition with the High Court of Justice,¹⁷⁰ which eventually led to a compromise agreement allowing its continued re-transmission.¹⁷¹ At the same time, the Cable Council undertook to set up a regulatory regime targeting all "converted" channels and published a first draft of these regulations that allows the creation of channels in the new category, subject to two major restrictions: (1) they are not to carry advertising for products marketed predominantly in Israel, advertising in Hebrew or home-shopping in Hebrew; and (2) they are to invest a minimum of \$1.5 million in local Israeli programming, which should constitute at least ten percent of their

decision on file with author).

¹⁶⁵ See METV Cases, *supra* note 157.

¹⁶⁶ HCJ 7051/98 Tel'ad Jerusalem Studios v. Minister of Comm. [1999], *retracted*, (portions of unpublished decision are on file with author).

¹⁶⁷ Using the Hebrew term for "conversion," associated with converts to Judaism.

¹⁶⁸ See, e.g., Protocol of Knesset of March 20, 2001, <http://www.knesset.gov.il/protocols/data/rtf/kalkala/2001-03-20.rtf>.

¹⁶⁹ The Council decision may be accessed at <http://www.moc.gov.il/new/documents/peled/foreign1.pdf>.

¹⁷⁰ HCJ 474/99 M.E. Television Services v. Cable Council [1999], *retracted*, (unpublished decision on file with author). The author served as counsel to METV in this petition.

¹⁷¹ Details of the compromise were outlined by the justices in the *Gal-Er* Case. HCJ 388/99 Netanel Gal-Er v. Minister of Comm., *petition denied* on May 10, 1999, (unpublished decision), <http://elyon1.court.gov.il/files/99/880/003/109/99003880.109.pdf>.

program fare.¹⁷²

This new policy groups the foreign channels together with the local channels as participants in the government's controlled programming offer. The foreign channels were to create local programming in order to dilute the "non-Israeli" fare in their broadcasts.¹⁷³ This created an inherent contradiction: on the one hand, the channel was prohibited from advertising in Hebrew, while on the other, it was required to broadcast original programs in Hebrew that were to be produced in Israel.¹⁷⁴ This draft never took effect, however, and only in 2002 were the regulations discussed in *Media Most* enacted.¹⁷⁵

4. *The Aftermath of METV and Amendment 15*

As previous studies demonstrate, cable television policy in Israel embodies national values like "unity" and "nationalism" at times, and values of national conflict and "tribalism" at others.¹⁷⁶ Amendment No. 15 to the Telecommunications Law adopted in 1997 created a new category of channels—"special interest" channels—that were to be carried on one-sixth of the cable network's capacity, originally designated for use at the government's discretion.¹⁷⁷ As part of this amendment the Knesset authorized the government to create these special interest channels, defined as channels aimed at a certain linguistic, cultural, or traditional audience or channels centered on a particular topic.¹⁷⁸ In order to ensure that language-based channels do not threaten the established "general interest" channels, the law specified that these channels must carry most of their programs and all advertising in that language.¹⁷⁹ This policy stemmed from pressures from the commercial channel's franchise holders to

¹⁷² Cable Council Regulations (1999), <http://www.moc.gov.il/new/documents/peled/foreign1.pdf>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Communication Regulations (Telecommunications & Broadcasting) (Broadcast License Holder) (amend.), 2002, KT 6146, 765.

¹⁷⁶ Schejter, *Evolution of Cable TV Policy in Israel*, *supra* note 40, at 177-200.

¹⁷⁷ The Telecommunications (amend. 15) Law, 1997, S.H. 102.

¹⁷⁸ *Id.* art. 1.

¹⁷⁹ *Id.* art. 3, incorporated into the law as article 6(34)(1)(5)(1).

maintain at least their dominance, if not their monopoly, on the Hebrew advertising market. The government identified the following as special interests: providing channels for Arabic, Russian, and Amharic¹⁸⁰ speakers and creating a channel focused on the Jewish tradition; a channel focused on Israeli music; and a channel focused on the provision of news and information.¹⁸¹

The outcome of the policy was the eventual creation, through government licenses, of two “thematic channels:” an Israeli music channel and a Russian language channel.¹⁸² The latter channel was to compete with the Russian language transfrontier package offered by Israeli cable and satellite operators and minimize the uncontrolled impact of those channels.¹⁸³ Presumably aware of the fact that ethnic media use leads to stronger ethnic identification over time, the government must have also realized that uncontrolled ethnic media can help sustain existing ethnic identification and work against the government’s vision of cultural uniformity.¹⁸⁴

Like its broadcast predecessors, the Russian-language channel broadcasting from within Israel was charged with very specific cultural obligations.¹⁸⁵ An appendix to its license¹⁸⁶ lists its “cultural obligations,”¹⁸⁷ which include providing an “adequate representation to the means of life in Israel, to the Israeli character

¹⁸⁰ An Ethiopian dialect.

¹⁸¹ See Nisan, *supra* note 150, at 8.

¹⁸² See Music channel “Music 24” License, http://www.moc.gov.il/new/documents/mismachim/rishayon_music_10.12.02.pdf; Russian Language Channel “Israel Plus” License, http://www.moc.gov.il/new/documents/mismachim/rishayon_5.12.01.pdf. No attempt to license an Amharic language channel has been made. A license was awarded to a news channel, but it was eventually rescinded after the channel failed to launch. A license was awarded to an Arabic language channel that has yet failed to launch, and a tender is underway for launching the “traditional” channel.

¹⁸³ See Dan Caspi, Hanna Adoni, Akiba A. Cohen & Nelly Elias, *The Red, the White and the Blue: The Russian Media in Israel*, 64 GAZETTE: INT’L J. FOR COMM. STUD., 537, 542 (2002).

¹⁸⁴ Leo Jeffres, *Ethnicity and Ethnic Media Use: A Panel Study*, 27 COMM. RES. 496, 496 (2000).

¹⁸⁵ See appendix to Russian Language Channel “Israel Plus” License, http://www.moc.gov.il/new/documents/mismachim/rishayon_c.pdf § 1.1.

¹⁸⁶ See *id.*

¹⁸⁷ *Id.* § 1.1.

of life.”¹⁸⁸ Notably, it calls for 150 weekly minutes of programming dedicated to issues on the general public agenda in Israel and 135 minutes of programming dedicated to issues on the agenda of the Russian-speaking population in Israel, supplemented with 260 minutes of “enrichment programs that may help in the absorption of Russian-speaking immigrants in the Israeli experience.”¹⁸⁹ The channel is allowed to buy its news programs only from a body licensed to broadcast news in Israel—in other words, one that has a government license or is under government supervision.¹⁹⁰

According to two new sets of regulations created in 2002,¹⁹¹ a cable or satellite operator cannot re-transmit a satellite channel without the Cable and Satellite Council’s approval. In addition, two central concepts, the “own broadcasts” and the “broadcasts intended mostly for the Israeli public or a part thereof” were redefined.¹⁹² The “own broadcasts” defined in the original regulations from 1987 as “broadcasts whose source is the studio of the franchise holder, whether self-produced or purchased,”¹⁹³ are now defined as “including broadcasts that are not broadcast in the franchise holder’s own channels, that are intended mostly for the Israeli public or a part thereof.”¹⁹⁴ In other words, the Council defined “own broadcasts” to include broadcasts that are not “own broadcasts” by its own admission, stating that they are “own broadcasts” in the legal sense, if not literally.¹⁹⁵

¹⁸⁸ *Id.* § 1.3.

¹⁸⁹ *Id.* § 5.

¹⁹⁰ *Id.* § 7.1.

¹⁹¹ Communication Regulations (Telecommunications & Broadcasting) (Broadcast License Holder) (amend.), 2002, KT 6146, 340; Communications Regulations (Telecommunications & Broadcasting) (Broadcast License Holder) (amend. 2), 2002, KT 6169, 764.

¹⁹² KT 6146, 340; Communications Regulations (Telecommunications and Broadcasting) (Broadcast License Holder) (amend. 2), 2002, KT 6169, 764, art. 2.

¹⁹³ H CJ 6962/03, 10338/03 Media Most Inc. v. Cable & Satellite Council [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

¹⁹⁴ Nisan, *supra* note 150, art. 1.

¹⁹⁵ *Id.* art. 1. Such a paradoxical definition exists elsewhere in Israeli law. The most renowned example is the Fishing Ordinance; Article 1 defines a “fish” as “all marine creatures whether they are fish or whether they are not fish.” Fishing Ordinance 1937, Palestine Gazette, 137.

New presumptions were needed to identify “broadcasts aimed at the Israeli public,” including one that stated that if at least half of the broadcasts are *not* in Hebrew, the Council can still rule that they are aimed at Israeli audiences or a part thereof. On the other hand, the Council said that a channel viewed by a minimum of eight million households outside Israel and complying only with the criterion that it broadcast advertising in Hebrew can be considered “not being aimed at Israel.”¹⁹⁶

These new rules have established a new standard of absurdity in the Israeli government’s ongoing efforts to “close the skies” in order to combat the barrage of digital choice. In order to avoid competition with commercial “Channel 2,” the government-licensed “Russian” channel was not allowed to broadcast advertising in Hebrew.¹⁹⁷ However, it was awarded a *de facto* monopoly on Russian advertising in Israel. The creation of advertising monopolies of this sort contradicts all theories of market based economic development. In addition, they create cultural ghettos, which are no less problematic. Another aspect of this arrangement is the differentiation between the channels based on their presumed cultural impact: while the regulations restrict access of the Russian language channel in order to avoid dilution of the “absorption package” aimed at new immigrants, they are designed to allow the continued influx of American culture aimed at Hebrew-speaking Israeli youth.

5. *The Media Most Case*

The aforementioned regulations and their constitutionality were challenged in the Supreme Court by Media Most Ltd., the Israeli representative of an American-based Russian language channel called RTVi that was retransmitted by the Israeli cable and satellite operators and financed exclusively through advertising.¹⁹⁸ The decision in this case, written by Justice Esther

¹⁹⁶ Communications Regulations (Telecommunications & Broadcasting) (Broadcast License Holder) (amend. 2), 2002, KT 6169, 764, art. 2. The second rule was set in order to allow the re-transmission of MTV that was broadcasting only advertising in Hebrew.

¹⁹⁷ Telecommunications (amend. 15) Law, 1997, S.H. 102, art. 3, incorporated into the law as article 6(34)(1)(5)(1).

¹⁹⁸ HCJ 6962/03, 10338/03 Media Most Inc. v. Cable & Satellite Council (2004), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

Hayut, clearly supported the government's goal of minimizing the impact of transborder channels.¹⁹⁹ Justice Hayut asserted that "the broadcasting channels of the electronic media are a limited resource, and thus the legislature is required to regulate their usage and not leave them wide open for the forces of the market."²⁰⁰ She then acknowledged that the initial ban on advertising, as defined, did not apply to re-transmitted transfrontier channels but only to "own broadcasts" under the old definitions.²⁰¹ However, she concluded that changing times might necessitate new definitions.²⁰² Although the ban on advertising on cable channels was originally enacted to protect the viability of newspapers, its purpose today is to protect commercial television channels.²⁰³ Hayut argued that the term "own" should be interpreted to mean all channels transmitted by a cable or satellite operator.²⁰⁴ This change in the definition is justified, she asserted, since a technological change allows the creation of versions of channels targeting the Israeli population and threatening local channels in a manner not possible before.²⁰⁵ The court concluded that preserving the viability of commercial channels is a reasonable government policy; therefore, the change in interpretation is reasonable as well.²⁰⁶ On this basis the court denied the petition and allowed the banning of the channel.²⁰⁷

III. Discussion

The required first question in Fischer's methodology, a detailed description of Israeli transfrontier broadcasting policies, has been provided in the previous chapter. As for the second question of whether the policy succeeded, the answer is a straightforward affirmative. Until the introduction of commercial

¹⁹⁹ *See id.*

²⁰⁰ *Id.* at 9.

²⁰¹ *Id.* at 9.

²⁰² *Id.* at 11.

²⁰³ *Id.*

²⁰⁴ H CJ 6962/03, 10338/03 Media Most Inc. v. Cable & Satellite Council (2004), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

²⁰⁵ *Id.* at 12.

²⁰⁶ *Id.* at 13.

²⁰⁷ *Id.* at 24.

television, IBA (the public broadcaster) was the main source of news for Israelis.²⁰⁸ All attempts to circumvent regulations designed to maintain the dominance of the government's preferred cultural paradigm have been successfully blocked: the "Odellia" never set sail, METV now broadcasts in English, RTVi stopped broadcasting to Israelis, and Israel's own transfrontier broadcasts targeting enemy states now serve an internal constituency, traditionally regarded as a "fifth column."²⁰⁹ The second Iraq war came and went for Israelis; not a missile was fired at Israel and the government's plan to block transfrontier broadcasting was never put to the test.²¹⁰ All of these events show that the government's policy has achieved its explicit goals.

This section of the study attempts to reveal the underlying assumptions of Israeli policymakers whose position regarding the regulation of transfrontier broadcasting has turned full circle. It will question whether this about face can be justified within the set of values to which the Israeli system purportedly ascribes. Exposing the underlying assumptions provides a glimpse into the implicit goals.

The outcome of the policies addressed in *Kirsch*, *Al Musaawa*, and *Media Most* is twofold. Some Israelis today have limited access to sources and interpretation of information, with "information" in this context referring to both "news" and "culture."²¹¹ Indeed, throughout the years Israeli governments have supported policies that control the information environment of select social groups—reducing the diversity of perspectives communicated throughout society and specifically to those groups—and succeeded in doing so. These policies favor privileged rights over personal autonomy and wider choice of

²⁰⁸ Elihu Katz, *And Deliver Us from Segmentation*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 28 (1996).

²⁰⁹ Eli Avraham, *Press, Politics, and the Coverage of Minorities in Divided Societies: The Case of Arab Citizens in Israel*, 8 HARV. INT'L J. PRESS/POL. 7, 22 (2003).

²¹⁰ As mentioned by Justice Dorner in the *Kirsch* verdict. HCJ 2753/03, 2791/03 *Kirsch v. Chief of Staff of the Israeli Def. Forces* (2003) at 2, <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

²¹¹ This conclusion is based on the description in the text; Russian immigrants can only access news from an Israeli licensed channel and Israeli Arabs get their terrestrial public service from a propaganda arm of the government.

information sources. In adopting Benkler's²¹² approach to evaluating communication and information regulations along these criteria, the policies this study highlights cannot be considered justifiable. Other scholars believe that "promoting unconditional freedom of public debate in newly democratizing societies is in many circumstances likely to make the problem [of nationalist and ethnic conflict] worse."²¹³ This latter approach may challenge the analysis offered by this study. Therefore, it is important to differentiate between policies adopted in the formative years of the state and policies adopted in recent years. At the same time, even recognizing the legitimacy of policies that limit the free flow of information for the sake of national unity in times of crisis such as the birth of a state—a position not espoused herein—merely underscores how much a society needs to reject such policies. Indeed, the "special circumstances" under which these policies were constructed—the massive immigration creating the need for the Russian language channel discussed in *Media Most* or the looming missile attack behind the *Kirsch* decision—further highlight why these policies are dangerous even in the context of a newly democratizing society as they tend to resurface again and again when the given society has presumably matured.

Many signs of a system that is paternalistic and holds that the media *can and should* be used by governments to influence and mold national culture exist in Israel. These signs include: the description of the Israeli population that watched transfrontier broadcasts in the 1960s as the "most vulnerable," the portrayal of the defense of the national culture in the 1980s as a "need," the delegation of detailed cultural tasks to public and private broadcasters in the 1960s and 1990s, the creation of government-licensed "cultural ghettos" of broadcasting even when commercial alternatives were available, the move back to using propaganda tools in order to communicate with minority groups, and the support of efforts to limit foreign broadcasts based information during times of conflict. This paternalistic system has been the impetus behind Israeli media policymaking from its inception to

²¹² See generally Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001).

²¹³ Jack Snyder & Karen Ballentine, *Nationalism and the Marketplace of Ideas*, INT'L SEC. 5, 6 (Fall 1996).

this very day.

In the 1960s, transfrontier broadcasting was deemed a threat to national security and prompted the creation of Israeli television with its own propaganda mission in which the government sought to offer its own interpretation of events.²¹⁴ In the 1980s, transfrontier broadcasts were perceived as a threat to the monopoly of Israeli television—that was assigned an ambitious cultural mission and whose news program was viewed at times by more than two-thirds of the population²¹⁵—and were blocked by restrictive legislation. In this case, the government sought to eliminate competing sources of information. In the 1990s, a different environment altogether allowed for the re-transmission of transfrontier broadcasts on newly deployed cable systems, and afterward on direct-to-home satellite as well. This re-transmission was relatively unobstructed until the paternalistic approach to broadcasting policy resurfaced, with the government attempting to create niche channels on its cable infrastructure capacity in order to serve ethnic and cultural groups as it saw fit, and specifically in order to absorb them culturally into society according to the government-dictated cultural order. In this case, it started out by offering a government-regulated interpretation of events and went on to block the access of viewers to competing sources of information and interpretation.²¹⁶

The justifications for the policy using the European “yardstick” for measurement help highlight the underlying motivations of the Israeli government. The contradiction between the Euro-centrist “cultural-defensive” mode, on the one hand, and the pan-European “cultural-neutral” mode, on the other, make the comparison with Israel difficult. Indeed, Israeli law and regulations have adopted a quota system somewhat resembling the European model in order to confront the issue of foreign content on local channels and promote local production.²¹⁷ Public,²¹⁸

²¹⁴ TASHA G. OREN, *DEMON IN THE BOX: JEWS, ARABS, POLITICS AND CULTURE IN THE MAKING OF ISRAELI TELEVISION* 132 (Rutgers University Press 2004).

²¹⁵ Katz, *supra* note 208, at 29.

²¹⁶ *Id.*

²¹⁷ See Encouragement of Original Israeli Productions in Television Broadcasts Law, 1996, S.H. 308, *amended* by The Telecommunications Law, 2001, S.H. 530; The Second Authority for Radio & Television Law, 1990, S.H. 59, *amended* by Arrangements in the State of Israel National Economy Law, 2000, S.H. 140 and The

commercial,²¹⁹ cable,²²⁰ and satellite²²¹ television all have their own quotas. Still, there is no relevant region with which Israel is being harmonized culturally that parallels Europe. To the contrary, cross-border broadcasting is seen as serving Israel's enemies and is separate from the debate regarding cultural and commercial dominance issues. However, the cases of *Odellia*, *METV I* and *II*, as well as *Media Most*, did not involve enemies of the State of Israel, as they were commercial endeavors trying to take advantage of the Israeli media market's economic potential—a motivation similar to the European model—and they represented, in the eyes of the authorities, attempts to circumvent Israeli regulation just like their European counterparts have done: *Odellia* wanted to exploit an existing ban on television advertising, while *METV*—in both cases—and *Media Most* wanted to take advantage of the liberal approach to re-transmitted signals on the cable and satellite platforms that supposedly existed at the time.²²² As far as the authorities were concerned, these were not “accidental” overspills resulting from unplanned large satellite footprints, but concerted efforts to broadcast to Israeli audiences while bypassing Israeli regulations.²²³ Guaranteeing the commercial viability of free-to-air broadcast media was the

Second Authority for Radio & Television Law, 2003, S.H. 528; Encouragement of Original Israeli Productions in Television Broadcasts Law, 1996, S.H. 308, *amended by* Telecommunications Law, 2001, S.H. 530; Administrative Ruling, 2004, http://www.moc.gov.il/new/documents/council2/yes_lic1.pdf (This is a reference to the “YES” license; it is only accessible on the web and was not made part of the K.T.).

²¹⁸ Encouragement of Original Israeli Productions in Television Broadcasts Law, 1996, S.H. 308, art. 1, 3, *amended by* Telecommunications Law, 2001, S.H. 530.

²¹⁹ Second Authority for Radio & Television Law, 1990, S.H. 59, art. 59 *amended by* Arrangements in the State of Israel National Economy Law, 2000, S.H. 140, art. 1 and Second Authority for Radio & Television Law, 2003, S.H. 528, art. 9.

²²⁰ Encouragement of Original Israeli Productions in Television Broadcasts Law, 1996, S.H. 308, art. 3, *amended by* Telecommunications Law, 2001, S.H. 530.

²²¹ *See generally* Administrative Ruling, 2004, §14.3, http://www.moc.gov.il/new/documents/council2/yes_lic1.pdf. (This is a reference to the “YES” license; it is only accessible on the web and was not made part of the K.T.) (referring to the license awarded to the only direct satellite broadcaster in Israel, which provides the Cable and Satellite's Council authority to require local production quotas once the service is provided to more than 200,000 subscribers).

²²² *See section III infra* and notes 147, 148, and 149.

²²³ Otherwise they would not bother blocking them.

explicit reason given by the government for its decision to limit the scope of the activity of RTVi in the *Media Most* case, an explanation justified by the court.²²⁴ The permit given by the Cable Council to the cable operators to remove CNN and BBC broadcasts from their offering was never tested in court. However, the government's decision to block all of the foreign channels in case of a national emergency as defined by the military was challenged in court and subsequently rejected.²²⁵ In *Kirsch*, the court ruled in favor of the rights of citizens to free choice of information sources,²²⁶ but in the case of *Media Most*, the court sided with the government's position that advocated limiting consumers' choice.²²⁷

Maintaining the cultural functions of heavily regulated channels was undoubtedly a factor that came into play in *Media Most*, even if not explicitly, the mere acceptance of the argument that the limited capacity of the system—which is at least questionable, if not totally outdated—provides an automatic preference to the government's sanctioned channel and demonstrates that assumption.²²⁸ This was not the case in the *Kirsch* decision, which followed *Schnitzer*²²⁹ and *Zichroni*²³⁰ in exemplifying the Supreme Court's traditional defense of Israel's Jewish citizens from any attempts by the military or government to control the freedom of information flow with regards to both access (*Schnitzer*) and interpretation (*Zichroni*). This defense, however, is one-dimensional and limited to “information as news” and does not extend to “information as culture.”

The court's traditional defense of citizen autonomy over government controls is in line with its defense of the economic viability of commercial media outlets, a parallel to the American

²²⁴ HCJ 6962/03, 10338/03 *Media Most Inc. v. Cable & Satellite Council* (2004), <http://elyon1.court.gov.il/files/03/750/003/108/03003750.108.pdf>.

²²⁵ HCJ 2753/03, 2791/03 *Kirsch v. Chief of Staff of the Israeli Def. Forces* (2003) 2, <http://elyon1.court.gov.il/files/03/530/027/109/03027530.109.pdf>.

²²⁶ *Id.*

²²⁷ See HCJ 6962/03, 10338/03 *Media Most Inc. v. Cable & Satellite Council* [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/620/1069/v15/03069620.v15.pdf>.

²²⁸ *Id.* at 9.

²²⁹ See HCJ 680/88 *Schnitzer v. Chief Military Censor* [1989] IsrSC 42(4) 617.

²³⁰ See HCJ 243/82 *Zichroni v. IBA* [1982] IsrSC 37(1) 757.

tradition in which the individual and the corporate are protected.²³¹ This position was demonstrated in such rulings as *Daily Newspaper Publishers Union v. Minister of Education*,²³² in which the commercial stability of the newspaper industry was seen as an adequate reason to limit the different types of financing of IBA. Additionally, in the "*Reshet*" *Comm. & Prod. v. IBA*²³³ case, a similar consideration affected the ruling in favor of commercial over public broadcasting.

Media Most and *Al Musaawa*, represent a different challenge that the court has failed to meet. The regulations backed by the holding in the *Media Most* case supported a commercial channel that serves government cultural goals against a foreign channel that did not serve those goals.²³⁴ In the *Reshet* case, both the commercial and public networks were licensed and culturally obligated within Israel.²³⁵ The Israeli Russian-language channel was supposedly created in response to a market failure to launch a Russian-language television channel.²³⁶ Clearly, foreign Russian channels served the needs of the Russian speaking population well; otherwise, they would not have attracted advertising and would have been eliminated by the market, raising the question of whether there was in fact a "market failure."²³⁷ Their content, however, was not regulated. The government favored the Israeli Russian language channel, committed to its interpretation of events and its cultural message, and the court never asked why a local commercial channel should enjoy a monopoly limiting both

²³¹ For a critique on the importation of American legal constructions into Israeli court decisions on communication law see Amit Schejter, *The Fairness Doctrine Is Dead and Living in Israel*, 51 FED. COMM. L. J. 281, 300 (1999).

²³² See H CJ 757/84. [1984] IsrSC 41(4) 337, <http://www.rashut2.org.il/editor/UploadLow/00005112.pdf>.

²³³ H CJ 6032/94 "Reshet" *Comm. & Prod. v. IBA* [1994] IsrSC 51(2) 790, <http://www.rashut2.org.il/editor/UploadLow/jscj603294.rtf>.

²³⁴ See H CJ 6962/03, 10338/03 *Media Most Inc. v. Cable & Satellite Council* [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/620/069/v15/03069620.v15.pdf>.

²³⁵ See H CJ 6032/94 "Reshet" *Comm. & Prod. v. IBA* [1994] IsrSC 51(2) 790, <http://www.rashut2.org.il/editor/UploadLow/jscj603294.rtf>.

²³⁶ See H CJ 7200/02 *DBS Satellite Services. v. Cable & Satellite Council* [2005] 2, <http://elyon1.court.gov.il/files/02/000/072/s12/02072000.s12.pdf>.

²³⁷ This assumption is based on the economics of broadcasting.

commercial and cultural diversity for Russian-speaking immigrants.

Furthermore, in the *Al Musaawa* ruling, the court failed to recognize the constraints imposed on the free flow of information to Palestinian-Israelis, not looking beyond the deeply rooted depiction of this minority as enemies.²³⁸ However, the government made no attempt to block interpretations of the Palestinian uprising or of the Iraq invasion that originated in Arab countries, such as *Al Jazeera*, and they were re-transmitted on cable while cooperating with the cable operators in blocking CNN and BBC, whose broadcasts it saw as misrepresenting the political conflict.²³⁹ The audiences for the Arabic broadcasts are predominantly the Arabic speaking Palestinian-Israelis, themselves perceived as enemies.²⁴⁰ This minority, which has no public television channel of its own in Israel, remains exposed to Israeli government propaganda on the one hand, and over-the-border propaganda, on the other, the attitude being "let the best propagandist win." This is but one example of how this minority is pushed aside and how its absorption into the Jewish majority is far lower on the government's agenda than the absorption of Jewish immigrants. Identifying these preferences of the political establishment, regardless of party affiliation, in policies that seem at first sight to be unrelated to the issues they demonstrate is also further proof of the usefulness of the methodology chosen to uncover the underlying beliefs of Israeli policymakers.²⁴¹

The fact that, at the beginning of the twenty-first century, the government continues to cling to policies that some may argue were justifiable in Israel's formative years, shows that nothing in its underlying value system has changed, despite the tremendous advances in technology over time that allow for more choice in

²³⁸ H CJ 375/03 Musawa Ctr. for the Rights of Arab Citizens of Isr. v. Prime Minister [2004] (unpublished decision on file with author), <http://elyon1.court.gov.il/files/03/750/003/108/03003750.108.pdf>. This was well described in the Orr Commission Report. See Orr Report, *supra* note 108.

²³⁹ See *infra* Section 2.1.2.

²⁴⁰ See Avraham, *supra* note 209.

²⁴¹ During all of these events a constant change in ruling party dominance characterized Israeli politics. See THE ELECTIONS IN ISRAEL, 1999 (Asher Arian & Michal Shamir 2002); THE ELECTIONS IN ISRAEL, 2003 (Asher Arian & Michal Shamir 2005).

media fare and less paternalistic control of media content.

IV. Conclusion

This study demonstrates how over the course of four decades the regulation of transfrontier broadcasting emerged out of a desire to mold and protect an Israeli culture from foreign influence. The Israeli government tried to limit the exposure of its citizens to foreign television signals but has not been able to move ahead with the times, despite changes in technology that had made such limitations ineffective and unjustifiable. It demonstrates how the underlying assumption of media policymaking in Israel, where the state has the right to control the flow of information in order to advance its prescribed view of society and its values, has served as the cornerstone for policy measures that outlawed terrestrial television broadcasting from ships, the re-transmission of satellite signals “converted” to meet local commercial needs, and “converted” channels that threatened the government’s absorption plan for immigrant groups, as well as attempted to block information on foreign channels regarding security issues. By providing Palestinian-Israelis with only two electronic media alternatives—an Israeli channel targeting enemy states and channels originating in enemy countries—the same regulatory system continues to convey the message that this minority group is an enemy, albeit a weak and gullible one, and seems to reinforce an underlying assumption of policymakers in all walks of life.²⁴²

Government controls of information and culture through media regulation were maintained in a system that proclaimed itself, and was often described by others, as open and democratic. Even today, policymakers in Israel believe they have the right to regulate the flow of news. No less disturbing is the fact that the courts, as this study shows, have at times taken the policymakers’ side, unable to dodge an underlying belief that the media have a role in advancing government concepts of culture in which minorities are seen as either gullible targets or straightforward enemies. From an analysis of one particular aspect of broadcasting, a pattern emerges of a system inherently closed that has yet to prove it has internalized the meaning and importance of the free flow of communication, information, and culture in a

²⁴² See Avraham, *supra* note 209.

democratic society and the equal treatment and rights of minorities.

The Moabite prophet Balak's mission, as defined by his patron Bilam during biblical times, was to curse the Israelites.²⁴³ Instead he found their isolationist nature worthy of blessing.²⁴⁴ Insofar as media policy is concerned, his blessing may have come back to haunt them.

²⁴³ *Numbers* 23.

²⁴⁴ *Id.*