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Regulating minority-language use in broadcasting: international law and the Dutch national experience

To what extent does international human rights law allow States to regulate language use in broadcasting systems? What potential does such regulation have to restrict freedom of expression? A new set of international Guidelines on the use of Minority Languages in the Broadcast Media examines these and other difficult and divisive questions. This article uses the new Guidelines and how they fit into the framework of existing international legal and political standards as a backdrop to its consideration of relevant Dutch national policies, laws and practice.

Introduction¹

The playwright Arthur Miller once observed that a good newspaper is a nation talking to itself; a remark that is pregnant with potential for further analysis and analogy. It is a remark that could *prima facie* be applied to any organ of mass communication, and in particular to those with a specific public service or social mandate or ethos. However, Miller's remark fails to grapple with a number of crucial questions, such as the optimal modalities for achieving this kind of public discourse. The present article will focus on the role of language in this connection.

After briefly setting out some of the public policy concerns relating to language use and regulation, the article will proceed to present the essence of the main instruments of international (human rights) law touching on relevant issues. The limitations of these instruments will be considered, as will the likely impact of a set of recently adopted Guidelines on the use of Minority Languages in the Broadcast Media (October 2003).² Finally, there will be a tentative examination of whether current broadcasting policies and practices in the Netherlands measure up to the exhortatory standards promoted by the new Guidelines. Such probing is invited, *inter alia*, by the recommendation of the Committee of Ministers of the Council of Europe in 2001 that the Netherlands should, "as a matter of priority [...] take into account the special needs of broadcasting in Frisian and consider increasing its financial support [...]".³

¹ The author would like to thank Dr. Nico van Eijk, IViR, and Dr. Wouter Hins, IViR, for their very helpful comments on drafts of this article. However, any inaccuracies or omissions are the sole responsibility of the author.

² Available at: http://www.osce.org/documents/hcnm/2003/10/2242_en.pdf.

³ Council of Europe Committee of Ministers, Recommendation RecChL(2001)1 on the application of the European Charter for Regional or Minority Languages by the Netherlands, 19 September 2001, available at: <https://wcm.coe.int/rsi/cm/index.jsp>. For a proper contextualisation of this Recommendation, see

Public policy concerns

Tensions between the freedom and regulation of language use (especially where the latter rhymes with restriction) have great capacity for creating unity and division (if not polarisation) in society. This is hardly surprising, for a variety of reasons. First, it is a well-established tenet of international law that language is an impermissible ground for discrimination.⁴ It is often argued, however, that non-discrimination should not be seen as an end-goal in itself and that equality is the preferred paradigm to be strived for. The notion of “effective equality” which permeates the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM) is increasingly *de rigueur*. Allied to this is the particular reading of relevant international law provisions which holds that the purpose of such provisions is “to go beyond a guarantee of non-discrimination towards a more positive notion of conservation of linguistic identity.”⁵ In short, all of this leads to a more assertive, pro-active role for the law in the protection of language.

Second, language can be a vehicle for consolidating a sense of national identity or, more accurately, perhaps, the majoritarian identity of a given State. On the other hand, it can equally be a mechanism for asserting minority or non-majoritarian identities. A third reason is that language is inextricably bound up in cultural matters. Indeed, the same is also true of the relationship between language and education; language and the media, and language and participation in public life generally. The nature of these highly sensitive relationships can have a determinative effect on society, leading alternately to greater cohesion or fragmentation (or even ghettoisation), depending on the line of argumentation pursued.

International human rights law instruments

Throughout the last century, attempts to afford minority rights protection under international law have been defined by shifting priorities and approaches. It is perhaps as a result of this absence of continuity (and consistency) that the protection of minority rights is a burgeoning area of international law nowadays.⁶ However, its further

Section V (“The Netherlands”), *infra*. See also: Tarlach McGonagle, “Committee of Ministers Urges Greater Use of Frisian in Dutch Audiovisual Media”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2001-9: 4.

⁴ Ample evidence of this is provided by Article 2(2), ICCPR and ICESCR; Article 14, ECHR (and Protocol No. 12 to the ECHR (when it enters into force)); Article 21 of the Charter of Fundamental Rights of the European Union (as incorporated into the Draft Constitution for the European Union), all of which cite language as one of the prohibited grounds for discrimination (see further *infra*).

⁵ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991), p.197.

⁶ See further, Karol Jakubowicz, *Report on Persons belonging to National Minorities and the Media*, “Filling the Frame”, Conference marking the 5th anniversary of the entry into force of the Framework Convention for the Protection of National Minorities, Strasbourg, 30-31 October 2003, available at: http://www.coe.int/T/E/human_rights/minorities/5.5_anniversary/PDF_Final%20Report_media_Jakubo

development is being hampered somewhat in both conceptual and practical terms by the absence of any universally applicable definition of a minority (group). Existing international instruments tend to assume the existence of minorities rather than to seek to scrupulously define them. For want of a hard-and-fast legal definition which enjoys wide currency, recourse is often had to the so-called ‘Capotorti definition’ in order to establish some kind of conceptual parameters for the debate:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁷

The United Nations (UN) sister treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both contain provisions that are important for the realisation of the linguistic rights of minorities. Article 27 of the former provides that persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. Despite the negative formulation of this right, it does entail positive obligations on States Parties to the Covenant.⁸ Article 15 of the ICESCR, for its part, stipulates the right to take part in cultural life and to enjoy the benefits of scientific progress and its application. Building *inter alia* on Article 27, ICCPR, the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities safeguards the right of persons belonging to minorities “to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination” (Article 2.1).

In the context of the Council of Europe,⁹ Article 10 of the European Convention on Human Rights (ECHR) is, unsurprisingly, the primary centre of gravity. Also of major importance are the relevant provisions of the more thematically-focused FCNM and European Charter for Regional or Minority Languages.

[wicz.pdf](#). See also, ‘Overview’, in Tarlach McGonagle, Bethany Davis Noll and Monroe Price, Eds., *Minority-language related broadcasting and legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities (Programme in Comparative Media Law and Policy (PCMLP), University of Oxford & the Institute for Information Law (IViR), University of Amsterdam, 2003), pp. 1-31, esp. pp. 2-7, available at: <http://www.ivir.nl/staff/mcgonagle.html>, and the Explanatory Note to the Guidelines on the use of Minority Languages in the Broadcast Media, *op. cit.*

⁷ Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (New York, United Nations, 1979), p. 96, para. 568.

⁸ *The rights of minorities (Article 27)*, United Nations Human Rights Committee General Comment 23/50, adopted on 8 April 1994 (esp. paras. 7 & 9). See also in this connection, Article 4 (esp. paras. 1 & 2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by UN General Assembly Resolution 47/135 of 18 December 1992.

⁹ For further information on recent relevant developments in the Council of Europe, see: Tarlach McGonagle, “[Council of Europe] Parliamentary Ass embly: Focus on Freedom of Expression for Minorities”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2004-1: 4.

Article 9, FCNM, is modelled on Article 10, ECHR,¹⁰ but introduces additional specificities of particular significance to persons belonging to national minorities. These include the express assertion that the right to freedom of expression includes linguistic freedom and non-discrimination as regards access to the media (Article 9.1); the freedom to create and use print and broadcast media outlets without hindrance (Article 9.3) and the requirement for States Parties to “adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism” (Article 9.4).¹¹

The European Charter for Regional or Minority Languages protects and promotes the use of regional or minority languages in a variety of ways, including in the broadcasting sector. The operative provision is Article 11 and its wording also borrows from that of Article 10, ECHR.¹² In the graduated approach that typifies the Charter, Article 11 sets out a number of possible options for the realisation/enhancement of broadcasting in regional or minority languages in the public service and general/commercial broadcasting sectors. Its provisions embrace issues such as the production and distribution of audiovisual works; the provision of financial assistance; the training of journalists and the representation of users of regional or minority languages on relevant decision-making boards.

As regards the European Union,¹³ one of the most important legal bases for the protection of cultural heritage and diversity (including languages) is Article 151 of the Treaty establishing the European Community.¹⁴ Article 151(1) states: “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.¹⁵ The Draft Constitution for the European Union has incorporated the Charter of Fundamental Rights of the European Union¹⁶ as its Part II. Article 22 of

¹⁰ This is explicitly acknowledged in the Explanatory Report to the Framework Convention for the Protection of National Minorities: see, in particular, paras. 56 & 58.

¹¹ For an examination of the treatment of Article 9 under the FCNM monitoring mechanisms, see: Tarlach McGonagle, *Comments on Access of persons belonging to national minorities and the media*, ‘Filling the Frame’ Conference, *op. cit.*, available soon at: http://www.coe.int/T/E/human_rights/minorities/.

¹² For acknowledgement of the textual similarities, see the Explanatory Report to the European Charter for Regional or Minority Languages, paras. 107-113, esp. para. 112.

¹³ Constraints of space prevent a comprehensive overview of EU law concerning language rights and issues; but see in this connection: Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (The Netherlands, Kluwer Law International, 2002). Relevant current developments can be tracked in: François Grin, Tom Moring *et al.*, *Support for Minority Languages in Europe*, Final Report on a project financed by the European Commission, Directorate Education and Culture (submitted: May 2002; published: February 2003); Michl Ebner, Rapporteur, ‘Report with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057(INI))’, Committee on Culture, Youth, Education, the Media and Sport, European Parliament session document, 4 September 2003, Final A5-0271/2003.

¹⁴ Consolidated version, as published in the *Official Journal of the European Communities* of 24 December 2002, C 325/1.

¹⁵ See also in this connection, Articles 149, 150 and the subsequent paras. of Article 151, *id.*

¹⁶ Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

the Charter ('Cultural, religious and linguistic diversity') reads: "The Union shall respect cultural, religious and linguistic diversity."

The Organization for Security and Co-operation in Europe (OSCE), which currently comprises 55 Participating States, has also been in the vanguard of the protection of the languages of national minorities, primarily through the activities of the OSCE High Commissioner on National Minorities (HCNM). The Oslo Recommendations Regarding the Linguistic Rights of National Minorities were elaborated to elucidate "the content of minority language rights generally" in situations in which the OSCE HCNM is involved.¹⁷ Paras. 8-11 of the Recommendations deal with the use of languages in the media and cover similar terrain to the relevant section of the European Charter for Regional or Minority Languages (see *supra*).

Limitations of international human rights law

It is clear from the foregoing that the protection accorded to minority languages (specifically) in the broadcasting sphere by existing international human rights instruments is neither entirely comprehensive nor entirely coherent. It has been posited in some quarters that the role of (international) law is inherently restrictive in this respect:

But it is doubtful that international law will ever be able to do more than specify the most minimal of standards. The members of various linguistic groups have quite different needs, desires, and capacities, depending on their size, territorial concentration, and historic roots. A set of guidelines that is satisfactory to a small, dispersed immigrant group will not satisfy a large, concentrated historic minority. [...] Any attempt to define a set of rights that applies to all linguistic groups, no matter how small and dispersed, is likely to end up focusing on relatively modest claims. [...] Both majority and minority groups want much more than is, or could reasonably be, guaranteed in international law.¹⁸

While the challenges facing international law, sceptically articulated here by Kymlicka and Patten, relate to linguistic rights generally, the concerns they highlight are equally pertinent in specific sectors, such as the media. In any event, a programmatic approach would appear to be the most appropriate way of attempting to fill the interstices in international law, not least because of the detail and diversity of the subject-matter involved:

The complex interaction of a number of diverse factors affects the use of specific languages in the audiovisual sector.¹⁹ These include linguistic topography (including transfrontier considerations); official/State recognition of minorities/languages and market sustainability, all of which help to determine the climate in which certain types of language-broadcasting

¹⁷ See the Introduction to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities, (The Hague, The Foundation on Inter-Ethnic Relations, February 1998), available at: <http://www.osce.org/hcnm/documents/recommendations/>.

¹⁸ Alan Patten & Will Kymlicka, "Introduction – Language Rights and Political Theory: Context, Issues, and Approaches" in Will Kymlicka & Alan Patten, Eds., *Language Rights and Political Theory* (New York, Oxford University Press, 2003), pp. 1-51, at pp. 34-5.

¹⁹ See further, Tarlach McGonagle, *Comments on Access of persons belonging to national minorities and the media, op. cit.*

take place. The licensing of broadcasters, for its part, has great potential for stimulating and securing access to broadcasting opportunities for specific interest groups, including minorities. The most direct and palpable source of influence, however, is the regulation of broadcasting output itself: legal prescriptions governing the use of minority languages in public (and private) means of communication, especially access to broadcast facilities and time. Also of importance are questions of the representation of minorities on relevant authorities and decision-making bodies; public service broadcasting requirements and practices, especially as regards regional programming; the development of notions and strategies of social and special-interest broadcasting; miscellaneous financial, fiscal and capacity-building initiatives.²⁰

Guidelines on the use of Minority Languages in the Broadcast Media²¹

One particular ‘programmatic approach’, along the lines of that advocated in the previous section, gathered momentum towards the end of 2003, when a set of international Guidelines on the Use of Minority Languages in the Broadcast Media was launched. Elaborated by a group of experts under the auspices of the OSCE HCNM, the Guidelines draw inspiration from and seek to crystallise existing international legal and political standards dealing with the topic.

The Guidelines follow earlier standard-setting initiatives taken by the OSCE HCNM concerning specific aspects of minority rights. During the period when these earlier initiatives were pursued, the High Commissioner was the former Dutch Foreign Minister, Max van der Stoel.²² The initiatives in question led to the elaboration of the Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999); the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February 1998) and The Hague Recommendations on the Education Rights of National Minorities (October 1996).²³ However, the character of the Guidelines on the Use of Minority Languages in the Broadcast Media is more programmatic than that of its forerunners, which explains why they are styled as Guidelines rather than Recommendations.

²⁰ Tarlach McGonagle and Andrei Richter, *Regulation of Minority-Language Broadcasting, IRIS plus* 2004-2 (Strasbourg, European Audiovisual Observatory, 2004), available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2_2004.pdf.en.

²¹ This section is an abridged version of a text which first appeared in Tarlach McGonagle, ‘OSCE High Commissioner on National Minorities: International Guidelines on Use of Minority Languages in Broadcast Media’, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2004-1: 3 (reworked here with the kind permission of the European Audiovisual Observatory).

²² Van der Stoel was the first incumbent of the Office of the OSCE HCNM (January 1993-June 2001). For an overview of his activities in this capacity, see *inter alia*: Walter A. Kemp, Ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague/London/Boston, Kluwer Law International, 2001); Wolfgang Zellner and Falk Lange, Eds., *Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities* (Baden-Baden, Nomos, 1999). A more extensive bibliography is available at: <http://www.osce.org/hcnm/documents/bibliography/>.

²³ All available at: <http://www.osce.org/hcnm/documents/recommendations/>.

The first section of the Guidelines presents their underlying general principles: freedom of expression; cultural and linguistic diversity; protection of identity, and equality and non-discrimination.

The second section, entitled ‘Policy’, sets out that States should develop policy to address the use of minority languages in the broadcast media. The elaboration and application of such State policy should include the “effective participation” of persons belonging to national minorities. It ought to be supportive of public service broadcasting to the extent that such broadcasting caters, *inter alia*, for the linguistic needs of national minorities. State policy in this area should also “facilitate the establishment and maintenance by persons belonging to national minorities of broadcast media in their own language” (para. 8), and independent regulatory bodies should have responsibility for its implementation.

Regulation (including licensing) “must be prescribed by law, based on objective and non-discriminatory criteria and shall not aim to restrict or have the effect of restricting broadcasting in minority languages” (para. 9). States may not prohibit the use of any language in the broadcast media and any measures promoting one or more language(s) should not have restrictive repercussions for the use of other languages, or otherwise adversely affect the rights of persons belonging to national minorities. Furthermore, again drawing on the language of Article 10, ECHR, regulation must pursue a legitimate aim and be proportionate to that aim. The proportionality of regulation should be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

The Guidelines stipulate that onerous translation requirements should not be imposed on minority-language broadcasting and that transfrontier broadcasting must not be restricted (on the basis of language). Moreover, the availability of foreign broadcasting in a minority language does not obviate the need for States to facilitate the domestic production of programmes in that language, “nor does it justify a reduction of the broadcast time in that language” (para. 13).

The fourth section of the Guidelines countenances a number of facilitative measures aimed at stimulating broadcasting in minority languages, both qualitatively and quantitatively. These include States providing access to broadcasting technology and infrastructure; creating financial assistance schemes; pursuing advantageous fiscal policies and maintaining particular licensing and administrative regimes; all with a view to achieving “effective equality” for broadcasters operating (to varying degrees) in minority languages. As elsewhere in the Guidelines, providing incentives for minority language broadcasting and teasing out various possibilities for its realisation, are approached distinctly from public service and private broadcasting perspectives. The importance of capacity-building (eg. technical support for the distribution of productions in minority languages; education and training of personnel for minority-language broadcasting) is also emphasised.

The Netherlands

Although the Netherlands has signed the aforementioned Framework Convention for the Protection of National Minorities (FCNM),²⁴ it has yet to ratify this Convention,²⁵ thereby leaving its provisions with no more than persuasive value in the domestic legal order. The European Charter for Regional or Minority Languages, on the other hand, entered into force in the Netherlands on 1 March 1998, having been ratified on 2 May 1996. When ratifying the Charter, the Dutch authorities undertook to “apply to the Frisian language in the province of Friesland”²⁶ a number of provisions contained in Article 11 – Media, including: ‘to the extent that radio and television carry out a public service mission: [...] to make adequate provision so that broadcasters offer programmes’ in Frisian (para. 1(a)(iii)). An undertaking was also given to encourage and/or facilitate the broadcasting of radio and television programmes in Frisian on a regular basis (paras. 1(b)(ii) and 1(c)(ii) respectively). In addition, the Dutch authorities stated their intention to apply existing measures for financial assistance also to audiovisual productions in Frisian (para. 1(f)(ii)). The freedom to receive radio and television broadcasts directly from neighbouring countries in Frisian or similar languages was also vouchsafed, subject to certain conditions (para. 2). The potential impact of these commitments is geographically concentrated as their application is restricted to ‘the users of the regional or minority languages within the territories in which those languages are spoken, according to the situation of each language, to the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field [...]’ (para. 1).²⁷ Finally, as regards thematically-focused instruments at the European level, the Oslo Recommendations are more colourably political than legal in character.

It is therefore clear that the limited obligations concerning minority-language broadcasting by which the Netherlands are bound under international law have *prima facie* little direct legal effect at the national level. Nor does the *Grondwet* contain any specific provisions dealing with linguistic rights generally, thus leaving it to the *Mediawet* and the *Mediabesluit* to step into the breach and provide the required illumination, at least as far as broadcasting is concerned. The *Mediawet* catalogues the range of obligations on public service broadcasters (including diversity of programming) and also requires them to broadcast at least 50% of television airtime in the Dutch or

²⁴ Date of signature: 1 February 1995.

²⁵ See further: Second Periodical Report of the Netherlands under the European Charter for Regional or Minority Languages (presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter), MIN-LANG/PR (2003)6, 26 May 2003, para. 3.7.14.

²⁶ Officially known as Fryslân, as of 1 January 1997.

²⁷ For full details, see: <http://conventions.coe.int/>. The principles of the Charter are also to be applied to the Lower Saxon languages used in the Netherlands, as well as to Yiddish and the Romanes languages, *inter alia*, as regards Article 11 – Media. See further: Declarations contained in a Note Verbale handed over by the Permanent Representative of the Netherlands at the time of the deposit of the instrument of acceptance, on 2 May 1996, available at *id*. It should also be noted that on 19 March 1997, the Netherlands submitted an additional declaration to the Council of Europe regarding the recognition of Limburger as a regional language and pledging to apply the Charter’s principles to Limburger as well.

Frisian language (Section 54a(1)).²⁸ A related consideration is the obligation on the *Nederlandse Programma Stichting* (NPS) – by virtue of Section 15(1) of the *Mediawet*, *juncto* Article 15 of the *Mediabesluit* - to ensure that at least 20% of its television programme service and at least 25% of its radio programme service comprise programmes “for or relating to ethnic and cultural minorities” (although there are no express requirements governing language).

Until recently, the *Mediabesluit* used to require commercial broadcasters to devote at least 40% of their television programme service to programmes originally produced in the Dutch or Frisian language (Article 52l). This provision was repealed by the amendments to the *Mediabesluit* of November 2003, and Articles 33 and 34 which now deal with commercial broadcasting are silent on this matter.²⁹ However, the provision has not vanished completely: it has reappeared – intact - in the form of Section 71o of the *Mediawet*. The provision is now governed by two main qualifications. First, in special cases, the *Commissariaat voor de Media* can, upon request and subject to conditions, fix percentages lower than the stated 40%, with respect to certain commercial broadcasting entities (Section 71o(3)). Second, the provision does not apply to “programme services for special broadcasting purposes” (Section 71o(4)).³⁰ Upon examination, it would seem that a concerted and creative application of the *Mediawet* and the *Mediabesluit* could allow for the harnessing of considerable untapped potential for minority-language broadcasting.³¹

As in quite a number of other European countries,³² specific legislative safeguards for the promotion of allochthonous languages in the Dutch broadcasting sector are striking by their absence (see further, *infra*). The Frisian language – recognised as the second national language by virtue of the Netherlands’ adherence to the Charter – is the main focus of legislative attention and accommodation. For the purposes of the present analysis, however, it is imperative that the presumptive superiority of legislation over non-legal, miscellaneous administrative and financial practices not be overstated. Non-legal initiatives can often prove much more fruitful for stimulating minority-language broadcasting than formal legal measures seeking to attain similar aims. Current

²⁸ This includes programmes which comprise non-Dutch/Frisian elements and are introduced in Dutch or Frisian by a presenter (see: Article 6(1)(b), *Regeling van het Commissariaat voor de Media van 18 december 2001 houdende beleidsregels omtrent Europese, onafhankelijke, recente, Nederlandstalige of Friestalige programmaonderdelen (Beleidsregels programmaquota)*, *Stcrt.* 28 December 2001, nr. 250, p. 123 *et seq.*), but not dubbed programmes (Article 6(2), *id.*). Certain programme services are excepted under Section 54a(2), eg. those provided by religious institutions and political parties.

²⁹ See further, *het besluit van 12 november 2003 (Stb. 486), tot wijziging van het Mediabesluit (vaststelling van een nationale evenementenlijst en nadere regels inzake deze lijst, alsmede enige technische wijzigingen)*.

³⁰ This essentially means programme services for a specific audience (*bijzondere omroep*). According to Section 1(l) of the *Mediawet*, such a programme service is one which is “broadcast in encrypted format and intended for reception by members of the general public who have concluded an agreement to receive the programme service in question with the broadcaster which provides the programme service”.

³¹ See further, Ot van Daalen, “The Netherlands” in *Minority-Language Related Broadcasting and Legislation in the OSCE*, *op. cit.*, pp. 332-341.

³² See generally, *Minority-Language Related Broadcasting and Legislation in the OSCE*, *op. cit.*

broadcasting trends in the Netherlands arguably illustrate this point.³³ The Covenant on the Frisian Language and Culture (2001),³⁴ agreed between the Dutch Government and the Province of Fryslân, for instance, sets out a number of specific targets regarding the use of Frisian in the broadcast media.³⁵

The flagship for broadcasting in the Frisian language is *Omrop Fryslân*, a regional public service broadcasting organisation which broadcasts 12 hours of radio programming and one hour of television programming on a daily basis. *Nederland 1* broadcasts a (subtitled) documentary programme produced by *Omrop Fryslân* on its national network once a week.³⁶ As mentioned in the Introduction to this article, in 2001, the Committee of Ministers of the Council of Europe urged the Dutch authorities to take action to further facilitate broadcasting in the Frisian language. The Committee of Ministers' Recommendation drew on the findings of the Report of the Committee of Experts on the application of the Charter,³⁷ which in turn was based on the initial State Report submitted by the Netherlands under the Charter. In its Report, the Committee of Experts encouraged the Dutch Government to (i) 'take into account the special needs of broadcasting in Frisian and to consider increasing its financial support', and (ii) 'take further steps to promote the use of Frisian in private broadcasting'.³⁸

The reporting process under the Charter affords States Parties the opportunity to offer comments on the findings of the Committee of Experts. In this context, the Dutch authorities countered that 'Dutch government policy as a matter of principle does not seek in any way to promote commercial broadcasting' and that relevant funding 'exists solely to subsidise public broadcasting'.³⁹

Throughout Europe, public service broadcasters are today coming under ever-increasing strain; having to operate in an austere economic climate and to hold their own against the growing dominance of commercial broadcasting. Furthermore, they are under constant pressure to streamline their operations and become more efficient. These background considerations make it very difficult to set aside shares of limited available funds for the advancement of broadcasting in minority languages – never mind to augment existing funds ear-marked for such purposes. The Netherlands is no exception to this broader trend, as evidenced by ongoing drives for efficiency⁴⁰ and the recent imposition of

³³ See further, Ot van Daalen, *op. cit.*, esp. pp. 334-339.

³⁴ *Bestuursafpraak Friese taal en cultuur 2001*, *Stcrt.* 3 July 2001, 125. This is the third such Covenant to be agreed between the relevant parties: see further, Second Periodic Report of the Netherlands under the Charter, *op. cit.*, p. 166.

³⁵ See generally, the text of the Covenant, *op. cit.*, and the Second Periodic Report of the Netherlands, *op. cit.*, pp. 107-108.

³⁶ For further information on Omrop Fryslân's activities, see: <http://www.omropfryslan.nl/>.

³⁷ Report of the Committee of Experts on the application of the European Charter for Regional or Minority Languages (presented in accordance with Article 16 of the Charter): The Netherlands, 9 February 2001.

³⁸ *Ibid.*, p. 23. See generally, paras. 88-94 of the Report.

³⁹ *Ibid.*, Appendix II ('Comments of the Dutch authorities'). These comments are expanded upon and situated in their proper context in a comprehensive overview of broadcasting in the Frisian language in Section 9 of the Second Periodic Report of the Netherlands under the Charter, *op. cit.*, pp. 107-119.

⁴⁰ See, for example, governmental approval for the McKinsey report in June 2003: McKinsey & Co., *Organisatie- en efficiëntieverbeteringen Publieke Omroep (Eindrapport)*, Hilversum, 25 June 2003.

financial cutbacks.⁴¹ In November 2003, Secretary of State Medy van der Laan announced her intention to conclude performance-related agreements (*prestatieafspraken*) with public service broadcasters as a means of stimulating the transmission of various kinds of material targeting a broader cross-section of society.⁴² Although minority-language programming as such is not the central concern of the *prestatieafspraken*, it remains to be seen whether they will indirectly have any positive consequences for minority-language broadcasting.

Conclusion

The same, many-tendrilled conundrum has to be resolved by every multilingual State: how should the needs and interests of various groups in society (including linguistic minorities) be accommodated in an overall broadcasting policy; how should limited financial resources be equitably distributed among different (linguistic) groups; which process values and other criteria should be applied? There are no easy answers to these questions.

Wherever it wages, the debate on whether it is legitimate as a matter of social or language policy to differentiate between autochthonous and allochthonous languages,⁴³ tends to prove divisive. State interests in language regulation can be quite predictable and include the promotion of: national identity, social cohesion and varying degrees of integration for its component groups. But absent discriminatory policies and practices in this domain, it is difficult to contest a State's prerogative to seek to uphold these interests and therefore hold that a policy of "when in Rome, do as the Romans" should be broadly *de rigueur*. Notwithstanding these highlighted State interests and associated considerations, it is crucial that clear and balanced criteria be established in order to justify any differential treatment *vis-à-vis* co-existing languages within a given State.⁴⁴ Otherwise, the concept of distributive justice is quickly rendered notional, and discredited.

The new set of Guidelines detailed in this article represent a synthesis of existing international legal and political standards, as well as the best practices in operation at the national and sub-national levels across the sweep of OSCE Participating States.⁴⁵ They do not present a fixed blue-print for adoption in each of the 55 OSCE States. Rather, they offer a palette of options and examples which could usefully be adapted to meet the legal

⁴¹ See generally the *Mediabegroting voor de periode 2004-2008*, which provides for cutbacks in governmental funding for public service broadcasting to the tune of • 40 million in 2004, dimming to • 80 million in 2007: "Ministerraad stemt in met mediabegroting", Press release of the Ministry for Education, Culture and Science, 14 November 2003.

⁴² See further, Section II 'Ontwikkeling Publieke Omroep' (ss. 'Plaats en taak publieke omroep' (p. 16) and 'Aanbod en prestaties' (p. 17)), Letter from the Secretary of State for Education, Culture and Science to the Chairperson of the Second Chamber of Parliament (Topic: *Mediabegroting 2004*), 14 November 2003.

⁴³ These terms are employed here in their linguistic sense, meaning indigenous and non-indigenous languages respectively; the terms have not been defined in the (international) documents under discussion.

⁴⁴ See further, François Grin, "Diversity as Paradigm, Analytical Device, and Policy Goal", in Will Kymlicka and Alan Patten, *op. cit.*, pp. 169-188, at p. 177.

⁴⁵ *Minority-Language Related Broadcasting and Legislation in the OSCE*, *op. cit.*

and cultural priorities and sensitivities of individual situations in individual States. The margin of appreciation for States is wide. As such, the drafting of the Guidelines was infused with the hope that they could constitute a proverbial rising tide which would lift at least some boats – including in the Netherlands, where rising tides necessarily prompt rapid reaction.