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# EUROPEAN COMMUNITY LAW AND BROADCASTING: THE DUTCH CASE

— JOSEPHINA J.A. PELLE —

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In light of the Maastricht Treaty's defeat by the Danish, and its extremely narrow passage by the French, further integration of the European Community (EC) member countries has been called into question. A major concern for those who voted against "Maastricht" is that the EC would be usurping areas of jurisdiction which the voters felt should remain under the control of their national governments. Provisions regarding the establishment of the European Monetary Union, which would replace the national currency units by one European currency unit, and the European Political Union, which, among other things, would create a common foreign policy, are the ones which have received the most attention.

The EC also intends on pursuing a European cultural policy, which has given rise to equally heated controversy. The smaller countries of the EC fear that their national cultures will be "diluted" in a Europe devoid of cultural frontiers. For countries like Belgium, Denmark, and the Netherlands, the media — and television broadcasting in particular — form an integral part of their cultural identity. The EC, however, considers broadcasting an economic activity, and as such falls under its jurisdiction. Now-familiar conflicts ensue, as these countries resist surrendering control of their broadcasting systems to the EC. While EC law has indeed had an impact on broadcasting in the Netherlands, Dutch efforts to preserve their national culture have led to a certain amount of reconciliation between the two systems, setting an example for other nations grappling with similar problems.

## Dutch Society and the Broadcasting System

### *The Politics of Accommodation*

Dutch society has traditionally been based on deep social and religious ideological cleavages, which fall into four main blocs: Roman Catholic, Protestant, Socialist, and Liberal. These divisions consist of a network of affiliated organizations which govern society, politics, religion, and culture. A form of

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*Josephina J. A. Pelle holds a Master of Law from the University of Leiden. She is currently a doctoral candidate at Erasmus University in Rotterdam and research assistant in the Faculty of Law, Department of Constitutional and Administrative Law.*

"peaceful coexistence" has been maintained by the efforts of the leaders of the four main blocs to bridge these divisions. Settlement of such differences through a "politics of accommodation" (*verzuijing*), whereby a minimal consensus serves to resolve conflicts<sup>1</sup>, has formed the bedrock of Dutch society and has contributed to its stable and viable democratic system.

The broadcasting system mirrors the makeup of society. A public service system, it originally consisted of five private, nationwide broadcasting organizations, representing the four blocs: *KRO* and *NCRV* represented the Roman-Catholic bloc, *VPRO* represented the Protestant bloc, and *VARA* represented the Socialist bloc. While *AVRO* strove to represent a general and neutral public, it was, however, considered to represent the Liberal bloc. Each broadcasting organization played an important role in preserving the political accommodation by disseminating the ideas of its corresponding political organization.

Although the social and religious ideological divisions and their strong ties slowly diminished over time, the five broadcasting organizations remained protected by the government in the closed system. In the Netherlands, there are now roughly fifteen political parties, which represent a broad spectrum of religious, social, and liberal movements. During general elections held every four years, votes are divided between these political parties, with no single political party ever receiving an absolute majority. Dutch governments have therefore always been coalitions of these various interests. Religious political parties — the *confessionals* — have always received and continue to receive a large proportion of the votes. Their conservative outlook and large backing exert great pressure on the coalitions to preserve the established order.

In the seventies the broadcasting system opened slightly, with the entrance of three new organizations: *VOO*, *TROS*, and *EO*. *VOO* and *TROS*, both former "pirate" radio stations, represented a general and neutral trend in society, and attracted many young people with their broadcasting programs, while *EO* is an evangelical broadcasting organization. To date, the broadcasting system still consists of these eight private broadcasting organizations.

In addition to the establishment of five broadcasting organizations associated with the blocs in Dutch society, a general broadcasting organization, the *Nederlandse Omroepprogramma Stichting (NOS)*, or the Netherlands Broadcasting Program Foundation, was established by the Royal Decree for Television of 1956. The *NOS* is the last vestige of the move to establish a national broadcasting system after World War II. Its function is to provide overall coordination for the activities of the broadcasting organizations and to produce those programs which are meant to reach society as a whole and which require a collective approach, e.g. the news and national festivities. For this purpose, the broadcasting time allocated by the government to the *NOS* is at least twice the broadcasting time of any other broadcasting organization. Broadcasting time for the broadcasting organizations and the *NOS* is divided among three channels,

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1. Arend Lijphart, *The Politics of Accommodation* (Berkeley, CA: University of California Press, 1975) 102.

whereby the organizations broadcast two evenings a week, each on different channels. Yet even with the additional organizations, programming is still limited and slow to change: as in the rest of Europe, daytime programs in the Netherlands are a rather new phenomenon.

### *Advertising*

Since government regulation is justified to distribute scarce technical means and to preserve and protect the diversity in society, the government holds the view that there is no room for Dutch commercial broadcasting within the system. Advertising, however, is permitted, under the management of a separate advertising body, the *De Stichting Etherreclame (STER)*, or The Advertising Foundation. Advertisements are broadcast in clusters, which are recognizably separate from the programs. A share of these advertising revenues forms the greater part of the funding for the broadcasting organizations, which is also supplemented with monies from license fees paid by television owners themselves.

### *Admission Requirements*

In order to be admitted to the broadcasting system, a broadcasting organization must meet certain requirements. These requirements were first laid down in the Royal Decree for Television of 1956 and have not been altered since.

The first requirement is related to membership: a broadcasting organization must have a minimum of 150,000 members. These organizations are then classified into three categories according to the size of their membership,<sup>2</sup> which in turn serve to determine the amount of broadcasting time allocated to each broadcasting organization.

Another requirement for admission is related to the government's desire to protect the diversity of Dutch society. Each broadcasting organization must represent a movement in society — either cultural, religious, or spiritual — to ensure that every trend or movement in Dutch society has the opportunity to express itself in the media. To fulfill this diversity condition, each broadcasting organization is obliged to broadcast a comprehensive program, made up of a predetermined proportion of cultural, informational, educational, and entertainment programs.

Official membership is calculated by subscriptions to television guides. Each broadcasting organization publishes its own television guide, and those who subscribe are considered to be members of the broadcasting organization. However, people are indeed able to subscribe to the guides of many organizations, which makes such a tabulation extremely inaccurate as broadcasting organizations are reluctant to distinguish between the various kinds of members and subscribers.

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2. Category A must have a minimum of 450,000 members, Category B must have between 300,000 and 450,000 members, and Category C must have between 150,000 and 300,000 members.

### *Breakdown of the Politics of Accommodation*

When Dutch society was strictly based on the aforementioned cleavages and was divided into distinct blocs, the makeup of the various broadcasting organizations reflected this quality: members of KRO were generally Roman-Catholic, participating in the Roman-Catholic network, reading a Roman-Catholic newspaper; similar conditions existed in the other blocs. Accordingly, broadcasting organizations could count on a certain number of members. However, when the politics of accommodation in Dutch society began to break down, this assured membership decreased. People did not necessarily limit themselves to watching the television programs of "their" broadcasting organization — they often subscribed to other television guides. As a result, while a subscriber to a television guide is counted as a member of its respective broadcasting organization, their affiliation to that organization is not necessarily assured.

### *Competition*

Since broadcasting time is allocated according to membership, competition between the broadcasting organizations increased in intensity following the breakdown of the traditional politics of accommodation. This induced the organizations to broadcast programs which would attract the greater part of the viewers — such as the very successful American soapseries like *Dallas* and situation comedies like the *Bill Cosby Show* — and to publish the most colorful, convenient, and cheapest television guides. When VOO and TROS joined the broadcasting system, for example, they started broadcasting extraordinarily popular programs which attracted a vast audience and gave rise to imitation by the other broadcasting organizations. This competition began to erode the rigid lines which previously represented diversity in the broadcasting system. Programs and, hence, the broadcasting organizations became more "homogenized." Membership was no longer based on divisions and blocs, but rather on viewers' tastes. "Programming became a sort of marketing strategy in which viewers' polls helped the companies in deciding when to broadcast what...."<sup>3</sup>

### *Government Intervention*

Government intervention has traditionally been justified by three basic arguments: 1) the distribution of scarce financial and technical means, 2) the desire to consolidate the established order, based on the social and religious-ideological divisions, and 3) the necessity of preserving and protecting the diversity in society, a part of national culture.

Not all of these arguments are considered valid today. Since eighty-nine percent of all Dutch households are connected to a cable network, less scarcity exists in the marketplace. The breakdown of the politics of accommodation has eroded much of the second argument's relevance, but it still plays a part in some policymaking. However, the third argument is considered to be generally

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3. Kees Brants, "Broadcasting and Politics in the Netherlands: From Pillar to Post", *Western European Politics*, 8, No. 2 (1985): 114.

accepted and sustainable, especially considering that the media fall within the authority of the Ministry of Welfare, Health and Cultural Affairs.

### *Freedom of Expression*

In the Netherlands, freedom of expression is guaranteed by the legislature. Article 7, paragraph 2 of the 1983 Dutch Constitution authorizes the legislature to regulate the broadcasting system: "rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast."

Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe, in which the freedom of expression is laid down, also allows regulation of the broadcasting system through licensing. According to Article 10 ECHR, paragraph 2, the conditions attached to this license must be laid down in law and must be necessary in a democratic society, particularly for the protection of civil order and the rights of others.

In the Dutch Constitution, Article 120 reads that the constitutionality of a statute shall not be reviewed by the courts. The view is that the legislature must prevail over the judiciary. However, Statutes can be tested against self-executing provisions of international treaties. This means that the Media Act cannot be constitutionally reviewed, but can be tested against Article 10 ECHR, which is a self-executing provision.

### *Media Authority*

Media in the Netherlands is supervised by the *Commissariaat voor de media* (Media Authority), a quasi-autonomous non-governmental organization, which was established by the Media Act of 1988. It is authorized to impose penalties on the broadcasting organizations when they violate the Media Act. The decisions of the Media Authority can be challenged before the Council of State, and can also be annulled by the Crown through a proposal of the Minister of Welfare, Health and Cultural Affairs.

## Community Law<sup>4</sup>

The EEC Treaty — the European "Constitution" — established the European Community in 1957. The purpose of the EEC, which now consists of twelve Member States,<sup>5</sup> was to create a Common Market for all forms of economic activity. The Common Market would be based on the free movement of goods,

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4. This paragraph describes the very basics of the EEC. For greater detail, see Paul Kapteyn and Pieter Verloren van Themaat, *An Introduction to the Law of the European Communities*, second edition (Deventer: Kluwer Law and Taxation Publishers, 1990), and David A.O. Edward and Robert C. Lane, *European Community Law* (Edinburgh: Butterworths/Law Society of Scotland, 1991).

5. Members are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. As of October 1992, formal applications for admission have been received from Austria, Cyprus, Malta, Turkey, Sweden, Finland, and Switzerland.

persons, services, and capital, often referred to as the "Four Freedoms." In 1986, the Single European Act amended the EEC Treaty to include a new definition of the internal market; it would be "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." The Treaty of Maastricht,<sup>6</sup> a draft treaty at the present time, is an attempt to give shape to a European Political Union and a European Monetary Union, which would exist alongside what is now called the European Community.

European Community Law is an autonomous legal system, independent of the legal systems of the Member States. The European Court of Justice makes final decisions regarding the interpretation and the application of the EEC Treaty; its role is to ensure that Community law is observed. The Treaty of Rome, as amended by the Single European Act, is the foundation for Community law. Regulations, Directives, Decisions, jurisprudence of the European Court of Justice, and the general principles of law are additional sources of Community law. The provisions of Community law enter into the national legal order without the necessity of transforming the provisions into national law. This supremacy results in a uniform implementation of Community Law in the Member States. The Community legal order regulates the powers, rights, and obligations of the Member States, and, in certain areas, curtails their freedom.

By virtue of its EC membership, the Dutch government, like other EC governments, is in basic agreement with the implementation of Community Law. However, certain fields are considered an integral part of national interest, on which the EC has no jurisdiction.

In Germany for example, the conditions set to the ingredients of beer ("*das Reinheitsgebot*") is considered to be of national, not European, interest.<sup>7</sup> In the Netherlands, broadcasting is considered a part of national culture, on which the EC, primarily a European Economic Community, has no jurisdiction.

The EC is currently preparing amendments to the EEC Treaty, in order to extend its jurisdiction to political, monetary, and also to cultural affairs. Will the Dutch government be able to exempt its broadcasting from European jurisdiction in order to pursue a national broadcasting policy?

When the EEC Treaty was established in 1957, its founders could not foresee the thin line separating the free provision of goods and services. As Community Law developed, the jurisdiction and applicability of Community Law gradually became clearer. The first two cases of the European Court of Justice with respect to broadcasting set the foundation for broadcasting law. In the *Sacchi* Case, the European Court of Justice ruled that, "in the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as a provision of services. The transmission of such television signals,

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6. Maastricht is a city in the Netherlands where the negotiations were held by the Member States discussing the amendment to the EEC Treaty.

7. Case 178/84, (1987) ECR 1227.

including those in the nature of advertisements, comes as such, within the rules of the Treaty relating to services..."<sup>8</sup> In the *Debauve* Case, the European Court of Justice stated that "it did not make any difference whether these broadcast signals are transmitted by means of broadcast emit rays, cable relay or satellite,"<sup>9</sup> they were all to be considered provisions of services.

Article 59 of the EEC Treaty provides for the abolition of restrictions on freedom to provide services. National, non-discriminatory restrictions are also deemed to be within the scope of the EEC Treaty. Restrictions can, however, be justified under Article 56 of the EEC Treaty on one of the following grounds: protection of the public order, public security, or national health. Any restrictions allowed under Article 56 must not have an economic aim, and must stand up to the test of proportionality: that the means employed must be proportionate to the end to be achieved.

In 1984, the European Commission announced in its Green Paper, entitled "Television Without Frontiers," a Draft-Directive to guarantee the freedom of transmission in broadcasting.<sup>10</sup> The purpose of the Directive, which entered into force on 3 October 1991, was to regulate advertising and copyrights.<sup>11</sup> It contains measures concerning the protection of minors, on public order and security and the protection of personality rights.

According to Article 189 of the EEC Treaty, a Directive is binding on every Member State to which it applies, but only in regard to the desired outcome. The choice of the form and the means of implementing the directive are left up to the national authorities. Since the above Directive contains self-executing provisions, the provisions are directly applicable before the national courts. Member States must, therefore ensure that their national law as well as the broadcasts themselves comply with the provisions of the Directive.

The provisions of the Draft-Directive regulate a broad range of areas, and include regulation of both national and transfrontier television broadcasts. For example, freedom of reception must be ensured. A majority of transmission time — excluding the time spent on news, sports, games, and advertising — must be reserved for European programs.<sup>12</sup> Extensive requirements are set for the form, duration, and the content of advertising, and for its placement between and during the programs. Requirements are also set for advertising of alcoholic beverages. News and current affairs programs may not be commer-

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8. Case 155/73, (1974) ECR 409, at 428, ground 6.

9. Case 52/79, (1980) ECR 833 at 855, ground 8.

10. Commission of the European Communities, "Television Without Frontiers", *Green Paper on the Establishment of a Common Market for Broadcasting, in Particular Through Satellite and Cable*, COM (84) 300 def.

11. See the "Council Directive of 3 October 1989, On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities" (89/552/EEC), O.J., No. L 298/23, 17.10.89.

12. European Works are defined in Article 6 of the Directive as: (a) works originating from Member States of the Community; (b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe; (c) works originating from other European third countries, fulfilling certain conditions.

cially sponsored. Retransmissions of television broadcasts — e.g., when a Dutch broadcasting organization purchases and broadcasts a previously-shown program from a German broadcasting organization — can only be suspended if Article 22 (the protection of minors) is seriously infringed. The Directive also contains provisions regarding the distribution and production of television programs.

### *The Jurisdiction of the European Community*

Since broadcasting constitutes a service within the meaning of the EEC Treaty, by accepting the Treaty, the Member States thus accepted the Community's jurisdiction on broadcasting. The fact that most of the provisions of the Directive have economic goals facilitated the Directive's acceptance by the Council of Ministers.

However, the Directive's provisions in the cultural sphere have proved controversial, leaving the EC's jurisdiction in these areas open to dispute. In particular, Germany, Denmark, and the Netherlands have not unquestioningly welcomed the Directive. The German constitution places broadcasting under the jurisdiction of the states (*Länder*). Likewise, Denmark and the Netherlands consider broadcasting a specific part of national culture. These Member States consider a European broadcasting policy which determines national broadcasting systems to be outside the jurisdiction of the EC.

The Directive's content with respect to the relationship between certain provisions and the establishment of the internal market has also been criticized. The provisions with respect to the protection of minors, the content of advertising — "rules of decency" — and the reservation of broadcasting time for European programs — "super Europrotectionism" — can hardly be considered to contribute towards the establishment of the internal market.

To meet the Member States' objections to the provisions which have a non-economic aim, the preamble of the Directive guarantees that the special position of Member States' national culture will be taken into account.

With respect to the Article reserving broadcasting time for European programs, the Draft Directive stipulated that the Member States were forced to see to it that by the end of three years, sixty percent of the broadcasting time would be reserved for European programs. The current provision of the Directive, however, qualifies this with the language "where practicable and by appropriate means." The current provision also states this proportion should be achieved "progressively, on the basis of suitable criteria". These statements are difficult to enforce legally. The European Commission, however, has stated that the provision reserving broadcasting time for European works is completely legally binding. The provision's vague wording is the result of a demanding compromise, reached by the negotiating civil servants and Ministers, which allowed the Member States a margin of flexibility.<sup>13</sup>

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13. O.J., No. C 97, 17.04.90.

### Community Law and Dutch Commercial Broadcasting

In the 1980s, technical developments made it possible to receive any foreign program, commercial or otherwise, by cable. The Dutch government considered this a threat to the Dutch public service system. Because Dutch commercial broadcasting was prohibited, many of the foreign cable programs contained commercials aimed specifically at Dutch viewers. The foreign broadcasting organizations charged considerably less for broadcasting time for commercials than did the *STER* in the Netherlands. This resulted in a precipitous drop in advertising revenues for the Netherlands, as Dutch advertisers took advantage of lower prices charged by foreign organizations for broadcasting time.

#### *The Cable Regulation of 1984*

The Dutch government realized that a blunt refusal to admit all foreign broadcasting programs would have infringed on the freedom of expression and the freedom to receive and impart information. Instead, the government attempted to regulate the retransmission of foreign broadcasting programs by means of a Ministerial Decree, known as the *Cable Regulation of 1984*.<sup>14</sup> This regulation stipulated that foreign programs containing commercials aimed specifically at Dutch viewers would be prohibited from being retransmitted on the Dutch cable network. Furthermore, foreign programs containing Dutch subtitles would also be prohibited.<sup>15</sup>

The Cable Regulation was contested by the Dutch League of Advertisers (*Bond van Adverteerders*), which had two main concerns.

First, the League considered the Cable Regulation to be a violation of the prohibition of prior supervision, laid down in Article 7, paragraph 2 of the Dutch Constitution. The Supreme Court ruled that the Cable Regulation indeed conflicted with Article 7, paragraph 2 of the Constitution, as it was required that broadcasting programs and commercials be pre-examined before broadcasting, therefore allowing prior supervision.<sup>16</sup> In this case, the Cable Regulation, being a Ministerial Decree, could be constitutionally reviewed by the Supreme Court, because the prohibition of constitutional review applies only to Statutes.

Secondly, the Dutch League of Advertisers considered the Cable Regulation to be a discriminatory restriction of the free provision of services, laid down in Article 59 of the EEC Treaty. In regard to the prohibition of commercials aimed specifically at Dutch viewers, the District Court of The Hague asked the European Court of Justice for a preliminary ruling.<sup>17</sup>

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14. *Government Gazette* 145 (1984).

15. Providing Dutch subtitles is the standard procedure when foreign programs are broadcast by Dutch broadcasting organizations.

16. Supreme Court 11 December 1987, *NJ* 1990, No. 72.

17. *KG* 1985, No. 374, 30 October 1985, roll No. 85/593. Preliminary rulings assist national courts in interpreting and applying Community Law and ensuring its uniform application. National courts must apply the preliminary ruling of the European Court in the courts' disposition of the case.

*The Bond van Adverteerders Case*

On 26 April 1988, the European Court of Justice decided that the Cable Regulation was incompatible with Article 59 of the EEC Treaty, the free provision of services.<sup>18</sup> The Court compared the position of the foreign broadcasting organizations with the Dutch broadcasting system. Since foreign broadcasting organizations were not allowed to broadcast programs which contain commercials aimed specifically at Dutch viewers, while the Dutch broadcasting organizations, albeit through the *STER*, were allowed to broadcast such programs, the Cable Regulation was thus held to be discriminatory.

However, it can be argued that the Court should not have compared the foreign broadcasting organizations to the Dutch broadcasting system as a whole, but that the Court instead should have compared the foreign broadcasting organization to other Dutch broadcasting organizations. In that case, it would have been found that both foreign and Dutch broadcasting organizations and advertisers would not have been allowed to broadcast programs containing commercials, unless it was done through the *STER*. This situation would not have been discriminatory. Furthermore, the Dutch government argued that the Cable Regulation was necessary to preserve the non-commercial, traditionally diverse broadcasting system of the Netherlands. The Court did not go into a full consideration of this argument, but ruled that this restriction could not stand up to the test of proportionality, required by Article 56 of the EEC Treaty. At the time of the ruling, 1988, the Cable Regulation had already been incorporated in the Media Act of 1988.

*Article 66 of the Media Act of 1988*

Since the Dutch government had suspected the Cable Regulation would be found to violate Community Law, a related provision was slightly altered to be included in the Media Act of 1988, which was decided upon at approximately the same time as the *Bond* ruling. Article 66 of the Media Act thus stated that programs of foreign broadcasting organizations could be transmitted through the Dutch cable network, even if they contained commercials aimed specifically at Dutch viewers, provided that these programs first met certain requirements. The commercials should be managed by a separate body, clearly distinguishable as such and recognizably separate from the programs. They should not be broadcast on Sundays and should not exceed five percent of the total amount of broadcasting time, while commercial revenues should be devoted solely to broadcasting. At the time of the Court of Justice's ruling in the *Bond van Adverteerders* Case, the Dutch government insisted that Article 66 of the Media Act was consistent with Community Law, since the provision of the Media Act was not discriminatory. The Dutch government considered the requirements set for foreign broadcasting organizations to be the same as the requirements set for Dutch broadcasting organizations. Nevertheless, Article 66 of the Media Act was later challenged by three broadcasting organizations, *Cable One*, *RTL-V*,

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18. Case 352/85, (1988) ECR 2102 at 2103-2106.

and *TV10*, at the national level, and by a Dutch cable operator and the European Commission at the European level.

Since Dutch commercial broadcasting was prohibited, a different category of commercial broadcasting emerged, consisting of three new organizations: *Cable One*, *RTL-V*, and *TV10*. These organizations consisted of Dutch entrepreneurs who had established their registered offices and administrations in Luxembourg. Their programs were produced in the Netherlands, transported to Luxembourg and then transmitted via satellite from Luxembourg back to the Netherlands, a system known as a "U-turn-construction". In this way, the broadcasting organizations claimed recognition as foreign broadcasting organizations. Since their commercials met the conditions set in Article 66 of the Media Act, it was argued that these programs should be admitted to the Dutch cable system. The Dutch cable operators had already agreed to retransmit the programs to the cable network, since they received a fee per connection.

The Media Authority decided that *Cable One* was indeed a genuine foreign radio broadcasting organization, meeting the conditions set in the Media Act. However, the *NOS*, together with the public broadcasting organizations, challenged this decision before the Dutch Council of State. The Council of State decided that *Cable One* was actually a Dutch, not foreign, broadcasting organization, and as such had acted in breach of the Media Act. The Council of State noted that Article 66 of the Media Act did not provide a precise definition of the term "foreign broadcasting organization." According to the Council of State, the fact that the broadcasting organization was established in a foreign country in itself was not the decisive factor. The Council reasoned that the legislature could not have intended to permit the retransmission of these programs to the cable network, when, clearly, the only aim of the broadcasting organization was "to get around national rules."<sup>19</sup> As a result, cable operators would be fined if they retransmitted *Cable One's* programs to the Dutch cable network.

With respect to *RTL-V* and *TV10*, in September 1989 the Media Authority decided according to the ruling of the Council of State, that *RTL-V* was indeed a genuine foreign broadcasting organization, but *TV10* was not. On appeal, the Council of State confirmed this decision.<sup>20</sup>

At the time of these legal proceedings, the acceptance of the Community Directive was at issue. The Dutch government accepted the Directive, provided that the European Commission declared U-turn-constructions to be in violation of Community Law. However, the Commission had no power to make such declarations, as they fall under the jurisdiction of the Court of Justice. Nonetheless, the Commission did state:

in the exercise of the role incumbent upon it and in interpretation of the law, the Commission will ensure compliance with the case law

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19. *NOS vs the Media Authority*, Council of State, 30 August 1989, No. RO1.89.1485/Sp.90, with annotation of B.P. Vermeulen, *AB/NJ* 1991, No. 358.

20. *NOS vs the Media Authority*, Council of State, 4 October 1989, No. RO1.89.5433/8344, *Mediaforum*, 1, No. 2 (1989).

of the Court of Justice in matters of getting around national rules. This is notably aimed at situations in which broadcasting firms, in an attempt to be subject to the rules that would be applicable to them if they operated in the territory of the State of reception, establish broadcasting activities in another Member State in the sole aim of enjoying an advantage compared to broadcasting firms situated and broadcasting in the State of reception".<sup>21</sup>

While Article 66 of the Media Act was not only contested at the national level by *Cable One*, *RTL-V*, and *TV10*, it was also contested at the European level in two cases. The first case was brought by the European Commission itself. The Commission began an infraction procedure, applying for a declaration that Article 66 was indeed incompatible with the EEC Treaty. The second case concerned a request by the Dutch Council of State. A cable operator, *Stichting Collectieve Antennevoorziening Gouda*, had appealed before the Council of State a fine which had been imposed by the Media Authority for retransmitting the programs of *Cable One*, in violation of Article 66 of the Media Act. The Council of State then asked the European Court of Justice for a preliminary ruling on the case, at the same time the European Commission had begun its infraction procedure.

On 25 July 1991, the European Court of Justice decided in both cases that Article 66 of the Media Act was incompatible with Article 59 of the EEC Treaty.<sup>22</sup> The Court ruled that the conditions constituted a two-fold restriction on the free provision of services: it prevents cable operators from retransmitting programs if these programs do not fulfil the conditions of Article 66 of the Media Act and it limits the possibilities of foreign broadcasting organizations to broadcast programs containing commercials aimed specifically at Dutch viewers. As for the conditions concerning the commercials themselves, the Court decided that they could not be justified, since they had an economic aim (to secure the revenues for the *STER*). In both cases, the restrictions of Article 66 of the Media Act could not be justified and were considered incompatible with Article 59 of the EEC Treaty. The Dutch government's defense put forth to the Court of Justice is especially interesting when viewed in light of the Dutch government's reference to national culture, on which the EC has no jurisdiction. While the exclusion of *Cable One*, *TV10*, and *RTL-V* had the economic aim of safeguarding advertising revenues, the Dutch government had claimed exemption on the basis that the exclusion was actually in line with mandatory requirements relating, instead, to Dutch cultural policy for the broadcasting sector. The Court of Justice acknowledged that cultural policy potentially could be applied in such a manner, but that in this case, however, the conditions were not objectively necessary to safeguard the public interest.

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21. *Europe*, No. 5106 (new series), 7 October 1989.

22. Case C-288/89 and Case C-353/89, *Mediaforum*, 3, No. 10, 1991.

### The New Media Act

As a result of the described developments and the legal proceedings at both the national and the European level, the Dutch public broadcasting system now had to compete with a "foreign" commercial broadcasting organization, which fulfills all the needs of the Dutch viewers and advertisers. In the sixties and again in the early eighties, the possibility of Dutch commercial broadcasting has been debated, but there has never been a political majority to force a change in the system. In retrospect it can be argued that, if Dutch commercial broadcasting had been allowed at that time, a dual broadcasting system could have been established — consisting of both public and commercial broadcasting organizations — which could have prevented competition between the public broadcasting organizations and advertising revenues retained in the Netherlands.

At the time of the general elections of 1989, a new government was elected. This new government realized that the current broadcasting policy — protecting the public broadcasting system at the expense of excluding both national and foreign commercial broadcasting — was not tenable. A further amendment to the Media Act was prepared, concerning the establishment of a dual broadcasting system, consisting of both public and commercial broadcasting organizations. Under the new broadcasting policy, national culture was protected under the public domain of the broadcasting system, while the commercial aspect would concur with the requirements of Community Law.

Consequently, Article 66 of the Media Act, which regulates the retransmission of foreign programs, has been amended and now concurs with the requirements of Community Law. The new Article 66 Media Act reads that programs of foreign broadcasting organizations may be retransmitted, as long as the foreign broadcasting organizations broadcast their programs according to the law of the foreign State. All the other conditions regarding advertising and the exact structure of the broadcasting organizations have been withdrawn.

#### *Commercial Broadcasting Organizations*

The amendment concerning commercial broadcasting was subsequently adopted by the Dutch Parliament, and on 8 July 1992 began permitting Dutch commercial broadcasting by cable.<sup>23</sup> Commercial broadcasting organizations are obliged to have a corporate personality and be based in one of the EC Member States. While the granting of licenses will eventually be performed by the Media Authority, during the next three years, however, the Minister of Welfare, Health and Cultural Affairs will perform this function, to preserve some government authority over these sensitive areas and to ease the transition. The commercial broadcasting organization's programs must have a minimum range by cable of sixty percent of the households of each of the twelve Dutch counties. The cable operator is not obliged to transmit the program, contrary to the programs of the public broadcasting organizations. To prevent cross media ownership and dominant positions, the commercial broadcaster, or the license

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23. *Statute Book*, Nos. 334 and 335, 1992.

holder, is not allowed to have more than one quarter of a share in the newspaper market, or have more than one third of the voting rights. Finally, the commercial broadcasting organizations must meet the conditions set in the Directive, with respect to advertising, sponsoring, and the reservation of broadcasting time for European works. In this respect it can be concluded that the Media Act concurs with the requirements of Community Law.

### *Public Broadcasting Organizations*

The Media Act was also amended to consider public broadcasting organizations under the dual system. The amount of advertising time has increased overall and additional advertising is allowed on Sundays.<sup>24</sup> Other amendments to the Media Act are being prepared, but these are still under discussion in Parliament, taking place on the basis of the Memorandum "Public Broadcasting in the Netherlands."<sup>25</sup>

While the Dutch broadcasting system has opened slightly as a result of the Court of Justice rulings, the Dutch government is attempting in the Memorandum to reinforce its argument for exemption from EC jurisdiction on the basis of cultural preservation.

In this pursuit, the obligation to broadcast a comprehensive program will be tightened. Instead of the requirement for reserving a "certain" proportion of broadcasting time for information, culture, and education, the amounts are to be specified: twenty-five percent is to be reserved for information and twenty-five percent for culture and education (including ten percent to be reserved for art, e.g. ballet, classical music, literature — a reaction to the government's view that previously not enough time was devoted to such broadcasting). The remaining fifty percent of the broadcasting time will be at the broadcasting organizations' disposal.

Another possibility is to divide up the broadcasting organizations by channel, with a fixed amount of broadcasting time granted for a period of five or ten years. Broadcasting licenses would thus be granted by channel, rather than to the organizations themselves. This would reduce competition among organizations and would promote cooperation and coordination by channel.

## **Conclusions and Perspectives**

For a period of more than thirty years, the Dutch broadcasting system had not been altered. Based on a structure of deep social- and religious-ideological cleavages in the Dutch society, five — later eight — public broadcasting organizations represented a different bloc each. Although the competition between broadcasting systems gradually eroded the pluriformity of the broadcasting system, it did not alter the foundation of the broadcasting system itself. Since 1989, due to technical developments and the impact of Community Law, the

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24. *Statute Book*, Nos. 17, 282 and 283, 1991.

25. Documents of the Parliament 1990-1991, No. 21 247.

broadcasting system has been forced to undergo fundamental changes.

The major impact of Community law has been the Directive's stance on domestic broadcasting and its relationship to the Community-imposed regulatory system. Initially, the Directive distinguished transfrontier television programs from domestic programs. Now that this distinction has been withdrawn, all television programs broadcast within the EC are to be subject to the same rules. Smaller states, fearful of the potential oppressiveness of these rules, are beginning to voice their skepticism.

One such arena for this discontent has been the recent considerations of the Treaty of Maastricht.<sup>26</sup> This controversial treaty also contains a provision about culture, reading:

Title IX, Article 128:

1. 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.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples;
  - conservation and safeguarding of cultural heritage of European significance;
  - non-commercial cultural exchanges;
  - artistic and literary creation, including the audiovisual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty.

This reference to culture, coupled with the Directive's cultural provisions, leads to the conclusion that the EC intends on continuing in its pursuit of a European cultural policy. Such a policy would have increased ramifications for the broadcasting industry.

One possibility to preserve and protect the pluriformity of the broadcasting system — and national culture with it — would be to add a provision to the Article 7, paragraph 2 of the Dutch Constitution reading: "licenses should be granted in consideration of a pluriform broadcasting system." In this way, a pluriform and cultural diverse broadcasting system would be constitutionally guaranteed.

Another possibility is to ratify the Council of Europe's *European Convention on Transfrontier Television*.<sup>27</sup> This Convention regulates similar subjects as the

26. Treaty on the European Union, *Europe Documents*, No. 1759/60, 7 February 1992.

27. Strasbourg, 5 May 1989, *Tractatenblad*, 1989, No. 103.

Directive, but it has a cultural rather than economic intention. The Netherlands have decided not to ratify the Convention, for while it does contain a provision regarding U-turn-constructions, it does not add anything substantial to the Directive itself. It also contains decency rules concerning the content of television programs, which would require the alteration of Dutch morality laws, a change the government was unwilling to make. Unfortunately, by not ratifying the Convention, an opportunity to protect national cultures in Europe is lost.

One final opportunity for the Dutch government to exempt broadcasting from European jurisdiction would be to fulfil the condition, set by the European Court of Justice in its 1991 decision, stating that cultural policy may imply restrictions to the free provision of services when justified by mandatory reasons of public interest. Although this observation of the European Court of Justice contradicts the intention of the EC to pursue a European cultural policy, the Dutch government could have a strong case before the European Court of Justice when it succeeds in justifying national broadcasting regulations by mandatory reasons of public interest. If the Dutch government could present a strong enough case that maintenance of the pluriform society which underlies the broadcasting system is in the public interest, it may be able to exempt the system from encroaches by EC jurisdiction. How the Dutch act will set an example for other nations worried about preservation of their own national characteristics. National distinctions would be lost in a Europe without cultural boundaries. The jurisdiction of the EC should be clarified and clearly defined in such a way that Member States do not have to fear about the loss of non-economic identity, of which the broadcasting policy is a good example. If the EC and the Member States know what their respective rights are, the objectives of the EC can then be reached easily and through mutual consent.

