Summary

Semi-public entities
The legal position of private entities at the borderline between government and society

Semi-public entities
In the Netherlands today, as in many states, the performance of the public function is not restricted to the government. Over the past thirty years the Dutch state has been moving towards privatizing public services such as electricity and transport. This privatization trend – mainly driven by a desire for efficiency – means that public functions are increasingly being performed by private entities. This has resulted in the creation of a special category of private bodies, referred to here as semi-public entities. The central aim of this thesis is to examine how these semi-public entities are positioned in the Dutch legal system.

For the purposes of this thesis semi-public entities are defined as private bodies that perform an element of a public function or are institutionally linked to ‘classical’ governmental authorities. Institutional relationships can exist through governmental shareholdings or the government’s power to give instructions, to approve decisions of the private entity or to appoint or dismiss its directors. Government funding can also be seen as constituting an institutional relationship. Another important characteristic of semi-public entities is their performance of a public function. Semi-public entities are therefore situated at the intersection of public and private law, and this raises questions about the divide between the two areas of law. These questions can be differentiated and broken down into two sub-questions.

Applicability of public law standards and administrative judicial protection
Firstly, questions arise regarding the applicability of substantive law standards. The performance of a public function is, in principle, regulated by public law standards. Is this also the case when private institutions perform a public function? The private law nature of semi-public entities means it is not self-evident that such bodies should conform to public law standards. The basic assumption in administrative law is that such norms apply in any event to the government. This raises the question as to what extent semi-public entities, too, can be considered to be ‘government’ and therefore governed by public norms. More generally it prompts questions about the composition and mixture of the applicable law standards in situations in which private institutions perform public functions, even when legally they cannot be considered part of the government.
This thesis analyses how the concept of government is defined in the Dutch legal system in order to determine the applicability of public law standards. The specific focus is on whether semi-public entities are considered to be ‘government’ from a legal perspective and therefore governed by public law standards. To analyze the concept of government with regard to the applicability of public law standards, the thesis draws on case law and legislation such as the General Administrative Law Act (GALA; applicability of the general principles of proper administration, chapter 2), the National Ombudsman Act (chapter 3), the Public Records Act 1995 (chapter 4), the Government Information (Public Access) Act (chapter 5), the Equal Treatment Act (chapter 6), the Government Personnel Act (chapter 7), the Copyright Act (chapter 8) and the Government Accounts Act 2001 (chapter 9). It also examines how the concept of government is defined with regard to the applicability of national and international human rights (chapter 10), the EU procurement rules (chapter 11), EU competition law (chapter 12) and the direct effect of EU directives (chapter 13).

The next question arising is the extent to which public law standards apply to semi-public entities that cannot be considered to be legally part of the government. The thesis therefore specifically examines whether the general principles of proper administration (GPPA) apply to semi-public entities that cannot be considered to be administrative authorities within the meaning of the GALA (§ 2.3), as well as analyzing whether human rights apply horizontally to semi-public entities (§ 10.2.3 and § 10.3.3).

Questions concerning access to justice are then examined. In principle, an ordinary procedure is applicable to the actions of private bodies. If, however, a public function is performed by a private body, the case may be susceptible to administrative judicial protection. This raises the question of how the concept of government is defined for the purposes of demarcating administrative judicial procedures, and to what extent semi-public entities’ actions are amenable to such procedures. This question is examined in chapter 2.

Chapter 14 compares the legal position of semi-public entities in the Netherlands with those in South Africa. Here, too, the question of the extent to which substantive public law standards apply to semi-public entities, and whether their conduct is susceptible to administrative judicial procedures, is analyzed.

The concept of government: a multifunctional and context-dependent concept
This thesis examines how the concept of government (or, in other words, the distinction between government and private parties) is defined with regard to semi-public entities for the purpose, on the one hand, of defining the applicability of public law standards and, on the other hand, for demarcating access to administrative justice (more particularly: for defining the competence of the administrative courts). The concept of government as established in Dutch law is clearly shown to be used for several purposes and so can be characterized as multifunctional. The concept is also multifunctional in nature as far as the applicability of substantive public norms is concerned, given the variety of situations in which it is deployed. These include demarcating the GPPA, the National Ombudsman Act,
the Government Information (Public Access) Act, human rights, and rules of EU origin such as the EU procurement rules and competition law.

The criteria used to distinguish between government and private parties were consequently found to depend on the purpose of the distinction; in this case, therefore, access to administrative judicial protection, or the applicable standards. There is no single, all-embracing criterion for defining the concept of government. In one situation the semi-public body is of a public law nature, whereas in another situation it is not. The criteria applied differ, which is why the outcomes in specific cases also differ.

The same results were found in South African law. Although the two sets of criteria strongly resemble each other, the criteria used to determine whether an action of a semi-public body, other than an organ of state, is amenable to judicial review are not exactly the same as those used to determine whether the country’s Bill of Rights is vertically applicable. The category of private bodies subject to judicial review is also broader than the category of private bodies to which the Bill of Rights vertically applies. Again, the differences can be explained by the different purposes for which the various criteria are used.

As well as by their purpose, the contents of these criteria are determined by the context in which the criteria are used. That is why the concept of government is designated both as multifunctional and context-dependent. These contexts can vary quite considerably. Firstly, the context is determined by the nature of the legal issue. The criteria used, for example, to determine the applicability of EU procurement rules differ considerably from those used to demarcate the applicability of the GPPA. The context is also determined by the context of the different countries examined in this thesis: the Netherlands and South Africa. The comparative analysis between the two countries’ legal systems showed that the criteria used to determine the applicability of public law norms and the scope of administrative judicial procedures in South Africa differed considerably from those in the Netherlands, with the category of semi-public bodies required to apply such norms and procedures in South African law being more extensive than in Dutch law.

An important consequence of the multifunctional and context-dependent nature of the concept of government is that there is no unequivocal answer to the question of whether public law standards apply to semi-public entities. Instead, the answer depends on the legal environment in which the substantive norms are applied. Therefore certain public law standards are applicable to semi-public entities, whereas others are not. This was also the conclusion reached on the basis of the case studies used in this thesis and the examination of social housing corporations and ProRail, which is responsible for maintaining the Dutch railway network. The latter, for example, is not bound by the GPPA, whereas it is certainly subject to the EU procurement rules.

It was found not always to be clear why the criterion chosen by the legislator or the courts to define the concept of government was considered the most appropriate criterion in the light of the purpose for which the concept was used and the context in which it functioned. Remarkably, however, the European courts – the European Court of Human Rights and the European Court of Justice – take
explicit account of the particular purpose and legal context when formulating a criterion to define the concept of government.

**Functional and institutional criteria**

Two types of criteria are used to define the various concepts of government in the Dutch legal order: criteria of a functional nature (i.e., the public character of the conduct is determinative) and those of an institutional nature (a governmental shareholding, governmental control or public funding, for example). In my opinion, a combination of functional and institutional criteria is in any event needed to ensure that public law regulation (e.g., substantive public law standards and administrative judicial protection) is effectively implemented. The use of only functional or only institutional criteria is regarded as inadequate as some actions will then fall outside the scope of public law regulation. Not surprisingly, therefore, it was found that functional criteria and institutional criteria tended indeed to be used in conjunction with each other.

Interestingly, it was found that when the criterion used was of a functional nature, it was usually interlarded with institutional factors. The criterion used, for example, in the GALA to classify the actions of a semi-public entity as either public or private appears to be of a functional nature (‘a person or body vested with public authority’; see Article 1:1(1)(b) GALA): what matters is not so much the functionary as the function. A closer reading shows, however, that all kinds of institutional factors sometimes also play a decisive role. A good example of this can be found in the case law on semi-public entities providing financial support (such as subsidies) to citizens. In this case law – also referred to as the ‘Silicosis case law’ because of the landmark case involving Stichting Silicose Oud Mijnwerkers – the administrative courts have accepted the absence of a statutory basis for a public authority. Dutch case law regards these kinds of semi-public entities as administrative authorities within the meaning of Article 1:1(1)(b) GALA, and therefore subject to the GPPA and administrative law procedures, if: (i) they perform a public function, (2) the subsidies are mainly publicly funded, and (3) a ‘classical’ administrative authority has determined or approved the criteria for providing them. The public nature of the function as such was not found to be determinative; instead, public funding and substantive governmental involvement were found to be the true deciding factors. This can also be observed in South African law. At first sight, a functional approach is used, whereby the semi-public entity has to be performing a public function, both for the applicability of administrative law judicial review and for direct vertical application of the Bill of Rights. This functional criterion (‘public function’), however, was found to be interlarded with institutional factors. This

---

1 It is argued in section 15.4 that this case law should be terminated as the vagueness of the criteria used creates legal uncertainty, particularly in the case of the ‘public function’ criterion. These criteria are therefore seen as unsuitable for defining the competence of the administrative courts (i.e., access to administrative justice). The case law is also contrary to the principle of legality (‘legaliteitsbeginsel’) because it involves the administrative courts accepting the absence of a statutory basis for an administrative authority.
aspect relativizes the functional approach in both Dutch and South African law, possibly because the functional criteria, such as the public function, are so vague that no definitive meaning can be assigned to them, and the courts are thus forced to resort to factors of an institutional nature.

**Harmonize and systematize where possible, differentiate where necessary**

As explained above, the consequence of the multifunctional and context-dependent approach is that a semi-public entity is considered to be part of government in one context and as a purely private party in the other. Although this can obviously be the right choice in a particular case, the criteria used may also diverge unnecessarily. This would not appear to be compatible with the aim of seeking to maintain a consistent legal system. The extent to which criteria diverge should consequently be minimized, with the legislator and the courts advised to harmonize and systematize the concept of government wherever possible, and to take into account that, as far as possible, the same terms and uniform criteria should be used to indicate ‘concepts of government’ with a similar purpose. With regard to terminology, the concept of ‘administrative authority’ as defined in Article 1:1(i) GALA should be taken as the point of departure. On the other hand, the possibility of differentiation should also be available if this is appropriate for the function and context of the particular concept of government. The legislator should then motivate why a criterion other than ‘public authority’ as used in Article 1:1(i)(b) GALA is the right criterion for the function in the particular legal context. To put it briefly: harmonize and systematize where possible, differentiate where necessary.

**Administrative authority and governmental management supervision**

The Dutch GPPA apply only to semi-public entities that can be regarded as administrative authorities within the meaning of Article 1:1(i)(b) of the GALA (‘a person or body vested with public authority’). As the law stands, the criterion of governmental management supervision is not a general criterion for determining the concept of an administrative authority. This thesis argues that substantive public law standards, such as the GPPA, should apply also to semi-public entities that are subject to governmental management supervision. The criterion of governmental management supervision should, therefore, be incorporated, as an additional criterion, into the definition of an administrative authority within the meaning of Article 1:1(i) GALA so as to prevent the government from using entities with a private legal form to avoid public law regulation. To the extent that public law regulation of semi-public entities subject to governmental management supervision obstructs the exercising of these entities’ private functions, a balanced application of the substantive public law standards is provided for in Article 1:3(2) GALA. It should be noted that extending the concept of an administrative authority to semi-public entities that are subject to governmental management supervision not only has consequences for the applicable legal standards; it is quite possible that the actions of such semi-public entities will also be amenable to administrative judicial procedures, for example in cases involving the provision of subsidies to citizens,
as these actions may be considered to constitute ‘decisions’ (‘besluiten’) within the meaning of Article 1:3 GALA that are taken by an administrative authority and so open to appeal in the administrative court (Article 8:1 GALA).

Applicability of substantive public law standards and non-administrative authorities
This thesis lastly examines whether substantive public law standards in general, and the GPPA in particular, apply also to semi-public entities that cannot be considered to be administrative authorities. It specifically examines whether the performing of a public function or position of power gives rise to the application of substantive public law standards. The criteria of public function and power were found to be unsuitable for determining whether substantive public law standards apply to semi-public entities that cannot be regarded as administrative authorities. Such semi-public entities, performing a public function, should be made subject to public law regulation through special legislation that is tailored to the conditions of the relevant semi-public entity and that does not go beyond what is necessary. Rather than the government taking this to mean that it should immediately interfere with the regulation of semi-public entities, it should first examine whether its desired level of legal safeguards is already satisfied by means, for example, of self-regulation. Only if this self-regulation does not come up to scratch will governmental regulation be appropriate.