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van Rooij, A.E.

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SUMMARY

Order in the semi-public domain – private and public-private regulation in a legal perspective

SCOPE AND RESEARCH QUESTIONS

This research concerns plural policing and the regulation of order and security in the semi-public domain. The semi-public domain covers the places that are accessible to the public but which are controlled by private entities. Shopping malls, public transport, bars and sports events are examples of such places. The semi-public domain is important for people because it provides access to basic necessities and social resources. However, peaceful enjoyment of the amenities and services in this domain are not always guaranteed. Misconduct and nuisance during football matches, aggression in public transport and theft in shopping areas are examples of threats to the wellbeing and security of people visiting and working in the semi-public domain.

Responsibility for order and security in the semi-public domain is shared between public and private actors. Primarily, the private entity managing the specific semi-public space is responsible for the affairs in its establishment or during the event. In order to prevent nuisance and criminal behaviour, the private manager can set behavioural rules and organise surveillance to monitor compliance. In case of misconduct, the private manager may impose sanctions such as fines or exclusion orders. The process by which norms are established, monitored and enforced I refer to as 'regulation' throughout this book.

Significantly, private regulation of order and security in the semi-public domain does not release the government from its (legal) responsibilities. The government is still involved, in different capacities. On a local community level, it is the legal obligation and task of the Mayor to maintain public order. This task stretches out to all domains which are accessible to the public, even if such places are in private control. The public prosecutor is responsible for prosecuting criminal conduct wherever it takes place.

In reality, public and private actors co-operate on a voluntary basis and on a local level they have adopted a mutual approach to combat nuisance, crimes and other misconduct. The core of such Public Private Partnerships (PPP) is that parties retain their own identity and responsibility. Private parties use their private law

instruments to regulate order and the government uses public powers. PPP is usually formalised in a covenant: an agreement of which the exact legal status and binding force is unclear.

The shared legal responsibilities for order and security in the semi-public domain and the PPP led to a pluralistic system of different types of public and private regulation. From a legal perspective the following questions are relevant. To what extent does the public have a right to access such places? What legal conditions should private managers have to take into account when imposing restrictions on the personal liberties of visitors and regarding access to their domain? This research examines how private regulation in the semi-public domain relates to property and contract law doctrine and how this relates to public order and criminal law. Furthermore, it assesses whether co-operation with the government in a PPP influences the applicability of the legal framework. Lastly, questions about accountability are raised: are there sufficient legal mechanisms to prevent abuse of public and private powers in this area?

BEHAVIOURAL CONTRACTS AND PROPERTY RIGHTS AS A LEGAL BASIS FOR PRIVATE REGULATION

The first stage of this research was to examine the legal basis of the various instruments used to regulate order in the semi-public domain. Case study research for three particular types of places – football matches, shopping and nightlife areas and public transportation – provided useful information on the mechanisms used in practice. It appears behavioural rules used to monitor compliance and sanctions rely primarily on legal contracts. Conclusion of a contract is especially clear when a visitor of a semi-public place or event purchases an entrance ticket. By purchasing the ticket the visitor willingly agrees to the general terms and conditions, including behavioural rules and prescribed sanctions in case of breach. In other cases a contract can be made when the private manager opens his place to the general public under certain conditions prescribed in the house rules that are published at the door. If a visitor enters such place, he agrees to these house rules and I argued these rules then qualify as contractual terms. I call this type of contract an (implied) hospitality contract. A secondary legal basis can be found in property rights. The exclusive nature of the right to property enables the entitled user to set behavioural rules, monitor compliance and impose sanctions on people who are granted access and use the property.

Besides explicit behavioural rules that are prescribed in contractual terms and conditions or house rules, an unwritten behavioural standard to act as a 'good visitor' is implied. This standard can be derived from the Dutch legal doctrine of reasonableness and equity which also exists in property law and tort law. Good visitorship implies that visitors should not intentionally cause harm or danger to the property

rights and physical integrity of the manager and other visitors in a reasonable manner.

General terms and house rules may contain terms on sanctions and measures in cases of misconduct. A well-known example is the football stadium ban which the Royal Dutch Football Association imposes in case of football related misconduct based on its general terms. A property owner may also invoke the exclusivity of his property rights in order to deny others access and use of his property, in the form of barring an individual from a stadium, shopping area or public bar, discotheque or restaurant. If this exclusion order or ban is imposed by the private manager for other semi-public places as well – e.g. all stadiums in the Netherlands or all shops in the city centre – this is called a *collective* exclusion order. Shop-owners, hospitality entrepreneurs and football clubs work together to achieve such collective exclusion. The legal basis for collective exclusion is unclear. At best it resembles either representation in the broad sense or a bundling of the freedom to *not* conclude new (hospitality) contracts with this particular person.

General terms and conditions sometimes include penalty clauses. This is the legal basis for imposing a fine for misconduct. In addition to this, in the Netherlands the so-called ‘Nuisance Donation’ was created in order to directly hold a shoplifter liable for damages caused by the arrest. When a shoplifter is caught red-handed, the shop owner presents a declaration of liability to the individual. If the shoplifter signs this form, the damages – a fixed amount of €181 as compensation for loss of time – can be demanded without a court order. This instant penalty payment is also referred to as a ‘direct liability settlement’.

ADDITIONAL STATE REGULATION

The case study on the regulation of order in public transport showed dissimilarity when compared to the other cases. In this domain the Passenger Transport Act 2000 provides specific additional behavioural rules for passengers and appropriate enforcement measures for public transport providers. Since the liberalisation and privatisation of public transport in the Netherlands in the 1990s, these providers are regarded as private parties. According to this Act it is primarily the task of the public transport providers to care for ‘order, security, peace and good business operations’. This statutory duty does not relieve the Mayor from his task to maintain public order in cases of disruption. Despite the elaborate legal framework in the Passenger Transport Act 2000, I have argued that the relationship between the provider and passenger is primarily one of a private law nature. This so-called ‘transport contract’ is concluded between the provider and passenger as soon as the passenger enters the vehicle.

Under the transport contract, the provider is obliged to transport the passenger, whilst the passenger is obliged to pay for this service. In this legal relationship, the provider is legally entitled to propose additional behavioural rules and monitor

compliance, in a similar way as described for football clubs, shops and bars via house rules and general terms and conditions. The aim of the Passenger Transport Act 2000 however is to harmonize certain aspects of such self-regulation by different providers, such as the amount of the fine imposed in case of dodging ticket payment. The fixed rate of €50 favours passengers because it means providers cannot arbitrarily vary and impose much higher fines as they see fit for this type of offence. The legal basis for any fine is still the contract. However, I believe the travel and station ban has a different nature. This sanction is primarily based on article 98 of the Passenger Transport Act 2000 and not the transport contract. This type of exclusion order must be considered of public nature.

MOTIVES OF THE PRIVATE MANAGER TO INSTITUTE A PRIVATE SECURITY POLICY

Several public and private interests are intertwined in plural policing in the semi-public domain: the social interests of order and security; economic interests; fundamental interests; and legitimate interests of adequate access to certain public services. The private manager primarily serves his own interests: his private security regulation is aimed at preventing harm to property and reputation and keeping the staff and visitors free from harm while avoiding liability. Private managers have also a legal duty to keep the public in their domain safe and protect them from breaches of personal integrity. This 'duty of proper supervision' is derived from tort law jurisprudence together with the supplementary doctrine of reasonableness and equity. The scope of this duty depends on the nature of the services and activities that the manager provides and the predictability of the risks. Furthermore, certain security measures may be prescribed in the public law licence which the manager needs for his business. Hence, private managers not only have certain personal interests when designing and executing an adequate security policy, they also have a legal obligation to do so. However, I believe it is not adequate to qualify private policing as performing a public task –as some authors have – because their actions are too closely related to their own, legitimate, private law interests and duties.

THE PROTECTION OF FUNDAMENTAL RIGHTS AND PRIVATE REGULATION

Private regulation of order in the semi-public domain affects personal liberties of visitors. Monitoring by means of searching clothes and bags, camera surveillance and data collection touch upon privacy rights of the visitors. An exclusion order imposes restrictions on the freedom of movement in parts of the public domain. Even though visitors have a legitimate interest in preventing harm and contributing to order and security, these interests cannot justify *all* restrictions of visitors' personal liberties. In particular, the fundamental right to equal treatment and non-discrimination is of great importance. Profiling may lead to the undesirable situ-

ation where marginalized groups in society may have limited opportunity to enjoy the semi-public domain.

In their interplay, both legislator and courts aim at ensuring thriving commercial exchange where people can enjoy their civil liberties. The state can be regarded as the 'guardian of fundamental rights', also in horizontal relations, because of its obligations under the European Convention of Human Rights and EU law. I have selected three reasons for (indirect) application of human rights in private law relationships in the semi-public domain. The first reason is the presence of a position of (economic) power producing an imbalance in bargaining power, dependency and limited ability to negotiate the terms of the contract as a result. Second, if one party provides a public service or tends to public policy goals this may also justify application of human rights. Last, some human rights are considered to be of fundamental nature and their application is not limited to vertical relations but stretch out to all legal relationships. Besides legislative and judicial indirect effect, human rights can be safeguarded by public authority— e.g. the Mayor – in PPP and by private parties in the form of self-regulation.

LEGAL FRAMEWORK IN CASES OF PRIVATE SECURITY REGULATION

Various legal doctrines have been analysed in order to reach conclusions on the legal admissibility of private law instruments which are being used to regulate order in the semi-public domain. The legal framework consists primarily of general private law, since the relationship between the private manager of a semi-public place and the public is a private law relationship based on a contract or property rights. In addition to this public laws on non-discrimination and privacy are applicable to private law relationships to some extent. The analysis of the applicability of these private and public law doctrines in this specific domain and specific conditions together with the ratio of the rules has led to a broad legal framework. A study on lower court decisions on private regulation of security and similar matters provided insight into how the framework and the different factors are applied in court. In this framework the following principles can be distinguished.

First of all, foreseeability of private security regulations is of utmost importance. Does the public reasonably know beforehand what behaviour is expected and how these rules will be enforced? If private security policy is based on a contract, the general idea is that visitors have agreed to the conditions of their own free will. The relevant question is to what extent this agreement is based on *informed* consent. If consent is based on unclear, incorrect or incomplete information, I suggest the use of restrictive private law instruments has a degree of coercion and does not comply with the basic nature of private law instruments. Governmental use of coercion is considered legitimate if based on a law passed by a democratic body. The idea of a social contract and representation solves the legitimacy problem. In private law relations this is not the case. Private parties are only able to use some

degree of coercion within limits of the 'consent' provided, of free will and based on the information at the time of consent or within the limits of their property rights.

An illustrative example in this regard is the search of clothes and bags at the entrance of football events and in the nightlife sector. This can be considered a privacy-sensitive search and visitors may refuse to co-operate. The search is based on consent and therefore different from the mandatory stop and searches the government may impose in the public domain. However, if co-operation is refused, the private manager has the right to refuse access to his domain on basis of security and prevention of harm. This means visitors who wish access feel the urge to co-operate and consent to the search. I have argued in this book that this consent can only be considered to be informed consent if the search is foreseeable and has been intimated in advance. Then, visitors can leave private and sensitive objects at home. In order to prevent discrimination and ethnic profiling, the search must also be conducted consistently and the manager must be able to explain what specific and foreseeable risks he is aiming to eliminate. The search must be adequate to actually eliminate this risk. My recommendation is to codify these rules due to the fundamental importance of privacy and particularly since private searches are broadly used in the semi-public domain.

However, even where private security policy is foreseeable, a remaining problem is that the public has virtually no real negotiation power to change the terms. Entrance tickets and hospitality contracts are adhesion contracts – take it or leave it. Also, some managers hold a position of economic superiority. This is the case for football in which the Royal Dutch Football Association is a monopolistic entity and in public transportation where providers, due to their concession, have a regional monopoly. To compensate this inequality in the contract, I propose that the courts should adopt a dynamic attitude when assessing the fairness of non-negotiable contractual terms.

With regard to private (collective) exclusion orders, I derived legal boundaries from the equitable doctrine of reasonableness and fairness; prohibition of abuse of power; tort law; the right to equal treatment and non-discrimination; and the right to privacy. The legitimacy of excluding a visitor in the case of (threatening) misconduct can be determined by balancing the interests of the parties involved as well as general interests. I contend that the public nature and social function of a specific place in the semi-public domain needs to be taken into account. This leads to the basic principle that a private manager of a semi-public place may not exclude others without legitimate reason. Prevention of nuisance, disorder, crimes and other harm may be a legitimate reason, but the manager must explain what disruption exactly was caused by this particular person or which threats are actually still plausible, based on the facts. If exclusion is used to sanction past behaviour, the length and range of the ban must relate to the gravity of the disruption and the culpability. Furthermore, the availability of alternatives, the defamatory effect and

possible deficiencies in the implementation of the ban are relevant factors in the assessment of the legitimacy of a private (collective) exclusion order.

DIFFERENT TYPES OF GOVERNMENT INVOLVEMENT

The case studies show that the government is always to a greater or lesser extent involved in policing the semi-public domain. Governmental control is aimed at contributing to various public interests, such as prevention of vigilantism, protection of citizen liberties and securing the accessibility of certain public services and *social resources*. Government enforced behavioural rules in the form of criminal law and administrative law constitute legal order and prevent chaos. These laws have an expressive nature – it is clear what type of behaviour is socially and legally discouraged. Additionally, these laws serve the legitimacy of governmental control, because they prescribe competences which the government can use to enforce the rules.

On a local level, it is the legal task of the local Mayor to care for public order in a broad sense. With regard to the semi-public domain, three types of involvement can be distinguished. Firstly, the Mayor monitors the exploitation of the semi-public domain. The most important instrument is licensing public events and establishments, by which the Mayor is able to perform a preventive impact assessment of the safety of the proposed activities and has regulatory power to propose certain restrictions and revoke the licence in cases of (threatening) public order problems. For public transport, the Ministry of Infrastructure and Environment plays a similar role. Secondly, the Mayor is competent to act in instances of emergent public disorder, even when this occurs in the semi-public domain. The Mayor is able to impose immediate orders or even close down a public event or establishment. The available remedies under traditional public order law can be characterised as a safety net: if the private manager is unable or unwilling to maintain order in his semi-public domain, the Mayor can and will step in. Thirdly, in addition to the police and prosecutor, the Mayor co-operates in PPP's alongside private parties to contribute to a specific security issue on a voluntary basis. I will describe this dimension of governmental control hereafter.

LEGAL FRAMEWORK IN PPP

PPP is formalized in covenants, in which parties agree to use their own (legal) instruments to contribute to order and security in the semi-public domain. A key feature in these partnerships is that parties keep their own legal identities: governmental actors use their public law instruments and private parties use their private law instruments. This type of PPP is in accordance with the principle of legality, since the covenants do not involve extra competencies for private actors.

Since PPP does not involve a transfer of legal authority, the above described legal framework is also applicable to private actors who participate in a PPP and organize their private order and security accordingly. Even though they actively participate in policing and crime control, they are not obliged to respect human rights, principles of good governance and criminal law safeguards in the same way as a government does. However, private law, to some extent, contains standards that provide similar mechanisms to prevent abuse of power. Also, co-operation largely consists of the public-private exchange of intelligence and personal data of visitors. Co-operating private parties are subject to specialized public legislation on data protection.

PPP makes it possible for all participating members – public and private – to access shared intelligence and base their sanctions on this. This leads to the situation in which an alleged perpetrator faces private law sanctions, administrative measures and criminal prosecution. Under current (Dutch) law nothing stands in the way of this accumulation. Private law sanctions fall outside the scope of the principle of double jeopardy (also referred to as the *ne bis in idem* principle). Different administrative public order measures may be combined with prosecution, as long as the public order measures are indeed aimed at restoration of order en prevention of further disorder. They may not exclusively have a punitive effect. I have postulated that the proportionality principle, however, still requires that there is a reasonable relationship between all combined measures and sanctions and the gravity of the misconduct underlying these sanctions. This is especially important if accumulation of sanctions results from and is made possible because of a PPP.

FRAGMENTATION OF ACCOUNTABILITY IN CASE OF PPP

Accountability is a key component of regulation. It entails the basic idea of providing information, explaining and justifying one's actions to another body. Regulators need to show how they perform their given tasks in order to prevent and/or redress abuse of their regulatory powers. From a legal perspective, regulators should be held accountable for the lawfulness of their policy design and practical use of their instruments. An analysis of all available (legal) remedies to hold regulatory bodies – public and private – accountable for execution of their regulations in the context of security in the semi-public domain shows a fragmented system. In the phase of designing and executing regulation, the co-operating partners made an effort to integrate their approaches due to reasons of efficiency but this is not the case in the phase of accountability. All different sanctions can be checked by different courts and complaints committees, which use different criteria in their review.

The risk of fragmented and diffuse accountability is that all actors hide behind the autonomy of the others. Moreover, the different fora and criteria are too narrowly interpreted to serve as an adequate check for the use of powers by the network as a

whole. I consider the fragmented accountability problematic regarding accumulation of sanctions, especially when this is the result of PPP. In the different procedures, the accumulative effect of PPP and proportionality of the result is rarely part of the review.

In this regard, I see added value in integral complaints committees, in which both public and private actors partake alongside representatives of the public. Since exchanging information is a key feature in this process, I believe an integral committee could check the processing of information to secure data protection safeguards and provide the person involved a chance to explain in an amenable and inexpensive procedure. Especially if this check is available at an early stage, this could contribute to procedural justice. I believe an integral committee could thrive if independence is guaranteed and if the formation, assessment frameworks and procedures are transparent. Concerning court procedures, I recommend inclusion of an applicable proportionality test for concurrent and cumulative legal procedures and – if there is reason to in specific cases – judicial authority to adjust their sentence accordingly.

If possible, the above changes should be realized by co-operating public and private parties themselves in their covenants. This type of horizontal governance is preferable to unilateral government legislation. However, if self-regulation does not lead to the desirable level of accountability, the legislature must step up. This fits the theory of *anchored pluralism*: the normative idea that in complex public-private networks, the state must take it upon itself to function as an anchor and secure equal access to public services, public interests in society, protection of human rights and procedural justice.