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Tackling Online Troublemakers Through an Experimental Administrative Law Approach

ARTICLE

A Local Solution to a Global Problem?

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ABSTRACT

Social media are playing a larger role in affecting public order. This study examines the legal powers and limitations of Dutch mayors under the Municipalities Act in regulating online disturbances. While traditional powers are confined to physical public spaces, the pervasive role of digital platforms in organising and escalating public disturbances demands an evaluation of existing legal frameworks. Recent incidents in the Netherlands, such as the curfew riots and unauthorised social media gatherings, highlight the urgent need for adaptive legal tools that address the blurred boundaries between physical and virtual public domains. This paper, drawing on empirical research and legal analyses conducted between 2018 and 2023, examines the potential for extending mayoral powers to the digital realm. While the study acknowledges significant legal and ethical challenges, including issues of jurisdiction, freedom of expression and enforcement feasibility, it argues for a nuanced approach to bring online behaviour within the scope of local administrative law to pre-emptively mitigate public order disruptions.

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1. INTRODUCTION

Since COVID-19, public order disturbances linked to social media have increased both in the Netherlands and globally. Examples include the influence on public order and safety of drill rap, conspiracy theories, large public gatherings (e.g. protests) and unauthorised events. An example from the Netherlands is the curfew riots during COVID-19.[1] These disturbances are not unique to the Netherlands, as similar discontent with pandemic-related government measures such as school closures, compulsory working from home and restrictions on large gatherings also sparked demonstrations and occasionally violence in other countries, with social media playing a crucial role in the organisation of these events.[2] In May 2024, a TikTok user known as Oracle caused havoc in a Zurich park by dropping 24,000 Swiss francs (approximately 25,000 euros) from a drone, leading to injuries among bystanders.[3]

This incident underscores the urgent need for mechanisms, even at the level of local governments in the Netherlands, to monitor and interpret social media signals to prevent potential public order disturbances. In the Netherlands, the central government has given the mayors of the 342 municipalities the power to maintain local public order through the Municipalities Act (*Gemeentewet*).[4] This Act gives the municipalities the power to establish a municipal bye-law, the General Municipal Bye-law (*Algemene Plaatselijke Verordening* (APV)) that regulates details of maintaining public order. The Municipalities Act, however, was written when there was no cyberspace (1983). The mayors are increasingly looking for ways to enforce their powers on the internet, but they do not know whether this is ethically or legally allowed by the Municipalities Act and the General Municipal Bye-law. Questions raised in this context include whether the internet is a public space and whether governments are allowed to intervene by, for example, removing posts by a notice-and-take-down action or by instituting a ban on posting in specific situations.

In 2021, the first administrative law experiments began to emerge. Mayors wanted to explore how far their powers extended and whether they could be used to address troublemakers online.[5] More specifically, experiments were carried out with periodic penalties which could be imposed to prevent residents from disrupting public order. This local approach is unique and has raised ethical questions about mayors' use of online powers and legal conflicts with citizens. Moreover, how can one enforce this if the alleged troublemaker is from another municipality – who has jurisdiction? In addition, it might be complicated to distinguish opinions on social media from clear calls to disrupt public order. How can such online regulation be enforced?

The administrative law experiments are interesting, as they shed light on conflicts between users (citizens), governments and social media platforms. The scope of the current paper is limited to conflicts between local governments and users. In matters of public order and safety, it has often proved difficult for authorities to quickly remove content from the internet in cooperation with platforms, especially when no obvious criminal offence has occurred. Since public order issues are increasingly driven by social media, local governments are seeking means to discourage users (i.e. citizens) from disrupting public order via social media platforms. This paper explores the online public order disruptions and the recent and potential interventions by local governments in the Netherlands. The paper seeks to answer the following research question: *To what extent is it possible for mayors in the Netherlands to use their legal powers of maintaining public order, given to them in the Municipalities Act, on the internet, especially on social media?*

1 For more information: H Moors et al., '"Avondklokrellen": lokale dynamiek in een mondiale crisis: Analyse van de voedingsbodem van de ordeverstoringen in vier Noord-Brabantse steden' (EMMA, 2022).

2 R Wood et al., 'Resisting Lockdown: The Influence of COVID-19 Restrictions on Social Unrest' (2022) 66 *International Studies Quarterly*, no. 2, DOI: 10.1093/isq/sqac015, 1–16.

3 W de Jager, 'TikToker drops €25,000 from drone, causing commotion in Zurich' (2024), Dronewatch, 14 May 2024, <https://www.dronewatch.nl/2024/05/14/tiktokker-laat-geld-vallen-vanuit-drone-veroorzaakt-opschudding-in-zurich/> (last visited 28 September 2024).

4 For more information: <https://www.government.nl/binaries/government/documenten/regulations/2014/09/25/municipalities-act/gemeentewet.pdf> (last visited 28 September 2024).

5 For example: Gemeente Utrecht, 'Online area ban for man who called for riots in Utrecht', 26 November 2021, <https://www.utrecht.nl/nieuws/nieuwsbericht-gemeente-utrecht/online-gebiedsverbod-voor-man-die-opriep-tot-rellen-utrecht> (last visited 28 September 2024).

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The paper is organised as follows. Section 2 outlines the Dutch administrative legal framework and competences, in which mayors play an important role in maintaining public order and security. This Section also describes cases from the Netherlands in which messages sent via social media led to a disruption of public order and safety. Section 3 considers whether the online world can also be seen as a public domain from a practical and legal point of view. Section 4 reflects on the legal possibilities and limitations of the use of administrative powers online. Section 5 discusses the possibilities offered by the General Municipal Bye-Law as a basis for imposing sanctions against online calls to disrupt public order. The Section also covers administrative law trials of the municipalities. Section 6 focuses on organisational factors and other preconditions relating to the enforcement of such issues if a legal basis is made for them in the Municipalities Act. The Section also contains an outlook based on views of experts and practitioners. Finally, Section 7 concludes the paper, including a discussion on the future of public order enforcement and the role of mayors.

1.1 METHODS

Most of the empirical research (practice-based legal research) was conducted between 2018 and 2022 by NHL Stenden University of Applied Sciences in collaboration with the University of Groningen. This Section provides more information on the background of these studies that build on each other.

The study 'Mayors in cyberspace' (*Burgermeesters in cyberspace*) is the start of a series of studies in the Netherlands on the ability of mayors to use their powers to maintain public order online.[6] This study was a broad exploration and focused on identifying examples of disturbances related to behaviour on social media and the mayor's power to address behaviour on social media that could disrupt public order. The research also addresses the question of whether there is an online public space (and who is responsible for it). The study is based on interviews with 14 mayors and 33 experts (insofar as there were any experts on this issue in 2017). The interviews were conducted between 1 June 2017, and 20 March 2018. The results are discussed in Section 3 and Section 4 paragraph 1.[7]

The study 'Not Authorized, Yet Responsible' (*Niet bevoegd, wel verantwoordelijk*) was a follow-up study to 'Mayors in cyberspace' and aimed at mapping the interventions that mayors deploy to deal with online-incited disturbances and their views on the deployment of specific interventions and powers.[8] This research consisted primarily of a survey distributed to Dutch mayors (N = 355). The questionnaire was distributed on 6 June 2019, a reminder followed on 27 June, and the questionnaire finally closed on 31 July 2019. The questionnaire was fully completed by 94 mayors (27%). During the survey, there appeared to be a need for more clarity on the use of a periodic penalty payment by mayors. It was therefore decided to have an additional legal analysis performed by the University of Groningen. The results of this study are discussed in Section 4.2.[9]

The third study in the series was conducted between December 2021 and October 2022 and, with respect to the APV part,[10] was further developed in an article.[11] This legal-source research was based on legislation, case law, annotations and literature. Current events surrounding municipal experiments with the use of mayoral powers online were additionally included in the study. In addition, an expert meeting (a roundtable discussion) was held at the House of Representatives in April 2023 with several experts on the (future) ability of mayors to act

6 W Bantema et al., *Burgemeesters in cyberspace. Handhaving van de openbare orde door bestuurlijke maatregelen in een digitale wereld* (SDU, 2018).

7 For more details about the methods see: ibid, 13–16.

8 W Bantema et al., *Niet bevoegd, wel verantwoordelijk? Handhavingsmogelijkheden bij online aangejaagde ordeverstoringen* (Boom Bestuurskunde, 2020).

9 For more details about the methods see: ibid, 13–15.

10 W Bantema et al., *Juridische grenzen en kansen bij openbare-ordehandhaving. Een onderzoek naar mogelijkheden van de APV voor de aanpak van online aangejaagde ordeverstoringen* (Onderzoeksgroep Cybersafety, 2022).

11 W Bantema & S Twickler, 'Waar Mondiale het lokale treft: de APV als instrument in de strijd tegen online aangejaagde ordeverstoringen' (2023) 65 *Computerrecht*, no. 2, 118–125.

against online-incited disturbances. The experts all wrote their own position paper on the subject, all of which are referenced in this article.

2. BACKGROUND

2.1 LEGAL BACKGROUND

As of 1 January 2023, the Netherlands consists of 342 municipal authorities and mayors. Municipal authorities perform many tasks, including registering residents, building roads and footpaths, providing social services and maintaining law and order. Mayors are generally responsible for maintaining law and order, crisis management and representing their councils at the national and international levels.[12] Moreover, they decide how to deploy police forces to ensure public security. For example, mayors have the power to shut down illegal cannabis plantations, evict people from their homes if they commit acts of domestic violence and take emergency action to counter threats to public security and order. In the event of an emergency, mayors lead crisis teams.[13] In the Netherlands, a mayor is a non-elected administrative authority appointed by the national government. They chair both the executive board and the legislative council of their municipality.

A short description of public order and safety is needed to set the scene. The term 'public order' has a broad definition, and its meaning is often debated by lawyers and scholars. The Dutch Government (1988) explains it as the 'desired level of order and safety in public life'.[14] In the Dutch academic literature, public order is defined as 'the regular course of events in public spaces'.[15]

Article 172 of the Municipalities Act states that the mayor is responsible for the enforcement of public order and safety and has administrative powers for this task. According to this Article, enforcement includes the 'maintaining and re-establishing of the local public order and ensuring compliance in the case of noncompliance, when order and safety in the local public life are disrupted'. Thus, mayors' administrative powers can be used to prevent disorder in local public life.

It is also important to mention the distinction between (1) public spaces and (2) publicly accessible spaces. Public spaces are accessible to all without restrictions such as tickets, membership or other permissions or conditions formulated by the owners of the spaces. Examples include streets, public squares and terminals. Publicly accessible spaces are also open to the public, but their owners can formulate conditions for restrictions on access, such as restricting access to those with specific goals. Examples of publicly accessible spaces are restaurants and hospitals. In addition to public spaces and publicly accessible spaces, there are private spaces, such as residences and other fully restricted spaces. Such spaces do not fall under the domain of mayors in their role as guardians of public order and safety unless they disturb public order.

Examples of administrative powers to regulate public order and safety include preventive payment penalties (to prevent actual offences from occurring), area bans (the instigator of a nuisance is banned from a specific area for a set period of time) and the ability to shut down houses used for criminal activities such as drug trafficking.[16]

2.2 EXPERIENCES AND EXAMPLES OF DIGITAL DISTURBANCES OF PUBLIC ORDER

Before embarking on a legal analysis of the opportunities for mayors to enforce administrative law online, some examples can be given of digital disturbances to public order in the Netherlands. These include online calls for a water gun fight or demonstrations (without permission) made

12 See Chapter XI Municipalities Act.

13 ibid. See for detailed information about the specific Articles in this Chapter: M de Jong et al., *Orde in de openbare orde*, (Wolters Kluwer, 2016).

14 *Kamerstukken II*, 1988/89, 19 403, nr. 10, p. 89.

15 de Jong (n 13), 10–11.

16 Chapter XI Municipalities Act: Arts 172–180.

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on social media and announced fights. Other examples include calls for events such as Project X (mobilisation), online blame levied at administrators or other authorities (such as the police) and threatening tweets about a potential school shooting (fake news). In addition, local events sometimes provide the impetus for online (and eventually offline) unrest. One might also consider unrest related to paedophiles in residential areas, the potential establishment of an asylum centre and polarisation between population groups on local Facebook pages or Twitter. It is often well-known public order issues that gain a social media component.[17]

Project X is discussed in more detail here because it is one of the most familiar Dutch examples of public order disturbances initiated online. Haren is a town of 20,000 residents near Groningen. In September 2012, a 15-year-old girl accidentally posted an open Facebook invitation to her 16th birthday party. Facebook users broadcast the message, and thousands of young people heeded the call. The mayor attempted to stop them by spreading a social media message that in effect stated that there was no party. However, between 3,000 and 5,000 people assembled in the public space, which caused severe disturbances, including the destruction of shopfronts and robberies. For local authorities, Project X was a wake-up call about the serious threat posed by social media to public order and safety.[18]

3. SOCIAL MEDIA AS PART OF THE PUBLIC DOMAIN

3.1 SOCIAL MEDIA AS PART OF THE PUBLIC ORDER

To what extent are the internet and social media part of the public domain? This question is addressed first before the concept of public domain is further explained and applied to social media.

As mentioned earlier (in Section 2.1), the legal definition of public order is broad. Likewise, the participants in the studies presented here recognised a broad definition of public order.[19] For instance, some referred to mayors' responsibility to ensure safety in a broad sense or liveability and other factors. Others added a local perspective by directing their definitions of public order at local society, such as the 'normal and peaceful functioning of a local society' or a 'municipality'.[20] Some respondents took an even broader approach and discussed 'a disturbance of public order whereby people feel themselves unsafe and societal unrest can result'. One respondent in that research cited concrete disturbances of public order: 'The normal functioning of a society could be disturbed by a demonstration, by loss of electricity, or by plunder.' The physical context was also referred to: 'The legislator has consciously chosen an open and broad definition, because it's a variable concept, but what it clearly shows is that it's always related to a physical context.' Another respondent made a similar statement and explicitly excluded the internet from the definition of public order: 'Chaos on the internet, for instance, hate speech, is not a problem of public order and safety.' One mayor made a practical statement: 'I wish to speak to the first person who is capable of giving a proper definition of public order and safety. If I see a problem where I can use my administrative powers to maintain public order, I will formulate it as a part of public order and safety.' This shows that, while the legal definition of public order potentially covers a variety of things that can disrupt the normal course of events in the public domain, the respondents in these interviews in 2017 still generally thought of public order as pertaining primarily to physical disruptions, with online behaviour not being seen as part of that public order.

3.2 PUBLIC SPACE AS PHYSICAL OR VIRTUAL SPACE

Before the legal analysis of the application of mayors' powers to address the online behaviour of residents for the purpose of public order, I first expand on the aspect of public space on which the mayors' powers outlined earlier focus. How does the concept of public space relate to virtual public space?

17 For more examples: W Bantema et al. (n 8).

18 For more information: M Cohen et al., 'Twee werelden. You only live once: Hoofdrapport Commissie "Project X" Haren' (2013).

19 Bantema et al. (n 6).

20 Quotes from ibid, 19, 19–21.

The literature has shown that a new public sphere has emerged through social media and that ownership of this public sphere is a point of concern. Social media can be seen as part of the public sphere where users can participate in discussions and exchange ideas, similar to the traditional public spheres as described by Habermas;[21] a new form of public sphere that provides opportunities for citizens to express themselves publicly on numerous topics and where they can organise around social movements.[22] There are also more critical voices in the literature. While the opportunity for communication is widely endorsed, concerns have also been raised about the influence of corporations on these interactions. For example, the private companies that own the platforms have significant influence over what is shared on social media. This creates tension between government regulation and the autonomy of social media companies in managing content.[23] The major platform operators not only own the technical infrastructure, but also control the interactions and data flows within their systems, creating a 'platform society'[24] and a blurring of traditional divisions between public and private spaces.[25]

In the interviews, the respondents struggled with determining what is public and what is private. There was, for instance, discussion about the nature of the internet and social media: 'Facebook is just a private service on which people communicate. When you are posting, you are not present in a public space. However, Facebook can be used to communicate emphatically with many others.' Another respondent stressed the hybrid nature of online public spaces: 'I think it's too facile to describe services such as Facebook as solely private. Twitter and Facebook have a public character, so they are a kind of hybrid. The expressions of opinion on them are accessible to the public.' Moreover, social media settings can also affect the level of public accessibility based on personal configurations: 'It's possible to make your profile public, but it can also be configured as private.' There are ways to make profiles more accessible and visible or more private and less visible. Among the participants, there was also debate over the concept of public space and its online interpretation. Some respondents recognised such a space. For example, one participant said, 'In my opinion, it's an extension of the public domain we know', while another said that 'online is a public domain, a kind of public or digital space where everyone can remain or be doing things'. Another respondent added, 'A distinction between public space online and offline is in my opinion not useful; there is one public domain.'

Socially, it is important to know how users themselves view the use of social media. In the relevant study, based on a survey completed by 40 Facebook users (mainly students), insight was gained into how Facebook users perceive the use of social media and how they handle access to their data and messages.[26] The respondents concluded that online social spaces are primarily meant to be public rather than designed for private disclosures. Online places are built for all to see, even if they are explicitly chosen for a smaller audience. They may be private spaces that are partially closed off, but Facebook users use online social networks as public meeting places. This shows the public character that online users assign to, in this case, Facebook. This study indicated that Facebook users themselves regard it as a public domain.

A number of respondents directly linked virtual public space to the mayors' powers: 'For the enforcement of public order, I never thought about a mayor intervening on the internet.' Another opted for a narrower focus: 'For which public domain? I think order and safety in the public domain (as mentioned in the law) isn't applicable on the internet, although I admit that behaviour on the internet can have an effect on order and safety on the street'. According to one participant, borders can also play a role in determining whether online spaces fall under the

21 C Fuchs, 'Social Media and the Public Sphere' (2014) 12 *Triple C*, no. 1, DOI: 10.31269/vol12iss1pp57–101, 57–101.

22 E Çela, 'Social Media as a New Form of Public Sphere' (2015) 2 *European Journal of Social Sciences Education and Research*, no. 3, DOI: 10.26417/ejser.v4i1.p195–200, 126–131.

23 H Meyer, 'Pill to swallow: Compelled Speech Doctrine and Social Media Regulation' (2023) 58 *Tulsa Law Review*, no. 2, 155, 181; J van Dijck & T Poell, 'Social Media and the Transformation of Public Space' (2015) 1 *Social Media + Society*, no. 2, DOI: 10.1177/2056305115622482; F Badel & J Lopez Baeza, 'Digital Public Space for a Digital Society: A Review of Public Spaces in the Digital Age' (2021) 3 *Journal of Architecture, Engineering & Fine Arts*, no. 2, 127–137.

24 van Dijck & Poell (n 23).

25 Badel & Lopez Baeza (n 23), 127–137.

26 J Burkell et al., 'Facebook: Public space or private space?' (2014) 17 *Information, Communication & Society*, no. 8, DOI: 10.1080/1369118X.2013.870591, 974–985.

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public domain: 'Only offline and within the borders of his municipality is a mayor responsible for public order and safety.'

This subsection shows that public spaces and the possible online public spaces can be viewed differently. It is difficult to maintain that social media and the internet are not part of the public domain. Because large (private) social media companies play such an integral role in the public domain and are essential for communication, discussions about ownership and responsibility inevitably arise. The final part of this Section examines how public spaces are viewed from a legal perspective.

3.3 LEGAL PERSPECTIVE

Criminal case law shows that statements made on social media can be of a public nature. The Court of Appeal of Den Bosch decided in 2009 that the distribution of a text among 10 to 12 people on Hyves did not fall under disclosure, as this involved distribution to a limited number of selected people.[27] Shortly after this decision, the Leeuwarden Court of Appeal decided that the distribution of a text to 20 people did qualify as disclosure, because it concerns a 'potentially wider circle of people, who were apparently allowed to use the statements at their own discretion'.[28] This ruling was later upheld by the Supreme Court.[29] These decisions demonstrate that posting messages on the internet is a form of disclosure, unless the reach and audiences that can take note of them are small.

Based on the legal analysis, the place where the content is posted is irrelevant as long as the scope and publicness or public accessibility of the content are most important. Until 2021, these discussions about public spaces were limited to criminal law. In November 2021, a young man used social media to call for a riot in Utrecht. The mayor of Utrecht used the case to determine the extent to which her powers could be applied online. Among other arguments, she contended that the call to riot was made from a public online place. This case is discussed in greater detail in Section 5. On 3 February 2023, the judge indicated that a public place refers to a (local) physical place. Although an online group chat that is accessible to anyone is public, it is not a public place that falls within the scope of a mayor's powers.[30] This clearly represents a tension between the online and physical worlds or places.

4. USE OF ADMINISTRATIVE POWERS ONLINE

4.1 LEGAL LIMITATIONS OF THE USE OF POWERS ONLINE

The question of whether and how mayors' legal powers can be used online can be answered based on previous research and insights from current practice. In 2018, this discussion was still general and unfocused; later, it shifted to whether a municipality's general bye-law could be used as a basis for the application of mayoral powers online.[31] In addition to a practical exploration which covered views of mayors and practitioners, the research on mayors in cyberspace consisted of a legal analysis conducted by NHL Stenden University of Applied Sciences in collaboration with the University of Groningen.[32] At the time that this research was conducted, there were still few practical examples of disturbances that occurred online.[33]

The most import argument concerns the extent to which governments should use light sanctions to regulate intermediaries in online calls to disrupt public order. This argument concerns fundamental rights. It can be argued that online calls to action and behaviour related to disturbances of public order and safety are always protected by fundamental rights such as freedom of expression, which are articulated in both Article 7 of the Dutch Constitution

27 Court of Appeal 's-Hertogenbosch 12 October 2019, ECLI:NL:GHSHE:2009:BK5777.

28 Court of Appeal Leeuwarden 3 November 2009, ECLI:NL:GHLEE:2009:BK1897.

29 High Council 5 July 2011, ECLI:NL:HR:2011:BQ2009.

30 Dutch case law: Court Midden-Nederland 2 February 2023, ECLI:NL:RBMNE:2023:375.

31 For example: R Koops, 'Halsema wil ook online relschoppers de pas kunnen afsnijden', *Het Parool*, 25 February 2021, <https://www.parool.nl/amsterdam/halsema-wil-ook-online-relschoppers-de-pas-kunnen-afsnijden~b8ede149/> (last visited 28 September 2024).

32 Bantema et al. (n 6), 53–85.

33 ibid, 33, 44–50.

(*Grondwet*) and Article 10 of the European Convention on Human Rights (ECHR). Thus, when Dutch mayors intervene online with their administrative powers, their actions may restrict and infringe citizens' freedom of expression. The core of the ECHR restriction system is the requirement that any restriction of a fundamental right must be necessary in a democratic society. This means a consideration of interests. A restriction requires reasons to serve an urgent societal aim, which should outweigh the interest served by freedom of expression. In some cases (e.g. Article 17 of the ECHR), it is assumed that it is impossible to make claims based on freedom of expression – for instance, in cases involving comments of a racial or anti-Semitic nature. Based on national legislation, such comments are criminal offences. Freedom of expression is also enshrined in the Dutch Constitution (Article 7).

The second legal argument concerns the extent to which a sufficiently direct relationship exists between online behaviour and offline disturbances of public order. A few calls to action on Facebook are probably insufficient; a call must be shared with large groups of people, and some people must answer it. Perhaps the explicitness of the call and of references to disturbances of public order must also be considered. In many cases, it is not a single call to action that precipitates an event but rather a shared call to action. This raises difficult questions about the causality of a call to action and its effects on public order. In addition, the online agitator is usually not the same person or group of people who are present at disturbances of public order. This raises the question of who is responsible and the responsibility that online agitators and people who share their call to action have over the actions of people who create disturbances of public order offline. Online calls to action are often ambiguously formulated and not explicitly related to proposed offline behaviour.

A third argument relates to uncertainty about the perpetrator of an online call to disrupt public order. The people who commit physical disturbances of public order are not necessarily (or even usually) the same people who make and share a call to action on Facebook. The existence of troll accounts further complicates the matter, because it is unclear who is responsible for such behaviour.

4.2 LIMITATIONS OF IMPOSING A PERIODIC PENALTY PAYMENT ORDER FOR AN ONLINE CALL TO ACTION

Shortly after the study of Bantema and colleagues (2018), a follow-up study was conducted in which a questionnaire was administered to mayors to gain insight into their experiences, interventions and needs in relation to addressing online disruptions. The questionnaire was fully completed by 94 mayors (27%).[34] In addition, another legal analysis was performed to examine whether mayors can impose periodic penalty payments on residents in cases involving online calls to action that may disrupt public order.[35] The purpose of such penalties is to stop online calls to action or prevent new ones from being made. This is the first study to specifically examine the online application of a specific tool. This follow-up study was also a collaboration between NHL Stenden University of Applied Sciences and the University of Groningen.

Among other questions, the questionnaire asked mayors whether they felt responsible for countering public order disturbances in which the internet plays a driving role. The results showed that 71% of participants agreed with the statement that it is 'good that mayors are responsible for preventing public order disturbances where the internet plays a driving role', while 13% disagreed.[36] The survey also revealed that 50% of participants were in favour of imposing a periodic penalty as regulated in the General Administrative Law Act, Article 5:32, and the Municipalities Act, Article 125, to prevent public order disturbances in which the internet plays a driving role. These legal rules form the basis for a specific legal analysis of the periodic penalty as a tool that could potentially be used online. The periodic penalty is a corrective measure from administrative law. Its goal is not only to stop violations but also to prevent them from happening again. To impose such a measure, the (threatened) violation of a statutory regulation must be shown to be occurring for the first time or imminent. In practice, this means the obligation to pay a fine if the order is not followed. One of the requirements for applying

34 For more information about methods: Bantema et al. (n 8), 12–15.

35 ibid.

36 For more information about methods: ibid, 51–52.

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this instrument is that there must be a breach or violation of a statutory provision. Based on Section 3 of Article 125 of the Municipalities Act, the mayor may impose a periodic penalty payment when there is a violation of a statutory provision. This provision has to be lawful, sufficiently clear and foreseeable. The statutory provision is covered by the rules implemented by the mayor and the periodic penalty should not be used punitively.

Among other conclusions, it follows from the legal analysis that the imposition of a periodic penalty is legally complex. On the one hand, imposing such a penalty in a specific case involves combating residents' online comments that affect public order. This is an entirely different proposition than, for example, ending an illicit party. A major legal problem is that there is not usually a violation of a legal rule (if there is no violation, no recovery sanction can be deployed). If the mayors themselves made a legal regulation via an order, there would soon be an unjustified infringement on freedom of expression (Article 7 of the Constitution). Article 10 of the ECHR protects not only freedom of expression, but also the right to receive information. In addition, further reference is made to problems related to determining who the infringer is and the jurisdictional issues that were raised in Section 3.

5. THE MUNICIPAL BYE-LAW AS A LEGAL BASIS FOR ONLINE LAW ENFORCEMENT

5.1 THE UTRECHT CASE

Since COVID-19, mayors in the Netherlands have increasingly been calling for more online powers.[37] NHL Stenden University of Applied Sciences launched a follow-up study to assess whether municipal bye-laws allow for rules that enable online enforcement. Based on a current municipal bye-law, Utrecht, a municipality, imposed a periodic penalty against a resident of Zeist, a nearby municipality, who called for the disruption of public order in Utrecht. In addition, Almelo, another municipality, created a new Article in their General Municipal Bye-law which explicitly prohibits using the internet or digital means to disrupt public order there; this case is also discussed in this Section.

In the first case, the mayor of Utrecht imposed a fine on a young resident of the municipality of Zeist. The resident had distributed a pamphlet with a picture of Kanaalstraat and the text 'Utrecht in revolt![38] Bring your matties and fireworks'. The boy was traced, arrested and served a periodic penalty to prevent a repetition of his online incitement. He was required to refrain from posting content on social media that could cause public disorder. If he had not complied with the periodic penalty, he would have forfeited a penalty payment of €2,500. This forfeiture did not occur, and the mayor of Utrecht withdrew the temporary measure.

The administrative measure was based on Paragraph 3, Article 125 of the Municipalities Act and Paragraph 1, Article 5:32 of the General Administrative Law Act, which establish that mayors have the power to impose a periodic penalty payment. In this case, a periodic penalty payment was imposed on the defendant because he incited disorderly conduct (calling for a riot) through provocative behaviour, which is punishable under Article 2.2(1)(g) of the municipality's 2010 general municipal bye-law. The relevant provision reads:

> 'Without prejudice to the provisions of Articles 424, 426a and 431 of the Penal Code, it is prohibited in or at a public place or in a building accessible to the public, to in any way: (a) disturb the order; (b) behave in an annoying manner (c) harass people; (d) fight; (e) take part in a gathering; (f) unnecessarily intrude or (g) *cause disorder by defiant behaviour*'.

According to the mayor of Utrecht, it was not the location where the message originated that was decisive but rather the location where it was directed. According to the mayor, this was evident from the wording 'in any way' in Paragraph 1, Article 2:2 of the general municipal bye-law, from which it can be deduced that 'in any way' also refers to the digital world. Furthermore,

37 For example: M Adriaanse, '41 mayors ask the central government for more online tools to prevent riots', *NRC*, 6 February 2023, <https://www.nrc.nl/nieuws/2023/02/06/40-burgemeesters-vragen-den-haag-meer-online-middelen-om-rellen-te-voorkomen-a4156285> (last visited 28 September 2024).

38 This is translated from the Dutch.

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the mayor held that a group chat on Telegram is a 'public place' within the meaning of the general municipal bye-law because it is accessible to all.[39]

One of the relevant questions concerned whether the Article in the municipal bye-law and Section 125 of the Municipalities Act are sufficiently specific to restrict a fundamental right. In general, experts believe that a municipal bye-law is a law enacted by lower government bodies and, in principle, should not restrict freedom of expression, because it infringes the Constitution's restriction system for fundamental rights, in which municipalities in general cannot restrict fundamental rights. Only the central government can do so under certain conditions. Brouwer and Schilder, two eminent scholars in the field of administrative law, expected that the municipality's decision could not be upheld because of the Constitution's restriction system and that the periodic penalty would constitute censorship and thus violate freedom of expression.[40] In monitoring this measure, visibility is needed on content that disrupts public order in Utrecht, and this requires a substantive test of expressions. The municipality maintained that there was no censorship, because the penalty would only be collected if the defendant made calls again that aimed to disrupt public order in Utrecht.[41]

A focus group with legal experts was conducted.[42] The participants were critical of the measures taken in Utrecht. For instance, they believed that the Article in the municipal bye-law was insufficiently specific. In addition, they indicated that a physical restraining order concerns freedom of movement, but an 'online restraining order' concerns freedom of expression, and monitoring online content puts privacy and freedom of expression at stake. The term 'online area ban', now widely used in the Netherlands, is misleading, because it is not a measure that applies to the use of the internet as a whole, only to specific statements that may lead to disturbances.

In the Utrecht case, the administrative judge sided with the boy and upheld his appeal.[43] In doing so, the court stated that a 'public place' meant a physical place. According to Article 1:1(b) of the municipal bye-law, 'public place' means 'a place accessible to the public, including the road'. Accordingly, it refers to physical places, such as squares, parks, and pavements. Although the group chat on Telegram was public, it was not a place that fell within the mayor's powers under the meaning of the municipal bye-law. Thus, the mayor's interpretation of the municipal bye-law was not corroborated by the court, and it could not be inferred from the wording 'in any way' that the disorderly conduct could also take place online. Finally, the court found that the mayor's interpretation of the municipal bye-law resulted in the restriction of the defendant's freedom of expression, as enshrined in Article 7(3) of the Constitution. As a result, the boy was not found to have violated the municipal bye-law in Utrecht, and the mayor was not authorised to impose a periodic penalty.

5.2 THE ALMELO CASE

So far, municipal bye-laws do not appear to provide a basis for the imposition of a periodic penalty payment against online comments made by residents that may lead to public disorder, partly because the current legislation concerns physical places. To solve this problem, the municipality of Almelo drafted a new Article for their municipal bye-law.[44] It contains the following text:

> '(1) It is forbidden to make, share, and/or maintain comments through digital means, including via the Internet, virtual spaces, and social media, which could lead to a physical disturbance of public order within the territory of the municipality of Almelo or to the creation of a serious fear thereof.'

39 Gemeente Utrecht, 'Beantwoording schriftelijke raadsvragen 2021, nr. 295', (Beleidsveld Openbare Orde en Veiligheid, 2021).

40 J Brouwer & A Schilder, 'Online oproep verstoring openbare orde: dwangsom onhoudbaar' (2022) Expertisecentrum Openbare orde & Veiligheid, 21 February 2022 <https://openbareorde.nl/online-oproep-verstoring-openbare-orde-dwangsom-onhoudbaar/> (last visited 28 September 2024).

41 Gemeente Utrecht (n 39).

42 Bantema & Twickler (n 11), 118–125.

43 Dutch case law, Rechtbank Midden Nederland 3 February 2022, ECLI:NL:RBMNE:2023:375.

44 Bantema & Twickler (n 11), 123.

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In addition, it states that:

> '(2) without prejudice to the provisions of Article 54a of the Penal Code, administrators of web sites, domain name holders, and social media platforms are prohibited from: a. sharing or further disseminating (or allowing to be disseminated) statements, as referred to in the first paragraph, made via their communication service; b. maintaining them; or c. keeping them accessible and/or visible online.'

Finally, the Article states that:

> '(3) administrators of websites, domain name holders, hosting providers, and social media platforms are obliged to block, remove, and keep removed, by order of the mayor, expressions as referred to in the first paragraph, whether or not via their own notice-and-take-down procedures.'

No case has been brought because of this Article, although several experts have shared their opinions on the matter.[45] For instance De Jong was critical of the Article and stated that mayors should not take measures to target online comments. She also advocated for national rules rather than rules that differ from one municipality to another and stated that freedom of expression is one of the core values of the rule of law. Furthermore, De Jong indicated that banning online comments in advance, as in the Almelo case, is not permitted under state law, because the Constitution prohibits censorship. According to De Jong, there is only one route to address online calls to disrupt order: criminal law. Incitement is criminalised in Article 131 of the Penal Code, and anyone who is found guilty can be prosecuted. She added that monitoring carries the risk of interfering with freedom of expression and privacy, because digital devices must be monitored for any comments that might lead to disruption of public order Finally, she highlighted the fact that most laws are written for the physical world and cannot simply be applied online.

Buitenhuis saw more possibilities than De Jong for administrative online enforcement. In special situations, she perceived possibilities for a legal basis and indicated that, when people only express their dissatisfaction, it can be assumed that a fundamental right, such as freedom of speech or freedom of demonstration, is not directly restricted by law enforcement. Buitenhuis was also curious about how the judge would address these online calls to action. Her hesitation concerns problems with enforcement and enforceability, and she also wondered how to assess whether an individual posted a call to action on social media. In the case of incitement to disorder, the calls to action are often posted anonymously or posted using an alias. Mayors do not have access to IP addresses and cannot take tweets offline. If a law is not enforceable, there is no point in including Articles in the municipal bye-law, according to Buitenhuis.[46]

This discussion shows that, in addition to legal concerns, problems with enforcement of such a municipal bye-law Article are anticipated. It is striking how broadly and how vaguely the municipal bye-law in Almelo is formulated and that its intention is not only to prevent the repetition of a disturbance, but also to be able to prevent in advance any call for a disturbance of public order in Almelo. Online calls to action are often not formulated like 'Let's go riot' but rather 'We're going to have coffee'. They feature a play on words that is difficult to act against. Another disadvantage of the Article's broad formulation is that it is so widely applicable that it is impossible for citizens to assess what they may and may not do based on these rules. What is innovative about this Article, however, is that it is the first time that a Dutch municipality has set rules about online behaviour and that it deals with the possible effects of that online behaviour on the public order of the municipality. Thus, if a resident from the municipality of Groningen posts a call to disturb public order in Almelo in violation of the municipal bye-law APV Article, they can be dealt with by the mayor of Almelo. Local governments cannot constantly monitor citizens online, and there is no explicit administrative authority for a municipality to systematically monitor someone. Thus, the concerns about legal tenability and practicality seem justified.

45 M Knapen, 'De geitenpaadjes naar online gebiedsverboden' (2022), Binnenlands Bestuur, 27 December 2022 <De geitenpaadjes naar online gebiedsverboden>

46 M Buitenhuis & W Bantema, 'De burgemeester: burgervader, handhaver van de openbare orde en sheriff van het internet? (deel 2): Kunnen burgemeesters met een internetverbod optreden tegen een verstoring van de openbare orde met een aanleiding in het onlinedomein?' (2023) 8 *De Gemeentestem*, 1–11.

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6. PRACTICAL PERSPECTIVE AND FUTURE OUTLOOK

6.1 PERSPECTIVE FROM THE LOBBY OF MUNICIPALITIES AND MAYORS

A roundtable discussion on online area bans was held at the House of Representatives in April 2023. Mayors and experts attended the session, which mainly concerned legal possibilities but also needs. This Section presents the key insights from this session.[47]

According to the four largest municipalities in the Netherlands, mayors are responsible for maintaining public order and safety, a responsibility enshrined in law (e.g. Article 172[1] of the Municipal Law). It is a difficult task that involves continually striking a balance between protecting the freedoms that citizens enjoy in society and protecting them from violent behaviour. Online calls for violence have the potential for enormous reach, with all of the attendant public order risks. Therefore they advocate for national legislation and tools that enable mayors to act quickly in the event of fears about serious disturbances of law and order that originate online.

According to the 40 largest municipalities (G40), there are no legal means for addressing online calls for disorder. In the past, these calls have led to the criminal prosecution and conviction of those who posted them, but only after physical public order was disrupted and a criminal offence took place. Criminal prosecution aims to be punitive, while administrative law enforcement aims to restore public order or prevent its disruption to protect a general interest. The scope of the Article in the municipal bye-law in Utrecht is limited to calls that could lead to the physical disruption of public order. It also does not concern the restriction of fundamental rights, such as freedom of expression and the right to demonstrate. While it is recognised that a municipal bye-law cannot restrict fundamental rights in general and anyone may express their thoughts, feelings and dissatisfaction about various issues, this does not mean that they can call for a looting spree, make threats or engage in violence. Rights are almost always considered in relation to other rights and interests, including the prevention of disorder and crime or the protection of the rights of others. These rights and interests must be balanced against each other. This balance is considered on a case-by-case basis and based on careful assessment and substantiation. In a legal case, the judge ultimately decides whether a mayor's decision was justified and taken on the right grounds.

The Association of Dutch Municipalities (VNG) also advocates for new legislation and the preconditions that should apply to it. The VNG wants to see the Municipalities Act amended so that central legislative power can give the mayor powers to impose restrictions on fundamental rights.[48]

It is only then that the legislation applies to the Constitution's restriction system: only the central legislative power can limit the fundamental rights under certain conditions. When developing new legislation, freedom of expression and the right to demonstrate must be guaranteed. It is questionable whether additional regulation should be drafted at all, as additional regulation or criminalisation is not a panacea for preventing disorder initiated online. Because of their special position in society, mayors are ideally placed to protect the rights of residents and stand with them in difficult times.

6.2 PERSPECTIVE OF LEGAL EXPERTS

According to Van Grinten, the powers of command granted to mayors in the Municipalities Act do not lend themselves to the imposition of fines in response to inflammatory remarks online, because they contain generally worded provisions for the purpose of the immediate preservation of public order and are not intended to restrict future opinions of citizens by the mayor.[49] According to the Constitution, this kind of power would require a specific formal constitutional provision that clearly indicates the types of comments to which the restriction refers. In this context, Van Grinten also referred to Article 10 of the ECHR, which sets strict

47 <https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2023A01238> (last visited 28 September 2024).

48 VNG, 'Position paper Online Gebiedsverbod', 11 April 2023 <https://www.tweedekamer.nl/downloads/document?id=2023D14511> (last visited 28 September 2024).

49 J van der Grinten, 'Position paper voor de vaste commissie Digitale Zaken', 11 April 2023 <https://www.tweedekamer.nl/downloads/document?id=2023D14524> (last visited 28 September 2024).

requirements relating to the foreseeability of action to restrict this fundamental right. Nevertheless, Van Grinten did not consider it impossible that the Municipalities Act could include a legally tenable provision to give mayors the power to take action against, for example, online statements that call for gatherings with the apparent aim of causing disorder in a physical space in their municipality. As the right to demonstrate and its restrictions are regulated by the Public Demonstrations Act, any new legislation would concern gatherings which clearly do not have the character of a demonstration under the meaning of the Act. However, van Grinten expressed doubts about the effectiveness of this approach and, partly because of the geographical scope, he considered criminal law to be more appropriate for addressing online calls for riots.

According to Ichoh, the obvious option in the existing system is to grant mayors the power to act against online sedition. This could be accomplished by including a specific Article in the Municipalities Act. Mayors are already authorised to issue any orders necessary to maintain public order, as established in Article 172(3) of the Municipalities Act. According to legislative history, however, this power is intended to be a 'light' command power. In addition, it was specifically created to restrict certain fundamental rights if necessary. According to case law, it is too general and broadly formulated.[50] A statutory basis must be sufficiently specific. In view of this, an Article in the Municipalities Act that is tailored to the specific situation of online incitement to sedition and public disorder is thus appropriate and[51] necessary. As a legal text, it could serve, for example, the following purpose:

> 'The mayor is authorised to impose a periodic penalty payment if, through digital means, including the internet, virtual spaces, and social media, expressions are made, shared, and/or maintained which may lead to a physical disruption of public order or the creation of a serious fear thereof.'

Van de Sanden[52] did not see a need for new legislation based on the Utrecht ruling. In his opinion, the court did not rule that a so-called online area ban would not be possible, merely that there was no violation of the municipal bye-law in Utrecht because it did not provide for digitally driven public order disturbances. This ruling cannot lead to the conclusion that, in general, no online area ban would be possible.[53]

Regarding the recent legal rulings and the research outcomes on this topic, the prevailing conclusion is that the current legislation, including the General Municipal Bye-law, does not provide a sufficient basis for imposing period penalty payments online. Possibly, legislation can be amended nationwide, but it is complicated to do so adequately and legally and there are challenges around enforcement.

7. CONCLUSION AND REFLECTIONS

7.1 CONCLUSION

This paper began with the following research question: To what extent is it possible for mayors in the Netherlands to use their legal powers of maintaining public order, given to them in the Municipalities Act, on the internet, especially on social media? It emerged that mayors are confronted with public order issues where social media play an important role in mobilising residents, particularly during COVID-19. In the Netherlands, mayors have many powers to maintain public order based on municipal bye-laws (local rules) and the Municipalities Act (where the mayors' powers to maintain public order are laid down). In both the General Municipal Bye- and the Municipalities Act, 'public order' seems to refer to the physical territory of the municipality. The legislation was largely created before the internet, yet that has not

50 M Ichoh, 'Position Paper MI Stadsadvocaat overheidsrecht t.b.v. rondetafelgesprek Online Gebiedsverbod', 11 April 2023) <https://www.tweedekamer.nl/downloads/document?id=2023D14529> (last visited 28 September 2024).

51 Ibid, 4.

52 C van den Sanden, 'Position paper over juridische mogelijkheden aanpak online opruiing', 11 April2023) <https://www.tweedekamer.nl/downloads/document?id=2023D14513> (last visited 28 September 2024).

53 W Bantema, 'Position paper – Onderzoeksgroep Cybersafety – NHL Stenden Hogeschool/Thorbecke Academie', 11 April 2023 <https://www.tweedekamer.nl/downloads/document?id=2023D13547> (last visited 28 September 2024).

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stopped mayors from using their powers. Given the local effects of social media on public order in municipalities, it is easy to imagine that mayors also want to intervene to prevent the disturbance before it occurs. Although this article deals with the situation in the Netherlands, there will also be tension between outdated legislation and technological developments in other countries.

In addition, new legislation must be developed. While there are several options for dealing with online troublemakers, there is no measure in administrative law to intervene pre-emptively. In practice, such a power might rarely need to be used if previous (non-judicial) interventions work, but an ultimate power may also enhance the strength and effect of the other interventions. Moreover, the mayor is responsible for public order and safety, and the internet and social media play a major role in many new and existing public order issues, as they have become part of people's (social) lives.

The analysis in this article shows how difficult it is to interpret the concept of public space in relation to virtual spaces or online spaces on social media. Social media have a clear impact on public order, and residents interact frequently on social media. It is also conceivable that many social media users experience the interactions as part of the public realm. A major difference with physical public space, however, is that ownership of the social media platforms is in the hands of large technology companies. For example, in a municipality, if a café fails to maintain order, the mayor can use police authority to restore it. On social media, it is sometimes still possible to call an administrator to account for behaviour within certain online groups, but otherwise formal ownership is often in the hands of large technology companies.

Based on the broad definition of 'public space' in local law, there seems to be room to include online or public spaces on social media. Furthermore, the increasing examples of behaviour on the internet having consequences for public order make it easier to substantiate causality between online behaviour and public order. In addition, the aspect of territory is no longer a strong argument in 2024. It is conceivable that, when it is clear where the public order effect will occur, the mayor of a municipality will be authorised to act, even if it concerns a resident of another municipality. As yet, however, there is no relevant case law. The internet was not taken into account when the administrative law was created, but a simple adaptation of the legislation will not solve all the problems.

The local legislation of municipalities is not suitable to provide the necessary tools to deal with residents who use social media to disrupt public order. In the Netherlands, the municipal bye-law cannot be used to restrict fundamental rights. A mayor could argue that the intervention is only used when someone clearly calls for riots or disorder, but then it is still considered on a case-by-case basis as to whether a comment can be seen as a possible source of a future public order disturbance. If the municipal bye-law is used to impose a measure after the fact to prevent a repetition of behaviour on social media, it is less restrictive than prohibiting statements beforehand, but the municipal bye-law is still not an appropriate instrument, nor is the Municipalities Act, which defines the powers of mayors. Experts agree that if one wants to tackle the problem administratively, it can only be done by amending the Municipalities Act and this can only be done by the central government.

7.2 DISCUSSION

Not deploying administrative powers

One direction for the future may be for mayors not to be given powers to intervene online to ensure public order and safety in their municipalities. Such intervention may not be necessary, because there are non-legal options or because criminal options are already available, for example. When someone from their own community plays a significant role in organising public disorder, a municipality may choose to convince the person to remove their posts from social media. In some cases, when criminal behaviour is involved, prosecution can be initiated, such as for sedition. In addition, one can choose to submit a notice-and-takedown request to platforms. Within current legislation, it does not seem possible to tackle online troublemakers via an administrative law route.

Development of new legislation

Given the major influence of social media on public order and the importance of Dutch mayors in maintaining public order and safety, it seems prudent to consider new administrative legislation (amendments to the Municipalities Act) to make it easier for mayors to maintain public order. Should the Government choose to develop new legislation, a number of aspects must be considered. I propose four criteria for developing workable legislation. First, it is important to assess if regulation is needed or desirable, and whether non-legal solutions are available. It is also beneficial to discuss the topic. It should also be taken into consideration that, if mayors have powers to intervene on social media, certain expectations may arise about the use of these powers. Furthermore, if mayors become enforcers of the internet, it may create pressure on them as both leaders of the community and representatives of all citizens.

Second, it is important to assess whether the legislation will stand up in court (legal tenability). For instance, mayors can choose between broad legal provisions and more specific laws. The danger is that, with broad formulations, wide scope is given to mayors to tackle content on social media that is expected to cause public order problems, which poses a risk with regard to freedom of speech. With specific laws, the downside is that they offer limited application, leaving the mayor with limited legislative authority. Third, organisational feasibility must be considered. Reference was made earlier (5.2), for example, to the online information needed to determine whether a violation has occurred (online monitoring), and even after a preventive sanction is imposed, consideration must be given as to how compliance can be monitored. In addition, it may be unknown who is behind certain online calls to action, and thus it may be unclear who should receive the sanction. Moreover, as sanctions are sent by letter, it is not clear who should receive it. Can the measure be shared in a forum or on the internet? Fourth and finally, there is the question of whether the remedy is effective. When all four criteria are met, a useful law has been developed.

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