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*Regulating Algorithmic Decision-making One Case at the Time: a Note on the Dutch 'SyRI' Judgment**

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Court of the Hague, 5 February 2000, ECLI:NL:RBDHA:2020:865

Instigated by several citizens' rights NGOs, the District Court of The Hague delivered a judgment regarding the compatibility of legislation (the SUWI Act and the SUWI Decree) enabling a data-based surveillance tool known as 'SyRI' (which stands for Systeem Risico Indicatie) with the European Convention on Human Rights (ECHR). SyRI is used within the Dutch administration, mainly at the municipal level, to aid the detection of fraud with social benefits and allowances. The court found a breach of Article 8 ECHR, the right to respect for private and family life, home and correspondence. Of particular relevance in this case is Paragraph 2 of this article, which requires "striking a fair balance between the interests of the community as a whole, which the legislation serves, and the right of the individuals affected by the legislation to respect for their private life and home". The court noted that governments have a special responsibility when applying new technologies, which means that they must strike the right balance between the benefits of such technologies and the intrusion to the right to a private life. The outcome of the case is that the court declares two specific elements of the 'SyRI legislation', Section 65 SUWI Act and Chapter 5a SUWI Decree "insofar as it concerns SyRI and its application" unlawful and therefore not binding because of the insufficient safeguards to constitute a sufficiently justified interference with private life. Since the Dutch government is not appealing the case, this means that SyRI in its current insufficiently transparent form will no longer be used in The Netherlands. The case does not, however, provide a final resolution of any of the dilemmas surrounding data-based surveillance of citizens

ABSTRACT This case note analyzes the much-discussed Dutch 'SyRI' judgment. Although the way in which the District Court of The Hague brings Article 8 ECHR into its reasoning is an important step, the case does not conclusively set legal limits to data-based surveillance more generally.

The judgment by the The Hague District Court of 5th February 2020 that the Dutch legislation facilitating a system of data-based surveillance of citizens to combat benefits fraud (SyRI) breaches the European Convention on Human Rights is significant. It is the first successful Dutch example of a case heard in a court of private law, where the large-scale use of personal data in data analysis systems was put to a halt. There have been cases in the administrative courts, notably the AERIUS case law, in which the Administrative Jurisdiction Division of the Dutch Council of State established a duty for agencies to actively and timely disclose the fundamental choices made when automated decision-making is applied[1]. In *NJCM vs the Netherlands* no administrative 'decision' existed that could serve as the object of a judicial review action, leading the NGOs to take the gamble of taking the case to a private law court, which does have more far-reaching remedies to offer.

The case has attracted a fair bit of international attention. Those who would like to read the case in full, but do not master the Dutch language, do have access to the case in English, thanks to a growing practice of translating significant court cases[2]. Understandably, what drew most of the international attention for the case, are the substantive considerations regarding fundamental rights aspects. These are important, as they are likely to serve as sources of inspiration for public interest litigation on the subject in other jurisdictions[3]. However, this case note seeks to apply some nuances to the 'success

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[1] Administrative Jurisdiction Division of the Council of State, 17 May 2017, ECLI:NL:RVS:2017:1259 (PAS).

[2] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:1878.

[3] Amicus letter by Philip Alston, Un Special Rapporteur on extreme poverty and human rights: https://www.ohchr.org/Documents/Issues/Poverty/Amicusfinalversionsigned.pdf.

story' that the case appears to be at first sight. After presenting some facts about the now doomed system known as SyRI, this case note looks at how the court approached the sticky problem of legal control of data-based governance. This has a relevance beyond countries that are party to the ECHR, because the dilemma is the same everywhere: do you demand full legal accountability, when it is often precisely what happens inside the 'black box' what makes technology powerful? The note concludes with some remarks regarding the significance of the case as we move towards a future with ever more encompassing data analysis practices.

SyRI is an application that links data about citizens from a variety of agencies, such as the Dutch tax authority and agencies administering social and unemployment policies, and flags possible cases of fraud. Using risk models with fixed indicators, the system produces a list of citizens with an alleged higher fraud risk ('risk reports') and then leaves it to the authority that has requested to use SyRI to start an investigation. A limited number of authorities, municipalities, as well as agencies with responsibilities with regard to social benefits, tax and immigration are entitled to file a request. The SyRI legislation then makes it possible for these authorities to form a collaborative alliance in which they exchange data. The SyRI application enables them to do so in a structured manner, which produces the aforementioned risk reports.

The large amount of attention the case received may have given the false impression that SyRI played a large role in Dutch administrative practice. Use of SyRI was actually far from wide-spread among Dutch municipalities, with only a handful using it at the time of the judgment and the system being prone to technical difficulties. A legal technicality that is vital to understanding the case is that there is legislation, called the 'SUWI Act' and the 'SUWI Decree', in place which enables public authorities to apply for projects in which SyRI would be used. As becomes evident in the letter the Dutch government sent to the parliament in response to the 5th February court case[4], no applications had come in a while, making the decision not to appeal the case slightly less heroic.

Under the heading '[e]xtent and seriousness of the interference: what is SyRI? Dragnet, untargeted approach, data mining, 'deep learning', 'big data'?' the nature of SyRI is analysed by the court. The NGOs claim that SyRI is an example of 'deep learning' with Big Data-like features[5]. The State contends that SyRI only uses data from existing data sets of designated government or other bodies and likens its nature to "a simple decision tree"[6]. In its evaluation of these claims, the court arrives at a crucial finding: it is "unable to assess the correctness of the position of the State of the precise nature of SyRI because the State has not disclosed the risk model and the indicators of which the risk model is composed or may be composed"[7]. This also means that the court does not attach a clear technical label to SyRI in this case, as it remarks that 'Big Data' has no clear-cut definition[8] and since the SyRI legislation "leaves the option open that in the application of SyRI use is made of predictive analyses, 'deep learning' and data mining" with the definition of risk model in the SUWI Decree not precluding this[9]. The court does not agree with the coalition of NGOs that the SyRI legislation provides room for unstructured ('ad random') data collection[10]. Still the flaws of the system, including the fact that "the SyRI legislation does not provide for a duty of disclosure to those whose data are processed in SyRI so that these data subjects can be reasonably assumed to know that their data are or have been used for that processing"[11] are such that the court does not think the 'fair balance' of the second paragraph of Article 8 ECHR has been achieved. The court arrives at this conclusion citing *S. and Marper versus the United Kingdom*, adding that the special responsibility resting on states to strike the right balance when it comes to the development of new technologies is not limited to those claiming a pioneer role[12].

The focus on Article 8 ECHR is remarkable, given that the main argument of the coalition of NGOs was that SyRI in practice would be used to target certain 'problem neigbourhoods', resulting in stigmatization and unequal treatment. The court acknowledges this argument[13], but appears to see it mainly in the light of its own principal line of argumentation. The lack of transparency and verifiability – which in this case mean that whether the risk of bias or stigmatization is sufficiently neutralized cannot be assessed cause the SyRI legislation to contain

[4] Letter of 23 April 2020 to the President of the House of Representatives by the State Secretary for Social Affairs and Employment, Tamara van Ark, on a court judgment regarding SyRI, https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-enwerkgelegenheid/documenten/publicaties/2020/04/23/vertaling-kamerbrief-naar-aanleiding-van-vonnis-rechter-inzake-syri.

[5] Par. 6.45 and 6.46.
[6] Par. 6.47.
[7] Par. 6.49.
[8] Par. 6.53.
[9] Par. 6.51.
[10] Par. 6.50.
[11] Par. 6.54.
[12] ECtHR 4 December 2008, nos. 30562/04 and 30566/04 (*S. and Marper versus the United Kingdom*).
[13] Par. 6.93.

insufficient safeguards to protect the right to respect for private life[14]. According to the court, "[w]ithout insight into the risk indicators and the risk model, or at least without further legal safeguards to compensate for this lack of insight, the SyRI legislation provides insufficient points of reference for the conclusion that by using SyRI the interference with the right to respect for private life is always proportionate and therefore necessary, as required by Article 8 paragraph 2 ECHR, in light of its purpose of combating abuse and fraud"[15].

The claimants had also sought the disclosure of the risk models used in the specific SyRI project. For this, the court referred them to the appropriate 'administrative-law court procedures' and explicitly noted that the unlawfulness of the "SyRI legislation, insofar as it pertains to the use of SyRI" does not mean that the Dutch government is obliged to disclose these models[16].

What will be the legacy of *NJCM vs The Netherlands*? The case should first and foremost be seen as a wake-up call for the Dutch legislator. The Chamber of Representatives (*Tweede Kamer*) nor the Senate (*Eerste Kamer)* held a debate about the substance of the amendments that created the 'SyRI legislation', in spite of words of warning from the Council of State[17]. The lack of the possibility of constitutional review (abstract or concrete – the *NJCM vs The Netherlands* case was only possible because the legal argument was treaty-based, not constitutional) in the Dutch legal system leaves its mark on this case as a whole.

The case was decided at the District Court level. So, to what extent can we consider the The Hague court's assessment established law? As already indicated above, the Dutch government has since issued a statement, technically a letter to the Parliament, that it will not contest the judgment through an appeal[18]. In that sense the SyRI judgment stands. There are reasons though not to take the acceptance by the Dutch government of the court's ruling at face value. SyRI was not very successful as a system. A Dutch newspaper that investigated SyRI in 2019 reported that the application had not yet revealed so much as one case of fraud[19]. The reasons for SyRI's limited success do not appear to be directly related to the legal objections listed by the court. But the idea of constructing a new tool, 'better' in every respect, was clearly attractive to the government minister, who hinted at such a plan in her letter to the Dutch parliament. What is more, the court in its reasoning was quite nuanced and left room for a statutory basis for data-based surveillance. The court did not set the conditions for a possible lawful such practice, but instead explained why SyRI, in its current form, did not meet the mark. In appealing the judgment, the government would risk being faced with a set of more concrete limitations. It is thus too soon to say that a consensus regarding the legal limits of data-based surveillance has emerged across the different branches of the Dutch state. Illustrative of this point is the way a legislative proposal on private-public partnerships in data surveillance – not a response to the SyRI case as it was already drafted before the SyRI case began – is currently being pushed by the government. Quite contrary to the spirit of *NJCM vs the Netherlands* the government would like to make more types of partnerships possible on the same narrow statutory basis – an observation also made by the coalition of NGOs that started the SyRI case[20]. None of this is to suggest that the case turns out to be a Pyrrhic victory for them. The unapologetic linking of the right to privacy and data-based surveillance by public authorities is an important step in the debate. But paradoxically, the fact that the SyRI legislation was really quiet a clear-cut case of overstepping privacy boundaries resulted in a judgment that merely sets the stage for the next judicial battle on the subject.

[14] Par. 6.95.
[15] *Ibid*.
[16] Par. 6.115.
[17] https://www.raadvanstate.nl/@63143/w12-14-0102-iii/.
[18] This letter is also available in English translation: https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-en-werkgelegenheid/documenten/publicaties/-2020/04/23/vertaling-kamerbrief-naar-aanleiding-van-vonnis-rechter-inzake-syri.
[19] C. Huisman, *'SyRI, het fraudesysteem van de overheid, faalt: nog niet één fraudegeval opgespoord'*, in *De Volkskrant*, 27th June 2019, https://www.volkskrant.nl/nieuws-achtergrond/syri-het-fraudesysteem-van-de-overheid-faalt-nog-niet-een-fraudegeval-opgespoord~b789bc3a/.
[20] See various posts on their (Dutch language) website: https://bijvoorbaatverdacht.nl/.