

Brief by the United Nations Special Rapporteur on extreme poverty and human rights as *Amicus Curiae* in the case of NJCM c.s./De Staat der Nederlanden (SyRI) before the District Court of The Hague (case number: C/09/550982/ HA ZA 18/388).

A. INTRODUCTION

1. The United Nations Special Rapporteur on extreme poverty and human rights¹ (“Special Rapporteur”), Professor Philip Alston,² submits, as *amicus curiae*, the following brief to the District Court of the Hague (“District Court”) in the case of NJCM c.s./De Staat der Nederlanden (“SyRI case”).
2. The Special Rapporteur is an independent expert appointed by the UN Human Rights Council as part of the Special Procedures system. The Council has expressed deep concern that poverty persists in all countries of the world, regardless of their economic, social and cultural situation and has stressed that respect for all human rights – civil, political, economic, social and cultural rights – is of crucial importance in the fight against poverty. Through its resolutions 8/11 and 35/19, the Human Rights Council has requested the Special Rapporteur to, *inter alia*, examine the relationship between the enjoyment of human rights and poverty, identify approaches for removing obstacles to the full enjoyment of human rights for people living in poverty as well as identify the most efficient measures taken at the national, regional and international levels to promote the full enjoyment of the human rights of persons living in poverty. In order to fulfill his mandate, the Special Rapporteur undertakes country visits, submits annual reports to the Human Rights Council and the General Assembly, communicates with States and other concerned parties with regard to alleged cases of violations of the human rights of people living in poverty and social exclusion and engages in dialogue with governments, international organizations, civil society and other relevant actors on matters relating to his mandate.
3. It is customary to note in the context of amicus filings by UN Special Procedures mandate-holders that any submission by the Special Rapporteur is provided on a voluntary basis without prejudice, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, or of its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

B. THE INTEREST OF THE SPECIAL RAPPORTEUR IN THE CASE OF NJCM c.s./DE STAAT DER NEDERLANDEN (SyRI)

4. Since 2017, the Special Rapporteur has been looking into the implications of the increasing use of digital technologies in welfare states on the protection of the human rights of the poorest in society. During official country visits to the United States in 2017 and the United Kingdom in 2018, civil society actors and academics have underlined the severe human rights problems that emerge when welfare states turn into ‘*digital welfare states*’³ and the Special

¹ <https://www.ohchr.org/en/issues/poverty/pages/srextremepovertyindex.aspx>

² <https://www.ohchr.org/Documents/Issues/EPoverty/PhilipAlston.pdf>

³ <https://www.theguardian.com/commentisfree/2019/jun/27/britain-welfare-state-shadowy-tech-consultants-universal-credit>

Rapporteur has reflected his related concerns to the Human Rights Council.⁴ In October 2019, the Special Rapporteur will present a thematic report on digital welfare states and human rights to the United Nations General Assembly in New York.⁵ A great number of governments, civil society organizations and experts from around the world have been consulted for this thematic report and there are striking similarities (as well as contextual differences) in the types of human rights issues that emerge in digital welfare states around the world.⁶

5. Welfare state authorities have made use of digital innovations since at least the 1960s. As a result of a broader digital revolution, such innovations in the welfare state and other areas of government have increased in the past decades,⁷ but in recent years there appears to be a renewed and accelerated push toward digital government.⁸ The abundance of digital data available today, combined with rapid advances in computer power, storage and related innovations in the fields of data analytics and artificial intelligence have created a new impetus for digital government and digital welfare states.
6. From the Special Rapporteur's experience, welfare state authorities are often at the forefront of digital innovation within government. This can be explained in part by the large number of individuals who interact with the welfare state, the size of welfare state budgets and the opportunities new technologies offer to better administer such huge programs and bureaucracies. But digital innovation in the welfare state cannot be dissociated from broader trends in political discourse on the welfare state. Many countries have increasingly focused on reducing expenditure on welfare budgets, designed to make them more 'efficient' and 'cost-effective, reduce the number of individuals who receive benefits, introduce stricter requirements and controls on those who do receive government assistance and investigate and punish the supposedly large numbers of individuals who commit welfare fraud.⁹ Digital technologies are a common tool that governments turn to in order to implement such political objectives.
7. But despite the increased attention given to the use of digital technologies in other areas of government (notably in the military, intelligence, policing and immigration), there is still relatively little attention to digital innovation in social protection systems. What is more, the implications of these developments for the protection of human rights are often overlooked. One of the purposes of the thematic report by the Special Rapporteur to the General Assembly in October is to shine the spotlight on the specific human rights problems that result from the ways in which digital welfare states are pursued, and especially to highlight the consequences for the poorest in societies around the world.
8. The SyRI case is of particular interest to the Special Rapporteur for a number of reasons. First, this is one of the first legal challenges that the Special Rapporteur is aware of that fundamentally and comprehensively contests the systematic, legislatively sanctioned, use of digital technologies in the welfare state on human rights grounds.¹⁰ Second, this is the first example of litigation that the Special Rapporteur has come across in which the use of digital

⁴ See A/HRC/38/33/Add.1, para. 46; See A/HRC/41/39/Add.1, para. 59.

⁵ <https://www.ohchr.org/EN/Issues/Poverty/Pages/CallforinputGADigitalTechnology.aspx>

⁶ <https://www.ohchr.org/EN/Issues/Poverty/Pages/SubmissionsGADigitalTechnology.aspx>

⁷ Paul Henman, *Governing Electronically* (2010),

⁸ For the Netherlands, see, e.g.: 'NL DIGibeter: Agenda Digitale Overheid, July 2018, available from: <https://www.digitaleoverheid.nl/wp-content/uploads/sites/8/2018/07/nl-digibeter-agenda-digitale-overheid.pdf>; CBS, 'Verkennd onderzoek naar het gebruik van algoritmen binnen overheidsorganisaties', November 2018, available from: <https://www.cbs.nl/nl-nl/maatwerk/2018/48/gebruik-van-algoritmen-door-overheidsorganisaties>

⁹ David Garland, *The Welfare State: A Very Short Introduction* (2016).

¹⁰ This recent report gives an overview of other developments in Europe, but makes clear that relatively little litigation appears to be happening to challenge the human rights implications of 'digital welfare states': AlgorithmWatch, 'Automating Society: Taking Stock of Automated Decision-Making in the EU', January 2019, available from: https://www.bertelsmann-stiftung.de/fileadmin/files/BSI/Publikationen/GrauePublikationen/001-148_AW_EU-ADMreport_2801_2.pdf,

tools to prevent and detect *welfare fraud* has been challenged on human rights grounds.¹¹ Third, the Special Rapporteur has serious concerns about the specific targeting of poor and other vulnerable groups by the Dutch authorities through the SyRI system and the projects that preceded it. It appears that SyRI is predominantly used in areas where there are higher concentrations of such poorer and vulnerable groups, including poor neighborhoods in Capelle aan den IJssel,¹² Eindhoven,¹³ Haarlem,¹⁴ and Rotterdam.¹⁵ Finally, the Special Rapporteur considers that the involvement of such a diverse mix of civil society organizations in these legal proceedings is evidence of the widely shared concerns about the human rights implications of SyRI in civil society. The broad support for this litigation may reflect the genuine concern that while SyRI appears to be targeted especially at poorer groups in the Netherlands at present, this system and the type of risk-based surveillance it represents already affects a much broader group of individuals and is likely to affect everyone's rights in the near future.

9. In light of the legal precedent that this case may set in relation to the human rights protections of poor and vulnerable individuals affected by 'digital welfare states', both domestically and internationally, the Special Rapporteur would like to present his views on this case through this amicus brief. The Special Rapporteur, given his mandate, will underline the human rights implications of the use of SyRI for the poorest and most vulnerable individuals in the Netherlands. The Special Rapporteur is grateful to the District Court for taking this amicus brief into consideration and hopes that it may contribute to the present proceedings.

C. SyRI: A VERY BRIEF HISTORY

10. The Special Rapporteur attaches importance to highlighting here the experience with the forerunners to the SyRI system, because that history offers important insights into the potential implications of the SyRI system for the protection of the human rights of the poorest individuals who are most affected by it.
11. The early 2000s are a useful starting point, although the first steps toward data matching and analysis in the Dutch welfare system were taken even earlier.¹⁶ As the Special Rapporteur understands it, various authorities, including municipalities, welfare authorities, tax authorities, the Ministry of Social Affairs and Employment, police authorities and the Public Prosecution Service started intensifying and further institutionalizing their cooperation in relation to the enforcement of social security and employment legislation and regulation in the Netherlands in 2003.¹⁷ This took the shape of the so-called 'Landelijke Stuurgroep Interventieteams' ("LSI"). The objective behind this cooperation was to address social security fraud, illegal work, and tax fraud through more repressive controls and

¹¹ Valery Gantchev, 'Data protection in the age of welfare conditionality: Respect for basic rights or a race to the bottom?', *European Journal of Social Security* (Vol. 21 (1), 2019), p. 3-22.

¹² "In de genoemde buurten wonen de laatste jaren meer en meer bewoners die zich in het dagelijkse leven alleen maar bezig houden met overleven." <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/wob-verzoeken/2017/06/14/bsluit-wob-verzoeken-over-syri/40+-+54+%28Bestanden+Capelle%29.pdf>

¹³ "De wijk [information not made public] is een actiegebied voor de gemeente Eindhoven met betrekking tot de aanpak van werkloosheid, schuldenproblematiek en onveiligheid. Het bedrijventerrein [information not made public] kenmerkt zich door een bonte verzameling van, deels illegale, bedrijfsactiviteiten en illegale bewoning van voormalige bedrijfspanden. Er is sprake van verloederding." <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/wob-verzoeken/2017/06/14/bsluit-wob-verzoeken-over-syri/1+-+21+%28Bestanden+GALOP%29.pdf>

¹⁴ Schalkwijk, the district in Haarlem where a SyRI project was rolled out, has the highest number of poor households of any district in Haarlem: Schalkwijk also has the highest number of individuals with at least one parent who was not born in the Netherlands. <https://haarlem.incijfers.nl/>

¹⁵ The neighborhoods of Bloemhof and Hillesluis in Rotterdam rank at the bottom in terms of income levels in Rotterdam, and are among the neighborhoods in Rotterdam with the highest number of unemployed individuals and individuals on welfare benefits. https://rotterdam.buurtmonitor.nl/jive?cat_open=Beleids Thema%27s/Inkomen%20en%20Sociale%20Zekerheid/Inkomen; These are also neighborhoods with a high percentage of migrants: <https://www.volkskrant.nl/nieuws-achtergrond/veen-geld-om-bloed-te-laten-prikken-armoede-in-rotterdam-zuid-b2b0ac81/>

¹⁶ See Conclusie van antwoord, para. 4.4.

¹⁷ For more information, see: <https://www.naleving.net/themas/multidisciplinair-handhaven/dienstverlening/landelijke-stuurgroep-interventieteams/>

- investigation.¹⁸ Within the context of this cooperation, as well as in separate initiatives by various authorities, the exchange and analysis of digital data played an increasingly important role in preventing, detecting and investigating fraud and other illegalities.¹⁹ The pilots and other projects undertaken in the context of LSI paved the way for SyRI and the methods that had been used by LSI (including the ‘Black Box’ system) were the basis for the current SyRI system, now anchored in law.²⁰
12. In a 2012 report by the Inspectorate of the Ministry of Social Affairs and Employment, such use of digital data is described as having added value in several respects, including the ‘smart and effective detection of possible welfare fraud’, ‘reduction of administrative costs’, and a ‘preventative effect if it is known that the government is monitoring behind the scenes’.²¹ In an annex to that 2012 report, about 50 examples are given of project-based and more structural forms of data matching and analysis to detect benefit fraud. The report by the Inspectorate highlights a few cases of such data exchange and analysis between 2006 and 2012.
 13. One set of projects (‘Waterproof’ or ‘Waterproof’) implemented between 2006 and 2010, involved 60 municipalities and 63,000 individuals who received a (WWB) welfare benefit intended for those who have no other form of income or assets and are not entitled to other forms of government financial assistance.²² To identify so-called ‘living together’ benefit fraud (a situation where a beneficiary claims to be living alone to receive a higher benefit, yet lives together with another individual) databases from drinking water companies and welfare authorities were matched. If, at a certain address, there was a particularly low amount of water usage on a yearly basis, this was considered a ‘risk indicator’ for ‘living together’ fraud. This data matching exercise automatically flagged 457 individuals as ‘at risk’ and a final number of 404 individuals were considered ‘at risk’ after a next step of human assessment and/or correction. After a further investigation, 42 individuals were found to have committed ‘living together’ fraud. That means that 63,000 individuals receiving a welfare benefit were screened to eventually arrive at 42 cases of fraud, equalling a success rate of 0,07%. In one of the subprojects, 20% of the cases that were flagged as ‘higher risk’ turned out to be erroneous (for instance because the low level of water usage was caused by a broken water meter instead of actual low usage).
 14. A second case described in the 2012 report by the Inspectorate mentions the project ‘Kadastercheck’ in the North-East of the Netherlands (Groningen, Overijssel, Gelderland, Flevoland).²³ This project finished in 2010 and involved 130 municipalities. The digital data of 119,000 welfare (WWB) beneficiaries in those 130 municipalities was matched with data concerning the ownership of real estate. This automated matching exercise led to matches for 3,800 individuals (presumably this means that the names of 3,800 individuals with a WWB benefit were found in the Kadaster register). Those matches were shared with the individual municipalities, and these municipalities eventually gave feedback to the LSI concerning 181 individuals. In 117 cases, some form of ‘illegality’ (‘onrechtmatigheid’) or fraud was established and in 10 cases the benefit was terminated. That means that 119,000 individuals

¹⁸ *Kamerstukken II* 2002-2003, 170 50, no. 248, p. 2.

¹⁹ Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012.

²⁰ “De techniek die in het instrument SyRI een wettelijke basis heeft gekregen, werd overigens ook vóór de inwerkingtreding van de wettelijke regeling al in de praktijk ingezet. De aanleiding tot de ontwikkeling van deze techniek was project ‘Waterproof’ (soms ook vermeld als ‘Waterproof’, zie ook hoofdstukken 8 en 10): waterverbruik, gemeten door nutsbedrijven, werd gekoppeld aan adressen van uitkeringsgerechtigden. In die fase (2008-2010) stond deze techniek bekend als de genoemde ‘Black Box’. [...] De risicoanalyse is door de toenmalige SIOD (later Inspectie SZW) ontwikkeld en toegepast. De Black Box was de basis voor het instrument SyRI.” Wetenschappelijke Raad voor het Regeringsbeleid, ‘Big Data voor Fraudebestrijding’, WRR Working Paper no. 21 (2016), p. 100.

²¹ Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012, p. 9-10.

²² Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012, p. 21-22.

²³ Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012, p. 22-23.

receiving a welfare benefit were screened to eventually arrive at 117 cases of ‘illegality’ or fraud, equalling a success rate of 0,1%.

15. The third case described by the Inspectorate in its 2012 report is a project targeted at the municipality of Vlissingen, and more specifically the neighborhood of ‘Middengebied’. Middengebied has a disproportionate number of poor, unemployed, migrant and benefit-receiving inhabitants.²⁴ LSI started a project there that ended in 2011 and which was aimed at investigating and reducing ‘unwanted behavior’ (benefit fraud, tax fraud, illegal habitation, illegal work, small criminality and ‘other forms of nuisance’) as well as non-use of income support and other forms of social support. Internal databases of various departments of the municipality were matched by the foundation ‘Intelligence Agency’ (Inlichtingenbureau) and analyzed by the Ministry of Social Affairs and Employment (SIOD). This automated analysis resulted in a list of individuals who should face further investigation, euphemistically referred to as ‘objects of wonderment’ (‘verwonderobjecten’). Other individuals were added at the discretion of ‘experts who were involved in the action’. It is unclear whether the authorities used data involving the entire population of Middengebied (around 10,000 inhabitants) or only a subset, but this data matching and analysis exercise led to 193 welfare beneficiaries (WWB) being subject to further investigation. Of these 193, there were 35 individuals who were flagged as potential fraudsters, 117 as potential fraudsters who might also need social support and 31 individuals who might need social support (note that this adds up to 183 individuals, not 193). After further investigation, 16 benefits were terminated, and 9 municipal benefits were altered (unclear how exactly). Again, the success rate appears very low.
16. According to a 2016 report, the LSI ran a total of 22 projects between 2008 and 2014 using the method that would later become known as SyRI.²⁵ What is clear from this list of projects, is that SyRI has consistently been rolled out in poorer and more vulnerable areas of municipalities, including such neighborhoods as Kanaleneiland in Utrecht,²⁶ De Vergt in Zaltbommel,²⁷ Donderberg in Roermond,²⁸ and Tongelre in Eindhoven.²⁹ These projects were stepping stones towards SyRI³⁰ in its current legislative form and are therefore relevant to the present proceedings.
17. SyRI was subsequently entrenched in legislation in 2014 (via Wet SUWI and Besluit SUWI). Two reasons for anchoring SyRI in law stand out. First, there was a clear intent to bolster the ever-harsher approach toward benefit fraud (most recently legislated through the 2013 ‘Fraudewet’) by using digital technologies and digital data.³¹ Second, the Dutch government expected that years of concerns expressed about violations of the right to privacy and the right to data protection by regulators would be resolved once and for all by anchoring SyRI into law and thereby providing the system with a legal basis.³²

D. THE SPECIAL RAPPORTEUR’S HUMAN RIGHTS CONCERNS ABOUT SyRI

²⁴ <https://www.omroepzeeland.nl/nieuws/95688/Middengebied-geen-gemiddeld-gebied>

²⁵ Wetenschappelijke Raad voor het Regeringsbeleid, ‘Big Data voor Fraudebestrijding’, WRR Working Paper no. 21 (2016), p. 106.

²⁶ <https://www.ad.nl/utrecht/weer-meer-utrechtters-leven-in-armoede~a6072a48/>

²⁷ <https://www.volkskrant.nl/nieuws-achtergrond/waarom-zaltbommel-niet-het-raqqa-aan-de-waal-is~bd4f9035/>

²⁸ <https://www.1limburg.nl/reputatie-donderberg-roermond-wordt-maar-niet-beter>

²⁹ <https://www.ed.nl/overig/geld-voor-aanpak-wijk-in-tongelre~aa2204a8/>

³⁰ The link between LSI and SyRI has been formalized in Article 1.1 bb of the Besluit SUWIL: Authorities that would like to make use of SyRI also need to be a party to the LSI Covenant.

³¹ Wetenschappelijke Raad voor het Regeringsbeleid, ‘Big Data voor Fraudebestrijding’, WRR Working Paper no. 21 (2016), p. 99.

³² Wetenschappelijke Raad voor het Regeringsbeleid, ‘Big Data voor Fraudebestrijding’, WRR Working Paper no. 21 (2016), p. 108-110; “De gestructureerde gegevensverwerking met de inzet van SyRI is in overleg met het College Bescherming Persoonsgegevens (CBP) destijds zo ingericht dat privacy van betrokkenen zoveel mogelijk is gewaarborgd. In de voorliggende wetswijziging wordt de in de interventiepraktijk beproefde manier van gegevensverwerkingen wettelijk geregeld en aan inzichten van het CBP aangepast.” Wijziging van de Wet structuur uitvoeringsorganisatie werk en inkomen en enige andere wetten in verband met fraudeaanpak door gegevensuitwisselingen en het effectief gebruik van binnen de overheid bekende zijnde gegevens, Memorie van toelichting, *Kamerstukken II* 2012-2013, 33579, nr. 3; See also: Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012, p. 10-11.

18. The Special Rapporteur has a number of concerns about the impact of the use of SyRI on the human rights of the poorest and most vulnerable in the Netherlands, and these are addressed below. He considers that the history of SyRI – as very briefly recounted above – is relevant to those concerns, but he will also specify below his concerns with specific elements of SyRI as currently legislated. He would like to caution against the common – and very human – impulse to assess a system or legislation by comparing it to what came before and to equate improvements with legality. In contrast, he considers that SyRI should be analyzed in terms of the threat it represents to human rights as currently legislated and implemented.

(i) The right to social security

19. The first concern of the Special Rapporteur about SyRI relates to the human right to social security, a fundamental human right firmly established in key international human rights texts. Article 22 of the 1948 Universal Declaration of Human Rights (UDHR) recognizes the right to social security, while article 25 of the UDHR recognizes the right to an adequate standard of living, including “necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. The right of everyone to social security, including social insurance, was subsequently included in article 9 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by 169 states, including the Netherlands. The right to social security was incorporated in a range of other international human rights treaties ratified by the Netherlands, including the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 5 (e) (iv); 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), articles 11, para. 1 (e) and 14, para. 2 (c); and 1989 Convention on the Rights of the Child (CRC), article 26. The European Social Charter furthermore recognizes the right to social security and to social assistance (article 12 and 13). While the European Convention on Human Rights (‘Convention’) does not recognize a separate right to social security as such, because this particular human rights treaty codifies mostly civil and political rights, the Convention nevertheless has relevance to the enjoyment of the right to social security in a variety of ways.³³ Finally, the right to a basic safety net (‘bijstand’) for those who cannot provide for themselves, has been recognized in article 20 (3) of the Dutch Constitution.
20. The idea of social security and assistance as a matter of right is firmly entrenched in postwar international human rights law (with historical roots predating the postwar international legal order). This idea of social security as a right means that government has obligations to provide support and the individual is entitled to that support as of right. Yet, while firmly established now in international law, the notion of social security as a right has long been contested. T.H. Marshall has written about how, well into the 20th century, social rights were divorced from the idea of citizenship and how the poor could only claim government assistance if they gave up basic civil and political rights.³⁴ The American legal scholar Charles A. Reich, wrote in 1965 how, despite the recognition of social security as a right in the United States in the 1930s, those receiving government assistance were still treated as second-class citizens who lacked fundamental procedural safeguards against bureaucratic arbitrariness and faced serious infringements of their constitutional rights to privacy and equal

³³ The right to a fair trial in article 6 (1) ECHR has been applied to disputes involving the right to social security by the European Court of Human Rights. The right to social security has, in certain circumstances, been considered a ‘possession’ by the Court under article 1 of Protocol No. 1 to the ECHR. The Court has furthermore considered article 2 (right to life), 3 (prohibition of torture), 8 (right to privacy) and 14 (prohibition of discrimination) in relation to social security rights. For a good overview, see: Council of Europe, ‘Social security as a human right’ (2007), available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-23\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-23(2007).pdf); See also: Ingrid Leijten, ‘Social Security as a Human Rights Issue in Europe – Ramaer and Van Willigen and the Development of Property Protection and Non-Discrimination under the ECHR’, *ZaöRV* 73 (2013), p. 177-208

³⁴ T.H. Marshall, *Citizenship and Social Class* (1950).

protection under the law.³⁵ Reich described a long history of conceptualizing welfare as handouts by the state, which required strict control on this form of voluntary expenditure: “With these justifications at hand, recipients have been subjected to many forms of procedure and control not imposed on other citizens. No one will deny that fair and reasonable eligibility standards and effective protection against fraud are necessary when benefits are handed out. But the poor are all too easily regulated.”³⁶

21. While much has changed since Marshall and Reich wrote their analyses, much has also remained the same (or changed for the worse again). The poor are still ‘all too easily regulated’, and political currents that have gained traction in many countries in recent decades have sought to undermine and delegitimize the human right to social security. Since the 1980s, welfare states across the globe have come under a sustained assault: “The welfare state was [portrayed as] a socialist monstrosity sapping the nation’s spirit and ruining its economy. The public sector was costly, bureaucratic and inefficient. Welfare clients were cheats and scroungers. Handouts were the opium of the masses, leading to dependency, idleness, drugs and crime.”³⁷ As McKeever has explained in relation to developments in the UK and Australia, the focus on benefit fraud in recent decades is a renewed and stealthy attempt to revoke the social citizenship and social rights of the poorest in society.³⁸ The right to social security, a key principle underlying the idea of a welfare state, has regularly been portrayed in recent decades as a violation of the right to property and not a ‘real’ human right to begin with.³⁹
22. The present proceedings should be located within the wider context of reforms aimed at undermining the human right to social security. Indeed, the experimentation with data matching and analysis in the Netherlands since 2003 has coincided with an ever-stronger push to detect and prevent benefit fraud. The legislative implementation of SyRI took place around the same time as the passing of the ‘Fraudewet’, which is an attempt to more strictly enforce and punish fraud in the welfare context. The use of digital tools to pursue welfare fraud is therefore not a neutral development, but part of a partisan political trend. In this environment, welfare recipients, especially those who receive non-contributory assistance designed to assist the poorest in society, are regularly depicted as second-class citizens intent on defrauding the state and the community. In such an atmosphere, which is not uncommon in a range of countries around the world today, digital tools are being mobilized to target disproportionately those groups that are already more vulnerable and less able to protect their social rights.
23. The Committee on Economic, Social and Cultural Rights (“CESCR”), the UN treaty body overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights, has interpreted the human right to social security in article 9 of the ICESCR to mean that any qualifying conditions for receiving welfare benefits must be “reasonable, proportionate and transparent.” What is more, the “withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.”⁴⁰ There can be no doubt that SyRI can affect the right to social security of individuals in the Netherlands, because the use of this system determines whether a welfare beneficiary is flagged for further investigations that may lead (and have led) to the withdrawal, reduction or suspension of individual welfare benefits.

³⁵ Charles A. Reich, ‘Individual Rights and Social Welfare: The Emerging Legal Issues’, 74 *Yale L.J.* (1965), p. 1245-1257.

³⁶ Charles A. Reich, ‘Individual Rights and Social Welfare: The Emerging Legal Issues’, 74 *Yale L.J.* (1965), p. 1245.

³⁷ David Garland, *The Welfare State* (2016), Chapter 7; See also: Frances Fox Piven, ‘Neoliberalism and the welfare state’, *Journal of International and Comparative Social Policy* (Vol. 31:1, 2015), p. 2-9.

³⁸ Gráinne McKeever, ‘Social Citizenship and Social Security Fraud in the UK and Australia’, *Social Policy & Administration* (Vol. 46:4, 2012), p. 465-482.

³⁹ Hartley Dean, *Welfare Rights and Social Policy* (2014), p. 61-62.

⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment no. 19 (The Right to Social Security), E/C.12/GC/19, 4 February 2008, p. 8.

Since SyRI may affect the human right to social security, the operation of this system should meet the fundamental safeguards provided by the CESC and other human rights treaties.

24. But the lack of fundamental, procedural, safeguards surrounding SyRI is precisely one of its main shortcomings. *First*, article 64 and 65 of the ‘Wet SUWI’ as well as chapter 5a of the ‘Besluit SUWI’ appear to lack clarity to such a degree that an average welfare beneficiary – or any other individual - would be unable to form any reasonable expectation in advance about how the use of SyRI would affect his or her rights. The overall goal of the legislation,⁴¹ the particular government authorities potentially involved in a specific SyRI project,⁴² as well as the categories of data that may be used,⁴³ are so broad that an average welfare beneficiary (or any lawyer, judge or other individual well-versed in legal language for that matter) will have only an extremely general idea at best about the functioning of SyRI and how it might affect them individually. *Second*, crucial information that would enable a welfare beneficiary or his or her lawyer to form a basic notion of what goes on in a *specific* SyRI project is deliberately kept secret. This applies to the *request itself* for a SyRI project by cooperating government authorities,⁴⁴ but also to which databases and what exact data are actually matched in a concrete SyRI project,⁴⁵ to the precise indicators used to predict risk, as well as to the inner workings of the algorithm that produces the risk score.
25. The government has denied access to information about the ‘risk models’ used (i.e., the algorithm used, the precise risk indicators, the precise input data and the exact output that the risk model produces). The argument used here has been invoked in many different countries and contexts to argue against basic standards of transparent decision-making: “Door vrij te geven naar welke gegevens en verbanden de Inspectie SZW kijkt, kunnen (potentiële) overtreders precies weten op welke registraties zij zich moeten richten.”⁴⁶ According to the government, the public interest in investigating and prosecuting crimes as well as in inspections, controls and monitoring by public authorities, weighs more heavily than the public interest that those affected should be able to obtain information about these systems and how they function exactly, as well as their interest in knowing how their social rights are affected. The government reasons that if information were to be made available about these risk models, (potential) violators (of which law specifically remains unclear), would be able to ‘game the system’ by knowing exactly which ‘registrations’ to pay attention to.
26. While this argument is understandable from the perspective of a government attempting to be maximally efficient in cracking down on welfare fraud, it runs counter to other important principles, including that of the rule of law. In democracies, laws are made public, among other reasons, in order for citizens to know what is expected of them, in order for laws to be

⁴¹ Article 64 (1) Wet SUWI: “[...] voorkoming en bestrijding van onrechtmatig gebruik van overheidsmiddelen en overheidsvoorzieningen op het terrein van de sociale zekerheid en de inkomensafhankelijke regelingen, de voorkoming en bestrijding van belasting- en premiefraude en het niet naleven van arbeidswetten [...]”.

⁴² Article 64 (1) Wet SUWI: “de colleges van burgemeester en wethouders, het Uitvoeringsinstituut werknemersverzekeringen en de Sociale Verzekeringsbank [...] de personen die bij of krachtens wettelijk voorschrift zijn belast met het houden van toezicht op de naleving dan wel de uitvoering van de regelgeving op het terrein van Onze Minister [...] de Belastingdienst [...] andere bestuursorganen en personen [...]”.

⁴³ See the long list in Article 5a.1 (3) Besluit SUWI.

⁴⁴ Article 65 (1) Wet SUWI. It was necessary to file a freedom of information request to receive basic information about how such requests come about, but part of that information asked for was shielded by broad exceptions in the relevant law and the request to the Minister itself is not made public. What is more, information on projects from before 2014 were not made public at all in response to a freedom of information request. See: <https://www.rijksoverheid.nl/documenten/wob-verzoeken/2017/07/05/besluit-wob-verzoeken-over-syri>

⁴⁵ Article 5a.1 (3) Besluit SUWI is an incredibly broad set of categories of data which may be used in a SyRI project. When a concrete SyRI project is rolled out, there is no further information made public about what data is matched exactly. See for example this text from a very brief announcement of a SyRI project in Haarlem: “Als eerste stap van deze integrale aanpak worden met de toepassing van het risicomodel in SyRI gegevens uit de bestanden van de gemeente, de Belastingdienst, het Uitvoeringsinstituut Werknemersverzekeringen, de Sociale Verzekeringsbank, de Immigratie- en Naturalisatiedienst en de Inspectie SZW, met elkaar vergeleken.” The claim that the extremely broad scope of data exchange which this allows for is meaningfully restricted by the objectives of a concrete SyRI project is somewhat laughable, because these are the objectives in the Haarlem SyRI project (typical of other such projects, it appears): “De doelstelling van het interventieteamproject in de wijk Schalkwijk te Haarlem is het leveren van een bijdrage aan de verbetering van de naleving van wet- en regelgeving, veiligheid en leefbaarheid in deze wijk. Dit geschiedt door middel van de integrale aanpak van: uitkeringsfraude; belastingfraude; illegale bewoning en bebouwing; Illegale bedrijfsactiviteiten; overlastgevendende situaties en daarmee samenhangende misstanden.” See: <https://zoek.officielebekendmakingen.nl/stcrt-2018-12088.html>

⁴⁶ See Productie 17 of plaintiffs.

subject to public scrutiny and in order to ascertain, including via the judicial process, whether laws are properly applied and enforced and in line with higher principles, including international human rights law. It might be argued by some that risk models, like the ones used in the SyRI system, are not law, but just matters of internal procedure which do not have to meet the same strict standards of the rule of law. However, since these risk models play a crucial role in determining whose right to social security may be affected and who may be the subject of intrusive scrutiny of their data and person, and may cause significant hardship to individuals, they are a matter of *public concern*, not a matter only of *internal concern to welfare bureaucracies*. At the same time, the public provisions of article 64 and 65 Wet SUWI and chapter 5a of Besluit SUWI fail to clarify the inner workings of the secret risk models used in SyRI and therefore do not alleviate the above-mentioned concerns.

27. The Special Rapporteur cannot comment on the specific political and public policy reasons for keeping these risk models secret, but in his view, the burden of proof would fall upon the government to explain convincingly – and in terms that go beyond general remarks about the ‘gaming of the system’ – why more openness about such an important system is impossible. Any such analysis would also need to demonstrate that adequate account has been taken of the impact on the human rights of affected individuals. This would in turn need to be weighed against the government’s justifications for such stringent levels of secrecy. The Special Rapporteur would also underline the significance of the fact that the overwhelming majority of welfare recipients in the Netherlands are clearly not committing fraud and have a right not to be singled out for disproportionately intrusive monitoring which can have a variety of negative and unjustified consequences.

(ii) The right to privacy

28. SyRI runs on data collected by various public authorities in the Netherlands. In essence, it matches data in a multitude of government databases and on that basis seeks to predict the likelihood that an individual will violate a range of laws. Each of these individual databases, or siloes, already contains information capturing elements of the private lives of people living in the Netherlands. The reality for any individual is that government authorities already know your name, your gender, where you live, when you were born, whether you work, whether you receive any benefits or assistance etc. As the Special Rapporteur understands it, SyRI’s risk model takes data from siloed databases, which were originally collected for and justified by reference to specific purposes, connects the data in ways that were neither announced nor foreseen, and draws conclusions from the matching and analysis exercise. A very intimate picture of an individual’s private life emerges from that highly intrusive process. For the right to privacy to be affected by SyRI, it does not matter that the individuals involved may not have been inconvenienced in any way,⁴⁷ although it should be mentioned that those individuals who are flagged as a ‘high risk’ by this data matching exercise are ‘inconvenienced’ quite significantly by becoming the object of government scrutiny and all the consequences that may result from it. And those who are not considered ‘high risk’ are inconvenienced by the mere fact that their data is subjected to a significantly higher level of analysis than is applied to individuals who are not flagged by the discriminatory criteria, and that negative consequences can well result.
29. The Special Rapporteur believes that the *essence* of the right to privacy is at stake here. Whole neighborhoods are deemed suspect and are made subject to special scrutiny, which is the digital equivalent of fraud inspectors knocking on every door in a certain area and looking at every person’s records in an attempt to identify cases of fraud, while no such scrutiny is applied to those living in better off areas. In the real world, there would never be enough fraud inspectors to undertake such an exercise and the general public would quickly resist and protest against such invasions of their privacy. The fact that SyRI operates in the digital realm

⁴⁷ See: Court of Justice of the European Union, Case C-293/12 (Digital Rights Ireland), 8 April 2014, para. 33.

and not in the real world is little solace, however, for those affected by it. The psychological and other effects of a physical raid on a neighbourhood by fraud inspectors is relatively easy to imagine, but a digital raid on such a scale leaves equally problematic traces. That SyRI operates in relative silence and is *de facto* invisible to the naked eye may actually add to the unease and prejudice suffered by those living in those areas.

30. A key question in this case is whether there is a ‘*pressing social need*’ for SyRI which would justify its level of intrusion on the privacy of those affected by it. The Special Rapporteur fully accepts the undoubtedly reasonable objective of reducing benefit fraud. But the question for the court is whether the focus in the Netherlands and in other countries on the supposedly omnipresent ‘welfare cheat’ reflects the actual incidence of fraud and the consequences thereof or is in reality a function of ideologically-driven narratives reflecting discriminatory and prejudicial notions about the proclivities of the poor, the unemployed and migrant populations to engage in such fraud, while the well-off members of the population are largely exempt from such concerted and narrowly targeted monitoring.⁴⁸ There is no question that welfare fraud exists and that it should be punished. But if the focus on fraud seen to be committed by the poor is highly disproportionate to equivalent efforts targeted at other income groups, there is an element of victimization and discrimination that should not be sanctioned by the law.
31. Clearly, in the context of legal proceedings, there are significant grounds for accepting as a starting point the principle that the detection and punishment of welfare fraud is a ‘*pressing social need*’.⁴⁹ But this analysis leads to the next level of inquiry which concerns the extent to which such fraud exists, not merely in the rhetoric of politicians or the headlines of tabloid newspapers, but in actual government statistics. A program that singles out such alleged fraud as a basis on which to adopt stringent and highly intrusive measures would need to be carefully and fully justified in order to dispel concerns that it is a politically driven campaign directed at the most vulnerable members of society. The issue of whether welfare fraud is in fact a major problem is of great relevance to the question of whether deep privacy intrusions in the context of SyRI are justifiable and is therefore central to these proceedings. The court should adopt a high standard of proof for the government to demonstrate any pressing social need since accepting the narrative that welfare fraud is widespread and deeply problematic has major consequences. As the brief by FNV underlines, a singular focus on welfare fraud to the exclusion or downplaying of many other challenges both in the welfare system but also the tax system and other areas in which the government provides benefits has led to the adoption of a tunnel vision by government authorities.⁵⁰ In fact, the available evidence points to the conclusion that suspected welfare fraud cases in the Netherlands (and elsewhere) are much more likely to be the result of error, caused by a range of contextual circumstances in which poor and vulnerable people live, such as their (digital) illiteracy.⁵¹
32. Another important question in this case is the *proportionality* of the infringement on privacy, (as well as the right to social security) resulting from the SyRI system compared to the purported benefits of such a trade-off. In light of the serious impact of SyRI on these rights, the Special Rapporteur believes that a particularly stringent proportionality assessment is in order. Such a stringent assessment by the court is all the more needed given the lack of legislative scrutiny accorded to SyRI before its adoption. As the government underlines in its reply to plaintiffs, passing SyRI into law was a mere formality (‘*hamerstuk*’).⁵² For whatever

⁴⁸ “The assault on welfare states began with a battle for hearts and minds. Reform proposals were accompanied by a steady drumbeat of criticism, in which welfare states were demeaned and demonized. The welfare state was a socialist monstrosity sapping the nation’s spirit and ruining its economy. The public sector was costly, bureaucratic, and inefficient. Welfare clients were cheats and scroungers. Handouts were the opium of the masses, leading to dependency, idleness, drugs, and crime.” David Garland, *The Welfare State: A Very Short Introduction* (2016), p. 107.

⁴⁹ Conclusie van Antwoord, para. 6.5.1 and further.

⁵⁰ Akte uitlating van de FNV, para. 1.7.

⁵¹ <https://www.ohchr.org/Documents/Issues/Poverty/DigitalTechnology/ITCU.pdf>

⁵² Conclusie van Antwoord, para. 4.4.

reasons, Parliament appears to have had little interest in or understanding of how SyRI works, judging from the lack of an oral debate and the limited written questions asked by legislators,⁵³ despite severe criticism by other constitutional institutions. It is telling that the then-head of the Dutch privacy regulator, Jacob Kohnstamm, publicly denounced the passing of SyRI into law as ‘dramatic’ (‘dramatisch’).⁵⁴

33. To assess the proportionality of SyRI, it is important to analyze its ability to achieve the purported objective of reducing benefit fraud. One striking feature of the projects that ultimately led to anchoring SyRI in law is their low success rate. In the Waterproef project, 63,000 welfare beneficiaries in 60 municipalities were the object of suspicion, yet only 42 individuals were found to have committed ‘living together’ fraud. In the Kadastercheck project, 119,000 welfare beneficiaries in 130 municipalities were on the radar of the authorities, yet only 10 benefits were terminated as a result. And in Middengebied in Vlissingen, which has around 10,000 inhabitants, only 16 benefits were ultimately terminated. Interestingly, the government was quite open in Parliament about these low success rates by mentioning a pilot project (one of the ‘Waterproof’/‘Waterproef’ pilots) where a data matching exercise involving 15,000 individuals identified only 5 new cases of fraud.⁵⁵ Why SyRI would be more effective at detecting and preventing benefit fraud remains unclear.
34. But even if these success rates were to be considered acceptable, the benefits would have to be weighed against the costs involved. The direct benefits of SyRI remain rather vague however. The government has refused to indicate how much money SyRI and its predecessors ‘deliver’ in terms of detected fraud and recovered benefits.⁵⁶ A WRR-report investigating predecessor systems to SyRI between 2008 and 2014 (22 SyRI-like projects in total), mentions benefits totalling 12 million euros over this 6-year period, equalling a relatively limited (especially when compared to other forms of fraud⁵⁷) 2 million euros per year.⁵⁸
35. In terms of direct costs, the government indicated during the legislative process that SyRI would cost only 264.000 euros per year. In the current proceedings, the government has indicated that this amount has risen to 325.000 euros per year.⁵⁹ But there is no transparency that would enable the court to verify whether 325.000 euros per year is an accurate estimate of the real financial costs involved in the operation of SyRI. The Special Rapporteur would question, for example, how much public money was spent over the years to develop the SyRI system, including the possible costs involved in purchasing outside consultancy services and licensing fees for the use of intellectual property involved in the risk models used. What is more, the amount of 325.000 euros does not appear to include expenses in terms of human resources. Indeed, the number of civil servants involved in the SyRI process as well as in subsequent enforcement measures must be quite considerable, and that is not including the work done by the ‘Inlichtingenbureau’.
36. Over and above financial costs, there are other costs involved in the operation of SyRI that are difficult to measure, but all too real in their consequences. One fact which is particularly concerning, and resonates with the Special Rapporteur’s findings in other countries, is the discriminatory impact of SyRI and how this may further fuel existing inequalities. Most of the projects preceding the legislation of SyRI as well as projects rolled out since then are specifically targeted at those at the bottom of the social safety net (‘Bijstand’), the

⁵³ *Kamerstukken II* 2012-2013, 33 579, no. 7.

⁵⁴ <https://leenvandaag.avrotros.nl/item/jacob-kohnstamm-uit-zorgen-over-syri/>

⁵⁵ *Kamerstukken II* 2012-2013, 33 579, no. 7.

⁵⁶ “Er worden voor dit vorstel om die reden geen afzonderlijke opbrengsten ingeboekt.” *Kamerstukken II* 2012-2013, 33 579, no. 7; “De resultaten van de inventarisatie geven een onvolledig beeld over de opbrengst van de bestandskoppelingen in termen van het aantal gevallen waarin fraude of onrechtmatig gebruik van uitkeringen is vastgesteld.” Inspectorate of the Ministry of Social Affairs and Employment, ‘Bestandskoppeling bij fraudebestrijding: Nota van bevindingen’, June 2012, p. 20; see also: <https://algorithmwatch.org/en/story/high-risk-citizens/>

⁵⁷ <https://www.cpb.nl/sites/default/files/omnidownload/CPB-Policy-Brief-2019-01-Conduit-country-the-Netherlands-in-the-spotlight.pdf>

⁵⁸ Wetenschappelijke Raad voor het Regeringsbeleid, ‘Big Data voor Fraudebestrijding’, WRR Working Paper no. 21 (2016), p. 107.

⁵⁹ Conclusie van Antwoord, para. 6.56.

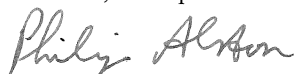
unemployed, and migrants and at the specific geographical areas in which they live. Those who are targeted by SyRI are those least likely to be able to defend themselves against the intrusions and the resulting negative consequences. This is part of a global phenomenon of digital government adversely affecting the poorest in society particularly.⁶⁰ And this is evident from other related cases as well, including the recent commotion around the denial of childcare benefits by the Dutch tax authorities to families with a second nationality.⁶¹

37. In the context of an appropriately demanding proportionality assessment, the Special Rapporteur believes the burden lies with the government to provide evidence that dispels the suspicion that the singular focus of SyRI on poor and marginalized groups in Dutch society is justified in light of available government statistics. An important test in this regard would be whether similar levels of intrusiveness that are evident in the context of the SyRI system would also be considered acceptable if well-off areas and groups were involved instead of poor ones. These considerations affect the proportionality assessment in this case, but are also relevant in light of an assessment of whether SyRI discriminates on prohibited grounds, including on the basis of race, colour, national or social origin, property, or birth status.⁶² In light of the above, it is relevant to take into account the apparent discrepancy between the approach to fraud committed by those at the bottom of the Dutch safety net and other types of fraud committed in the Netherlands. In November 2018, for example, the Dutch Tax Authority halted a pilot project analysing images from roadside cameras to automatically detect tax fraud by individuals driving company cars, but using those cars privately without paying relevant taxes ('bijtelling').⁶³ The Dutch Tax Authority concluded that it was not possible to undertake this automated assessment without violating the right to privacy of those driving company cars.⁶⁴ The following quote by Dutch journalist Bart de Koning, who did extensive research on the discrepancy between enforcement of benefit fraud and tax fraud in the Netherlands, is relevant in this context: "Bij de FIOD openen ze niet eens een dossier als het om een bedrag van enkele duizenden euro's gaat, dan moeten ze zeker een paar miljoen kunnen plukken."⁶⁵ It is also not without relevance to this case that the European Parliament has recently labeled the Netherlands a 'tax haven'.⁶⁶

E. CONCLUSION

38. The Special Rapporteur would like to express his gratitude to the District Court for its consideration of this amicus brief. He will continue to follow this case with great interest. The SyRI system, as well as the use of other digital technologies in the Netherlands and many other countries that are transforming welfare states into 'digital welfare states', pose significant potential threats to human rights, in particular for the poorest in society. These systems should therefore be scrutinized accordingly, not just by courts, but by governments, legislators and the whole of society.

New York, 26 September 2019



Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights

⁶⁰ Madden et al., 'Privacy, Poverty and Big Data: A Matrix of Vulnerabilities for Poor Americans', 95 *Washington University Law Review* 53 (2017); Khiara M. Bridges, *The Poverty of Privacy Rights* (2017); Virginia Eubanks, *Automating Inequality* (2018).

⁶¹ <https://www.trouw.nl/nieuws/discrimineert-de-belastingdienst-onderzoek-gestart-naar-etnisch-profileren-b8c97834/>

⁶² International Covenant on Economic, Social and Cultural Rights, article 2 (2). International Covenant on Civil and Political Rights, article 2 (1).

⁶³ https://www.telegraaf.nl/financieel/2751477/fiscus-stopt-met-flitsen-voor-bijtelling?utm_source=google&utm_medium=organic

⁶⁴ Belastingdienst, 22e halfjaarsrapportage (2018), p. 6.

⁶⁵ <https://bijvoorbeeldverdacht.nl/gedachte-burgers-potentiele-fraudeurs-zit-systemen-als-syri-gebakken/>

⁶⁶ <https://www.icij.org/investigations/luxembourg-leaks/seven-eu-countries-labeled-tax-havens-in-parliament-report/>