Application of M. Jonker on 25 February 2022 to the European Court of Human Rights (ECtHR)

/ Verzoekschrift M. Jonker op 25 februari 2020 aan het Europese Hof voor de Rechten van de Mens

Public transport - a Railroad to Surveillance?

Piecemeal Elimination of Privacy by Discriminatory Means

/ Openbaar vervoer - enkele reis naar "Track & Trace"?

Stapsgewijze vernietiging van privacy met behulp van discriminerende maatregelen

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E. Statement of the facts

--- What is at stake: freedom of movement with privacy in the Netherlands and in the EU / Schengen Area ---

Until June 2014 Dutch citizens who travelled by public transport in the Netherlands, were free to travel on any train or bus without losing (part of) their privacy and without being discriminated if they chose not to divulge their identity to the public transport company. They could buy a paper ticket and use that separately or in combination with a personal card that showed they had a special right to a reduced price, for instance during the hours outside rush hours ("Voordeeluren-kaart", VDU). Typically, these reduction cards were valid for a number of years and had to be paid for once a year. During the trip, the train conductor could check the ticket and, if it had been bought against a reduced price, the reduction card.

Since about 2008, the Dutch National Railways (Nationale Spoorwegen, NS) also offered and promoted a chipcard that could be used as a ticket, the so-called "OV-chipkaart". With this card, a traveller had to "check in" at the point of departure and to "check out" at the point of arrival, and sometimes halfway the trip, when changing trains or buses. In order to reassure the Dutch parliament and some Dutch citizens who were concerned about the fact that the OV-chipkaart made it possible to register every single trip of every individual traveller, NS also offered a so-called "anonymous OV-chipkaart" and told the parliament and citizens that the users of this card could not be traced when using public transport, because it was a card on which money could be loaded by anybody and it could be used by anybody.

In June/July 2014 the Dutch National Railways (NS) ended the possibility to buy paper tickets. The only options that remained for those who wanted to continue to travel with privacy, were (a) the "anonymous OV-chipkaart"; and (b) single tickets with a chip, that could be used for "checking in" and "checking out". The third options was (c) a "personal" or "personalized OV-chipkaart", which offered no privacy. Parts of train stations, which had in practice been public space until then, were closed off by metal fences and automated gates that could only be opened by means of the chipped tickets or the chipcards. In 2018, bus company Connexxion ended the possibility to pay for tickets with cash in the bus. In 2017/18, NS started to demand name and date of birth when selling international train tickets. In late 2019 this became official.

Issue (1). From July 2014, travellers who used a single chip-ticket in order to retain their privacy, had to pay much higher prices than travellers who used a (personalized or so-called "anonymous") OV-chipkaart, and could not travel with reduction anymore, regardless whether they had a reduction card or not.

Travellers who used an "anonymous OV-chipkaart" paid the same, full price as holders of a "personal card" during rush hours. But outside rush hours, the holders of an "anonymous OV-chipkaart" were not allowed to travel with reduced prices anymore, regardless whether or not they had a reduction card (for which they payed an annual fee). This amounted to price discrimination of travellers who chose to retain their privacy.

Issue (2) Another form of discrimination was introduced in connection with European regulation that obliges railways to compensate travellers when trains are substantially delayed. The Dutch National Railways only compensated travellers with an "anonymous OV-chipkaart" if these travellers allowed their "anonymous" cards to be scanned, which revealed the last ten trips they had made, and connected the unique number of the card to the identity of the traveller, so that all past and future trips made with the card could be connected to this traveller. In practice, this meant that travellers with an "anonymous OV-chipkaart" were forced to choose between either renouncing their right to compensation after delay, or to give up their anonimity and lose their privacy. Since 2014, this discrimination and blackmail of travellers who choose to retain their privacy have continued to this day.

Issue (3). In 2016 and 2019 I received proof that the so-called "anonymous OV-chipkaart" was not anonymous at all. Each card has unique numbers that are registered at every "check-in" and "check-out", rendering location data that can be used to identify the owner of the card. Moreover, answers to questions posed by the Dutch privacy authority (AP) after many years of legal pressure from me, made clear the money was not loaded on these anonymous cards, but to a server in the back-office of a subsidiary owned by NS and a few other public transport companies. In 2019 I was made aware of a report by scientists in 2010, in which they explained why the "anonymous OV-chipkaart" was not anonymous at all. The public transport companies and the transport ministers had kept the Dutch parliament in the dark for nine years. Now that the system was "normalised", nobody seemed to care anymore about the structural, large-scale privacy violation.

--- Summary of the complaints ---

In this application to your court (ECtHR), I complain about the above-mentioned violations of privacy and/or of the prohibition of discrimination (1) to (3), and about new violations of privacy (4) that started in 2017/2018:

(1) price discrimination of users of an "anonymous OV-chipkaart" with a reduction card, because the price reduction is withheld from them;
(2) discrimination of users of an "anonymous OV-chipkaart" because they are, also in violation of European compensation regulation, not compensated for delays unless they allow their "anonymous" card to be de-anonymised;
(3) violation of the privacy of users of an "anonymous OV-chipkaart" because this card turns out not to be anonymous;
(4) other privacy violations in public transport:
    a. refusal of cash payment in buses;
    b. demand of personal data when refunding unused money.
    c. demand of personal data when selling international tickets;
    d. "service fee" for cash payment.

I request your Court to consider these violations of privacy not just as separate items on a list of complaints, but also as a COHERENT DISCRIMINATORY SYSTEM that pushes people to relinquish their privacy and submit to possible surveillance.

In 2021 the corona crisis (which is most of all a crisis of the rule of law) has shown that governments within the EU are willing to use digital registration systems to deprive citizens of their freedom of movement, without proof of necessity, proportionality or subsidiarity. Years before the

European "Digital Green Pass" or the Dutch covid passport, the Dutch OV-chipcard was already an experiment in making citizens dependent on a central digital system by means of which their possibility to travel inside their own country can be monitored and switched off at any moment. Hopefully your Court recognises the fact that rights and freedoms of EU citizens have been severely attacked for more than a year now.

If your international, but also European Court wants to contribute to a restoration of the credibility of "the rule of law" in the EU as something that protects normal, individual citizens (as distinguished from powerful companies, governments, organisations and lobby groups), then your Court will have to show that the right of citizens of an EU member state like the Netherlands to travel with privacy in their own country, is effectively protected by the European Convention on Human Rights - and by extension the right of all EU citizens to travel with privacy in their own country and within the EU.

It is not for me, a lay citizen, to find all the legal arguments - although I have come up with a number of them, as you will see in the documents attached to this form. In essence, the question is whether your Court is willing to protect EU citizens effectively, by giving a meaningful interpretation to the European Convention on Human Rights. If not, more and more European citizens will realise that they have been betrayed and cannot expect any real legal protection against the depredations of our national and European rulers. Then they will have to look for other solutions. Many people are doing that already, from people starting their own, non-state-sponsored schools to truckers organising convoys. But I want to do my utmost to "give law a chance". That is to say: traditional, written, institutional law, administered by courts like yours.

--- Summary of the legal proceedings ---

With regard to the four complaints mentioned above, I have lodged complaints (1) and (2) with the Dutch supervisory authority for privacy (AP) in 2014 (repeated in 2015), and in 2016 a request to include new findings, which was interpreted as a separate complaint by the AP, leading to complaint (3). In 2018 I lodged the complaints under (4) with the AP.

Separately, in 2015, I approached the Dutch supervisory authority for the prohibition of discrimination (College voor de Rechten van de Mens) with regard to complaints (1) and (2). This authority refused to treat my complaints because it was of the opinion that it has to limit itself to treating complaints about the limited number of forms of discrimination that are mentioned and prohibited in the Dutch law called Algemene Wet Gelijke Behandeling (AWGB - "General Law of Equal Treatment"). Although both the ECHR (art. 14, Protocol 12) and the Dutch constitution prohibit all discrimination (unjusti-fied unequal treatment), it seems that in the Netherlands parts of the ECHR and the constitution are not implemented.

The AP rejected all my complaints without serious investigation and refused to take action that would have protected my privacy. In 2015 I lodged a complaint about the rejection of complaints (1) and (2) with the lower court of administrative justice (Rechtbank Gelderland). The lower court found that the AP had not done enough research and ordered the AP to do more. The AP complied but appealed to the higher court (Afdeling bestuursrechtspraak v.d. Raad van State) at the same time. When I asked the AP (November 2016) to include new indications that the "anonymous OV-chipkaart" was not really anonymous in its investigation, the AP interpreted this as a new

complaint that had to be treated separately. This became complaint (3). After "(re)investigation", the AP rejected the complaints (again).

In 2018 I first lodged complaints (4). In 2019 the lower court rejected all complaints. I appealed to the higher court. The higher court treated all complaints jointly and rejected them on 10 november 2021 in three rulings (ECLI:NL:RVS:2021:2509 - 2511 - 2514).

-- Summary of one core aspect of the legal argument: multi-step violation of privacy in public transport ---

During the last twenty years, Dutch governmental authorities have increasingly circumvented the substance of the protection of human rights that international, EU and national Dutch law aim to provide to citizens. They do this by means of four practices that serve to mask their violations of human rights - practices that have become the unwritten norm:
1. Executing substantive violations in such a way that a pretence of respect for formal law is maintained;
2. Dividing substantive violations into smaller steps, each of which remains below the treshold of a formal violation;
3. Referring to earlier steps as mentioned under 2, as if they are established legal precedents, normalising them so that they are not regarded any longer as "stretching the boundaries of the law", but as normal law that can justify new, even more damaging violations of substantive law. In this way, legal protection and the rule of law are dismantled piecemeal;
4. Masking governmental measures by hiding them behind actions of formally "private" companies (in this specific case: public transport companies, some of which are owned by central or local Dutch governments). This includes drawing up so-called "contracts" that are unilaterally forced by these companies on individual citizens who are dependent on services. In this way, citizens are denied access to administrative courts of justice and are referred to civil courts, which (in the Netherlands) require representation by very expensive lawyers. In substance, citizens are denied access to justice.

This has been condoned by judges who restrict their investigations of cases more and more to only the investigation:
(a) whether there can be found, on formal grounds, excuses for the above-mentioned behaviour of authorities; and
(b) whether formal legal procedures have been followed correctly - at least ostensibly.
Moreover, judges allow governmental authorities to "repair" procedural mistakes, but citizens who make procedural mistakes are very quickly excluded from access to justice. Your Court has also relied on the "margin of appreciation".

In this way, the rule of law both in the Netherlands and in the EU has already been severely undermined in substance. While criticising the authorities of Poland and Hungary and emphasizing the importance of the "rule of law" (i.e. the jurisdiction of the European Court of Justice - ECJ) in Brexit negotiations, the European administrative and legal establishment more or less ignores its own disregard for substantive rule of law. Although European jurisprudence still gives protection against relatively primitive forms of abuse of power, as practised by for instance the present Polish and Hungarian governments, it seems not to protect EU citizens anymore from sophisticated abuse of power by formally democratic governments that undermine human rights while at the same

time upholding an elaborate, but hollow formal pretence of respecting those rights. The present case belongs to this latter category.

In this specific case, the Dutch supervisory authority AP evades, by means of a multi-step approach, its legal obligation to provide substantial protection of the privacy of Dutch citizens. This has been condoned by the highest Dutch court and has therefore become legal precedent in the Netherlands, unless your Court (the ECtHR) protects the substance of the law.

Some core reasoning of the AP and the Dutch courts of justice shows this multi-step approach and goes as follows:

1. The GDPR is assumed to cover all privacy aspects of article 8 ECHR. Therefore, the ECHR can be disregarded in practice, including its requirement that violations of human rights are only allowed when "necessary in a democratic society".

2. The Dutch National Railways (NS) is a private company, even though it is owned by the state, serves an essential public function, has a monopoly and has introduced the OV-chipkaart system in close consultation with the state and its lobbies.

3. The requirements of NS in its "general terms" that Dutch citizens use a personalised OV-chipkaart or pay a much higher price for their tickets, should according to Dutch law be regarded as a "contract" in the sense of article 6 section 1 under b GDPR, even though it is unilaterally forced on individual citizens, who are denied access to public transport if they don't submit themselves to these requirements. If a data subject does not like it, they are referred to a prohibitive civil court.

4. A private company like NS is free to choose its own aims (in this case "efficiency", later complemented with "safety", which are assumed to be "specific" and "explicit" in the sense of article 5 section 1 under b GDPR), and to choose the means by which to realise those aims, in this case the digital "OV-chipkaart system". The outcome of these choices is assumed to be "necessary" and "proportional", unless a citizen can prove that it is not so: the burden of proof of article 5 section 2 GDPR is shifted from the data controller to the data subject. How can one prove that a God does not exist?

5. The GDPR principles of data-minimisation and subsidiarity do not really have to be taken into account when the alternative that would require the processing of less data is not a digital system, but only a system of paper tickets and reduction cards that functioned well for decades. As the AP argued in court: "Digitalisation is a given". Consideration (15) of the GDPR with regard to data protection criteria that are technology-neutral, is ignored. Digital surveillance is God.

This core reasoning is incorrect. I request your Court to declare the judgment of the Dutch highest court unlawful, to restore substantive justice and to give directions how such substantive justice can and should be realised and safeguarded.

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

Article invoked: **Article 8**

Explanation:

My right to respect for my private and family life has been violated as the Dutch state (the supervisory authority AP) refuses to protect me from the unnecessary, forced collection and registration of my individual travel data when travelling with Dutch public transport: national railways (NS) and bus companies. This concerns: time and location of departure, time and location of arrival, and in some cases: time and location when I change trains or buses, or when I have to go through a check-in/check-out gate in order to visit a bathroom. These violations started in 2014, when the possibility of railway travel with paper tickets was ended. Since 2014 ever more fences and gates have been installed at Dutch railway stations. Since 2018, cash payment in buses is refused. Since 2017 (unofficially) or late 2019 (officially) NS demands personal data for tickets in EU.

The violations are perpetrated in both indirect and direct ways. The indirect ways (see complaints (1), (2) and (4)) are by making the remaining possibility for travelling with privacy (buying single "chip tickets") more expensive and/or more difficult compared to travelling after surrendering my individual travel data to a digital system controlled by a subsidiary (TLS) of the public transport companies and ultimately by the state, and paying digitally. This is what I call "privacy discrimination" - the discrimination of people who choose to keep their privacy.

The direct ways (see complaints (3) and (4)) are:
(3) by making the "anonymous OV chipkaart" not anonymous, and
(4) by demanding personal data before selling an international ticket in the EU, without which a ticket cannot anymore be obtained.

Using the "anonymous" card is cheaper per trip than single "chip tickets" when travelling frequently, but more expensive than the "personalised OV chipkaart" that does not offer a pretence of anonymity. My personal, individual travel data are still collected and registered, not only on the "anonymous" card itself, but also on a server of a subsidiary of NS. According to the public transport companies, these data are anonymised and/or "stored separately" after(!) they have been collected, but:

-- as a data subject, I have no control or even the possibility to check what happens with these data; I just have to believe organisations who lied about the "anonymity" of these cards for nine years. This lack of credibility has a chilling effect on me. I do not feel safe in public transport anymore when using the so-called "anonymous OV-chipkaart", because I know my personal trip can be tracked and traced at all times.
-- authorities have already requested personal travel data of users of the "OV chipkaart" to be shared with them in order to discover the home addresses where those travellers really resided, in a case of possible fraud with government benefits that could be claimed on the basis of a person's place of residence (the case of students living at home with their parents or independently, claiming benefits from DUO). This shows that once the personal data is collected, it can be de-anonymised and handed on, which in fact also happens in some cases, even when there is no indication that an individual person has committed fraud, and

thus no legitimate suspicion. This "function creep" and abuse of power was condoned (declared "lawful") by Dutch judges.

The necessity of the breach of the privacy of all public transport users has not been demonstrated, which violates article 8 par. 2 ECHR and article 5 par. 2 GDPR. After initially denying to me that NS was interested in any personal data of travellers (in 2014), later on NS gave new reasons why it wanted to use the data ("making personal offers to travellers, promoting efficiency"). Still later, NS introduced a vague argument of "safety" without specifying it and without proving that there was a serious, general safety problem or that the data collection contributed to safety. The well-known risk of people smuggling bombs into airplanes does not occur in the same way in trains, nor was this given as a reason for introducing the OV-chipkaart system at the time (2008-2010). Moreover, the fact that it has stayed possible all these years to buy expensive but anonymous single "chip tickets" shows that the aim of "OV-chipcards" is not to prevent dangerous people from entering a station or a train.

My family life is also hurt by the violation of article 8 ECHR, because my close family lives in three EU member states. I could travel with privacy between those states as long as I was not forced to hand over my personal travel data to public transport companies. This is the subject of complaint (4)c (international train tickets). On 10 November 2021 the highest Dutch court ruled that the AP did not (yet) need to investigate clear indications that international train tickets were refused to people unless they submit to their personal data being registered (ECLI:RVS:NL:2021:2514).

Article invoked: **Article 14 and Protocol 12**

Complaints (1), (2), (4). As a person who wants to keep privacy, I am made to pay a higher price for the same journeys compared to travellers who surrender their personal travel data. This is discrimination, in violation of art. 14 ECHR and Protocol 12, because:

-- Living with respect for my own and other people's privacy is part of my religious views, which include a deep belief in respect for human dignity in the face of the mystery of our existence. My religion does not contain a Sky God (a man with a long white beard on a cloud) and it does not have a hierarchical organisation of priests. But these are not requirements for a belief system to be (equivalent of) a religion. By discriminating me when I respect my fundamental beliefs when travelling, the public transport company is discriminating me on the basis of my my view of life.

-- Even if my belief in human dignity and privacy would not be regarded as part of my religion or belief system that should be treated as equivalent to religion, article 14 and Protocol 12 also prohibit discrimination (unjustified worse treatment) on other grounds.

-- When it comes to issues of equal treatment, the Dutch national railway company (NS) and bus company Connexxion should be seen as arms of the state. NS is 100% owned by the Dutch state, it fulfils an essential public service and it has a (near) monopoly on the use of the main railway infrastructure of the country. The activities of the state are covered by article 14 and Protocol 12.

-- Even if NS would not be regarded as an arm of the state, it should be acknowledged that article 14 and Protocol 12 have a "horizontal" significance (like in privacy juris-prudence),

meaning that private firms are not allowed to discriminate, especially when there is a very big power imbalance between such private firms and individual citizens.

Article invoked: **Protocol 15**

In August 2021, Protocol 15 became effective after ratification by sufficient states. Protocol 15 makes it even more difficult for complaints to be admissible to your Court, lessening the hope of EU citizens that your Court will adequately protect them. The time for lodging a complaint has been shortened from 6 to 4 months (why?). And the complainant is required to show beforehand that they have suffered not only "significant disadvantage" but also "significant damage" from a decision of national authorities, otherwise the complaint is declared inadmissible by your Court.

What is "significant"? In itself, this is a very subjective criterion. Does your Court regard ANY privacy violation as causing significant damage? I have heard that inside the office of your Court, complaints about privacy violations have been ridiculed. Did Rosa Parks suffer "significant" damage when she had to sit in the back of the bus because she was black? For me, the structural violation of the integrity of my private life by organisations like public transport companies is humiliating and causes structural psychological stress. The costs of having to pay between 50 and 100% more for train journeys than other people, year after year, accumulates to serious financial damage.

A more detailed explanation of my grievances and my legal reasoning can be found in the annex to this application - see attachment no. 25.

G. Compliance with admissibility criteria laid down in Article 35 § 1 of the Convention

Complaints	**Information about remedies used and the date of the final decision**
	Because this page does not offer enough space to describe the details of the process, I refer to section 2 of my explanation of 29 October 2019 to the Afdeling Bestuurs- rechtspraak for fuller information on complaints (1) to (3). For complaint (4), I refer to the introduction to attachment 24 (p. 877 on list of attachments). Summarised:
Complaints (1) and (2)	17-06-2014 Jonker requests "advice and help" from the supervisory authority (AP) with regard to the privacy violation of NS.
""	19-11-2014 Jonker informs AP that he has initiated mediation with NS and renews his request for help.
""	21-02-2015 Jonker sends an official complaint and request to the AP, referring to privacy law, asking AP to investigate.
""	13-08-2015 AP rejects Jonker's complaint definitively ("besluit op bezwaar").
""	10-09-2015 Jonker lodges a complaint with the lower court
""	16-08-2016 The lower court declares Jonker's complaint to be justified and orders the AP to investigate the actions of NS as requested in Jonker's original complaint.
""	13-09-2016 AP appeals to higher court (Afd. bestuursrechtspraak Raad van State)
""	22-09-2016 Jonker appeals to higher court
Complaint (3)	24-11-2016 Jonker requests AP to include non-anonymity of OV-chipkaart in its investigation and refers to new information on plans for "ID-based ticketing".
""	19-12-2016 AP writes to Jonker: it interprets his new request as a separate complaint.
Complaints (1) and (2)	20-09-2017 The higher court declares the appeal of the AP justified.
Complaint (3)	28-09-2017 AP rejects Jonker's request of 24-11-2016 ("primary decision").
""	16-10-2017 Jonker complains to AP about rejection of 28-09-2017 ("bezwaar").
Complaints (1) and (2)	22-12-2017 AP rejects Jonker's orig. complaints definitely again ("besluit op bezwaar").
""	29-01-2018 Jonker lodges complaint with lower court about rejection of 22-12-2017.
Complaint (3)	26-02-2018 AP rejects Jonker's complaint definitively ("besluit op bezwaar").
""	19-03-2018 Jonker lodges complaint with lower court against rejection of 26-02-2018.
Complaint (4)	09-07-2018 and 21-07-2018 Jonker lodges first complaints with AP.
""	15-03-2019 With regard to complaint (4), the AP sends Jonker new technical info that is also relevant for the other complaints. Jonker reacts to this on 16-03-2019.
Complaints (1), (2) and (3)	05-07-2019 Jonker complements his complaint to the lower court,

	reacting to AP's arguments and informing the court about the new info that emerged on 15-03-2019.
Complaints (3) and (4)	08-08-2019 Jonker receives scientific info about non-anonymity of OV-chipkaart.
Complaints (1), (2) and (3)	20-08-2019 Lower court hears the parties in the complaints (Jonker, AP, NS).
""	05-09-2019 Lower court rejects Jonker's complaints (includes compl. (1), (2) and (3)).
""	09-10-2019 Jonker appeals pro forma to higher court (because of lack of time).
""	29-10-2019 Jonker submits explanation of the appeal to the higher court.
Complaint (4), later also for reference (1), (2) and (3)	06-03-2020 Jonker submits double appeal "In Praise of Individuality - Privacy, Connectivity and Authoritarian Thinking" to the higher court (ECLI:NL:RVS:2021:2511 and ECLI:NL:RVS:2021:2514). Jonker later enters this into case ECLI:NL:RVS:2021:2509.
Complaints (1), (2), (3), (4)	29-04-2020 Jonker submits explanation "Privacy, Ethics and the Administration of Justice in Times of Crisis" to the higher court in all three appeals about privacy and public transport (ECLI:NL:RVS:2021:2509 - 2511 - 2514).
""	15-01-2021 Jonker submits explanation "Monitoring Movement, Limiting Movement" to the higher court in all three appeals about privacy and public transport.
""	05-05-2021 The higher court hears the parties in all three appeals.
""	10-11-2021 The higher court rejects all three appeals (ECLI:NL:RVS:2021:2509, ECLI:NL:RVS:2021:2511 and ECLI:NL:RVS:2021:2514). Unless your Court rules differently, this ends any right to real privacy that can be legally enforced by citizens (as opposed to political favours that can be temporarily granted) with regard to privacy in public transport in the Netherlands, setting a precedent for the EU.

I. List of accompanying documents

Attachment 25 - part 2

(page 962 on the list of attachments)

Annex to the application of M. Jonker to the European Court of Human Rights (ECtHR)
concerning the violation of articles 8 and 14 ECHR by decisions of the
Dutch supervisory authority with regard to privacy (Autoriteit Persoonsgegevens - AP)

Public Transport - a Railroad to Surveillance?

Piecemeal Elimination of Privacy by Discriminatory Means

25 February 2022

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1 Introduction

Since 2008, the dependence of Dutch and other EU citizens on public transport has increasingly been abused by Dutch authorities to install a technical system (the "OV-chipkaart-systeem" - Public Transport Chipcard System) that can be used for the surveillance of all public transport users and can be put into general operation at any time. So far, parts of this system have been put into operation in a piecemeal way. Citizens have been cajoled and pressed to make use of "facilities" that involve the collection of their personal data as individual travellers - times and places of departure and arrival that can be connected to their identities, either directly or by profiling. They have been told that they can travel "anonymously" with an "anonymous" chipcard, which turned out not to be true - but by that time, the Dutch parliament had already griven the green light to legislation making the *OV-chipkaart* system possible, based on false assurances about privacy.

Since 2014 I have resisted these measures to subject me and other citizens to a surveillance system that can technically be switched on anytime. The corona crisis of 2020-2021 has shown how quickly the fundamental rights and freedoms of citizens (especially the freedom of movement) can be taken away if the authorities and their formal or informal subsidiaries (like public transport companies) possess the technical means and think they have a reason to do so.

So far, the Dutch courts of justice have not protected citizens against the increasing, and increasingly structural, violation of their privacy as users of public transport. This has forced me to turn, as a last resort, to your international Court (the European Court of Human Rights - ECtHR) and apply for justice, referring to articles 8 (protection of privacy and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR). I am supported in this by the Dutch NGO Privacy First (www.privacyfirst.nl).

The purpose of this annex to my application to the ECtHR is to highlight some legal and ethical questions concerning the behaviour of Dutch public transport companies, the Dutch supervisory authority Autoriteit Persoonsgegevens (AP), and Dutch courts of justice, with regard to the present case.

Note on the transition from Wbp to GDPR

I lodged complaints (1), (2) and (3) in 2014/2015 and 2016, when the *Wet bescherming persoonsgegevens* (Wbp) was in force. On 25 May 2018 the General Data Protection Regulation (GDPR - Dutch: *Algemene Verorderning Gegevensbescherming, AVG*) became applicable law. My complaints (4)a, (4)b, (4)c and (4)d were lodged after that.

It has been said that GDPR offers the same substantive protection of personal data as the Wbp, but hands the supervisory authority more instruments to maintain the law effectively.

In this annex, I will try to distinguish between Wbp and GDPR where relevant. However, where I mention articles of GDPR, this should be understood to refer also to the corresponding articles of the Wbp. If the Wbp offers, in certain situations, less (or more) protection than GDPR, I request your Court to mention this explicitly in your ruling.

2 Articles 8 and 14 ECHR as formulations of substantive law

Article 8 ECHR protects the private life of people, including their personal data. For a better understanding of the concept of "private life" case law should be analyzed. In *Niemietz v. Germany*, the Court held that it "does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings." This makes clear that the use of public transport by private individuals in order to visit other human beings and to reach places where it is possible to participate in society, should also be regarded as "private life".

During the last twenty years, Dutch governmental authorities have increasingly circumvented the substance of the protection of human rights that international, EU and national Dutch law aim to provide to citizens. They do this by means of four practices that serve to mask their violations of human rights - practices that have become the unwritten norm:

1. Executing substantive violations in such a way that a pretence of respect for formal law is maintained;
2. Dividing substantive violations into smaller steps, each of which remains below the treshold of a formal violation;
3. Referring to earlier steps as mentioned under 2, as if they are established legal precedents, normalising them so that they are not regarded any longer as "stretching the boundaries of the law", but as normal law that can justify new, even more damaging violations of substantive law. In this way, legal protection and the rule of law are dismantled piecemeal;
4. Masking governmental measures by hiding them behind actions of formally "private" companies (in this specific case: public transport companies, some of which are owned by central or local Dutch governments). This includes drawing up so-called "contracts" that are unilaterally forced by these companies on individual citizens who are dependent on services. In this way, citizens are denied access to administrative courts of justice and are referred to civil courts, which (in the Netherlands) require representation by very expensive lawyers. In substance, citizens are denied access to justice.

This has been condoned by judges who restrict their investigations of cases more and more to only the investigation:

(a) whether there can be found, on formal grounds, excuses for the above-mentioned behaviour of authorities; and
(b) whether formal legal procedures have been followed correctly - at least ostensibly. Moreover, judges allow governmental authorities to "repair" procedural mistakes, but citizens who make procedural mistakes are very quickly excluded from access to justice. The ECtHR has relied on the "margin of appreciation" (Dutch: *bestuurlijke beoordelingsmarge*), giving authorities of member states ever more leeway to evade the substance of international and European law.

In this way, the rule of law both in the Netherlands and in the EU has already been severely undermined in substance. While criticising the authorities of Poland and Hungary and emphasizing

the importance of the "rule of law" (i.e. the jurisdiction of the European Court of Justice - ECJ) in Brexit negotiations, the European administrative and legal establishment more or less ignores its own disregard for substantive rule of law.

Although European jurisprudence still gives protection against relatively primitive forms of abuse of power, as practised by for instance the present Polish and Hungarian governments, it seems not to protect EU citizens anymore from *sophisticated* abuses of power, perpetrated by formally democratic governments that undermine human rights while at the same time upholding an elaborate, but hollow formal pretence of respecting those rights. The present case belongs to this latter category.

In this specific case, the Dutch supervisory authority AP evades, by means of a multi-step approach, its legal obligation to provide the level of protection of the privacy of Dutch citizens that was formulated in the Safe Harbor ruling of the ECJ on 6 October 2015. The behaviour of the AP in this case has been condoned by the highest Dutch court on 10 November 2021, and has therefore become legal precedent in the Netherlands, unless the ECtHR will protect the substance of the law.

To illustrate the difference between the substantial application of a law and an application that is only or mainly formal, I give the following example. During the corona crisis, on 25 September 2021, the Dutch government implemented a so-called "3G" policy. Citizens were forbidden to enter certain spaces (like cafes or restaurants) if they did not possess a "corona entry certificate" (Dutch: *coronatoegangsbewijs - CTB*). Formally, there was no discrimination of unvaccinated citizens, because one of the three ways to obtain a CTB (the "three G's") was to obtain an officially confirmed negative result of a certain kind of corona test. The other two G's were vaccination and recovery. But in practice it took so much time and energy to obtain a negative test result that non-vaccinated citizens were excluded from social participation on most occasions. If one has to spend two hours to get a test in order to drink a cup of coffee in a cafe, few people take the trouble. In fact, this was precisely the intention of the "3G" system, as various authorities, including the then minister of public health, confirmed. The government did not feel obliged to follow the substance of the prohibition of discrimination anymore, but tried to blackmail the unvaccinated.

This is comparable to the way in which voter suppression is organised in certain states of the USA, by making voting difficult for certain groups of citizens. Formally they are allowed to vote, but in practice, i.e. in substance, this is made very difficult for them.

In some countries, for instance Finland (an EU member state that has ratified protocol 12 ECHR), there is a legal concept of "indirect discrimination" in use, although I do not know how significant it is in practice. However, as a concept it is conducive to a substantive interpretation of law.

My point of departure in this application to the ECtHR is that the Court regards articles 8 and 14 ECHR as substantive law and requires the ECHR to be applied in that way. I have heard that the ECtHR has shifted from a substantive approach to a formal approach in recent years. However, I do not want to assume that such a regrettable dismantling of legal protection has in fact occurred.

In fact, a secondary aim of this application is to discover - hopefully - that articles 8 and 14 ECHR offer substantial protection and are not just a charade in order to hide the rightlessness of EU

citizens with regard to privacy protection and equal rights, or an instrument for the achievement of certain (geo)political aims of the EU, for which "privacy protection" is only used as a pretext.

On pages 122-124 of his recent work *Europe - the History of a Political Community* (*Eurooppa - Poliittisen yhteisön historia*, 2021) the Finnish scholar Timo Miettinen reminds us that the culture of European governmental administration was partly born from an alliance between spiritual leaders and worldly rulers, starting with the coronation of Charlemagne by the Pope in CE 800. Hopefully, European courts like the ECtHR and the ECJ do not follow the example of those Popes in the Middle Ages, but take care to interpret the *trias politica* as something substantively different from the *Holy Trinity* that informed judicial decisions a thousand years ago.

When it comes to privacy, a substantive interpretation of article 8 ECHR means that:

- Privacy is interpreted as substantive privacy, not just conformity to formal rules that offer no real protection in specific cases;
- It is not just assumed that privacy is safeguarded when some formal rule says that certain data should be treated in a certain way. Real safeguards are required;
- Principles like data minimisation and subsidiarity (no forced collection of personal data if it is not objectively necessary because of lack of an alternative) are taken seriously;
- The principle that the processing of personal data is only justified if consent has been freely given or a necessity can be "demonstrated" (i.e. proved, art. 5 par. 2 GDPR), is taken seriously. The proof has to be objectively verifiable with regard to a specified, explicit aim as meant in art. 5 par. 1 sub (b) GDPR. A general claim (e.g. "It is safer") is not enough.
- It is illegal to press citizens, by means of direct or indirect discrimination or any other means, to give up their real privacy without the criteria of art. 8 paragraph 2 ECHR being fulfilled (necessity in a democratic society);
- The "margin of appreciation" for states that are party to the ECHR is not used as a euphemism for a "margin of law evasion" that renders the concept of "the rule of law" almost meaningless.

In the present case, these requirements mean that it is illegal for public transport companies or public transport authorities to press their customers into making use of payment systems that invade those citizens' privacy, or even to require them to make use of such systems.

As I mentioned in the text on the application form, I request your Court to consider the violations committed by the Dutch public transport companies (in this case: NS and Connexxion) not just as seven separate items on a list of complaints, but also as a COHERENT DISCRIMINATORY SYSTEM that pushes people to relinquish their privacy and to submit themselves to possible surveillance.

This system violates the human rights that articles 8 and 14 ECHR aim to protect. The system has been gradually installed by a conglomerate of Dutch national, regional and local governments, advisory boards, commercial firms in public transport and in the data business, and so-called representatives of citizens' interests that have been co-opted by this conglomerate. The conglomerate pre-empts and bypasses democracy and the rule of law, in a corporatist fashion. For more details, see my analysis *"OV-data-jacht: op weg met Surveillance Corporatism"* ("The Hunt for Public Transport Data: On the Road with Surveillance Corporatism"), 7 October 2019, which you can find in attachment 19 to my application (page 457 as mentioned on the list of attachments).

3 Articles 8 and 14 ECHR in relation to GDPR (AVG) and AWGB

The Dutch higher court (Afdeling Bestuursrechtspraak van de Raad van State) that treated my complaints, is of the opinion that the Wbp and GDPR are implementations of (among other things) **article 8 ECHR** and that ***therefore*** it is not necessary for a court of justice to check anymore whether its interpretation of Wbp or GDPR is in accordance with article 8 ECHR. The court just assumes that Wbp and GDPR put more stringent limits on data processing than article 8 ECHR.

I do not agree with that, and I mentioned this during one of the hearings on 5 July 2021. In fact, the Dutch courts interpret Wbp and GDPR in a way that is incompatible with article 8 ECHR. Right from the beginning of the legal procedures (in 2015) I have asserted that Wbp and GDPR should be interpreted in such a way that it respects article 8 ECHR completely, in view of the criteria contained in paragraph 2 of article 8 ECHR, pertaining to ***necessity in a democratic society***.

The Dutch courts assume correctly that data controllers are allowed to choose aims that are not necessary in a democratic society. But they also assume, ***incorrectly***, that such aims in themselves provide sufficient legal grounds for data processing without consent of the data subject, not only insofar as those chosen aims are necessary in a democratic society, but *tout-court*, that is to say: also insofar as those chosen aims are ***not*** necessary in a democratic society.

With this last assumption, the Dutch courts use their interpretation of Wbp and GDPR (national and Union law) to allow more data processing than article 8 ECHR (international law) allows.

I request your Court to put this right and to reassert the primacy of international law above national and European Union law, insofar as the Dutch courts' interpretation of Wbp and GDPR leads to a violation of article 8 ECHR. Such a violation of the ECHR should not be condoned by means of a referral to a "margin of appreciation" of states that have ratified the ECHR. This would make article 8 ECHR almost meaningless in practice.

I will return to the theme of "necessity" later.

With regard to **article 14 ECHR**, the Dutch authorities follow a comparable strategy in their attempt to evade it. As my communication with the Dutch supervisory authority for the prohibition of discrimination (College voor de Rechten van de Mens; see attachment 25 to this application) shows, there is no protection in the Netherlands against forms of discrimination that are not mentioned in certain national Dutch laws, like the AWGB. For instance, people who choose to keep their privacy, are not protected by the AWGB against discrimination on that grounds.

Instead, the Dutch authorities refer those people to the supervisory authority on privacy (the AP). In this way, the Dutch authorities evade their responsibility for protecting Dutch citizens against all forms of discrimination.

As a citizen who seeks protection of my privacy, I would probably have resigned myself to this situation if I had been protected adequately by Dutch privacy regulation. Now that this has turned out not to be the case, I request your court to assert, on the basis of article 14 ECHR and protocol 12, including its "horizontal" function, the prohibition of discrimination of people who choose to keep their privacy when they make use of public transport.

4 Burden of proof (the practice of "marginal testing")

During the last twenty years, and maybe even longer, Dutch courts have steadily increased their emphasis on "judicial reticence" (Dutch: *rechterlijke terughoudendheid*) with a view to "respect" for the role of the executive branch in the *trias politica*. The Dutch saying is: "the judge should not sit on the chair of the executive". In itself, it is very good and necessary that judges are aware of the limits of their own roles. But in the Netherlands (and possibly elsewhere in Europe) this has has developed into a situation where many judges have so much "respect" for the executive that they have started to "sit on the lap of the executive", becoming "lapdogs of the executive".

This comes to the fore in the judicial practice of "marginal testing" (Dutch: *marginale toetsing*). A judge does not involve themselves in testing whether a decision of an executive administration is "efficacious" (Dutch: *doelmatig*), but only if it can be considered to be within the "margins" (boundaries) that the law provides. Moreover, a decision is ***assumed*** to be within the boundaries of the law, unless a complainant can prove that it is not so. That is almost impossible when the judge leans back with closed eyes and does not listen carefully to what the complainant says.

This judicial (mal)practice has become more and more extreme in Dutch administrative law, which has resulted in impossible hurdles for complainants if they want to show that a governmental decision is unreasonable. I personally know of a case in which a lower court judged that written evidence of a promise made by a government official, as well as ten witness declarations, brought forward by a complainant, were still not enough evidence to prove something, just because a legal representative of the local government in question simply said that it was "impossible" and "unthinkable". Just those two words counted for more than all the evidence. That case is now pending in a higher court.

The practice of "marginal testing" (as interpreted by Dutch judges) leads to legal tension with article 5 paragraph 2 GDPR, which requires that "the controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (accountability)". Most Dutch judges assume that a controller has "demonstrated" that they fulfill the criteria of paragraph 1 of said article, simply by asserting that they have done so.

In the present case this has happened when the controllers NS and Connexxion (followed in lapdog-style by the "supervisory authority" AP) claimed to have fulfilled the criteria by mentioning so-called "specific, explicit" aims like "efficiency" or "safety" to legitimise the processing of personal data, without addressing my criticism about the lack of specificity and explicity of such general expressions (labels). I have called these words "magic words" because as soon as they are used by data controllers, both the supervisory authority (AP) and Dutch judges immediately ***believe*** that those aims have been sufficiently specified.

In this way, "marginal testing" has become a euphemism for "no testing" in judicial practice (which is to say: in Dutch judicial culture). This reduces the "rule of law" to a laughing matter.

5 Data minimisation and purpose limitation

The principle of ***data minimisation*** for data collection without consent of the data subject is explicitly mentioned in article 5 paragraph 1 under (c) GDPR, and explicitly linked to the principle of ***purpose limitation*** as mentioned in article 5 paragraph 1 under (b) GDPR. Both principles follow from the principle of ***necessity*** in article 8 paragraph 2 ECHR. If the data subject does not freely give consent, data collection and further processing is only allowed if it is necessary in a democratic society.[1]

At least, that is what article 8 ECHR says. It is not how Dutch judges interpret that article in practice (see chapter 2 above about substantive law and how it is circumvented in this and other cases).

Here I want to briefly discuss three implications of article 8 ECHR for data minimisation and purpose limitation.

5.1 Interpretation of the concept of legitimate aims

On the grounds of article 8 paragraph 2 ECHR, two kinds of legitimate aims should be distinguished from each other:

(1) legitimate aims that are necessary in a democratic society. For instance, the aim of taxation, which justifies the registration of all citizens who are or might be subject to taxation.

(2) legitimate aims that are ***not*** necessary in a democratic society. For instance the aim to make an inventory of all travellers and their individual journeys on public transport, in order to find out who might be interested in certain kinds of special reductions on the price of train tickets.

The requirement in article 5 paragraph 1 under (b) GDPR that personal data shall be processed for "legitimate purposes" should be interpreted in accordance with article 8 ECHR, which means that in cases where the data subject does not freely(!) give consent, only the category of "legitimate aims" that is necessary in a democratic society can legitimise a breach of privacy.

This interpretation is the only way to prevent governments and companies from violating the substance of article 8 ECHR.

5.2 Interpretation of the concept of data processing

The definition of data processing in article 4 under (2) GDPR includes the "collection" of data. This means that the principle of data minimisation also applies to the ***collection*** of personal data of users of public transport, not just to the further processing (like more or less effective "anonymisation", "safeguarding", "storage", "removal" etc.) of those data.

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1 **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5.3 Interpretation of the concept of subsidiarity

The concept of data minimisation as formulated in article 5 paragraph 1 under c) GDPR implies and includes the principle of subsidiarity, which means that if it is possible to achieve the same legitimate purpose in an alternative way that requires less personal data to be processed, the data controller is obliged not to use the more intrusive method, but to give precedence to the less intrusive alternative.

In view of consideration (15) of GDPR, which requires a technology-neutral application of GDPR in order to protect personal data, the subsidiarity principle forbids controllers to disregard analogous systems (for instance paper railway tickets) that require less personal data than digital systems (for instance the OV-chipkaart system).

In several court cases, among others the hearing of the Dutch higher court on 4 September 2017, the AP brought forward that "digitalisation is a given" as an excuse why the AP refused to consider the paper ticket system that had been in use until 2014, as a viable alternative. After I pointed this out, the AP and Dutch judges tried to find other, specious reasons why a paper ticket system could not be considered a viable alternative. I hope your Court will correct this and put this right.

5.4 Interpretation of the concept of proportionality

The AP, the lower Dutch court and the higher Dutch court have interpreted the principle of proportionality in an abjectly ***subjective*** manner. In essence they simply ***asserted*** (claimed) that what the data controllers want, was proportional, and that what I want, is not proportional.

For instance, in its ruling of 10 November 2021, the higher court considered the registration of all individual travel movements of Dutch public transport users "proportional" in view of the aim of "fraud prevention" and the wish of NS to have "more control" and "more effiency". The higher court simply assumed that it is acceptable to ditch fundamental rights like respect for private life in order to achieve more "efficiency". We know horrible historic examples of what this kind of reasoning can lead to.

Moreover, the Dutch courts incorrectly assume that the data processing is "proportional" if the ***data subject cannot prove*** the opposite. In this way, the courts violate article 5 paragraph 2 GDPR, which requires that the ***data controller is able to demonstrate*** proportionality.

5.5 Conflation of necessity and subsidiarity with proportionality

The supervisory authority AP and the Dutch courts incorrectly conflate the concepts of "necessity for the achievement of legitimate purposes" and "subsidiarity" with the concept of "proportionality". Their reasoning is that, ***if*** the data collection is proportional, there is no legal objection to assuming that it is also necessary and that the principle of subsidiarity is respected.

Again, they violate article 5 par. 2 GDPR by shifting the burden of proof from the data controller to the data subject. (See also chapter 4 above.) In this way they reduce the criteria of necessity and subsidiarity to an almost completely subjective pseudo-criterion of "proportionality", which they interpret in favour of the data controllers, harming the rights of data subjects - i.e. citizens.

6 Abuse of the concept of a contract

The AP and the Dutch courts tolerate and promote an abuse of the concept of a contract as legal grounds for the processing of personal data without the consent of the data subject. Their basic reasoning is as follows:

(1) A data controller (in this case: NS or Connexxion) can choose its own aims, which should be regarded as "legitimate" unless a data subject can prove that they are not. The aims should also be regarded as "specific and explicit", even if they contain only one word (like "safety" or "effiency" or "fraud prevention").

(2) A data controller can choose the means by which they can realise those aims, and these means should be regarded as proportional, and for that reason also as necessary to achieve those aims, unless a data subject can prove that this is not so - which is impossible, because the data controller's wishes are always proportional in relation to the tiny, tiny interests of data subjects.

(3) A data controller can include these means, for instance a digital system, in his general terms and can force a data subject who is dependent on vital services (like public transport) to "agree" with these terms, because otherwise the data subject (a citizen) is excluded from that service.

(4) As soon as the citizen has submitted themselves (erm... "agreed") to these general terms, this formally counts as a "contract" in the sense of Dutch law, so also in the sense of GDPR, and thus provides legal grounds (article 6 par. 1 under (b) GDPR; article 8 under b Wbp) for whatever data processing the data controller has decided to impose on the citizen.

In this way, the AP and the Dutch courts tolerate and promote a violation of article 8 paragraph 2 ECHR, which requires any data processing that happens without real consent, to be "necessary in a democratic society". Such a necessity cannot be created by an arbitrary contract that is:

- ***not*** based on freely given consent - article 7 and considerations (32), (42) and (43) GDPR;
- ***not*** necessary in a democratic society in the sense of article 8 paragraph 2 ECHR.

GDPR does not define (in article 4 or in considerations (40) or (44) the meaning of the term "contract" in GDPR. The Dutch courts refer to Dutch civil jurisprudence, which includes "general terms" in the definition, regardless whether a party has freely consented to those general terms or not. In the present case, this interpretation of the term "contract" and of article 6 paragraph 1 under (b) GDPR / article 8 under b Wbp leads to a violation of article 8 ECHR. This means that, according to the interpretation of Dutch courts, Dutch civil law can in effect overrule article 8 ECHR, which would mean that Dutch civil law can overrule fundamental human rights. I hope your Court will correct this interpretation. (For more on this, see chapter 9 below.)

An additional abuse of the concept of a contract is the idea of the AP and the Dutch higher court that a data controller can stipulate in their general terms that a third party is data controller. In the present case, NS (data controllor on the basis of the definition in article 4 under (7) GDPR) stipulated in its general terms that the firm Trans Link Systems, partly owned by NS, is the data controller (this concerns my complaint (4)d). Connexxion is also of the opinion that TLS is data controller (my complaint (4)a). However, TLS can choose to have different "legitimate purposes" than the public transport companies NS and Connexxion. This is an attempt to evade the principle of purpose limitation as mentioned in article 5 paragraph 1 under (b) GDPR.

7 Interpretation of the concept of "demonstration" (proof)

In the present case of privacy violations with regard to public transport, the supervisory authority AP and the Dutch courts have tried to ignore, evade and reduce the requirement of article 5 paragraph 2 GDPR that the data controller shall be responsible for and be able to demonstrate compliance with the requirements of paragraph 1 of that same article.

One way in which they have done this, is to show themselves satisfied that breaches of privacy (the processing of personal data without consent) where legitimised by ***"legitimate purposes" that were formulated in very general terms***, like "efficiency", "fraud prevention", "social safety". By keeping it so general, it became impossible to demonstrate (i.e. to prove) that the data processing was either necessary or unnecessary to achieve these purposes.

This made it easier for the AP and the courts to propagate that the data processing was necessary, because they could use the vagueness of the aims to give them an aura of wide-ranging meaning.

Another way in which the AP and the Dutch courts evaded the requirement of article 5 paragraph 2 GDPR is that they are of the ***opinion that it would be unreasonable to require of the data controller to provide specific evidence***. This happened in the case of Connexxion, where the AP and the Dutch courts drew conclusions from a report about all Dutch bus lines, ignoring my criticism that the report did not provide evidence about specific bus lines or even regions. Unspecified safety incidents (they were only mentioned as a coded category of incidents) that had occurred in only a few areas, mainly around Rotterdam, where used to quasi justify the refusal of cash payment in all buses in the whole country.

A third way in which the AP and Dutch courts tried to evade the requirement of demonstrable proof, was that they made ***assumptions which they just claimed to be true, without evidence***. Examples of this are the higher court's assumption that "it is a ***generally known fact*** that the presence of cash creates a risk of robbery" and the assumption of a so-called ***"waterbed effect"*** - the fact-free idea that if cash payment was refused in one region, bad guys would try to rob buses in other regions. My criticism that the report, in which three profiles of possible "risk groups" were discussed, did not offer any evidence that such a "waterbed effect" existed, was ignored.

It was also mentioned that in the past, "robberies had happened", which had had a deep impact on bus drivers and had made them ***"feel unsafe"***. My criticism that the figures in the report showed that incidents of violence were getting less before the refusal of cash payment and that it was not clear if any of those incidents was caused by the presence of cash, was ignored. The AP and the courts went along with the propagation of vague, unspecified fears as an argument why "more control" and "less cash" was required.

On the other hand, the AP and the courts ignored evidence that I presented, which showed the practice of NS to demand personal data from customers who wanted to buy international tickets.

In essence, the AP and the Dutch courts believed the data controllers without proof, and ignored my evidence. In this way, article 5 paragraph 2 GDPR and article 8 paragraph 2 ECHR are violated.

8 Who is the data controller?

In 2016, after my first complaint to a Dutch court in the present case (concerning the issues described in complaints (1) and (2) of this application to your Court), the AP took the initiative of presenting two other possible interested parties to the court: railway company NS (the data controller - article 4 und (7) GDPR) and the data company TLS (the data processor - article 4 under (8) GDPR). At the hearing, the court concluded that TLS should not be regarded as an interested party, because Dutch administrative law requires a ***direct*** interest (Dutch: *rechtstreeks betrokken belang*). TLS was a subcontractor of NS. The court asked the lawyer representing TLS to move to the public gallery - which she did.

In its ruling of 20 September 2017, the higher court confirmed this correct interpretation of both Dutch administrative law and GDPR.

However, later on the AP, NS, Connexxion and TLS kept trying to sow confusion over the roles of data controller and data processor (see also chapter 6 above, last paragraph). They kept trying to suggest that TLS is the data controller, even though it is NS and Connexxion who, as a public transport companies, require me to surrender my personal data, and who determine what happens with my data (it is their general terms to which I am forced to submit if I want to be able to use public transport. Right from the beginning (my letter to NS of 5 June 2014) I have made clear that I do not voluntarily enter into any agreement with TLS.[2]

The AP, NS and Connexxion are of the opinion that NS and Connexxion:

- can "create" an agreement between me and a third party (TLS) by asserting this in their general terms, and
- that they can turn TLS into a data controller with regard to my personal data in that way.

In my email of 16 March 2019 to the AP (see attachment 16 to this application) I explained why this is in violation of the article 4 under (7) GDPR.

On 10 November 2021, the Dutch higher court wrote in paragraph 4.6 of its ruling ECLI:NL:RVS:2021:2514, concerning the issue that is the subject of my ***complaint (4)b*** to your Court, that TLS should be regarded as the data controller for the refunding of unused money amounts from the "anonymous" OV-chipkaart, "because TLS determines the conditions and devices by means of which the chip-ID is read". This is a travesty of justice. The higher court seems to think that a data processor can turn into a data controller because the processor "determines" what happens in the data processor's own computers. The higher court forgets that it is ***the data controller (NS) who determines what happens to my personal data*** and whether TLS is allowed to do anything with those data at all, and if so, what TLS is allowed to do with my data.

The higher court uses this argument to disregard my complaint to the AP about this instance of data processing, because I "have not complained about TLS". The court forgets that my complaint concerns ***the processing of certain data***, also if TLS would be the data controller (quod non).

2 GDPR article 4 under (7): 'controller' means the legal or natural person, agency, a public authority, or any other body who, alone or jointly with others, determines the purposes of the means of processing personal data. (...) (8) 'processor' means a legal or a natural person, agency, public authority, or any other body who processes personal data on behalf of a data controller.

9 The task of the supervisory authority (AP)

Since the beginning of these cases about privacy in public tranport (2014) I have consistently reminded the AP of its legal task as the national supervisory authority with regard to data protection to protect the rights of Dutch citizens like me effectively.

The ruling of the ECJ on 6 October 2015 in the case of "Safe harbor" (Schrems vs. the Irish supervisory authority Data Protection Commissioner) makes clear that the supervisory authority is legally obliged to realise a high, complete and effective level of data protection within the supervised national state.

The AP and the Dutch courts do their utmost to evade and diminish this legal obligation of the Dutch supervisory authority. In its ruling ECLI:NL:RVS:2021:2509 on 10 November 2021 (see attachment 23 of this application to your Court), the higher Dutch court states in paragraph 6.1:

"If a traveller enters a train, a transport contract comes into existence. The fact that a traveller has no choice which party he enters into an agreement with when he travels by train, does not mean that there is no contract. Apart from that, [this Dutch higher court] has no mandate to judge whether or not the contract is legally valid. In Dutch law the concept of a contract and the interpretation thereof belong to the domain of civil law. Jonker can approach a civil court to bring forward the question whether this contract is legally void because it has not been agreed, or cannot be agreed, on a voluntary basis, in view of the alleged monopoly of NS. [The lower court] was justified in considering that a contract should be considered to exist and that it should be judged whether the processing of personal data is necessary for the performance of that specific contract."[3]

In this way, the Dutch higher court attempts to relieve the AP of the AP's legal obligation to handle my complaint on the basis of an interpretation of Wbp or GDPR that is in accordance with the requirements of article 8 ECHR.

If the AP just assumes that Dutch civil law, and the effects of Dutch law, are in accordance with article 8 ECHR, the AP is not fulfilling its legal obligation to protect the rights that Dutch citizens can derive from article 8 ECHR.

When a citizen approaches the AP with a request for protection (which is the essence of a complaint to the AP), the AP has the obligation to safeguard a high level of protection. This level of protection is not realised if the AP defers to Dutch civil law without being interested in the consequences of Dutch civil law for the human rights of the complainant in that specific case.

The AP and the Dutch courts should have recognised that the Wbp and the GDPR, interpreted in accordance with article 8 ECRH, constitute a source of law that is independent from and higher than (Dutch) civil law. The AP has the legal obligation to protect ALL rights that are derived from a correct interpretation of Wbp/GDPR, not only those human rights that are not touched by civil law.

3 Translation into English by M. Jonker

10 Pretexts for discarding the obligation to investigate

10.1 "Policy freedom" as pretext; covering up an earlier ruling

By now your Court has probably observed that in this case, some Dutch judges do not seem to be focused on honestly applying the laws that should protect Dutch citizens, but instead seem more focused on trying to protect the supervisory authority AP and the large public transport companies NS and Connexxion from becoming accountable for respecting people's privacy.

I will give an example of how especially the higher Dutch court (the *Afdeling bestuursrechtspraak van de Raad van State*) gives precedence to the "policy freedom" (Dutch: *beleidsvrijheid*) of the supervisory authority over its obligation to protect the rights of citizens.

In its ruling ECLI:NL:RVS:2021:2509 of 10 November 2021, paragraph 3.1 (see attachment 23 to this application), the Dutch higher court states:

"In its ruling of 16 August 2016 [the lower court] has (...) ordered the AP to conduct an extensive investigation as meant in article 60 of the Wbp. [This higher court] has, in its ruling of 20 September 2017, ECLI:NL:RVS:2017:2555, judged that the AP did not have to conduct that extensive investigation, but had to take a new decision on [Jonker's complaint] with a further explanation."[4]

This is misleading. The relevant texts in the ruling of 20 September 2017, ECLI:NL:RVS:2017:2555, are as follows:

7.2.1 [The CBP - i.e. the predecessor of the AP] has referred to earlier investigations. This concerns [list of earlier investigations done by the CBP]. In those investigations it has not been investigated whether the processing of personal data (...) is necessary for (...). ***Therefore, [the lower court] was justified in concluding that reference to the earlier investigations does not suffice.***

7.2.2 Moreover [the lower court] has rightly considered that the circumstance that the OV-chipkaart is, from a general point of view, in accordance with the Wbp, ***does not mean*** *that the circumstance that it is impossible to combine a personal product [like the reduction card] with the anonymous OV-chipkaart, is also in accordance with the Wbp.*

8. The AP states that [the lower court] should have satisfied itself with declaring the AP's decision of 13 August 2015 to be void. By ordering the AP to also investigate [Jonker's complaint] as meant in article 60 of the Wbp, [the lower court] has availed itself of the policy freedom that article 60 of the Wbp accords to the AP and which the AP is free to use on the basis of its own policies. (...)
8.2 The AP states correctly that the choice whether or not to start an investigation about the way in which the Wbp should be applied, is the prerogative of the AP, in view of the text of article 60 of the Wbp, because this is about policy freedom that is accorded to the AP."[5]

4 Translation M. Jonker

5 Translation M. Jonker. Emphasis by M. Jonker.

So in 2017 the higher court confirmed the conclusion of the lower court that the CBP/AP ***had not investigated the case sufficiently***, but also confirmed the objection of the CBP/AP that the lower court should have left it to the CBP/AP to decide ***on which legal grounds a more extensive investigation should be done*** - article 60 Wbp or (again) a more informal "administrative investigation" (Dutch: *bureau-onderzoek*) like the CBP/AP had done the first time.

However, the judges who represented the higher court in November 2021, tried to cover up the fact that the judges of that same court in September 2017 had judged that the CBP/AP had not investigated my complaint sufficiently. Instead of recognising that, the higer court changed an ***insufficient investigation by the AP*** into an ***insufficient explanation by the AP*** in its new ruling.

This kind of judicial trickery destroys the trust of citizens in the judiciary, in the judicial system and ultimately in the rule of law, if they notice what the judges try to do to them. Of course these judges tried to do it so cleverly that citizens and even lawyers would not notice it.

It is clear that judges of this highest Dutch court of administrative law, who are semi-politically appointed and sometimes also serve as advisers of the government, are much more interested in the protection of the prerogatives of the supervisory authority (like "policy freedom") and other organs of the executive, than in the adequate protection of citizen's rights.

The Dutch judicial system, and especially the Dutch system of administrative law, is pervaded by this mentality of the high-mighty regents (Dutch: *hoogmogenden*) who know how to gently protect each other. Common folk are also treated gently (in form, not in substance), as long as they don't presume to speak out loud about unpleasant truths.

From a human rights perspective, this situation is troubling. In times of crisis (like the Covid year 2021), this paternalistic, anti-democratic mentality can lead to (1) unreasonable measures by the authorities to curb people's freedoms without demonstrable necessity; (2) rubber stamping of those unreasonable measures by a judiciary that is in cahoots with the executive. In ostensibly "normal" times, this judicial mentality or "culture" is conducive to the gradual dismantling of people's rights, as has happened in the case of privacy and public transport in the Netherlands.

10.2 Ignoring clear indications of violations of the law

Another example of the AP and judges looking for pretexts to justify a refusal to investigate, are the different excuses the AP and the courts brought forward with regard to my complaint about the refusal of NS to sell international train tickets unless the customers gave personal data (complaint **(4)c** to your Court). NS initially denied that this happened, referring to its "handbook".

First (in its primary decision) the AP said it had no mandate to investigate such a complaint. Next, in its definitive decision *(besluit op bezwaar)* it said that my complaint had not covered the sales of international train tickets, even though my complaint literally mentioned that. Then the AP and the lower court said that, although my complaint mentioned the sales of international train tickets, this mention had not been "sufficiently specific". In its ruling of 10 November 2021 (ECLI:NL:RVS: 2021:2514) the higher court acknowledged that my complaint covered this subject, but said that I had not proved sufficiently in my complaint that the privacy violations had already occurred at the time of the definitive decision of the AP - written evidence of a NS employee was nog enough.

11 Conflating formal independence with real independence - dismantling the rule of law

During my attempts, since 2014, to defend my privacy, it became clear to me that the way in which the AP and the Dutch courts of justice tried to diminish privacy protection, was not a collection of separate incidents, but a structural pattern of behaviour. Together with some experiences of the *modus operandi* of Dutch executive and judicial authorities in cases about other issues, this led me to wonder what could explain this behaviour.

Why did all these authorities refuse to use the law as a guideline that indicates the substantive aims of the law, or as an instrument to protect citizens, but instead used it as an instrument to find formal excuses for ***not*** protecting citizens? Why were they, in practice, dismantling the rule of law?

With regard to the **judiciary** - might these high judges possbily have more affinity with their consiglieri in leading positions in the executive administration than with ordinary Dutch citizens who have the temerity to bother the Dutch leadership with complaints about alleged violations of their insignificant "human" rights? In other words, is it possible that in the Netherlands, the famous *trias politica*, the "separation of powers", has been reduced to a shadow of its (presumed) former self, a hollow façade of formal, symbolic rules that have no real substance anymore?

The Netherlands is a low country, but not so low that there would be no space left for towering arrogance of power, even if such arrogance is not as ostentatious as in certain other, less Calvinist cultures (like in the USA or in France). The Netherlands are known for their corporatist *polder* culture, that has inherited certain traits of the old culture of "regents" *(regentencultuur).*

This could also explain the way in which the higher court tried to cover the back of the AP, as an **executive organ with formal independence**, in the present case. In its ruling ECLI:NL:RVS: 2021:2509 on 10 November 2021 (see attachment 23), the higher court uses the following argument in an attempt to show that the AP, in spite of it having tried to use a political assertion of a former minister (a *staatssecretaris*) in order to justify its decision not to protect my privacy, should still be regarded as functioning "independently" of the government:

"11.1 As [this higher court] has considered in its ruling of 2 May 2018, ECLI:NL:RVS:2018:1442, consideration 14.7, there is a legal guarantee that the AP enjoys independence which enables her to fulfil its task without outside influence. From this it follows that the AP is free from any - direct or indirect - outside influence that could steer her decisions. (...) It has not been demonstrated that the AP, when treating the complaints of Jonker, has allowed itself to be influenced by the former minister."[6]

The argument of the higher court is here that:

(1) ***because*** the formal law prescribes independence of the AP, it is impossible that the AP allows itself to be influenced by other organs of the executive in practice;

(2) from this it follows that, even though the AP refers explicitly to an explicit assertion of a former minister in order to justify the AP's decision, this does not demonstrate any influence of that minister on the decision of the AP.

This kind of reasoning from a supposedly "independent", highest Dutch court of administrative law would be laughable, if it was'nt so sad. *It can't be true because officially it is not allowed...*

6 Translation M. Jonker.

12 Substantive justice - a sine qua non

Today, on 24 February 2022, when I start to write this chapter, the country of Ukraine has been bombed and invaded by Russian military forces. The Russian leader Vladimir Putin's justification for this attack is that it is "a peace-keeping" mission involving a "demilitarisation of Ukraine". Here we see the ultimate consequence of conflating formal law with the substance of law. Any wild claim will create "law", as long as it is backed by power, which in turn is backed by the possibility to commit violence. It is the Hobbesian way of interpreting and using the idea of "law". If law is nothing more than the word of the most powerful, then might is right.

This underscores the importance of substantive law as the only way to create trust in and voluntary obeyance of the law. However, substantive law requires substantive justice, as a principle and as a practice. The famous statement of Saint Augustine that without justice, kingdoms are nothing more than large robber bands, should be interpreted as asserting that without ***substantive*** justice, governments are nothing more than large robber bands.[7]

The project of a European system of justice, as part of, and motor of, an international system of justice, has entered into deep trouble. One problem was and is the gradual kidnapping of EU law by neoliberalist forces that try to reduce substantive law to a system and practice of formal, procedural law in which the rights and interests of ordinary citizens are subjugated to those of (roughly speaking) big companies and governments serving those big companies.

Recently I listened to lectures given by professor Zhang Weiwei of Fudan University, a prominent ideologue who has the ear of the Chinese leader Xi Jinping. He also answered questions from audiences. His subject was "the China Model", an only partially defined concept that became known in the West through a book of that name by Daniel Bell. Professor Zhang exalted the Chinese way of governing society and clearly advocated it as being superior to the way of Western "democratic states with the rule of law", because the Chinese way involves the rise of people to leadership positions on the basis of "meritocracy", not "procedural democracy". He even went so far as to say that Chinese "democracy" was more "real" than Western types of democracy. According to him, China has much better "governance" than most Western democratic states.

From his spell-bound, Western audiences ***no*** questions reached the professor about his ideas concerning Chinese "good governance" in relation to the internment of a million Uighurs, the suppression of the Hong Kong movement for democracy, the disappearance of critics of the Chinese regime, censorship (recently the ending of the film Fight Club was changed in China, apparently on orders from above - the police had to win), respect for the rights of all homosexual people, or the strange case of tennis star Peng Shuai, who withdrew her written accusation that she had been sexually abused by a powerful member of the CCP and said that it had all been a "misunderstanding". Pobably professor Zhang did not even need to explicitly mention the absence of such questions as a condition for his availability.

But when listening to him, I realised that he made an important point that is relevant to the present case of privacy in public transport, and more generally, to human rights in Europe.

7 Augustine of Hippo: "Remota iustitia quid sunt regna nisi magna latrocinia", from *De Civitate Dei*, IV, 4.

The point that Zhang made, is that the right way to measure the quality of governance, democracy and justice is the quality of their substance, not the quality of their formal procedures.

If the Dutch or the European judiciary, including your Court, allows the substance of justice to be relegated to a secondary position and to be overruled by formal, procedural considerations, European justice will deteriorate and will assume "Chinese characteristics". The independence of the European judiciary will slide into a deep, comfortable affinity with the perspective of European (governmental, technological and commercial) rulers, an affinity which will not be called into question anymore - at least not by the people who make judicial and governmental decisions.

On internet, I have already seen much talk about the EU as "China 2.0", because of the EU proposal to prolong the use of European "Covid passports" without medical necessity, restricting the movement of citizens in the Schengen Area of (formerly) free travel, EU experiments with a Central Bank Digital Currency (CBDC) and the institution of a centrally registered and digitally controlled "digital identity" for all EU citizens. These are seen as a prelude to a social credit system.

This would be a further, dramatic shift in the already very skewed power (im)balance between EU governments and their citizens. Chipcards for public transport seem to be only a beginning.

This raises the following question. Why would EU citizens be interested in the maintenance of "democratic states with the rule of law" (Dutch: *democratische rechtsstaten*) if in practice "democracy" and "the rule of law" have been reduced to hollow façades?

If Dutch courts of justice, or your Court, do not attach much importance anymore to the substance of the law, for instance articles 8 and 14 ECHR, why, in that case, would citizens like me continue to attach importance to the rule of law?

Instead of defending my right to privacy in public transport, I could also spend my energy on finding other ways to keep in touch with my friends and organise my social participation - ways that are less dependent on using public transport or other activities that can be easily monitored or quickly switched off by those with power over digital systems.

If substantive justice cannot be derived anymore from traditional legal systems, whether national, European or international, then people will look for other possibilities to realise such justice. They will start to learn from Russian and Chinese subjects. 2500 years ago, Greek city-states formed alliances and resisted Persian overlordship because they valued their freedom. How long will European states have an equally good reason to resist Chinese overlordship?

The question is which path your Court wants to follow and promote in the present case. Nothing is easier for you than to quickly declare my application inadmissible - it is always easy to find a pretext for that, and there is no higher court to which I would have recourse. It would also be quite easy to take the case into your consideration and then, after long years, reject it on formal grounds or on the grounds that public transport companies have already installed their digital systems and invested large sums of money in them. Facts on the ground...

The only way to avoid such a scenario, if your Court wishes to do so, is to put substantive justice at the forefront of your considerations.

13 Pressure from the EU on the ECtHR

In an article named "Everybody obeys" (Dutch: *Iedereen gehoorzaam*) in the Dutch weekly *De Groene Amsterdammer* of 21 February 2022, experts on digitalisation and privacy warn about the consequences of the "normalisation" of digital corona certificates (QR passes) that are installed on smartphones.[8] In less than half a year, after the introduction of these certificates on 25 September 2021 in the Netherlands, many people have got used to the practice of having to prove with their smartphones that they are free to enter certain spaces (like bars, restaurant or planes) to which their access as free, healthy people had been obvious only two years ago. These violations of their privacy and freedom have become "normalised" in record time. The article was introduced as follows:

> The proponents of the QR code have never seen much harm in measures that exclude people, temporarily. But what is temporary? Brussels and Big Tech are working on identification by means of one's smartphone and the QR code has removed some large obstacles that stood in the way.

On 24 November 2016, I informed the AP about plans of Dutch public transport companies to introduce "ID-based ticketing" (see attachment 7 of this application), making use of the services of a Hong Kong and a German company. After this, the public transport companies seemed to understand that their plans were a bit too brazen to be swallowed immediately by Dutch citizens (public opinion) and the Dutch judiciary. But in 2021, "ID-based ticketing" took on a whole new dimension with the introduction of corona certificates on smartphones, with QR codes.

There are powerful lobby organisations for "digitalisation", "digital identities" and "digital currency" (read: veiled surveillance) in the Netherlands (ECP) and Europe (for instance WEF).

It is clear that your Court will be under substantial pressure from the EU and Big Tech, even if this will never be acknowledged, not to create any legal obstacles to these plans.

As a citizen, I exhort you to retain the independence of your Court, because your Court may be the last authority that protects the freedom of EU citizens to travel in their own country and in the EU without constantly being monitored and potentially barred from travelling, regardless of their fundamental rights like freedom of movement, freedom of demonstration and respect for their family life.

Note about publication

I would like to inform your Court that I will publicise the text on the application form and the text of this annex online. My aim with that is to enable the public to form an opinion about the case, and about its implications for the "rule of law" and legal protection in Europe.

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8 Frank Mulder, "Iedereen gehoorzaam", in: *De Groene Amsterdammer,* 21 February 2022, https://www.groene.nl/artikel/iedereen-gehoorzaam?utm_campaign=website&utm_medium=owned_social&utm_source=linkedin
The article was discussed extensively on: https://www.security.nl/posting/744017/Privacyexperts+waarschuwen+voor+blijvende+gevolgen+van+corona-apps (retrieved: 22 February 2022).