Nelleke Hijmans

Profiling the Welfare State: Upholding or Updating Human Rights Standards? A Case Study of the Netherlands

European Master's Programme
in Human Rights and Democratisation

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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (EMA) was launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA soon came to serve as a model of inspiration for the establishment of other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. Since 2013 these are all connected and managed by the *European Inter-University Centre for Human Rights and Democratisation* (EIUC) in the framework of the *Global Campus of Human Rights*.

EMA is a one-year intensive master's degree devoted to the study of human rights and democratisation. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological, and philosophical perspectives with targeted skill-building activities. The interdisciplinarity and wide-ranging scope of EMA is testimony to the benefits of European inter-university cooperation and reflects the indivisible links between human rights, democracy, peace and development.

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follow additional courses in an area of specialisation of their own choice and to write their thesis under the supervision of the EMA Director or other academic staff. After successfully passing exams and completing a master's thesis, students are awarded the *European Master's Degree in Human Rights and Democratisation*, which is jointly conferred by a group of EMA universities.

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, and potential usefulness in raising awareness about neglected issues and capacity for contributing to the promotion of the values underlying human rights and democracy.

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• Hijmans, Nelleke, *Profiling the welfare state: upholding or updating human rights standards? A case study of the Netherlands*, Supervisor: Dr. Daniel Dumont, Université Libre de Bruxelles

• Leal de Freitas, Alexandre, *Red light at the intersection: the stigma of sex work and the double oppression inflicted upon trans sex workers*, Supervisor: Prof. Csilla Kollonay-Lehoczky, Eötvös Loránd University, Budapest

• Pierro, Robin, *A double-edged sword: benefits, challenges and recommendations for using information and communication technology to monitor or investigate human rights*, Supervisor: Prof. Paolo De Stefani, University of Padua

Like past editions, the selected theses demonstrate the richness and diversity of the EMA programme and the outstanding quality of the work performed by its students. On behalf of the Governing Bodies of EIUC and EMA and of all participating universities, we congratulate the authors.

Prof. Manfred Nowak
EIUC Secretary General

Prof. Ria Wolleswinkel
EMA Chairperson

Prof. George Ulrich
EMA Programme Director

This publication includes the thesis *Profiling the welfare state: upholding or updating human rights standards? A case study of the Netherlands* by Nelleke Hijmans, and supervised by Dr. Daniel Dumont, Université Libre de Bruxelles

BIOGRAPHY

Nelleke Hijmans is a human rights specialist with a special interest in human rights and business, and human rights and social justice. She previously worked at the Dutch Ministry of Foreign Affairs on sustainable economic development and is now a public affairs advisor. In this thesis she unravels a previously invisible area of fraud enforcement in social security. Here she gives shape to her advocacy for equal rights and non-discrimination.

ABSTRACT

This thesis investigates the use of profiling as a fraud enforcement instrument in the execution of the 'participation law': the law which regulates the 'bijstand' in the Netherlands, a form of social benefits. Taking a social science approach, we conducted elite interviewing in 13 Dutch municipalities. Fraud enforcement officers were interviewed on the extent to which and the way in which they profile. We found a large amount of profiling instruments that were, have been, or will be used, ranging from the most basic human profiling to very advanced Big Data systems. The way in which these instruments are applied and valued as a tool also greatly differs, though municipalities were unanimous in their disappointment of the tool. With regards to human rights, the most prominent risks were found to be risks of discrimination, privacy, and the right to a fair trial, specifically the principle of innocent until proven guilty.

NELLEKE HIJMANS

PROFILING THE WELFARE STATE: UPHOLDING OR UPDATING HUMAN RIGHTS STANDARDS? A CASE STUDY OF THE NETHERLANDS

Acronym	Dutch	English
CBS	Centraal Bureau voor de Statistiek	Central Bureau of Statistics
DPD	Databeschermingsrichtlijn	Data Protection Directive
EC	Europese Commissie	European Commission
ECHR	Europees Verdrag voor de Rechten van de Mens	European Convention on Human Rights
EctHR	Europees Hof voor de Rechten van de Mens	European Court of Human Rights
EU	European Union	European Union
FTE	Full-time equivalent	Full-time equivalent
IB	Inlichtingen Bureau	Intelligence Agency
IoT	Internet der dingen	Internet of Things
ISZW	Inspectie Sociale Zaken en Werkgelegenheid	Inspection of Social Affairs and Labour
PPW	Participatiewet	Participation law
SIOD	Sociale Inlichtingen- en Opsporingsdienst	Social Inspection and Detection Service (SIOD)
UDHR	Universele Verklaring van de Rechten van de Mens	Universal Declaration of Human Rights
UNGA	Algemene Vergadering van de Verenigde Naties	United Nations General Assembly
VVD	Volkspartij voor Vrijheid en Democratie	People's party for Freedom and Democracy
WAHS	Wet aanscherping handhaving en sanctiebeleid	Law to sharpen enforcement and sanction policy
WWB	Wet werk en bijstand	Employment and Assistance Act

TABLE OF CONTENTS

1.

INTRODUCTION

Profiling is a phenomenon that used to be limited to the sphere of criminology but has quickly made its way into the social domain. Mainly private actors have swiftly adapted and adopted the possibilities that profiling provides them, usually for e-commerce purposes (Bosco et. al, in Creemers et. al 2015, p. 29). With the *Internet of things (IoT),* evolving profiling is becoming more valuable as *the* tool to handle the large amounts of data that the IoT produces (Hildebrandt, 2006, p. 550). Slowly, the public domain is catching up and discovering its value. The possibilities that the goldmine of Big Data provides are now endless. Parallel to this technological development there is a trend or political regime in the Netherlands that has been moving towards a slimming government, putting pressure on the classical large-scale bureaucratic system that social security often is (ISZW 2015; Rutte & Samsom, 2012, p. 5). Between these new technical possibilities and political pressures, profiling seems to fit right in: it is the perfect tool to cut down costs of social benefits by efficiently fighting fraud. However, there is little known about the actual, practical use of profiling. Is it indeed the case that profiling is used simply because the technology is available? And if so, what does this mean for the human rights of those dependent on social security? In the Netherlands, we see that the central government is looking towards this tool as a promise for the future, to be as effective as possible in their fight against social security fraud (ISZW, 2015). These developments from the government side in the social contract that social security is, create a new balance in the relationship between citizens and government. The 'participation law' is the latest radical change, which by law regulates that one must give back to society if they want to enjoy their right to social benefits. This thesis aims to see what this relationship (under the 'participation law') looks

like in practice—how do municipalities, responsible for the executive side of social benefits, handle their clients when it comes to profiling? In a practical case study of the Netherlands, 13 municipalities will show if and how they conduct profiling. Our research aim is twofold: firstly, we aim to find out the extent to which profiling is conducted—on what scale and what frequency. Secondly, we aim to find out the way in which profiling is conducted: what are the practices, who is profiled, what do these profiles look like, and how are they applied? Through first-hand elite interviewing, the everyday operations of fraud enforcement departments will be analysed with regards to human rights risks, to effectively identify if profiling is a force to be reckoned with in this domain.

Thus far, scholars have focused their research on the risks of profiling as such, often within the framework of criminology.[1] As is seen in recent broader studies, the field is limited in analyses on profiling carried out in the public administration sphere (Hildebrandt in Creemers et al., 2015, p. 2). This thesis hopes to add to the filling of this research gap. Identification of the main human rights risks that have already been found in profiling, albeit in other spheres (including but not limited to criminology, for example), will be made (Bosco et. al. in Creemers et. al, 2015, p. 37). Human rights risks found in this domain, may be different or distinct from the risks identified in profiling in other domains. To make a sound assessment of risks, it is necessary to assess its different facets: the aim with which the tool is used, the scale on which it is used, the level of automation, and other important factors that will be laid out further in the literature review.

This thesis is not a legal analysis of how the use of profiling relates to fundamental rights. Although undoubtedly useful, the Dutch 'College voor de Rechten van de Mens' is already conducting such an analysis parallel in time to this research. The research presented in this thesis adopts a social science approach and thereby aims to give insight into what is considered a rapid development of profiling in the social security sphere. Moreover, it is believed that providing answers to the 'how much' and 'what for' questions will add to the emancipation of citizens. For without knowing one is being profiled, one cannot adequately defend

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[1] See for example Clarke, 1993; Hildebrandt, 2006, 2008, 2010; Eijkman, 2010; Leun & Woude, 2011, and many others.

one's rights. In other words, we must first know what is happening to be able to question it. Using existing knowledge on possible human rights risks in profiling in general, we can then identify human rights risks here.

This thesis thereby aims to give substance to the law analyses on profiling already available, by filling in the practical gaps in a small-scale, explorative study in which one aspect of profiling in social security will be researched: the social benefits, 'bijstand', regulated under the 'participation law'. Therefore, the aim is not to be representative of all cases of government profiling in social security, but rather to give a first insight into the practice in the interesting case study that is the Netherlands. Thereby adding to the recent start of what will hopefully become a comprehensive overview of the different states' practices,[2] so that in the future different systems and their corresponding risks for human rights can be compared, assessed, and improved. In sum, this thesis aims to give insight to two fundamental questions. Firstly, to what extent is profiling used? And secondly, in what way is profiling used? These broad questions may not find conclusive answers, but that is not the aim of such an exploratory research. Rather, these questions function as a common thread throughout the analysis.

Lastly, with regard to the approach and aim of this thesis, it must be noted that whatever is found in practice, this thesis will not aim in any way to make a judgement on violations of human rights. We will only speak of possible risks. There are different conceptions of the notion of neutrality, and we will take a quite narrow one. Not because it is not useful or necessary to make judgements on human rights violations, on the contrary, but because doing so is a delicate endeavour that requires a different skill set than that belonging to the author. In the humble opinion of the author, making such analyses would require an established record of knowledge of law and a certain authority with regards to the subject one is judging. It is simply more useful to employ an approach more in line with the author's background: a social science approach. As with such an approach, we will focus on aiming to deepen our knowledge on the workings and behaviour of people. Exploring these behaviours requires, amongst many things, a skill for observation,

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[2] Field studies on profiling by governments have been carried out in Germany and Italy by the PROFILING project. They concerned respectively political activism and border control.

a certain distance, and at the same time the ability to gain the trust of the subjects of study so that they are able to speak freely. Therefore, it should not be the task or the intent of this particular research to make judgements. Any remarks on the primary data are thus merely to observe, identify, analyse, explain, or recommend.

The thesis is structured along the lines of the natural process of the research. Firstly, we will explore the topic in more depth in a literature review that will help us to identify the important concepts of profiling and social security that will allow us to make an analysis of our data further on in the process. Moreover, it will point us to a research gap that pinpoints where the added value of this research lies and helps us to indicate relevant research questions. Following this initial stage, we will then explain in detail the 'how' and 'why' of particular methodological choices in the research design. Here, the large size and nature of our sample will be shown, and we will show how the sample will be explored by elite interviewing. Hereafter, the data analysis follows, in which we will see that our sample has almost unanimously encountered the use of profiling, albeit in a great variety of ways. By structuring the research along the lines of the different types of profiling we will show the human rights difficulties of each category using the previous literature review as our basis to make this analysis. In the conclusion, the identified risks and the extent to which they are present will be summarised. The risks are most apparent in matters of privacy, discrimination, and the right to a fair trial. Moreover, we find that it is not so much the system that is used that determines human rights risks, but rather the indicators that people feed these systems and the way that they handle the data of their clients that poses the risks. Finally, recommendations will be made to the field to improve practices by minimising these risks, as well as recommendations for academia to further research this quickly developing field.

2.

LITERATURE REVIEW

In this section, we will elaborate on the various concepts and theories relevant to this research, starting with the concept of profiling as such, often within the framework of criminal law, the various forms of profiling, and the pertaining risks for human rights as identified by scholars in this area. After which we will elaborate on the domain of social security (fraud), the freedoms that accompany this domain, and relate the risks previously identified in this domain and the freedoms social security is built on. Thereby we will identify a specific set of risks, providing us with a relevant framework in which we will conduct the research. Moreover, we will briefly reflect on the literature concerning the Netherlands, before elaborating in the methodology section the choice to use the Netherlands, specifically on the municipality level, as our case study.

2.1. PROFILING

2.1.1 The concept of profiling

The term 'profiling' is commonly used interchangeably, referring to both a verb and a noun. However, within the literature, as we will see, a clear distinction is made between profiling and a so-called (risk) profile. Though both are inextricably linked, as they are part of the same procedure, they are two different matters. This is relevant as both bring about distinct implications for the human rights risks also involved. Therefore, let us first review what a profile is.

2.1.2 Profiles

A profile is defined as 'the curated outcome of data mining operations...not necessarily stable portrayals' (Creemers et. al., 2015, p. 2). This 'outcome' has the purpose to have 'structure[d] [data] in a way to discover patterns and probabilities' (Creemers et al., 2015, p. 5). A profile is thus made, *constructed*, after which it is *applied* (Hildebrandt, 2006, p. 549). The need for data to be structured is increasing in our data-based society because, as Hildebrandt (2008) states, it is increasingly necessary for law enforcement to 'discriminate noise from information' in this pile of data. As a profile is the outcome of a sorting method, whether a fully automated or manual exercise, anything of interest may be sorted into a profile. Considering the previous point of a data-based society, nowadays some form of computer/software interference in this exercise is more likely to be the rule rather than the exception. Making the distinction between noise and information is therefore often an exercise carried out by or with the help of software. The product of this software, the profiles, are a new type of inductive knowledge built on correlations in data that are in no sense the product of reasoning or hypotheses but of a pragmatic nature—the result of no more than simply a selected set of aggregated data (Hildebrandt, 2006, p. 9). Though this new dimension/manner of obtaining knowledge without involving our brains is something to consider further, this does not mean that profiles are a new product that has only arisen since we have the ability to mine large sets of data.

As Wu (2001) shows us, profiling is an old exercise carried out by all of us, every day. For example, if you are in an audience of people and you would have to choose one person likely to speak Chinese, you would probably look for someone who seems to have Asian traits. This is very basic (racial) profiling, but profiling nonetheless. The example illustrates how quickly one may be conducting profiling without being fully aware. Merely when applying '*a set of characteristics of a particular class of person [which] is inferred from past experience*' one is constructing a profile (Clarke, 1993). *The literature shows a great range of profiles and the tools from which they are constructed, ranging from non-automated to autonomic (Creemers et al., 2015, p. 8).*

These articles show more parallels in the framework in which the profiles are constructed rather than the type of profiling; they often concern profiles constructed within the sphere of law enforcement,

profiles, to put it boldly, that need to match suspects to then be criminals, that 'correlate a number of distinct data items in order to assess how close a person comes to a predetermined characterization or model of infraction' (Marx & Reichman, 1984, p. 429 in Clarke, 1993). Profiling research focuses often on profiling in the criminal sphere: criminal investigations, intelligence, surveillance, risk analysis (Hildebrandt, 2010, p. 116). However, this puts profiles in the public domain, where actually it is a widespread and quite profitable endeavour for the private sector, with purposes such as finance, social media, insurance, and marketing; behavioural advertising is a well-known example (Creemers et al, 2015, p. 29). We will keep to the profiles used in the public domain, though not within the sphere of hard core criminology, but specifically the social security domain. Thereby the data with which a profile is constructed is of a distinctly different nature and size: it is more likely governments are able to construct a more comprehensive profile. The profiles a government can construct are more likely to be all-embracing as they have citizens' data on multiple fronts available to them, whereas private actors may have sensitive data but always on a single front that interests them; for example, your favourite bag of crisps and other groceries. Governments may have this information and more, especially in advanced welfare societies where these data are needed for the system to work.[3] This particularity is an aspect highly relevant to researching profiling in social security, as social security is a corner stone of such advanced welfare societies.

2.1.3 Profiling

The next step from noun to verb is the application of a profile, this is what is often referred to as *profiling*, but as has already occurred in this thesis, at times *profiling* is the term used to cover the whole process from construction to application of a profile. To be precise, within this research *profiles* will refer to the outcome of the data-mining process, the foundation of what is used to identify people(s), whereas the term *profiling* may be used both in the context of the whole phenomenon and specifically the application of the profiles. The application is

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[3] Thereby one must not attach conclusions with regards to data risks and privacy risks; they are not necessarily the same. The concept of privacy will be explored further on in this chapter and shown to be much broader than merely concerning one's data.

often defined simultaneously with the construction, in which it is the matching exercise of the procedure: 'to individuate and represent an individual subject or to identify a subject as a member of a group (which can be an existing community or a discovered category)' (Hildebrandt, 2009, p. 275); profiles 'searched for individuals with a close fit to that set of characteristics' (Clarke, 1993). However, some argue that the application of profiles is not only the matching, but also taking action as a result of a match: 'the process of identifying and representing a specific individual or group as fitting a profile and taking some form of decision based on this identification and representation' (Creemers et. al., 2015, p. 9). It is arguable that if a decision or whatever form of action is never taken after the process of matching, the actual risks to human rights may always remain just risks and therefore would never be relevant. Though the risks occur precisely in this process and the way it is carried out (for example with whatever safeguards are in place), risks are by their very nature an anticipation that at the end of a process wrongful action may occur. If we do not include this action in our definition we are missing the point and cannot truly justify identifying risks as actual risks. For this reason, we will adapt this assumption that application encompasses both the matching and the consequence of this matching, whatever that may be.

The risks that will be further elaborated later in the thesis are, as stated before, closely linked to the type of profiling. The study of profiling is interdisciplinary in nature, which seemingly has led to clear distinctions between types, purposes, and other forms of categorisations of profiling, perhaps to prevent a Babylonian confusion between disciplines. These categorisations mostly concern the application of profiles and are generally mutually exclusive, allowing for accessible use in the empirical research this thesis will carry out. After careful review of the literature, one can distinguish these categories as shown below in the following subsections.

2.1.4 Profiling typologies

Figure 1. Profiling typologies
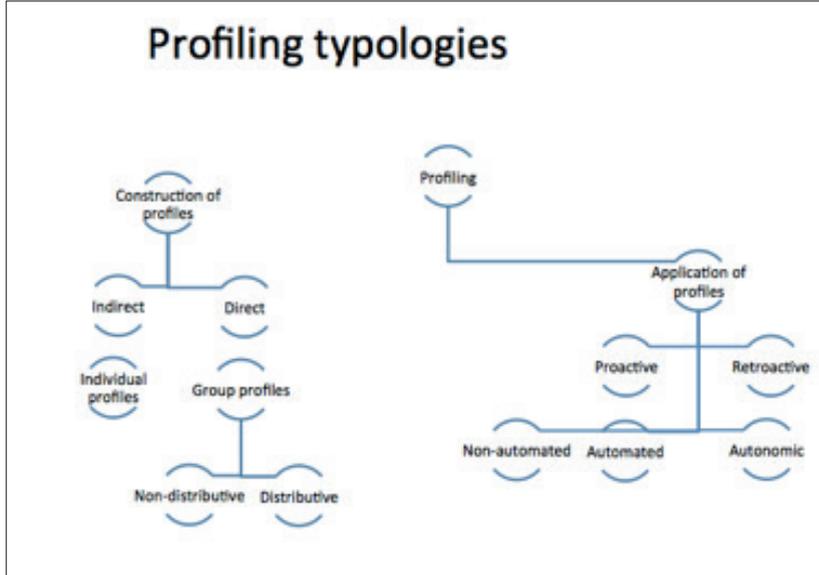
Firstly, as we have previously established, there is the *construction* versus the *application*. Let us again start with the construction side of the process. The literature distinguishes between individual or 'personalised' profiles and group profiles, where the individual profile identifies and represents a person by describing a set of attributes, the group profile does this for a group of people, which can be both actual communities or merely groups on the basis that the profile identifies them as such (Hildebrandt, 2006, p. 549). Within these group profiles, one can further distinguish between distributive and non-distributive groups, a division that concerns the individuals within the groups (Hildebrandt, 2006, 2010; Vedder, 1999, p. 277). Where in the first category attributes of the group can be directly translated to the individual level (for example, for a group of people with red hair, every individual will have red hair), this is not the case in the latter (for example, a group of people with blue eyes of which 88 per cent are likely to get sick, one individual does not hold this percentage). One can

immediately see that this typology is an important distinction to make, especially when concerning law enforcement, as here lies a risk for any individual to be wrongfully attributed group characteristics. Problems with non-distributive groups being perceived as distributive are often seen in racial profiling (Wu, 2001). The application of non-distributive group profiles to an individual is referred to as 'indirect individual profiling' (Hildebrandt, 2010, p. 120). Cautious further inquiry into an individual that is subjected to this type of profiling is thus crucial.

Then there is direct versus indirect profiling, where direct profiling relies on data collected from one single person or group that is then applied to all individuals of the same group. In contrast, indirect profiling relies on categorisation and generalisation from data collected among a large population that is then applied to certain persons or groups (*Creemers et al., 2015, p. 9*). The latter can be problematic as the relationship between the large population and the group to which it is applied must be clear and justified. Also, it uses data of the larger population without a clear aim in that population: they may have no relation whatsoever to the reason for profiling but are now part of the process.

The application side has its typologies as well. Firstly, there is the 'when' of profiling, retroactive or proactive (Creemers et. al., 2015, p. 9; Hildebrandt, 2010, p. 116). Retroactive is often generally described as meaning profiling when there is a concrete lead, signal, or other form or reason to do so. For example, a murder has been committed and profiles are applied to identify possible suspects. Proactive profiling is a predictive method, and therefore often used in risk analysis rather than investigations (Creemers et. al., 2015, p. 9; Hildebrandt, 2010, p. 116). As it concerns prediction, the outcome is 'an actuarial type of knowledge', therefore leaning towards 'actuarial justice' (Hildebrandt, 2010, pp. 115–116; Leun & Woude, 2011, p. 448). Here we come back to the idea that profiling produces a pragmatic type of knowledge, without previous bases. Some argue that the technology that *allows* for this type of knowledge thereby *affords* this type of knowledge, without questioning what this means for the socio-legal infrastructure (Hildebrandt, 2010, p. 114; Leun & Woude, 2011, p. 452). Whether actuarial knowledge is a precedent for actuarial justice remains to be seen in practice, but the notion of proactive knowledge gathering itself touches upon the important human rights notion of a fair trial, more specifically the assumption that one is innocent until proven guilty.

As seen with proactive profiling, the technological side is indeed an important component in assessing profiling. There are generally three different types or rather levels of profiling automation. Each again with their own specific implications for human rights. Classifications in the literature are non-automated profiling, semi-automated profiling, and autonomous profiling (*Creemers et al., 2015, p. 8; Hildebrandt 2008, pp. 25–28*).[4] They concern the amount of human involvement in the process of profiling, where non-automated is a fully human process, semi-automated is at least based on automatically aggregated data, sometimes giving advice or taking a range of low-level decisions, and autonomous is a fully automated process where the interpretation of data is done by a machine (Hildebrandt, 2006, p. 549). These types, though more of a sliding scale than fixed categories are important from a legal perspective. The EU Data Protection Directive (DPD) (Article 15 of Directive 95/46/EC) only considers the semi-automated form, 'Every person has the right not to be subjected to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects'.

Moreover, each level bears different human rights risks which will be evaluated later. The rationale behind these levels in both the literature and the DPD is that automated processes are more precarious regarding human rights than non-automated profiling processes. However, as seen in Wu (2001) and in recent examples of ethnic profiling, the level of automation is certainly not the only concern for determining how serious human rights risks or violations may be.[5] Considering this fact and that this research does not aim to make a legal assessment but rather review the actual practice of the use of profiling, this research will consider all three levels of profiling to be profiling.

As mentioned earlier, profiling is often seen as a concept that belongs to the domain of criminology and law enforcement in the public sector and as a marketing tool in the private sector. We will now look at the social security domain and use the above identification of the

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[4] These may also be referred to as respectively 'organic, human, and machine' (Hildebrandt, 2008, p. 28).

[5] See, for example, in the Netherlands the case of Typhoon, a musician that was stopped because his 'skin colour did not match his car' as the police forces declared: http://www.nrc.nl/handelsblad/2016/06/01/staande-houden-van-typhoon-was-een-dubbele-uitglij-1623570.

phenomenon within this framework. Thereby identifying a link between social security and profiling, and identifying what specific human rights risks may be involved when using profiling in this domain.

2.2 SOCIAL SECURITY AND PROFILING

2.2.1 Fundamental right to social security

The notion of social security as a human right first arose in Roosevelt's 1935 Social Security Act and gained international attention under Roosevelt's Four Freedoms, as the 'Freedom From Want' (Roosevelt, 1935, 1941). It then took legal shape in the Universal Declaration of Human Rights (UNGA, 1948, 217a, art. 22) and is often referred to as part of the 'second generation rights'.

Though around for many years, social security remains controversial as a human right. It has many facets and many costs, and it is thus of large economic importance for states. A system of social security contributes substantially to big government, for some states this proves an unwanted or simply difficult task (Pennings & Vonk, 2015, p. 3). Apart from the somewhat practical question, social security systems rely on solidarity between citizens. This makes it prone to socio-economic and political realities and their fluctuations.

Social security is not an aim in itself but rather a way to create social justice, which, as all human rights do, safeguards human dignity (Pennings & Vonk, 2015, p. 9). In the welfare state, legal equality is not enough to safeguard social equality. Welfare states cope with the challenge of diversity among their inhabitants due to conditions beyond their control (Pennings & Vonk, 2015, p. 9). Though social security entails much more, this piece of research focuses on social benefits. The rationale behind benefits is that they enable individual freedom and thereby they tie into the notion of social equality: the aim to provide every individual with an equal starting position in society (Pennings & Vonk, 2015, p. 9). Or as Pennings and Vonk (2015, p. 9.) summarise, 'social security strengthens the freedom of the individual whenever independent life is jeopardized by social risks'. It is relevant to point out this basic foundation of social security as it will help us to evaluate at a later stage whether the basic foundations may be undermined by the use of profiling

The very notion of profiling seems to be on a tense basis with the rationale behind social security. Profiling uses the diversity of people (sometimes beyond their control), thereby undermining the equality notion. It can create a negative connotation for certain characteristics. Profiling and social security find each other in the fight against social security fraud. This 'fight' is broader than 'regular' law enforcement that mainly aims to keep society safe. It is first and foremost a means to ensure and continue the solidarity on which the system is based and the system itself. Therefore, if the measures taken to tackle fraud are not upholding these core values of the social security system, they are arguably unfit at the very least. However, there are also the principles of proportionality and subsidiarity, and thus this research aims to analyse the use of profiling in this respect as well. In other words, is it just a few being profiled for the benefit of many, or is everyone subjected, and what lighter instruments are available to the civil servants fighting fraud?

2.2.2 Social security fraud and enforcement mechanisms

The set of instruments for combating fraud in the Netherlands is often divided into preventive and repressive instruments. This finds its origin in the introduction of 'hoogwaardig handhaven', which translates roughly into 'high quality/all-round enforcement'. The concept, introduced in 2003, establishes a blueprint for fraud enforcement in social benefits at the municipal level (Fenger & Maan, 2014). It aims to make enforcement part of the process from start to end by adapting four pillars, two preventive and two repressive. They concern informing clients at an early stage, optimising service, custom checks, and custom sanctions (Fenger & Maan, 2014, p. 5). There is a range of instruments that can be used to fulfil these different enforcement tasks, of which profiling is one. The idea of 'custom' checks especially may have paved the way for profiling. But profiling can truly fall within any of these pillars: one can profile not to find suspects but for other purposes, profile on whom to specifically inform or send a reminder to, for example. It is the manner of application and the aim with which one uses profiling that is decisive in whether it is a preventive or repressive measure. Thereby, it is also the manner of application and the aim which create, or do not create, possible human rights risks. Scholars have thus far categorised profiling within certain boxes so to say, but we will not

make a presumption on which particular sphere we expect profiling to be used. To illustrate, Fenger and Voorberg (2012, p. 14) found profiling to be part of the preventive set, as a 'signalizing instrument' (2012, p. 14), whereas Hildebrandt found it to be used differently, as a predictive tool (2010). The versatile nature of the tool, as illustrated in section 1, so dependent on its construction and application, opens it up to a great range of human rights risks in different phases of the process.

2.3 FUNDAMENTAL RIGHTS RISKS OF PROFILING ALSO RELEVANT TO PROFILING IN SOCIAL SECURITY

2.3.1 Privacy

The first risk for human rights that comes to mind when one speaks of profiling is privacy; it carries the connotation of Orwell's 'Big Brother' society (Orwell, 1949). Often, profiling is linked to 'Big Data', as Big Data may be seen as the raw material for the profiling machine. The privacy risk identified is then easily translated to the hazard of personal data (ab)use. But privacy entails a lot more than personal data alone. The fundamental right to privacy is laid down in article 8 of the European Convention on Human Rights (ECHR) as a much broader right to a 'private life' (ECHR, art.8). The right 'concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality' (Kilkelly, 2001, p. 11). Part of this fundamental freedom does translate into jurisdiction concerning the privacy of personal data. Here we can see that the nature of the data and the way they are used are of great importance as to whether art. 8 is applicable. For instance, In *Friedl v. Austria* (1994), the Court of Strasbourg makes a clear distinction between having the data and the act of profiling. According to the Commission, the judgement on non-interference with art. 8 would have to be reconsidered if the data had been put into a data processing system. The fact that it was only kept in an administrative sphere added to the judgement of non-interference (Kilkelly, 2001, p. 35); it was relevant that the information obtained was only kept in a general administrative file recording the events in question and that it was not entered into the data processing system (Kilkelly, 2001, p. 35).

Moreover, the positive obligation of states to safeguard personal information of individuals is weighed heavily by the European Court

of Human Rights (ECtHR). In *Leander v. Sweden,* the Court specified that democratic controls must be in place, both in the implementation of information systems and the supervision thereof (Leander v. Sweden, 1987; Kilkelly, 2001, p. 37). In this case it was Parliament, but one can reason that every level of information (from public to highly classified) deserves an equal level of democratic control. In sum, we can see in these few cases three aspects for the assessment of possible privacy risks of profiling: the freedom to act and develop oneself freely, the nature and use of personal data, and the safeguards in place to protect this right.[6]

2.3.2 Discrimination

Apart from privacy, profiling is often simplified to a specific type of profiling: ethnic profiling. Ethnic profiling is profiling on a discriminatory ground: race. But again, the concept is broader than one may first assume. There are several grounds of discrimination that are forbidden under the ECHR art. 14, some are explicitly mentioned (i.e. sex, language, political opinion) but it is not limited to only those. The formulation of discriminatory grounds in art. 14 is open-ended rather than exclusive and thus leaves space for development on a case-by-case basis. Therefore, rather than listing endless possibilities here, it is more relevant to test the indicators/criteria used in the construction and application of profiles that will be researched, against the case law of the ECtHR. If these indicators match a decision on a violation of art. 14, there may be a human rights risk.

Furthermore, apart from the grounds of discrimination, distinguishing between direct and indirect discrimination is relevant in profiling. Indirect discrimination is when a 'neutral rule, criterion or practice... affects a group defined by a 'protected ground' in a significantly more negative way by comparison to others' (Sugarman and Butler, 2011, p. 129). In profiling, this may occur when certain steps in the process or criteria appear to be neutral but actually discriminate a certain group of people, for instance a postal code as a criterion that may actually target a certain ethnic group that is highly represented in this area. In the case law of the ECtHR, we can also see that it may be difficult for claimants to show that the basis for a certain decision (such as terminating a

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[6] These are illustrative cases and not intended to be representative of all relevant case law.

benefit) lies in the fact that they have been profiled, i.e. that the basis lies in them having a particular characteristic (Olsson v Sweden, 1988 in Hildebrandt, 2008, p. 260).

Privacy and discrimination are thus broader concepts than often assumed at first sight. They are perhaps most prominent, but not the only human rights at stake. Deducting from these fundamental rights and others, there are several risks specifically relevant to profiling which will now be illustrated in further detail.

2.3.3 Risk of moral regulation: loss of self-determination

In their research, Fenger and Voorberg illustrate the risks of moral regulation of social security fraud. The concept of moral regulation risks concerns the unintended consequences of a moral rule, such as the prohibition of prostitution leading vulnerable women to be criminalised and stigmatised. The same goes for the qualification on those committing social benefit fraud (Fenger & Voorberg, 2012, p. 3). The risk is that when people are stigmatised as fraudsters it will be harder for them to reintegrate into the labour market. Stigmatisation leads to longer benefit dependency as people become more and more unattractive to potential employers. Ultimately continuing their social benefit dependency (Gustafson, 2011, p. 563). Thus, it matters, and Hyman (2001, p. 563) argues similarly, whether the providers of benefits believe there to be a 'few rotten apples' or if they perceive every fraud case a criminal act. This is a blind spot in fraud detection that is also applicable to profiling: profiling considers data, not reasoning or people's intent. It only considers 'fiscal integrity' (Hyman, 2001, p. 564). It may just be the case that people need help, care, instead of punishment (Fenger & Voorberg, 2012, p. 3; Brummelkamp 2010, p. 37). Fenger and Voorberg (2012, p. 14) identify profiling as the 'most strong' form of this moral regulation in the array of fraud fighting/enforcement instruments. As people come to know how profiles are constructed, certain behaviours are avoided, for example working in the hotel/restaurant/bar domain. This may be a serious hazard for the freedom of individuals to live their private life as they wish.

Moral regulation may thus stand in the way of people become self-reliant again and therefore threatens their right to self-determination. Though not an explicit right or article under the European Convention, self-determination and personal autonomy are basic principles on

which the Convention was developed. It is not only that these people are then discriminated by the labour market. The state also has a direct influence; moral regulation may lead to what James Scott calls 'invisible manipulation' (Scott, 1998 in Fenger & Voorberg, 2012, p. 2). States create a 'paralysed citizen': work experience is key to participation and acquiring new employment, but any experience is forbidden by benefit law, people are aware they are being watched and thus do not dare to undertake anything, resulting in a viscous circle of unemployment (Fenger and Voorberg, 2012, p. 18).

2.3.4 Risk of innocent until proven guilty notion

Profiling, as we have established, leaves no space for the distinction between intentional and unintentional fraud. But how important is intention for fraud detectors? It matters when fraud becomes a criminal offence.[7] The prominence of the notion of intention in the current legal framework is one of the cornerstones of the rule of law within constitutional democracies, the *mens rea.* The effect of the intention being left out of the equation is perhaps a limited problem when profiling is only there to point the finger in the right direction. Though one may question if all fraud cases are to be treated equally when not all intentions are the same.[8] It is a different story when we speak of proactive profiling and autonomous profiling.[9] They afford for judgements of future events and thereby may afford for a form of actuarial justice, 'proactive criminalization' (Hildebrandt, 2010, pp. 127–130). This may pose a risk for the notion that one is innocent until proven guilty. Arguably, a risk within the scope of the right to a fair trial. For example, if profiling does not claim you are guilty, but claims you *will be*, how are you able to defend against that claim if your guilt is a self-fulfilling prophecy? Though these questions may seem rather legal-philosophical, the fact that profiling is a risk analysis identifying possible suspects is a first step in this process. The identification of the profiling process is then proven (guilty) or countered (not guilty) by

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[7] The specification of when social benefit fraud counts as a criminal offence differs per country. In the case study of this thesis it will be specified. In short, the Netherlands sets the bar at 50,000 EUR of fraud, when people cross this line it becomes a criminal offence.

[8] See section 2.3.1 for the rationale behind treating the same offence differently.

[9] See section 1.1.3 for explanations of these concepts

human research. The notion of the human check is therefore of great importance, and something to consider in the analysis.

2.3.5 Risk inherent to type of knowledge

Whereas knowledge is commonly either empirical (by research) or reasoned (by ratio), profiling outcomes create a new type of pragmatic knowledge (Hildebrandt, 2006, p. 548). The resulting profiles and profiling exercise are never based on ratio or tested hypotheses. Rather, the hypothesis (subject x has committed fraud) is the result of such an exercise instead of the start. The correlations that these results are based on are found by the automated process of matching up criteria, indicators, data—but are reason-free. They do not supply causes or reasons but are based merely on statistical correlations, that have a fair chance of being spurious, as they have no knowledge/theoretical basis (Hildebrandt, 2008, pp. 24–47). However, unlike Hildebrandt warns, indicators and correlations put into the profiling 'machine' may be the result of sound theoretical research, or empirical findings from fraud experts, or other 'real' knowledge. Without ignoring the risks of spurious relationships, it is expected that when there is no basis, except for the data itself, in the profiling process, profiles are unlikely to be very successful or effective. As we will see later, effectiveness is an important notion in this domain for reasons linked to available resources, people, and time. Thus, the risk for spuriousness may 'undo' itself. Moreover, due to this type of knowledge gathering, a machine-made *profiling morale* may arise. The (non-)fitting to a profile becomes the morale, the standard of whether one is a suspect or not. Thus, what constitutes a real fraud risk, is then only that which the technology is able to define. This is troubling because here there is new a framework of justice created not on the basis of knowledge but on the basis of the abilities of a certain tool.

Thus, what is important here and what will be researched is whether people base the construction of profiles on solid grounds, whether they are aware of the effectiveness, how correlations are made, and last but not least how profiling is valued as a tool within the broader domain of fraud fighting.

2.3.6 Risk of 'dirty data': accuracy of information

Profiling is in fact 'turning human subjects into correlated objects' (Hildebrandt, 2010, p. 130). This transformation from personal information to data is an important step that takes place even before the construction phase of profiles. It is crucial to have quality checks to ensure profiles are not constructed with flawed data, otherwise the whole process is 'dirty' from the beginning. Moreover, data must be reviewed on an ongoing basis; once a correlation is established and a person fits the risk profile, this established correlation is a snapshot (Hildebrandt, 2010, p. 133). Meaning from then on there is an established link between this person and this risk profile, leaving out the possibility of change. This can create a flawed view or a biased view, in which the same individuals keep popping up in the system. The risk of 'dirty data' is perhaps not a human rights risk on its own, but it can perpetuate other human rights risks we may find.

Considering the profiling literature and having identified some likely human rights risks, we can combine both in the first part of our two research questions; firstly, *to what extent is profiling used in social security*? And secondly, *in which way is profiling used*?

Now that the concept of profiling, the concept of social security, and the possible human rights risks have been identified, the next section will operationalise this knowledge into a research design, advancing the research question into a specific framework of social security in the Netherlands.

3.

RESEARCH DESIGN

In social sciences, the aim is often to observe behaviours, but with the challenge of not being able to confine the subject matter to a laboratory. An excellent way to still be able to frame the subject matter while gaining in-depth knowledge is a case study. Moreover, case studies are a good way to study the often under-researched implementation phase of policy (Holsti, 2004). Though this research is exploratory— gaining insight to an uncultivated area of knowledge, which may suit a more shallow and broader method than the one chosen—this uncultivated territory entails a very practical field, the daily use of profiling in everyday fraud-fighting by the government. As we have seen in the literature, the risks we have considered will (or will not) occur precisely in this daily practice. Thus, this research chooses an approach which does justice to the practical nature of the subject matter: a case study of the Netherlands, with a mixed-method approach of qualitative and quantitative research. Respectively, elite-interviews supplemented with a statistical analysis of the context in which we find the interviewees, in order to gain both in-depth knowledge and the adequate context. This will allow us to be able to value and analyse the data obtained by the interviews in the right manner.

3.1. CASE SELECTION: THE NETHERLANDS AS A CASE STUDY

The Netherlands provides an interesting case for numerous reasons. A recent change in social benefit law from the 'Wet werk en bijstand [Law work and benefits]' (WWB) to the 'Participatiewet [Participation law]' (PW), a new political climate and a changing attitude in society towards those in need of a provision makes for a stimulating case (Fenger & Voorberg, 2012;

Goudswaard, 2014; Reelinck, 2010). Before explaining these 'pushing' factors in more detail, it must be noted that since 2004 when the WWB law came into force, municipalities became fully responsible for the costs of the social assistance benefits (bijstand) of their inhabitants (Goudswaard, 2014, p. 10; Reelinck, 2010, p. 62). Thus, even though the Netherlands is the case study, every unit researched is almost like a case on its own: they are running their own social benefit 'business'. It is interesting to discover the differences or similarities in how they use profiling to do so. Moreover, from a practical point of view, the Netherlands is well suited for field research. It is a densely-populated, small country allowing for field research in relatively many different municipalities concerning many people, over a short period of time. Lastly, the mother tongue of the researcher is Dutch but raised fully bilingually and therefore little is lost in translation when gaining the primary data.

3.1.1 Political climate and public opinion

The political climate in the Netherlands was always known for one of extraordinary tolerance and solidarity but, like in many Western-European countries, global developments of the past decades such as the global terrorism threat, the immigration crisis, and the financial crisis, have put a strain on this climate. An atmosphere of insecurity and fear seems to be on the rise. This is reflected in the political arenas and public opinions that are rapidly changing towards a more individualistic society. Divisions in society are becoming stronger; an 'us' versus 'them' attitude undermines the solidarity that the welfare state is built upon and needs to thrive effectively (Leun & Woude, 2011, p. 447). A well-known international example of the polarising political sphere is the rhetoric of Geert Wilders, who has made it clear that solidarity is not for all when he repeatedly calls for 'less Moroccans' and for 'giving the Netherlands back to the Dutch' (Wilders, 2014). The effects of this new set of norms and values can be found perhaps most profoundly in the area of social security. The tolerance of the Dutch population vis-a-vis social security fraud is now at the very lowest of Western democracies (Fenger & Voorberg, 2012, pp. 1–2).[10]

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[10] These are not primary data, for these statistics Fenger and Voorberg have combined the World Value Surveys of 1981, 1990, 1999, and 2006.

3.1.2 Policy and law

The attitudes described above quickly found their way into policymaking. The association of Dutch municipalities speaks of a true 'witchhunt'-policy (VNG, 2012 in Fenger & Voorberg, 2012 p. 10). In the 4-yearly report of the national government '*Handhavingsprogramma 2011-2014*' a stronger sanction policy was announced and was set up from 2011 onwards (*Kamerstukken* II/2010/2011, 17 050, nr.402). There is an urgency for less social benefit receivers; the ageing population is pressing on the system and there is little that can be done to solve this problem, thus every penny must be accounted for, and every penny gained through fraud must be returned (Rutte & Samsom, 2012, p. 5). At the same time, the neoliberal government led by the conservative liberals (VVD) since 2010 is aiming for a slimmer government. The combination of the need for every penny to be returned and the ever-slimming government makes the turn towards technology an easy one. With fewer people and more pressure on fraud enforcement, profiling may be the holy grail of efficiency.

The social benefits right this thesis is concerned with are those under the umbrella of 'participation law' (PW). The concrete legal changes that this law brings about compared to the 1994 Werk en Bijstand law is the explicit participation obligation for the clients and the explicit obligation for municipalities to create policy in this respect to fulfil this obligation. Moreover, it obliges municipalities to lower the benefit in cases where clients do not participate. Participation is not just an obligation to inform or co-operate with institutions, but an obligation to work, to do some form of (unpaid) labour, in return for their benefit. Like its predecessor, this law also secures the constitutional right to 'aid' (art. 20 Dutch Constitution). Firstly, because the PW is the ultimate social security law in the sense that it is the last resort of the system (Goudswaard, 2014, p. 9). After the PW, there is no social security safety net remaining for an individual. Secondly, this form of social assistance benefit is the largest expense of all the different types of social benefits in the budget (Ministry of Social Affairs, 2012, p. 1). Supplemented by the 'law to sharpen enforcement and sanction policy' (hereafter referred to as 'WAHS') that allows for up to a 100 per cent cut of the benefit in cases of fraud, this makes fraud enforcement under the PW extra relevant for studying. The WAHS announces stricter fraud enforcement and combines this with an increase in the exchange of personal data

between executive organs (*Kamerstukken* II 2011-2012, 33 207, p. 13, 27). There are concerns this law leaves little room for the executive municipalities and little space for the notion of intent when assessing fraud (Goudswaard, 2014, p. 5).

The risk of people losing their basic right to social security is at stake. Moreover, the PW is a law carried out at a decentralised level, giving the executive power of both PW and WAHS to the municipalities. It is focussed on participation in society, meaning that if benefit clients do not participate by way of a clear 'counter contribution', ranging from doing something in return for their benefit which is a new feature under the PW, to providing information, the law gives a mandate and even requires municipalities to take 'measures'. As mentioned before, these measures include penalties and termination of the entitlements. The implementation of these measures is entirely up to the municipality, and thereby we expect it to be sensitive to the political reality of these municipalities. An example is the situation in Rotterdam versus that in Amsterdam, where the aldermen have very different views on the execution of the PW resulting in great differences in perception of those dependent on entitlements (Blokker, 2016). We will see if these differences are translated into their policies, perhaps resulting in unequal treatment.

3.1.3 Sampling method: 15 municipalities

Now that the Netherlands is chosen as the case study, in which it has become clear that the municipalities are the executive organs in social benefit supply and fraud enforcement for the PW social benefits, they are the units of this study. To get a relevant sample that will provide us with a broad view of different uses and perceptions of profiling as a tool, one may take a random sample. However, as time and resources are limited, and we want to ensure that we have a relevant sample, a great diversity of municipalities has been selected that have one important variable in common: a large amount of long-term benefit receivers and thus a great incentive to fight fraud. These municipalities represent 20.6 per cent of the total population of the Netherlands and host 37.9 per cent of all PW receivers in the Netherlands.[11] There are several reasons

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[11] See Figures 1a and 1b.

why the sample consists of these particular 15 cities out of the total number of 390 municipalities. Firstly, 15 is a slightly arbitrary decision made by the constraints of time and resources. Keeping in mind that not the whole sample may be keen to contribute to this research, 10 or 2/3 of the municipalities is enough to find some patterns through the interviews and at the same time be able to make a modest but meaningful quantitative analysis. More than 15 is not viable for this research, though more cases will greatly increase reliability and validity, unfortunately one must restrain samples when doing research to ensure both quality and feasibility.

Then, the question of why these 15 cities. As mentioned earlier, they have one thing in common: a great incentive to fight fraud. These cities are the top 15 cities with the most *long-term* social benefits clients (CBS, 2016). For this ranking, the Central Bureau for Statistic (CBS) considered *long-term* to be the average percentage of two groups: 3–9-year receivers and 9-year or longer receivers. There is also a benchmark of 100,000 inhabitants, indicating that we will find a certain minimum level of organisation within these municipalities. In other words, these municipalities are expected to have at least a sufficient branch of fraud enforcement necessary for this research. The cities differ in many other relevant aspects—demographically, geographically, amount of social benefit receivers, political governance, etc. This way a *Most Different Systems Design* is created; with only this one aspect in common profiling in social security can be researched within very different situations.[12] This strategy is used when trying to rule out reasons (such as demographic or geographic variables) for certain patterns we may find. The rationale is, that with as many different circumstances as possible in every unit any patterns that are found across the researched units will be as uninfluenced by outside variables as possible. This has the benefit of eliminating sampling bias as much as possible while still having a sample that is expected to be relevant to study the subject. This is relevant, as previous research on this type of social benefit has shown that the period over which individuals receive

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[12] The 'Most Different System Design' and 'Most Similar System Design' is a methodology used in comparative politics that fits within case study research designs, originally developed by John Stuart Mill in *A System of Logic* (1843) but advanced by many scholars such as Lijphart (1971) and more recently Anckar (2008).

social benefits correlates to fraud (Van Gils, Frank & van der Heijden, 2007 in Reelinck, 2010, p. 64). All units have this variable in common, using this knowledge from previous research is expected to provide us with relevant results. Moreover, arguably the municipalities with the most long-term receivers have the most long-term experience with their 'clients' on an individual level. Thus, the elite-interviews will be obtained from municipalities with long-term experience, adding to the validity and relevance of their claims. In addition, having a large number of long-term benefit receivers in a municipality may call for or create (political) space for new methods of fighting fraud. Lastly, if this sampling would have been on other more personal factors (rather than a variable relating to one's benefit) relating to fraud such as age, sex, marital status, etc. we would be greatly decreasing the diversity of the group of people studied, thereby already performing profiling ourselves and thus interfering with the subject matter. This criterion of length is in this respect a relatively neutral one. Lastly, a practical argument is that there is no top 15 of everything available; the list used in this research is one of the data lists made available to the public by the Dutch Central Bureau for Statistics.[13]

Figures 2a and 2b. Sample descriptives: 2a Residents in sample as part of total; 2b PW receivers in sample as part of total

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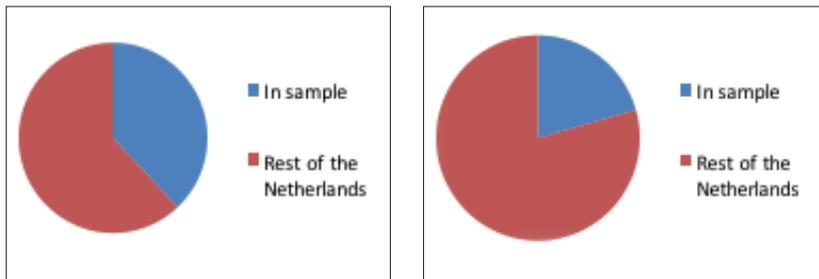
[13] See Figures 2a and 2b.

Table 1 PW benefit receivers with long-term assistance, CBS, June 2015

	Length 'bijstand'	
	3 to 9 years	9 years or longer
	%	
Netherlands	31	17
100,000+ municipalities		
1. Amsterdam	31	28
2. Rotterdam	33	23
3. Arnhem	31	21
4. Groningen	32	18
5. Emmen	36	15
6. Maastricht	29	21
7. Nijmegen	34	16
8. s-Gravenhage (Den Haag)	30	20
9. Delft	34	15
10. Leiden	29	20
11. Enschede	33	16
12. Breda	30	18
13. Zwolle	31	18
14. Eindhoven	30	17
15. s-Hertogenbosch	30	18

3.2 DATA COLLECTION

3.2.1 Elite interviews

In this case study, intensive interviewing will be conducted, meaning one-on-one (or at times one-on-two) conversations. The interviews are semi-structured, which allows for the discovery of aspects that are not anticipated (Babb, 2012, p. 301) This suits the exploratory nature of

the research as we are not testing a hypothesis but rather discovering the new combination of social security and profiling. The choice for elite interviewing is made on the assumption that those who work in the field of fraud enforcement know best which methods they use and how they are used.[14] We are looking for patterns and facts about their use of profiling in social security that only the relevant services can provide, rather than being concerned about precise measurements and statistics that one may find in the annual reports of these services.

Interviewees

To get access to the interviewees, every responsible alderman was sent a uniform request informing them of their position in the CBS statistics, shortly explaining the purposes of the research, and a request to interview those responsible for fraud enforcement. This resulted in a positive reply from 15 cities and in the end interviews with 13 out of the 15 cities. The remaining two cities, Breda and Emmen, have not been able to follow-up on their initial commitments. Most often two persons were interviewed, one responsible for policy and one responsible for the execution of that policy. Exceptions are Nijmegen, where a special advisor of the alderman and a policy officer were interviewed, and Maastricht where three persons were interviewed: a policy officer, a manager, and someone who was the link between policy and execution.

It is crucial to note that in this method of semi-structured interviews, what is said by the interviewees is not a substitution for factual data, but rather the fact that *they* said it are the data (Babb, 2012, p. 301). For answering the sub-questions and evaluating this in the context of the human rights risks, the perceptions of the interviewees matter— what they are aware of concerning the method, but also what they are unaware of— as they are the ones putting the profiling into practice (or not).

Interview structure and questions

There is a strong preference for face-to-face interviewing. Rather than the many other forms of interviewing made possible by various technologies today, this form allows for the close registration of the data. Having this opportunity allows for the interpretation of non-

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[14] These are respectively sub questions 1 and 2.

verbal language, which may help in the researcher's choice to follow up on certain questions and leave aside others. Interviews were conducted in Dutch, and thus the interview scheme used is in Dutch as well.[15] With the explicit permission of the interviewees, all interviews were recorded to increase transparency and accuracy of the data. In total, 522 minutes and 53 seconds, or 8 hours, 42 min and 53 seconds of interviews have been conducted. Though impossible under such time constraints to transcribe all these hours, the recordings are and remain to be available upon request. The choice to record was also made in the interest of the interviewees, gaining their trust by preventing as much as possible any event of their words being wrongfully portrayed.

3.2.2. Contextual quantitative data

To supplement the interviews and to be able to analyse the interviews in the right context or framework, extra information was requested in writing following the interviews.[16] These basic data concern numbers of Full Time Equivalents (FTEs), most recent numbers of benefit clients that are not yet available from the CBS, and similar statistics. The analysis of this quantitative data will supplement the main analysis of the qualitative data.

3.3 RELIABILITY AND VALIDITY OF METHODOLOGY

There are a number of factors within this methodology that influence the reliability and validity of this research. It is important to note these before the analysis, to be able to appreciate the value of the results. Firstly, because there is interaction between the researcher and the subject matter, a certain amount of interference with the data cannot be prevented. This affects reliability; the systematic and the repeatable are limited. It is likely that when another researcher conducts the same interview, different aspects may be highlighted. To limit this effect, the interview scheme is the same every time, the method of interviewing is as similar as possible, and the amount of time given to the interviewee

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[15] The original scheme and a translation are provided in Appendix 1.
[16] The overview of the questions is provided in Appendix 2. In the analysis, the questions will be shortened to key words for practical purposes.

is equal every time. The sample number (n) is 13 and very diverse in nature, adding to the validity of the results. Patterns found will likely be of a high validity due to the earlier explained Most Different Systems Design. Moreover, elite interviewing adds to the validity as we are getting first-hand insights. At the same time, this is also a weakness, as we are only speaking to those in governance and not the clients themselves, who may also have valuable insights on how they perceive profiling is being used. There may be stakes for the interviewees that we are not aware of that influence this research. Moreover, as the identification of certain human rights risks will follow the analysis of this data, this analysis may, as a result, be quite subjective. We are only identifying the risks that the fraud enforcement officers have allowed us to see. Moreover, only one researcher carries out the analysis, and it is not peer-reviewed, although it is supervised. Nonetheless, this research would benefit from an interdisciplinary view on the data from different experts who will all value the human rights risks differently. To minimise the subjectivity, there is explicitly no moral or value judgement to the human rights risks identified, they are merely an indication. A first indication, linking the risks mentioned in the literature to the actual practices, which is what makes this research valuable despite its challenges: challenges of reliability and validity inherent in all research.

4.

DATA ANALYSIS

First, we will provide an analysis of the extent to which profiling is used and in which way (our two research questions). Then we will deepen these topics by first elaborating on the experiences and future intentions of different municipalities when it comes to the use of profiling, and second by making an analysis of human rights risks found in the different ways profiling is used.[17] Possible risks for the future will be briefly considered but will be explored in greater detail in the conclusions and recommendations sections (chapters 5 and 6).

4.1 QUALITATIVE ANALYSIS

4.1.1 To what extent?

Of the 13 municipalities, all but one had heard of the term profiling. However, connotations such as 'NCIS' (Enschede) and 'ethnic profiling' (Delft) and several municipalities asking for a refresher on the definition of profiling, showed that no municipality had truly grasped the concept in full. Profiling is, in this sense, a new term for many and is considered something more intrusive than their current practices: 'truly something different from using risk profiles!' (Rotterdam). In all municipalities, there is a difference found between enforcement

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[17] Relevant sections of the interviews were transcribed and this is the raw data for our analysis. Thus, many quotes will be used. Even though there were often different people present in one interview, they have all spoken from their roles as fraud enforcement officers. Thus, for both relevance and anonymity, they will be referred to by the name of their municipality rather then their personal name.

'at the door' and enforcement on the 'ongoing file'. This is relevant, as different instruments are used to fight fraud right when someone requests a benefit and later on in the process when they are already receiving benefits.

As we have already stated in the literature review, for this research we consider all forms of profiling, whether through simple, man-made profiles or fully autonomic profiling. In this regard, all municipalities were familiar with the more simplistic, non-automated risk profiles. With regard to profiling 'at the door', at one point or another, Amsterdam, Arnhem, Maastricht and Eindhoven have worked with a so-called 'fraudscoremap', in which a certain score is suspicious, but what action should be taken thereafter is not always clear. The construction of the risk profile here is a static one, developed by central institutions using very general indicators, such as 'a woman between certain ages' (Eindhoven). Some have used a decision tree model, also made by a central institution, the Social Intel and Investigative Service (SIOD) (Enschede). No one has reported a successful experience with either instrument and report them as stigmatising: 'you really talk about [factors like] origin, single parents. It was faulty, not put together well'(Maastricht); 'Just not reliable. What was red was actually green and what was green was red. It was too standard' (Leiden). Other municipalities have therefore made their own risk 'checklist' (The Hague); sometimes the list can be found on paper (The Hague, Den Bosch), sometimes it is simply through the 'fingerspitzengeful' (Delft) or a 'fishy feeling' (Maastricht) from their employees at the gate.

A step further is the use of systems like Alert made by Capgmenini, Smartbox 1.0 made by Info Support, or the Szeebra System from Matchcare, reportedly used at some point by Groningen, Zwolle, Leiden, The Hague and Arnhem. By using these systems, there is an automatic shift from 'at the door' to the 'ongoing file', as data are needed that are simply not yet available when people are just requesting a benefit. The Alert system divides people into 'traffic lights' of risks—red, orange, and green (Groningen). All three municipalities that have used this system have stopped doing so, again because of disappointing results: 'with Alert you had like seven indicators and they wouldn't change so the same people kept popping up' (Groningen), 'The same people kept coming up' (Zwolle), 'it was not self-learning, it was archaic as in it wasn't very intelligent' (Groningen). The same goes for the Szeebra System, 'It is static' (Arnhem). Some municipalities are

currently back to, or have only focused on, the knowledge and know-how of their employees as being key in risk assessment, both at the door and on the ongoing files (Leiden, Nijmegen, Den Bosch, Maastricht, and Amsterdam). The added focus on at the door enforcement has come since the general introduction of 'high-end enforcement' in 2004, which entailed four streams of enforcement, two preventative and two repressive, it seems to have introduced enforcement throughout the social benefit chain (Eindhoven). As Rotterdam illustrates, 'enforcement is not a department'. Moreover, some claim that since the introduction of high-end profiling, the term profiling and risk-profiles have 'finally been formally recognised' (Groningen).

With the exception of Nijmegen and Maastricht, all municipalities are orientating themselves to more automated forms of profiling. There is an inter-city workgroup consisting of The Hague, Rotterdam, Enschede, Eindhoven, and others that are focusing on the possibilities of Big Data. However, this is still 'in child's shoes [at the very start of the process, NH.]'(Enschede). Some municipalities have started pilot schemes with more advanced systems, namely Den Bosch, The Hague, Rotterdam, and Groningen, 'We'll soon be changing to a Big Data System of VX company (Den Bosch). The Hague is now working with Smart Box 2.0, 'which, on the basis of our in-house data, can make a preventive risk-analysis of our client files. We can give our results back; it's a self-learning system.' This further shifts the grip that the municipalities have on their data, though in The Hague they strongly emphasise the fact that these are only indications and are never in themselves reasons to fully research someone, in Groningen experiments with more advanced (in this case Big Data) systems are handled differently. With great faith in the system 'you get a situation in which you could include anything'. When questioned about whose data they would then use, they replied 'Yes, everyone'. 'But it is so anonymised that even we don't know who the people are but also not what the indicators are, the people will just pop-up and then we research them', 'I think the predictive value will increase because a computer can make correlations that we with a human brain can't even handle anymore'.

When asked, no matter at what stage the municipality was at that very moment in time, the ideas about future importance profiling as an instrument were mostly very positive, many assumed the rise of the tool: 'it's a hot issue, we currently have some presentations from data brokers who offer their data and their software as a product' (Arnhem);

'It's something we're interested in' (Leiden); 'Only privacy is holding us back...the rules have been sharpened and we've had some internal fuss... but you know you are dealing with vulnerable information' (Eindhoven). In Amsterdam, though it has no form of profiling at the moment, the future prospect is radically different, accompanied by a great shift towards prevention: '[we will experiment with] an intervention-compass, an influencing instrument on the basis of data. Perceived chance of getting caught, sanction seriousness, are part of this. It's part of a city-broad programme of behavioural influence; it will profile and then tell you what trigger to put on the outcomes of those profiles ... Then you're using it as prevention. I find that much more interesting.' And with that comes a great data link, 'it could be that all enforcement data of the city will be linked: public space, (child) day care, restaurants and bars, and then in one dashboard you can see where the risk of social security fraud is highest' (Amsterdam). A similar prospect is found in The Hague 'it is the future, especially Big Data'. Then when asked if data from all inhabitants is used, 'not yet but that is "future music" [a likely prospect for the future, NH]'. There is a naturalness of moving towards more advanced profiling, 'This alderman is more realistic, he just says 'it's unstoppable, it's coming, it's a possibility and I have to make sure the money adds up'(Delft).[18] 'Big Data, of course, that will be the future' (Enschede).

Exceptions are Nijmegen and Maastricht, Nijmegen because it is 'politically unfeasible', Nijmegen is 'very left, Havana on the Maas' (Nijmegen). Maastricht, after their experiences with profiling so far, would 'rather invest in our client managers than invest in profiling' (Maastricht). The past use of risk profiles has not brought them high 'hit-ratios', which has given them more faith in their people than in such systems.

Though most municipalities use or have used some form of profiling in the past, there seem to be large differences between municipalities on the extent to which they do, and there is already an indication that the way in which they profile also differs. However, their larger processes for executing the 'participation law' are very similar, with the only great difference being that in larger cities such as Rotterdam

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[18] The alderman's citation is not to be taken literally. It is an interpretation of his stance given by the interviewee; his spokesperson.

and Amsterdam the requests for benefits are automatised, changing the nature of 'at the door' enforcement. Such uniformity is not found in the extent to which profiling is used, some swear by it already (Groningen, Rotterdam, Den Haag, Delft, and Den Bosch), some see it as the method for the future even though they have not been satisfied by the use of risk profiles previously (Zwolle, Eindhoven, Amsterdam, Enschede, and Leiden) some simply do not know yet (Arnhem), and then there are a few that will either invest in profiling by people (Maastricht), or seem to view profiling as a dirty word never to be used in their city (Nijmegen).

4.1.2 In which way is profiling used?

Now we have a view of the profiling landscape of the sample, we will focus on their practices: in which way is profiling applied?[19] The workings of the systems mentioned in the previous section will be explained in more detail. We will consider them from the interviewees' perspectives and thus any omissions on the procedure that may seem relevant to the reader, are omissions also found in the data. Rather than filling these omissions by providing information on the different methods and thereby interfering with the data, we will consider the fact that there are omissions *as* data, i.e. the omissions are data. [20] In the previous section we have given an indication of which municipalities are using, have used, or will use a certain method. In this section, we will focus on the methods of profiling, rather than the time frames of the municipalities; please note that certain cities may thus appear several times as the 'when' is not relevant here and systems are not mutually exclusive.

Firstly, the most basic form of profiling is unsupported by outside systems but an invisible, human form that is sometimes referred to as the 'fingerspitzengefuhl' (Delft). This non-automated, non-distributive, individual, direct, and proactive profiling relies heavily on the knowledge and know-how of the client managers at the door. They use a fluid set of indicators that differs from manager to manager as

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[19] This section will use the terminology explained and elaborated on in the literature review. If certain concepts are unclear, please see chapter 2 for reference.

[20] For a more detailed explanation of why this approach to the data was chosen, please refer to the methodology section.

'the interpretation of risks is very diverse…There is a personal factor' (Maastricht). Ultimately, on the basis of their personal interpretation of unknown indicators, cases get passed on to the fraud enforcement departments. Some municipalities heavily invest in the knowledge and know-how of their people, but even so discrepancies are seen between people: 'The other day someone said, 'I'm a crime fighter', and I said wait a minute, people are innocent until proven guilty, so yeah, it differs' (Den Bosch); 'profiling by heart ensures a human touch/ dimension' (Eindhoven); 'One thinks everybody is a potential fraud… and others assume everyone is a good person (Leiden). There are opposing perceptions and sometimes 'some are just better at it than others' (Maastricht). There is a lack of consistency and objectivity in such a method. This complicates a judgement of any human rights risks within this form of profiling—it may be that certain client managers call for further research based on unsound grounds, but it is invisible. Preconceptions of individuals cannot easily be discovered; one would have to observe the daily practice of these client managers.

However, what can be stated with a large degree of certainty is that by using this method of non-automated, non-distributive, individual, direct, and proactive profiling there is no level-playing field for clients, which gives space to the risks of the innocent until proven guilty principle and may lead to dirty data and spurious relations used in policy-making. With regard to the innocence principle; as we see in the different examples of Eindhoven and Den Bosch, where one manager sees everyone as someone to be helped, and another treats everyone as potential fraudster or criminal. Though a certain degree of variations can be taken away by training and peer review, it remains difficult to measure the knowledge uptake of such initiatives. Moreover, the human resources in an organisation are often more flexible than the procedures or systems, and thus this form of profiling requires a constant investment in the knowledge and skills of the employees, to safeguard good practices and eliminate bad practices. The spurious relations are seen in the risk of discrimination; discrimination through the self-fulfilling prophecy of these 'not right feelings' (Maastricht). Unsupported by sound factual data and knowledge basis some instincts may translate to discriminating indicators, creating a self-fulfilling prophecy and thereby discriminating statistics, which in turn are translated into policy: 'We see that we have a lot of non-natives that bring a certain risk with them, Turkish, Bulgarian, Croation, those are nationalities where we see most fraud, whether we

like it or not…So we do look particularly at capital abroad' (Maastricht).

The realisation that ultimately the use of profiling by using human preconceptions as indicators, which happens mostly at the door, may translate to such a discriminating policy outcome via the spurious relations created by those preconceptions, is missing. Unfortunately, we cannot be certain whether indeed people have these discriminating preconceptions that have led to these policy remarks but the fact that the above statements bear in them a notion of discrimination indicates a need for a more sound knowledge base. Though we cannot test preconceptions, we do see that these and similar comments on fraud suspicion on the (sometimes indirect) basis of heritage and nationality have mostly come from cities that (have) applied this human form of profiling at the door. Other examples are the following: 'The social investigations department saw a lot of problems with the Somalian community in a certain neighbourhood, but we stopped profiling them because it is stigmatising certain people and neighbourhoods' (Delft); 'Thematic foreign investigations have originally come from us' (Den Bosch); 'We know we cannot check nationality, so we check where people go on vacation' (The Hague).

The next form of profiling to consider is the, still non-automated, written profile or 'risk check-list'. It can be divided into two categories: those on the basis of municipality indicators, which may be called 'home-made' and those on the basis of centralised/national research, including the 'fraudscoremap' and the Social Inspection and Detection Service (SIOD) decision tree (Enschede). To start with the latter category, the fraudscoremap was provided by the central government, but no one mentions how it was developed. It is a standard, static, non-automated, non-distributive, individual, indirect, and proactive profiling tool. There has not been any positive experience in the use of this tool, and some describe it as 'stigmatising, you really talk about someone's origin, whether they are a single woman…you see that you're putting labels on people that are often not right, you are actually judging them before you know a thing' (Maastricht). Meant for 'at the door profiling', it coded people as potential fraudsters or not, using an ambiguous point system and corresponding traffic lights of green (not suspicious) or red (suspicious) that no one could explain. When asked who decided the boundaries of red and green and how people were given risk points, no municipality had an answer. The indicators used were static and made reference to very general personal characteristics—logically, as client

managers do not know a client at the door yet, but what may seem logical was not justified anywhere. These ambiguous circumstances were reflected in the experiences with the tool: it was 'too standard, what was red was in practice [in reality, NH] green and what was green was red' (Leiden); 'We got all sorts of indicators that we couldn't do anything with' (Leiden); 'We used it after [a home-made checklist] but we also said goodbye to that one' (Amsterdam); 'it was faulty, not put together well' (Maastricht). As users have mentioned themselves (Maastricht), such a standard tool is not only highly ineffective, it is also highly stigmatising on a large, national scale. Though municipalities all quit using it fairly quickly, so any 'damage' was for a short period of time, one wonders who developed the tool and if there had been any judicial or quality check on it. Given that there were no good results, it is likely to have been filled with indicators originating from wrong assumptions and correlations. This reveals a lack of central insight into the client files. Apart from an apparent risk of discrimination (see the comment on sex, single parents, origin p. 31) and the innocence principle (p. 34), there is the risk of moral regulation. The stigmatisation of, for example, single parents as potential fraudsters, can obstruct them in their participation in society, particularly their way back into the labour market. As we have considered in the literature review, this group may just as well need help. In Nijmegen, they approached the map differently; they used this profile to invite the single mothers and explain to them the rules and procedures after which a great deal of them changed their benefit status themselves. The same seems to be true for the SIOD decision tree that has similar characteristics to the fraudscoremap, only a different format. It was used by Enschede, 'we got a lot of results on people moving about, but that was because we are a key municipality in the region and all care institutions are here, that's why people move about all the time. We found those people didn't commit fraud, no, they needed care, help'. However, usually when this group, or any other for that matter, is put in the fraud sphere, the question of a need for help rather than suspicion is not a standard consideration of all fraud enforcement departments.

Though there is a large variety in how they are constructed, the 'home-made' checklists seem to work better and as they are developed by the municipalities themselves, they have control over the types of indicators, giving them the at least the opportunity to protect human rights principles in these checklists. In addition, the local situation is taken into account, thereby likely increasing effectiveness. Amsterdam and Groningen

have worked together with universities to create checklist with an 'academically and statistically sound basis' (Amsterdam). However, to their surprise 'the signal-based enforcement had a much higher hit ratio in absolute and relative terms so due to budget constraints we are fully focusing on signal-based enforcement'(Amsterdam).[21] Though a promising development, the municipality realised 'We did not have in-house knowledge to fathom these profiles.' Groningen sees it as a conscious step to start taking data as the knowledge base; 'We gave students our data and simply said work with this...it was not successful but it was the first step in a new way of thinking from data.'

Den Bosch and Enschede have created flexible written checklists/ risk profiles using their own indicators based on experiences from the past, 'it's what you would get from signals, for example, if someone has a valuable car, if they have committed fraud before. Then green or red comes out [of the checklist, NH]. If it's green we put little time in, if it's red further research is done by a fraud enforcement employee' (Den Bosch); 'It's just a very simple list that has things on it of which the people at the intake know ok this should go to enforcement for a closer look' (Enschede). The home-made lists in the way Enschede and Den Bosch use them are flexible, transparent, and the interviewees know exactly why and how they are constructed. This seems to give room for relativity; they know how to put the indicators into perspective and thereby do not seem to value and weigh heavily the outcome of these lists, but merely see them as part of a broader procedure and no more than a simple check. Handling the profiles in such a way limits the influence of profiling for the client. The checklists used by Amsterdam and Groningen may not have provided great results, but it has created an awareness, especially in Amsterdam, that knowledge is needed to be successful—the consequence of no in-house knowledge was termination of the tool. The right knowledge and know-how are also important if we want to protect human rights. We see that where the ownership of the checklist and thus the knowledge and knowhow are kept within the municipality, the profiling tool is valued and handled differently, providing better results in fraud enforcement, but also giving the opportunity to take ownership of human rights risks. It is important

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[21] Signal-based refers to concrete leads on individuals that have attracted suspicion, signals may come from any sort of party: neighbours are common but many municipalities have a hotline and in addition there is a national Intelligence Bureau (IB) providing concrete leads.

to note these two components, successful enforcement and protecting human rights, are in this research thus not (yet) seen to be mutually exclusive or opposing aims.

The next advancement we see in the use of tools is the use of semi-automated systems. Again, we see a division in the success and protection of human rights in those systems that allow municipalities to create their own profiles and those systems that do not give this option. There is a great variety of systems on the market that work semi-automated; Alert, Szeebra, Socrates, and Smartbox 1.0 are the ones we have come across that we can categorise as such. All but one (Socrates) use primarily their own indicators; they are often static systems. These indicators form a profile that is then applied to the client files and a group of people that have a higher risk pop-up. To show the risk someone poses, they work with a traffic light systems; red, yellow, and green (Alert). Generally, municipalities cannot adjust the risk-meter themselves. Similarly, to what we have seen in the non-automated fraudscoremap, no one knows why a certain indicator gives X number of points to someone and why another indicator gives Y number of points. Neither do they know (when they are static) why the boundaries between red, yellow, and green are as they are, 'We never had a say in the indicators. I don't know which indicators they took. When asked it is very difficult for them [Matchcare, developer of Szeebra, NH] to give an answer on what's behind it. But that conversation will have to take place'(Arnhem). Moreover, there is very little influence of the enforcement departments on the profiling of their own client files: 'At one point you've checked all the people Alert tells you to check. It's not a self-improving system. What button do you need to press then? That is difficult; then you really need someone who knows about the software, about enforcement...We got stuck at some point, the maintenance [of Alert, NH] is very difficult, it is not self-learning, and it was pretty archaic.' Other municipalities have encountered similar difficulties, 'It is inconvenient and only costs time and energy' (Zwolle).

Again, the lack of control and insight leads to human rights risks. Firstly, indirect discrimination is a realistic risk when one has no validation or control over indicators, 'We used Alert, it searched on the basis of particular postal codes' (Zwolle). The correlation of postal code and fraud is likely to be a spurious one and carries the risk that in segregated cities where there are so-called 'Turkish neighbourhoods', a particular group is being labelled as a higher risk on the basis of their

nationality.[22] Secondly, such indicators, often unknown, together with the static nature of these systems carry a risk of self-fulfilling prophecy that may lead to further stigmatisation, 'On the same indicators the same people kept coming up' (Zwolle); 'With Alert if you had seven indicators that you couldn't change you really got a tunnel vision' (Groningen). The Hague has until recently used Smartbox 1.0 that has similar issues, '1.0 was static. For example, the signals we already got from the Intelligence Agency (IB) were in there as well, so they were double, so all those people ended up high on the list'. Thus, if indicators are flawed or carry within them a human rights risk, their effect was strengthened by the nature of these systems.

The Socrates system is the odd one out in this category; it facilitates the creation of profiles by the enforcement officers themselves. The fraud enforcement puts indicators into the system to create a risk profile (Rotterdam). This allows for a validation of profiles, something which has become 'an explicit part of the process; we first validate our profiles before we apply them on all the files' (Rotterdam). 'You can eliminate spurious relationships before you apply them because you know from experience they must be wrong' '…' For example, diesel based busses, a municipality in Brabant had had a high hit ratio with that indicator, 10/20, we did the same thing and we also got 10, but out of 1000. What happened to be the case: we have a large Turkish community that uses those things in summer to drive to Turkey with the whole family. So yeah, you can never, even with Big Data, take out the human test, that must be a check' (Rotterdam). Here we see again possible stigmatisation of the Turkish community, but due to the ownership of the system by the enforcement officers they can take out such indicators that are not useful to them and in this case a risk for indirect discrimination.

Currently, some municipalities are moving towards the next step in profiling, e.g. autonomic systems such as Smartbox 2.0 in The Hague and Groningen. There are more municipalities connected to a regular Big Data meeting, such as Eindhoven, Rotterdam, and Enschede, but The Hague and Groningen have given us insight in what they are already undertaking in pilot form as a start for developing the use of Big Data.

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[22] The largest groups of immigrants in the Netherlands are of Turkish and Moroccan descent. It is a commonly known problem that Dutch cities are highly segregated. For demographics on these groups and the segregation of Dutch cities, please refer to the Central Bureau of Statistics.

Unlike the other categories, the systems of Groningen and The Hague (will) use indirect profiling, meaning using data from other people than the group of PW receivers or fraudsters for the construction of their profiles. It is a necessity for these systems to work effectively, 'For Big Data, we'll need more data. Even all inhabitants of Rotterdam is still not big enough'...' Yes, you use everyone's data' (Rotterdam). When asked if the source group of all inhabitants used for the construction of profiles will eventually also be subjected to the application of those profiles, The Hague tells us 'Yes, it is future music to apply it preventively to see who may risk needing benefits in the future'.

However, where The Hague explicitly mentions that any results from the system regardless of how advanced it is are still 'part of the process, not an actual suspicion, at best a starting point'...'And we always look at proportionality: first look in our own files, talk to the client, only if that gives a stronger signal we will investigate but it is always us making that call' Groningen does, or aims to do, this differently, 'The predictive value is higher [with a Big Data system, NH] because the computer makes ties that we with our human brain cannot. And the beautiful thing about it is that it keeps learning!' When asked if the system telling them to investigate someone is enough to do so, the answer was simply 'yes' (Groningen). The way these systems are valued thus differs greatly per city, it seems that the advanced nature of autonomic systems leads to a lot of trust in that very system in the case of Groningen. Groningen feels ownership of the process as they can 'feedback results and the system will learn itself'. Although at the same time the role of the data broker becomes more important, they seem to be the central actor when it comes to client data, 'Info Support cannot look in our files, but they do get our data and information, but it is anonymised' (The Hague); 'They have a lot of their own data too that we don't have and they have done the research' (Groningen). With good intentions of privacy, the interviewee remarks, 'These systems are so advanced that we won't know why someone has a high score. What formula, what consideration has led to that judgement, well that's so subtle and complex we just won't know anymore. It is fully dependent on that computer. And at the point where we don't even know, you should ask yourself in how far those people's privacy is violated' (Groningen).

Such high trust in systems, whether correct or not from an efficiency point of view, is inadvisable as a system-made suspicion works towards actuarial justice: the system has given a judgement of guilt that is highly

trusted. However, the notion of *mens rea* is completely absent, as well as the opportunity and right for citizens to know why they are being investigated. Moreover, as we have seen with previous systems, indicators are unknown, which may lead to indirect discrimination. In contrast to previous systems, the scale of these human rights risks will be enormous if these pilots will indeed lead to a move in focus towards all inhabitants. And based on which data? 'They have the data and the research' is insufficient to be able to judge if the data are clean and sound, thus we must assume the risk of dirty data. Moreover, in previous systems we see that indicators can be taken out of profiles, like in Rotterdam with the Diesel bus example. Taking out these indicators on the basis of efficiency does not require knowing them—it is a self-learning system as Groningen stated, so that should be taken care of. But taking out indicators because they may be stigmatising is impossible this way: indicators are invisible and thus cannot be evaluated, 'We don't really need to know indicators, we just want the system to decide who we have to take action on.' (Groningen) The use of privacy as an argument for the anonymisation of data and indicators so that they are invisible even for the enforcement manager, however well intended, reminds us of the idea that human rights should never be abused to violate other human rights. It is not something we can state for certain here, but we can also not rule out that this may happen—it shows transparency is key to evaluate human rights risks.

Thematic controls

An anomaly in profiling is the thematic controls that were often addressed in different interviews incidentally. Though not the focus of this study they are worth mentioning, and perhaps something to consider in further research. We will briefly elaborate, as our goal is to show the landscape of profiling in full, also outside our expected focus. Thematic controls are checks based on one theme such as water use (Origin in Groningen, copied by Eindhoven, Rotterdam, and Arnhem). The themes vary and the checks are not applied on a regular basis but rather on a project basis. In a sense, it is profiling on one single indicator, very different from what we have seen in the previous categories. They seem to come at random times, and municipalities sometimes copy themes from one another. This may work very well or not at all because every local circumstance is different, it depends on the theme. Thematic controls are always started on the initiative of the municipality, and originate from their experience. The themes, or indicators that are used

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seem mostly innocent, such as water use. However, they can also be quite obviously discriminating and used as a means to research people of a certain descent. For example, Delft, which had a thematic control on 'bakeries with a non-Western product range'.

Having analysed the systems, the procedures, the processes, and the perceptions within these 13 municipalities, we will now provide a short quantitative overview of the social benefit landscape, to allow the reader to put the above remarks into context.

4.2 QUANTITATIVE ANALYSIS

Here we will provide a small quantitative analysis. The aim was to provide more than what is shown here, but we have found that, in fact, municipalities do not record the effectiveness of profiling. The number of fraud cases caught through profiling as a basis is not recorded, neither is it known how many people work with profiling. In addition, some municipalities have not provided any information, thus all that *is* provided here is an incomplete view of the sample.

The most relevant numbers are the fraud cases in relation to the number of residents in municipalities, as shown in Figures 4a and 4b.

Figure 4a Comparison of total PW clients and fraud cases
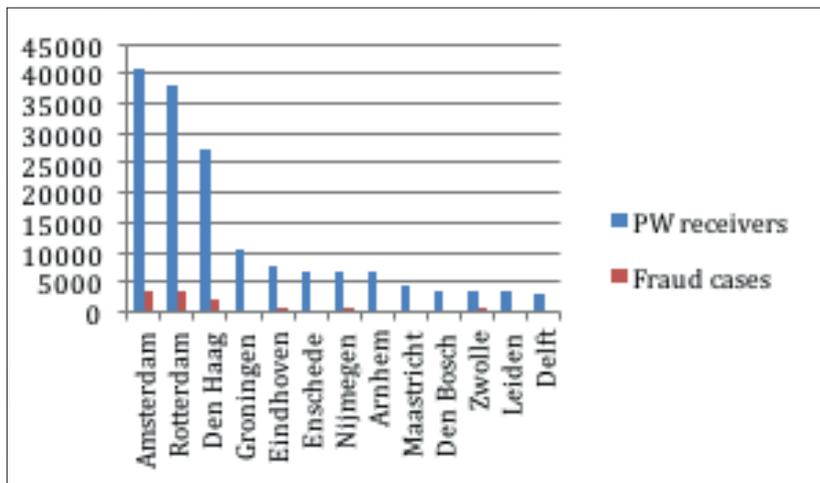
*Figure 4b Fraud cases (Please note that the values of the empty bars are
likely not 0, but are simply missing in the data.)*
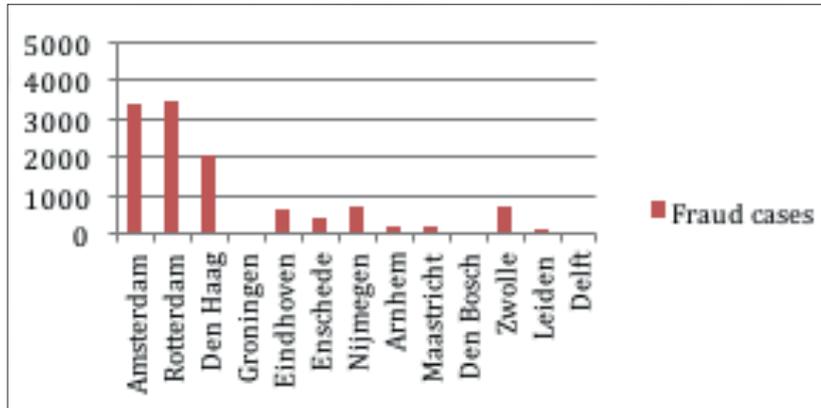
As we can see there does not seem to be significant changes in absolute
and relative terms between the two largest cities, i.e. Amsterdam and
Rotterdam. One profiles and the other does not, which could suggest
profiling is not a crucial tool. However, this assumes that both have
relatively similar amounts of undetected fraud. Moreover, Rotterdam
has not fully developed a Big Data system yet, so it would be interesting
to look at such statistics at a later stage, when all municipalities now
doubting or slowly moving towards profiling, have truly operationalised
it. In this respect, it is extra pitiful that Groningen is missing, as we
have seen in the qualitative section it is probably the city that has most
advanced its profiling efforts.

What can be further said is that generally the amount of registered
fraud is very little in every municipality when compared to the total client
system. This could be because much fraud is undetected, but it could
also be that there is simply not a lot of fraud. This raises the question
of how useful it is to have this crack-down on fraud as a solution to
the pressing social benefit budget. Though it fits the current political
climate as discussed early on in this thesis, as we look at the amount of
fraud now, the numbers hardly seem to have the potential to be a great
part of the solution.

Having analysed the extent to which profiling is used across our
sample and the way in which the studied municipalities use the tool, we

will now draw some conclusions on the impact of those practices with
regard to human rights.

5.

CONCLUSIONS

In sum, we will draw some conclusions on the profiling landscape in executing the 'participation law' and the human rights implications thereof. Firstly, we can say that every municipality, with the exception of Nijmegen, profiles or has done so in some way. All municipalities have had very little success with the method so far, either due to failing instruments, a lack of knowledge and know-how, or a combination of the two. Moreover, success is measured in this domain as a cost-benefit analysis; how many fraud cases are detected and what were the costs? What is the hit-ratio of a certain instrument or fraud indicator?

With regard to human rights risks, the practices of municipalities have some important implications. Let us firstly consider discrimination. The idea that profiling may be discriminative is something municipalities are aware of only partially. They are aware to the extent that ethnic profiling is discriminative, as well as profiling on the basis of nationality. They are aware that this is forbidden and are also quite aware of the relevant case law in The Netherlands with regards to this. However, the consideration that the very nature of discriminative profiling is ineffective is lacking. They work around what judges have forbidden, e.g. instead of looking on the basis of nationality, real estate in recurring vacation destinations are considered, and instead of looking at the Turkish community, bakeries with a non-western product range are checked. However, although this may play out legally, we can say quite bluntly that this plays into discrimination. Then there is the notion of indirect discrimination, where we identified it is the indicators used to create profiles that may carry a risk of indirect discrimination. We have seen examples that this may be the case—profiling on the basis of marital status (the single mothers) or on the basis of owning a diesel bus (the Turkish community in Rotterdam). The difference between these two is that the latter

category was taken out as it failed as an indicator, while the first one is used broadly. Municipalities check their indicators if they can, if their method of profiling allows them to do so, but they only check for effectiveness, not for possible discriminating consequences. Hopefully, one rules out the other as we have seen in the Turkish example, but this is not a given. Perhaps the most worrisome indicator: the unknown indicator. The movement towards semi-automated or even autonomic profiling has generally come with a shift in ownership of the process. The systems are built in such a way that enforcement officers rely on the names that the systems profile for them; however, often without even knowing which indicators are behind this or how these risk profiles were made. Fortunately, this has ended, so far, in a termination of the use of semi-automated systems as this very aspect, no control over indicators, has resulted in very ineffective systems. However, in the future that particularly Groningen, The Hague, and to a lesser extent Rotterdam, have pictured for us, systems will be very efficient, but indicators still unknown. This is a much more dangerous combination—thus far profiling has disappointed and therefore not triggered a widespread careful review of the indicators. We can only imagine what happens when profiling starts to work for these municipalities; the incentive to evaluate may be even less.

The next human rights risk to consider is privacy; this was the first thing that came to every interviewee's mind when asked if they saw any human rights risks themselves. Though data seems to always get anonymised, and thus a narrow conception of privacy is served, in the bigger picture we see some potential problems. There has been a great range of data brokers offering their services. They offer systems, but often also get some data for trial and error purposes. It is unclear where the exact boundaries are concerning which and whose data is kept in-house and which is, albeit anonymously, given to the private actors. Even if data remain anonymous, it is unlikely clients have ever given consent for their data to go to third parties. Anonymity does not solve this challenge; it is still their data that ultimately is potentially being used against them. There is a strong emphasis on the 'information obligation' of clients: they have to inform municipalities on their *personalia* but also when they plan to take a vacation and where. However, there is no clear obligation for the municipality to ensure that these data are only kept because of the original aim, which is a clear requirement under various data protection laws. Moreover, there is little realisation that these

private actors may generally serve a different purpose than the public actors, by their very nature they live off data and privacy thus cannot be their core aim. This generally endangers any privacy protection effort when part of the key public task is trusted to data brokers.

Concerning the notion of innocence and the warnings of actuarial justice we have encountered in the literature, there is no case where we have seen that people are labelled fraudsters merely based on the systems. Perhaps because the systems have been so ineffective, the need for a human check was always there. However, even the most basic fraudscoremap was considered stigmatising in the sense that people were made suspicious without having even talked to them, as Maastricht mentioned. But in the future of Amsterdam in particular, predictive profiling will change this paradigm. As they aim to find those who may need benefits and thus may commit fraud in the future, the risk of actuarial justice becomes more realistic. Similarly, the way in which the new system in Groningen will simply tell who to investigate moves towards the idea of actuarial justice—the question is whether such grounds would ever hold up in court, something we will leave for legal experts to consider.

The risk of moral regulation and thereby loss of self-determination then also does not sound extreme anymore. As Amsterdam mentioned, their predictive/preventive programme is part of a larger city-wide behavioural influence program. When such systems come and the status quo vis-à-vis data brokers does not change, a risk may occur where public actors are influencing their citizens based on unknown, perhaps discriminatory or in other sense limiting in freedom, indicators. It should be emphasised that this is not the case at the moment, but the fact that it is mentioned for the near future shows that continued critical research on profiling in social security is crucial.

Subsequently, we should also be critical in portraying the above risks, because to what extent are they truly there? The risks we have identified in our sample are widespread but vary in severity as every municipality profiles in a slightly different way. As our sample covers 38 per cent of PW receivers in The Netherlands and in 12 of our 13 municipalities we have seen profiling, we can state it is likely a widespread phenomenon. With the important note that these municipalities are benchmarked in size and municipal organisation, so a different picture may come out when we also consider smaller municipalities. At the same time, we also see that signal-based enforcement is still the main tool for fraud enforcement.

But when we consider the statistics, these bigger municipalities make up a great deal of the landscape. The risks found are thus not marginal and deserve careful consideration. To give a start in this respect, we will now finish this thesis with a set of recommendations, for both the field and further research.

6.

RECOMMENDATIONS

6.1 FOR THE FIELD

We have seen risks in all types of profiling, and the common denominator is not that the systems are inherently 'wrong' but risks arise from how profiling is used, who has the ownership of the process, and the extent of the knowledge. From simple checklists to more advanced systems, we see that if the ownership is with the municipalities, there are fewer risks or they are less severe simply because the organisation knows what they are doing, know the local situation, and their clients, etc. The first recommendation to these municipalities is, therefore, perhaps unsurprising but not unnecessary: to keep this ownership. To be able to do so, they may need to hire in-house knowledge on how these systems work, and this should always be knowledge from independent sources, i.e. other parties than those who sell these systems. When doing so, municipalities should also consider hiring or at times choose to keep, the judicial employees and consult them time and time again—due to working in an ever-changing, highly politically-sensitive environment. In the long-term, an investment in knowledge and skills pays off as it makes systems more effective and hopefully keeps municipalities out of court where cases may be dismissed, for example, in The Hague a whole range of cases was dismissed because the ownership of that research laid with an external company. A general recommendation on the use of any non-in-house systems: to demand more from those offering their services. Whether it is the Ministry of Social Affairs providing a faulty, stigmatising fraudscoremap or a data broker that cannot say what he based his whole system on—only the municipalities are protecting its clients' files. The municipality is the face of government for these clients; it is only them who can decide whether or not to expose citizens to certain instruments.

For those municipalities who already seem to understand the value of people rather than systems—, the recommendation is to realise that people are a resource that needs constant investment. Though the risks of the Big Data systems that we have identified are not apparent here, the 'not right feelings' and 'figerspitzengefuhls' we have come across, are not very different from the unknown indicators that we find in the Big Data systems. To ensure uniformity, people not only need to be trained to understand how to use a tool but as human resources are a fluid form of resources, procedures are needed. Clear evaluations of risk profiles are needed, not only a validation of the effectiveness of indicators in risk-profiles but also on human rights. At the moment, skill sets and understanding of how to use the profiling instruments differ from employee to employee, carrying a great risk of arbitrariness. Training employees and inserting procedural checks can lessen this phenomenon. Again, this is in the interest of the municipality as arbitrariness is also not an effective way of carrying out fraud enforcement.

In light of the current Big Data meetings amongst municipalities, that aim for a uniform system: uniformity may lead to further professionalisation and make it easier to ensure equal treatment of citizens. Moreover, it allows for better evaluation; it makes it easier to assess the human rights implications of such a system. Even in this thesis, if we would have come across a single profiling system used everywhere we would have been able to analyse it much more thoroughly

Then there are a number of municipalities that have never been fully satisfied with the methods of profiling in the past; they are now looking at Big Data systems and other forms of more advanced profiling for the future (Zwolle, Eindhoven, Amsterdam, Enschede, Leiden). There is the connotation of a certain inevitability of profiling: as if it is a movement, a development like perhaps the internet, one which cannot be ignored and will be the future. We would like to remind these municipalities that *they* are in fact in charge of how they execute the PW. Of course, a certain degree of digitalisation/automation of processes may be necessary or inevitable, but the extent to which, and the way in which such processes take place is up to these public institutions themselves. We have seen a lack of knowledge and insecurity when it comes to the technological advances in profiling, but they should not be a reason to go along with them, but rather a signal to be extra careful.

Lastly, transparency is key, as we have seen that protecting human rights and being effective in fraud enforcement are not mutually

exclusive aims. Transparency allows for further critique and research on these practices. Fortunately, we have seen a high degree of willingness to co-operate in this piece of research, for which we are very grateful.

6.2 FOR FURTHER RESEARCH

Lastly, a recommendation to researchers is to explore beyond the boundaries of this thesis. Let us first underline the reason once more. At the moment we see a cross-point in the field; many municipalities are seriously considering the use of advanced Big Data profiling systems. This may affect the analysis made here significantly. Thus, there is a need to keep following these developments. Moreover, as we have seen, there is little awareness of human rights risks other than a narrow concept of privacy in these municipalities. Research on human rights in their daily practices may change this, and fill this gap. Awareness of a broader spectrum of human rights is a first step to policy change (though policy change in itself is not the intent of this research).

As for a suggestion of how to carry on with this subject matter. We have spoken to those in governance, and though they have been very knowledgeable, it has also significantly limited our scope and view. It would be very useful to hear from clients, which may also have valuable insights on how they perceive profiling is being used. A broader scope would help to put our perhaps subjective sources into perspective and context, which could help to value the findings reported in this thesis better.

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APPENDICES

APPENDIX 1 *INTERVIEW SCHEME NL AND ENG*

1.1 Interview scheme NL

Eigen informatie:
Intro en toelichtingen tijdens verhaal +/- 10 min
– Eigen achtergrond mensenrechten/fundamentele rechten, doel onderzoek, subonderzoeksvragen, vraag om mail 7 vragen, vraag om recording, vraag om nog vragen voor we beginnen?
Sub: 1. In hoeverre wordt profiling gebruikt bij bestrijding van bijstandsfraude?
      2. Op welke wijze wordt profiling gebruikt?

Interviewvragen algemeen/kader scheppend (10 min)
1. Bent u bekend met het begrip profiling? (Ja/Nee) 3 vormen info

2. Wordt profiling op basis van risicoprofielen in uw gemeente gebruikt bij de opsporing van bijstandsfraude? (Ja/Nee)

3. Is profiling naar uw mening een belangrijk instrument en ziet u het gebruik hiervan in de toekomst toenemen (indien niet reeds op grote schaal toegepast)?

Interview vragen over de techniek (20 min)

Constructie
4. Hoe komt een profiel dat u gebruikt tot stand?
– Stelt u uw profiel zelf op? (Ja/Nee) zo ja:
– op basis van
      – documentenonderzoek;
      – ervaringen uit het verleden van eigen medewerkers
      – theoretische analyses
      – statistische analyses

5. In hoeverre is profiling bij u geautomatiseerd, waar in het proces is het mensenwerk en waar is het computerwerk?

6. Wiens data wordt gebruikt bij het opstellen van risicoprofielen?
– Alle inwoners/alle bijstandsgerechtigden/alle eerdere frauders/anders namelijk:

7. Welke databronnen gebruikt u bij het opstellen van risicoprofielen?
– uitkeringsgegevens (duur, hoeveel per huishouden)
– *persoonsgegevens (sekse, leeftijd, postcode)*
– anders waaronder sociaal psychologisch

8. En hoe komt de gemeente aan die data?

Toepassing
9.
– Past u groepsprofielen/groepsrisicoanalyses toe op individuen?

10. Hoe gebruikt u uw profielen in de dagelijkse praktijk?
– *Proactief* of retroactief (toelichten wat dit is)? Preventief en repressief.
– Op individuen of op groepen?

11. Ondergaan uw profielen een kwaliteitstoets en zo ja wat houdt deze in?

12. Is er ambtelijk en politiek toezicht op de inzet van profiling binnen uw gemeente? Hoe zit dat toezicht eruit? Wanneer is voor het laatst een debat over profiling binnen uw gemeenteraad geweest?

Mensenrechten (indien tijd over)
13. Welke rechten denk u dat gemoeid zijn met deze methode van werken door gemeentes? Ziet u hier (potentiele) knelpunten?

14. Zijn er maatregelen getroffen in uw organisatie waarvan u zich bewust bent die rechten van burgers die potentieel geprofiled worden beschermen?

1.2 Interview scheme ENG

Research information:

Intro/explanations during interview +/- 10 min
– Background of human rights/fundamental rights, goal of research, research questions, request for contextual questions per email, request for recording, ask if any questions before we start.
Sub: 1. To what extent is profiling used in combatting PW fraud?
    2. In what way is profiling used to combat PW fraud?

Interview questions general/create framework (10 min)
1. Are you familiar with the term profiling? (Yes/No → if not explain)

2. Is profiling used on the basis of risk profiles in your municipality in fraud enforcement? (Yes/No)

3. Is profiling in your perception an important instrument and do you see the use of it increasing in the future (if not applied full-scale already)?

Interview questions on technique (20 min)

Construction
4. How is a profile you use established/created?
– Do you create your own profiles? (Yes/No) if so:
– on the basis of
       – document research
       – past experiences from employees
       – theoretical analyses (scientific)
       – statistical analyses (without former base, in the system)

5. To what extent is profiling automated, where in the process is it people's work and where is it computer work?

6. Whose data are being used in the creation of risk profiles?
– All inhabitants/all social benefit receivers/all former fraudsters/different:

7. Which data sources do you use when creating a risk profile?
– benefit data (period of benefit, how many benefits per household)
– personal data (sex, age, gender)
– different, e.g. social-psychological (e.g. perceived probability of being caught)

8. How does the municipality get those data?

Application
9. Do you apply group profiles to individuals or the other way around, or both?

10. How do you use your profiles on a daily basis?
– Proactive or retroactive and preventive or repressive
– On individuals or on groups?

11. Are your profiles subjected to a quality test and if so what does this test entail?

12. Is there civil and political supervision on the use of profiling within your municipality? If so, what does this supervision entail? (When) has there been a debate in the municipal council on the use of this tool?

Human rights (if time left)
13. Which human rights do you think may play a role in this method? Do you see any possible linkages between your method and human rights here?

14. Are their specific measures taken within your organisation that you are aware of to protect the rights of citizens that may be targeted by profiling?

APPENDIX 2 *CONTEXTUAL QUESTIONS NL AND ENG*

2.1 Contextual questions NL

1. Omvang gemeente in 2015 (populatie)?
2. Hoeveel bijstandsgerechtigden had u in uw gemeente in 2015?
3. Hoeveel zaken van bijstandsfraude zijn er in uw gemeente geregistreerd in 2015?
4. Hoeveel fraudegevallen zijn gevonden door middel van of met behulp van risicoprofielen/profiling?
5.Hoeveel FTEs werken er in de bijstandsfraudebestrijding in uw gemeente?
- hoeveel daarvan werken er met risicoprofielen/profiling?
6. Welk belang heeft deze methode naar uw inschatting als onderdeel van de totale aanpak van bestrijding van bijstandsfraude binnen uw gemeente (als percentage (bijv. 30%) of als breuk (bijv. 1/3))?
7. In hoeveel zaken was er sprake van verminderde verwijtbaarheid in 2015?

2.2 Contextual questions ENG

1. Size of municipality 2015 (population)?
2. How many social benefit/PW receivers did you have in your municipality in 2015?
3. How many cases of social benefit/PW fraud have been registered in your municipality in 2015?
4. How many fraud cases have been found by or with help from risk profiles/profiling?
5. How many FTEs work in fraud enforcement in your municipality?
6. What weight does this method have, in your perception, as part of the total effort of fraud enforcement within your municipality (as percentage, e.g. 30% or share e.g. 1/3)?
7. In how many cases did you use the notion of reduced accountability in 2015?