



**BROKEN
CHALK**

Submission to the United Nations OFFICE OF THE HIGH
COMMISSIONER FOR HUMAN RIGHTS

**CALL FOR INPUT | OFFICE OF THE HIGH COMMISSIONER FOR
HUMAN RIGHTS**

ISSUED BY OHCHR

Application of digital technologies in the administration of
justice - Report to the General Assembly on human rights in
the administration of justice.

Submitting Organization: BROKEN CHALK

March 2024

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Application of digital technologies in the administration of justice - Report to the General Assembly on human rights in the administration of justice.

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Broken Chalk is an Amsterdam-based non-governmental organisation (NGO) committed to addressing human rights violations in the education sector. It was established in October 2020. A multinational team of dedicated human rights advocates collaborates extensively on researching violations in every corner of the world.

The organisation's primary activities include removing obstacles to education, promoting peace and tranquillity in society through intercultural tolerance, preventing radicalism and polarisation, and eliminating educational opportunity gaps across different demographics.

Broken Chalk works hard in advocacy and lobbying on behalf of these educational victims, engaging with international organisations to prompt action. Additionally, the volunteers and interns working remotely worldwide at Broken Chalk prepare comprehensive reports for international organisations, stakeholders, and governments, highlighting human rights violations in education. These reports aim to draw attention to the often-overlooked aspects of human rights violations, providing stakeholders with a complete understanding and calling for the international community to act in cases where conflict halts access to education and endangers civilians' lives. This approach ensures that awareness is raised and necessary actions are taken to address these violations. Broken Chalk is genuinely international, achieving a local and global perspective in its work.

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With respect to the information above, please indicate what regulatory framework is used, whether the existing regulatory framework has been amended to accommodate the use of digital technology or whether specific regulation has been adopted for this purpose. Please indicate how data protection is legally guaranteed and enforced in the administration of justice. 6

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In recent years, there has been an increase in the use of new technologies to administer justice in the Netherlands. To give a few examples of the digital technologies used, there has been an increase in legal applications, the creation of prediction tools for lawyers, such as judicial analytics, and an increase in legal help desks that offer free legal advice.¹

Legal apps are a great help in making legal help more accessible to people who don't have the means for in-person help, but if legal advice is provided by an algorithm, then there would be no proactive referral system for the user, and the legal advice would be pointless.

When it comes to prediction tools for lawyers, it helps lawyers in time management, but cases with low success prediction can be abandoned by lawyers, and that is not fair because prediction tools can be biased on people of colour and indigenous people. This conflicts with Article 47 on the right to an effective remedy and to a fair trial of the European Union of Fundamental Rights because if the future of a case is decided based on an algorithm decision, it conflicts with the right to an effective remedy.

Judicial analytics are allowed in the Netherlands, judicial analytics are the use of statistics and machine learning to understand or predict judicial behaviour.² The problem with such analytics is bias, as machine learning algorithms are easily tainted by racism, sexism, or other biases.³ For example, data analytics tools have been criticised for assigning risk scores to black defendants. AI tools may also exacerbate wealth inequalities.⁴

Concerning the administration of justice for children in the Netherlands, since 2011, the Dutch police have been using an automated risk-assessment tool named ProKid, which assesses the

¹ Jan van Etekooven, B & Prins, C. (2018). "Chapter 18: Data analysis, artificial intelligence and the judiciary system". *Research Handbook in Data Science and Law*. (Cheltenham, UK: Edward Elgar Publishing). pp.425-447. <https://doi.org/10.4337/9781788111300.00026>

² Livermore, M & Rockmore, D. (2019). France Kicks Data Scientists Out of Its Courts. Slate. <https://slate.com/technology/2019/06/france-has-banned-judicial-analytics-to-analyze-the-courts.html>

³ Livermore, M and Rockmore, D. (2019). France Kicks Data Scientists Out of Its Courts. Slate. <https://slate.com/technology/2019/06/france-has-banned-judicial-analytics-to-analyze-the-courts.html>

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risk of future criminality of children and young people.⁵ A significant number of incorrect ProKid assessments have been reported, assigning children as “at-risk” of neglect from their family but it was wrongly assigned.⁶

⁵ Fair Trials. (2021). Automating Injustice: The use of artificial intelligence & automated decision-making systems in criminal justice in Europe. Fair Trials. <https://www.fairtrials.org/articles/publications/automating-injustice/>

⁶ Fair Trials. (2021). Automating Injustice: The use of artificial intelligence & automated decision-making systems in criminal justice in Europe. Fair Trials. <https://www.fairtrials.org/articles/publications/automating-injustice/>

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In the Netherlands, the regulatory framework used is the General Data Protection Regulation (GDPR) and various data protection laws and regulations, which protect the sensible data of the general public. These laws and regulations have been adopted before the use of AI in the judicial system. But in the Netherlands, concerning Artificial Intelligence, the European Commission is helping the Dutch Authority for Digital Infrastructure to set up a national AI supervision system to supervise AI applications, which can be used for AI in the administration of justice⁷, for example, with legal applications. In the future, this can help regulate the risks of using artificial intelligence in the judicial system.

⁷ European Commission. (2023). Commission supports the Netherlands in setting up a national Artificial Intelligence supervision system through the Technical Support Instrument. Directorate-General for Structural Support. https://commission.europa.eu/news/commission-supports-netherlands-setting-national-artificial-intelligence-supervision-system-through-2023-10-05_en

With respect to the digital technologies used and referred to above, please provide information on the challenges and benefits of the use of these digital technologies as well as good practices and lessons learned.

The digital technologies mentioned above have challenges and benefits; for example, with legal applications, there is better accessibility to legal advice for the public. However, the legal advice can be pointless if the user is not referred to a legal professional after getting the legal advice. Prediction tools can help lawyers with time management, but because of the bias of the algorithms, certain cases can be deemed to fail when this reasoning comes solely from bias. Concerning the automated risk-assessment tool named ProKid, the risk of putting children in categories of being at risk of future criminal behaviours or assigning children as "at-risk" of neglect from their family creates risks of putting children in categories wrongly, which can have a substantial negative impact on the child's future.

Digital technologies in the judicial system can help with the time management of cases, but it also puts an enormous responsibility on Artificial intelligence, which can dictate one's future; the weight of one's future should not be solely put on digital technologies in the judicial system.

Please provide information on the measures taken in the development and use of these digital technologies to ensure protection of human rights including, but not limited to, the rights to privacy, fair trial, non-discrimination, gender equality, enforced disappearance, liberty and security of the person and effective remedies.

The Netherlands is using the help of the International Center for Not-For-Profit-Law (ICNL) and is a member of the Freedom Online Coalition to ensure that the protection and promotion of civil freedoms are critical considerations in developing technology and policy.⁸ The Freedom Online Coalition is a group of countries committed to the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and the Netherlands is part of this coalition.⁹

Nevertheless, in 2020, a Dutch Law creating a system designed to detect levels of risk associated with welfare fraud named "System Risk Indication" (SyRI), was struck down by the District Court of The Hague¹⁰ on human rights grounds¹¹. SyRI aimed at reducing administrative fraud.¹² However, the system's lack of transparency caused issues of fairness and discrimination and harm to the right to privacy and the right to a fair trial because there is a risk of harm to the most vulnerable whenever a government deploys technology to deliver services.¹³ The analysis concludes that deploying new technology to solve governance problems can be problematic because "technological systems reflect the embedded privileges of those who design them".¹⁴

⁸ Organisation for Economic Co-operation and Development. (2021). "The Netherlands' inclusive and human rights-based approach to supporting civil society in the digital age". OECD. <https://www.oecd.org/development-cooperation-learning/practices/the-netherlands-inclusive-and-human-rights-based-approach-to-supporting-civil-society-in-the-digital-age-ccaa7bb2/>

⁹ Freedom Online Coalition, (n.d.) "Our Mission". FOC Website. <https://freedomonlinecoalition.com/>

¹⁰ Land, M. & Aronson, J. (2020). "Human Rights and Technology: New Challenges for Justice and Accountability" (*Annual Review of Law and Social Science*, Vol. 16) pp.223-240

¹¹ Van Veen, C. (2020). "Landmark judgment from the Netherlands on digital welfare states and human rights". Open Global Rights. <https://www.openglobalrights.org/landmark-judgment-from-netherlands-on-digital-welfare-states/>

¹² Van Veen, C. (2020). "Landmark judgment from the Netherlands on digital welfare states and human rights". Open Global Rights. <https://www.openglobalrights.org/landmark-judgment-from-netherlands-on-digital-welfare-states/>

¹³ Land, M. & Aronson, J. (2020). "Human Rights and Technology: New Challenges for Justice and Accountability" (*Annual Review of Law and Social Science*, Vol. 16) p. 232

¹⁴ Land, M. & Aronson, J. (2020). "Human Rights and Technology: New Challenges for Justice and Accountability" (*Annual Review of Law and Social Science*, Vol. 16) p. 232

Please indicate whether human rights impact assessments are undertaken prior to the design and implementation of digital technology used in the administration of justice, whether regular monitoring and evaluation are undertaken at later stages, and whether such assessments are made public.

In October 2019, the Dutch Government published a Strategic Action Plan for Artificial Intelligence, which outlines goals and actions for the Netherlands to take advantage of the social and economic opportunities offered by AI¹⁵, along with this Action Plan, the Government mentioned that the plan should consider challenges such as protecting fundamental rights like privacy, non-discrimination, and autonomy.¹⁶ In 2021, the Dutch government drafted guidelines for the application of algorithms and data analysis by government agencies.¹⁷ The Dutch Government proceeded with such guidelines because in 2018, while attempting to regulate the distribution of childcare benefits, the Dutch Tax Administration (Belastingdienst) falsely accused thousands of parents of fraud due to discriminations embedded into the design of self-learning algorithms.¹⁸ This is proof that human rights need to be embedded in the design of algorithms used in the judicial system, and the effort made by the Dutch Government is not sufficient to protect the general public against discrimination regarding the right to privacy and the right to a fair trial.

¹⁵ Willems, J., Zadeh, S., & Reinders, E. (2023). "The Netherlands: Artificial Intelligence". NautaDulith. The Legal 500, Country Comparative Guides 2023. p.2

¹⁶ Willems, J., Zadeh, S., & Reinders, E. (2023). "The Netherlands: Artificial Intelligence". NautaDulith. The Legal 500, Country Comparative Guides 2023. p.3

¹⁷ Willems, J., Zadeh, S., & Reinders, E. (2023). "The Netherlands: Artificial Intelligence". NautaDulith. The Legal 500, Country Comparative Guides 2023. p.3

¹⁸ Willems, J., Zadeh, S., & Reinders, E. (2023). "The Netherlands: Artificial Intelligence". NautaDulith. The Legal 500, Country Comparative Guides 2023. p.3

Please provide information on how these technologies accommodate and negatively impact persons often in vulnerable situations such as women, child and juveniles, persons with disabilities, migrants, minorities, indigenous peoples, and Africans and people of African descent.

The utilisation of AI in the pursuit of justice has resulted in adverse consequences for children, migrants, and the African community in the Netherlands. AI applications within various areas of the justice system, such as criminal prosecutions and tax adjustments, have raised significant concerns regarding the respect of human rights.

One of the most prevalent issues stems from the inherent biases embedded within AI algorithms, which are trained on pre-existing data collected by authorities. Unfortunately, this data often reflects historical biases and stereotypes. For instance, in a society where individuals who do not fit the stereotypical Dutch appearance have historically been targeted as suspects of crimes, AI algorithms may disproportionately target individuals of Turkish, Moroccan, or Black descent.

For instance, since 2017, the National Police in the Netherlands has been utilising the 'Criminality Anticipation System' (CAS) to forecast crimes, or 'hot spots', on a national scale. Developed by the Dutch police, particularly the Amsterdam unit, CAS aims to identify and predict criminal activities within specific timeframes and geographical areas.¹⁹ However, the majority of mapping occurs in low-income neighbourhoods where migrant and economically disadvantaged families reside.²⁰ Consequently, this results in increased police presence in these areas and the heightened detention of individuals who fit the predetermined stereotypes associated with those most likely to commit crimes.

An illustrative example is the case of tax fraud declarations related to childcare benefits. The algorithm used to identify potential fraudsters unfairly targeted individuals with migrant backgrounds, low incomes, and multiple children, leading to erroneous accusations of fraud. Chermaine Leysner's case in 2012 serves as a poignant example, where she was wrongly accused of owing over €100,000 in childcare allowance.²¹ The Dutch tax authorities utilised a self-learning algorithm to create risk profiles, resulting in thousands of families, primarily from lower-income backgrounds or ethnic minorities, being pushed into poverty due to

¹⁹ van Arman, T. (2019). Smart Cameras for a Smart City. Amsterdam Smart City.

²⁰ Van Brakel, R. Pre-Emptive Big Data Surveillance and its (Dis)Empowering Consequences: The Case of Predictive Policing (2016). pp. in 117-141 in van der Sloot, B. et al (ed.) (2016) Exploring the Boundaries of Big Data, Amsterdam: Amsterdam University Press. <https://ssrn.com/abstract=2772469> or <http://dx.doi.org/10.2139/ssrn.2772469>

²¹ Heikkila, M. (2022). The Dutch scandal serves as a warning for Europe about the risks of using algorithms. Politico.

<https://www.politico.eu/article/dutch-scandal-serves-as-a-warning-for-europe-over-risks-of-using-algorithms/>

unwarranted debts and accusations of fraud. Tragically, some victims even resorted to suicide, and many children were placed in foster care.²²

These incidents highlight the alarming risks faced by children from migrant communities, particularly those of African descent, due to the biased use of AI in the justice system. Innocent young men are disproportionately criminalised, derailing their aspirations for work or higher education.²³ Furthermore, the child support tax debacle resulted in children from already disadvantaged families being denied equal access to education, perpetuating cycles of poverty and inequality.

In conclusion, the unchecked use of biased AI in the Dutch justice system poses significant threats to the rights and well-being of children, migrants, and African communities, exacerbating existing disparities and injustices. Urgent reforms and safeguards are necessary to mitigate these harms and uphold the principles of fairness and equality in the administration of justice.

²² Ibid.

²³ Amnesty International. (2020). Netherlands: We sense trouble: Automated discrimination and mass surveillance in predictive policing in the Netherlands. <https://www.amnesty.org/en/documents/eur35/2971/2020/en/>

Please provide information about whether specific measures have been taken to ensure accountability and access to remedies for violation of human rights resulting from the use of digital technologies in the administration of justice.

Specific measures have indeed been implemented to ensure accountability and access to remedies for human rights violations resulting from the use of digital technologies in the administration of justice in the United Kingdom.

The framework primarily consists of the Police Data Act (PDA) and the Police Act. However, questions arise regarding whether this legal framework provides adequate protection under Article 8 of the European Convention on Human Rights (ECHR). For instance, in projects like the Roermond project, the police assert that sufficient legal grounds for predictive policing projects can be found within Article 3 of the Police Act in conjunction with Article 8 of the PDA concerning daily police tasks.²⁴ While Article 3 of the Police Act lacks substantive guarantees, the PDA does offer some data protection measures regarding the reliability, impartiality, and effectiveness of AI-based systems. Notably, it prohibits fully automated decisions without human intervention and requires using accurate and lawfully obtained data.

Individuals are granted certain rights under the PDA, such as the right to request information about collecting their personal data and the right to rectify or remove certain information.²⁵ However, exceptions to these rights exist for reasons such as protecting investigative interests. Moreover, individuals can file complaints with the Data Protection Authority (DPA) and seek compensation for damages using AI-based systems in criminal investigations.²⁶

However, criticisms have been raised regarding the effectiveness of these safeguards, particularly in law enforcement contexts. The reliance on data subject rights places significant responsibility on individuals subjected to investigative measures, with limited knowledge of processing practices hindering effective supervision by the DPA. The DPA's limited powers to remedy violations further exacerbate these issues.²⁷ While general principles, such as proportionality and subsidiarity, may play a role in guaranteeing the reliability and impartiality

²⁴ Amnesty International. (2020). Netherlands: We sense trouble: Automated discrimination and mass surveillance in predictive policing in the Netherlands. <https://www.amnesty.org/en/documents/eur35/2971/2020/en/>

²⁵ Dutch News. (2021). 'Police Remove 218,000 Photos from Facial Recognition Database'. <https://www.dutchnews.nl/2021/07/police-remove-218000-photos-from-facial-recognition-database/>

²⁶ Das, A., & Schuilenburg, M. (2020). Garbage in, garbage out: Over predictive policing en vuile data. *Beleid en Maatschappij*, 47(3), 254- 268. <https://doi.org/10.5553/BenM/138900692020047003002>

²⁷ Amnesty International. (2020). Netherlands: We sense trouble: Automated discrimination and mass surveillance in predictive policing in the Netherlands. <https://www.amnesty.org/en/documents/eur35/2971/2020/en/>

of predictive policing systems, their application remains implicit and unwritten in current Dutch law.²⁸

In conclusion, while specific measures exist to ensure accountability and access to remedies for human rights violations arising from using digital technologies in the administration of justice, there remain challenges and criticisms regarding their effectiveness and adequacy in safeguarding individual rights and ensuring accountability.

²⁸ Purtova, N. (2017). The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law. 2018 Law, Innovation and Technology 10(1), <https://ssrn.com/abstract=3036355> or <http://dx.doi.org/10.2139/ssrn.3036355>

Please provide information on any decisions taken by the judiciary relating to the use of digital technology in the administration of justice.

In 2020, The Hague District Court issued a landmark judgment, ruling that the legislation governing the use of SyRI (System Risk Indication) to combat fraud in the interest of economic welfare violated fundamental rights.²⁹ The court determined that the legislation failed to strike a fair balance, as mandated by the European Convention on Human Rights (specifically, Article 8 regarding the right to respect for private life). It emphasised the necessity for adequate justification when infringing upon private life. The court highlighted concerns regarding the lack of transparency and verifiability in the application of SyRI. The Hague District Court concluded that the underlying legislation breached Article 8 ECHR, emphasising that states should strike a fair balance between public interest and individuals' right to privacy when implementing new digital technologies.³⁰

In cases pertaining to the search of smartphones incident to arrest, the Dutch Supreme Court invoked Article 8 ECHR, stipulating that prior judicial approval is necessary for searches that involve significant intrusions into an individual's private life. Additionally, amendments to the Police Data Act (PDA) in 2018 were made to align with the requirements of the Law Enforcement Directive. However, these changes were relatively minor, as the Dutch PDA closely resembled the Directive's provisions.³¹



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²⁹ The Hague District Court, judgment of 5 February 2020, ECLI:NL:RBDHA:2020:1878 (case nr. C-09- 550982-HA ZA 18-388).

³⁰ Ibid.

³¹ Supreme Court of the Netherlands, judgment 1 July 2014, ECLI:NL:HR:2014:1563 (case nr. 13/04296)