Editorial

Recently, I've gifted myself an upgrade of my train subscription from second to first class. In the Netherlands, the differences are slim (save for the price): the fact that the colour of the seats are red instead of blue is perhaps the most striking one. First class is equally busy as second class during rush hours, if not more, because the commuting civil servants usually travel first class. Off peak, however, second class is still packed, while first class is almost empty, which is when I like to travel. Traveling first class took me back to my youth, when my parents would acquire a first class railway pass for our yearly biking vacation. Smelling of rain, wind and sweat, our attire would sharply stand out from other people traveling first class, which often lead them to friendlily remind us that we were sitting in first class... We would laugh and say: that is right, if you are looking for the second class, it is over there.

This memory was triggered when travelling to Brussels for the yearly CPDP conference, a person entered first class talking very loudly in Arabic, wore a ragged sweatpants and who had a distinct smell. When the train conductor passed by to open the doors, he stopped at this person and only this person to ask him for his ticket. It appeared that the man did not have a train ticket, let alone a first class ticket. Later, the conductor came to me and started to explain himself in an apologetic way. He was no racist, he insisted, but he always ran this line, and every time he would encounter one or two people that had no train ticket. These were asylum seekers who were rejected and stayed in the Netherlands in a nearby shelter; they didn't care if they were fined or not, because they had no money and no hopes of staying (legally) in the Netherlands.

At first, I felt the apologies were unnecessary, because I also suspected that this person would not have a first class ticket, but I realised that might be copying the people in my youth who must have been certain that my family 'did not belong' in first class. Should the train conductor have checked everyone in first class, even although he was really only after that one person, should he not have checked anyone, because he was initially only intending to open the doors, should he have checked everyone, both in first and second class, or was his conduct right?

In current debate, these questions as well as those over predictive policing, profiling and biased AI, are typically answered by reference to non-discrimination law. Although obviously relevant, the right to non-discrimination, such as laid down inter alia in Article 14 of the European Convention on Human Rights, is part of a bigger human rights framework. That framework is best characterised as tackling one problem: the arbitrary use of power. Adopted in the wake of the Second World War, the focus on arbitrariness can be explained in several, non-exhaustive, ways. First, fascist regimes crimi-

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nalised people not on the basis of their conduct, but on their racial, sexual and other nature. Second, these regimes usually stripped powers from both the judicial and the legislative branch to allow the executive branch unfettered power; checks and balances and procedural safeguards on the use of power were removed. This meant that the executive branch had an almost unlimited discretion in choosing how it would use and apply its power in practice. This meant that the use of power was unforeseeable and unpredictable. Third, and linked to that, because there were no limits on the use of power, not only against whom power was exerted was arbitrary, but the amount of force was also often excessive and arbitrary.

The non-discrimination principle is part of that larger goal of the human rights framework; to a large extent, it can be described as a rationality discourse, posing questions as to the relevance of selected persons, groups and factors when determining how power is exerted. It is legitimate for the government to differentiate on the basis of race, ethnicity, gender or other factor, if there are good reasons to. Sometimes, it even should. If the police only enters the homes of Quakers because it has received reliable intel that among the small Quaker community in a city, several terrorist attacks are prepared, this may be deemed legitimate. The reverse also holds true. If the police has information that a male between the age of 20-30 is going to commit a terrorist attack at a certain train station, not only can it use this information as relevant criteria, it should. It has a positive obligation to act on that information. And when it would do body cavity checks on women over 60 in response to this information, this might be deemed a human rights violation in itself, because there were no good grounds for doing so. Because the state should keep human rights interferences to a minimum, it should operate in the most effective way: it should discriminate.

This became evident inter alia in a case that concerned ethnic profiling by the Dutch border police. This was deemed legitimate by the court of first instance because ethnicity was a relevant criterion with respect to the aim of preventing illegal stays in the Netherlands. 'The State rightly pointed out that MTV [Mobile Surveillance Security] controls may not have the same effect as border controls at the internal borders. For this reason, they are limited in number, frequency and scope in Article 4.17a paragraph 3 to 5 of the Aliens Decree 2000. For each flight, only part of the passengers may be checked, for each train only part of the train may be searched and in no more than four compartments, and on the road or waterway only part of the passing vehicles or ships may be stopped. This precludes the alternative of blanket checks mentioned by Amnesty International et al. Purely random checks would, as the State argued during the session, greatly reduce the effectiveness of the MTV, because action would not be sufficiently targeted. Given the nature and the objective of the MTV - fighting illegal stay in the Netherlands - a reasonable alternative for targeted selection decisions, in which ethnicity may also be relevant, has therefore not appeared."[1] Although this judgement has later been overruled by the court of appeal, it shows that

1 ECLI:NL:RBDHA:2021:10283, Rechtbank Den Haag, C-09-589067-HA ZA 20-235.

blanket surveillance is in itself considered a human rights violation, because unfettered use of power is arbitrary use of power.

The same problem ultimately exists with random checks. If this is truly random, and not informed by subconscious personal preferences or a biased database, this will not be discriminatory. But it is arbitrary. It conflicts with the principle that there must be a reason for the use of power. Though the European Court of Human Rights has accepted random use of power and has okayed mass surveillance in light of the 'war' against international terrorism, it does so only in exceptional circumstances and attaches an extraordinary range of procedural requirements with one aim: to prevent arbitrary use of power. Ultimately, the human rights regime is geared towards preventing arbitrary use of power; non-discrimination is only one element of that pursuit, and is also limited to that extent. The question of what is legitimate or not ultimately depends on whether the grounds on which the use of force was based were relevant to that use. It is the procedure through which force it is used that ultimately counts for the Court, which also holds true for the process of setting societal goals. The ECtHR has okayed discriminatory policies, for example differentiating between the right to marry and found a family on the gender and sexual orientation, if that was the outcome of a democratic debate.

Years ago, I was asked by the Dutch government to work on what was called non-discrimination by design, or the question of how to apply non-discrimination principles to the AI context. Like many other and more established experts in the field, such as Custers, Gerards, Veale, Wachter and Zuiderveen Borgesius, we concluded that non-discrimination law was, on several accounts, difficult to apply to algorithmic decision-making. Though that conclusion of course still stands, I wonder in hindsight if, had we had focussed on arbitrariness instead of discrimination, we would have come to a different understanding, namely that the human rights framework does lay down the right principles for the AI context. Let me give two examples.

One conclusion we, and before us many others, drew was that the categories listed in Article 14 ECHR may be too limited in respect of data-driven decision making. Humans often, consciously or unconsciously, discriminate on the basis of race, gender and sexual orientation, algorithmic decision-making can discriminate on the basis of those categories, but also on new groupings that are not contained in the provision. Though many of these new groupings may indirectly correlate to the fixed categories (e.g. having the newest smart phone might have an indirect correlation to race and gender, because more men than women want to show of with the newest gadget and more white than non-white have the resources to do so), others will not or only marginally so. Is it more unfair to not be invited for a job interview because of gender than because of the smart phone edition? Under the human rights framework, the answer will ultimately not depend on the grounds used for the decision, but on the question whether those grounds were relevant.

Another point is that discrimination law focusses on the basis on which a decision is made, and on the effects of a decision or policy, but not on the process leading up to

the decision: how are data collected, how are they categorised, how an algorithm is programmed and how results are interpreted. That is true, but the Court's jurisprudence on arbitrariness is geared towards that particular question: was the process leading up to the decision to use power arbitrary? This is by no means an easy question to answer, not for the train conductor and certainly not for the AI context, but the principle is the same. The Court will find a violation of the Convention when the government arbitrarily uses its power, for example through algorithmic decision making, perhaps not under Article 14 ECHR, but under Article 8 ECHR or another provision. Article 14 ECHR is a subsidiary right in any case, and is just one part of the Convention mechanism geared towards preventing arbitrary use of power.

Let me turn to this edition. It opens as always with two opinion pieces by renowned experts. Joanna Grossman and Lawrence Friedman have written a fascinating book, *The Walled Garden: Law and Privacy in Modern Society*, and in their foreword, they share some of their insights. Similarly, in his foreword, Jaap-Henk Hoepman, the author of *Privacy Is Hard and Seven Other Myths: Achieving Privacy through Careful Design,* in which he explains how privacy can be protected by design in systems and processes, offers the reader with some of his most important findings.

In the articles section, the EDPL team is proud to present the papers of the three finalists of our yearly Young Scholar Award. Magdalena Brewczyńska, Mona Winau and Benny Rolle are the authors of the papers that were selected by a jury, led by Franziska Boehm, from a large number of submissions. Each of them was invited to present their paper at CPDP and respond to the questions and remarks from the jury as well as the audience. Brewczyńska has written on the notion of legitimacy, Winau discusses the relationship between AI and data protection and Rolle covers the topic of damages. Each of these papers are intriguing and showcase the bright generation of academics that will soon populate European universities. The Young Scholar Award 2023 went to ……. Magdalena: congratulations! Next to these three papers, Georgios Bouchagiar delves into Distributed Ledger Technology, a complicated, but highly interesting topic.

The reports section, led by Mark Cole and Christina Etteldorf, offers an almost all-encompassing overview of all of the most relevant developments on national and European level. Tosza on the E-Evidence package, Quintel on the Council Legal Service's opinion on the Regulation on child abuse, Schmitz-Berndt with an overview of several guidelines recently adopted by the EDPB and Mustert on the recent EDPB decision that was triggered by the Schrems case. Kollmann on the Austrian DPA's take on pay or okay models, Korpisaari on a judicial decision in Finland on children's data, Lami on the French court's approach to augmented video recognition, Bincoletto on the Italian DPA's fine for disclosing positive covid-19 status, Caruana and Borg on the Maltese DPA's decision on voter databases, and Roussev on the UK's new Data Protection and Digital Information Bill. Finally, Witzleb and Hunting, in the practitioner's corner, discuss developments in Australia, California and China triggered by the GDPR.

In the case note section, led by Maria Tzanou, Marola and Lindroos-Hovinheimo each cover an important CJEU case, while I cover some cases by the ECtHR. Finally, in the book review section, spearheaded by Gloria Gonzalez Fuster, Suzanne Nusselder discusses an edited volume with landmark privacy cases, and Niovi Vavoula the book by Teresa Quintel on the complicated relationship between border control and data protection.

If you didn't know what to bring on summer holiday, I think you know now.

For those interested in submitting an article, report, case note or book review, please e-mail our Executive Editor Jakob McKernan (mckernan@lexxion.eu) and keep in mind the following deadlines:

– Issue 3/2023: 15 July 2023;

– Issue 4/2023: 15 October 2023;

– Issue 1/2024: 15 January 2024;

– Issue 2/2024: 30 April 2024.

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