

Privacy and Legitimacy in Public



a constitutional history of compulsory identification legislation in the Netherlands

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1. Introduction

On January 1, 2005, the Expanded Compulsory Identification Act (*Wet op de uitgebreide identificatieplicht*¹) entered into force in the Netherlands. The main elements of this statute were as follows²:

- the existing Compulsory Identification Act (*Wet op de identificatieplicht*) was expanded to require all individuals 14 years of age and older to display a recognized identity document upon being summoned to do so by an authorized official: a police officer, a special criminal investigation agent or an administrative inspector;
- the 1993 Police Act (*Politiewet 1993*) was amended to grant police officers the authority to summon the display of an identity document if doing so is required for the reasonable discharge of their duties;
- the General Administrative Law Act (*Algemene Wet Bestuursrecht*) was amended to grant administrative inspectors the explicit authority to summon the display of an identity document if doing so is required to supervise compliance with the specific statutory provisions that they are charged with enforcing;
- for refusing or neglecting to display an identity document upon the first summoning to do so, an individual can be fined up to €2250.

If these statutory changes are not placed into historical context, their full significance will be lost on the outsider. Suffice it to say, however, that for most Dutch citizens, the new statute meant that they were suddenly faced with the requirement to be able to produce an identity document in situations that they were not previously used to doing so. In fact, many Dutch citizens were not previously accustomed to taking an identity document with them at all when leaving their homes, at least not if they were not planning to drive a motor vehicle that required a driver's license.

Nevertheless, the new compulsory identification legislation had been passed with a comfortable parliamentary majority, having been initiated by the coalition government of the Christian democrats (CDA), the conservative liberals (VVD) and the progressive liberals (D66), and there were few signs of extra-parliamentary dissent on the part of the general public.

The contrast with the rather tentative introduction of compulsory identification in 1994 was striking. At that time, the government-initiated Compulsory Identification Act³ consciously limited

Cover photo: a poster from a 2004 advertising campaign informing young people about compulsory identification

Note: whenever a text published in Dutch, French or German is quoted in English in this thesis, it should be understood to be a translation by the author of this thesis unless otherwise noted.

¹ Passed on June 24, 2004 and published in *Staatsblad* (State Gazette of the Netherlands, hereafter *Stb*) 2004, 300.

² Abels, p. 742.

the areas in which identification would be made compulsory. The introduction of a so-called ‘general’ compulsory identification system had been specifically ruled out in the coalition accord of the Christian Democrats (CDA) and the Labor party in 1989⁴, mainly due to the political reservations of the Labor party. More significantly, it was generally known that anything approaching a requirement to have an identity document when leaving one’s home would encounter great resistance from the general public. As such, the situations in which compulsory identification was established for Dutch citizens were limited to:

- certain transactions with public authorities, such as requesting a social insurance number;
- certain bank transactions, such as opening an account;
- in accepting employment, the employee was required to present an identity document to his employer and the employer was required to keep a copy of the document on file; furthermore the employee was required to be able to identify herself or himself in the workplace;
- certain types of private legal transactions with public legal effect, such as signing papers before a civil-law notary;
- apprehension for fare-dodging on public transit; and
- in the vicinity of football (soccer) matches when the public order has been disrupted or may be disrupted.

Additionally, under the 1994 statute, if the police had a ‘reasonable suspicion’ that someone was an illegal alien, they could demand to see a document proving identity, nationality and immigration status.

It is the intention of this thesis to analyze the constitutional aspects of this legislation and its history. There are traditionally two lines of inquiry in constitutional law: one, which could be called substantive constitutional law, is concerned with the fundamental rights of the individual. The other, formal or procedural constitutional law, is concerned with the establishment of the various institutions of a state and the ways that they must work together. In a constitutional democracy, however, the state does not exist in isolation from the citizens subject to its authority. The direction of those political decisions, after all, is determined by the messages that the citizens send. Both lines of inquiry in constitutional law are concerned with the placement of limitations on the power of the state and its institutions; and in a democracy, both lines are concerned with the proper relationship between the state and the individual.

The establishment of compulsory identification in the Netherlands provides a particularly interesting case study in this regard. On the one hand, substantive civil rights issues are at stake when individuals are required to identify themselves; in particular, a certain amount of *privacy* is forfeited. On the other hand, the legislation establishing compulsory identification was made in a democratic process that the formal rules of constitutional law are designed to aid. The potential

³ *Stb.* 1993, 660.

⁴ Hirsch Ballin, p. 6.

limitation of rights is *legitimated* by the notion that a majority of the individuals entitled to vote have ostensibly assented to the placement of that limitation on themselves.

This thesis will examine the compulsory identification legislation in terms of these two aspects: the privacy of the individual affected and the legitimacy of the legislation. The third element of the title of this thesis, *public*, has a double meaning as it relates to both of those aspects: the physical space outside the home, on the one hand, and the realm of authority in a constitutional democracy, the *res publica* or *polis* on the other. The ultimate goal is to trace both privacy and legitimacy back to a central, commonly held notion of the ideal relationship between the individual and the state. While some of the discoveries of this constitutional investigation will certainly be peculiar to the Netherlands, it is the intention of this thesis to expose how the same ideals are at work in other constitutional democracies as well.

Constitutional democracy is a political system with two essential features. The rule of law⁵, on the one hand, stipulates that all power in the political system be subject to limitations—such as rights and the separation of powers—that can be formulated in terms of rules and interpreted by independent, impartial courts. Democracy, on the other hand, determines how decisions are made in the political system on issues of general interest: these decisions must be made by the people, if necessary by way of representatives. Our discussion of privacy, where we will begin, will necessarily be a discourse more in the vein of the rule of law: the circumstances under which a court can enforce the individual's right to privacy. That discussion will be relatively brief, for the level of judicial protection of the right to privacy can be formulated in a rather compact set of abstract terms and case law. Moreover, the protection of civil rights makes a certain claim to permanence and immutability, which means that it can be presented more or less ahistorically. The discussion of legitimacy, by contrast, will take up the bulk of this investigation, because it will be an examination of historical change in a culture: how a population has different concerns at different times and how democracy crystallizes the myriad concerns politically. To that end, it should be interesting to examine the public democratic debate that went on prior to the 1994 legislation, then prior to the 2004 legislation. However, if democracy in the Netherlands is the experiment, it will also be useful to have a control: before getting to modern times, we will look at a system of compulsory identification that was imposed with little more than a pretense of democratic legitimacy, specifically during the occupation by Nazi Germany in the Second World War. The extent to which the memory of that regime still lives in the popular historical consciousness will be illustrative not

⁵ A related notion in the Dutch and German constitutional traditions is that of the *rechtsstaat*. While the rule of law and the *rechtsstaat* are by no means identical concepts, they are sufficiently analogous to be used interchangeably in the context of a contemporary discussion of civil and political rights.

only for more fully understanding the Dutch constitutional culture, but for understanding how democracy defines itself by contrast to authoritarianism.

2. Privacy

The most obvious concern about compulsory identification in terms of civil rights is that it runs the risk of violating an individual's right to privacy. Article 10, paragraph 1 of the Dutch constitution⁶ (*Grondwet*) provides:

Article 10 [Privacy]

(1) Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.

Privacy is by no means narrowly interpreted in Dutch case law to apply only to an individual's life inside the home. An individual's privacy is also at stake when her movements in public are being tracked, as the Dutch Supreme Court (*Hoge Raad*) ruled in the so-called case of the 'Edam welfare recipient'⁷. The aforementioned plaintiff, Ms. G, sued the assistant director of her local welfare agency, Mr. K; the defendant had seen Ms. G and her boyfriend together in various places and drawn the conclusion that they were cohabitating. When the defendant placed a memorandum to this effect in Ms. G's file, her welfare benefit, which was contingent on her living alone with her children, was stopped. The Court ruled that even though the defendant may have only casually made his observations in public, he had violated the plaintiff's right to privacy specifically in the way in which he had recorded and passed on these observations.

It is important to note that although the plaintiff suffered a public legal consequence as a result of the violation of her privacy, this was ultimately a tort case against Mr. K as a private citizen. Since it was not the defendant's job to conduct inspections for the welfare agency, the Court ruled, the case was not a matter of a public authority violating the rights of the plaintiff. However, if a public authority were to have infringed the plaintiff's right to privacy, the Court went on, the severity of the infringement would have to be weighed against the public interest at stake in the public authority's use of surveillance.

The Court was, by its own admission, basing its standards on Article 8 of the European Convention on Human Rights and the Fundamental Freedoms (ECHR) and the associated case law from the European Court of Human Rights (ECtHR).

⁶ For the complete English translation of the Constitution of the Kingdom of the Netherlands as cited in this thesis: <http://www.servat.unibe.ch/law/icl/nl00000.html>

⁷ Dutch Supreme Court, 9 January 1987; published in *Nederlandse Jurisprudentie* (Netherlands Case Law Journal) 1987, case number 928.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

In fact, due to a quirk of Dutch constitutional law, article 10 (1) of the Dutch constitution is all but devoid of meaning in practice and has been almost entirely supplanted in substance by art. 8 ECHR. The reason for this lies first in the ban on judicial review of Acts of Parliament against the constitution, established in art. 120 of the constitution:

Article 120

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

At the same time, however, the constitution provides for a level of direct integration of international law into the domestic legal order that is unparalleled in any other country:

Article 93

Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Under this ‘monistic’ validity of international law, Dutch courts can review Acts of Parliament against any treaty provision that is directly applicable to all persons, which is certainly the case for all of the rights granted as such by the ECHR. For any purely legal discussion of the substantive constitutionality of the compulsory identification legislation, therefore, it will be sufficient to refer to the case law of the ECtHR.

In 1992, the European Commission of Human Rights (ECmHR: which until 1998 functioned as a ‘gatekeeper’ to the ECtHR) reviewed the admissibility of a complaint filed against Belgium by law professor F. Reyntjens.⁸ The police had stopped Mr. Reyntjens as he walked on a public road in

⁸ ECmHR decision *Reyntjens contre la Belgique*, 9 September 1992, application number 16810/90.

Antwerp and asked him to show his identity card. When he asked why, he was told that it was simply a routine identity check and that he was not suspected of any crime. Reyntjens then stated that he did not carry his identity card with him because as a matter of principle, he would refuse to hand it over to a police officer when asked. The police then asked Reyntjens to come along to the police station, where they interrogated him and then released him after two and a half hours.

Reyntjens was prosecuted for violation of a law (in the form of a decree) requiring all Belgian nationals over the age of 15 to carry an identity card and to display it to any police officer (among other officials listed) requesting to see it for any reason. The first-instance court convicted Reyntjens. After Reyntjens exhausted the appeals available to him in the Belgian legal system, he filed a complaint with the ECtHR, alleging violations of article 8 as well as article 5 (the right to freedom, of which he was disproportionately deprived during his arrest), article 2 of the Fourth Protocol of the ECHR (the right to freedom of movement) and article 18 (providing that no legal provision limiting rights protected in the ECHR be used for a purpose other than was intended). As to article 8, Reyntjens put forth that:

...an identity check carried out without a specific and legitimate reason, as in this case, as well as the registration of data subsequent to such a check, constitute an interference in the right to respect for private life guaranteed by article 8 of the Convention. If such interferences are prescribed by law, they by no means constitute measures “necessary in a democratic society” as is required by paragraph 2 of this provision to justify such interference. [The applicant] raises that of the justifications listed in paragraph 2 of article 8, the only one applicable to an identity check is the “prevention of crime”. However, it should be noted that according to the preamble to the royal decree of 1967 and the case law, the goal of the obligation to carry an identity card is to be able to check the accuracy of the data in the population registers. Considering this intended objective, one cannot thus claim that the organization of identity checks is a measure necessary to “the prevention of crime”. The question also arises of knowing how random identity checks can contribute to the “prevention of crime”, especially if one raises that of the sixteen Member States of the Council of Europe for which the applicant could obtain data on this subject, only four countries (Denmark, Greece, Portugal and Spain) have, like Belgium, rules obliging their citizens to always carry an identity card.

Reyntjens’ arguments anticipated the Court’s standard method for determining whether a violation of one of the civil rights guaranteed by the Convention has taken place. The first question is: has there been an *interference* in the right to respect for private life as guaranteed by paragraph 1 of article 8? If that question can be answered in the affirmative, one moves on to paragraph 2 of article 8 and asks the second question: was the interference *prescribed by law*? The third question is: did the interference have a *legitimate aim* in terms of one of the public interests listed? And finally: was it *necessary in a democratic society*?

If the Commission had reached the final question, having answered all of the previous questions in the affirmative, it would have considered whether or not the interference was proportionate to the public interest served; in other words, whether a ‘fair balance’ had been struck between the rights of the individual and the interests of society. In determining what the interests of society are (or, in ECtHR jargon, the ‘pressing social need’ justifying the interference), the legitimate aim is highly relevant. And for some legitimate aims, in fact, the culture of the specific jurisdiction involved must also be taken into account. For ‘the protection of morals’ (a legitimate aim for interferences in the freedoms of conscience, expression and assembly as guaranteed by articles 9, 10 and 11 of the Convention), in particular, the Court recognizes that different cultures have widely varying interests. The Court ruled, for instance, that the impoundment and destruction of a film determined to be blasphemous by the Austrian state of Tyrol did not constitute a violation of the freedom of expression guaranteed by article 10, in light of the particular religious sensibilities of the Tyrolean public⁹. The Court thus leaves a certain ‘margin of appreciation’ to national authorities to determine their particular needs democratically for this legitimate aim. Had a similar incident happened in the considerably more secular-minded Netherlands, on the other hand, the Court very likely would have determined that there had been a violation of article 10.

For others of the ‘legitimate aims’, however, the Court draws a much harder line. For instance, the degree of necessity of interfering with freedom of expression in the interest of ‘maintaining the authority of the judiciary’, as an English court had done in prohibiting a newspaper from printing a particular story, does not particularly vary among the constitutional democracies of Europe.¹⁰ In other words, while moral standards may vary, the signatories to the Convention must be considered to share certain legal and political standards. Thus the Court could state in absolute terms that even though the English court had made use of a legal provision unique to English common law (‘contempt of court’), the disputed interference was not ‘necessary in a democratic society’.

Would the Commission then take a hard line on ‘prevention of crimes’ (and for that matter, ‘prevention of disorder’), establishing a European standard against compulsory identification, or would it recognize that different countries have different culturally determined standards for what is necessary to prevent crimes and disorder? As it happened, the Commission sidestepped the ‘fair balance’ test altogether, along with all of the tests required by paragraph 2 of article 8, by simply denying that there had been an interference.

⁹ ECtHR judgment *Preminger vs. Austria*, 20 September 2004

¹⁰ ECtHR judgment *Sunday Times vs. UK*, 26 April 1979.

In this matter, the Commission considers that the obligation to carry an identity card and to present it upon any request of the police does not as such constitute an interference in the private life of a person within the meaning of article 8 of the Convention. It notes that under the terms of the legislation applicable to the identity cards, those may not include other information than the surname, the first names, the sex, the date and the place of birth, the address of the principal place of residence and, possibly, the surname and first names of the spouse. It may also include, if the holder requests in writing, his identification number in the National Register of Natural Persons and the names and first names of his deceased spouse or his former spouse. In the opinion of the Commission, the identity card thus does not contain data relating to private life, insofar as the indication of the identification number [in the]¹¹ National Register appears there only if the holder of the identity card requests it in writing (cf. No. 10473/83, 11 December 1985, D.R. 45 p. 121¹²). In the absence of any special circumstance likely to modify this general consideration, the Commission considers that the examination of the objection of the applicant, such as it was formulated, does not reveal any interference in his private life within the meaning of article 8 of the Convention.

The Commission subsequently rejected Mr. Reyntjens' complaint, including his other grounds, as manifestly ill-founded. The Commission's decision with regard to art. 8 can thus be seen as a mixed form: on the one hand, it determined that a compulsory identification law such as Belgium's cannot constitute an infringement of art. 8. Considering that the Belgian compulsory identification law was one of the most stringent in Europe, therefore, the Commission was in effect setting a standard of maximum intrusiveness, based on substantial provisions, for any signatory's compulsory identification legislation¹³. Of course, the Commission was not saying that all signatories' compulsory identification systems were required to be that stringent: it implicitly left an 'inverse margin of appreciation' for any signatory to establish a less stringent compulsory identification scheme relative to its own democratically-determined standards.

Neither the 1994 nor the 2004 version of the Dutch compulsory identification legislation would give rise to any formal objections in light of *Reyntjens*. Even under the more stringent 2004 version, a police officer must have some sort of reason for demanding identification that is necessary to the discharge of his duties; and the Dutch legislation does not require the citizen to *carry* an identity document, only to *display* it when summoned to do so. In other words, unlike in

¹¹ French original *ou* (or) seems likely to be a typographical error for *au* (in the) -- JBB

¹² ECmHR decision *Lundvall vs. Sweden*, in which the Commission ruled that the establishment of a system of personal identity numbers does not as such constitute an interference with art. 8 or any other provision of the Convention. -- JBB

¹³ NB: The ECtHR has yet to rule on the issue in repressive or preventive terms rather than permissive terms—*i.e.*, to rule that a given signatory's compulsory identification law constitutes or would constitute an infringement of art. 8. Only then would we know what kind of compulsory identification law would be absolutely unacceptable. A survey of the compulsory identification legislation in all of the signatories to the ECHR (all 46 member states of the Council of Europe) is outside the purview of this thesis, but as long as no complaint is filed about a compulsory identification law more stringent than that in force in Belgium in 1992 (and now), we will not find out what the ECtHR's absolute limit of intrusiveness is.

Belgium, not carrying an identity document is not in and of itself an infraction, and a police officer's mere suspicion that an individual is not carrying an identity document is not sufficient cause to summon the individual to display it. The Compulsory Identification Act does not itself specify the content of the identity document required, only the types of acceptable identity documents. For Dutch citizens, the most commonly used identity documents (the passport and the identity card) are regulated by the Passport Act (*Paspoortwet*); according to this statute and the ministerial policy implementing it (the 2001 Netherlands Passport Execution Rules—*Paspoortuitvoeringsregeling Nederland 2001*), these documents shall specify the surname (and any titles or predicates of nobility), first names, date and place of birth, sex, height, nationality and the public insurance/tax number of the holder. Upon request of the holder, these documents can also include the holder's marital status and the name of the holder's current or former spouse or registered partner.

It must be noted that the Commission did not appear to devote a great deal of attention to the identity check itself, while that was the crux of Mr. Reyntjens' complaint. The Commission instead focused on the information that a public authority could gather by looking at an identity document and whether or not this specific information revealed anything about the private life of the holder. It is useful in this regard to distinguish between two types of moments of interaction between public authority and the (private) identity of the individual: the first type of moment is when the personal data are compiled by a public authority to the end of issuing the identity document. The second type is the check, when a public authority summons the individual to produce the identity document and reads it.

The Commission's reasoning would seem to imply that the only real moment at which the individual's private life could potentially be intruded upon by public authority is the moment at which the personal data are compiled and made accessible on the identity document. The Commission underscores this reasoning by noting that certain—ostensibly more 'private'—data concerning the individual's former or deceased spouse or the individual's number in the population register may only be revealed on the identity document with the individual's explicit consent. As to the check moment, the Commission implies that this cannot possibly intrude on the individual's private life because the public authority is merely reviewing information that it already has, the individual's 'public life'.

Such an analysis of *Reyntjens* cannot help but betray certain objections to the Commission's reasoning. One argument against the Commission's reasoning is that the check moment also reveals at least two additional pieces of information about the individual that the public authority did not already have and which the individual did not necessarily consent to revealing: the physical

location of the individual at a particular *time*. To rephrase the Dutch Supreme Court's reasoning on the Edam welfare recipient, Ms. G: her right to privacy was not violated by the fact that the defendant knew who she was, *i.e.* could link her physical appearance to her identifying data. Her right to privacy was violated in that the defendant correlated her identifying data with her physical location, her companionship, and time and made public record of it.¹⁴

At any rate, the most salient legal conclusion of this chapter should be that there is no Dutch or ECtHR case law on privacy standing in the way of the Dutch compulsory identification legislation *in abstracto*. In the review yet to come of the recent political history of this legislation, moreover, it will become clear that the compilation moment is almost entirely non-controversial; the change between 1994 and 2004 had everything to do with the check moment. The recent introduction of the National Identity Card in the United Kingdom, by contrast, was preceded by a firestorm of political debate and legal analysis concerning the compilation moment.¹⁵ But first, a review of the prehistory of compulsory identification in the Netherlands will reveal the original compilation moment there.

¹⁴ The ECtHR has in fact ruled that an interference in the sense of art. 8 can be found in the way in which a public authority systematically stores and uses publicly available information about an individual, see *Rotaru vs. Romania*, 4 May 2000. Admittedly, then, the ECtHR would reserve judgment on the check moment until it was presented with a complex of check moments and evidence on how the information gathered that way was used by a public authority.

¹⁵ See, for instance, the Parliamentary Joint Committee on Human Rights, First Report on the Identity Cards Bill, 25 May 2005, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/48/4807.htm>

3. The first compulsory identification system

‘Every totalitarian system requires acute surveillance of the behavior of every citizen,’¹⁶ writes the Dutch historian Loe de Jong in his authoritative 14-part history of the Kingdom of the Netherlands during the Second World War. And during the occupation of the Netherlands by Nazi Germany from 14 May 1940 until 6 May 1945, the introduction of the identity card (*persoonsbewijs*¹⁷) and the imposition of compulsory identification were indispensable elements of that surveillance. We shall intersperse De Jong’s historical account with legal commentary.

The Netherlands had had at least the beginnings of a public population register, which was to take the place of more informal church records of baptisms, deaths and marriages, ever since it had been implemented during the French occupation¹⁸ (1795-1815). While this registration system never quite covered the entire population, its most memorable achievement was requiring most of the members of the Dutch population to choose surnames for the first time. After the Netherlands regained independence and the Kingdom of the Netherlands was established (with the constitution that is still in effect today, albeit countless amendments and conventional developments later), the register was completed and updated by means of censuses in 1828-1829, 1839 and 1849; as of 1850, new ‘civil status officers’ (*ambtenaren van de burgerlijke stand*) were created in each municipality, charged with constantly updating the registers. As of 1887 it was compulsory for all citizens (or at least: heads of household) to report their vital data and places of residence to the municipal registers.

However, the system was by no means uniform among all of the municipalities in the Netherlands. It was not until a centralized ‘population register inspection agency’ (*inspectie van de bevolkingsregisters*) had been created in 1928 and placed under the Ministry of Home Affairs in 1932 that the head of that agency, career civil servant J.L. Lentz, got the chance to design a uniform registration system for all municipalities. The new system, which went into effect on 1 July 1936, stipulated that all municipalities would record every individual’s vital data, as well as his or her religious denomination, on a standardized card that could be transferred between municipalities for changes of residence or transferred to a central population register upon the individual’s death.¹⁹

¹⁶ De Jong, part 5, p. 441.

¹⁷ NB: This is a term for ‘identity card’ that was only ever in use for this specific identity card system during the German occupation and which has indelible associations with that period. The Dutch term for the modern identity card is *identiteitskaart*. However, the English term ‘identity card’ will be consistently used as the English translation for both terms in this thesis.

¹⁸ De Jong, part 5, p. 445; the preceding development of the notion of ‘civil status’ (*l’etat civil*) in revolutionary France that was necessary to this is discussed in Torpey, *i.a.* on pp. 43-44.

¹⁹ De Jong, part 5, pp. 446-447.

It is very much the question to what extent the establishment of such an efficient registration system can be considered a purely administrative affair. Constitutional democracies tend to draw a horizontal dividing line in the executive branch between the ‘political’ heads of ministries, who in parliamentary systems are always bound to have the confidence of a parliamentary majority for their actions, and the ‘administrative’ civil servants under them, who have a certain amount of latitude to act independently insofar as their actions are non-controversial or stay within the political boundaries set by the ministers. Of course, the creation of the population register inspection agency and the decision to place it under the Ministry of Home Affairs had been political acts of the governments in power in 1928 and 1932 respectively²⁰. It can of course be researched to what extent these acts had been a plank in the election platforms of the parties in those coalitions (in both cases, the three mainline conservative/Christian parties, the forerunners of the modern Christian Democrats; and when Lentz’s system was implemented by decree in 1936, an even broader coalition including the two liberal parties²¹ was in power). However, it is just as plausible to assume that these changes were merely in the spirit of a general and relatively non-controversial development across Continental Europe toward the expansion of the authority of the state. De Jong describes the post-WWI era as one characterized by ‘a previously unheard-of degree of government intervention in any number of matters²²’, while Torpey identifies the modern nation-state’s desire to ‘embrace’²³ its subjects by means of this type of measure as its defining characteristic from the early 19th century onward.

To return to De Jong’s account: Lentz wanted nothing more than to go even further, because even though nearly every member of the population had been registered, there was no way of proving if someone was the registered person she or he claimed to be. Only a small minority of Dutch citizens had passports, since very few people ever traveled abroad, and the passports of the time were fairly easy to forge and manipulate. Not only Lentz, but other senior civil servants saw a need for a compulsory, secure identity document; the Ministry of Justice was concerned with the prevention of fraud and the reliable identification of criminal suspects and victims of crime. An inter-ministry

²⁰ The first government under leadership of De Geer from 1926 to 1929 (http://nl.wikipedia.org/wiki/Kabinet-De_Geer_I); and the third government under leadership of Ruijs de Beerenbroek from 1929 to 1933 (http://nl.wikipedia.org/wiki/Kabinet-Ruijs_de_Beerenbrouck_III)

²¹ The third government under leadership of Colijn, from 1935 to 1937 (http://nl.wikipedia.org/wiki/Kabinet-Colijn_III)

²² De Jong, part 5, p. 446.

²³ Torpey introduces this term on pp. 11-12; he chooses it as both an alternative to the masculinized metaphor, used by some other authors, of the ‘penetration’ of the state into people’s lives, and as a rough English translation of the German term *erfassen*. The term ‘compile’ as used in this thesis is also intended to convey a sense of the verb *erfassen*.

commission issued a report in March 1939 recommending the introduction of an identity card.²⁴ The fourth government under leadership of Colijn²⁵, which was then in power, took the report into consideration—war was looming on the horizon and the government was already preparing for a potential *en masse* distribution of personal ration cards, but making secure identity cards with photographs out of these cards was ultimately decided to be non-feasible.²⁶ The following cabinet (after a very brief failed fifth Colijn government), the second under leadership of De Geer²⁷, expressed more substantial objections to the report in March 1940. The government rejected the report's proposals on the grounds that the introduction of an identity card would mean that every citizen would be viewed as a potential criminal, and that that would be 'incompatible with Dutch traditions.'²⁸ It was a sharply worded admonition to the civil servants, including Lentz, reminding them of what their boundaries were.

It is likely that the ministers were already casting a wary sidelong glance at what was going on to the east, in the Third Reich. By an order of 11 May 1937, the German Minister of Home Affairs was given the task of radically reorganizing the system of passports and identity documents. Shortly thereafter, on 6 January 1938 the Order on Residential Registration (*Reichsmeldeordnung*) was passed, establishing a system of population registration that was designed to be extremely difficult to evade, unlike previous registers that had existed in Germany. And shortly thereafter by an order of July 1938, all Jews were required to acquire an identity card (*Kennkarte*) indicating that they were Jewish; the issuance of this card to an individual was then noted in that individual's record in the population register. At the same time, all draft-age men were also required to acquire an identity card.²⁹

On 10 May 1940, not long after the Dutch cabinet had rejected the identity card proposed by its senior civil servants, Germany invaded the Netherlands. On 13 May, in the face of almost certain defeat, all of the ministers of the government fled to London to set up a government in exile together with Queen Wilhelmina, who also fled on the same day. The last minister to leave The Hague, finance minister M.P.L. Steenberghe, had gathered all of the secretaries-general (the head civil servants of each of the ministries) to notify them of the government's decision to go into exile. In the name of the queen and the cabinet, Steenberghe transferred executive authority to the commander-in-chief of the military, General H. Winkelman, and asked the secretaries-general to

²⁴ De Jong, part 5, p. 447.

²⁵ in which only the three conservative/Christian parties were represented:

http://nl.wikipedia.org/wiki/Kabinet-Colijn_IV

²⁶ De Jong, part 5, p. 448; also part 1, p. 648.

²⁷ in which not only the conservative/Christian parties, but the progressive liberals and (for the first time ever) the social democrats were represented: http://nl.wikipedia.org/wiki/Kabinet-De_Geer_II

²⁸ De Jong, part 5, p. 448.

²⁹ Torpey, pp. 133-135.

follow Winkelman's orders and to 'look after the affairs of their respective ministries as best they could.' The secretaries-general decided the next day to simply move into the offices of their departed ministers as if they were their own offices, in the hope that that would discourage the Germans from moving into them.³⁰

The secretaries-general did in fact get to stay in the ministers' chambers. Winkelman capitulated to Germany on 15 May, after the Luftwaffe had bombed Rotterdam to rubble on 14 May. The Austrian-born A. Seyss-Inquart was appointed *Reichskommissar* of the occupied Netherlands on 29 May, effectively taking Winkelman's place as the supreme executive authority in the Netherlands. Seyss-Inquart realized that the installation of an entirely new administration made up of Germans or members of the Dutch national-socialist party (NSB) would be 'politically unbearable' for the Dutch population, and that it would be far too inefficient besides. He decided to leave the secretaries-general in charge of executing his orders. He was pleasantly surprised, noting that they 'continued to govern as the ministers, and even held cabinet meetings'; and in a letter to Hitler he reported that all of the decrees imposing painful measures on the Dutch population, including 'limitations on public discourse', 'bore the signatures of the Dutch secretaries-general ... such that all of these measures had the character of being fully voluntary.'³¹

Although there was little more than an illusion of free will in the actions of the secretaries-general, many of them had to admit a certain satisfaction with no longer being bound to the fickle winds of parliamentary democracy and the limitations they felt the ministers had placed on their good ideas.³² In June 1940, when the secretary-general of justice J.C. Tenkink reported to the secretary-general of home affairs K.J. Frederiks that the German police authorities had communicated their 'wish' for a system of identity cards to be introduced, the secretaries-general did not see it as an order in disguise, in De Jong's view: they saw it as a chance to finally implement the report that they had helped to draft.³³ They decreed on 1 October 1940 that identification was compulsory for everyone over fifteen (the introduction, as De Jong writes, of the 'so-called' *identificatieplicht*)—for those who did not have a passport, a photograph would have to be affixed to the personal ration card.³⁴

There was still the problem that it was all too easy to falsify one of these documents by simply affixing a photograph of somebody other than the person they had been issued to. Lentz had already started working on the perfect identity card in the summer of 1940. It would be printed on cardboard with a watermark and a background pattern with the microprinted text 'Netherlands

³⁰ De Jong, part 3, pp. 310-313.

³¹ De Jong, part 4, pp. 139-140.

³² De Jong, part 4, pp. 130-131.

³³ De Jong, part 5, pp. 448-449.

³⁴ De Jong, part 5, p. 449; and part 4, p. 726.

Population Registers’, to make it impossible to erase writing from the card undetected. The background pattern would be printed in a special purple ink that had the property of disappearing when it was illuminated with a quartz lamp, and the main text would be printed with a kind of ink that would betray the use of acetone to modify it. The card also made use of what in today’s language would be called ‘biometric information’: the holder was to place a fingerprint from his or her right index finger on one page of the card, and another fingerprint on the back of the photograph, so that if someone else tried to replace the photograph, the fingerprints would not match. The back of the photograph, exposed through a hole in the card, was to be covered with a transparent seal using an adhesive that could not be steamed or soaked off without leaving a visible trace. When Lentz submitted a prototype to the researchers at the forensic institute of the *Sicherheitspolizei* in Berlin, they were suitably impressed: the Dutch *persoonsbewijs* was much more secure than the German *Kennkarte*. But they would not accept his proposed system unless a copy of all of the data on each card, including fingerprint and photograph, would be stored in a central registry. Once that was agreed, the production of the blanks could begin.³⁵

Let us look at the legal goings-on at this time. In mid-October 1940 Frederiks issued the ‘Decree from the Secretary-General of the Ministry of Home Affairs relating to measures regarding the introduction of a *Persoonsbewijs* to be valid as general proof of identity’, or the ‘Identity Card Decree’ for short. All Dutch nationals, Dutch [colonial] subjects and aliens age fifteen and above were required to possess an identity card, to carry it at all times and to display it upon demand to any police officer, other civil servant, or any other person demanding it in accordance with any legal provision.³⁶ When one reads the text of the decree, which is included in a 402-page policy handbook authored by Lentz himself for distribution to all of the municipal authorities, one is struck that the requirement to carry and display the card is only rather briefly touched upon: the rest of the decree and the associated policy is primarily preoccupied with the compilation of the personal data and the issuance of the document itself, which took place on a mass scale in 1941: by the end of that year, according to De Jong, 7,177,504 identity cards had been issued and a roughly equal number of ‘shadow’ records had been filed.³⁷

The text of the 21-article decree itself does not significantly depart from a style recognizable in Dutch laws even today, although it is printed in parallel and to the right of the German text which, one would suspect, was the only authentic version. It is difficult to grasp the atrocities that would be committed with the indirect help of this decree, although one must really look at the gaps

³⁵ De Jong, part 5, pp. 449-451.

³⁶ Art. 2 (2) juncto art. 3 (1) Identity Card Decree (*Verordening* 197/40, published in the *Verordeningsblad*, 1940, pp. 566-77), in Lentz, pp. 49-53.

³⁷ De Jong, part 5, pp. 452-453.

and delegated provisions in the text. Article 3 (2), preamble and point 1 provide that those persons of foreign nationality, to be determined by administrative decision by the secretary-general of home affairs, shall be exempted from the requirement to carry the card. In an appendix to the decree and associated policy, Article 1, Administrative Decision on Identity Cards I (*Beschikking Persoonsbewijzen I*)³⁸ provides that persons of German nationality, or the nationality of the Protectorate of Bohemia and Moravia, shall be granted the exemption referred to. Article 1, Administrative Decision on Identity Cards VII³⁹ then provides that the aforementioned exemption provision is not applicable to those persons of German nationality, or the nationality of the Protectorate of Bohemia and Moravia, who are also subject to the compulsory registration of persons entirely or partly of Jewish blood.

Although no special provisions for Dutch Jews can be found in Lentz' handbook, their identities as such were already being compiled as part of the process of issuing the identity cards to the entire population, De Jong tells us. A black mark with the letter 'J' was already being attached to the 'shadow' records of 'fullblooded' Jews in the first months of 1941⁴⁰. In the summer of 1941, a large letter 'J' was stamped in two places on the corresponding identity cards before the cards were issued. As to the corresponding identity cards that had already been issued, their holders were summoned to bring those in to have them stamped as well. De Jong writes that this registration formed the administrative basis for the deportations to the concentration camps yet to come.⁴¹

It should not be necessary to go into detail on the steps that followed in the execution of one of history's greatest crimes against humanity, or why it was that compulsory identification lived on in the collective memory of the postwar Dutch population as one of the most hated instruments of the occupier. Suffice it to say that of the approximately 140,000 Jews in the Netherlands, around 101,800 or 73 percent of them were systematically deported and murdered⁴², one of the highest percentages out of all of the territories occupied by Nazi Germany; it is not a stretch to assert that the inescapability of the Dutch registration and identity card system contributed to this ruthless efficiency. De Jong tells us about the work of special detachments of police officers who went out in the spring and summer of 1942 to track down the Jews who had not yet been rounded up via the central register. They would go down entire platforms at a train station, checking the identity card of every traveler. Or canvass the streets, asking people who 'looked Jewish' but were not wearing a yellow star to show their identity card. If the identity card bore a 'J', the person would be arrested.

³⁸ Administrative decision of 24 January 1941, in Lentz, p. 194.

³⁹ Administrative decision of 4 March 1941, in Lentz, p. 218.

⁴⁰ De Jong, part 5, p. 532.

⁴¹ De Jong, part 5, p. 534.

⁴² De Jong, part 8, pp. 707-708.

If the identity card had no ‘J’, but had clearly been forged, then the person would be arrested and beaten until she or he revealed the source of the forged identity card.⁴³

Was the creation of the identity card system itself a violation of human rights, of the *substantial* constitutional law that constitutional democracies have come to accept the universal validity of, especially in the aftermath of the Second World War? There is clear evidence that compulsory identification was not merely a jumble of disconnected compilation moments and check moments, but that there was systematic correlation and use of the data collected at those moments. At worst, we could say, people’s right to privacy was violated by this process, but that seems quite mild compared with the other human rights violations, some of which were committed with the aid of the identity card: the violations of the rights to freedom, to bodily integrity, to freedom of association and to life itself. Furthermore, the decrees pertaining to compulsory identification mentioned above are fully preoccupied with ‘legality’, at least in a formal sense. But in what way could these ‘legal’ provisions also been in violation of *formal* constitutional law?

Let us return to Seyss-Inquart’s comment that provisions such as these ‘had the character of being fully voluntary’. The free will that he was alluding to with the term ‘voluntary’ was not actually that of the secretaries-general issuing the decrees; rather, he was saying that the provisions were successful because they appeared to be the free will of the Dutch people. The core concept in the Enlightenment tradition of democracy is J-J. Rousseau’s⁴⁴ notion of the *general will*, a force used by all of the members of a society in unanimity to choose a form of government that defends and protects the lives and property of each member.⁴⁵ The collectivity of all of the members of society makes a contract with itself to be its own sovereign; as such it cannot possibly be in the interest of any individual member of society to disobey the sovereign.⁴⁶ In practice, modern democracies, with the possible exception of some cantons and villages in Switzerland, do not actually live up to Rousseau’s ideal: he insists that the general will cannot be merely represented by means of elections.⁴⁷ But Rousseau’s notion of the people as its own sovereign persists in modern constitutional democracies: the citizens as voters are considered to be the ultimate source of sovereignty and legitimacy, and the politicians they elect are expected to at least pay lip service to the will of the people.

In Dutch formal constitutional law, there is a hierarchy of delegation of the will of Parliament, which represents the entire Dutch people. All government action is, at least in theory, ultimately based on Acts of Parliament (*wetten in formele zin*), statutes passed by a majority of the

⁴³ De Jong, part 6, pp. 360-361.

⁴⁴ (1712-1778)

⁴⁵ Rousseau, part I, ch. 6.

⁴⁶ Rousseau, part I, ch. 7.

⁴⁷ Rousseau, part II, ch. 15.

members of both houses of Parliament and signed by the monarch. The text of a statute may specify that more specific provisions can be made in a certain matter ‘by administrative order (*bij algemene maatregel van bestuur*)’: an administrative order is a law in the form of a royal decree which has been unanimously approved by all of the ministers in government, who must of course enjoy the political support of a parliamentary majority. If the text of the statute specifies that provisions can be made ‘by or by power of (*bij of krachtens*) administrative order’, then the text of the administrative order, in turn, can delegate even more specific provisions to a particular minister, who for his or her part can independently issue ministerial regulations (*ministeriële regels*) by simply placing his or her own signature while still, of course, needing to enjoy the political support of a parliamentary majority. The minister, in turn, can authorize a subordinate civil servant in his or her ministry to make administrative decisions (*beschikkingen*) applying the law on behalf of the minister, or decrees relating to specific persons or places; while the minister retains accountability to Parliament for the actions of the civil servants in his or her ministry.

The three occupation-era decrees mentioned above appear to have a hierarchical relationship: Administrative Decision VII refers to Administrative Decision I, which in turn refers to article 3 (2) of the Identity Card Decree. And sure enough, the text of article 3 (2) leaves the possibility open that more specific provisions can be filled in by administrative decision. But this delegation creates little more than an illusion of hierarchy: in fact, the Identity Card Decree, Administrative Order I and Administrative Order VII are all signed by one and the same person: the civil servant Frederiks, on behalf of no one else. With a stroke of a pen, Frederiks could have just as easily revised the Identity Card Decree to include the substance of Administrative Orders I and VII without even using ‘delegation’. But this illusion of hierarchy was useful, for it created the illusion that a democratically determined will was at the top of the hierarchy.

It must be noted, additionally, that there was possibly also a semantic illusion of free will involved in compulsory identification as it was imposed in the occupied Netherlands. While the German order of July 1938 mentioned above established *Kennkartezwang*, literally ‘forced identity cards’, the Dutch decree established *identificatieplicht*, literally ‘obligatory identification’. Obviously, if one is *obligated* to do something, a certain degree of free will is involved in complying, by contrast to when one is *forced* to do something.

As to the use in this thesis of the English term ‘compulsory identification’ to refer to what is (to this day) literally called ‘obligatory identification’ in Dutch: it has been chosen as a general term to refer to any country’s legal requirement to carry or show an identity document. The term ‘compulsory identification’ is simply the term that comes more naturally in English to describe this phenomenon. Any possible philosophical gap resulting from the fact that ‘compelling’ (admittedly not quite the

same as ‘forcing’) lies at the root of the English term while an ‘obligation’ lies at the root of the Dutch term (not to mention the modern German term *Ausweispflicht* and the French term *identification obligatoire*) can probably be traced to historical differences in the political and legal culture of most English-speaking (thus common law) countries from that of civil law countries. At any rate, despite the recent introduction of the British National Identity Card, the phenomenon of compulsory identification is one that remains rather alien to most common law countries. The registration and identification system that did exist in the UK during the First World War was derided as a ‘Prussianizing institution’⁴⁸ (note that Great Britain and Ireland, due to their geographical isolation, were immune to both the Prussian and the Napoleonic flavors of bureaucratic government that swept the Continent in the 18th and 19th centuries). Another system introduced in the UK on the eve of the Second World War, in 1939, was rather widely despised, and was ultimately robbed of any practical validity by the 1951 *Willcock v. Muckle* court ruling.⁴⁹ For that matter, no English-speaking country (with the notable exception of South Africa) has ever known a nakedly totalitarian system of government in which identity cards were part of a thorough system of surveillance and control: what almost all Continental Europeans can refer back to in their national histories can only be approached by most native English speakers in the realm of fiction, such as Orwell’s *Nineteen Eighty-Four*.

We have now gone into depth on the use of compulsory identification during the German occupation of the Netherlands and what this reveals about the nature of laws and how they should ideally be legitimated. How will the systems of compulsory identification introduced in 1994 and 2004 compare in terms of democratic legitimacy?

⁴⁸ Agar, p. 105.

⁴⁹ Agar, p. 106-111.

4. Legitimacy: 1994

The end of the Second World War and the years to follow in the Netherlands were hallmarked by not only a return to parliamentary democracy, but the introduction of a new ‘post-national’ political trend as well: European integration. In the political debate leading up to the re-introduction of compulsory identification in 1994, the ostensible arguments for introducing compulsory identification would remain the same: the prevention of fraud and crime and the enhancement of criminal investigations. This time, of course, the introduction of compulsory identification would have to be democratically legitimated. But in the meantime European integration, in the form of the European Economic Community and its successors, the European Community and the European Union, had also given rise to a new supranational (and quasi-constitutional) legal order. Was European law another source of actual or apparent legitimacy for the 1994 legislation? We shall trace the national and European political developments separately.

On 29 July 1945, less than two months after the German occupation had ended, the interim head of the National Population Register Inspection Agency (*i.e.*, the successor of Lentz, who at that moment was imprisoned and awaiting trial for collaboration) issued notice of the abolition of compulsory identification and the cessation of the issuance of identity cards. However, the new minister of home affairs, L. Beel (of the Roman Catholic KVP, one of the three conservative/Christian parties) was in favor of re-establishing compulsory identification.⁵⁰ Beel appointed a commission to research the matter; the commission concluded that although representatives of the police and the courts were strongly for re-introduction of compulsory identification, the time was not ripe. But the commission also predicted that an identity card would become more and more necessary, and that ‘once the time is ripe, the possession of an identity card can be made compulsory [lit.: be imperatively prescribed]’.⁵¹ And so the issue would rest for almost forty years.

The identity card had left an indelible impression on the minds of the Dutch who had lived through the war; but the identity card’s older sibling, the passport, had long been an irritating hurdle for people all over the world, at least those who wished to travel internationally.⁵² ‘Freedom of movement’, particularly the freedom to leave one’s own country, was increasingly seen as a human

⁵⁰ NB: The first post-war government did not enjoy the support of an elected parliament (because there wasn’t one yet), but rather had been personally appointed by the Queen.

⁵¹ Roest, pp. 36-37.

⁵² Turack, pp. 1-2.

right⁵³; and in (Western) Europe, a movement began toward reducing or eliminating both the sometimes arduous procedures for getting a passport and the formalities required to cross a border. In 1952, the Committee of Ministers of the Council of Europe gave serious consideration to a proposal to ultimately replace all national passports of member states with a single European passport, the creation of which would have the consequence of rendering border and visa formalities unnecessary within Europe. The Committee of Ministers rejected the proposal as impractical, but opening the borders within Europe was to remain a sought-after objective.⁵⁴

The Netherlands, in particular, had already become part of a system that would be an inspiration for open borders. In 1950, Belgium and the Netherlands had agreed to abolish the obligation to carry a passport between the two countries for each other's nationals: a Belgian identity card or a certificate of Dutch nationality, or one of a number of other basic documents, would be sufficient. Since Belgium and Luxembourg had already had a comparable agreement since 1949, there was now understood to be freedom of movement among all three countries⁵⁵. This was a first step toward a much more extensive, formally tripartite agreement, the institution of the Benelux Economic Union on 1 November 1960, which also included freedom of employment in the Benelux for the nationals of all three signatories.⁵⁶ By a treaty that had come into force on 1 July 1960, the Benelux states had already terminated all internal border controls.⁵⁷

The Council of Europe did manage to establish a treaty to at least relax travel requirements, the European Agreement concerning the Movement of Persons among the Member States of the Council of Europe, signed in Paris on 13 December 1957. Under the Agreement, a passport was no longer necessary; a national identity card (at least from one of the countries that issued national identity cards) would be sufficient as well for visits of not longer than three months.⁵⁸

On the domestic political scene in the Netherlands, the issue of identity cards remained dormant. But in 1971, a new political concern of the population erupted into existence rather unexpectedly: the protection of privacy in conjunction with the collection of information by the state. The impetus was the 1971 census.

Censuses had of course been carried out on a regular basis in the Netherlands since time immemorial⁵⁹. But in 1970, Parliament voted in favor of replacing the old Census Act (*Volkstellingswet*) of 1879 with a new one introducing a number of technical improvements. It was

⁵³ Turack, p. xv and p. 1

⁵⁴ Turack, pp. 67-69.

⁵⁵ Turack, pp. 89-90.

⁵⁶ Turack, pp. 93-94.

⁵⁷ Turack, p. 95.

⁵⁸ Turack, pp. 74-75.

⁵⁹ cf. p. 12

the type of legislative change that was considered purely administrative and non-controversial, and so the bill had been passed with an overwhelming majority. A number of experts, after all, had praised the usefulness of holding an efficient census.⁶⁰ Little did the politicians and administrators suspect that the census would be torpedoed by a popular revolt.

Already before the census was to begin on 28 February 1971, there had been signs of dissent. While organized protest committees were somewhat predictably emerging from the countercultural and leftist segments of the population, a large proportion of the more conservative, normally law-abiding population was unsettled as well. It was widely known, after all, that the census forms were to be punch cards—from that format alone it was crystal-clear that the census data were to be compiled and stored with the help of computers.⁶¹ Those who had gone along with the storage of ‘shadow’ records of their identifying data during the war had at least been able to rest easy in the thought that no one would all too easily be able to search and cross-reference the cumbersome card catalogs. The process of placing reference marks on the records of all of the Jews alone had been a massive bureaucratic project, requiring months of overtime work for the civil servants and secretaries of Lentz’ agency.⁶² But if the technology had existed to store all of that data in computers, then not only an identification number, but a name, an address, a date or place of birth, a religious denomination or a profession, a photograph or a fingerprint would have provided a lightning-fast link to a record.

In response to the growing unease in the population, Parliament summoned the responsible ministers for questions on 10 February 1971, and the ministers agreed to scrap plans to archive 10% of the personalized census data for future research. But the population’s trust in the government had already been poisoned: at least 20,000 people openly refused to participate in the census, and countless more quietly resisted. Although this was technically punishable by law, the minister of justice ended up not pursuing the prosecution of the resisters. Not because such prosecution would have ignited an even louder revolt, but because some municipalities’ census registers turned out to be too disorganized to be able track down the resisters there; prosecuting only the resisters from the better-organized municipalities would have been a violation of the principle of equality before the law.⁶³ In the end, the 1971 census was generally considered to be a failure: the population had sent a message to the politicians that the government had overstepped its legitimate political bounds with what it had thought to be a purely administrative affair, much like the message that the pre-war politicians had sent to their civil servants.

⁶⁰ Kuitenbrouwer, p. 5.

⁶¹ Kuitenbrouwer, pp. 5-6.

⁶² De Jong, part 5, p. 532.

⁶³ Kuitenbrouwer, pp. 6-7.

While the politicians never quite acknowledged that the 1971 census had been a failure, it was decided in 1980 to shelve plans for a 1981 census—ostensibly in light of a test census that had shown a 26% non-response rate.⁶⁴ The most important consequence drawn from the population's demonstrated concern for privacy was the introduction of Article 10 as part of a package of constitutional amendments in 1983⁶⁵; not only did this include the individual right enshrined in paragraph 1⁶⁶, but programmatic instructions to Parliament as well:

(2) Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.

(3) Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.

Meanwhile, European integration had continued apace. Where the Council of Europe, that intergovernmental talking shop, had once been the driving force behind European integration (in fact, it was responsible for the ECHR), that role had long been taken over by the organization that had been rather unassumingly born in 1952 as the 'European Coal and Steel Community': the European Economic Community. The Treaty of Rome founding the EEC established a common market as of 1 January 1958, not only free of internal tariffs on goods and services, but also with freedom of employment and establishment for the nationals of all of the EEC member states. The notion of freedom of movement, a development that was implicit in the personal freedoms, had now been placed firmly in the realm of economic necessity, no longer a purely idealistic goal.

The EEC, furthermore, was not to remain just another intergovernmental treaty organization, comparable to the Council of Europe or the United Nations. On the one hand, the Council of Ministers of the EEC (the executives of all of the member states) could issue directives and regulations toward realizing the goals of the treaty to the parliaments of the member states, and the parliaments were bound to implement directives in national legislation. Going even further, with its landmark decision *Van Gend & Loos*⁶⁷, the Court of Justice of the European Communities (ECJ) declared that the EEC Treaty had called a 'new legal order of international law' into being, to which end the member states had limited their sovereignty. The ECJ further asserted in its decision *Costa/ENEL*⁶⁸ that if a national court wished to determine whether a national law was in conflict with the Treaty, the ECJ would have the last word on the proper interpretation of the Treaty and thus, implicitly, as to whether the national court would have to strike down the national law.

⁶⁴ Kuitenbrouwer, p. 8.

⁶⁵ Kuitenbrouwer, p. 50.

⁶⁶ cf. p. 5

⁶⁷ ECJ C 26/62, 5 February 1963

⁶⁸ ECJ C 6/64, 15 June 1964

This development meant that the powers of national parliaments were rather diminished: not only were they obligated to pass legislation for which the initiative had come from on high, but their national courts were obligated to also strike down legislation that was in conflict with Community law. This had serious consequences for the democratic legitimacy of laws. If national laws were ultimately European in origin, there was some democratic legitimacy, since the national governments legislating in the Council of Ministers had to enjoy the confidence of the democratically elected parliaments; but this was by no means as direct a connection as that between a national electorate and a national parliament. Even the promotion, through amendments to the Treaty, of a directly elected (as of 1979) European Parliament to a more prominent role in the Community legislative process has to this day done little to resolve this ‘democratic deficit’.⁶⁹

As it happened, the decision to create a sort of European passport was made under the aegis of the Community, but was not technically Community law, nor was it legally binding. On 23 June 1981, the representatives of governments of the member states, meeting within the Council of Ministers, resolved that the member states would issue passports of uniform format by 1 January 1985, of which the most recognizable features would be a burgundy-colored cover and the words ‘European Community’ above the name of the issuing state.⁷⁰ The competence to make Community legislation concerning this type of matter did not exist in the EC Treaty; this was more a sort of informal agreement among the member states, which as yet needed to be ‘voluntarily’ implemented by the parliaments of all of the member states. Furthermore, it was not a true European passport, as it was to remain a passport issued by member states, and a holder was still to be identified as a national of her or his member state.

Following up on this resolution, the Council and the representatives of the governments of the member states resolved on 19 June 1984 to abolish all checks at internal borders for nationals of member states; or at least, in the absence of truly open borders, to more or less wave through holders of the uniform passport.⁷¹ A core of member states, however, was ready to completely open the borders. On 14 June 1985, France, (West) Germany and the three Benelux states signed the Schengen Accord at the village of the same name in Luxembourg; committing by 1990 to the complete dismantlement of border posts and the institution of a common border control policy for their common external border.

⁶⁹ De Witte, pp. 7-8.

⁷⁰ Resolution of the Representatives of the Governments of the Member States of the European Communities, meeting within the Council of 23 June 1981, Official Journal C 241, 19 Sept. 1981 pp. 1-7.

⁷¹ Resolution of the Council and the representatives of the Governments of the Member States of the European Communities, meeting within the Council of 19 June 1984, Official Journal C 159, 19 June 1984 pp. 1-2.

In the Netherlands, some politicians on the right had already started indicating that it was time to re-introduce compulsory identification. On 27 June 1984 (eight days after the Council resolution to abolish border checks), minister of justice F. Korthals Altes, a member of the conservative-liberal VVD, expressed his ‘strictly personal opinion’ that it was time to introduce a compulsory identity card.⁷² Whatever the minister’s inspiration had been, the idea had now been aired in the public forum. It is unclear whether the VVD or its senior coalition partner, the Christian democratic CDA made an issue out of compulsory identification during the parliamentary election campaign of 1986, but the electorate returned the coalition to power with exactly the same total number of seats in parliament that it had had before⁷³. In fact, the CDA had gained 9 seats and the VVD had lost 9 seats, effectively giving the CDA a resounding mandate to go on with its policy objectives.

In their coalition accord of 8 July 1986, the CDA and VVD indicated in the section ‘Crime, Police and Justice’ that ‘[a] system of general compulsory identification based on existing documents is of great importance for fighting crime.’⁷⁴ In the government’s opening declaration to Parliament on 30 July 1986, compulsory identification was said to be important ‘in the framework of combating fraud in certain situations’ and ‘also for the situations in which police and other criminal investigation agents currently have the authority to ask someone what his or her name is’.⁷⁵ The political debate concerning compulsory identification was now fully out in the open. Members of parliament from the three biggest parties made their opinions known: two members of the Labor party (the successors of the pre-war social democrats), H.J. Roethof and A. Kosto indicated that they not only had principled objections to the idea, but also didn’t believe it would be effective. A member of the CDA, H. Gualthérie van Weezel indicated that it would have a preventative effect on crime; and a member of the VVD, F. Bolkestein praised the advantages of efficacy and efficiency it would have for the social insurance and welfare system, as well as in fighting crime. Gualthérie van Weezel also noted, as the only one of these politicians, that the opening of the borders rendered compulsory identification necessary.⁷⁶

The newspaper *De Telegraaf* and the NIPO polling agency also conducted a poll in July 1986 in which the question was: ‘There are plans to introduce general compulsory identification. Every individual would, as a result, be required to carry one of the existing identity documents, such as a passport or a driver’s license, and show it on demand. [...] What do you think of such a general system of compulsory identification? Are you for the idea, against it, or don’t you care?’

⁷² Holvast and Mosshammer, eds. (introduction), p. 5.

⁷³ The first government under prime minister Lubbers (1982-1986): http://nl.wikipedia.org/wiki/Kabinet-Lubbers_I ; and the second (1986-1989): http://nl.wikipedia.org/wiki/Kabinet-Lubbers_II

⁷⁴ *Regeerakkoord tweede kabinet-Lubbers*, p. 36.

⁷⁵ Quoted in Veerman e.a., p. 7.

⁷⁶ Interviews in newspapers and radio programs, cited in Veerman e.a., pp. 7-8.

34% of those polled were for, 44% were against, and 19% didn't care. Their answers, when correlated with their political preferences, also corresponded with the positions of the three major parties (at least if one conflates 'don't care' with 'for'): supporters of Labor were 51% against and 26% for; supporters of the VVD were 42% against and 36% for; and supporters of the CDA were 33% against and 44% for. Of the respondents, those over the age of 55 were generally more able to live with compulsory identification (only 32% against) than younger people, a result that could be interpreted to mean that the memory of compulsory identification during the war no longer weighed as heavily against re-introduction.⁷⁷

The government asked G.J. Wiarda, former presiding judge of the Dutch Supreme Court and of the ECtHR, to prepare a report advising on the legal aspects of compulsory identification in a limited number of situations, such as in transactions with banks or employers or for criminal suspects. In his report of 2 June 1987, Wiarda came to the tentative conclusion that no rules of national or international law would be in conflict with such a limited system of compulsory identification. A general system of compulsory identification, on the other hand, would be 'difficult to reconcile with the right to freedom of movement, generally connected as it is to the right to privacy', unless it could be justified in terms of a 'pressing social need'.⁷⁸

On 3 March 1989, the government coalition between the CDA and the VVD ended as the result of a conflict over changes to the tax code. After new elections were held in November, the CDA, still led by Lubbers, formed a coalition government with the Labor party that together corresponded to a ringing majority in the Second Chamber (lower house) of Parliament: 103 out of 150 seats.⁷⁹ The position of each party on the introduction of general compulsory identification had been clear before the elections: CDA for, and Labor against. Thus, if one were to radically oversimplify the political process and assume that the parliamentary election had been a referendum on general compulsory identification, one could say that the voters had made their preference known, and that just over half of the majority wanted general compulsory identification (the CDA had 54 seats in the Second Chamber) and just under half of the majority rejected it (Labor had 49 seats). Perhaps in light of this need to compromise; perhaps in light of Wiarda's report; or perhaps in light of polls subsequent to the one mentioned above, indicating that a majority of respondents were explicitly for compulsory identification in *some* situations⁸⁰ — the new coalition agreement presented to Parliament included a section labeled 'Compulsory Identification':

⁷⁷ "Legitimatieplicht wekt weerzin van jongeren." *De Telegraaf*, 10 July 1986. Cited in Veerman e.a., pp. 19-20.

⁷⁸ VRP, p. 13 and Loof and Brouwer, p. 11.

⁷⁹ http://nl.wikipedia.org/wiki/Kabinet-Lubbers_III

⁸⁰ NIPO poll, March 1987, cited in Veerman, p. 20.

Due to European developments and the opening of borders, among other things, so-called compulsory identification has increasingly become a topic of political debate in recent years.

We are now agreeing on the following policy line: There shall be limited compulsory identification based on existing documents such as the passport, the driver's license, the postal ID card, the public pension card and the like, in specific situations to be described by law, e.g. in the context of football vandalism and fraud.

The introduction of general compulsory identification is not under consideration. As to activating a system of domestic alien surveillance, which has become necessary in light of Schengen and Europe 1992, a commission to be set up by the minister of justice will be consulted for advice.⁸¹

And on 13 July 1992, minister of justice Hirsch Ballin presented a bill to Parliament aiming to introduce compulsory identification in the following areas:

- major financial transactions with banks (to prevent fraud and money laundering);
- in the workplace and at the time of accepting employment (to combat social security and tax fraud as well as labor by illegal aliens);
- transactions with public social security agencies;
- transactions performed before a civil-law notary;
- public transit, in case of fare-dodging;
- football matches with a risk of hooliganism; and
- alien surveillance.

Up to this point, we have traced the legitimacy of this now-established legislative objective in terms of the ways the population had participated in the political process: through the electoral process, which communicates very broad bundles of concerns, and polls subsequent to public debate, which can cast a more subtle light on specific concerns. These are the ways that legitimacy is obtained *procedurally*. However, as we saw in the case of the 1971 census, it can turn out that a government action is *substantially* illegitimate, as evidenced in that case by widespread non-compliance on the part of the population. To illuminate this distinction from a slightly different angle, we will borrow and adapt a pair of terms that have gained currency in academic discussions concerning the European Union: *input legitimacy* versus *output legitimacy*.

Schimmelfennig describes input legitimacy as a theory that derives the legitimacy of a democratic system from the features of its political process: the way in which citizens participate in the decision-making process or democracy as 'government *by* the people'.⁸² To elucidate this notion, Schimmelfennig makes use of political scientist R.A. Dahl's theory of the democratic process. Dahl's criteria⁸³ for a democratic process are:

⁸¹ Legislative documents of the Second Chamber of the Estates-General (*Tweede Kamerstukken*, hereafter 'TK') 1989-1990, document number 21132, sequence number 8, p. 45.

⁸² Schimmelfennig, pp. 13-14.

⁸³ Dahl, pp. 109-115.

1. *effective participation*: citizens must have an adequate and equal opportunity to make their wishes known in the decision-making process;
2. *voting equality at the decisive stage*: each citizen must be ensured an equal opportunity to express her or his wishes and preferences in a way that is equal in weight to any other citizen;
3. *enlightened understanding*: each citizen must have an adequate and equal opportunity to become informed enough to discover and validate his or her decision; and
4. *control of the agenda*: the citizens as a collective must have the exclusive opportunity to decide how the matters in which they will express their choices and preferences are to be placed on the agenda. This does not preclude the citizens delegating this responsibility to a select few, but the citizens must retain the ultimate ability to set the agenda.

Dahl admits that no real-world democracy will ever fully live up to these standards⁸⁴; but we can evaluate the input legitimacy of a democratic system in terms of how close it gets to satisfying the criteria.

In our analysis of the national (parliamentary) political decisions made up to this point, we have looked at the participation of citizens in terms of the electoral process and polls. As far as voting equality goes, the Dutch electoral process might appear to be a quite ideal form of this for adult citizens. The proportional representation system for elections to the Second Chamber of Parliament means that all voters' votes are equally weighted for choosing representatives. All Dutch voters make a choice on a more or less identical ballot containing a few hundred candidates, and there is none of the risk of uneven geographical distribution of vote weight inherent to a district system.

However, this is ultimately only a decision about representation, not about the substantial decisions to be made by public authority. At best, the citizen can therefore only indirectly cast a vote in the decision-making process. Although there are a few hundred candidates to choose from on the ballot, these are grouped into between roughly ten and twenty party lists; it can be assumed that any of the candidates on a given party list, if elected to Parliament, would make decisions in some consistent way. If a party has publicized its political goals, then the voter can make a rough guess at what kind of political decisions the voter's representation decision will translate into. This is, of course, dependent on the criterion of enlightened understanding: has the voter had the opportunity to find out what he or she is indirectly voting for? And ultimately, it is the parties that assemble their own lists of political goals: there is little opportunity for the citizen to put concerns on the agenda this way, although parties may be sensitive to inputs such as polls or the public debate in that process.

⁸⁴ Dahl, p. 117.

We can briefly return to the question of how the introduction of compulsory identification made it onto the government program in 1989, and to what extent this was legitimated. Even there, admittedly, we had to radically oversimplify the electoral process in order to divine what the voter was ‘saying’ about compulsory identification in the election. It could well be the case that a majority of the voters had never even heard that the introduction of compulsory identification was on the agenda. It is certainly the case that some voters, even though they knew that the position of the party they voted for was at odds with their own position on compulsory identification, had more overriding concerns that moved them to vote for that party nonetheless.

Output legitimacy is a rather simpler notion: it is concerned with a utilitarian idea of democracy as ‘government *for* the people’. Schimmelfennig defines this in terms of democracy’s ability to ‘achieve the citizens’ goals and solve their problems effectively and efficiently’⁸⁵, drawing partly on Dahl and Tufte’s notion of ‘system capacity’, or the system’s ability to respond fully to the collective preferences of its citizens⁸⁶. It is no accident that a discussion of increasing the legitimacy of the European Union inevitably focuses on increasing the Union’s output legitimacy, since the input legitimacy of the Union is quite tenuous and indirect. The question is asked in this discussion: how can the European Union better realize the citizens’ goals?

But it is also a unique feature of the European Union as a public authority that while it can directly benefit citizens, for instance by disbursing subsidies, it does not itself have much capacity to coerce or limit citizens directly: simply put, it does not have its own police. So if we return a discussion of output legitimacy to the level of national government, it might be useful to distinguish between two types of government action: on the one hand, creative or supportive action, and on the other, coercive or limiting action. To adapt Schimmelfennig’s definition of output legitimacy to this second type of government action, we could reformulate it negatively: a system’s capacity to *not interfere with* the citizens’ existing interests and *not cause* them problems. The 1971 census was illegitimate on this account because by coercing the citizens to provide information, the government interfered with the citizens’ interests, specifically their concerns about privacy. We shall henceforth refer to this type of output legitimacy as *negative* output legitimacy, as opposed to the *positive* output legitimacy to be achieved by creative or supportive government action. How, then, did concerns of output legitimacy play a role in the making of the 1994 legislation, now that the bill had been introduced in Parliament?

Some relevant concerns are well represented in an article written at the time by a member of Parliament for the progressive-liberal party D66, G.J. Wolffensperger, who was a vice chair of the

⁸⁵ Schimmelfennig, p. 13.

⁸⁶ Dahl and Tufte, p. 20.

justice committee of the Second Chamber.⁸⁷ In the article, Wolffensperger outlines what he sees as some of the ‘social and legal sticking points’ in the bill⁸⁸ that the government introduced on 13 July 1992. In implicitly answering the question as to whether the population could live with the changes proposed by the bill, he notes that most citizens were already long accustomed to constantly carrying any number of personal documents such as bank cards and security badges.⁸⁹ He makes a distinction between two types of check moments that the law would introduce: predictable check moments and unpredictable check moments. The predictable check moments, such as when opening an account at the bank, requesting a social insurance/tax number at the tax agency, or beginning employment, would be unproblematic for most people. They would themselves see the importance of being able to identify themselves in these relatively important, infrequent situations, and they would know in advance that they would have to bring along an identity document.⁹⁰ For that matter, one might add, forgetting to bring an identity document in these situations would not be penalized: an individual could always still go home to retrieve it.

The unpredictable check moments, on the other hand, are more problematic in Wolffensperger’s view. As far as the two check moments in which there would be a criminal penalty for not having an identity document—at football matches where there is or could be a disturbance in the public order, and upon being apprehended for fare-dodging on public transit—Wolffensperger mainly has doubts about the efficacy of these provisions. He asks the rhetorical question: would someone planning to fare-dodge bring his or her identity document along specifically in order to pay a lower fine when caught? Wolffensperger’s concerns about the football match provision is somewhat more serious in terms of legal certainty: at what point does the public order surrounding the match begin? Only at the stadium, or on the train on the way there? And what of the unwitting passer-by walking through that zone, who never would have known that she or he was expected to carry an identity document?⁹¹

The bill proposed an additional requirement to have an identity document at the workplace and to display it on demand to tax inspectors checking for work under the table, welfare inspectors checking that no one is working while receiving a social benefit, or immigration inspectors checking for aliens working illegally. Because non-compliance could be ‘penalized’ with the use of

⁸⁷ An interesting side note is that Wolffensperger is a son of slain resistance fighter Gerrit van der Veen, a prominent figure in De Jong’s history. Van der Veen was keenly aware that the Nazi occupation was heavily dependent on compulsory identification and registration: he founded an underground production facility for forged identity cards and was a co-conspirator in a firebomb attack on the Amsterdam population register. (De Jong, part 5, pp. 451-452 and numerous other places)

⁸⁸ Original version: TK 1991-1992, 22694, no. 2.

⁸⁹ Wolffensperger, p. 9.

⁹⁰ Wolffensperger, pp. 13-14.

⁹¹ Wolffensperger, pp. 18-20.

coercive measures (especially detention) to establish the identity of an anonymous subject, Wolffensperger finds this proposed provision disproportionate. But even more problematic for him is that this ‘limited’ area of compulsory identification fast approaches general compulsory identification, since it would mean that in practice, everyone would have to carry an identity document not only at work, but on the way to work and the way home. Wolffensperger notes that he proposed an amendment to the bill with which the employer’s photocopy of the identity document would be sufficient, or with which the subject would get the chance to go home and pick up his or her identity document.⁹²

The bill’s proposal for alien surveillance runs an even greater risk of turning into general compulsory identification in disguise, according to Wolffensperger. A border agent or other agent carrying out immigration inspection would be authorized to stop persons for the purpose of establishing their identity, nationality, or immigration status. Anyone claiming to be a Dutch national would be required to prove it, or otherwise be subject to detention. This creates a situation, Wolffensperger notes, in which everyone would be subject to compulsory identification; only if the situations in which alien surveillance would be conducted are very specifically delineated could this be acceptable. And as to the danger that this provision would be applied in a discriminatory way, targeting ethnic minorities in particular, Wolffensperger notes that alien surveillance by its very nature runs the risk of being discriminatory. The provision in force at the time (1992-1993), in fact, was arguably more discriminatory: it provided that persons who could ‘be reasonably suspected of being aliens’ and who could not produce identity documents could be arrested and held until their identity was established. The government would have to make a policy to execute the new provision fairly and without discrimination, Wolffensperger concluded.⁹³

The two core concerns to be distilled out of Wolffensperger’s arguments that could be relevant to determining the output legitimacy of the bill’s provisions are on the one hand: *reasonableness*, or whether individuals would be able to identify with the necessity of the provisions; and on the other hand: *legal certainty*, or whether individuals would be able to know with some degree of precision what behavior was expected of them in various situations. As to this second concern, Wolffensperger makes the general comment that ‘it is much more convenient to either completely introduce compulsory identification or not introduce it at all’.⁹⁴ He is alluding to what some called the problem of ‘fragmentation’ with the limited compulsory identification bill⁹⁵: the proposed Compulsory Identification Act itself contained no substantial provision instituting compulsory identification (only a provision indicating the acceptable identity documents), rather the

⁹² Wolffensperger, pp. 17-18.

⁹³ Wolffensperger, pp. 14-16.

⁹⁴ Wolffensperger, p. 10.

⁹⁵ Referred to by Hirsch Ballin, pp. 1-2 and 5-6.

bill simultaneously aimed to amend twelve other laws to introduce compulsory identification in their substantial provisions. As such, a problem of legal certainty could be said to arise from the fact that the proposed compulsory identification was not a single coherent provision, but was scattered across many different laws and substantial provisions.

The parliamentary debate concerning the bill was quite extensive, and a number of amendments were proposed by various factions in order to satisfy their concerns, most of which passed. It is telling that in this process, the bill grew from one amending twelve existing statutes to one amending 21 existing statutes.⁹⁶ Wolffensperger's proposed amendment to do away with compulsory identification in the workplace was ultimately rejected, but other amendments, including one aiming to ensure non-discriminatory application of the alien surveillance provision and one making a driver's license an acceptable identity document for the workplace, did pass. On 29 June 1993 the bill was nearly unanimously passed by the Second Chamber, since almost all of the party factions were satisfied with the final version of the bill. Wolffensperger had the last word before the vote, announcing that his D66 fraction would support the bill in light of the fact that the driver's license amendment had made compulsory identification in the workplace less of a burden.⁹⁷ The only fraction voting against were the six members from the Green-Left party, who were not satisfied that the bill was not merely a first step toward introducing general compulsory identification. On 9 March 1994, the Compulsory Identification Act (*Wet op de identificatieplicht*) entered into force.

For convenience' sake, we have focused on the Compulsory Identification Act in isolation, although in reality the deliberations on it were closely related to a so-called 'anonymous suspect' bill⁹⁸ introducing a number of coercive measures to the Criminal Code and the Code of Criminal Procedure for establishing the identity of anonymous criminal suspects. There was, however, another related bill passed soon afterward that is more relevant to this investigation: a bill to amend the Passport Act⁹⁹ to introduce a brand new identity document, an identity card in fact. It was the intention of the Compulsory Identification Act that most citizens would simply be able to use an existing identity document; in 1988, 83% of the residents of the Netherlands over 18 already had a

⁹⁶ TK 1992-1993, 22694, no. 26. This did not necessarily mean that compulsory identification was to be introduced in 21 substantial areas: many of the additions had to do with coordinating and correlating the display of identity documents with other information, such as the social insurance/tax number, in the interest of preventing fraud.

⁹⁷ *Tweede Kamerhandelingen* (Transcript of events in the Second Chamber of the Estates-General) 1992-93, 22 June 1993, p. 6154.

⁹⁸ TK 1989-1990 through 1992-1993, 19757; *Stb.* 1994, 78.

⁹⁹ TK 1992-1993 and 1993-1994, 22973.

passport.¹⁰⁰ But with (limited) compulsory identification, there emerged a need for a new document that was less expensive and more portable, not to mention available to those Dutch citizens who for various reasons (such as being sought for criminal investigation or not having paid fines) were prohibited from having a passport.

Besides, the introduction of an identity card would bring an added advantage with it: it would enable its holders to travel without a passport under the Europe Agreement of 1957, the substance of which had meanwhile been duplicated in EC law.¹⁰¹ Perhaps with that functionality in mind (the introduction of the bill in fact specifically mentioned the Europe Agreement), the new document was christened the ‘European identity card’ (*Europese identiteitskaart*), and after the bill passed¹⁰² the card was made available as of 1 January 1995.

¹⁰⁰ NIPO poll, March 1988, cited in Veerman c.s., p. 21. This statistic implies an astronomical increase in the international mobility of the Dutch, when compared to how few had passports before the war!

¹⁰¹ Directive 73/148/EEC

¹⁰² *Stb.* 1994, 78.

5. Legitimacy: 2004

The subject of compulsory identification rested again for a few years after a new left-of-center ‘Purple’¹⁰³ coalition of the Labor party, the VVD and D66 came into power on 22 August 1994, the first cabinet since 1919¹⁰⁴ in which no Christian democratic party was represented. It seems likely that the introduction of compulsory identification had not made much of an impression on the population.

According to a 1996 newspaper article¹⁰⁵, a task force set up to check for unreported work in the fishing industry and at festivals found that most employees were unable to show an identity document when asked. A month later, the Appeals Court of The Hague interpreted the compulsory identification provision in the Wage Taxation Act (*Wet op de loonbelasting*) to mean that an employer only had to confirm an employee’s identity once, not keep a copy of the employee’s identity document on file.¹⁰⁶ The Supreme Court later corroborated the ruling¹⁰⁷, but in any case the text of the law had already been modified to make the requirement to keep a copy on file more explicit.¹⁰⁸ A newspaper article from 1999¹⁰⁹ reports that employees were by and large complying with compulsory identification: but this ‘compliance’ refers only to the obligation to provide a copy of an identity document to the employer. As to the obligation to be able to show an identity document on demand at work, the article reports that it is only rarely enforced, and that few employees know the obligation exists. Clearly, Wolffensperger’s fears that this particular obligation would turn into a kind of general compulsory identification had never materialized. The provision had never really chimed with the ‘limited’ spirit of the rest of the 1994 legislation, considering that a copy on file was obviously sufficient, and so citizens simply did not comply.

As to the position of aliens, or for that matter of Dutch nationals who could be suspected of being aliens: from the published case law it would appear that the courts made some attempt to protect them from demands to show identification in everyday, ‘walking down the street’ situations. It was the intention of the law, after all, that a police officer not be allowed to conduct a check for immigration status purely on the basis of a person’s appearance.¹¹⁰ In one such ‘walking (or

¹⁰³ http://nl.wikipedia.org/wiki/Kabinet-Kok_I : called ‘Purple’ because of the association of the colors red and blue with Labor and the VVD, respectively

¹⁰⁴ the constitutional turning point at which all adults were given the right to vote and proportional representation was instituted in the Second Chamber

¹⁰⁵ “Identificatieplicht wordt niet nageleefd,” *NRC Handelsblad*, 8 February 1996, p. 7.

¹⁰⁶ “Identificatieplicht onderuit gehaald door gerechtshof,” *De Volkskrant*, 23 March 1996, p. 9; Appeals Court of The Hague, 22 March 1996, case number 95/3826

¹⁰⁷ Supreme Court of the Netherlands, 28 January 1998, case number 32179, LJN AA2396.

¹⁰⁸ *Stb.* 1996, 655.

¹⁰⁹ “Identificatieplicht wordt nageleefd,” *Algemeen Dagblad*, 11 November 1999, p. 47.

¹¹⁰ Van Dokkum, pp. 151-152.

driving) down the street' situation, the police stopped a motorist in conjunction with the enforcement of traffic laws. The police asked the passenger (who was of Moroccan nationality) to identify himself, and subsequently detained him for illegally being in the Netherlands. The court ruled that there had been no legal basis for the police to ask the passenger for identification, since the police had stopped the car to enforce traffic law, not immigration law, and traffic law only imposed compulsory identification (with regard to the driver's license) on the driver.¹¹¹ Courts took a similarly dim view of other instances of police unlawfully demanding identification while enforcing municipal ordinances¹¹² or even enforcing criminal laws enacted by Parliament¹¹³, and thereby 'happening to discover' that the subject was an illegal alien. It seems likely that of the 'immigration' checks (aside from at borders) in which a public authority had a legal basis to demand identification, most would have been conducted at workplaces.

In practice, however, there are indications that police may have made ever more frequent use of a legal 'excuse': stopping persons for some other reason and then ostensibly gaining the 'concrete indications of illegal residence' required to check immigration status (or, after the introduction of the Aliens Act 2000—*Vreemdelingenwet 2000*¹¹⁴, 'facts and circumstances that, measured by objective standards, provide a reasonable suspicion of illegal residence'). Between April 1998 and April 1999 there were 12,001 recorded cases of aliens being stopped, and between April 2003 and April 2004 there were almost twice as many: 22,958. In only half of those cases was the alien initially stopped on grounds of immigration control; usually it was on criminal grounds.¹¹⁵

A particularly interesting court ruling, considering that the initial impulse for the 1994 legislation was the opening of borders in Europe, comes from the ECJ. In the case *Salah Oulane vs. the Netherlands Minister of Alien Affairs and Integration*¹¹⁶, the Court ruled that the compulsory identification provision for aliens, as instituted in 1994, was illegal with regard to aliens with the nationality of other EU countries. As we have seen, European law provides that an EU citizen can prove legal presence in another member state by showing only a national identity card. However, the Court ruled, if a member state does not require its own citizens to be able to identify themselves at all times, then it cannot impose any more extensive compulsory identification requirement on EU aliens. To do so, after all, would be a violation of the non-discrimination principle of the EC Treaty.

¹¹¹ District Court of The Hague, 29 January 1999, published in *Jurisprudentie Vreemdelingenrecht* (Immigration Case Law journal: 'JV') 1993/93.

¹¹² District Court of The Hague, immigration chamber sitting in Amsterdam, 20 July 1999, JV 1999/301.

¹¹³ District Court of The Hague, immigration chamber sitting in Nieuwersluis, 15 January 1997.

¹¹⁴ *Stb.* 2000, 495.

¹¹⁵ Van Dokkum, p. 147.

¹¹⁶ ECJ 17 February 2005, C-215/03

At any rate, the ECJ did not issue this ruling until 2005, at which point it had already become irrelevant with the introduction of general compulsory identification.

In the Purple years (the same coalition was able to form a second government¹¹⁷ after the 1998 elections), it was only very occasionally that a call would be heard from the right to introduce general compulsory identification. In 1998, CDA member of Parliament W. van de Camp published an opinion piece¹¹⁸ in which he argued how useful general compulsory identification would be in combating crime. In terms of how Van de Camp was formulating the output legitimacy of this idea, then, the goal of the citizen to be realized by the government was safety. As far as the ‘negative’ output legitimacy of the idea, on the other hand, or to what extent the citizen would have to put up with interference in her or his interests: Van de Camp argued that almost everyone gladly handed over his or her discount card or bonus miles card to be scanned with every trip to the supermarket. If people had no qualms with the supermarket’s computer knowing about their shopping habits, he reasoned, who should have a problem with showing identification when asked?

This last argument raises a very interesting point. It reflects a certain historical evolution in the culture with regard to technology and privacy that is relevant for the process of political change; after all, if most people living in 1971 had been asked if they would be willing to have their weekly shopping list automatically copied and stored in exchange for a small discount, they might have had rather serious misgivings. It is also interesting to note that although this argument strongly resembles one cited by Wolffensperger, *i.e.* that people were already used to carrying around any number of passes, it nonetheless raises the bar of what the average citizen can be expected to put up with. While Wolffensperger referred to the fact that people were used to carrying around passes (and having them checked once in a while), Van de Camp refers to the fact that people are used to having their personal data *registered* and potentially *correlated* with other data with the help of a pass, quite a significant difference when we look back to our discussion of privacy in chapter 2. Van de Camp is not necessarily aware of this escalation in terms when he makes this argument. Arguably, it simply reflects a difference between 1992, when the only type of electronic registration most people dealt with was the bank machine, and 1998, when many people were already in the throes of the internet and mobile telephony revolution. We shall return to this point in the conclusions.

¹¹⁷ http://nl.wikipedia.org/wiki/Kabinet-Kok_II

¹¹⁸ Van de Camp, W. “Identificatieplicht verder uitbreiden; Voor bonuskaart of air miles mogen ze alles van je weten,” *Algemeen Dagblad*, 30 April 1998, p. 18.

Van de Camp, together with the members of Parliament A. Nicolaï and B. Dittrich (of the VVD and D66, respectively), introduced a motion¹¹⁹ on 9 November 2000 calling on the government to ‘investigate how general compulsory identification, consisting of an obligation to carry identification, and limited to the cases in which the authority already exists to apply coercive measures¹²⁰, can resolve the gaps [in] and harmonize [the current different areas in which compulsory identification exists]—and to make proposals and present them to the Second Chamber by the summer of 2001.’ The motion passed.

On 29 October 2001, the minister of justice, A.H. Korthals (VVD) finally presented the results of his investigation to Parliament¹²¹. The minister concluded that the existing legal provisions, in combination with new policy to be developed by the government (mainly involving the use of the social insurance/tax number to keep track of criminal incidents), was perfectly sufficient as far as establishing the identity of criminal suspects. Expanding the existing compulsory identification provisions, the minister went on, would be not be effective unless it was coupled with more and more intensive identity checks and registration of the data collected. There is no objective need for that, the minister said, while it is doubtful whether it would reap any additional benefits. In this he was referring to the opinion of the Council of Police Chiefs (*Raad van Hoofdcommissarissen*), who had been consulted. J.A. Peters, who at the time was Director of Constitutional Affairs and Legislation at the Ministry of Home Affairs, was indirectly involved in the preparation of the minister’s report. Peters says¹²² that the opinion of the police chiefs was more blunt: they didn’t want general compulsory identification, they said, because it would mean too much extra work for police officers without any real benefit, only more resentment from citizens.

Addressing the issue of ‘fragmentation’, the minister concluded that as far as the provisions outside of criminal law for compulsory identification went, there was no need for simplifying them: citizens were already well aware of the types of transactions and situations in which they were required to show identification. Besides, introducing general compulsory identification would mean a departure from the notion that compulsory identification was there specifically to enhance the efficacy of certain laws. If checking identity documents were to become an end in and of itself, rather than a means tied to specific ends, then the general acceptance of compulsory identification would suffer.

¹¹⁹ TK 2000-2001, 27400 VI, no. 30.

¹²⁰ Note: coercive measures should be understood to include not only detention, but also simply stopping someone on the street.

¹²¹ TK 2001-2002, 28069, no. 1.

¹²² J.A. Peters, personal communication

Finally, the minister indicated that ‘in light of the recent events in the United States’, it would be desirable to allow public prosecutors to institute *ad hoc* compulsory identification in cases of an acute threat of terrorist activity.

The terrorist attacks of 11 September 2001 had taken place just over six weeks prior to the presentation of the minister’s report, when the report had presumably already been completed; so this particular comment of the minister could not help but be an afterthought. But those ‘recent events’ were a watershed moment, creating the conditions necessary for the introduction of the 2004 legislation. Not only would they provide an opportunity for politicians to start calling for general compulsory identification; they were also to be a catalyst for the rise of new politicians calling for changes in Dutch democracy.

In an interview¹²³ published on 27 September 2001, the minister in charge of urban and integration policy, R. van Boxtel (D66), indicated that he was a supporter of general compulsory identification, and that he was not afraid of potential criticism that it would call up too many memories of the war or be a violation of privacy. ‘We live in a different time,’ he said, ‘with many more possibilities in terms of technology that can also be convenient for the citizen.’ At the same time, he rejected the notion that all Muslims who supported the attacks in the US should be ejected from the Netherlands, an idea that had gotten the support of 60 percent of respondents in a recent poll.

In response to Van Boxtel’s comments, the Council of Police Chiefs indicated¹²⁴ that although it might like to see the introduction of general compulsory identification, it did not consider it an ‘opportune’ time to agitate for introduction. The spokesperson for the police chiefs noted that the introduction of general compulsory identification had little to do with combating terrorism, and that ‘people who really have bad intentions have enough opportunities, even with compulsory identification.’

Although Van de Camp now had the prevailing wind in his sails, he also expressed his reservations about whether compulsory identification could have prevented the US attacks¹²⁵. ‘Our safety will not be 100 percent guaranteed if we introduce compulsory identification. But police and prosecutors will be better able to identify persons who are engaged in preparatory actions of a criminal or terrorist nature. And in our open society, without borders in Europe and the stream of

¹²³ Nicolassen, L. and F. van Veen, “Laat de discussie over de Ausweis maar komen’ ; Volgens minister Van Boxtel kan de burger wellicht veel gemak hebben van een algemene identificatieplicht.” *De Volkskrant*, 27 September 2001, p. 3.

¹²⁴ “Politie: verwacht niet te veel van legitimatieplicht.” *NRC Handelsblad*, 27 September 2001, p. 5.

¹²⁵ Lammers, E. “CDA'er: Privacy inleveren voor veiligheid ; Legitimatieplicht”, *Trouw*, 28 September 2001, p. 4.

refugees, that is necessary.’ Van de Camp was already tentatively associating certain phenomena with terrorism—open borders, refugees, and crime—that other politicians would be less afraid to meld into one powerful message.

W.S.P. (Pim) Fortuyn had first made the national news in 1988, when he retired from his position as an associate professor of sociology at the University of Groningen to start a career as a government consultant in Rotterdam. In an interview published with him at that time¹²⁶, he was already making his ideas about democracy known in his answer to the question ‘What makes the youth ... so averse to politics?’

We saw society as an object for change, and an implicit assumption was that we could in fact change society. Nowadays young people see society much more as a given, a moving and changed given, within which they have to find a place. Politics, by contrast, exists by the grace of the malleability of society, because otherwise politics has no right to exist. Perhaps the administrators from Labor shouldn’t insist so often that there is so little that they can change.

He elaborated on his critique of the ‘mandarins’ of the Labor party (of which he had once been an active member) in a 1991 opinion piece¹²⁷:

Formal democracy—municipal councils, provincial parliaments and the Parliament—has degenerated into a formal democracy in the sense of a formality: the citizen is allowed every so often to color in a box and then beat it. The political parties’ link to society is extremely fragmentary and thin. Of all the political parties, the CDA is the most successful at anchoring the party in society. That could be the most convincing explanation for their continuing success.

Fortuyn’s democratic ideals could be firmly placed in the camp of positive output legitimacy: implementing bold new ideas to realize citizens’ goals effectively and efficiently. From 1988 until 1992 Fortuyn was director of a semi-public corporation charged with introducing a new pass to be given to students as part of their student financing, with which they could travel for free nationwide on all trains and public transit. From 1990 to 1995 he also held a special professorship in ‘formation of labor conditions’ at the Erasmus University of Rotterdam; all the while, and afterwards, he also published a number of books and wrote a column in the center-right news magazine *Elsevier*, constantly criticizing the ‘Purple’ government.

In 1997, Fortuyn published a book titled *Against the Islamization of our culture*¹²⁸, in which he identified problems with immigrants in Dutch society as the most acute problem caused by the

¹²⁶ Joustra, A., “De radikalinski wordt ondernemer met chauffeur.” In *De Volkskrant*, 22 February 1988; reprinted in *Het fenomeen Fortuyn*, pp. 11-14.

¹²⁷ Fortuyn, W.S.P., “Geperverteerde mandarijncultuur doet PvdA de das om.” In *De Volkskrant*, 9 March 1991; reprinted in *Het fenomeen Fortuyn*, pp. 19-24.

¹²⁸ The edition used here for references is an updated edition published—significantly—after 11 September 2001, but we will limit ourselves to Fortuyn’s original message.

‘technocratic’ Labor political culture. In its heyday in the 1970s, when prime minister J. den Uyl had championed the ‘makeable society’, Labor had set out to inspire and emancipate the working class. But Labor was now adrift and no longer spoke to the lower classes of society.¹²⁹ With Fortuyn’s critique of what he called Labor’s tactic of ‘keeping the bandage moist’ he could be said to be criticizing a notion of negative output legitimacy, or finding out what the people are willing to go along with rather than finding out what they really want. The implementation of European integration, in his view, is one of the worst examples of this style of governing.¹³⁰

And in the book, Fortuyn describes a number of his substantial ideas that he knew would powerfully speak to the disenfranchised.

[In light of the fact that we have a multicultural society whether we like it or not, it is] completely rational and also very compassionate to say: full is full. We already have enough multi-culti problems crying out for a solution, so [let’s just close] the borders tight as a drum right now. ... That means immediately withdrawing from the Schengen treaty and re-establishing national border checkpoints ...¹³¹

On page 90, Fortuyn repeats this call to close the borders (with an exclamation point) and withdraw from Schengen, as well as to withdraw from the UN Treaty Concerning the Status of Refugees. The autochthonous Dutch culture has to be promoted and presented to immigrants as a standard to integrate into.¹³² Islam, in particular, is ‘a cultural stumbling block for economic and social integration in the Netherlands’.¹³³

On 20 August 2001 Fortuyn announced his intention to go into politics, announcing his candidacy for the party leadership of Livable Netherlands (LN), a new party that had been founded in 1999 by a number of regional-interest politicians.¹³⁴ At first, it was not at all certain whether he would get the party leadership; the party founders had serious differences with Fortuyn’s position on asylum and his prima donna style. Perhaps Fortuyn would have won the party leadership, but both he and LN might well have remained politically marginal.

The attacks of 11 September 2001 changed everything. Suddenly, Fortuyn’s message resonated throughout Dutch society at the same time as worldwide, Islamism and Islam were in the spotlight. On 25 November 2001, Fortuyn was chosen to be party leader of LN. By 8 December, a

¹²⁹ Fortuyn (2001), pp. 31-33.

¹³⁰ Fortuyn (2001), p. 27.

¹³¹ Fortuyn (2001), p. 47.

¹³² Fortuyn (2001), pp. 42-43.

¹³³ Fortuyn (2001), p. 59.

¹³⁴ Van Dinther, M. and B. Wagendorp, “Een bevlogen hervormer die altijd applaus wil.” *De Volkskrant*, 22 August 2001; reproduced in *Het fenomeen Fortuyn*, pp. 48-51.

poll revealed that LN would win 10 seats in a parliamentary election¹³⁵. By 9 January, LN was polling 18 seats; this would rob the coalition partners Labor and the VVD of a parliamentary majority, which they had hitherto had even without D66.¹³⁶ The increasing threat from LN spurred the mainline parties to move their platforms to the right: the VVD began to talk about harder measures for deporting refugees; D66 indicated that more restrictions should be placed on people of immigrant backgrounds marrying people from their countries of origin; and even Labor began to sound more critical on asylum issues.¹³⁷ By 2 February, LN was polling 21 seats, and the three ‘Purple’ parties together were no longer polling enough for a parliamentary majority.¹³⁸

On 9 February, in an interview with *De Volkskrant*¹³⁹, Fortuyn repeated that it was time to close the borders and withdraw from Schengen and the refugee treaty. ‘Restore the border controls and equipment in the seaports, airports, and at the borders with Belgium and Germany. Everything and everyone will be scanned.’ He went on to say, ‘[if] I could manage it legally, then I would just say: not a single Muslim more will get in! But I can’t manage that. Islam is backwards, I’ll just say it, it is just a retarded¹⁴⁰ culture.’

It was not just Fortuyn’s unpolished comments about Islam, but also his stubborn disagreement with the party leadership’s more tolerant position on refugees that moved LN to fire him as party leader on 11 February. Fortuyn went on to set up his own party, the Pim Fortuyn List (LPF), and continued to be the leader of the local party Livable Rotterdam. In city council elections on 6 March, Livable Rotterdam crushed Labor, which had historically controlled the Rotterdam city council, by winning 17 out of the 45 seats there. At the same time, the LPF was already polling 18 seats for Parliament¹⁴¹, indicating that Fortuyn personally had accounted for the popularity of LN before.

On 20 March, the LPF was polling 29 seats, thereby tying the CDA for biggest party at the time.¹⁴², although this result cooled off to 23¹⁴³ by 23 March, after Fortuyn had presented his party’s list of candidates for Parliament, all politically inexperienced outsiders. It seemed that nothing could keep Fortuyn from a role as kingmaker in the upcoming parliamentary elections, which had

¹³⁵ “PvdA grootste, LN op tien zetels.” *Het Parool*, 8 December 2001, p. 1

¹³⁶ Veerman, R., “Leefbaar Nederland op 18 zetels.” *De Telegraaf*, 9 January 2002.

¹³⁷ “Fortuyn zet aan tot ruk naar rechts.” *De Volkskrant*, 26 January 2002, p. 1.

¹³⁸ “Peiling: Paars verliest meerderheid, LN 21 zetels.” *De Volkskrant*, 2 February 2002, p. 2.

¹³⁹ Poorthuis, F. and H. Wastink, “‘De islam is een achterlijke cultuur’”. *De Volkskrant*, 9 February 2002; reprinted in *Het fenomeen Fortuyn*, pp. 59-64.

¹⁴⁰ Fortuyn used one word twice in this sentence—*achterlijk*—which has been translated here as both ‘backwards’ and ‘retarded’ in order to convey both the literal sense and the pejorative sense of the word -- JBB

¹⁴¹ “Fortuyn brengt slag toe aan gevestigde politiek ; Verlies paarse partijen bij raadsverkiezingen ‘Leefbaar’ grootste in Rotterdam Lage opkomst.” *NRC Handelsblad*, 7 March 2002, p. 1.

¹⁴² “Lijst Pim Fortuyn in peiling naar 29 zetels.” *De Volkskrant*, 21 March 2002, p. 1.

¹⁴³ “De vaart is er even uit bij Lijst Pim.” *Het Parool*, 23 March 2002, p. 1.

been set for 15 May. But then, however, Fortuyn was assassinated on 6 May as he left a television studio.¹⁴⁴

Fortuyn's message lived on, though, and all of the parties now knew that crime and immigration were the voters' highest priorities. The LPF, without Fortuyn, won a landslide victory of 26 seats in the 15 May elections to become the second-biggest party after the CDA. When the coalition accord between the three biggest parties, the CDA, the LPF and the VVD was announced on 3 July, the first item in the new center-right government's¹⁴⁵ program was the introduction of general compulsory identification.¹⁴⁶ Furthermore, a new ministerial post in charge of 'alien affairs and integration' was created and granted to the LPF politician H. Nawijn.

The coalition crumbled less than three months later on 16 October, mainly due to the inexperience and squabbling among the 'headless' politicians of the LPF¹⁴⁷, and the government had to retreat to a caretaker role until new parliamentary elections and the formation of a new government. But the concerns of the population were still the same, and minister of justice P.H. Donner (CDA) was almost certainly banking on this when he publicly announced his proposal for general compulsory identification for everyone aged 12 and up.¹⁴⁸ The subject was now even more prominent in the national debate than it had been prior to the previous elections; and it stands to reason that more voters knew that it was on the agenda in the elections of 22 January 2003 than in the 1989 elections. When the results came in, the LPF had shriveled just as quickly as it had shot up, down to 8 seats, while Labor bounced back to become the second-biggest party with 42 seats to the CDA's 44. After a failed attempt to reach a coalition accord with Labor, the CDA came to an accord with the VVD plus (in order to squeak to a majority) D66¹⁴⁹.

The coalition accord as presented to Parliament¹⁵⁰ announced in the section 'Security' that general compulsory identification would be introduced for all those 14 and up, and that it would consist of the obligation to always carry an identity document and show it to any officials who asked to see it while discharging their duties. Donner's initial proposal of age 12 had been adjusted in light of criticism from judges, lawyers, and privacy organizations, most of whom had insisted on

¹⁴⁴ "Verbijstering na moord Fortuyn." *De Volkskrant*, 7 May 2002; reprinted in *Het fenomeen Fortuyn*, pp. 113-115.

¹⁴⁵ http://nl.wikipedia.org/wiki/Kabinet-Balkenende_I

¹⁴⁶ "Identificatieplicht en strak drugsbeleid ; De belangrijkste voornemens uit het ontwerp-regeerakkoord; VEILIGHEID," *NRC Handelsblad*, 3 July 2002, p. 3.

¹⁴⁷ "Kabinet valt, met dank aan LPF ; VVD: nieuwe verkiezingen; CDA: vertrouwen is weg; Bomhoff vertrekt; Herben keert terug." *Het Parool*, 16 October 2002, p. 1.

¹⁴⁸ Verlaan, J., "Laat zien wie je bent, anders ga je mee' ; Minister Donner (Justitie) wil identificatieplicht op straat." *NRC Handelsblad*, 30 November 2002, p. 2.

¹⁴⁹ http://nl.wikipedia.org/wiki/Kabinet-Balkenende_II

¹⁵⁰ TK 2002-2003, 28637, no. 19.

a minimum age of 16, in line with other European countries with compulsory identification.¹⁵¹ If the two liberal parties VVD and D66 had once had any qualms about compulsory identification on classical liberal grounds, these had certainly evaporated: the VVD, in any case, had increasingly been positioning itself as a law-and-order, anti-immigration party in order to capture as many of Fortuyn's votes as possible. D66, for its part, was keeping its powder dry for the 'democratic' reforms it wanted to make to the Dutch constitutional order (which we can more specifically describe as 'increasing input legitimacy'), such as turning the municipal office of mayor into a directly elected office rather than an appointed one. At this point, there were no political barriers to introducing compulsory identification.

Donner introduced a bill¹⁵² on 29 September 2003 in which one further adjustment had been made: the obligation to *carry* an identity document had been scrapped, leaving only the obligation to *show* an identity document upon demand. In a session of the (indirectly elected) First Chamber for questions to the minister, Donner said that the reasoning behind this was that it was not considered desirable to make carrying a document an obligation in and of itself that police could check on. However, he admitted that allowing the police to ask someone to show a document, insofar as it is necessary to the discharge of their duties, did substantially boil down to an obligation for the citizen to carry an identity document at all times.¹⁵³

Prior to the vote in the First Chamber on 22 June 2004, the Labor faction leader, M. Westerveld, expressed the reservations of her faction that compulsory identification would be enforced in a discriminatory way, and that the distinction between an obligation to carry and an obligation to show was a rather artificial one. Nonetheless, in light of promises from the minister of justice to make sure that police officers were educated on the distinction and that the minister would report to the First Chamber on complaints filed about the enforcement of compulsory identification, Westerveld indicated that the majority of the Labor faction had decided to vote for the bill.¹⁵⁴ The only votes against the bill came from the Green-Left faction, the Socialist faction, three members of the Labor faction and the majority of the factions of the two conservative Calvinist parties. In the Second Chamber, the bill had already passed with unanimous votes from the CDA, Labor, the VVD, the LPF and D66.¹⁵⁵

¹⁵¹ "Vanaf 14 jaar met pas op zak ; Kabinet wijzigt identificatieplicht." *Algemeen Dagblad*, 3 May 2003, p. 7.

¹⁵² TK 2003-2004, 29218, no. 1-2.

¹⁵³ *Eerste Kamerhandelingen* (Transcript of events in the First Chamber of the Estates-General), 2003-2004, no. 33, pp. 1747-1762.

¹⁵⁴ *Eerste Kamerhandelingen* 2003-2004, no. 34, pp. 1838-1839.

¹⁵⁵ Abels, p. 743.

The new law came into force on 1 January 2005. If we compare the timelines of the 1994 and 2004 laws in terms of the length of the democratic trajectory each followed (from the beginning of the public debate to enactment), it is striking how quickly the 2004 legislation was enacted. The trajectory of the 1994 legislation began in 1984, after the EC Council of Ministers resolution to open the borders, or (perhaps more realistically) in 1986, when it was included in a coalition accord—and so took eight to ten years. The trajectory of the 2004 legislation, on the other hand, really only began on 11 September 2001, and so took just under three years.

We have discussed the legitimacy of the 2004 legislation in terms of positive output legitimacy, how general compulsory identification was a goal the citizens wanted to see realized. It is difficult to gauge, however, how much input legitimacy the 2004 legislation had. On the one hand, the person and ideas of Fortuyn had provided a vehicle for the electorate to participate in the democratic process more forcefully than ever before, allowing them to very clearly communicate their fears concerning crime and immigration by casting a vote. However, one does get the feeling that general compulsory identification was not so much a direct translation of that mandate as a plan that had been gathering dust on the Christian democrats' shelf for fifteen (or 55!) years, waiting for the time to be ripe. After all, even if Fortuyn had never swept through the political scene, the vague fears engendered by the 11 September attacks, together with law-and-order attitudes represented by mainstream parties would very likely have been sufficient to introduce general compulsory identification.

A problem with limited compulsory identification had been the 'fragmentation' of the responsibilities it placed on the individual; general compulsory identification resolved that problem by placing one uniform responsibility on the individual, thus increasing legal certainty somewhat. But the unitary nature of general compulsory identification may conceal a fragmentation in its reasonableness: *i.e.*, if the reasons different citizens accept it are divergent or contradictory. One need only imagine a citizen who supported compulsory identification because he pictured it being used as an instrument against illegal aliens, or against some obnoxious neighborhood teenagers, outraged when he himself has to spend a few hours in jail for being caught bicycling at night without lights and not being able to show an identity document.

This brings us to another point about the output legitimacy yet to be revealed of the 2004 legislation: its system is so airtight that it offers little chance for the type of passive disobedience (civil or otherwise) that sank the 1971 census. In other words, absent the emergence of an organized protest movement against general compulsory identification, or a great number of complaints filed about incidents, it will never become apparent as to whether general compulsory identification enjoys negative output legitimacy or not. With the 1994 provision on showing an identity document in the workplace, there was an escape valve: most inspectors could afford to be reasonable about

non-compliance as long as an employee had complied with the parallel provision on keeping a copy on file with the employer, thus allowing the first provision to become more or less a dead letter. With the 2004 legislation (in combination with the pre-existing coercive measures for ‘anonymous suspects’ and the enforcement policy¹⁵⁶ for compulsory identification), the hands of a police officer are tied: a suspect, even of an extremely minor infraction, must be detained until someone brings the suspect’s identity document to the police station.

The futility of civil disobedience, especially for those who could be suspected of being illegal aliens, should be apparent from a pair of recent cases. In the first case¹⁵⁷, an Amsterdam man (NN1) was stopped for riding his bicycle in a pedestrian zone. When he was asked to identify himself, he said in English that he was against compulsory identification and that he had done nothing wrong. Furthermore, he said, even if he did have an identity document with him, he would refuse to display it. As a result, the police suspected that NN1 was an illegal alien and opened an investigation into his immigration status; on the basis of information gained this way, the police transferred him to alien detention to await possible deportation. NN1 filed a court appeal against the minister of alien affairs and integration (the minister responsible for alien detention) for refusing to suspend his detention so that he could await a deportation hearing in freedom. When the hearing took place, fourteen days after NN1 had first been detained, NN1 repeated his arguments on principle and added that he was an EU citizen.

The court ruled that the fact that a person does not show an identity document upon being asked and also does not give any indication of being a Dutch national, such as speaking Dutch, is sufficient to arouse a suspicion that the person is an illegal alien. Even the fact that a person has refused to show an identity document on reasons of principle, despite very likely having legal residence in the Netherlands, is not enough to keep the person from being placed in alien detention. The only thing the NN1 could do to obtain his release was to have someone bring an identity document that also proved his legal residence in the Netherlands. The court rejected NN1’s appeal.

In another civil disobedience case¹⁵⁸, however, even speaking Dutch was not considered to be a substitute for an identity document for proof of nationality. The first-instance court had granted NN2’s appeal for release from alien detention. The court ruled that since NN2 spoke Dutch, it was

¹⁵⁶ According to the policy of the Office of Public Prosecution (*Openbaar Ministerie*), ‘a right to lenient treatment must definitely not be allowed to develop, because otherwise the value of compulsory identification for law enforcement will be undermined in the long run.’ *Staatscourant* (State Policy Gazette) 2004, 247. Point 2.3.

¹⁵⁷ District Court of The Hague, immigration chamber sitting in Amsterdam, 4 January 2007, AWB 06/61500, LJV AZ5954.

¹⁵⁸ Administrative Judicial Division of the Council of State, 2 April 2007, 200701970/1, JLV 2007/232, LJV BA2831

very plausible that he was a Dutch national, such that there was no concrete expectation of deportation and therefore no reason to keep him in alien detention. The immigration agency appealed the decision to the highest administrative court, the Council of State. The Council of State quashed the decision, ruling that the fact that NN2 speaks excellent Dutch was no reason to assume that he cannot be deported and therefore that he cannot be kept in alien detention. NN2 must suffer the consequences of his refusal to cooperate with an investigation into his identity and nationality, the Council ruled, even if this includes detention for an indefinite length of time.

6. Conclusions

In a pamphlet discussing worrying developments in Dutch politics, particularly the hard-line ‘rules are rules’ policies of R. Verdonk (VVD), who was minister of alien affairs and integration from 2003 to 2006, D. Pessers quotes the ‘ironic saying among lawyers ... that only laws having to do with weights and measures do not need any further interpretation.’¹⁵⁹ It could be said that ever more rigid compulsory identification legislation to some extent embodies a desire to make the individual a fixed quantity as well: to make it impossible for someone to move about in public with any degree of ambiguity or anonymity, and to make it impossible to engage in any kind of reasonable discussion with public authority about the necessity of these rules.

We first discussed the legal notion of the right to privacy, even in public. Then, in discussing the political history of compulsory identification legislation, we distinguished between two types of legitimacy: input and output legitimacy. The output legitimacy of government action can be more specifically evaluated in terms of positive output legitimacy, the extent to which it realizes the goals of the citizen, or negative output legitimacy, the extent to which it refrains from interfering with, or dovetails with the established interests of the citizen. To come full circle, how do these notions of legitimacy, intrinsic as they are to democracy, relate to the notions of rights and the rule of law in order to achieve the critical symbiosis of constitutional democracy?

Let us first return to the legislation of the occupation period. Since the democratically elected Parliament (and the monarch acting in concert with it) had been cut out of the picture by the Nazi occupiers, the most that that legislation could hope to achieve was the illusion of input legitimacy. It achieved this by selectively applying formal legislative rules of constitutional law, associated as they were with the idea of being able to trace government action back to popular participation.

The legislation of the occupation period may have even laid some claim to actual output legitimacy. After all, it appears that Seyss-Inquart did want to win the hearts and minds of the Dutch, at least at the beginning of the occupation. Leiden law professor B.M. Telders wrote in October 1940, together with some colleagues, that the Germans were not yet taking ‘draconian’ measures, but rather, ‘a certain degree of moderation was necessary if Germany wanted to succeed in fulfilling what ... has been the most striking characteristic of the occupation: the wish to turn the Netherlands into a national-socialist country, by virtue of which the Netherlands would naturally

¹⁵⁹ Pessers, p. 39.

fall into line with the Germans.¹⁶⁰ By exercising some restraint, perhaps the Nazis wanted to show the majority of the Dutch that they could go on with their everyday lives as before, thereby lending some negative output legitimacy to Nazi rule. And if the Nazis had gone on to boldly realize goals of the majority, as they had at first in Germany by increasing employment and giving people hope for a better life, then their rule might have gained positive output legitimacy as well.

Notably absent from Nazi rule, however, were key aspects of the rule of law, especially those concerned with placing restraints on government action. Civil and human rights, in particular, are characterized as mainly negative obligations for the government: the government is absolutely bound *not* to undertake certain actions that impinge on the freedom of the individual.¹⁶¹ In the *pas de deux* of constitutional democracy, rights are to the rule of law as negative output legitimacy is to democracy: they are both concerned with government restraint, and they can either work in tandem or one can pick up where the other leaves off. The Nazi occupiers of the Netherlands may have exercised restraint at first, this much is true; but they did it in an effort to ingratiate themselves to the population. When they began to exercise less and less restraint with regard to human and civil rights, there were no legal boundaries to contain them.

It may seem obvious that the Dutch Supreme Court would not have dared try to stop the occupier-controlled executive in light of the climate of fear that existed at the time. But even if the judges of the Court had not been laboring in the shadow of the gallows, so to speak, the bar on judicial review inherent in the Dutch constitutional system may well have meant that it would not have had a formal basis to resist the occupier. Or at least, this was the position that it took in the infamous ‘Review Decision’ (*Toetsingsarrest*) of 12 January 1942¹⁶² in which it refused to strike down *Verordnungen* issued by the occupier for being in violation of the Land Warfare Convention of 1907. The Court ruled that it was not up to any Dutch court to judge the ‘inner value or reasonableness of a law,’ nor to review a law against a treaty¹⁶³.

This brings us to a further question about the nature of the rule of law in constitutional democracy: is a court merely an ‘external’ enforcement authority, policing the behavior of the democratically legitimated legislature and executive? In England, as in the Netherlands, courts have

¹⁶⁰ Telders e.a., ‘Nota over het Duitse bestuur in bezet gebied’ (1940), p. 7, cited in De Jong, part 4, pp. 122-123.

¹⁶¹ Note that we are focusing on the classical view of rights: meanwhile, there is a more sophisticated view of rights in which government may also have ‘positive obligations’ (see e.g. ECtHR *Ärzte für das Leben vs. Austria*, 21 June 1998) to actively protect rights, particularly civil rights such as freedom of expression that are seen as essential to the democratic political process.

¹⁶² *Nederlandse Jurisprudentie* 1942, 271. The highly controversial aspect of this decision, it must be said, was that the Court implicitly equated the *Verordnungen* with Acts of Parliament.

¹⁶³ Judicial review against treaties (art. 94 of the constitution) was not introduced until after the war.

practically no powers of judicial review¹⁶⁴: Parliament is trusted to exercise restraint. It is not simply that the legislators accept human and civil rights (among other boundaries) as a moral obligation, although it might be nice to think so. It is also that these boundaries correspond to values cherished by the English electorate: if the party constituting the majority in Parliament and supplying the ministers to the government were to overstep those bounds, losing negative output legitimacy, that party would theoretically be sent packing in the next election. In England, then, there exists a culture in which negative output legitimacy is largely coextensive with rights, and in which the rule of law is integrated into politics.

Does this mean that constitutional democracies such as the United States or the Federal Republic of Germany, in which courts have a power of judicial review and in fact use it vigorously, have less of a 'rule of law' culture? Not at all: for the individuals populating the executives and legislatures of those countries do largely respect the power of the judiciary to strike down unconstitutional laws. The courts do not need to enforce their own decisions: in fact, the courts do not have an army or police force to use if they should wish to do so. The decisions of the courts are respected because it is part of the culture to do so: whether or not the members of the executive and the legislature accept the formalistic notion that their authority springs from the same source as the authority of the judiciary, the constitution is alive as an integral part of their culture.

An anthropological account of constitutions as a cultural phenomenon can go a long way toward resolving some of the paradoxes (explored by *i.a.* Okoth-Ogendo) as to why some of the best-architected constitutions fail while others thrive, perhaps indeed without even having to be codified, such as England's. This is not to say that certain cultures are inherently incapable of evolving constitutional values. For instance, German culture was historically characterized by a prevalence of anti-liberal and authoritarian values; this, more than anything, may have contributed to the collapse of the Weimar constitution.¹⁶⁵ The federal constitution instituted after WWII contained a number of legal safeguards to prevent the same thing from happening again; but Baun also sees evidence that the culture of (West) Germany has grown into its new constitution and accepted the values of human and civil rights as its own.¹⁶⁶

If we apply the anthropological perspective to the history of compulsory identification in the Netherlands, we might conclude that the issue of privacy, at least as it relates to having to identify oneself in public, is not a highly cherished value in the culture of the Dutch electorate. The Dutch may well be satisfied to enjoy the bare minimum level of privacy protection provided by the ECHR

¹⁶⁴ Historically, at least; meanwhile, through the passage of the Human Rights Act of 1998, English courts have in fact gained the power to review statutes against the ECHR. As such, Dutch and English courts are now in quite comparable positions. (Verhey)

¹⁶⁵ Baun, p. 79.

¹⁶⁶ Baun, pp. 80-87.

without insisting that their own democratically legitimated legislation exercise a greater degree of restraint.

To illustrate the opposite phenomenon, other ‘rights’ have developed in the Dutch democracy that are not actually constitutional rights, but values that are considered to be so intrinsic to Dutch society that government action interfering with those values cannot claim negative output legitimacy. To provide one specific example, equality based on sexual orientation is now firmly established as a ‘right’, even though it is not codified as such. This was revealed, for instance, in the fact that the abolition of same-sex marriage was ‘not up for debate’¹⁶⁷ when the current government was being formed by the CDA, Labor and the Calvinist party ChristianUnion, the last of which is deeply conservative on the issue of homosexuality.

It may be anthropologically revealing that in everyday Dutch (as opposed to legal language), an identity document is more often than not referred to as *legitimatie* (‘legitimation’), identifying oneself with an official document is *zich legitimeren* (‘legitimizing oneself’) and compulsory identification is *legitimatieplicht*. In a way, then, the onus of legitimation is placed not on the legislation instituting compulsory identification, but rather on the individual subject to it. This is without a doubt a linguistic hold-over from the influence of Prussian or Napoleonic administrative culture, in which similar terms were used; but Torpey would not hesitate to point out that this terminology has everything to do with what he describes as the ‘monopolization of the legitimate means of movement’ by the modern nation-state. While Torpey’s history focuses on the passport for international travel, and not so much on domestic compulsory identification, the two phenomena are closely linked.

Someone may find compulsory identification to be a curious or objectionable thing, and yet at the same time not question the requirement to show a passport at an international border. It is telling that in the public debate with regard to compulsory identification, the fact that there were ‘no more borders in Europe’ was the most common argument for introducing it, with no further explanation. It should be quite obvious in the account presented here that the opening of the borders provided the occasion to start a national political debate about compulsory identification, while at the same time no European project¹⁶⁸ had been the direct legal source of compulsory identification. In fact, as Hirsch Ballin had noted in the report accompanying the initial draft version of the compulsory identification bill, the European Commission had emphatically announced in 1985 that

¹⁶⁷ Timmer, R. and M. Visser, “ChristenUnie drukt stempel op akkoord”. *Het Financieele Dagblad*, 6 February 2007, p. 3.

¹⁶⁸ Schengen was not technically an EC project, although it was later absorbed into the EU with the Treaty of Amsterdam (effective 1 May 1999).

it was not planning on making the carrying of identity documents compulsory in the Community, and that the institution of any such provision remained under national authority.¹⁶⁹

The implicit assumption of the ‘open borders’ argument, rather, was that if there were no more borders between states, there had to be borders somewhere: and the effect of general compulsory identification is to place a border at the front door of every home. Compulsory identification, like the passport, has everything to do with states’ assertion long ago ‘of the authority to determine who “belonged” and who did not.’¹⁷⁰ Interestingly, while it might appear that the political ideas of Fortuyn can take some credit for the passage of the 2004 legislation, Fortuyn himself may not have actually been a supporter of compulsory identification. Nevertheless, his ideas do show a clear desire to throw up a wall to establish at one moment who was ‘inside’ and who was ‘outside’ of Dutch society. In practice, since withdrawing from Schengen would be perceived by all as patently absurd, ideas such as Fortuyn’s could only be implemented with ‘paper walls’.

‘In the past, politicians promised to create a better world,’ begins the prologue to A. Curtis’ documentary series *The Power of Nightmares*, which traces the political history of Islamism and neo-conservatism and their respective influences on world politics up to the attacks of 11 September 2001.

They had different ways of achieving this, but their power and authority came from the optimistic visions they offered their people. Those dreams failed. And today, people have lost faith in ideologists. Increasingly, politicians are seen as managers of public life. But now, they have discovered a new role that restores their power and authority. Instead of delivering dreams, politicians now promise to protect us from nightmares.

Rather troublingly, of the ideas that politicians have presented since 11 September, aiming as they are for positive output legitimacy, many involve interference with existing freedoms: satisfying the electorate not with something substantially new, but with the notion that something is being taken away from someone else. Insofar as the bulk of those interferences is directed at aliens, achieving negative output legitimacy is not a problem: by definition, aliens are not citizens and so are not a source of democratic legitimacy.

As far as input legitimacy, there is certainly a problem that affects citizens. Not only are the citizens detached from the actual decision-making process, but they cannot really actively control the agenda, either. It is to be hoped that this thesis, for its part, helped to highlight how the very notion of compulsory identification was something that was not really put on the agenda by the citizens themselves. It would rather appear to be an age-old dream of professional bureaucrats that

¹⁶⁹ Draft bill reproduced in VRP, p. 75.

¹⁷⁰ Torpey, p. 20.

had lurked in the shadows for years, waiting to piggyback on another political issue. And when compulsory identification finally did explicitly appear in the election platforms of political parties, we cannot be certain how many members of the electorate were really aware of the issue and were able to make a fully informed voting decision.

This thesis does not have any proposals for improving the input legitimacy of the legislative process. However, there is a very basic and vital kind of democracy at work when the population can simply not comply with certain kinds of legislation that it does not see as reasonable, as it did with the 1971 census or the 1994 requirement to be able to show an identity document in the workplace. It is a natural and desirable thing for laws to run their course and become a dead letter when no one sees them as reasonable anymore, as has also happened with laws against sodomy, blasphemy¹⁷¹ and the like. Non-compliance or civil disobedience can be useful forms of democratic participation, even going so far as to set the agenda, as the resistance to the 1971 census did. On this view, the way in which general compulsory identification is enforced in the Netherlands is very troubling, for it implies that there may never be a time in the future when it can no longer be seen as reasonable and fade into irrelevance.

Finally, to return to a point made in Van de Camp's opinion piece, the population is ever more accustomed to the use of technology to monitor and register its activities. In 1998, people were already used to their shopping lists being registered, stored and analyzed. In 2007, almost all Dutch people are used to a good deal of their communicative activity and personal information being registered and stored on the internet. Even leaving the possibility of electronic snooping by a public authority aside, many users of the internet voluntarily fill in personal data on promotional websites, expose their social connections on networking sites, or publish their vacation photos online for all to see. For that matter, it is a safe bet that more people carry around a mobile telephone at all times than carry around an identity document. It can be expected that if legislation is ever drafted to make carrying around an electronic transponder compulsory, it would be justified in similar terms to Van de Camp's argument.

¹⁷¹ Even the Netherlands still has a criminal statute against blasphemy on the books, article 147 of the Criminal Code.

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Robert Coleman, former security expert for the prime minister's office in The Hague, shows how easy it is to acquire an identity card with an unrecognizable photo: in this case, with his face made up as the Joker (Photo: ANP)