Gloria González Fuster
& Niels van Dijk (eds.)

Liber amicorum

SERGE GUTWIRTH

Uncommon explorations into law, science & technology

VUBPRESS

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Table of Contents

Serge Gutwirth: Making excellent science differently

Niels van Dijk and Gloria González Fuster

It is not (just) about what you do, it is about how you do it. Serge Gutwirth often emphasises this idea when discussing the notion of the commons. The commons are not just about identifying something that a group of people decides to share as a common but also about the *commoning* connected to it. And *this commoning* would be about a certain way of sharing, organising, working together, itself guided by a certain notion of what the commons should be about and of why one would want to support the commons. It is about the manner in which things are done. A mode? An attitude? A style, perhaps, also.

With this volume we wish to celebrate Serge Gutwirth – the many great things he has done, the many great things he is and has become, but also the unique manner in which he has been doing what he has been doing. This is because we believe that such a manner of being and doing things is extremely valuable and worth being celebrated, both within and outside of academia. But how to describe it, how to bring such a life into words? That is a challenge.

The readers who know Serge might have an idea of what we are trying to evoke. Generosity is a word often used to describe academics who seem to care for other academics – for instance, by engaging in acts such as supporting them, guiding them, or reading or listening to them. It is most probably not the right term to apply to Serge. Generosity seems to imply a sort of charity, as if any of this was an exceptional gesture from a superior being towards the less informed or from the sovereign towards his subjects. Serge might give you his time, his support, his best counter-arguments, but not by marking the distance between his knowledge and experience and yours. On the contrary, when his cognitive appetite is evoked, Serge goes all in and inserts himself fully into the subject-matter at hand.

Serge's commitment to science – understood as the peculiar kind of activity performed under the demanding conditions of the object of study put to the critical test and the collective of peers to which the results are presen-

ted[1] – also permeates the way in which he has been doing science, especially legal science, over the past decades. It is an extremely serious commitment in which no one is expected to take themselves *too* seriously. He is a man of strong views who is also, as far as we can tell,[2] the kindest person on Earth. His career is a very personal one, one with which he created a unique collective space in which many other researchers feel welcome, supported and free.

Serge loves to discuss and we love to discuss with Serge. Some of his tropes have been recurrent over time, which makes the whole experience even more enjoyable. A favourite statement is "*the judge is always right*", which has become a kind of modern Epimenides paradox, knowing as we know that judges are often wrong, except that they are – in the specific legal sense in which the statement is to be understood – always right. Another treasured allegory is regularly built on the rules of football, a sport we have actually never seen him play. Of great pertinence has been his call for more time in performing research and for "slow science", fed by years of active resistance against the pressures and inconsistencies of modern academia.

We ourselves do not know much about how Serge became Serge, or what he was doing exactly before we were fortunate enough to meet him. For this ignorance in which we have lived many years we might be tempted to blame him. In this world full of egos, he stands out as almost the opposite, never insisting to be on stage or under the spotlights. He rarely talks about his own achievements and will encourage you most often to read other people's books rather than his own. You will not find him on social media. He does carefully list (and when possible make available) his own publications on a dedicated internet page, and does not mind sharing his CV, which is famously longer than an extended version of Frank Zappa's discography. But he is apparently allergic to superficial praise and immune to flattery.

With this volume, we wish at least to provide a glimpse of the many different directions in which his work has ventured. Throughout his academic career, Serge has come to explore originally a wide variety of topics relating to various characteristics, topics or fields of the law and science, from literature and the law to the law and psychiatry, from surveillance to research integrity. This book attempts to pay homage to this versatility and to the importance of his contributions. It may well be that many readers, if they know Serge, know him

1 In Serge's own words he describes science as the collective production of reliable, verified, rectified and robust knowledge that is characterised by its objecticity and its collectivity (Serge Gutwirth, "Le droit n'est pas une science, mais la science juridique existe bel et bien" in Georges Azzaria (ed), *Les nouveaux chantiers de la doctrine juridique* (Editions Yvon Blais/Thomson Reuters 2016).

2 Based on a limited sample.

mainly within a certain area of work. This book intends to open up and to bring into connection the broader variety of the strands of work and thought that mark his career as an academic who has, in addition, inspired non-academic thinkers and activists.

This introductory chapter kicks off the book with a series of introductory sketches. This text, of course, is not meant as a comprehensive overview, which is an impossibility. It has also extreme limitations regarding factual reliability, as it is based partially on a series of interviews which we found fascinating, but that, in our excitement, we failed to document properly.[3]

After this introduction, the floor is given to the contributors, all of whom have at some point – or several – worked together with Serge. They provide us with a pluriformity of voices and testimonies. In each of their individual testimonies we obtain a monadic refraction of Serge as a singular academic person, and more than that. Some voices could unfortunately not be collected here for a variety of reasons, ranging from time constraints to form constraints. Pieced (and imagined) together, they should nevertheless come to constitute a kind of Arcimboldo-style composite portrait of Serge, an artist which he himself once used as the frontispiece to his own PhD. Let us decelerate and zoom in on Serge's story.

1. *Veri-diction*: a multiplicity of truth claims

> Les grands problèmes contemporains … passent par l'ensemble des rapports de droit et de la science. Nous avons à réinventer le lieu de ces rapports, nous avons à produire donc une nouvelle philosophie pourque les juristes puissent inventer un nouveau droit, et, peut-être les savants une nouvelle science.[4]

Serge Gutwirth studied both the Law and Criminology at the Vrije Universiteit Brussel (VUB) in Brussels, where he also obtained a post-graduate degree in Technology and Science Studies. He tried around that time to leave university and, aiming to go for legal practice, took the bar exam in Belgium for practising lawyers. Apparently, however, he quickly realised he was not really interested in being a lawyer. In hindsight, it was rather the study of what lawyers and judges do in legal practice, the typical arsenal of legal operations, which would turn

3 One of us was responsible for recording but obtained only partially usable recordings, the other took notes on a paper that she then immediately lost. We trust researchers will in future develop a better methodology and implement it with the necessary accuracy.

4 Michel Serres, *Eclaircissements. Entretiens avec Bruno Latour* (François Bourin 1992), pp. 199-200.

out to be of true interest for him. Very soon he published his first opus based on his student work on the reading of Fyodor Dostoevsky through a criminologist prism.[5]

At this time, Bart De Schutter was looking for a legal scholar with a Master's degree. De Schutter, a key figure at VUB (Dean of the Faculty of Law and rector for several years) and a pioneer of legal scholarship about informatics (eventually also a key player in data protection), led a whole research group engaged in carrying out research related to European projects. He became the supervisor of Serge's PhD and took him into academia, where Serge became part of the research group consisting of several young researchers, among whom were Beatrijs Spruyt and Tony Joris, who would both develop their own careers at the VUB. These were the times of (post-)punk, and it would seem that Serge was not the only one who took to travelling to London to get the right look.

De Schutter introduced Serge to the field of data-protection law. An initial plan to write a PhD in computer law eventually transformed into a broader endeavour, as he eventually preferred to bring many different topics and theoretical sources together. This was in order to think more fundamentally about the legal statute or status of information, where the concept of information would be taken in the broadest possible sense. This undertaking involved an exploration of the many different legal fields that concern themselves with information, such as, most notably: privacy, data protection, intellectual "property" law (e.g., copyright, patents, trade secrets) and penal law; but it also involved incursions into environmental law. This was also an opportunity to weave many previous theoretical influences and inspirations together: from philosophers of science such as Bruno Latour, Isabelle Stengers and Michel Serres, his criminological background in the work of Michel Foucault (a whole page of references in the bibliography), and his legal influences through the works of René Foqué and Joest 't Hart on legal protection and instrumentality.

It all culminated in his PhD dissertation "*Waarheidsaanspraken in recht en wetenschap*" (Truth claims in law and science),[6] unfortunately not yet translated into English. The stated goal of the book, well introduced by Serres' quote, is the search for a new possible relationship between law and science through the hybrid figure of the "truth claim". This notion unites both the notion of truth as the supposed goal of scientific endeavour and the notion of a claim situated at the core of legal practice. Through claiming truth, certain kinds of knowledge

5 Serge Gutwirth, *Dostojevski criminoloog? Een historische en biografische speurtocht naar de criminologische inzichten van de Russische schrijver* (Kluwer Rechtswetenschappen 1985).

6 Serge Gutwirth, *Waarheidsaanspraken in recht en wetenschap* (VUB Press 1993). See also the preface by René Foqué (pp. 17-20).

become situated and attributable to a specific subject as claimant, whereas this subject in this way becomes simultaneously positioned both in a specific web of legal and scientific relations. This interpretation could open up a space for law to play a mediating role in considering different kinds of truth claim by a plurality of actors instead of merely allowing scientists to close down the debates. In other words: it could open a clearing for various kinds of veridiction.[7]

In order to write his PhD thesis, Serge had found refuge in a small village in France, where he teamed up with a Dutch musician whose country house Serge helped to restore. He did return to Brussels to defend – on 15 December 1992 – the PhD before a grand jury of eleven (!) professors, among whom were Jean-Paul van Bendegem and Yves Poullet, both of them contributors to this book. According to an urban legend, his supervisor De Schutter asked him to make an effort for the special day of the public defence and wear a tie, to which Serge would have replied that unfortunately he did not possess any.

2. *Contra-diction*: roads to freedom

As early as during the final years of the PhD writing, Serge and others were developing a line of critical thought about law. This period runs parallel to his work at the editorial boards of two journals in Dutch: *Tegenspraak* and *Recht & Kritiek*. In these editorial board meetings, long and extensive debates took place that zoomed in on alternative trends regarding matters related to the law. These debates provided an important window onto what academic life can consist of – especially valuable in our times that have become increasingly characterised by the "publish or perish" culture in academia.

The title of the journal *Tegenspraak* is literally translatable as "Contra-diction" after the right of a legal party in a legal process to make their position heard and to contest the positions of others. It was a Flemish journal aiming to constitute a site from where contestation of all kinds of modern development regarding the legal system could be organised. The group working on the journal saw itself as a progressive, Marxist-inspired collection of academics and lawyers and included people such as Mark Lambrechts, Koen Raes, Dirk Voorhoof and Wilfried Rauws (for whom Serge would later become vice-dean of the Faculty of Law and Criminology of the VUB). Serge took part in these

7 Inspired by the later work of Latour, this notion could later also be applied to the practice of law itself as one specific regime of veridiction, among others (e.g., science, technology, politics, religion), different modes of speaking truths, be they legal truths or scientific truths. See Bruno Latour, *An inquiry into modes of existence: An anthropology of the moderns* (Harvard University Press 2013).

inspiring discussions on many different topics. He contributed to several cahiers of the journal during the period 1992-1998, about themes such as human rights, the role non-human beings in environmental law, mental illness in criminal law, and love and law, and also co-edited some of these volumes.[8]

Koen Raes was the key connection to another Netherlands-based journal *Recht & Kritiek*. They always travelled together by car to Utrecht for the journal's meetings. This journal had as its goal to become a forum for promoting the development of a critical legal science in the Netherlands. It created a further bridge with René Foqué and Joest 't Hart, who had been major inspirations for his research. It also triggered a connection with Mireille Hildebrandt, with whom he would engage in multiple collaborations, eventually resulting in her joining the VUB. The journal meetings also opened up further links with Dutch academic networks.

These developments led Serge to the Faculty of Law of the Erasmus University in Rotterdam, where he obtained a part-time position as lecturer from 1994 to 2009. He became involved in the group around René Foqué and also met other legal scholars such as legal philosopher Jean-Marc Piret and legal sociologist Nick Huls. He started teaching courses in the philosophy of law. In practice, the period was marked by much driving from Brussels to Rotterdam and back, and much teaching.

At the VUB, after obtaining his PhD, Serge had first become a post-doctoral assistant. In 1994 he was appointed as a full-time lecturer at the VUB. He started teaching the course Legal Methodology, where he had to deal with many groups of students. Later he would also be teaching courses in International Protection of Human Rights, Legal Theory and a course in comparative law on the Introduction to Major Legal Systems, among others.

In 1998, the book *Privacyvrijheid! De vrijheid om zichzelf te zijn*,[9] was published about privacy not as a right but as a freedom (to be oneself). The text was originally supposed to be only a shorter essay for the Rathenau Instituut, touching upon a subject trending at the time following the adoption in 1995 of the Data Protection Directive.[10] In his review for *Rechtsfilosofie & Rechtstheorie*,[11]

8 For instance, Cahier 15 on *Milieu rechtgezet? Een bezinning over de grondslagen en de toepassing van het milieurecht*, with a contribution by François Ost on the legal status of the environment.

9 Serge Gutwirth, *Privacyvrijheid! De vrijheid om zichzelf te zijn* (Rathenau Instituut 1998).

10 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ. L. 281, 23.11.1995, pp. 31-50.

11 Peter Blok, "Privacyvrijheid" (2000) *R & R* 29, 178.

Peter Blok would note the enthusiasm emanating from the book, which certainly covered much more than the average text on privacy and data-protection law.

Privacy is contextualised with the help of, inter alia, sociology (Stanley Cohen and Gary T. Marx), philosophy (Gilles Deleuze), history (via Philippe Ariès and Georges Duby, but also Norbert Elias and Michel Foucault) and computer science (Joseph Weizenbaum), discussed in the light of capitalism compared to the protection of personal data. Privacy is celebrated by building on the writings of the Belgian legal scholar, François Rigaux, mentioned as a key inspiration together with Foqué and 't Hart, just before a special shout out to Paul De Hert, highlighted as an already longstanding collaborator and friend. In 2002 an English version of the 1998 book, under the title *Privacy and the Information Age*, saw the light of day.[12]

De Hert was also in De Schutter's team, and often worked with Serge on surveillance-related issues. Their collaboration would cover different areas. In 2006 they jointly wrote "Privacy, data protection and law enforcement: Opacity of the individual and transparency of power", a particularly influential piece on privacy, data protection and law enforcement against the background of the principles of the democratic constitutional state.[13] Privacy here sets limits to the power of others to interfere in someone's affairs and provides a legally articulated point of resistance to speak against and to contradict certain techniques of power.

In general, Serge has himself described this first phase in academia as "tropical academic years" in which a young staff member has to juggle in overdrive with the many different obligations of teaching, research projects and the politics of faculty and university committees. This is rather like a Chinese artist who tries to simultaneously keep various plates turning on fragile sticks without them all crashing into pieces. He, for instance, later became part of the research council of the VUB for many years, where he could observe the politics around research from close quarters. Nevertheless, several of these experiences also created a critical stance to the politics of academic research. This research was increasingly falling under the sway of the knowledge economy and its discontents, especially the kind of fast science fuelled by competitive benchmarks such as the publish-or-perish logic for research output. During this period, the seeds would be planted for his later engagement with what would be called "slow science".

12 Serge Gutwirth, *Privacy and the Information Age* (Rowman & Littlefield 2002).

13 Paul De Hert & Serge Gutwirth, "Privacy, data protection and law enforcement. Opacity of the individual and transparency of power". In Erik Claes, Antony Duff & Serge Gutwirth (eds), *Privacy and the criminal law* (Intersentia 2006).

In any event, an exit strategy was called for, and so during this time he tried to obtain a research professorship.

3. *Ius-diction*: professing what one preaches

In 2003 Serge was appointed a research professor with a prestigious position that was only awarded to a small group of professors for a period of 10 years (a group which included Sonja Snacken, who is also a contributor to this book). This appointment cemented his commitment to research and bought him freedom from the high number of teaching courses. This can be considered as the start of a second academic period in his life.

The real transformation regarding research, however, comes with the successful application for a project in the international Interuniversity Attraction Poles (IAP) programme. The project was called "The loyalties of knowledge: The positions and responsibilities of the sciences and of scientists in a democratic constitutional state". The project ran from 2002 to 2006 and Serge was to become its coordinator. This project united researchers from five different universities. Importantly, it included some of the scholars that Serge had been inspired by since his PhD, most notably the philosophers of science, Isabelle Stengers from the Groupe d'études constructivistes at the ULB, and Bruno Latour, from the Centre de Sociologie de l'Innovation at the Ecole des Mines in Paris – both of whom also had an interest in the study of law. Several other contributors to this book were also part of this project, such as Jean-Paul van Bendegem, Mireille Hildebrandt and Laurent de Sutter.

The IAP provided the opportunity to develop different research agendas and once again to dive into the kind of deep discussions that are academically so rewarding. The project aimed to explore the public character of sciences and a criticism of the separation between science dealing with facts and politics and law dealing with values. More concretely, it wanted to create new paths to open up the processes in which the sciences construct facts by including constraints in scientific practice derived from legal and political theory such as democratic participation, rule of law, transparency, accountability, human rights and individual freedom.

Intellectually, this was a period marked by an important transition, one away from more theoretically informed thinking about law that still marked his PhD and which strongly emphasised the modern state, constitutional democracy and the rule of law. The work of Latour and Stengers played a key role in this. Latour's later philosophical-ethnographic studies in the French Conseil d'état of law as a specific mode of existence (published in his book *La fabrique du*

droit[14]) and Stengers' cosmo-political philosophy[15] opened up a new empirical and theoretical avenue for the study of law. Law (but also science and politics) could be approached as a concrete practice marked by certain characteristic constraints in the work of practitioners who have to solve specific issues. Law as a practice co-exists with other practices such as science and politics in an ecology of practices in which interrelations have constantly to be established. The project allowed Serge to make his own connection with law and to explore new, more empirically informed ways to conduct legal theory. This implied an exploration of how to speak well about the work in legal practice of making a conflictive issue come to pass to legal speech (*ius-diction*).

These years were also important for another reason. In 2003, Serge founded the VUB Research Group on Law, Science, Technology and Society (LSTS), which he first chaired and later co-chaired with Paul de Hert (until 2019). Devoted to many of the research subjects which had driven his earlier work, LSTS was one of the first research groups that linked Legal studies (the "L" in the title) to the studies of Science, Technology and Society (STS), creating a new kind of hybrid, unexplored space for research.

From its conception the VUB Research Group deployed a two-track approach. On the one hand, it had a conceptual strand that focused on generic questions concerning the relationship between the practices of law, science and technology in society. One the other hand, it would pursue positive legal science and analysis by starting from legal issues raised by scientific and technological innovation, especially in the field of privacy and data-protection law. Learning from earlier lessons about the exigences of academic politics regarding how to do research and how to foster critical thinking under the conditions of the knowledge economy, it secured funding for young researchers, thanks mostly to European Union-funded research projects, while never giving up on different forms of research. This was always a key part of the group's strategy: to create an academic climate for time to flow more slowly. This was to be a space for engagement with research that does not only have to rush to be "delivered" to a commissioning institution or to insert itself into a performance matrix to discipline a new generation of academics into a questionable conception of excellent science. In short, it tries to foster alternative ideas and practices in the pursuit of research.

14 Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'État* (La Découverte 2004).

15 Isabelle Stengers, *La Vierge et le neutrino: Les scientifiques dans la tourmente* (Les Empêcheurs de penser en rond 2006).

LSTS grew successfully, becoming an internationally recognised centre of excellence in the field of law and technology. Numerous PhD candidates who joined the research group and would over time defend their doctorates and/or stay around or move on to new adventures: Laurent de Sutter, Katja de Vries, Rocco Bellanova, Raphael Gellert, and many more.

4. *Inter-action*: towards common grounds

The year 2017 marked another shift or transition in academic engagement. In her contribution to this book, Isabelle Stengers describes this as a shift from legal theory towards legal activism. This is a period in which Serge started to focus increasingly on the commons as a topic of research and general attention.

As mentioned, Serge had worked on environmental law in his PhD and in the cahiers of the journal *Tegenspraak*. In the IAP, he had explored issues related to gene technology and food. Furthermore, outside of academia, he had been regularly active – intellectually and physically – in a collective engaged in vegetable gardening. All of these strands somehow came together and were further pushed forward in an exploration of the commons as a generative site capable of generating new relationships between human beings and non-human beings in ecological settings. In their turn, these reflections also became successfully welded in other projects and endeavours, among others with Dominique Nalpas, whose contribution is also included in this book.

The commons therefore mark new avenues for the study of, and an engagement in, the practice of law. If earlier in his career Serge had explored questions around what law *does* through studies about the characteristic repertoire of the "operations" and "sources" of law that legal practitioners work with and through, here the interrogation turns towards what law *can do* as a practice as an increasingly prominent mode of enquiry. Spinoza once said that we do not know what a body can do, we do not know into what kinds of affective relationship it can enter. This saying is here made relevant to law itself: we still do not really know what law can do. What can law be? What can legal practices mean for other practices that are engaged in fostering affective relations with ecological beings? There is still a plasmatic potential for action in law, an actionability, that remains to be explored by tapping into the creative registers of legal practice. This proposition offers new opportunities, and we cannot wait to see where this will take Serge next in his ceaseless explorations of doing (academic and non-academic) research differently.

Close encounters of a special kind

Sonja Snacken

In my contribution to this *Liber amico/arum*, I want to reflect on three close encounters of a special kind that link me to Serge: (1) 40 years of collaboration and friendship with him; (2) encountering inhuman and degrading treatment in criminal justice systems; and (3) the dilemmas of academic activism.

1. First close encounter: 40 years of collaboration and friendship

I met Serge in 1983 – exactly 40 years ago. I was a PhD researcher and teaching assistant in Criminology at the Vrije Universiteit Brussel (VUB); Serge was a Criminology student. One of my seminars dealt with female criminality, in which we discussed the different explanations offered by criminological, sociological, psychological and even biological research for the limited proportion of women in official and self-reported crime statistics. At the end of that particular seminar, Serge came up to me and asked for some more literature about the "emancipation-hypothesis". This hypothesis by Freda Adler[1] states that the emancipation of women and their increased economic opportunities will lead to more similar male and female crime patterns, both in the crime rate and in the types of crime. I was, of course, delighted that a student would show such an interest in this topic and gladly offered to bring some books to the next seminar. I learned much later – when we had become close friends – that this request in fact emanated from his then girlfriend, Linda, who was very interested and active in women's emancipation movements …

But by then I had come to know Serge as an intelligent, smart, funny, wilful and unconventional thinker and scholar. His master's thesis in Criminology, *Dostojevski – criminologist?* was so impressive that it was published by a scientific

1 Freda Adler, *Sisters in crime: The rise of the new female criminal* (McGraw-Hill, 1975).

editor – a unique feature for a student.[2] His PhD *Truth claims in law and science*[3] brought together criminal law, computer law, environmental law, criminology, psychiatry, natural sciences, social sciences, philosophy of sciences, legal theory, data protection, privacy – all in a mere 846 pages ... Many of the authors used in this first magnum opus – Michel Foucault, Michel Serres, Isabelle Stengers, Bruno Latour – would continue to inspire him throughout his academic career, up to today.

This interdisciplinary approach brought us together also as scholars. Being both lawyers-criminologists with a fierce interest in societal challenges and injustices, we would eventually collaborate as co-supervisors in four interdisciplinary fundamental research projects on Contemporary Punishment; Legitimate Justice in Times of Insecurity; Restorative Justice in Prisons; and Human Rights in Situations of (extreme) Dependency. We were involved together in five PhDs on topics as diverse as restorative justice, legal pluralism and ethnocriminology, the politics of crime control, euthanasia requests by prisoners, and a comparison between a prison and a rehabilitation hospital as total institutions. This would lead to several joint publications, especially on the interaction between punishment and human rights. And also to numerous work lunches and dinner parties, eventually also including our respective partners.

So, thank you, Serge. For all these years of true friendship. For all the shared personal stories, dreams, joys, losses and sorrows. But also for your unrelinquishing critical thinking, out-of-the-box academic creativity and the never-ending search for new insights, challenging any risk of intellectual complacency – both for yourself and for your friends.

2. Second close encounter: witnessing, explaining and countering inhuman and degrading treatment in European criminal justice systems

Witnessing inhuman and degrading treatment

For many years, starting in 2000 and ending in 2022, Serge invited me to give a guest lecture on "The European Committee for the Prevention of Torture (CPT)" as part of his course on the International and European Protection of Human Rights that he has been teaching since 1994 in the LLM in International

2 Serge Gutwirth, *Dostojevski criminoloog? Een historische en biografische speurtocht naar de criminologische inzichten van de Russische schrijver* (Kluwer, Gouda Quint, 1985).

3 Serge Gutwirth, *Waarheidsaanspraken in recht en wetenschap* (Maklu, VUBPress, 1993).

and European Law in the Faculty of Law and Criminology of the VUB. Serge founded the VUB Research Group on Human Rights in 1999 and chaired it until 2003, when he founded the VUB Research Group on Law, Science, Technology & Society (LSTS). But human rights remained an important topic in his research and writings. In his course, he always tried to stimulate critical reflections and discussions with his students on the nature of such rights, often evoking controversial issues.[4]

In the international human rights instruments, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into effect in 1989, adopts a specific position because it mainly establishes a multidisciplinary committee – the CPT – endowed with large competences to access all places of detention in the member states of the Council of Europe and to monitor the treatment of detainees.[5] My guest lecture was of a slightly different nature for his international group of law students because it was also based on my own year-long experiences as an expert for the CPT, accompanying the committee on its visits all over Europe, including Central and Eastern Europe and the Baltic States. The very real and specific examples of torture and degrading treatment or situations described in the CPT visit reports led to many questions and reactions by his students.

To cite a few:

> The torture rooms found in the Ankara and Diyarbakır Police Departments in Turkey in 1990 and 1991, and the many consistent and medically certified allegations of torture practices such as *"suspension by the arms; suspension by the wrists, which were fastened behind the victim (so-called 'palestinian hanging', a technique apparently employed in particular in anti-terror departments); electric shocks to sensitive parts of the body (including the genitals); squeezing of the testicles; beating of the soles of the feet ('falaka'); hosing with pressurised cold water; (...) forcible penetration of bodily orifices with a stick or truncheon"*.[6] In more recent visits, many allegations were still received concerning "*excessive use of force and/or physical ill-treatment by police/gendarmerie officers from persons who had recently been taken into custody (including women and juveniles). (...) A significant proportion of the allegations related to beatings during transport or inside law enforcement establishments, apparently with the*

4 See 'Serge Gutwirth' (Brussels School of Governance) <https://brussels-school.be/team/serge-gutwirth> accessed 15 April 2023.

5 European Treaty Series No. 126. Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152), which entered into force on 1 March 2002: CPT/Inf/C (2002) 1.

6 CPT, *Public statement on Turkey* (1992) CPT/Inf (93) 1, §§ 5-10.

aim of securing confessions or obtaining other information, or as a punishment. In a number of cases, the allegations of physical ill-treatment were supported by medical evidence."[7]

The indifference of prison staff in a Lithuanian prison, where inter-prisoner violence in the hierarchical caste system of the prisoner subculture had led to two deaths of prisoners, was especially disturbing. Staff allocated prisoners from different caste-levels to the same large dormitory, resulting in the "slaves" being at continuous risk of victimisation and brutalisation by higher-status prisoners, unprotected by prison staff who knew of the risks. However, this failure by staff to intervene was "*hardly surprising*", according to the CPT, given their severe understaffing – 100 custodial staff for 2,000 inmates – thus raising the state's responsibility for the duty of care of its prisoners ....[8]

We witnessed the lengthy periods of solitary confinement in a Scottish prison, in a cell where material conditions were "*spartan in the extreme*", without sanitation, with only a slopping-out bucket being provided. Prisoners spent more than 23 hours a day in their cells, the only out-of-cell activities being slopping out (the manual emptying of human waste from a bucket) and use of the telephone. This resulted in a "dirty protest" by one of the prisoners.[9] Relations with uniformed staff had deteriorated to such a degree that staff brought food to this prisoner wearing full riot gear, including helmets with full face visors.[10]

The "*inhuman treatment*" of escape-risk prisoners held for several years in "*very impoverished regimes*" came to our attention in a Dutch maximum security unit. There, routine strip-searches, including anal inspection, were carried out at least once a week, even in the absence of any contact with the outside world. These systematic strip-searches, which did not respond to legitimate security needs and were humiliating for prisoners, came on top of many other highly restrictive security measures: family visits took place through an armoured glass panel in a visiting booth; direct contacts with staff were very limited, staff and inmates usually being separated by armoured glass panels; no work or educational activities were provided; very limited contacts with fellow prisoners were allowed. The CPT found that this regime had severely harmful psychological consequences for those subjected to it: feelings of helplessness leading to depersonalisation; feelings of powerlessness resulting

7 CPT, *Visit to Turkey 2019*, CPT/Inf (2020) 24, §§ 10-12.

8 CPT, *Visit to Lithuania 2000*, CPT/Inf (2001) 22, §§ 64-65.

9 "Dirty protest" refers to prisoners smearing the contents of their slopping-out buckets on the walls of their cells, usually as a form of protest against their imprisonment (e.g., IRA political prisoners in the 1970-1980s) or their prison conditions, as in this case.

10 CPT, *Visit to the United Kingdom 1994*, CPT/Inf (1996) 11, §§ 321-323.

> in regression; anger and rage directed at oneself (depressive symptoms) and others; and communication difficulties. Persistent psychological sequelae (insomnia; anxiety symptoms; disturbance of identity; emotional liability, and psychosomatic symptoms) were found in former inmates of this unit who were eventually transferred to a Forensic Clinic.[11]
>
> We uncovered different examples of inhuman and degrading treatment in Belgian prisons, evidence of which was reported on repeatedly throughout the CPT reports since its first visit in 1993. These resulted from several systemic failures: severe overcrowding, a lack of sanitation and a lack of activities in remand prisons; inadequate psychiatric care for both mentally ill and sentenced prisoners; disproportionate and unwarranted violence by prison staff on prisoners; insufficient attention by staff to inter-prisoner violence.[12]
>
> The regular, lengthy and unannounced strikes by prison staff in Belgium, that have resulted in the deaths of two prisoners, serious restrictions on access to healthcare for prisoners and a virtual halt to their contacts with the outside world, including with their lawyers, have also been severely criticised. The CPT emphasised in 2017 that "*During its many visits to the 47 Council of Europe member states over the last 27 years, the Committee has never observed a similar phenomenon, in terms of both the extent of the phenomenon in question and the risks involved*".[13]

Some students, coming from countries in the world where torture and ill-treatment by police or in places of detention were quite pervasive, would listen and nod – and often gave other examples of inhumane practices and the mechanisms behind them in their national contexts. Other students would look at me in disbelief, incredulous that such practices could exist in Europe, especially in Western Europe. As the years went by, my examples grew in number – but the mechanisms behind them remained fairly the same. By the time of our last common class, on 15 December 2022, I think Serge knew both the examples and their explanations as much by heart as I did – but he kept looking interested, adding enriching comments and reflections to the discussion.

The three-hour class always passed very quickly and would be followed – naturally – by a working lunch …

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11 CPT, *Visit to the Netherlands 1997*, CPT/Inf (1998) 15, § 65.

12 See the CPT reports on its 14 visits to Belgium: <https://www.coe.int/en/web/cpt/belgium> accessed March 2023.

13 CPT, *Public statement concerning Belgium*, CPT/Inf (2017) 18

Prevention requires "explaining" inhuman and degrading treatment

In order to *prevent* such practices, we have to understand the *mechanisms* behind them.

Why does the Convention focus specifically on places of deprivation of liberty? In my class for Serge, I emphasised the importance of the experiences in the concentration and extermination camps during World War II for the eventual scientific attempts at understanding the dynamics behind such a large-scale, bureaucratically organised industrial form of genocide. Two iconic social-psychological experiments are traditionally mentioned in this regard: Haney and Zimbardo's 1971 simulated *Stanford Prison experiment*;[14] and Milgram's 1975 experiment on *Obedience to authority*.[15] The first illustrated how situational forces can influence individual behaviour into taking up specific roles. The experiment had to be stopped after six days (instead of two weeks) after part of the students playing the "guards" were abusing their fellow students playing the "prisoners" and four "prisoners" were presenting severe psychological problems. The second showed how, under certain circumstances, many people are willing to obey an authority figure to perform acts that are otherwise in conflict with their personal conscience.

The Stanford prison experiment has been severely criticised since, especially after an attempt at replication in the *BBC Prison Study* in 2002 that resulted in very different findings: the "guards" here did not take on a similar abusive role and the "prisoners" took over the situation.[16] And in an Australian study where guards were trained to respect the prisoners as individuals and to include them in decision-making processes, the ensuing behaviour of both guards and prisoners was far less aggressive and extreme.[17]

A fierce debate between Zimbardo and colleagues followed. Zimbardo was criticised for inducing the brutality of some of his "guards" himself, as he had emphasised that they could create a sense of fear and of arbitrariness; that the "prisoners" would have no privacy or freedom of action; that the "guards" would

14 Craig Haney, Curtis Banks & Philip Zimbardo, 'Interpersonal dynamics in a simulated prison' (1973) *International Journal of Criminology and Penology* 69; Philip Zimbardo, *The Lucifer Effect: Understanding how good people turn evil* (New York: Random House, 2007).

15 Stanley Milgram, *Obedience to authority, an experimental view* (New York: Harper Torchbooks, 1975).

16 Stephan Reicher & Alexander Haslam, "Rethinking the psychology of tyranny: The BBC prison study" (2006) 45 *The British Journal of Social Psychology* 1.

17 Syd H. Lovibond, X. Mithiran & W.G. Adams, 'The effects of three experimental prison environments on the behaviour of non-convict volunteer subjects' (1979) 14 *Australian Psychologist* 273, cited in Reicher & Haslam (n 16).

take away their individuality in various ways; and that the aim was to lead to a sense of powerlessness. He had predicted, in the wake of the brutal behaviour among guards in American prisons at that time (1971), that their acts would be induced more by the prison environment – and hence be situational – than by their sadistic personalities, and hence be dispositional. Two of the students who had presented the most extreme behaviour on both sides of the experiment – the "John Wayne guard" and the prisoner who completely broke down emotionally – later stated that they had merely "acted" in that way, as they knew this was what Zimbardo had wanted to happen … I will return to this discussion on the potential impact of a researcher's convictions on the research results (see the third encounter on academic "activism"). In his rebuttal, Zimbardo noted that it was always clear from the data that while some "guards" exploited their power, others had sided with the "prisoners" and yet others were "tough but fair". The sadistic behaviour presented by the "John Wayne guard" was far beyond his demand to guards to be "tough" and "in control" – which was exactly what guards were told in real American prisons.[18]

Whatever the arguments on both sides of this controversy, the CPT reports have brought forward sufficient evidence of deliberate forms of torture or ill-treatment to illustrate the inherent risk of *degradation* in punishment, of *reducing* human beings in terms of one feature: being a "criminal" or a "prisoner".[19] And while some of the earlier degradation ceremonies, such as being shaved bald or being called by a number, may have disappeared in our modern Western prisons, prison as an institution still "produces prisoners": untrustworthy bodies, subjected to a similar institutional distrust, regardless of their individual characteristics; people who are perceived as by definition being bad, mad, weak or morally inferior.[20]

Countering inhuman and degrading treatment or punishment

My class for Serge always ended with an attempt to evaluate the impact of the work of the CPT – its visits, its reports, its standards – on prison reality. Owing

18 'Philip Zimbardo's response to recent criticisms of the Stanford Prison Experiment' (Stanford Prison Experiment 23 June 2018) <https://www.prisonexp.org/response> accessed 15 April 2023.

19 Sonja Snacken, 'Human dignity and prisoners' rights – A European perspective' (2021) 21(50) *Crime and Justice* 301. On degradation in punishment, see James Q. Whitman, *Harsh justice: Criminal punishment and the widening gap between America and Europe* (New York: Oxford University Press, 2003).

20 Thomas Ugelvik, *Power and resistance in prison: Doing time, doing freedom* (London: Palgrave Macmillan, 2014).

to its rigorous methodology and independence, the CPT has gained legitimacy as a monitoring body and it has had an enormous impact on the case law of the European Court of Human Rights (ECtHR) in these matters: by 2020, the Court had referred to the CPT standards and visit reports in more than 1,000 cases.[21] But reactions by the national authorities to the CPT reports vary greatly, illustrating both compliance and resistance.[22] Tangible effects are occasionally direct and immediate, when an individual problem is resolved on the spot. But recommendations more often require a change of legislation, tackling structural shortcomings or altering professional cultures – which takes more time. Such reforms eventually often result from a combination of pressures, criticisms or initiatives by the CPT, the ECtHR and other actors such as local NGOs, prisoner litigators or prison researchers.[23]

Research on how prisoners experience this form of prison monitoring is emerging only slowly. In Ireland, for example, where existing national mechanisms had provoked cynicism or resignation by prisoners about their limited effects, independent monitoring was seen as potentially able to protect their rights, if certain conditions were met relating to their access and methodology – such as are applied by the CPT. However, views on monitoring bodies' ability to bring about meaningful changes remained mixed.[24] In Romania, however, where the human rights discourse has entered prisons only recently and prisoners' right to petition was introduced only in 2013, prisoners had fully internalised the European terminology of prisoners' human rights, referring to human rights violations, inhuman and degrading treatment, article 3 of the ECHR, and the European Prison Rules on overcrowding, living conditions, discrimination and family visits.[25] The example of 50 years

21 Snacken (n 19).

22 Tom Daems, 'Slaves and statues: Torture prevention in contemporary Europe' (2017) 57(3) *British Journal of Criminology* 627; Tom Daems & Luc Robert (eds), *Europe in prisons: Assessing the impact of European institutions on national prison systems* (Basingstoke: Palgrave Macmillan, 2017); Gaëtan Cliquennois & Hugues de Suremain, *Monitoring penal policy in Europe* (Abingdon: Routledge, 2018); Gaëtan Cliquennois & Sonja Snacken, 'European and United Nations monitoring of penal and prison policies as a source of an 'inverted Panopticon'?' (2018) 70 *Crime, Law and Social Change* 1; Gaëtan Cliquennois, Sonja Snacken & Dirk van Zyl Smit, 'Can European human rights instruments limit the power of the state to punish? A tale of two Europes' (2021) 18(1) *European Journal of Criminology* 11.

23 Snacken (n 19).

24 Sophie Van der Valk & Mary Rogan, 'Experiencing human rights protections in prisons: The case of prison monitoring in Ireland' (2021) 18(1) *European Journal of Criminology* 101.

25 Christina Dâmboeanu, Valentina Pricopie & Alina Thiemann, 'The path to human rights in Romania: Emergent voice(s) of legal mobilization in prisons' (2021) 18(1) *European Journal of Criminology* 120.

of prisoner litigation in the United States, however, illustrates that rights consciousness and legal mobilisation may turn into cynicism if prisoners do not experience real changes.[26]

3. Third close encounter: the dilemmas of academic "activism"

This brings me to my third close encounter: that between science and "activism".

The controversy around the Stanford Prison Experiment raises questions about the impact of the personal convictions of researchers on their research. In their contribution to my own *Liber amico/arum*, Serge and Paul De Hert contend that my involvement with the CPT and my "radical humanism" bring me close to a slightly naïve "belief" in the human rights narrative as a basis for penal reform and policy.[27] I have rebutted this allegation in another volume honouring Serge,[28] but it is true that I have struggled with the potential impact of my personal values on my research. Given Serge's longstanding interest in the nature of scientific practices and his own more recent work on "the commons" as a possible solution to some of our ecological challenges,[29] I want to dig somewhat deeper into this dilemma.

On the one hand, the three main missions of a university are research, education and service to society. This last assignment refers to making scientific results or insights available to society, either at our own initiative or at the request of public authorities, individuals or groups in society. Our expertise as a scientist is then used for a non-scientific, social purpose, but in direct relation to our academic domain. In my own case, this refers, for example, to assisting the CPT during its visits; drafting European penal and prison standards or Belgian

26 Kitty Calavita & Valerie Jenness, *Appealing to justice: Prisoner grievances, rights, and carceral logic* (Oakland: University of California Press, 2015).

27 Serge Gutwirth & Paul De Hert, 'Mensenrechten: Een Seculiere Religie met Juridische Koevoeten?' in Kristel Beyens, Diete Humblet, Hilde Tubex, An-Sofie Vanhouche & Kristof Verfaillie (eds), *Sonja Snacken. Redelijk Eigenzinnige Humaniste* (Brussels: ASP, 2021) 215, 233.

28 Sonja Snacken, 'Waardigheid, penologie en empirische mensenrechten als antwoord op de seculiere religie' in Serge Gutwirth, Paul de Hert & Maarten Colette, *Strafrecht in dialoog. Vrienden en collega's over Prof. Dr. Serge Gutwirth als penalist* (Antwerpen: Intersentia 2023; 541-564)

29 See, e.g., Alessia Tanas & Serge Gutwirth, 'Le pluralisme juridique retrouvé au temps des désordres écologiques. Penser la relation entre le droit et les communs de la terre avec Paolo Grossi" (2021) 1(86) *Revue interdisciplinaire d'études juridiques* 37; Alessia Tanas & Serge Gutwirth, 'Une approche «écologique» des communs dans le droit' (2021) 2 *Situ. Au regard des sciences sociales* [En ligne], mis en ligne le 18 mars 2021, consulté le 5 avril 2023.

prison legislation; participating in media and public debates; and other attempts at achieving reform. Serge's many visits to and lectures about commons – including those for lay publics – are another example.[30] In contrast, in one of her last interviews, our much-regretted Rector Caroline Pauwels distinguished between the "engagement" of scientists, which she advocated[31] – and "activism", which she did not.

Looking at different definitions of "activism", the distinction is not always clear, though:

- The policy or action of using vigorous campaigning to bring about political or social change.[32]
- A doctrine or practice that emphasises direct vigorous action, especially in support of or in opposition to one side of a controversial issue.[33]
- Efforts to promote, impede, direct or intervene in social, political, economic or environmental reform with the desire to make changes in society towards a perceived greater good. Forms of activism range from mandate building in a community (including writing letters to newspapers), petitioning elected officials, running or contributing to a political campaign, preferential patronage (or boycott) of businesses, and demonstrative forms of activism such as rallies, street marches, strikes, sit-ins or hunger strikes.[34]

In our Criminology Department, we certainly attempt through our research to contribute to criminal or juvenile justice reforms. We do write opinion pieces in newspapers and participate in radio and TV programmes on our topics. We comment on penal policies and propose alternative options. Does this make us engaged scientists or activists? And does it matter?

In a special series on "*The blurred boundaries between science and activism*", the challenge was described as follows:

30 By the way, if you want to hear Serge singing Jacques Brel's 'Il est parait-il des terres brulées donnant plus de blé qu'un meilleur avril' from the latter's iconic *Le plat pays*, watch https ://notesondesign.org/droit-et-communs-serge-gutwirth-et-isabelle-stengers/ accessed 7 April 2023.

31 See also the VUB website: "The world needs you" https://www.vub.be/en/about-vub/vub-university-future/world-needs-you accessed 3 April 2023.

32 "Activism" (dictionary – Oxford languages). <https://www.google.com/search?q=activism&rlz=1C1GCEA_enBE765BE765&oq=activism&aqs=chrome..69i57j0l7.2174j0j15&sourceid=chrome&ie=UTF-8> accessed 3 April 2023.

33 "Activism" (Merriam Webster dictionary) <https://www.merriam-webster.com/dictionary/activism> accessed 3 April 2023.

34 "Activism" (Wikipedia) <https://en.wikipedia.org/wiki/Activism> accessed 3 April 2023.

> When used together, the terms "science" and "activism" usually provoke an uncomfortable reaction. For some, socially and often politically laden activism, striving to bring about social change, seems to be in stark contrast to the neutrality of scientific research, which is concerned with producing knowledge. Activism adds a layer of social purpose to the endeavour of research, and might compromise its objectivity. An activist purpose might therefore distort or even "corrupt" the enterprise of science.[35]

However, especially in the field of climate change and environmental challenges, the boundaries between activists and scientists are increasingly blurry: activists use scientific knowledge to sustain their arguments; some scientists become activists in the wake of political indifference or inaction – and vice versa. An increasing number of associations of scientists take on advocacy work on these issues. They include Scientist Rebellion, a group of scientists committed to civil disobedience activities emanating from the Extinction Rebellion movement.[36] Or Scientists for Future, who call for their colleagues across all disciplines and from the entire world to support the young climate protesters and declare that "[t]heir concerns are justified and supported by the best available science. The current measures for protecting the climate and biosphere are deeply inadequate."[37] Or Scientists for Global Responsibility, an independent UK-based organisation of hundreds of natural scientists, social scientists, engineers, IT professionals and architects, established in 1992,

> who promotes ethical science, design and technology, based on the principles of openness, accountability, peace, social justice, and environmental sustainability; carries out research, education, and advocacy work centred around the military, environmental and political aspects of science, design and technology; and provides a support network for ethically-concerned professionals in these fields.[38]

When is science distorted or even corrupted by activism?

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35 Andrea Bandelli, 'The blurred boundaries between science and activism' (2015) 14(02) *Journal of Science Communication* 1.

36 Audrey Garric, 'Out of the lab and into the streets: Scientists turn to activism to combat climate change' *Le Monde* (15 February 2023) <https://www.lemonde.fr/en/environment/article/2023/02/15/out-of-the-lab-and-into-the-streets-scientists-turn-to-activism-to-combat-climate-change_6015898_114.html> accessed 3 April 2023.

37 'Scientists for future' <https://scientistsforfuture.org/> accessed 3 April 2023.

38 'Scientists for global responsibility' <https://www.sgr.org.uk/pages/about-sgr> accessed 3 April 2023.

Serge has described science as a collective practice that aims to produce robust, verified, rectified and reliable knowledge. With Bruno Latour and Isabelle Stengers, he argues that two interwoven aspects play a constitutive role in determining science: "objectity" – not "objectivity" – and peer review. "Objectity" refers to the fact that scientific knowledge must accurately correspond to what the object allows scientists to claim:

> what scientists claim may not have been provoked, imposed, manipulated, suggested or contrived by them. The object ultimately confirms or invalidates what scientists claim about it.[39]

Because only pure experiments can produce "evidence", in all other cases knowledge is rendered robust and reliable through, for example, the thoroughness and consistency of the observations or the interpretations. The peer-review process then ensures that the scientific knowledge presented is challenged, improved and corrected by the collective of scientists working on the same issues and questions. This requires that scientists render their actions completely transparent and verifiable. This knowledge is by definition temporary, as new claims may start the process all over again.[40]

Following this line of thought, activism may then entail the risk that your convictions (even unconsciously) may influence your research in the way you develop research questions, design your methodology or interpret your research results. Or – as in the controversy surrounding the Stanford Prison Experiment – that they (allegedly) may affect the behaviour or responses of your participants. Moreover, if your object of study is "controversial", activists can choose to support one particular side because they are convinced it may contribute to "a perceived greater good", as mentioned in some of the definitions above, while scientists are supposed to study all sides of a controversial issue. On the other hand, many issues relating to climate change or to crime and punishment are not scientifically controversial, as they are based on sound research results; but they may remain "controversial" in the public eye, in the sense that there is no consensus in society or in politics on how to deal with them.

This challenge has become even more complex in our current post-truth and increasingly populist context characterised by mistrust of expert opinion.[41] For example, the politicisation of climate change in the United States since 2016 by

39 Serge Gutwirth & Jenneke Christiaens, 'Reageren op problematisch wetenschappelijk gedrag voorbij de moralisering: Een ander wetenschapsbeleid is mogelijk!' (2015) 5(1) *Tijdschrift over Cultuur en Criminaliteit* 70, 71 (my translation).

40 Gutwirth & Christiaens (n 39).

41 Paul A. Taggert, *Populism* (Open University Press, 2000).

the Trump Administration has led to an important decrease in public trust in science, but also to a growing political divide: 62% of Americans on the left have a lot of trust in scientists, compared to 20% of individuals on the right.[42] This has resulted in a new era of *science activism* in which scientists try to communicate the benefits of science better, to increase the perceived legitimacy of particular scientific fields or to respond to the politicisation of particular fields.

A similar politicisation has been described in the case of crime control and punishment in Western late-modern societies, leading to increased populist punitiveness and harsher policies.[43] But – again – leading also in response to rising demands for a "public criminology" directed at conducting and disseminating research on crime, law and deviance in dialogue with affected communities.[44] Academic proponents of such public criminology contend that criminology's overarching public purpose is to contribute to a better politics of crime and its regulation, and they hope to open a dialogue with the public in order to reshape public debates and policies.[45]

Some authors have proposed *science-based advocacy* as a solution to these questions, in which scientific advocates ensure that

> scientific results get into the hands of relevant people, and that these people are able to understand these results; (...) put more simply, that the best science is in the right hands, at the right time and in the right format.[46]

In this way, the scientists' integrity is not at risk, as they merely aim at communicating science better and to a wider audience. The 'advocacy' part lies in the fact that the scientific results are invoked as arguments for a *change* in management or policy.[47]

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42 Pew Research Center study from 2019-2020, mentioned by Kathleen Rogers, President of EarthDay.org: 'Science alone can't save the world. Activist scientists can' <https://www.gcseglobal.org/gcse-essays/science-alone-cant-save-world-activist-scientists-can> accessed 3 April 2023.

43 David Garland, *The culture of control: Crime and social order in contemporary society* (Oxford: Oxford University Press, 2001).

44 Christopher Uggen & Michelle Inderbitzin, 'Public criminologies' (2010) 9(4) *Criminology & Public Policy* 725.

45 Ian Loader & Richard Sparks, *Public criminology*? (New York: Routledge, 2011); Kathryn Henne & Rita Shah (eds), *Routledge handbook of public criminologies* (New York: Routledge, 2020).

46 Chris Parsons, ''Advocacy' and 'activism' are not dirty words – how activists can better help conservation scientists' (2016) 3(229) *Frontiers in Marine Science* 2.

47 Parsons (n 46).

This does not necessarily mean that such a scientific endeavour is value-free. Advocating human dignity for prisoners is based on empirical penological research into the risks of institutional dependency and abuse of power, but also on a principled choice for human dignity as a fundamental value. Criminal justice policies are full of proclaimed values – justice, fairness, non-discrimination, respect for victims, aiming – or not – at the reintegration of offenders … Anthony Bottoms has argued that the normative or moral dimension is of central importance for criminology and that criminologists must make this morality explicit. He distinguishes this "critical morality", a critical ethical analysis of current laws, social practices or policy proposals, from "positive morality", the moral norms held by a social group or an individual.[48] Barbara Hudson similarly described "critical penology" as a scientific endeavour that analyses political choices and indicates potential alternative responses, based on cultural resources that the political can draw upon, such as legal theory or political philosophy.[49] I have argued elsewhere that human dignity and human rights *may* be such a cultural resource for more moderate penal policies, especially in a European context. Socio-legal scholars have described human rights as "one of the great ideologies of the age".[50] And – at least theoretically – protecting human dignity and fundamental rights is an important "European" cultural value, as illustrated by successive Eurobarometers and the presence of fundamental rights and human dignity in political and criminological narratives.[51]

If such values also underpin your own research, it is important – for the sake of the required transparency and verifiability mentioned by Serge – to make them explicit and to argue on the basis of sound theoretical and/or empirical research why they are important to your domain.[52] But it is equally important to remain critical towards these principled choices, to evaluate their advantages

48 Anthony E. Bottoms, 'Morality, crime, compliance and public policy' in Anthony E. Bottoms & Michael Tonry (eds), *Ideology, crime and criminal justice, a symposium in honour of Sir Leon Radzinowicz* (Cullompton: Willan Publishing, 2002) 20.

49 Barbara Hudson, 'The culture of control: Choosing the future' (2004) 7(2) *Critical Review of International Social and Political Philosophy* 49.

50 Dennis Galligan & Deborah Sandler, 'Implementing human rights' in Simon Halliday & Patrick Schmidt (eds), *Human rights brought home: Socio-legal perspectives on human rights in the national context* (Hart Publishing, 2004) 23.

51 Sonja Snacken, 'Punishment, legitimate policies and values: Penal moderation, dignity and human rights' (2015) 17 *Punishment & Society* 397.

52 See, e.g., in my case: Dirk van Zyl Smit & Sonja Snacken, *Principles of European prison law and policy. Penology and human rights* (Oxford: Oxford University Press, 2009).

and disadvantages, to analyse their real impact and to understand the resistances they evoke. Over the last several years, socio-legal and criminological scholars have been analysing the real impact of "empirical" human rights on penal policies and practices, on the different penal actors involved, on the experiences of victims and offenders – illustrating many limitations and shortcomings.[53]

Serge has similarly grown increasingly critical of his own earlier defence of human rights and democratic constitutional states as protectors of pluralism and dialogue in society. He recently suggested that the commons will certainly offer a better solution to the many problems raised by the brutal way in which the West has subjugated the rest of the world, life on earth and the atmosphere to its destructive greed:

> Give us also 250 years, and we will certainly make something better of it, bottom up, not as individual calculating and uprooted egoists but as ecological and connected beings, without armed states as powerful gendarmes, in mutual cooperation, without majority-minority rule, but with consensual-speculative palavers, and without externalisation of harm, risk and misery.[54]

I recognise the passion and engagement in Serge's words that kept us both going as academics for more than 40 years. But I do hope that his new emeritus status will give him plenty of time to contribute to the critical evaluations of the commons, so that we don't have to wait 250 years …

Conclusion

In the end, the degree of one's social engagement as an academic is a personal choice. Some scholars are at their best as detached observers and analysts, others are so appalled at or enthusiastic about their findings that they want to translate their insights into action. Both options are equally valid, under certain conditions. This personal choice may also vary over time, with different topics or with accumulating experiences.

At the start of my contribution, I referred to Serge and my common interest in societal challenges and injustices. Protecting dignity and tackling

53 For an overview, see: Sonja Snacken, 'Waardigheid, penologie en empirische mensenrechten als antwoord op de seculiere religie' in Serge Gutwirth, Paul de Hert & Maarten Colette (eds), *Strafrecht in dialoog. Vrienden en collega's over Prof. Dr. Serge Gutwirth als penalist* (Antwerpen: Intersentia, 2023; in press); Snacken (n 19).

54 Gutwirth & De Hert (n 27) 246 (my translation).

criminological or ecological problems illustrate this shared interest – and indicate no small ambition indeed.

But then again, dear Serge, what can we not do with a little help from our friends?

Serge Gutwirth: from theorist to activist

Isabelle Stengers

I am not a lawyer and will therefore not venture into areas that require expertise in the law or in the philosophy of law. However, I had the great fortune to develop an active working relationship with Serge Gutwirth on issues that interested us both. What I was able to learn from him came first of all from the way in which he deeply transformed his relationship with law without ever losing the demanding and committed character of this relationship. My text will therefore be testimony to a journey that has always been faithful to the question that is more than ever open today: What can the law do?

The starting point of my working (and friendly) relationship with Serge Gutwirth was, I believe, a workshop we both attended on the theme of sustainable development at the University of Brussels. We were both in "foreign" territory, he a lawyer and I a philosopher, but were both sceptical about the great project proclaimed at the Rio conference in 1992.

For me, taking the Rio Declaration seriously would have implied a radical transformation of the assemblage that articulates (techno)sciences, (capitalist) economy and States under the guise of progress. The promoters of sustainable development intended to reconcile the economic, social and environmental dimensions of development without questioning what made it "unsustainable" in the first place. What, more precisely, made it irresponsible and deaf to those who had long been emphasising, and protesting against, its destructive character, as well as to the cry of those who were paying the price. As a philosopher trying to characterise the part scientific practices play in this unsustainable assemblage, I knew that these practices were part of the problem, not the solution; and Serge Gutwirth, based on his experience of the limits of environmental law, no doubt shared the same scepticism about legal practice. The way in which other participants in the workshop seized on this new object of research as if it were a consensual object to which they were going to contribute, created between us a relation of affinity which also connected our respective practical matters of concern.

However, it was only after I was involved in a "decontamination" operation on a GMO experimental cultivation site belonging to Monsanto, on 7 May 2000,

and faced court with 12 other defendants in February 2002,[1] that my friendly relationship with Serge Gutwirth turned into a collaborative one. Indeed, the GMO case posed problems both from the point of view of scientific practices and from that of the law. On the one hand, the biologists who defended GMOs crushed all those who warned against their dangers with their authority and presented the agro-industry as the "finally rational" answer to the question of world hunger. On the other hand, there was no room for either the agreement on the need for "sustainable development" or the new precautionary principle affirming that socially perceived risks were to be considered socially or politically without subjecting them to the strict imperative of a scientific demonstration of their actual existence. That GMOs are the very type of unsustainable development (but extremely profitable for industry) and was fraught with risks, as some courageous biologists and dissident agronomists have pointed out, would thus not have stopped them invading European fields, were it not for the activists risking legal reprisals. Elsewhere in the world, GMOs have since proven their multiple health, economic and environmental harms. Patents do promote sustainable profits instead of sustainable development.

In 2002 began the collective adventure of the network "The loyalties of knowledge. The positions and responsibilities of the sciences and of scientists in a democratic constitutional state" coordinated by Serge Gutwirth. This network had been created within the framework of the programme "Interuniversity Attraction Poles" under the auspices of the Prime Minister's Office and the Federal Services for Scientific, Technical and Cultural Affairs, a programme that was intended to create or strengthen relationships between research groups belonging to different Belgian and foreign universities. Our project was to conduct experimental action-research.[2] It aimed to break down the idea that "true" researchers do not have to ask themselves questions that would take them outside their discipline, that they do not have to feel responsible for the

1 The trial took place in Namur in 2003 and ended in January 2004 with a guilty verdict and a suspended sentence. Thanks to the impressive relevance of the arguments developed by some of the defendants and the numerous witnesses called by the defence, it had become a real trial against Monsanto.

2 This was not understood by the evaluation committee, which confused us with a network of settled interdisciplinary study centres, which resulted in the project not being renewed. This reaction heralded the professionalisation of the specialists in science and society relationship, who allowed European programmes such as ours to be buried without much resistance. Those programmes had been financed with the aim of avoiding a repetition of the GMOs affair, not of actually opening up the work of researchers to the concerns of the public. This, for most researchers, just meant a waste of time and of money which should be devoted to "true" research. They won and the slogan of "responsible research" was mostly forgotten.

consequences "in the world" of what their discipline produces and should not even be interested in them. They must trust and accept that participating in the advancement of knowledge in their discipline is their only mission. We wanted to show that young researchers were able, without betraying their loyalty to their discipline, to learn that this discipline could not claim to give its "finally scientific" solution to problems of common interest. Doctoral students from each disciplinary group were therefore closely involved in the project and the network offered them an environment in which they could learn about the different ways in which the same problem was approached and understood in other fields. Two problematic situations would be treated in parallel: the resistance to GMOs, whose growing success was precisely due to the ability of activists to communicate without hierarchy the different reasons for opposing this "progress", and the "correlated humans" – the individuals of today who leave in their wake an enormous mass of computer traces (electronic records, magnetic and chip cards, badges, identification systems, participation in social networks ...) that can be mined, processed, correlated, used and marketed without the knowledge of those concerned, in defiance of the protection of their "privacy" and "freedom".

Bruno Latour was part of the network because the essay he had published in 1999, *Politiques de la nature*,[3] dealt with a possible transformation of the regime of political representation aimed at "bringing science into democracy". But it was the publication of *La fabrique du droit* in 2002, based on an ethnographic survey of the French Conseil d'État, that transformed Serge Gutwirth's relationship to law and renewed his sense of loyalty to the role of law in society.[4] He turned away from the *theories* that define this role to focus upon the *practices* that make law exist in our societies.

The subtitle of Latour's book, announcing an "ethnographic" investigation, was in itself a challenge. For Latour, whatever the singularity of the Conseil d'État, it was a place where "law is made" and which he studied in the same way as he had studied laboratories where "science is made". In both cases, he observed as an ethnologist observes distant peoples, posing questions such as: "How do they do it?", "What matters to them?", "What satisfies them?", "What makes them hesitate?"

That book, which showed the radical divergence between the practices of law and science, interested me deeply. In particular, the contrast between "facts" in

3 Bruno Latour, *Politiques de la nature: comment faire entrer les sciences en démocratie* (La découverte, 2016).

4 Bruno Latour, *La fabrique du droit: une ethnographie du Conseil d'État* (La découverte, 2020).

the legal or scientific sense, as related with the strong legal obligation for a judge to reach a judgement, whereas the possibility of reaching a conclusion is never guaranteed in the laboratories, was a masterstroke. And, above all, it brought into sharp focus the contrast between the requirement of "legal certainty", refusing any innovation that would create inconsistencies in the web of rules and texts, and the way in which scientists honour those who have succeeded in questioning the best-established theories – even attributing to the term "revolution" the very meaning of progress. And whereas every legal subject must be able to know what is lawful and what might bring them to court, any scientific knowledge can be triumphantly dispelled or refuted.

But for Serge Gutwirth, a critical legal theorist seeking to define what the law should be and should do against positivist theories that accept it as it is, Latour's proposal was an upheaval in perspective.

Gutwirth's critical perspective was based on the thesis of René Foqué and Joest 't Hart[5] that law should have a mediating power, not an autonomous authoritarian power. It should articulate the different forms of power that transform human life, human relationships and relationships with their environment in a way that makes them interdependent. And it was often a musical metaphor that he used, that of an ensemble of different voices that are in danger of becoming cacophony if they do not weave together. But the different voices would blend not according to an already fixed authoritarian score but in the mode of an open polyphony, one evolving in real time. No voice should dominate; each should be sensitive to the others, to the fact that the possibilities open to each of them involve all the others. And for a multiplicity to become a unity of contrasts, for the weaving of voices to be possible, each voice has to know and accept that its own significance in the whole depends on the others and that each makes sense to the others. This ideal vision allowed me to understand Serge's commitment to our action-research project. For as long as each specialised discipline reproduced itself by ignoring the others, by considering them as secondary, unworthy of making them hesitate, no mediation would be possible. The law would then have to enforce some kind of (usually botched) coherence.

Serge Gutwirth was convinced that a law claiming the power to enforce its coherence was not only undesirable but also impractical: the balance of power is too uneven today. Techno-scientific innovations follow one another at a frenetic pace and the innovators complain that the law is always late, too slow, an obstacle to development. And they protest if the claims and guarantees they put forward are not accepted as they are, with the support of their many allies who insist on

5 René Foqué & Joest 't hart, *Instrumentaliteit en rechtsbescherming* (Kluwer, 1990).

the economic stakes of these innovations. For Serge, it is unacceptable that a techno-scientific argument – for example, GMOs produced by the new CRISPR-Cas-9 gene-editing technique – should escape the existing rules because, biologists (though not all of them) argue, the technique is much more precise and does not introduce foreign genes into the genome of the targeted plants. But what is a published article[6] worth in the face of the bulldozer of aligned interests? Certainly, based on existing laws, the techno-scientific argument can be countered, and was countered by the European Court of Justice in July 2018. But European legislators can change the law and allow themselves to be convinced that the precautionary principle in the restrictive sense (health and environmental risks) is met by the "new" GMOs, which will be renamed and defined as "safe", not requiring the regulation the "old" GMOs had justified. The effective justification of the former regulation had in fact been a widespread public hostility, but this public is now mobilised by the countless other evidences of government inaction in the face of the climate crisis and the vertiginous loss of biodiversity. Whether it is authoritarian or not, the meaning of law depends mainly on the legislator, that is, on political power relations.

I had a lot of sympathy for Serge's theory of the law as mediator, all the more so because it had a lot of affinity with the philosophical thought of Whitehead, for whom the only true progress is the event by which theses that seem contradictory are transformed into contrasts that bring about not innovations but new possibilities of thinking and acting. But I was not sure that the institution of the law could play this role in the world that instituted it and which also invented "unsustainable development". In the GMO affair, something like a mediation event has taken place; but it was the work of activists who succeeded in bringing together diverse reasons for resistance around the common question: "What kind of agriculture do we want?" It was this convergence and the many objections thus raised that made the experts stammer and allowed the interested public to understand the eminently selective nature of their knowledge and the extent of their ignorance as to the difference between laboratory GMOs and patented GMOs, reseeded year after year today on some two hundred million hectares.

Bruno Latour's *Fabrique du droit* and the many debates it has provoked in our network, both with him and without him, have reoriented Serge Gutwirth's

6 S. Gutwirth & N. Van Dijk, "Judging new plant modification techniques: Law, science, innovation and cosmopolitics", *Revue Juridique de l'Environnement*, 2020/1: 123-145 and S. Gutwirth, Niels van Dijk, Isabelle Stengers & Marjolein Visser, "Nauwelijks was de brexit goedgekeurd, of de ggo-lobby schakelde al enkele versnellingen hoger", in *Knack opinie*, 15/1/2021 via https://www.knack.be/nieuws/nauwelijks-was-de-brexit-goedgekeurd-of-de-ggo-lobby-schakelde-al-enkele-versnellingen-hoger/.

interest in law. He has not abandoned his critical options, but one might say that he has learned "loyalty" to the knowledge and practices of the law through its daily functioning, in court and, more broadly, in any place where one seeks to anticipate the interpretative paths and decisions that it might take. The alternative between authoritarian and normative law and mediating law has lost its theoretical edge in favour of an appreciation of the legal practice which, when judges are not lazy or timid, is far from "applying" the law (*dura lex sed lex*). Of course, they must respect legislation, but only after having determined how, in this case, it would or could be applied. Here I found another thesis of Whitehead's: outside laboratory purification, no cause tells how it causes. The law as a "cause" cannot be ignored, of course, but it does not tell how, in this case that is to be judged, it will cause. It is up to the judge to make it speak. And the task of the judge, and of the lawyers, is not to purify the case so that the verdict can be deduced from the law – this corresponds to the practice of scientific laboratories – but to thicken it so that "how" the law is to be applied can become a real question, a matter for hesitation. When a prosecutor limits themself to asking for "the application of the law", as was the case in the Namur trial, it often means that, in their heart they regret having to say it, and the final verdict was along the same line – guilty, because we have no choice, but with a suspension of the sentence, because (thanks to what we have learned about GMOs) it does not stop us thinking.

And Serge Gutwirth discovered what he knew but had not, as a theorist, appreciated the importance of: the variety of ways in which, in addition to formal, abstract, "authoritarian" legislation, judges and lawyers can invoke many other formal sources, including customs. And these can allow for important forms of mediation because they refer to what is accepted or condemned by concrete groups (a case that fascinated Gutwirth, I remember, was the accepted norms in the milieu of sado-masochistic practitioners), groups that are themselves constantly learning in a changing world.

In its turn, legislation as it is abstractly stated is, of course, formulated with the help of jurists, but they are not the authors. Statutes are the work of parliament, which is also, in its own way, affected by conflicts of interest and power relations which are inherent in the political representation. This is an obvious fact, but one that theory sometimes forgets.

The aim of our network was to experiment with the possibilities of sensitising young researchers, and therefore also students, to the situated character of the specialised practices that would (perhaps) become theirs. This, of course, implied learning to "speak well" of these practices, to recognise their specific obligations, what counts for them, but without identifying them with what should count in general and for all. It can be said that for Serge Gutwirth

himself this networking activity has fully accomplished its mission. It was no longer a question of defending a desirable but abstract representation, one highly unrealistic in the current situation, of a law ensuring the polyphony of the democratic constitutional state. It was a question of participating in the making of law by activating the imagination and creativity of jurists.

Bruno Latour, in *Aramis ou l'amour des techniques* (*Aramis or the love of technology*), told the fictionalized story of an investigation into the sudden abandonment, after years of promises, studies and developments, of a project for a fully automatic and modular public transport network eliminating time-consuming connections.[7] Noting that in all these years of work the project itself had not changed but had retained the dreamy perfection of its beginnings, the fictitious investigator had said to his sponsors: "Aramis is dead because you didn't love it enough." To love, for a technician, is to realise and not to dream; it is to know that technical equipment must respond reliably to a wide variety of conditions, and therefore lose the purity of a "beautiful" idea in order to become "earthly". Similarly, to "love law" is not to love a coherent and self-sufficient system that allows the right answer to be deduced for each case. The members of the Conseil d'État observed by Latour congratulated themselves for having "hesitated well". The law offers legal resources for hesitation as to how to qualify a situation in order, then, and only then, to "apply" the law.

It is such a love of law that Serge Gutwirth, as a teacher and a director of a research centre, has since tried to convey. He emphasised the creativity of law as it is concretely made and not an abstract function with a power and rule of its own. It has aroused the interest of researchers in the particular mediation operations that are sometimes hidden in the grounds and considerations of a judgment and which make the practice of law a living and sensitive reality. In short, it has brought into existence and transmitted a pragmatic approach in the adventurous sense of the term, in the sense that the question is and must remain topical: what, *in this case*, can the law be capable of?

However, this was only one step in Serge's trajectory and I had the opportunity and privilege to accompany the one that followed. In 2016, the *Revue juridique de l'environnement* published an article that we co-authored, titled "Le droit à l'épreuve de la résurgence des commons". I had been interested for some years in the importance of the movement of resistance to the "new enclosures", to the privatisation of resources that had previously been open access. The fact that computer scientists used the word "enclosure", making the connection with the expropriation of the old commons that had caused the destitution of innumerable poor farmers in England, is significant. It was this

7 Bruno Latour, *Aramis ou l'amour des techniques* (La découverte, 2020).

expropriation that Karl Marx saw as the primitive phase of capital accumulation – a mass of uprooted people, deprived of their means of subsistence, were forced to sell their "labour force" – their only possession now – for squalid wages. Computer scientists knew that the generalised regime of intellectual property rights would destroy the commons in which they all participated and on which they depended: the computer language with its repeatedly reprised and re-articulated algorithms. All the practices of cooperation and sharing were bound to be destroyed if this "toolbox" were to be privatised. And, to resist, they resorted to what threatened them, that is: the protection guaranteed by intellectual property rights. In their case, however, the "proprietor" of an innovation claimed this right not to protect an exclusive use but to protect open access to what they had created and to extend this protection to any production that made use of it.

However, the case of the computer scientists was singular in the sense that what they were protecting had its value in the multiplicity of its users, whereas, in the case of free access use, material resources are likely to be destroyed by over-exploitation. The free access model is not the one that allows us to understand why different forms of commons have existed for centuries almost everywhere on earth before liberal revolutions, colonisation and post-colonial land-grabbing set out to destroy them systematically. When my collaboration with Serge began, what interested me was the thesis that exploitation, in the sense Marx applied to it, had to be complemented by expropriation in the strong sense of destroying what enables humans to endorse together the responsibility for the commons upon which they all depend. Abolishing exploitation may be a perspective concerning humanity as a whole, but reclaiming the commons, becoming capable of commoning again, concerns concrete groups that can learn from each other but each in their own way. For it is not only a question of fighting against physical expropriation but also of "healing" and "recovery", of becoming capable again of the forms of organisation and cooperation, of the collective intelligence that enables participants to take care of each other and of what they all depend on.

Serge Gutwirth became interested in this collaboration as a lawyer, of course, but also as a participant in such a group – a collective vegetable garden in the vicinity of Brussels that has now existed for over a decade. The group has gradually, year by year, cultivated its own ways of doing things, of distributing responsibilities among themselves. And of learning to become sensitive to the demands of trusting relationships between human beings, but also with the earth and the plants, without the prostheses of hierarchical organisation, fertilisers and pesticides. But whatever they achieved, the garden existed only by the goodwill of the owner, who had put the terrain at their disposal through

a lease, while retaining the right to break this agreement if he so decided according to the contractual clauses. This situation was tolerated by the group, but for Serge Gutwirth, when we started working together on the commons, it was food for thought: the links forged with the place did not give rise to any right that limited the owner's right to dispose of his property as he wished, and, given the "formal sources of law", it was hard to imagine reasons that could convince judges to decide otherwise. This is why we have focused not on commons that defend already established practices threatened by enclosures, such as the practices of computer specialists and scientists who struggle to preserve them, but on "resurgent" commons, those that are now making a comeback and must reinvent what "commoning" practices mean in worlds where they were supposed to have been eradicated and which are institutionally hostile.

Until then, Serge had accepted the idea that modern law was the product of a history of progress, of protection against arbitrary power relations. Whatever its imperfections, its ideal was indeed to treat all individuals equally, whether they were powerful or miserable. Everyone was to have legal security. But the other side of this security was now making itself felt: law was about "individuals". What the gardening group he belonged to had created over the years between human participants and with the land and plants was not protected by anything. The way in which this group had become "proper" to this place, had in this sense "appropriated" it, possessed it and been possessed by it, was and is worthless in the modern property-law regime that privileges the security of the owner.

It was Fritjof Capra and Ugo Mattei's book, *The Ecology of Law*,[8] that got us thinking together. The practice of law as described by Latour may have been far from the ideal of mechanical deduction, but the judgement has to respect the appearance of such a deduction and the hesitation and creativity of lawyers are their private turf. Only those who know the legal machinery know what it can do. The ecology of law was an extractive ecology, extracting from concrete conflict situations those elements that only specialists knew the effect they could have in a court of law. Woe betide the colonised peoples who could not produce a title deed. Land they had never thought of as their own was declared *terra nullius*, open to (often "unsustainable") development.

The weakness of environmental law was part of this ecology. Law and legal certainty were supposed to protect individuals and their property against the power of the state, the representative of the public interest. The environment is therefore not thought of for its own sake but in terms of the limitations it justifies or not on individual freedoms. Today the status of legal subject is attributed in New Zealand or Bolivia to certain "natural" beings, or even to Mother Earth

8 Fritjof Capra and Ugo Mattei, *The Ecology of Law* (Berrett-Koehler Pub, 2015).

itself, but the rights recognised to them are, like collective rights, associated with struggles and subject to the permanent pressure of the necessities of the (unsustainable) development that prevails today, as in the past.

Capra and Mattei's book has forced us to question the potential dangers of a claim sometimes made by supporters of the commons,[9] the recognition of commoning as a human right, and, moreover, as a right that promotes the satisfaction of other human rights such as the right to work, to health, to food and to a healthy environment. The proposition is tempting because it could be said that the state would then have the opportunity to repair what it has destroyed in the name of the rights attributed to individuals who are deemed to be motivated by their interests alone, within the limits assigned by the law. Without practices of solidarity and cooperation, human beings would probably not have survived and, from this point of view, we can characterise the modern individual as the result of an anthropological violence, of a explicitly normative or nudging training that must be repeated from generation to generation.

However, the ecology of modern law requires that laws refer to verifiable and stable definitions or qualifications. Even if they do not dictate their meaning to the legal practitioner, the hesitating judge will have to take such definitions and qualifications as premises in order for his ruling to look like a deduction. In order to acquire the right to exist, commons would thus have to submit to an abstraction that would make them visible to the state and render them understandable by the law. However, as Elinor Ostrom has shown, self-governance is part of the conditions of existence of commons and many commons were destroyed when the state claimed the right to sanction their modes of governance. And in today's resurgent commons, the ever-evolving task and challenge is to relearn practices of interdependence among human participants and with other inhabitants of the place in relation to which they must enter into "appropriate" relationships. The only commons that will be able to satisfy the demand for a stable definition may well be the pseudo-commons that will seize the label if it is to their advantage, or the "living dead" commons which maintain the appearance of doing and deciding in common while being maintained in a routine mode, thanks to the will of a few individuals who feel "responsible".

We have come to hypothesize that the modern state and the modern legal system, the birth of which cannot be dissociated from the destruction of the commons, cannot repair what they have destroyed. Certainly, in countries where an established tradition of commoning has been resisted, a form of legal

9 B.H. Weston & D. Bollier, *Green governance. Ecological survival, human rights and the law of the commons* (Cambridge University Press, 2013), 9.

plurality may exist, even if it is often seen as a regrettable archaism, doomed to disappear in favour of the rule of law and market hegemony. But in our countries, where this hegemony exists, the resurgent commons cannot appeal to a stable "customary law". Each of them "generates" customs that are under the sign of an intrinsic precariousness, because they are the result of a gradual and immanent process of learning what commoners can become capable of, thanks to the links they weave and the modes of attention they cultivate, in relation to the new challenges that will be imposed on them by the unstable world that is now ours.

In this unstable world, the ability to learn with and from each other, and to form appropriate relationships of care and attention with the other inhabitants of the place to which we belong far more than it belongs to us, can be seen, if not as a matter of life and death, then at least as potentially making the difference between an open future and a world in which the ruthless rule of *vae victis*, woe to the defeated, will prevail. This is why, if a new "right holder" were to be defined, it would be the "generativity" of commons, the way in which they demand and arouse enduring ways of existing, feeling and doing that are not mimetic copies of an idealised past. Resurgent commons are realities in the making, a regeneration–reinvention of what in the past was taken for granted, but with other means and other challenges.

I learned from Serge Gutwirth the difference between *lex lata* and *lex ferenda* and we learned together that if generativity is to be a right holder, it is not a new law that must protect it but a different ecology of law which does not extract but participates in regeneration. It could be compared to a justice of the peace or a justice of proximity, one of the remains of the old medieval legal pluralism. As its name suggests, justice here, if it is to restore peace, must be "vernacular", speaking the language of the place and relying on local customs to try to calm conflicts or propose compromises. In this case, customs would be not only a "source of law" but also what determines the opportunities and modes of intervention of justice. And in this case, such a justice would not mean the restoration of "peace" but the sharing of problems (both internal and external) whose solution must contribute to a process of custom generation that demands to be respected.

Struggling for a desirable world, one that insists on coming into existence, but without being able to give it an abstract definition or fit it with a ready-made programme, is what activism is all about. Activists participate in practical realities in the making, but what they know is what they have to resist; and they also know that to be able to resist, they have to "heal", to make themselves capable of the concrete collective intelligence from which they have been separated. Reclaim. Since the Zapatista event and the alterglobalisation

movement, a cry has resounded that has since diversified into multiple echoes: another world is possible, a world in which many worlds fit. I myself have taken up this cry, trying to make researchers feel and think that another science is possible, and Serge Gutwirth has taken the risk of affirming that another law is possible.

For Serge, becoming a "legal activist" does not mean abandoning his love of law. His love is more than ever about passing on and exploring, forging alliances and learning. He has not given up what he has learned about the creativity of the law as it is made, and this is what he passes on to the reclaiming collectives in danger of being evicted, looking with them for the interstices of the legal edifice where "crowbars" could be inserted. Of course, he has no illusions: everything depends on the judges and what is obtained, on a case-by-case basis, always risks including conditions that hinder a generative process. But the encounter with non-academic "researchers" of a new kind, who are interested in law because they come up against it, who are attached to what they struggle for in a way that vitally engages them, makes law a practice worth living for. For it is a matter of trying, together with other lawyers who are also committed, to be worthy of their trust.

At the same time, a learning process is underway. Today, new studies on the history of law are feeding the imagination of lawyers who, like Serge Gutwirth, are seeking to give meaning to their practice. The richness of medieval law in particular, which did not know the opposition between subjects as right holders and objects or goods but multiplied the ontological–practical categories, taking what beings demand and what they oblige human beings to do as their "real rights,"[10] is no longer the dead memory of an archaic past but resonates with the critical contemporary issues of biodiversity protection and regional planning. The topical intelligence of this law is invigorating, as we recently experienced when we pleaded, together with a group of local residents the cause of easements to be maintained or created,[11] a cause also defended by eco-biologists. Everywhere, the care of interdependencies that are now recognised as crucial to all living beings is giving rise to new practices, new knowledge and new demands.

Of course, legal activists are a minority, but imagining the possible has its own power and its own ways. It does not pursue an abstract theoretical dream but it has the power to insist and is now able to spread because it responds to the evidence that our so-called modern institutions are zombie institutions,

10 Sarah Vanuxem, *Des choses, de la nature et de leurs droits* (Editions Quae2020)

11 Isabelle Stengers & Serge Gutwirth, « Pour une résurgence des servitudes », in *Le souffleur de feuilles*, coord. M. Schmitz, Bruxelles (Editions Couleur livres, 2022), 83-96.

incapable of doing anything other than maintaining and reproducing what is leading us to social and ecological disaster. Of course, large-scale political transformation will be needed to dismantle their routines and what they take for granted; but this transformation will need to be carried out not against but with at least some of those who today know their powerlessness but have the sad conviction that they have no choice, because the institutional order is what protects us from the worst. Because he has escaped the grip of this conviction, Serge Gutwirth knows that others can escape it. He has taken the bet of trust against sadness. The future has not been decided. Another ecology of law is possible.

The loyalties of knowledge, mathematics in particular

Jean Paul Van Bendegem

Prologue

On the first of January 2002, a group of researchers started work on a grand five-year project titled *The loyalties of knowledge. The positions and responsibilities of the sciences and of scientists in a democratic constitutional state*. It was financed by the Federal Belgian Authority under the heading of a so-called IUAP, an *Interuniversity Attraction Pole*. The general objective of this financial support was stated as:[1]

> The "Interuniversity Attraction Poles" (IAP) Programme aims to provide support for teams of excellence in basic research that belong to Belgium's various (linguistic) Communities and work as part of a network in order to increase their joint contribution to general scientific advances and, where applicable, to international scientific networks.

That group of researchers or, more precisely, the supervisors consisted of Serge Gutwirth and me (Vrije Universiteit Brussel), Koen Raes (Universiteit Gent), Isabelle Stengers and Jean-Claude Grégoire (Université Libre de Bruxelles), François Mélard and Marc Mormont (Fondation Universitaire du Luxembourg) and Bruno Latour (Centre de Sociologie de l'Innovation, Ecole Nationale Supérieure des Mines, Paris). It is clear that we did meet the abovementioned general objective; and the participation of Isabelle Stengers and especially (the late) Bruno Latour added, certainly for me, a particular flavour to the project. What that flavour was will hopefully become clear in what follows.

1 Belgian Federal Science Policy Office, "Interuniversity attraction poles 5 (IAP)" (Database of research projects) https://www.belspo.be/belspo/fedra/prog.asp?l=en&COD=P5#projects (consulted 24 January 2023).

The object of this contribution is not to explain in detail what the project was all about but, since this is a *Liber amicorum* for Serge, I focus on the contribution of the Vrije Universiteit Brussel and, more specifically, what this project has meant for my research group, *The Centre for Logic and Philosophy of Science*, and me in particular. It will show how deeply indebted and grateful I am to Serge for his impact on my own intellectual development. To explain what made the situation rather special, I should perhaps quote again from the website mentioned in the first footnote. This is the first paragraph of the project's description:

> While no one contests that science and technology have a decisive general impact on our lives, societies and environments, it is surprising on the contrary to see the persistence of the postulate of partition, whereby science is limited to establishing "facts", on the basis of which political deliberation is responsible for determining "values". This thesis ultimately does not explain the myriad dynamic entanglements between science ("nature") and society ("culture") that have been revealed by both actual scientific experience and practice and the work of certain thinkers (such as Foucault, Serres, Stengers, and Latour) and social protest movements (with regard to biogenetics, the environment, cloning, etc.).

And here lies the real challenge: How does one fit mathematics into this description? After all, is not mathematics the intellectual discipline *par excellence* detached from the physical and social world? How on earth (pun intended!) could the statement "2 + 2 + 4" be influenced by facts, political ideas and movements, cultural evolution and what not? Let alone, if we look at high-level mathematics, accessible only to a small portion of humanity? In addition, if one happens to be a well-educated (neo-)Platonist, then one can speak of mathematical facts, with the qualification that these facts pertain to another ideal world, often referred to as a "Platonic heaven". A world that is accessible only to the happy few that happen to possess the required mathematical intuition, for some an innate faculty, for others an acquired expertise, no longer expressible in words (and formulas). The follow-up question seems inevitable: Is this really the only image we have of mathematics or are there different, alternative ways to look at the "Queen of the sciences"? As one might expect, especially with the IUAP project in mind, the answer is positive, as I try to show, or rather sketch, in the next section.

Mathematics in society

As philosophers know, sometimes a genealogical approach can do wonders to learn how to look at things differently, as Nietzsche has so clearly shown. Although the origins of mathematics are not easy to trace, most authors, whether historians, philosophers or practitioners of mathematics, seem to agree that counting and measuring practices can be identified as a starting point.[2] That observation, however, does not answer the more difficult question why we got involved with those practices in the first place? Why count, why measure? The answer to that question points in the direction of economy, politics and religion. Geometry, after all, does literally refer to the measuring of earth or land. In agricultural terms, this refers to the amount of land one has available to grow crops. If a society reaches a level where the economy is socially organised, it is not surprising to see a system being put in place that asks (or forces) members, not necessarily all, to contribute to the general welfare of said society; in short, some form of taxation is installed. If it so happens that some principle is used, such as "*More land means more taxes*", then the need will arise to quantify what *more* means. The obvious answer seems to be to take the surface of the land as a standard of comparison. And thus the question became how to measure surfaces. Preferably as simply as possible. It is then not surprising at all that we end up with squares and rectangles. Take a rectangle with length a and width b then the surface is the product $a \times b$; and, if needed, the perimeter twice the sum of a and b or $2(a + b)$. Put $a = b$ and for the square one gets a^2 and $4a$ respectively.

If we now add warfare to the equation (again, pun intended) then mathematics becomes deeply involved. How to aim a cannon such that the projectile ends up where one wants it to end up? Is it not striking that so many illustrations in renaissance mathematical treatises dealing with mechanics contain drawings that refer to military practices? Or how to construct a fortress such that from the inside one can see nearly all of what is outside and from the outside preferably nothing that is inside? And, as far as religion is concerned, is it permitted that I just quote one of the three Delian problems, namely the doubling of the cube[3]?

2 This does presuppose that we do not let the story start with living organisms, different from human beings, possessing faculties such as to make a distinction between smaller and larger amounts of food, known as subitising, or to make spatial estimations as to distance and orientation. If one thinks of primates, then that is a limited view: fish and birds also have such faculties. See, specifically for the number instinct, A. Nieder, *A brain for numbers: The biology of the number instinct* (MIT, 2019).

3 Given a cube with volume V, is it possible to construct a cube that has a volume $2V$, using only a compass and a ruler? In some formulations of the problem, one does not speak of a cube but of an altar, a clearly religious reference. I just mention that the answer is negative, as it is for the other two related problems, namely, the trisection of an arbitrary angle

Or perhaps I could add that in many cultures numbers came in two types: as part of a religious framework or as part of handling goods. If we take all this together, then it becomes difficult to deny that mathematics and society are deeply connected to each other. But there is a counter-argument and it is quite straightforward. Granted that such was the case in the past, today, however, the situation is totally different. Now mathematics is a *pure*, intellectual activity that sometimes turns out to have a practical use, up to the point that amazement is expressed as to its usefulness.[4] But use has to do with applications and that belongs to applied mathematics, not to pure mathematics. So the genealogical route is blocked. But is it really?

The core issue to deal with is how to counter the counter-argument. It seems clear that the division into a pure and an applied domain is an essential ingredient. But how strict is it? Is it one-way traffic from pure to applied? No feedback in any form from the applied to the pure? Should we perhaps consider the possibility that the applied is determined, as it were, by the pure? Not merely a one-way route but also an asymmetric relation of power, putting the applied in an ancillary[5] position vis-à-vis the pure. These are truly vast questions, too vast to be treated in sufficient detail here. I will therefore limit myself to a few remarks. Following Bettina Heintz,[6] there is an interesting case to be made for the thesis that the division between applied and pure has been a strategy to avoid "the applied" affecting "the pure". And following MacKenzie[7] and David Bloor,[8] there is a very good case to be made for applied and pure mathematics having sufficiently separate and autonomous dynamics and developments and hence interacting with each other in a two-way traffic (in the very same sense that years before in the philosophy of science was developed, it was largely accepted that applied and theoretical sciences have distinct and autonomous dynamics,

(dividing an angle in three equal parts) and the squaring of the circle (construct a square with the same surface as a given circle).

4 The most famous reference for this view (still) is that of Wigner, 'The unreasonable effectiveness of mathematics in the natural sciences', (1960) *Communications on Pure and Applied Mathematics*, 13: 1-14.

5 It is interesting to note that this subservient position occurs a number of times in Western culture, probably the most famous one being "Philosophia, ancilla theologiae", attributed to the 11th-century thinker, Petrus Damiani. So, in this case could a paraphrase be "Mathematica applicata, ancilla mathematicae purae"?

6 B. Heintz, *Die Innenwelt der Mathematik. Zur Kultur und Praxis einer beweisenden Disziplin* (Springer, 2000).

7 D. MacKenzie, "Mechanizing proof", in *Computing, Risk, and Trust* (MIT, 2001).

8 D. Bloor *The enigma of the aerofoil. Rival theories in aerodynamics, 1909-1930* (University of Chicago Press, 2011).

as Peter Galison[9] has so cleverly shown). There are, however, alternative ways to question this division between pure and applied and, in the framework of the IUAP-project, a different route was chosen.

Enter statistics and the search for a new language

It is a safe starting point to claim that mathematics is to be found everywhere in human and societal life. There is, however, an important caveat: in many cases, in societal perception, it is not straightforwardly "visible" where the mathematics is to be found. Compare Charles Babbage's machines, those precursors to what would become our household computer. The Analytical and Differential Engines resemble much more clockwork, closer to a Newtonian universe, with visible cogwheels, churning away, quite similar to Alan Turing's machine, the not so well-known Bombe calculating machine in Bletchley Park, an essential tool for decoding the German *Enigma* code.[10] Our present-day computers have become, to the user at least, black boxes. Examples are easy to find, from gps-systems to virtual banking to Amazon to Google to Chat-GPT to …. However, simply glancing through any newspaper, we are often directly confronted with a specific branch of mathematics, namely statistics. We are, more specifically, confronted with charts, tables, pie- and other diagrams and whatnot. In some cases, there is talk of averages, of deviations from the mean,[11] sometimes even of the median[12] and that clearly is mathematics – even to the untrained eye. In that sense, it is not an exaggeration to claim that in this case mathematics visibly permeates society, in contrast to cases where, if one is lucky, traces can be found.

An important feature of statistics is obviously the need for data, preferably an extensive amount of data, otherwise most statistical measures carry little or no weight. The whole business – I am making a deliberate choice of words

9 P. Galison, *Image & logic. A material culture of microphysics* (Chicago University Press, 1997).

10 To get a rather faithful impression of the Bombe, see the movie *The imitation game*. Note, by the way, the almost uncanny likeness between Alan Turing and actor Benedict Cumberbatch; but note at the same time the uncanny unlikeness between Joan Clarke, the only female mathematician in Turing's group, and actress Keira Knightley.

11 Usually this is the arithmetic mean, that is, if n data are given, take the sum of all data and divide by n; but there is also a geometric mean, that is, multiply all the data and take the n-th root. In fact, there are more possibilities for defining a mean.

12 Given n data, the median is that value which divides the data into two equal-sized groups. Example: the median of {1, 3, 5, 7, 12} is 5 because there are two values below 5 and also two values above 5. The difference between arithmetical mean and median is often quite informative.

here – of big data (see further for some additional comments) does precisely that: it provides us with an unprecedented amount of data, making it possible to dream of and, at present, to actually implement real-time monitoring. These few considerations show that statistics is indeed a prime example to develop a different view of how mathematics is integrated into society. All that being said, before the IUAP project, I was not really involved with these topics. Being trained as a mathematician and a philosopher, although I was critical of many philosophical issues about mathematics, its concepts and its theories, my work at that time was mainly internal to mathematics. But now I was forced to leave familiar ground and explore new domains. In a sense, the main task was to construct and imagine a language that could be suited to that purpose. In one of the IUAP workshops I presented, as a first attempt, an ecological metaphor. A piece of mathematics leaves the "surroundings" where it had grown and was cultivated and now enters a new environment where a process will start of adapting to that environment and vice versa.

One example seems rather straightforward. Consider a proof of a mathematical theorem. In the environment of the mathematical theory to which the theorem belongs, the proof has to meet the standards of that *environment*. Today that most important standard would be how rigorous the proof is or, in other words, whether it is surveyable. Every other mathematician should be able to judge the proof for its correctness and arrive in a finite amount of time at a final conclusion. If the proof "migrates" to, for example, the educational context, the story changes completely: in a sense, the pupil is introduced to and asked to play the "correctness game" without necessarily knowing why the game is to be played this way rather than another.[13] If, however, the proof migrates to the media, then again very different stories will have to be told. Here it is often the case that a weak argument in a debate easily trumps a mathematically grounded argument, as any expert knows. Often the expert cannot really explain what is happening and all too often the "general public" is accused of emotionally based irrationality and/or plain ignorance. The ecological metaphor explains it neatly by referring to the biological fact that a predator in one environment can be a prey in another.[14]

13 All too often the comparison is made with the game of chess. Once the rules have been established, it is easy to check whether a particular chess game satisfies the rules or not. The rules themselves are often seen as arbitrary and hence the idea appears of a "meaningless" game. It is at that point that the analogy breaks down and that chess is differentiated from mathematics.

14 Surely the best-known example is the ecosystem where rabbits have a sufficient amount of food, say grass, and foxes prey on the rabbits. If the foxes as predators are too eager, the population of rabbits will become too small and the foxes starve, enabling the rabbit

The most important and direct consequence of the metaphor is that the environment plays a crucial part, to the extent that mathematical concepts in one environment will not behave in the same fashion in another environment. In extremis, it leads to the following bold thesis: if two environments E_1 and E_2 are sufficiently different, then the mathematical practices that occur as subcultures in E_1 and E_2 will also be sufficiently different. This seriously complicates matters, as each different environment will require a different analysis. Add to this that environments are not isolated territories, so that mutual influences need to be taken into account, and the full complexity appears in all its glory. A few examples:

- *Law and mathematics*: What role can mathematically based evidence play in a courtroom? Are probabilistic statements acceptable? Imagine an expert who declares that the crime has been committed by X with a degree of certainty of 93% (not unusual if DNA analysis is involved). And, of course, it matters how a degree of certainty is interpreted. But this raises the problem of how interpretations are environmentally dependent. There are clear-cut views, based on solid mathematics, that "solve" the issue.[15] But, in many cases, these solutions are valid only within the mathematical domain itself and not necessarily outside of it.
- *Education and mathematics*: as mentioned above, this is a very particular environment. Probably the most important issue is the question whether mathematics can or cannot claim universality. If universal, it will be culture-independent or, in the vocabulary of the metaphor, environment-independent. If, however, one maintains the universality, despite that fact that it is not, one should expect clashes between mathematics and local cultures. The whole field of ethnomathematics tries to make clear that the latter scenario is indeed (and unfortunately) the prominent one.[16] It follows that the mathematical "organism" needs to adapt to a new environment. An equally important related theme is the STEM issue.[17]

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population to grow again and, in that sense, they are no longer prey. At least not until the cycle is restored and the process starts anew. This has been mathematically modelled in the so-called Lotka-Volterra equations (F. Sánchez-Garduño, P. Miramontes & T. Marquez-Lago, "Role reversal in a predator–prey interaction", (2014) *Royal Society Open Science*, 1(2): 11 https://doi.org/10.1098/rsos.140186).

15 See, e.g., A. Jessop, *Let the Evidence Speak. Using Bayesian Thinking in Law, Medicine, Ecology and Other Areas* (Springer, 2018).

16 M. Rosa, U. D'Ambrosio, D. Clark Orey, L. Shirley, W. Alangui, P. Palhares & M. Elena Gavarrete, *Current and future perspectives of ethnomathematics as a program* (Springer, 2016).

17 K. François, K. Coessens & J.P. Van Bendegem, "We're only in it for the money: The

- *Big data and mathematics*: as it is utterly impossible to deal with this topic in any depth, let me present one example that immediately illustrates the deep issues involved.[18] Consider two databases that exist separately and are now connected into an overarching, larger database. The information of the latter is not the sum of the former, as new information can be derived. Database 1 contains an item (A, B) and database 2 contains another item (B, C); it follows that the integrated database will contain (A, C), but is this truly "new" information? Note that whether or not one accepts the information's novelty, the legal issues are different. If the information is considered to be new, privacy issues will be crucial and will need to be dealt with.
- *Art and mathematics*: no one doubts that mathematics plays an essential role in the arts. But all too often it is seen as a form of applied mathematics. The standard examples that are repeated over and over again are well known: either it is about the development of perspective in paintings and architecture or the development of the tonal system in music. The golden ratio to be found in the former and the compositional techniques of J.S. Bach in the latter are the prototypical examples. This is a shame, because in both cases the actual historical processes are far more complex than imagined and better characterised by a two-way exchange between mathematics and the arts.[19] This complexity only grows when non-Western cultures enter into the picture, as is done in the already mentioned domain of ethnomathematics.

The framework that I have sketched here with a few rough brushstrokes also made me aware of the fact that the distinction between pure and applied mathematics, as discussed above, is indeed rather bizarre. There are many more environments in society than the specific environment of "pure" mathematics and, since these all influence one another, more attention should be paid to the majority of the environments where mathematics interacts with other non-mathematical features of the environment. I must unfortunately add to this that the philosophical study of mathematical practices is at present still largely focused on the special "pure" environment, with an exception made for educational issues.

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financial structure of STEM and STEAM research, in P. Smeyers & M. Depaepe (eds), *Educational research: Ethics, social justice, and funding dynamics* (Springer, 2018), 261-274.

18 From the extensive literature available, I would suggest A.J. Schuster (ed.), *Understanding Information. From the Big Bang to Big Data* (Springer, 2017) for a first survey.

19 For a splendid overview, see Sriraman, B. (ed.), *Handbook of the mathematics of the arts and sciences* (Springer, 2021).

To remain within the ecological framework, at present a great deal of effort is being put into look differently at pure mathematics as an organism, in such a way that it becomes easier to see how it could adapt and survive in other environments. At least, that is how I myself have approached this difficult and complex topic, thanks to the work that has been done in the IUAP project.

Epilogue

If I have to summarise in one sentence what I have been trying to explain above, it is this: the collaboration with Serge have had a profound impact on my thinking about mathematics and, through this, on the philosophy of mathematics and philosophy *tout court*. But it would be a very distorted picture that I have drawn in this contribution, if I were to leave the reader with the impression that our collaboration was limited only to the IUAP project. There is much more besides, in fact. I could have mentioned many other examples but I will restrict myself to just one.

Long before the IUAP project, there existed an informal research group that called itself the "BLWOge". It arose out of a formal post-graduate training programme "Bijzondere Licentie Wetenschapsontwikkeling" ("Special License of Science Development"), initiated, among others, by former VUB Rector Roger van Geen. As the formal programme did not last that long (from only 1989 to 1991), the researchers involved decided to continue the meetings informally. Many disciplines were represented, both from the natural and the human-social sciences, and ideas were tossed around in all directions. For a researcher, young and old(er) alike, this was a great time to experience how intellectual work is done, how it is grounded not only in academics but also – perhaps even more so – in the outside world. And lest I forget, humour. The addition of "ge" to "BLWO" simply stands for "goei eters" ("appreciating good food" is the closest translation I can imagine).

Apart from all this, there is a certain Serge Gutwirth, whom I would like to describe as an intellectual (and much more) *compagnon de route*. Serge is someone who has had (and still has) a profound impact on my thinking – a voice to listen to – and I can only hope that there is a form of (Latourian?) symmetry at work here and that I might have had (and hopefully still have) some impact on this thinking.

Hoe het coronavirus de wetenschap blijvend verdeelde.
Publieke immunisering, consensusclaims en ontrading van het wetenschappelijk debat

Paul De Hert[1]

> 'We need to abandon illusions about policy being 'led by the science', and the myth of science as saviour. While scientific insights have much to contribute, they are not the sum total of the expertise needed. Science does not have all the answers. What science knows about COVID-19 is continually changing, and will often be contested. Some disciplines will have insights where others have gaps. This is the nature of knowledge production. Disagreement is not a problem. One of the strongest lessons to emerge from this pandemic is to drop naive understandings of the role of science in policymaking. This means searching for the best things to do in response to the pandemic given what we know, rather than arguing that a particular action is the only thing we can do because the science says so'.[2]

Inleiding

Het beleid en de mainstreammedia gingen in de voorbije jaren voorbij aan de realiteit van onzekerheid binnen de wetenschap. Er is, zeker bij grote onzekerheid, niet altijd sprake van een consensus rond éé́n verklaring of één wetenschappelijk inzicht.[3] Over de covid-kritische wetenschappers die deelnamen aan de *Tegenwind documentaires* is af en toe geschreven, maar zelden kwam het tot

1 Gewoon hoogleraar Vrije Universiteit Brussel en Hoofddocent Universiteit Tilburg (TILT). Met dank aan Maarten Colette en Joke Jacobs voor het nalezen van de tekst.

2 Jeremy Baskin, 'The Coming Covid Science Sh*Tstorm: Responding to the Great Barrington Declaration' (*Arena Online*, 15 October 2020) <https://arena.org.au/the-coming-covid-science-shtstorm-responding-to-the-great-barrington-declaration/> accessed 15 May 2023.

3 Ivan Van de Cloot, 'Expertise, beleid en communicatie' (*Doorbraak,* 14 February 2020) <https://doorbraak.be/communicatie/> accessed 15 May 2023

een interview of een debat. Met uitzondering van de *Groene Amsterdammer*[4] werd geen zorgvuldige aandacht besteed aan het werk van Mattias Desmet, wel aan mogelijke fouten in het werk en aan associaties met rechts. Het 'omgaan met afwijkende visies' werd door de mainstream media zo begrepen dat aanvallen op de persoon mochten, maar dat een reactie of interview met de persoon moest worden vermeden.

Vreemd genoeg wordt er in de literatuur door bepaalde mainstream wetenschappers (die achter het pandemiebeleid staan van de meeste Europese landen, met uitzondering van Zweden) openlijk gepraat over nuttige strategieën om kritische wetenschappers te demoniseren en weg te duwen uit het debat.

In deze bijdrage worden deze strategieën onder de loep genomen. Het gaat respectievelijk over verdachtmaking door associatie met industrie en rechts; over het inroepen van consensus en deze wetenschappers buiten deze consensus plaatsen; en over publieke immunisering.

Het resultaat is een verdeelde wetenschap. In de wetenschappelijke literatuur werd en wordt nochtans gewaarschuwd voor nodeloze dualisering: het helpt de publieke zaak niet, het staat haaks op de aard van wetenschapsbeoefening en het sluit inzichten uit waardoor fenomenen zoals vaccinatietwijfel en het succes van complottheorieën moeilijk te begrijpen vallen. We gaan in deze bijdrage in op het lot van kritische wetenschappers, buiten België (groep rond de *Great Barrington Declaration*) en binnen België (*Wintermanifest, Tegenwind*). Hoewel de recente cijfers over het Zweedse pandemiebeleid, dat het dichtst aanleunt bij het programma van de *Great Barrington Declaration,* uitgesproken gunstig zijn, niet alleen op het vlak van gezondheid, maar ook op allerlei andere domeinen, werd de *Great Barrington Declaration* van meet af aan afgewezen door een groep wetenschappers die uiteindelijk zouden zorgen voor een klimaat dat discussie onmogelijk maakte.

Het in Amerika gecreëerde vijandsbeeld over kritische wetenschappers als antiwetenschap en wetenschappers met rechtse agenda's, vond ook ingang in ons land. Na een bespreking van een drietal voorgestelde strategieën om kritische wetenschappers buiten de discussie te houden, ronden we af met een reflectie over het resultaat, een verdeelde wetenschap. Het valt niet te verwachten dat deze verdeeldheid zal wegdeemsteren. De anti-wetenschappelijke toon in het praten over wetenschap en wetenschappers is gezet.

4 Frank Mulder, Interview Mattias Desmet over de staat der technocraten (2022) 32 De Groene Amsterdammer <https://www.groene.nl/artikel/onze-maatschappij-biedt-grond-voor-totalitair-denken> accessed 15 May 2023. Onze maatschappij biedt grond voor totalitair denken. De Vlaamse psycholoog Mattias Desmet ziet een groeiende hang naar totalitarisme in de westerse maatschappij. 'De bevolking snakt naar een overheid die de controle pakt.'.

Serge Gutwirth is mijn *collega proximus* op het vlak van publicaties en wetenschapsbeoefening. Het verhaal van onze vriendschap is me dierbaar, maar is niet het onderwerp van deze bijdrage. Centraal in deze bijdrage staat Gutwirths levenslange inzet voor een integere wetenschap. Zijn proefschrift *Waarheidsaanspraken in recht en wetenschap* (1992),[5] zijn jarenlange betrokkenheid bij de wetenschappelijke integriteitscommissie van de universiteit en vooral zijn vele interdisciplinaire contacten en discussies met uiteenlopende denkers, illustreren dat. Een van zijn laatste mails aan ondergetekende bevatte een link naar een tekst van biofysicus François Graner en zijn twijfels over het gedrag van wetenschappers tijdens de pandemie en hun sociale dominantie op het debat.[6] Mijn bijdrage haakt in op dit onderwerp.

Reactie op de Great Barrington Declaration (2020): the John Snow Memorandum

We starten onze bijdrage met de aanvallen op de wetenschappers achter de *Great Barrington Declaration* uit 2020. Deze verklaring vormt een basistekst van de covid-kritische beweging, opgesteld door Oxford-epidemiologe Sunetra Gupta, Stanford-professor geneeskunde Jay Bhattacharya en Harvard-professor geneeskunde Martin Kulldorf en ondertekend door duizenden wetenschappers en gezondheidsprofessionals. [7] Het document bevat een pleidooi voor een gericht gezondheidsbeleid dat vooral bescherming (*focused protection*) beoogt van kwetsbaren en het overige maatschappelijk leven zo veel als mogelijk doorgang wil laten vinden. Het document staat dus voor een beperkte lockdown alleen voor zieke en oudere mensen en bevat voor het overige duidelijk sociale bezorgdheden vertaald met een 'linkse signatuur'. Juristen herkennen in deze boodschap moeiteloos een toepassing van het principe van proportionaliteit bij de toepassing van overheidsmaatregelen. Proportionaliteit is een centraal beginsel in vraagstukken over mensenrechten zoals meningsuiting, privacy en

5 Gepubliceerd als Serge Gutwirth, *Waarheidsaanspraken in recht en wetenschap* (Maklu 1993). Het boek is digitaal beschikbaar via <https://bib.kuleuven.be/rbib/collectie/archieven/boeken/gutwirth-waarheidsaanspraken-1993.pdf> accessed 15 May 2023.

6 François Graner, 'Devons-nous arrêter la recherche?' (*Pieces et main d'oeuvre*, 30 September 2021) <https://www.piecesetmaindoeuvre.com/IMG/pdf/virus_et_recherche.pdf> accessed 15 May 2023. Graners eigen tekst 'Petit virus, grandes questions', volgt op deze inleiding.

7 Zie Sarah Wheaton, 'How the coronavirus split science in two. With so many lives on the line, some ideas have been too dangerous to discuss' (*Politico* 8 December 2021) <https://www.politico.eu/article/coronavirus-split-science-in-two-pandemic/> accessed 15 May 2023.

bescherming tegen overheidsgeweld. Het is ook een sleutelbeginsel in publieke gezondheidsethiek.[8] Toch komt het ons voor dat velen in de medische wereld niet echt goed vertrouwd zijn met het beginsel of er niet veel voor voelen om het toe te passen in de strijd tegen infectieziekten.

Onmiddellijk werd er immers gereageerd op de boodschap van de *Great Barrington Declaration*: op 6 oktober 2020 kwam er een site op *Science Media Centre* met interessante wetenschappelijke reacties van individuele wetenschappers.[9] De reacties op *Science Media Centre* lopen uiteen (van constructief met vragen, tot meer afwijzend wegens het gaat niet werken).

Midden oktober 2020 volgde een reactie in *The Lancet* met de veelzeggende titel 'Scientific consensus on the COVID-19'.[10] Via het artikel werd opgeroepen om een memorandum te ondertekenen (*John Snow Memorandum,* genoemd naar de grondlegger van de epidemiologie) om meer gewicht te geven aan de boodschap, wat ook gebeurde.[11] We kunnen deze groep wetenschappers de 'consensuswetenschappers' noemen (zoals de titel suggereert) of ook wel 'de mainstream wetenschappers', zoals Gavin Yamey zichzelf beschrijft.[12] Het artikel in *The Lancet* is uitgesproken negatief, maar ook kort en karig met argumenten.[13] De toon is alarmerend, het virus is erg besmettelijk en vermijding van

8 Kevin Bardosh, Allison Krug, Euzebiusz Jamrozik, Trudo Lemmens, Salmaan Keshavjee, Vinay Prasad, Marty Makary, Stefan Baral and Tracy Beth Høeg, 'COVID-19 Vaccine Boosters for Young Adults: A Risk-Benefit Assessment and Five Ethical Arguments against Mandates at Universities' (2020, 0 Epub ahead of print) Journal of Medical Ethics, 1, 1 <https://jme.bmj.com/content/medethics/early/2022/12/05/jme-2022-108449.full.pdf> accessed 15 May 2023.

9 'Expert reaction to Barrington Declaration, an open letter arguing against lockdown policies and for "Focused Protection"' (*Science Media Centre*, 6 October 2020) <https://www.sciencemediacentre.org/expert-reaction-to-barrington-declaration-an-open-letter-arguing-against-lockdown-policies-and-for-focused-protection/> accessed 15 May 2023.

10 Nisreen A Alwan, Rochelle Ann Burgess, Simon Ashworth, Rupert Beale, Nahid Bhadelia, Debby Bogaert et al., 'Scientific consensus on the COVID-19 pandemic: we need to act now', (2020) 396, 10260 The Lancet <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32153-X/fulltext#section-7c530872-6235-4433-899c-b3f276970189> accessed 15 May 2023.

11 'John Snow Memorandum', (John Snow Memorandum 2021) <https://www.johnsnowmemo.com> accessed 15 May 2023.

12 Gavin Yamey, 'The White House Wants to Achieve Herd Immunity by Letting the Virus Rip. That Is Dangerous and Inhumane' (*Time*, 14 October 2020) <https://time.com/5900024/covid-19-herd-immunity-dangerous/> accessed 15 May 2023. 'This approach, roundly rejected and discredited by scientists worldwide, is at the heart of a controversial new statement, titled the Great Barrington Declaration, written by three academics with views far outside the scientific mainstream—Jay Bhattacharya, Martin Kuldorff, and Sunetra Gupta.'.

13 Wel verwijst het naar een reactie op de *Great Barrington Declaration* van Gavin Yamey in het tijdschrift *Times*.

besmetting staat centraal. De titel van het artikel vat de inhoud goed samen: *wij, voorstanders van maatregelen om virusverspreiding tegen te gaan, belichamen de consensus, de ondertekenaars van Barrington niet*. Deze boodschap wordt onderbouwd met voetnoten en een reeks argumenten[14], die aantonen dat de inmiddels gekende top-down mix van maatregelen (lockdowns, contactverboden, afstandsregels, ...) 'op bewijsmateriaal gebaseerd' is,[15] hoewel vele van die maatregelen voor 2020 nooit op die schaal werden toegepast.

Kanttekening bij het John Snow Memorandum in het licht van het succesvol Zweedse beleid

Het zou fijn zijn om al de argumenten in het hoger besproken *John Snow Memorandum* tegen de idee van *focused protection* vandaag nog eens te herbekijken. Herlezing van de *Great Barrington* leert dat de basisboodschap, – 'richt je gezondheidspolitiek op de bescherming van de risicogroepen en laat de rest van de samenleving draaien' –, er vooral een is over zorg voor de kwetsbaren. Geef deze al de aandacht die ze verdienen.[16] Stellen dat gezonde mensen geen schrik moeten hebben van het virus, kan perfect samengaan met grote zorg voor het lot van mensen met een gezondheidsrisico. Het succes van het Zweedse pan-

14 De lockdowns hebben drie voordelen: ze verlagen het sterftecijfer, ze voorkomen overbelasting van de gezondheidszorg en geven reactietijd. Het virus laten circuleren onder niet-risicogroepen, is een gevaarlijk precedent en realiseert geen van de drie genoemde voordelen van lockdowns, temeer omdat ook jongeren risico's lopen en natuurlijke bescherming door een infectie op te lopen niet lang werkt. We weten niet wie er kwetsbaar is, schattingen lopen op tot 30 % en deze groep isoleren is niet ethisch en leidt tot segregatie. De opstellers ontkennen niet dat bijzondere inspanningen om de meest kwetsbaren te beschermen essentieel zijn, maar willen daarbovenop veelzijdige strategieën op bevolkingsniveau. Uit de lectuur blijkt dan vooral dat daarbij gedacht wordt aan een zero-covidbeleid dat op sommige eilanden enigszins werkte, maar elders niet. Japan, Vietnam en Nieuw-Zeeland worden met name genoemd als voorbeelden. Krachtige maatregelen om overdracht te beheersen totdat er veilige en doeltreffende vaccins en therapieën beschikbaar zijn, is de kern van het verhaal in *The Lancet*.

15 Zie de slotzin van Gavin Yamey and David Gorski, 'Covid-19 and the new merchants of doubt' (*British Medical Journal Opinion*, 13 September 2021) <https://blogs.bmj.com/bmj/2021/09/13/covid-19-and-the-new-merchants-of-doubt/> accessed 15 May 2023.

16 Dit staat in schril contrast met wat in vele landen gebeurde: bejaarden massaal vaccineren vanaf dat het vaccin beschikbaar werd, ze allemaal een groene vink op de coronagezondheidspas geven en ze vervolgens met een vals gevoel van veiligheid in bussen naar zee te laten rijden of andere naïeve boodschappen te geven over herwonnen vrijheid. Hoeveel slachtoffers heeft het overheidsbeleid rond de coronapas (CST) op die manier niet veroorzaakt bij deze risicogroepen, in plaats van te reduceren?

demiebeleid - lage oversterfte en toch weinig repressieve maatregelen vanwege de overheid - toont aan dat men voorzichtig moet zijn om te spreken van een wetenschappelijke consensus over het juiste pandemiebeleid.[17] Er is wel degelijk een alternatief voor de hoger besproken mix van maatregelen die we kennen in de meeste Europese landen (lockdowns, contactverboden, afstandsregels, ...). Opvallend is dat het prachtig resultaat van Zweden op beide fronten (vrijheid én gezondheid) erg weinig media-aandacht heeft gekregen in de andere Europese landen, terwijl het land in 2020 op vele lippen lag als een toonbeeld van onverantwoord beleid.[18]

Merken we op dat Anders Tegnell, de architect van het Zweedse coronabeleid en hoofd van de Public Health Agency of Sweden (*Folkhälsomyndigheten*), zich steeds tegen die beeldvorming verzet heeft. Er is voor Tegnell geen Zweeds experiment. Het omgekeerde is waar: niet Zweden maar de rest van de westerse wereld experimenteert met een zero-covidbeleid en miskent daarbij het voorzorgbeginsel. Tegnell weigert terug te vallen op volksgezondheidsinterventies waarvan de opportuniteit niet bewezen is, zeker in het licht van alle mogelijke schade en nadelen (leerachterstand, sociale achterstand etc.). Hij past met andere woorden het voorzorgsbeginsel niet alleen toe op onvoorziene infectieziekten, maar ook op de overheidsreacties en -maatregelen die voorgesteld worden.[19] Het Zweedse agentschap legt voortdurend de nadruk op empirisch onderbouwde reacties ('evidence-based responses'), een nadruk die ook wettelijk verplicht is gesteld.

17 Paul De Hert, 'De evaluatie van het Zweeds pandemiebeleid door de Zweedse Coronakommissionen' (*Tegenwind.tv*, 19 December 2022) 25<https://www.tegenwind.tv/post/prof-dr-paul-de-hert-de-evaluatie-van-het-zweeds-pandemiebeleid-door-de-zweedse-coronakommissionen> accessed 15 May 2023.

18 Johan Anderberg, 'Here's Why No One Wants to Talk About Sweden' (*The Pulse*, 19 April 2022) <https://www.thepulse.one/p/heres-why-no-one-wants-to-talk-about-sweden> accessed 15 May 2023. De auteur merkt op dat vanaf 2022 buitenlandse journalisten op vreemde wijze wegbleven op Zweedse persconferenties in tegenstelling tot hun massale aanwezigheid in de jaren ervoor.

19 Richard Milne, 'Anders Tegnell and the Swedish Covid experiment' (*Financial Times,* 11 September 2020) <https://www.ft.com/content/5cc92d45-fbdb-43b7-9c66-26501693a371> accessed 15 May 2023. Lockdowns, bijvoorbeeld, zijn voor Tegnell extreme, draconische en bovenal niet-geteste experimenten en werden daarom in Zweden niet ingezet. Iedereen opsluiten, kinderen van school houden, burgerlijke vrijheden opschorten, politie achter mensen aan sturen die hun hond uitlaten – is geen 'voorzorg'.

Een analyse van de argumentatie gehanteerd in het *John Snow Memorandum* dringt zich op,[20] gekoppeld aan een diepteanalyse van het Zweedse model dat dichter bij de *Great Barrington Declaration* aanleunt.[21]

Dat onderzoek moet verrijkt worden met een literatuurstudie over de groeiende lijst empirisch onderbouwde studies over wat we vandaag weten over zaken zoals het nut van lockdowns, gezondheidspassen en over de inferioriteit, dan wel superioriteit van natuurlijke immuniteit opgebouwd na infectie. Er zijn weliswaar kritische overheidsevaluaties gepubliceerd in buurlanden over het gebrek aan wetenschappelijk bewijs voor bepaalde overheidsmaatregelen.[22] Er zijn ook onthullingen over fouten en datamanipulatie bij wetenschappelijke

20 Een eerste analyse van een aantal *John Snow*-denkfouten over kudde-immuniteit geeft Bert De Munck, *Leven en laten leven. Een kritische geschiedenis van de pandemie* (Ertsberg 2022) 74.

21 Het spreekt vanzelf dat de tekortkomingen van de *Barrington Declaration* ook aan bod moeten komen. Nog steeds een van de betere commentaren hierop geeft Baskin (n 1)

22 Christophe Degreef, 'Nederlands rapport vindt voor geen enkele covidmaatregel wetenschappelijke basis, maar blaast warm en koud. En wanneer een rapport over het Belgische covidbeleid?' (*Doorbraak*, 28 October 2022) <https://doorbraak.be/nederlands-rapport-vindt-voor-geen-enkele-covidmaatregel-wetenschappelijke-basis-maar-blaast-warm-en-koud/> accessed 15 May 2023. Het rapport is te vinden op https://www.onderzoeksraad.nl/nl/aanpak-coronacrisis-deel2. In Duitsland kwam er op 30 juni 2022 een dik officieel evaluatierapport uit over het pandemiebeleid van Angela Merkel, die eind 2021 opstapte. Uit het rapport blijken ontoereikende data en ondoorzichtige politieke besluitvorming. En de maatregelen? Het rapport vindt nauwelijks bewijs van hun effect. Voorts is er, afgezien van het dragen van maskers, geen duidelijk uitsluitsel over het nut van afzonderlijke maatregelen. In het rapport van 160 pagina's beschrijven de achttien leden van de evaluatiecommissie - onder wie juristen, virologen en wetenschappers - de rampzalige situatie van de coronadata in Duitsland, waarvoor de politici en de autoriteiten verantwoordelijk zijn, en waardoor de meeste door de politici voorgeschreven maatregelen slechts onvolledig konden worden geëvalueerd. Het rapport is verschenen op https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/S/Sachverstaendigenausschuss/220630_Evaluationsbericht_IFSG_NEU.pdf.

overheidsinstellingen,[23] en over opportunistisch regeringsbeleid,[24] waarbij beroep werd gedaan op commerciële consultancybedrijven. Een globale wetenschappelijke onderbouwde evaluatie van het pandemiebeleid blijft evenwel uit. Er kan bijgevolg zeker niet gesproken worden van een overwinning van d*é*

23 Britse openbaarheidsverzoeken bij overheden en ziekenhuizen leverden nieuwe inzichten op over datamanipulatie in 2021 met betrekking tot de mensen opgenomen in ziekenhuizen met covid (Norman Fenton, 'Claims the unvaccinated were at higher risk of hospitalisation and death were based on deliberately murky record keeping. Again, another statistical illusion of efficacy was manufactured by simple miscategorisation' (*Where are the numbers?*, 7 March 2023) <https://wherearethenumbers.substack.com/p/claims-the-unvaccinated-were-at-higher> accessed 15 May 2023. De cijfers wekten de indruk dat het overgrote deel van de Britse overlijdensgevallen en ziekenhuisopnames ongevaccineerden (acht op tien) betrof. Patiënten van wie de vaccinatiestatus onbekend was, werden automatisch gelabeld als ongevaccineerd. Idem voor patiënten die nog niet heel het vaccinatieproces hadden doorlopen. Tot ten minste veertien dagen sinds de derde prik of tussen ten minste veertien dagen en minder dan zes maanden na de tweede prik werd er systematisch aangenomen dat het ongevaccineerden betrof. Met dit semantisch spelletje kon gemakkelijk volgehouden worden dat acht op tien gehospitaliseerden wegens covid ongevaccineerd waren, wat als argument werd gebruikt om mensen tot een eerste vaccin of een booster te krijgen. Volgens data-analist Maurice de Hond moet ook in Nederland onderzoek volgen naar dit soort praktijken (Maurice de Hond, 'Statistische illusies over de werkzaamheid van vaccins' (*MDH blogs*, 9 March 2023) <https://www.maurice.nl/2023/03/09/statistische-illusies-over-de-werkzaamheid-van-vaccins/> accessed 15 May 2023). Academici van de Universiteit van Californië (San Francisco) beschrijven dan weer de vele statistische fouten van de Amerikaanse Centers for Disease Control and Prevention (CDC) tijdens de COVID-19-pandemie. (Kelley Krohnert, Alyson Haslam, Tracy Beth Høeg and Vinay Prasad, 'Statistical and Numerical Errors Made by the US Centers for Disease Control and Prevention During the COVID-19 Pandemic' (*SSRN*, 7 March 2023) <https://ssrn.com/abstract=4381627> en <http://dx.doi.org/10.2139/ssrn.4381627> accessed 15 May 2023. Over het rapport Arjun Walia, 'New Analysis Shows How The CDC Spread False Information That Exaggerated The Severity of COVID-19' (*The Pulse*, 29 March 2023) <https://www.thepulse.one/p/new-analysis-shows-how-the-cdc-spread> accessed 15 May 2023

24 In Groot-Brittannië doken begin maart 2023 de Lockdown Files op. Journalist Isabel Oakeshott bracht meer dan 100.000 WhatsAppberichten van voormalig Brits minister van Volksgezondheid Matt Hancock in de openbaarheid. Daaruit blijkt dat verschillende adviseurs herhaaldelijk waarschuwden voor de nefaste gevolgen van lockdowns. Die waarschuwing negeerde hij aangevuurd door zijn *behavioural unit* met erin gedragspsychologen die hem adviseerden vooral initiatief en daadkracht te tonen. Uit de berichten blijkt dat Hancock bewust gebruik ging maken van een discours om angst te installeren over de gevolgen van het virus. Via een angstpolitiek zou het hem beter lukken om scholen te sluiten, mondmaskers te verplichten, aan te zetten tot vaccinatie. Kritische wetenschappers wou hij laten ontslaan (Patrick van Ijzendoorn, 'Britse oud-zorgminister onder vuur vanwege gelekte WhatsAppjes over lockdowns' (*De Morgen*, 7 March 2023) <https://www.demorgen.be/nieuws/britse-oud-zorgminister-onder-vuur-vanwege-gelekte-whatsappjes-over-lockdowns~bb6bfe84/> accessed 15 May 2023

wetenschap in de zin van de 'consensus'-wetenschap naar voor geschoven in het *John Snow Memorandum*.[25] Integendeel.[26]

Het vijandsbeeld van antiwetenschap en wetenschappers met rechtse agenda's

Keren we even terug naar de reacties op de *Barrington Declaration* bij het verschijnen van de tekst. De reacties op dit document waren soms bijzonder agressief en 'op de persoon'. Illustratief is het opiniestuk *Covid-19 and the new merchants of doubt* uit 2021 van de professoren Gavin Yamey en David Gorski.[27] In dat stuk wordt gekeken naar de financiering van het werk van de auteurs van de *Barrington Declaration* en het gegeven dat deze vervolgens contacten hebben gehad met politici in meerdere landen op zoek naar alternatieven voor een streng lockdownbeleid.

Yamey en Gorski's aanklacht was striemend, wat al blijkt uit de titel van het stuk. Deze auteurs rechtvaardigen hun harde aanval op de individuele wetenschappers achter *Barrington* met het argument dat geloofwaardigheid van een wetenschapper in de eerste plaats van zijn of haar contacten afhangt (en dat met andere woorden de inhoud een mindere rol speelt).

In het Amerikaanse wetenschappelijke landschap is het nooit moeilijk om private sponsoring aan te wijzen en dat is volgens Yamey en Gorski ook het

25 'Sommigen hebben de pandemie intussen een overwinning van de wetenschap genoemd, maar ik heb vooral gemerkt dat slechte of op zijn minst haastige wetenschap vaak toch gepubliceerd werd en bovendien een heel grote impact had op het beleid' (De Munck (n 20) 123). Eveneens kritisch over de kwaliteit van de gepubliceerde wetenschap zijn Peter Gøtzsche and Maryanne Demasi, 'Serious harms of the COVID-19 Vaccines: A Systematic Review' *(medRxiv*, 22 March 2023) < https://www.medrxiv.org/content/10.1101/2022.12.06.22283145v2 accessed 15 May 2023. Een eerste conclusie uit deze preprint (er werd nog geen volledige peerreview afgerond) is dat vele beoordeelde wetenschappelijke studies van zeer slechte kwaliteit waren en gepubliceerd werden in tijdschriften, zonder dat fundamentele fouten werden ontdekt.

26 Zo moet een grondige evaluatie van vaccinatieschade nog beginnen, gegeven het feit dat dat vaccinfabrikanten en medicijnregulatoren nooit toegestaan hebben dat onafhankelijke onderzoekers toegang kregen tot ruwe proefgegevens, wat praktisch betekende dat deze laatsten moeten hopen op de uitkomst van openbaarheidsverzoeken voor elke toegang tot deze data. Pas dan is onafhankelijk onderzoek mogelijk. Zie over de studie van Peter Gøtzsche vermeld in de vorige voetnoot ook Arjun Walia, 'Renowned Medical Researcher & Colleague Publish Systematic Review of Serious Harms From COVID-19 Vaccines' (*The Pulse* 4 April 2023) <https://www.thepulse.one/p/renowned-medical-researcher-and-colleague> accessed 15 May 2023

27 Yamey and Gorski (n 15)

geval bij *Great Barrington Declaration*.[28] Schande, aldus Yamey en Gorski, die op deze grond (zonder inhoudelijke discussie) een alarmerende diagnose stellen: de wetenschap wordt geplaagd door 'a well-funded sophisticated science denialist campaign based on ideological and corporate interests',[29] en door 'twijfelmachines'.[30]

Yamey was ook de drijvende kracht achter het al genoemde artikel in *The Lancet* met de boodschap in de titel '*Wij, voorstanders van maatregelen om virusverspreiding tegen te gaan, belichamen de consensus, Barrington niet'*. Het resultaat is bijgevolg een krachtige wij-zij-voorstelling met een categorieke afwijzing van het andere kamp, niet langer als menselijke collegae, maar als twijfelmachines en -ontkenners van de consensus.

Een even duidelijke karaktermoord met een snuif oorlogsretoriek gaf de Amerikaanse viroloog Peter J. Hotez in maart 2021.[31] Covid-kritiek staat voor Hotez gelijk aan 'antiwetenschap'. Dit begrip definieert hij erg ruim als 'de verwerping van gangbare wetenschappelijke opvattingen en methoden of de vervanging ervan door onbewezen of opzettelijk misleidende theorieën'.[32] Vooral het eerste deel van deze definitie (*antiwetenschap is wat afwijkt van de consensus*) staat haaks op een dynamische wetenschapsbeoefening die werkt met

28 'Magness and Harrigan ask whether "financial theories about AIER (American Institute for Economic Research) and the GBD (Great Barrington Declaration)" are where we want to hang our hats. The answer is: obviously. The AIER's support of the GBD and AIER's own sources of financing are important to understanding its ideological agenda and motives, for example, its well documented climate and tobacco denialism. Naomi Oreskes, co-author of *Merchants of Doubt* and a scholar of science denialism, wrote about AIER and the GBD in her book *Why Trust Science?*, stating that AIER "promotes anti-scientific discussion of climate change, much of which promotes the familiar canard that climate change will be minor and manageable." As we said previously, scientists should understand that, when it comes to AIER, we are dealing with "a well-funded sophisticated science denialist campaign based on ideological and corporate interests.' (Gavin Yamey and David Gorski, 'The American Institute of Economic Research and the Great Barrington Declaration' (*British Medical Journal Opinion*, 4 February 2021) <https://www.bmj.com/content/374/bmj.n2268/rr-1> accessed 15 May 2023).

29 Yamey and Gorski (n 28)

30 Cecília Tomori, 'Scientists: don't feed the doubt machine. From climate to COVID, naivety about how science is hijacked promotes more of the same' (2 November 2021) Nature 599, 9, doi: <https://doi.org/10.1038/d41586-021-02993-7>, <https://www.nature.com/articles/d41586-021-02993-7> accessed 15 May 2023.

31 Peter J. Hotez, 'The Antiscience Movement Is Escalating, Going Global and Killing Thousands' *Scientific American* (29 March 2021) <https://www.scientificamerican.com/article/the-antiscience-movement-is-escalating-going-global-and-killing-thousands/> accessed 15 May 2023.

32 In het Engels klinkt het zo mogelijk nog verontrustender: 'Antiscience is the rejection of mainstream scientific views and methods or their replacement with unproven or deliberately misleading theories' (Hotez, (n 31).

methodische twijfel en invraagstelling en een product is van argumenten en tegenargumenten.

Hotez ziet geen problemen in zijn eigen definitie en beschouwt antiwetenschap als het grote kwaad van vandaag. Het is vergelijkbaar met terrorisme en leidt tot moord.[33] Voor Hotez is het probleem van die orde dat een heuse oorlogsinfrastructuur nodig is om de tegenaanval in te zetten.[34] De viroloog wijst daarbij politiek rechts en de Amerikaanse republikeinse partij met de vinger, die gretig inzichten van deze antiwetenschap gebruiken bij hun beleid.

We zullen onmiddellijk zien dat het door Hortez en Yamey gepropageerd vijandsbeeld gretig werd overgenomen buiten de Verenigde Staten en ook in de lage landen. Het past evenwel om eerst stil te staan bij de strategieën die ze voorstaan. De gecreëerde wij-zij-tegenstelling verpakt in oorlogstaal gecombineerd met de strategie om niet inhoudelijk in gesprek te gaan, maar een collega af te wijzen louter en alleen op basis van diens contacten ('*guilty by association/ funding*') is verre van neutraal. Op de inhoud van rationele wetenschappelijke, ethische en politieke argumenten wordt niet ingegaan. Bijna automatisch wordt op deze wijze de redelijkheid en de rationaliteit van de tegenstander in vraag gesteld, wat een dialoog of gesprek niet bevordert. De persoon is het voorwerp van *canceling*, waardoor de inhoud niet telt. Na een korte bespreking van de werking van het vijandsbeeld in de eigen regio, komen we terug op de voorgestelde *canceling*-strategieën.

Framing van covid-kritische wetenschappers als rechts in België

De door Hortez gemaakte link tussen covid-kritiek en rechts werd in Europa gretig overgenomen door opiniemakers en journalisten en zette hen aan om op elke dissidente stem, vaak traditionele verklarende schema's toe te passen, in het bijzonder het schema van rechts-links en dat van kapitaalbezitters tegenover arbeiders.[35]

Een zeer grote Europese betoging tegen het pandemiebeleid in Brussel op 23 januari 2022 werd in de media als door extreemrechts georkestreerd weggezet.[36]

33 'antiscience is causing mass death' (Hotez, (n 31).

34 Hotez (n 31).

35 'Dat verklaart waarom velen tot op vandaag vastzitten in het idee dat Trump en brexiteers simpelweg de belangen van het grootkapitaal dienen en de belangen van Jan met de Pet en Average Joe daaraan ondergeschikt maken' (De Munck, (n 20), 89).

36 Samira Atillah, 'Achter de coronamanifestatie in Brussel zat een goed geoliede machine van antivaxers die 50.000 betogers ronselde' (*De Morgen* 23 January 2022) <https://

De framing blijkt tot vandaag succesvol in de media, hoewel wetenschappelijk onderzoek een ander en meer divers beeld geeft van de betogers.[37]

In *Panorama* en de *De Afspraak* stelde een VUB-onderzoekster in 2020 dat er geen alternatief was voor het huidig pandemiebeleid in België en dat er geloof nodig was in de consensus en in de overheid en het officiële nieuws. Ook hier werd het spook van de verrechtsing boven gehaald van mensen die zich laten misleiden.[38] De combinatie van een assertief gebruik van de termen zoals 'nepnieuws', 'controversiële informatie' en 'misinformatie' gecombineerd met dreigbeelden over manipulatie van onschuldige burgers en recuperatie heeft een duidelijke impact op het politieke centrum en de linkerzijde.[39]

De framing als 'rechts en onverantwoordelijk' treft ook wetenschappers. Eigenlijk moeten we niet 'ook' maar 'vooral' schrijven, want de *canceling* van wetenschappers is net het voorwerp van de strijd van Hortez en Yamey tegen antiwetenschap. Het 'omgaan met afwijkende visies' werd door de mainstream media zo begrepen dat aanvallen op de persoon mochten, maar dat een reactie of interview met de persoon moest worden vermeden. Inhoudelijke analyse werd 'gewaarborgd' door het parafraseren van wat uitspraken, eerder dan de persoon zelf aan het woord laten.[40] De veelgehoorde opmerking dat de covidkritische beweging voldoende aan het woord is gekomen in de pers, berust dan ook op onzorgvuldige analyse.

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www.demorgen.be/nieuws/achter-de-coronamanifestatie-in-brussel-zat-een-goed-geoliede-machine-van-antivaxers-die-50-000-betogers-ronselde~b5051982/> accessed 15 May 2023.

37 Filip Michiels, 'Het profiel van de corona-betogers: realiteit versus framing Onderzoek UA levert verrassende resultaten op' (*Doorbraak,* 11 February 2022) <https://doorbraak.be/het-profiel-van-de-corona-betogers-realiteit-versus-framing/> accessed 15 May 2023.

38 'De 'corona-infodemie': SMIT-onderzoekster over de gevolgen van desinformatie in Pano' (SMIT, 3 November 2020) <https://smit.vub.ac.be/de-corona-infodemie-smit-onderzoekster-over-de-gevolgen-van-desinformatie-in-pano> accessed 15 May 2023. Over de ontwikkeling naar een klimaat beheerst door de TINA-logica (there is no alternative), De Munck, (n 20), 38

39 Een partij zoals de Belgische Partij van de Arbeid heeft haar covid-kritische programmapunten geleidelijk aan verwaarloosd, toen ze vaststelde dat 'rechts' te succesvol de materie gekaapt had.

40 Zie over het patroon van nieuwsverzorging in de mainstreampers en op televisie: Maurice de Hond, 'Moderne boekverbranding in België' (*Maurice,* 8 February 2023) <https://www.maurice.nl/2023/02/08/moderne-boekverbranding-in-belgie/> accessed 15 May 2023. Eveneens Van de Cloot (n 3); Siegfried Bracke, *Open het debat!* (Ertsberg, 2022); Jona Walk, 'Over de media en de macht', (*Jonawalk*, 21 May 2022) < https://www.jonawalk.com/blog/over-media-en-macht >, accessed 15 May 2023. Over ombudsman van VRT NWS Tim Pauwels, voor wie er wel degelijk ruimte voor kritiek was, maar dat er een boodschap gebracht moest worden ('Je moet de maatregelen mee uitdragen'), leze men De Munck, (n 20), 54.

Toen honderdtwintig wetenschappers in januari 2020 het *Wintermanifest* uitbrachten met een oproep om in alternatieven over pandemiebeleid te denken, was er onmiddellijk sprake van *canceling* in de media. 'Rechtse wetenschappers aan het werk!', blokte het weekblad *Knack* onverwijld.[41] Wat het rechts project is achter het *Wintermanifest* wordt niet verduidelijkt,[42] maar de politieke framing van wetenschappers op de oh zo gemakkelijke, doch vaak nietszeggende snijlijn van links en rechts, is compleet.

We bespraken hoger al de *Barrington Declaration* uit 2020, opgesteld door Amerikaanse epidemiologen Sunetra Gupta, Jay Bhattacharya en Martin Kulldorf en de Amerikaanse reacties op hun tekst. Hoewel de auteurs stellen dat de input voor de tekst zowel van links als rechts komt, werden ze in de reacties onmiddellijk neergezet als rechts en vergeleken met klimaatontkenners. In eigen land bracht *Knack* een factcheck over de tekst die bij nader inzien alleen kijkt naar de private financiering van de auteurs ('een libertaire denktank die gesponsord wordt door grote industriële bedrijven') en erop wijst dat er onder de ondertekenaars tientallen valse namen zitten.[43] Het weekblad verwijst daarbij als bron naar het reeds besproken opiniestuk (*Covid-19 and the new merchants of doubt*) van Yamey en Gorski dat een week eerder verschenen was en waarin de financiering van de denktank achter de *Barrington Declaration* wordt besproken en bekritiseerd.

Wat *Knack* niet signaleert, is een repliek in het *British Medical Journal* vanwege de betrokken denktank (American Institute for Economic Research) met een toelichting over de financiering.[44] Wat *Knack* ook niet doet, is kijken naar Yameys verklaring over 'Competing interests'. Terwijl Yamey verontwaardigd spreekt over 'miljardairs die op één lijn zitten met de industrie en steun hebben

41 Walter Pauli: 'Ik heb het 'Wintermanifest' aandachtig gelezen (wat een woordenbrij). Mijn conclusie: een tekst van de verzamelde rechtse wetenschappers, aangevuld met een aantal nuttige idioten. Als ik enkele ondertekenaars beledigd heb: dat was precies de bedoeling, stel ijdeltuiten' (Walter Pauli, tweet (*Twitter*, 13 January 2022), < https://twitter.com/walterpauli/status/1481744729217904643)> accessed 15 May 2023.

42 Door een politicus ondervraagd over de betekenis van dit begrip 'rechtse wetenschapper', antwoordt Walter Pauli, redacteur bij *Knack:* 'Een wetenschapper die zijn inzichten gebruikt voor een rechts-politiek project. Niets op tegen: 'rechts' en 'links' zijn voor mij descriptief (…), maar wel geldig. En mag het eens benoemd worden? Zie bv.: 'linkse leraars, linkse proffen'. (Walter Pauli, tweet (*Twitter*, 13 January 2022) <https://twitter.com/walterpauli/status/1481747143442456580)> accessed 15 May 2023.

43 'Wie schuilt er achter het antilockdownpleidooi 'Great Barrington Declaration'?, (*Knack*, 21 September 2021, https://www.knack.be/nieuws/wereld/wie-schuilt-er-achter-het-antilockdownpleidooi-great-barrington-declaration/ accessed 15 May 2023.

44 Phillip W. Magness and James R. Harrigan, 'Medice, cura te ipsum', (*British Medical Journal,* 23 September 2021) <https://www.bmj.com/content/374/bmj.n2268/rr> accessed 15 May 2023. Zie ook de repliek op de repliek: Yamey and Gorski (n 28).

verleend aan de voorstanders van kudde-immuniteit', geeft hij zelf aan geld te hebben ontvangen van de Vaccine Alliance (Gavi) en de Bill & Melinda Gates Foundation.[45] Terwijl Yamey als een ware onderzoeksjournalist aantoont dat er contacten zijn geweest tussen de opstellers van *Barringron* en politici van de Trump-administratie, is hij zelf actief betrokken bij beleidswerk (World Bank's COVID-19 Vaccine Development Taskforce en adviseur bij Gavi). Wetenschappers adviseren politici; politici toetsen formeel of informeel ideeën af met wetenschappers. Schandaal?

Wat *Knack* ten slotte ook niet vertelt, is dat het opiniestuk van Yamey en Gorski geen enkel inhoudelijk argument hanteert. In hun artikel *Merchants of doubt* staat ongeveer niets inhoudelijks over de ideeën naar voor gebracht in de *Barrington Declaration*,[46] op één zin na, met name 'dat het concept van *focused protection* niet duidelijk gedefinieerd wordt'.[47] De Belgische lezer van *Knack* komt op die wijze niets te weten over een alternatief pandemiebeleid, maar wordt uitgenodigd om de verdachtmakingen ernstig te nemen.

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45 Ik kom op deze vertakkingen tussen grote bedrijven en de mainstream pandemiewetenschappers nog terug op het einde.

46 *Merchants of doubt* (Yamey and Gorski (n 15)) vindt het niet de moeite om meer argumenten te verspillen aan de zaak, en houdt het bij een opsomming van contacten met foute politici en bedrijven en wat leedvermaak over de censuur door *YouTube* van een video met Bhattacharya waarin hij 'in tegenspraak is met de consensus van lokale en wereldwijde gezondheidsautoriteiten over de doeltreffendheid van maskers om de verspreiding van Covid-19 te voorkomen'. Voor *Merchants of doubt* zijn covid-kritische wetenschappers vergelijkbaar met de door de tabaksindustrie betaalde kankerontkennende wetenschappers en door de olie-industrie betaalde klimaatonkennende wetenschappers.

47 In *Merchants of doubt* (Yamey and Gorski (n 15)) staat zoals gezegd niet veel inhoudelijks, maar er wordt wel verwezen naar Yameys agressief getoonzet artikel in *Time* van 14 oktober 2020 (Gavin Yamey, 'The White House Wants to Achieve Herd Immunity by Letting the Virus Rip. That Is Dangerous and Inhumane', (*Time*, 14 oktober 2020), <https://time.com/5900024/covid-19-herd-immunity-dangerous/ >, accessed 15 May 2023. In dit artikel wordt zwaar gehamerd op de positieve receptie van *Barrington* door de Trump-administratie en wordt een loodzwaar autoriteitsargument pro lockdownrecepten al bij aanvang vooropgezet: 'Geen enkele pandemie is ooit onder controle gehouden door de infectie opzettelijk ongecontroleerd te laten verspreiden in de hoop dat mensen immuun worden. We moeten al het mogelijke doen om mensen tegen COVID-19 te beschermen, hen niet te laten besmetten, om wetenschappers de tijd te geven vaccins en geneesmiddelen te ontwikkelen om de uitbraak te beëindigen en het lijden te verlichten'. De *Barrington*-idee dat besmetting op zich niet erg is, maar besmetting van kwetsbaren wel, wordt vervolgens weerlegd met een reeks argumenten die ook hun weg gevonden hebben in het hoger besproken artikel van Alwan et al in *The Lancet*. ('Scientific consensus on the COVID-19 pandemic: we need to act now'): natuurlijke immuniteit werkt niet: kudde-immuniteit duurt lang en zal voor overbelasting van het systeem zorgen; het focussen op de kwetsbaren gaat leiden tot segregatie en de groep kwetsbaren is erg groot (Alwan (n 10)).

Belangenidentificatie als strategie tegen kritische wetenschappers

Yamey en Gorski's titel *'Covid-19 and the new merchants of doubt'* verwijst naar een boek uit 2011, *Merchants of Doubt,* waarin Naomi Oreskes en Erik Conway het hebben over het lobbywerk van de olie-industrie en door hen betaalde wetenschappers.[48] Met instemming citeren Yamey en Gorski het 'not again' van Jeremy Baskin van de Melbourne School of Government, die zich in oktober 2020 afvroeg of er een link kon gemaakt worden tussen de *Barrington*-wetenschappers en het lobbywerk in de voorbije decennia bij wetenschappers rond olie.[49]

Het lijkt er evenwel op dat Yamey en Gorski alleen de eerste regel van de bijdrage van Baskin gelezen hebben (waarin nagedacht wordt over die link). Baskin gaat precies de andere kant op en nodigt de wetenschappelijke gemeenschap uit om niet te dualiseren tussen wetenschappers en om niet naïef te zijn over onenigheid tussen wetenschappers. Weliswaar mag en moet er aandacht zijn voor politieke contacten van wetenschappers, maar in de wetenschap moet er ook verder gekeken worden door te concentreren op de inhoud. Hij schrijft met zoveel woorden dat 'progressieven' er moeite mee mogen hebben dat de opstellers van *Barrington* contacten hadden met de Trump-administratie, maar dat ze juist niet in de val mogen lopen hen daarvoor alleen te diskwalificeren.

Dat doen Yamey en Gorski dus wel. Zonder de moeite te nemen inhoudelijke argumenten toe te lichten, besluiten ze op basis van een analyse van geldstromen en politieke contacten, dat 'de wetenschappers achter *Barrington* twijfel willen zaaien over volksgezondheidsmaatregelen om de verspreiding van COVID-19 af te remmen'. Ze werken samen met conservatieve denktanks en bedrijfsbelangen en verlenen wetenschappelijk gezag aan pogingen 'om de ernst van de pandemie te bagatelliseren en te betogen dat op bewijsmateriaal gebaseerde volksgezondheidsmaatregelen niet werken'. De *canceling* van covid-kritische wetenschappers is compleet: met hen in discussie gaan is geen wetenschappelijke plicht, want ze zijn toch maar een deel van een ontkenningsmachine.[50]

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48 Naomi Oreskes and Erik M. Conway, *Merchants of Doubt. How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Climate Change* (Bloomsbury Press 2011).

49 Baskin (n 1).

50 'For physicians, scientists, and public health officials to be effective countering efforts like the GBD, it will be absolutely critical for them to realize that they are not dealing with an orthodox scientific debate based on sound data and evidence, but a well-funded sophisticated science denialist campaign based on ideological and corporate interests' (Yamey and Gorski (n 15)).

Die wetenschappelijke doodverklaring van covid-kritische wetenschappers, ligt aan de basis van drie, toch wel heel vergaande, strategieën tegen kritische wetenschappers die Yamey en Gorski voorstellen:

> How best can scientists push back against the AIER and GBD? There is a range of evidence-based strategies. These include:
> -"Public inoculation"–warning people about the risk of being misled and drawing attention to who is pushing the contentious information and their financial competing interests;
> -Highlighting scientific consensus; and
> -Mapping the institutional networks who are pushing controversial information and then using political and legal strategies to counter them.[51]

Laten we dit lijstje van drie strategieën in omgekeerde volgorde doorlopen, te beginnen met de laatste strategie (belangenidentificatie), die al aan bod is gekomen. Het mappen van belangenconflicten is zonder enige twijfel een terechte eis bij wetenschappers, maar een wetenschappelijke kritiek moet verder gaan dan een *follow the money*-analyse en een *guilty by association*-beschuldiging. Het is bovendien niet duidelijk waarom deze strategie alleen nuttig zou zijn *tegen* covid-kritiek. De belangen van grote farmaceutische industrie en de belangenvermenging van veel mainstream experten is even problematisch.[52] Gelooft er trouwens iemand dat de farmaceutische bedrijven ethisch minder te wantrouwen zijn dan oliebedrijven? Waakzaamheid moet in alle richtingen gaan, wat in het door ons besproken artikel in *Knack* over de belangen van Yamey en Gorski niet gebeurde.

Het spreekt vanzelf dat letten op belangenconflicten tot de algemenen interne hygiëneregels van alle wetenschap behoort.[53] Of het sekwestreren van weten-

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51 Yamey and Gorski (n 15)

52 Clara Bauer-Babef, 'Big Pharma has 'disproportionate' influence on public health, new report says' (*EURACTIV France,* 20 January 2023) <https://www.euractiv.com/section/coronavirus/news/big-pharma-has-disproportionate-influence-on-public-health-new-report-says/> accessed 15 May 2023. Zie ook K. Bardosh et al. 'The unintended consequences of COVID- 19 vaccine policy: why mandates, passports and restrictions may cause more harm than good', 2022, 7 *BMJ Global Health* 7, 10; Aseem Malhotra, 'Curing the pandemic of misinformation on COVID-19 mRNA vaccines through real evidence-based medicine - Part 2' (2022) *Journal of Insulin Resistance,* vol. 5(1), a72, 10 <https://doi.org/10.4102/jir.v5i1.72> accessed 15 May 2023

53 Het conflict tussen politiek-industriële belangen en wat Goorden 'Popperiaanse wetenschap' noemt, is aanwezig in talrijke andere kennisdomeinen. Men leze Thomas Goorden, 'Waarom liggen sommige wetenschappelijke vragen zo moeilijk?' (2023) Samenleving & Politiek, 10p. <https://www.sampol.be/2023/03/waarom-liggen-sommige-wetenschappelijke-vragen-zo-moeilijk> accessed 15 May 2023

schappers nodig is omdat ze gehoord werden door de federale Trump-administratie, wat de auteurs achter Barrington overkwam, is een andere vraag. Gehoord worden door het beleid is op zich geen belangenconflict, deel uitmaken van raadgevende commissies wel. Voor velen in de Verenigde Staten en in Europa is evenwel elke associatie met de Trump-administratie een *no go*, die een vermoeden van schuld en antiwetenschap schijnt te voeden. We verwijzen naar de hoger aangehaalde boodschap van Baskin die 'progressieve' wetenschappers aanmaant zich over hun allergieën te hijsen en niet in de val te lopen door alleen op deze grond collega's te diskwalificeren.

Consensus claimen als tweede strategie tegen kritische wetenschappers

Yamey en Gorski's tweede strategie tegen foute wetenschappers bestaat uit het beklemtonen van de wetenschappelijke consensus onder de goede wetenschappers. 'Wij zijn met meer en jullie zijn fout'. Tijdens de pandemie strekte deze strategie tot het marginaliseren van covid-kritische wetenschappers. Hoger zagen we dat het 'neutraliseren' van *Great Barrington,* met zijn vele wetenschappelijke ondertekenaars, gecounterd werd door een beroep op consensus,[54] een alternatieve tekst (*John Snow Memorandum*) met als doel meer ondertekenaars te verzamelen dan *Great Barrington*, het in de verf zetten van valse ondertekenaars bij *Barrington*, en het lanceren van een oorlog tegen *antiscience*, een begrip dat zo ruim is dat alles buiten de consensus eronder valt.

De consensusstrategie werd en wordt ook in België toegepast, zoals al bleek uit ons relaas over *Panorama*- en *De Afspraak*-uitzendingen, waarin onderzoekers stellen dat er geen alternatief is voor het huidig pandemiebeleid in België (hoger). Nog een voorbeeld is de mededeling die het Universitair Ziekenhuis Brussel de wereld instuurde om zich te distantiëren van kritische uitspraken van een van zijn artsen. In de mededeling werd gesteld 'dat zijn standpunt niet dat van het UZ Brussel, noch van de VUB, vertegenwoordigt.' [55]

54 Nisreen A Alwan, Rochelle Ann Burgess, Simon Ashworth, Rupert Beale, Nahid Bhadelia, Debby Bogaert et al., 'Scientific consensus on the COVID-19 pandemic: we need to act now', (2020) 396, 10260 The Lancet <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32153-X/fulltext#section-7c530872-6235-4433-899c-b3f276970189> accessed 15 May 2023

55 'UZ Brussel distantieert zich van arts die virologen in twijfel trekt', (*BRUZZ,* 31 July 2020) <https://www.bruzz.be/veiligheid/uz-brussel-distantieert-zich-van-arts-die-virologen-twijfel-trekt-2020-07-31> accessed 15 May 2023

De arts had nochtans een interessant punt gemaakt over de disciplinaire eenzijdigheid van de 'overheidsexperten'. Deze experts kregen volgens hem te vaak een podium, hoewel zij nooit het standpunt van de arts geconfronteerd met patiënten vertolkten.[56] Jeremy Baskin, de we al vaker aan het woord lieten (hoger) en, bij ons, microbioloog Herman Goossens, zijn maar twee namen van gewicht die stilstaan bij het belangrijke thema van disciplinaire eenzijdigheid van de door de overheid en media gekozen experts onder wetenschappers en wat voor soort consensus dat hieruit voortkomt.[57]

Het gebruik van het argument over een universele consensus vroeger en nu

Het fenomeen van geclaimde consensus is niet nieuw. In zijn derde hoofdstuk over de vroege Verlichting ('Faith and Reason: Bayle versus the Rationaux') beschrijft Jonathan Israel, auteur van het bekende *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670-1752*,[58] de reacties van een bezorgde intellectuele elite over de nadruk op de rede door vroege verlichtingsdenkers, in het bijzonder Pierre Bayle (1647-1706), auteur van het toen zeer populaire *Dictionnaire historique et critique* (1697).

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56 'Plots zie ik uit alle hoeken artsen, vooral professoren in virologie, microbiologie, epidemiologie, vaccinologie en zelfs biostatistici opduiken met allemaal hun 'expertise'', aldus de arts die vervolgt met de vaststelling, 'dat al deze mensen eigenlijk nooit met patiënten in contact komen (…) dat de core business van deze artsen vooral in de laboratoria plaatsvindt met studies en testen meestal in het voorbereiden van papers of publicaties.'

57 Men leze bijv. Barbara Debusschere, 'De toekomst is onvoorspelbaar. Dat heb ik op de vreselijkste manier geleerd. Interview met Herman Goossens', (*De Morgen,* 25 June 2022) <https://www.demorgen.be/nieuws/herman-goossens-de-toekomst-is-onvoorspelbaar-dat-heb-ik-op-de-vreselijkste-manier-geleerd~b94f221a/> accessed 15 May 2023. Microbioloog Herman Goossens geeft omzeggens in elk interview suggesties voor bijsturing van het te eenzijdig door virologen bepaald pandemiebeleid en wijst daarbij op talrijke negatieve gevolgen Zo acht hij het Belgisch testbeleid ondermaats, omdat niet alle bestaande alternatieven op het vlak van testen ernstig werden genomen. Goossens staat onder meer stil bij voorstellen tot sneltests in bedrijven en bij het Belgisch conservatief vasthouden onder druk van experts aan 'diepe neuswissers'. Bij Goossens tref je tevens fijne reflecties aan, verder uitgewerkt in wetenschappelijke publicaties, over de sturing van de politiek door een beperkte groep experten, over disciplinaire gevechten tussen wetenschappers, wetenschappelijke starheid en de nood aan gedragscodes. Zijn onderzoek geeft sterke steun aan de voorstellen uitgewerkt in *het Wintermanifest*.

58 Jonathan I. Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670-1752* (Oxford University Press 2006) 63-93. Zie ook Ludo Abicht, *De Verlichting vandaag* (Houtekiet 2007) 62.

De *crème* van de elite aangeduid als *les rationaux*,[59] greep naar de pen om de ideeën van de verlichtingsdenkers te bestrijden. Deze *les rationaux* vreesden dat een vergaande bevraging van geloofsovertuigingen voedsel zou geven aan een ontevreden bevolking die door 'slechte ideeën' misleid zou kunnen worden. De genoemde verontruste auteurs stelden daarentegen dat er een universele consensus, de *consensus gentium*, bestond rond het geloof, wat voor hen een argument vormde om te stellen dat de waarheden van het christelijk geloof ook met beroep op de rede bewezen konden worden. Het argument was eenvoudig: omdat alle volkeren in een God geloven, bestaat hij. Voor Bernard, Le Clerc en de andere *rationaux*, vormde het bestaan van deze consensus een geldig filosofisch bewijs van de essentiële redelijkheid van het geloof, niet alleen in God, maar ook in zijn goedheid, almacht en voorzienigheid, iets wat bindend is voor alle mensen die in staat zijn tot overtuigend redeneren.

Het is meteen duidelijk dat dit consensusargument eerder beroep doet op de redelijkheid, dan op strenge logische rede. Het is met andere woorden niet zozeer een logisch argument, maar een autoriteitsargument, dat bovendien onmiddellijk voor problemen zou zorgen binnen het christelijke denken over het statuut van het confucianisme: religie of niet? [60]

Abicht trekt in zijn commentaar op de strategie van *les rationaux* de parallel met consensusargumenten gebruikt in totalitaire regimes uit de twintigste eeuw. Via dit argument worden andersdenkenden of niet door de consensus overtuigde mensen *buiten* de consensus geplaatst, wat onder meer het Sovjetregime toeliet om dissidente stemmen als abnormaal te behandelen.[61]

Argumenten in de sfeer van de wetenschap baseren op het gewicht van een consensus blijft tot vandaag bij sommige legitiem. Massimiliano Simons, Vlaams wetenschapsantropoloog, bekijkt in een bijdrage het fenomeen van de expert.[62] De expert vervult in onze maatschappij vandaag een centrale rol en is qua rol onvergelijkbaar met de wetenschapper. De expert is iemand die

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59 Het gaat om schrijvers en stemmens zoals Jean Le Clerc (1657-1736), Jacques Saurin (1677-1731), Isaac Jaquelot (1647-1708), Jacques Bernard (1658-1718), David Durand (c.1680-1763).

60 Jonathan Israel, 'La querelle sur Confucius dans les Lumières européennes (1670-1730)' (2014) 2 (n° 81) Rue Descartes, 64-83 <https://doi.org/10.3917/rdes.081.0064> accessed 15 May 2023
De jezuïeten die voor strategische redenen kozen voor een voorstelling van het confuscianisme als zijnde geen religie (wat een christening van China zou toelaten) brachten met deze voorstelling het argument over de *consensus gentium* in gevaar.

61 Abicht (n 58) 2007) 60-62.

62 M. Simons, 'Een expert is geen wetenschapper' (*EOS Blogs*, 9 September 2020) <https://www.eoswetenschap.eu/gezondheid/een-expert-geen-wetenschapper> accessed 15 May 2023

dealt met en weegt op de politiek. Hij of zij treedt daarbij op als vertegenwoordiger van een heel vakdomein en spreekt in naam van de hele discipline of zelfs de hele wetenschap. 'Wetenschap is gefascineerd door punten van onenigheid, terwijl expertise draait om het uitdragen van consensus'.[63] In onze moderne expertenmaatschappij komen we met andere woorden het consensusargument vaak tegen. De overheid doet steeds vaker beroep op experten en deze doen dan weer beroep op het argument.

In een andere bijdrage bespreekt Simons het vertrouwen/wantrouwen van mensen in de wetenschap en onderscheidt hij daarbij wetenschap als methode en wetenschap als instituut.[64] Consensusvorming binnen de wetenschap is een van de beschikbare mechanismen van *accountability*, die wetenschap als instituut kan helpen om te communiceren met de buitenwereld, niet alleen over het resultaat van een onderzoek, maar ook over hoe dat onderzoek tot stand is gekomen.[65]

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63 In wetenschappelijk onderzoek is dat uiteraard niet het geval. Simons schrijft zijn stuk als een observatie. Er bestaat een rol van wetenschapper en een rol van de expert of deskundige. Deze rollen verschillen grondig, want in de wetenschap gaat de individuele wetenschapper een eigen stelling innemen binnen bestaande debatten. Zoals gezegd is Simons' analyse descriptief, hoewel hij duidelijk de rol van expert in verdediging neemt. Deze moet consensus claimen om zijn autoriteit als spreekbuis te vestigen. We komen later terug op de casus van Marc van Ranst, Belgisch topexpert, en zijn omstreden mediatechnieken.

64 M. Simons, 'Het vertrouwen in wetenschap is niet zoek' (*EOS Blogs*, 19 November 2019) <https://www.eoswetenschap.eu/psyche-brein/het-vertrouwen-wetenschap-niet-zoek> accessed 15 May 2023 : Complotdenkers, klimaatsceptici of anti-vaxxers, aldus Simons, zweren bij het eerste, maar niet bij het tweede, want wetenschappelijke instituten hebben in de ogen van deze mensen 'hun ziel verkocht aan het grootkapitaal of aan een (linkse) ideologie'. 'Ook is er een onderscheid nodig tussen vertrouwen in wetenschap als methode en vertrouwen in wetenschap als instituut. Er bestaat immers een kloof in het vertrouwen tussen beide: een grote groep mensen vertrouwt de wetenschappelijke methode wel, maar niet de huidige instituten die deze methode belichamen. Er bestaan zelfs studies waaruit blijkt dat als je bij een wetenschappelijke stelling toevoegt dat de overheid deze onderschrijft, het vertrouwen erin juist daalt. Het resultaat is niet noodzakelijk een afkeer van wetenschap per se, enkel van de instituten die ermee verbonden worden. Deze instituten worden dan verweten hun ziel verkocht te hebben aan het grootkapitaal of aan een (linkse) ideologie. Zij die zich van deze instituten vervreemd voelen, kunnen daarbij bovendien overgaan op eigen alternatieve groeperingen te vormen die dan 'werkelijk' trouw blijven aan de wetenschappelijke methode. Dit zie je aan het werk bij complotdenkers, klimaatsceptici of anti-vaxxers. Zij beweren vaak dat zij de echte kritische geesten zijn, terwijl de geïnstitutionaliseerde wetenschap gecorrumpeerd is'. De zwart-wittaal van Simons is niet erg aantrekkelijk, maar zijn uitspraken over het belang van wetenschap als instituut zijn dat wel.

65 'Belangrijk is dus te beseffen dat wetenschap niet zomaar een methode is, maar ook een instituut. Zoiets erkennen is geen schuldbekentenis, maar een positief verhaal: wetenschap werkt enkel als instituut. Een individuele wetenschapper komt niet ver zonder. Wetenschapscommunicatie moet dus meer zijn dan het tonen van resultaten.

Johan Braeckman, filosoof, zit op eenzelfde lijn.[66] Wetenschappers vandaag zijn geen individualisten, maar werken in groepen, lezen elkaars eerste *drafts* en zijn competitief. Anders dan foute, zelfverklaarde experts die alleen publiceren op sociale media, kunnen wetenschappers niet zomaar om het even wat schrijven in een wetenschappelijk artikel. Braeckman, die, zo leren zijn opgetekende uitspraken, het verschil niet schijnt te zien tussen polio en corona, en voor wie het hele vaccinatieverhaal bijgevolg een eenvoudige positieve zaak is, gelooft erg in de consensus opgebouwd door peerreview. Consensus bestaat, want peerreview werkt.[67]

Dit laatste is wel heel optimistisch en het is maar de vraag of daarmee het consensusargument wordt gelegitimeerd. Los van de vraag naar de kwaliteit van de peerreviews in het algemeen,[68] en de eerste studies over het gebrek aan kwaliteit van de gepubliceerde vaccinstudies,[69] los van strategisch misbruik van peerreviewprocessen,[70] kan alleen vastgesteld worden dat reviewprocessen bij

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Het moet ook verhalen over de processen waarmee wetenschap tot deze resultaten komt. Het belang van laboratoria, seminaries, symposia, peer review, consensusvorming, enzovoort moet ook in de spotlight komen zonder deze bij voorbaat af te doen als onfeilbaar of corrupt' (Simons (n 64)).

66 Johan Braeckman aan het woord in Tim Verheyden, *Het had waar kunnen zijn. Op zoek naar de impact van desinformatie en fake news*, (Pelckmans, 2022) 255.

67 'Als er op die manier uiteindelijk consensus ontstaat, dan betekent dat wel iets, dan heeft dat een zeker gewicht', zegt Braeckman. 'Wanneer experts en vakbladen zeggen dat een vaccin veilig is, ben ik dus geneigd dat te geloven. Ik weet namelijk hoe de methodes werken en dat de selectie streng is'. (Braeckman (n 66) 255).

68 Zie de kritiek van Adam Mastroianni op het reviewproces met verwijzing naar papers die uiteindelijk frauduleus of fout bleken in 'The rise and fall of peer review. Why the greatest scientific experiment in history failed, and why that's a great thing.' (Experimental History, 13 December 2022) <https://www.experimental-history.com/p/the-rise-and-fall-of-peer-review> accessed 15 May 2023

69 Zie de bespreking van allerlei fouten in vaccinstudies, Yaakov Ophir *et al.*, 'The Efficacy of COVID-19 Vaccine Boosters against Severe Illness and Deaths- Scientific Fact or Wishful Myth?' (2023) 28 Journal of American Physicians and Surgeons 20 <https://jpands.org/vol28no1/ophir.pdf> accessed 15 May 2023; Peter Gøtzsche & Maryanne Demasi, 'Serious harms of the COVID-19 Vaccines: A Systematic Review' (2023) medRxiv < https://doi.org/10.1101/2022.12.06.22283145> accessed 15 May 2023 ('Many of the studies we reviewed were of very poor quality and published in journals that failed to identify fundamental errors.'). Zie over deze laatste studie Arjun Walia, 'Renowned Medical Researcher & Colleague Publish Systematic Review of Serious Harms From COVID-19 Vaccines' (*The Pulse*, 4 April 2023) <https://www.thepulse.one/p/renowned-medical-researcher-and-colleague> accessed 15 May 2023

70 Het peerreviewproces wordt strategisch ingezet door wetenschappers die kritisch onderzoek onwelgevallig zijn. Zo werd de studie van Fraiman et al. over bijwerkingen van de Pfizer- en Moderna-vaccins bij het verschijnen als preprint in juni 2022 fel bekritiseerd *omdat het nog niet peerreviewed was*, waardoor het mogelijk was om belangrijke informatie langere tijd te negeren. Het peerreviewproces werd pas maanden

nieuwe fenomenen niet onmiddellijk afgewerkt zijn. In afwachting is er bijgevolg geen robuuste informatie die toelaat om van een consensus te spreken.

Bedenking bij de consensusstrategie

Het voorgaande leert dat consensusvorming geen onbekende is in het wetenschappelijk bedrijf, maar dat vooral experts terugvallen op het consensusargument wegens de aard van hun rol. Om te kunnen functioneren als expert, is voor experts consensus nodig om ten aanzien van media en beleid met meer autoriteit te kunnen spreken. Bij onzekerheid wordt dat een risicovolle onderneming: wetenschappelijke consensusvorming is een heel traag proces, zeker bij onzekerheden zoals een onbekend virus.

Dat onze samenleving 'nood' heeft aan experts, mag ons niet doen vergeten wat de rol is van de wetenschapper. Het beleid en de mainstreammedia gingen in de voorbije jaren voorbij de realiteit van onzekerheid binnen de wetenschap en aan de rol van wetenschappers (niet vergelijkbaar met die van experts).[71] Er is, zeker bij grote onzekerheid, niet altijd sprake van een consensus rond één verklaring of één wetenschappelijk inzicht.[72] Dat werd onvoldoende gebracht. Een overheidsexpert zoals Van Ranst in België, met zijn omstreden strategie van koloniserend en quasi dagelijks mediaoptreden, wilde naar eigen zeggen één boodschap brengen en de bevolking niet verontrusten.[73]

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later afgerond. Joseph Fraiman, Juan Erviti, Mark Jones, Sander Greenland, Patrick Whelan, Robert M. Kaplan, Peter Doshi, 'Serious adverse events of special interest following mRNA COVID-19 vaccination in randomized trials in adults' (2022) 40 *Vaccine* 5798, <https://www.sciencedirect.com/science/article/pii/S0264410X22010283> accessed 15 May 2023. Men leze over dit peerreviewproces, Christophe Degreef, 'Vaccin-critici krijgen weer een stukje gelijk Wetenschappelijke consensus verandert grotendeels in stilte', (*Doorbraak*, 24 January 2023) <https://doorbraak.be/mrna-vaccin-critici-krijgen-weer-een-stukje-gelijk/> accessed 15 May 2023

71 Maurice de Hond over de wijze waarop de media de afgelopen drie jaar hebben gefunctioneerd: schoothondjes in plaats van waakhonden van de democratie (in 'Een interview waar ik verdrietig van word' (*MDH Blogs,* 12 February 2023) <https://www.maurice.nl/2023/02/12/interview-verdrietig/> accessed 15 May 2023)/. Over de gezagsgetrouwheid van de media in Vlaanderen en Nederland en het *rally round the flag*-mechanisme, leze men M. Boudry and J. De Ceulaer, *Eerste hulp bij Pandemie. Van acherafklap tot zwarte zwaan* (Lannoo, 2021) 201-204.

72 Van de Cloot (n 3)

73 M. Chini, 'How to sell an epidemic': a Marc Van Ranst conspiracy theory, explained' (*The Brussels Times,* 18 February 2021) < https://www.brusselstimes.com/155486/how-to-sell-an-epidemic-a-marc-van-ranst-conspiracy-theory-explained-chatham-house-pandemic-vlaams-belang-h1n1> accessed 15 May 2023

In hun boek *Eerste hulp bij Pandemie* behandelen Boudry en De Ceulaer 'consensus' als een apart lemma, maar de toelichting is erg kort: *Een toestand van deskundige eensgezindheid in een bepaald wetenschapsgebied waartegen het doorgaans onverstandig is om je als totale leek te verzetten.*[74] Gelukkig staat er 'totaal' voor 'leek' omdat de luxe van invraagstelling aan wel heel veel mensen ontraden wordt. Uit de omschrijving volgt onmiddellijk welke belangrijke rol wetenschappers in onze kennismaatschappij hebben: zij zijn de enigen die op legitieme wijze in staat tot tegenspraak worden geacht. Deskundigen zijn doorgaans niet zo goed in tegenspraak. Zij worden opgetrommeld om richting aan te geven. Zij verkopen hun deskundigheid. Sommige wetenschappers treden als deskundige op, maar niet altijd zijn deskundigen wetenschappers. Het is maar de vraag of alle wetenschappers goede deskundigen zouden zijn en welke prijs ze daarvoor als wetenschappers betalen. Een goede rechtswetenschapper citeert en bespreekt alle bronnen, inclusief strijdige rechtsleer en rechtsspraak. Een goede taalwetenschapper haalt het politiek project achter 'taal' en 'de standaardtaal' er onmiddellijk uit.[75] Een goede 'harde' wetenschapper streeft naar falsifieerbaarheid van methoden en data, heeft weet van paradigmaveranderingen en is op de hoogte van de rol van levensbeschouwing bij het opzetten van de onderzoeksvraag en bij de interpretatie van data. [76]

Stoppen met praten over consensus?

Dat tijdens de pandemie niet weinigen verleid zouden worden door een consensusstrategie werd reeds in oktober 2020 op visionaire wijze voorspeld én betreurd door Jeremy Baskin. Argumenten steunen op een vermeende consensus als strategie is fout, aldus deze auteur. Als we één les kunnen leren uit het olielobbydossier van de voorbije decennia, dan is het dat we dit vooral niet moeten doen. Baskin schrijft naar aanleiding van de pandemiediscussie over 'de paar dingen die progressieven zouden moeten leren van de klimaatoorlogen': vermijd het consensusargument want het creëert dualisering wat de publieke zaak niet vooruithelp, vermijd het benoemen van kritische wetenschappers zoals deze achter de *Great Barrington*-tekst als 'andersdenkenden'. Dergelijke benaderingen

74 Boudry and De Ceulaer (n 71)101

75 Marc van Oostendorp, 'Waarom we het nooit eens worden over het Nederlands', (*De Lage Landen*, 15 February 2023) < https://www.de-lage-landen.com/article/waarom-we-het-nooit-eens-worden-over-het-nederlands> accessed 15 May 2023

76 De Munck (n 20) 304.

zijn een politieke doodlopende weg, wat al zichtbaar is in de Verenigde Staten, met steriele discussies zonder dialoog.[77]

Dualisering is niet alleen weinig zinvol voor de publieke zaak, maar is ook gevaarlijk voor de wetenschap. Juist omwille van de aard van wetenschappelijke onderzoek moet elke verdelende consensusstrategie vermeden worden.[78] Wetenschap heeft niet alle antwoorden en zeker bij COVID-19 veranderde en verandert ze voortdurend en zijn er veel betwistingen. Sommige van die betwistingen hebben te maken met het naast elkaar bestaan van relevante disciplines bij infectiegolven. Belangrijke inzichten kunnen daarbij uit verschillende disciplines komen die elkaar kunnen aanvullen. Sommige disciplines zullen inzichten hebben waar andere lacunes vertonen. Dit is de aard van de kennisproductie, aldus Baskin. Onenigheid is geen probleem, naïeve opvattingen over de rol van de wetenschap in de beleidsvorming zijn dat wel.[79]

Er zijn nog meer wetenschappers die waarschuwen voor nodeloze dualisering en een verabsoluteren van consensus: het laat doodeenvoudig niet toe om fenomenen zoals vaccinatietwijfel en het succes van complottheorieën te begrijpen.[80] Dualisering speelt in de kaart van hen die baat hebben bij het stigmatiseren van mensen en verklaart waarom zo velen steevast spreken van 'antivax' en dit gelijkstellen met 'dom'. Wellicht is het vanuit wetenschappelijk oogpunt net heel belangrijk om deze minderheidsgroepen mee op te nemen in wetenschap-

77 'Reageer niet op de provocerende triggers - het Witte Huis van Trump en de connecties van de gebroeders Koch. Gebruik niet de tactiek om 'onze' wetenschappers op te stellen tegen 'hun' wetenschappers. Neem vooral niet de route van de 'wetenschappelijke consensus': '98% van de wetenschappers gelooft...', of richt je op het in diskrediet brengen van individuele ondertekenaars: 'Professor Gupta is ook slecht/fout op deze andere manieren...'. Dergelijke benaderingen zijn een politieke doodlopende weg. We zien de effecten al in de Verenigde Staten, met steriele argumenten tussen degenen die suggereren dat COVID-19 niet zo slecht is en degenen die benadrukken hoe slecht het wel is. Het COVID-19-discours in de richting van een tweedeling sturen komt de gebroeders Koch misschien goed uit, maar het draagt weinig bij tot een zinvolle publieke of praktische betrokkenheid bij de pandemie. Een logisch gevolg hiervan is dat de auteurs van de GBD niet als «andersdenkenden» worden bestempeld' (Baskin (n 1)).

78 Baskin (n 1).

79 'Dit betekent dat moet worden gezocht naar de beste manier om op de pandemie te reageren, gelet op wat we weten, in plaats van te beweren dat een bepaalde maatregel de enige is die we kunnen nemen omdat de wetenschap dat zegt', in Baskin (n 1).

80 'I wish to argue that overarching categories such as science/anti-science far from making us better understand what is going on trap us into dualist divides within which techno-social and historical specificity of the context in which misinformation spreads is lost' (A. Prasad, 'Introduction: Interrogating STS at the Time of COVID' (2023) 28(1) *Science, Technology and Society* 7, 9).

pelijk onderzoek. Maar dan geen onderzoek waarbij de uitkomst al op voorhand vaststaat.[81]

De grote verliezer hierbij is de wetenschap zelf. De wetenschappelijke consensus inroepen terwijl die wetenschap tijdens de pandemie nog niet geconsolideerd is, verplicht niet alleen tot stelselmatige bijstelling van eerdere consensusuitspraken, maar leidt ook tot ongeloof bij het grote publiek,[82] en grote spanning met de politiek die zich niet wil vergissen wanneer ze steunt op wetenschappelijke adviezen.[83] Voor wetenschapsfilosoof Jean-Paul Van Bendegem vormt wetenschap 'een proces van ploeteren, van vallen en weer opstaan' waarbij inzichten kunnen evolueren. Hij plaatst dan ook vragen bij het toenemend gebruik van het woord 'consensus' in gevallen waarin overeenstemming vaak nog groeiende is. Deze wetenschapsfilosoof lijkt alleszins te verkiezen om het consensusargument gewoon weg te laten, eerder dan het toch te gebruiken met

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81 'Deze ruwe muren rondom de consensusrealiteit houden voor machthebbenden, naast evidente voordelen, ook flinke risico's in. Ze maken immers het Popperiaanse 'beschaafde debat' zo goed als onmogelijk, plaats makend voor een oeroud sociocultureel machtsspel dat maatschappijen flink kan destabiliseren. Alles wat onder de mantel van dit type van taboe wordt gehouden, dreigt immers zijn eigen mythes, monsters en heksenjachten te kweken, waarbij het 'beter begrip van de werkelijkheid' alleen bij toeval soms dichterbij komt maar vaak gewoon nog verder gaat liggen. En wanneer de kloof in ons begrip van de werkelijkheid te groot wordt, durft daar wel eens geweld achteraan te volgen' (Goorden (n 53)).

82 Over het wantrouwen in de wetenschap, genuanceerd, Simons (n 64). Simons stelt dat het vertrouwen in de wetenschap in regel hoog blijft, maar dat er op deelthema's minder goede cijfers zijn. Hij kijkt onder meer naar factoren die verklaren waarom er wantrouwen ten aanzien van de wetenschap is in die domeinen. Hij staat onder meer stil bij ongeletterheid over de aard van wetenschap en bij ideologische en religieuze opvattingen als verklaringen voor wantrouwen rond specifieke thema's. Zo blijken ideologische redenen bijvoorbeeld een rol te spelen bij wantrouwen in klimaatwetenschap, terwijl kennis over wetenschap een rol speelt bij genetische modificatie van voedsel. Simons gaat uitvoerig in op wantrouwen bij rechts. In een recente studie over psychologische afstand toegepast op een resem controversiële thema's wordt dan weer gesteld dat wantrouwen in wetenschap op elk thema groter is wanneer mensen meer afstand tot wetenschap ervaren, ongeacht hun ideologie, kennis en opvattingen. Zie B. Većkalov, N., Zarzeczna, J., McPhetres, F., van Harreveld & B., Rutjens, 'Psychological Distance to Science as a Predictor of Science Skepticism Across Domains' (2022) Personality and Social Psychology Bulletin 1 <https://doi.org/10.1177/01461672221118184> accessed 15 May 2023; Bastiaan Rutjens, 'Psychologische afstand voorspelt wantrouwen in wetenschap', (UVA nieuws, 8 September 2022) <https://www.uva.nl/shared-content/faculteiten/nl/faculteit-der-maatschappij-en-gedragswetenschappen/nieuws/2022/09/psychologische-afstand-voorspelt-wantrouwen-in-wetenschap.html?cb> accessed 15 May 2023

83 Jean-Paul Van Bendegem in 'Spanning tussen wetenschap en politiek zelden zo expliciet', Interview Frank Olbrechts, (*Apache,* 5 March 2021) <https://www.apache.be/2021/03/05/spanning-tussen-wetenschap-en-politiek-zelden-zo-expliciet/> accessed 15 May 2023

een slag om de arm (door bijvoorbeeld spreken over 'een niet stabiele, veranderlijke wetenschappelijke consensus').[84] Thomas Goorden, schrijver en activist in milieudossiers zoals dit rond PFAS, stelt de zaken op scherp door te waarschuwen voor politieke en economische druk op wetenschappers, waardoor 'een échte Popperiaanse wetenschapsmethodologie, zoals die aangeleerd wordt aan eerstejaarsstudenten' ingeruild wordt door een 'pre-Popperiaanse consensuswetenschap'.[85]

Publieke immunisering als derde strategie nader bekeken: vermijd het debat

De laatste van de drie strategieën voorgesteld door Yamey en Gorski – vermeld bovenaan hun hoger besproken lijst – heet *public inoculation,* en hangt nauw samen met twee andere. Hamer op verdachte belangen achter wetenschappelijke stellingnames (strategie 3), zeg dat ze afwijken van de wetenschappelijke consensus (strategie 2) en bestrijd ze via *publieke immunisering* (strategie 1).

Wat zou dat zijn 'publieke immunisering' (*public inoculation*)? Yamez en Gorski spreken over 'mensen waarschuwen voor misleiding en aandacht vestigen op wie de omstreden informatie verspreidt en op hun concurrerende financiële belangen'. De term *inoculation* suggereert evenwel een hardere *Kaltstellung* en verdient meer toelichting.

Een aanwijzing over wat immunisering van wetenschappers zou kunnen betekenen vinden we bij Cecília Tomori. Deze bestudeerde het kopen en misbruiken van wetenschap in meerdere industriële sectoren.[86] Volgens Tomori is rond het verspreiden van wetenschappelijke mist een ganse nieuwe wetenschap gegroeid, met name *agnotology* ('the study of deliberate spreading of confusion') en immunisering helpt deze mist bestrijden. Voor Tomori is publieke immunisering in de eerste plaats een strategie van negeren. 'Echte' covid-wetenschap-

84 'In de wetenschap komt men normaal gesproken pas zeer laat tot een consensus. Resultaten moeten al zeer 'ingebakken' geraken vooraleer die er komt. Op dit moment zien we wetenschap in ontwikkeling.' (Van Bendegem (n 83)).

85 Goorden (n 53). Deze auteur bespreekt onder meer Noam Chomsky's *Manufacturing Consent* waarin gesteld wordt dat media en prominente intellectuelen zich regelmatig bezighouden met het vormgeven van de publieke opinie, waarbij er allerlei filters ontstaan tegen systemische kritiek en een 'consensusrealiteit' wordt gecreëerd, waarbinnen een maximale fractie van de bevolking gehouden moet worden, teneinde een zo frictieloos mogelijke maatschappij te verkrijgen. 'Anders gesteld, échte Popperiaanse wetenschap is noodzakelijkerwijs kritisch voor de status quo en inherent conflictueus, en dat vinden klassiek autoritaire machten allesbehalve nuttig', aldus Goorden.

86 Tomori (n 30)

pers moeten vooral *niet* in een wetenschappelijk debat stappen over effectieve gezondheidsmaatregelen, zoals maskers, schoolsluitingen en vaccinatie. Daarover debatteren met 'foute' wetenschappers is controverse en twijfel creëren bij de bevolking, die zich vervolgens kritischer gaat opstellen bij het aanvaarden van overheidsmaatregelen.[87]

Wetenschappers moeten alleen deelnemen aan 'echte' wetenschappelijke debatten. Deze onderscheid je van de onoprechte wetenschappelijke debatten ('twijfelmachines') via drie stappen: primo, onderzoek en bestudeer de relaties van wetenschappers met industrie en belangengroepen. Secundo, let op de impact van je positie op het grote publiek en gebruik de juiste kaders. Spreken over 'persoonlijke verantwoordelijkheid' past bij de belangen van het bedrijfsleven, dus frame je verhaal bij voorkeur als een kwestie van gemeenschappelijke verantwoordelijkheid en overheidsverantwoordelijkheid en vraag aan journalisten om hetzelfde te doen.[88] Tertio, geef geen aandacht aan 'verkeerde' stemmen, spreek er zo weinig mogelijk over, maar hou het bij het benadrukken van 'correcte informatie'.

Met dit laatste zijn we bij de kern van 'publieke immunisering'. Sander van der Linden *et al.* formuleren het meer rechtstreeks als 'stap af van in debat gaan!'. Onwaarheden weerleggen ('debunking false claims') werkt niet, want het kan weerzin creëren bij de toeschouwer. *Inoculatie* is doodzwijgen en op voorhand ('preemptively') via *pre-bunking* de burger resistent maken tegen misinformatie en onder meer door boodschap herhaling (*message repetition*) ervoor zorgen dat die resistentie aanhoudt.[89] Publieke immunisering is in feite een andere naam voor het controleren van het narratief. Journalisten moeten vooral vermijden om vaccinsceptici aan het woord laten. In naam van objectiviteit en onpartijdigheid 'beide kanten' aan het woord laten, geeft ten onrechte de indruk

87 'Although many scientific champions did provide appropriate context, I watched several respected colleagues step into debates on when, or if, society would reach herd immunity without realizing that the discussion was not simply a scientific debate. Their too-narrow focus unintentionally helped to promote controversy and doubt, and that ultimately impeded an effective public-health response. The same happened around mask use, vaccination and school policies. This helped to shift public opinion on which public-health measures were 'acceptable': the fewer the better' (Tomori (n 30)).

88 'whether health is seen as a matter of 'personal responsibility', which suits corporate interests, or a communal and governmental responsibility. This has a key role in whether individual decisions are cast as a matter of 'freedom' versus 'solidarity', and regulations as restriction or protection. Scientists can point out these framings when talking to reporters or on social media' (Tomori (n 30)).

89 Sander van der Linden, Graham Dixon, Chris Clarke & John Cook, 'Inoculating against COVID-19 vaccine misinformation', (2021) 33 *EClinicalMedicine* 100772 <https://doi.org/10.1016/j.eclinm.2021.100772 , https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(21)00052-3/fulltext#articleInformation> accessed 15 May 2023

van een verdeelde medische gemeenschap en leidt tot meer onzekerheid bij het publiek. Wat wel helpt is door zoveel mogelijk actoren, op zoveel mogelijke fora, op zoveel mogelijk momenten stellen dat er 'een wetenschappelijke consensus' is.[90] Deane Waldman, emeritus Professor of Pediatrics, Pathology and Decision Science, spreekt van *swindler tactics*.[91] Zij geeft nog andere voorbeelden van publieke immunisering als strategie voor 'het controleren van het narratief': het wegzetten en cancelen van vergelijkingen van SARS-CoV-2 als een vorm griep, en het stelselmatig vergelijken met Ebola of de pest (of bij ons polio),[92] het verzwijgen van het fenomeen van natuurlijke immuniteit dat in feite superieur is ten aanzien van kunstmatige immuniteit,[93] het opkloppen van de sterftecijfers door doodsoorzaken die niets met het virus te maken te hebben te negeren, [94] het dagelijks rapporteren van 'besmettingen' en 'gevallen', waardoor mensen een verkeerd beeld krijgen over het gevaarkarakter.[95]

Tomori, noch van der Linden reflecteren kritisch over dit concept van publieke immunisering van onechte wetenschappers en de mogelijke gevolgen. Die gevolgen zijn niet gering. Terecht wordt publieke immunisering gelijkgesteld antiwetenschap, hoewel het precies pretendeert ten strijde te trekken tegen *antiscience*. [96] De concrete gevolgen voor de betrokken wetenschappers zijn aanzienlijk. Wetenschappers die vraagtekens hebben bij sommige maatregelen werden

90 van der Linden, Dixon, Clarke and Cook (n 88) 1.

91 D. Waldman 'SARS- CoV-2, the emperor's new clothes and medical tyranny' (2022) 6 *Clin J Nurs Care Pract*, 9

92 Waldman (n 91) 11

93 Waldman (n 91) 10

94 "One of the more egregious swindler deceptions is the listing of 829,740 "COVID deaths," implying these individuals died because they were infected with SARS-CoV-2. Autopsy data and medical demographics indicate that only 12 % to 23% respectively of those who died with a positive test died *because of* the infection [6-8]. The majority succumbed to their pre-existing conditions. Not because of the virus. In one instance, the victim of a motorcycle crash was listed as a COVID death because he had the antigen in his blood" (Waldman (n 91) 10, met verw.)

95 "A highly successful swindler tactic is control of the narrative. "Cases" are reported daily, sometimes hourly, in order to stoke public fear. The word "case" in a medical context implies a sick person, but SARS-CoV-2 cases are literally those who test positive for the antigen, most of whom were not sick at all" ((Waldman (n 91) 9-10).

96 Het neerzetten van een homogene wetenschappelijke muur van betrouwbare wetenschappers die in staat is onechte wetenschappers te herkennen, behoort tot de meest ongelukkige invullingen van de wetenschappelijke keuzeinfrastruur, aldus Waldman. "First, those currently in authority behave contrary to their repeated assertions that, "They follow the science," and "I represent science" (Fauci, Nov. 30, 2021). Their posture and policies are *anti-scientific*. The foundation of scientific inquiry is the testing of different ideas and dialogue among those with alternate views and data. The swindlers aggressively suppress the basis of the scientific method: disagreement, discourse, and dialogue" (Waldman (n 91) 11).

weggezet als bedrijfsschoffies of zelfs ontslagen. Sociale-mediabedrijven haalden legitieme discussies over maatregelen onderuit. Onderzoekers, die gewend waren hun debatten te voeren in tijdschriften en op conferenties, geraakten niet meer in de media,[97] en vonden hun ideeën en hun reputatie afgeslacht terug op Twitter of op anonieme websites zoals *Tegenwindmolen,* opgericht om de kritische wetenschappers uit de *Tegenwind*-documentaires te immuniseren.[98]

Immunisering ondergraaft de immuniteit van wetenschappers, leidt tot een *chilling effect* en zet een sfeer van intimidatie neer in een milieu dat bij uitstek bevolkt wordt door wat rustigere mensen, die bij onrust niet goed meer functioneren. We kunnen dat gemakshalve benoemen met de term *reputatie* en elke wetenschapper is beducht voor *reputatieverlies*. Ook de overheidsexperts die de laatste jaren het grote woord hebben kunnen voeren, zijn ervoor gevoelig. Een mogelijke verklaring voor het gebrek aan eerlijk wetenschappelijk debat over de voorbije pandemie en de moeite om data los te krijgen om dat debat te voeren, heeft precies met de schrik voor reputatieverlies te maken.[99]

Besluit: de wetenschap is in een voorspelde storm beland

Deze bijdrage opende met een citaat van Jeremy Baskin (*Melbourne School of Government).* Baskin voorspelde al in oktober 2020 een 'shitstorm' voor de wetenschap. Hij kantte zich daarbij tegen het gebruik van het consensusargument en het immuniseren van afwijkende opvattingen. Zijn centrale boodschap luidt: deze strategieën zijn al uitgeprobeerd naar aanleiding van berichten in de

97 Wheaton (n 7). Zie ook Bardosh et al. (n 52) 6.

98 Een artikel in *Politico* illustreert al deze ontwikkelingen met voorbeelden uit de Verenigde Staten én België: Wheaton (n 7). Het spreekt vanzelf dat een moegetergde Sam Brokken centraal staat. Laatstgenoemde heeft naar aanleiding van de discussies over Mattias Desmet een lijst Belgische 'kaltgestellden' opgesteld, die Wheatons lijst aanzienlijk aandikt: Sam Brokken, 'UGent gebruikt rare redeneringen tegen Desmet' (*Tegenwind.tv*, 8 February 2023) <https://www.tegenwind.tv/post/sam-brokken-ugent-gebruikt-rare-redeneringen-tegen-desmet> accessed 15 May 2023

99 Over pogingen van RIVM-wetenschappers om gebruikte modellen over het nut van lockdowns *niet* vrij te geven, leze men Maurice de Hond, 'Ook de rechter doorziet de nonsens argumenten van VWS/RIVM om de modellen geheim te kunnen houden' (*MDH Blogs*, 20 February 2023) <https://www.maurice.nl/2023/02/20/ook-de-rechter-doorziet-de-slappe-argumenten-van-vws-rivm-om-de-modellen-geheim-te-kunnen-houden/> accessed 15 May 2023 ('Iedereen die maar iets van die modellen weet en de rol die zij gespeeld hebben in Nederland beseft dat er maar één echte reden is waarom men zich met hand en tand verzet tegen de openbaarmaking: het gaat niet om de privacy van de personen die in de database zitten die een rol speelden bij het maken van het model, maar om het imago van degenen die het model hebben gemaakt en verkocht aan de autoriteiten en de media').

voorbije decennia over financiering van de klimaatlobby door de olielobby en ze werken niet. Wetenschappers immuniseren en inhoudelijk debat vermijden brengt de wetenschap en de publieke zaak op een politiek doodlopende weg, wat al zichtbaar is in de Verenigde Staten, waar door politisering geen inhoudelijk debat meer mogelijk blijkt te zijn.[100]

Baskins visionaire waarschuwing uit oktober 2020 werd en wordt door Yamey en anderen duidelijk in de wind geslagen. De pandemiebestrijding werd gepolitiseerd. Denken in termen van proportionaliteit en *focused protection* werd afgedaan als rechts, weinig sociaal en roekeloos, terwijl ijveren voor het dichtgooien van de samenleving in afwachting van nieuwe vaccins als goed, gebaseerd op consensus en effectief werd gewaardeerd. De voorgestelde strategieën om deze dualisering te bereiken werden helder door Yamey en Gorski op een rij gezet: hamer op verdachte belangen achter wetenschappelijke stellingnames, zeg dat ze afwijken van de wetenschappelijke consensus en bestrijd ze via *publieke immunisering*.

Deze bijdrage bekijkt die strategieën en stelt vast dat ze mijlenver afwijken van de traditionele spelregels onder wetenschappers: uitwisseling van argumenten over inhoudelijke punten in een sfeer van competitiviteit, doch zonder oorlogsvoering of op de persoon spelen.

Het framen van wetenschappers en covid-kritische stemmen in het algemeen, blijft verbazen. In elk geval wat Europa betreft. Immers, het Zweedse pandemiebeleid, dat in covid-kritische kringen als referentiepunt geldt, kwam tot stand onder een sociaaldemocratische regering. En wat met de Belgische PvdA,[101] de Franse beweging van Mélenchon,[102] Franse intellectuelen zoals Barbara

100 'Reageer niet op de provocerende triggers - het Witte Huis van Trump en de connecties van de gebroeders Koch. Gebruik niet de tactiek om 'onze' wetenschappers op te stellen tegen 'hun' wetenschappers. Neem vooral niet de route van de 'wetenschappelijke consensus': '98% van de wetenschappers gelooft...', of richt je op het in diskrediet brengen van individuele ondertekenaars: 'Professor Gupta is ook slecht/fout op deze andere manieren...'. Dergelijke benaderingen zijn een politieke doodlopende weg. We zien de effecten al in de Verenigde Staten, met steriele argumenten tussen degenen die suggereren dat COVID-19 niet zo slecht is en degenen die benadrukken hoe slecht het wel is. Het COVID-19 discours in de richting van een tweedeling sturen komt de gebroeders Koch misschien goed uit, maar het draagt weinig bij tot een zinvolle publieke of praktische betrokkenheid bij de pandemie. Een logisch gevolg hiervan is dat de auteurs van de GBD niet als «andersdenkenden» worden bestempeld' (Baskin (n 1)).

101 Stavros Kelepouris & Jeroen Van Horenbeek, 'Is er iemand die die zever van jou gelooft?: Conner Rousseau (Vooruit) en Raoul Hedebouw (PVDA) gaan voor het allereerst in gesprek' (*De Morgen* 15 January 2022) <https://www.demorgen.be/nieuws/is-er-iemand-die-die-zever-van-jou-gelooft-conner-rousseau-vooruit-en-raoul-hedebouw-pvda-gaan-voor-het-allereerst-in-gesprek~b0b280a0/> accessed 15 May 2023

102 Mélanie Heard, 'Jean-Luc Mélenchon et le Covid: le grand écart idéologique' (*Terra Nova,* 12 May 2022) <https://tnova.fr/societe/sante/jean-luc-melenchon-et-le-covid-le-grand-ecart-ideologique/> accessed 15 May 2023

Stiegler,[103] de Nederlandse groen-linkse Martijntje Smits,[104] … allemaal rechts? Betaald door Poetin en Trump? Allemaal nuttige idioten of wetenschappers die inzichten gebruiken voor een rechtspolitiek project, zoals *Knack*-redacteur Walter Pauli het stelt? Het immuniseren van covid-kritische wetenschappers blijft ondertussen doorgaan.[105] Recent gaat men in de Verenigde Staten nog een stap verder door covid-kritische stemmen niet alleen als immoreel, antiwetenschappelijk en rechts weg te zetten, maar ook als antisemiet.[106]

Een uitweg uit deze doodlopende straat van non-discussies bieden nieuwe afspraken met de media. Media moeten hun fierheid herwinnen en alle stemmen aan het woord laten ten behoeve van de zoekende lezer.[107] Journalistieke principes, zoals woord en wederwoord, grondig bronnenonderzoek, uitvoeren

103 Auteur van *De la démocratie en pandémie : santé, recherche, éducation* (Gallimard, 2021).

104 Martijntje Smits, 'GroenLinks-lid Smits te gast in Op z'n Kop' (*NPO-radio*, 28 October 2021) <https://www.nporadio2.nl/nieuws/podcast/5ecf724f-2fed-4523-b941-1d18f8775846/groenlinks-lid-smits-te-gast-in-op-zn-kop> accessed 15 May 2023

105 Jonathan Howard, *We want them infected* (Redhawk Publications, 2023. Howard reserveert zijn diepste minachting voor de promotors van de «Great Barrington Declaration». Volgens Howard verkochten wetenschappers zoals Jay Bhattacharya, Martin Kulldorff, Sunetra Gupta en Jeffrey Tucker de VS een rampzalig COVID-plan en betaalden nooit een professionele prijs..

106 'The health sector overall appears paralyzed or at least confused by the fact that antiscience has morphed into a dominating political enterprise. This reality is also deadly, killing more Americans, as well as others in Europe, Latin America, and elsewhere, than other forms of political terrorism. And yet, we do not frame it as such. While everyone is entitled to their political views, even extreme ones, we must find a way to uncouple them from deadly antiscience propaganda. More and more, the antivaccine framework is now heavily imbued with the imagery of Nazi era atrocities and relies on discrediting, humiliating, or threatening scientists and physicians, including many who are Jewish. Antiscience has become an opportunity to openly and brazenly express anti-Semitic tropes and beliefs. Beyond the obvious humanitarian concerns of this new reality is the potential for it to unravel the modern structure of biomedical science and cause our health and global security to suffer.' (aldus Peter Hotez, vaccinatieontwikkelaar en (joods) wetenschapper in P.J. Hotez, 'Global Vaccinations: New Urgency to Surmount a Triple Threat of Illness, Antiscience, and Anti-Semitism' (2023) 14(1) Rambam Maimonides Medical Journal < https://www.rmmj.org.il/issues/56/articles/1555> accessed 15 May 2023).

107 Het mag niet zijn dat media om die reden als rechts worden weggezet. Gevraagd naar het verschil tussen *NRC* en de *Volkskrant* stelt een journaliste over de redactie van de *Volkskrant*: 'de redactie doet erg haar best om stemmen 'van de andere kant' aan het woord te laten. Daardoor is de *Volkskrant* in de praktijk soms rechtser dan *NRC*. Ik vind het goed om alle strekkingen met open blik te benaderen.' (Mira Sys in gesprek met Walter Pauli, in 'Mira Sys, Vlaamse journaliste in Amsterdam: Antivaxers wappies noemen vind ik zo vooringenomen' (*Knack,* 1 January 2023) <https://www.knack.be/nieuws/belgie/maatschappij/mira-sys-vlaamse-journaliste-in-amsterdam-antivaxers-wappies-noemen-vind-ik-zo-vooringenomen/> accessed 15 May 2023).

van check en dubbelcheck, moeten opnieuw aangemoedigd worden en bij de publieke omroepen dwingend worden voorgeschreven. De Amerikaanse regering legde vanaf 1949 een *fairness doctrine* oftewel een eerlijkheidsdoctrine op aan radio en tv, die hen verplichtte om in hun berichtgeving aandacht te hebben voor belangrijke publieke kwesties en daarbij verschillende visies even lang aan het woord te laten.[108] De regel werd in 1987 opgeheven, waardoor de nieuwskwaliteit achteruitging en er in de VS ook een opsplitsing kwam van het medialandschap langs partijpolitieke lijnen. [109]

Nog een uitweg om te komen tot depolitisering en de-dualisering van de wetenschap, is te kijken naar de overheid. Twee interessante voorstellen zijn controle op het gebruik van experten bij de overheid en op de kwaliteit (eerlijkheid en betrouwbaarheid) van overheidsdata. Beide voorstellen zijn expliciet opgenomen in het al genoemde *Wintermanifest*, maar duiken ook elders op.[110]

Beginnen we met het voorstel om toe te kijken op de selectie en het gedrag van experten ingeschakeld in publieke adviesorganen. De Deen Michael Bang Petersen, politicoloog en hoofd van een groep wetenschappers die het fenomeen van de politisering én moralisering uitvoerig in kaart hebben gebracht,[111] dringt erop aan om crisisbeheer *niet* langer over te laten aan domeindeskundigen. Sociale wetenschappers met een brede gedragsexpertise moeten bij crisisbeheer betrokken worden, om te vermijden dat er voorbij gegaan wordt aan signalen van de bevolking. Het risico op een laag of afnemend vertrouwen in overheidsbeleid moet worden behandeld als een belangrijke risicofactor bij pandemieën.[112] In het licht van de hogervermelde opvatting dat de verdeelde wetenschap

108 John Vandaele, 'Waarom desinformatie overal is en wat eraan te doen valt. Op zoek naar waarheid in een stroom van desinformatie' (*MO,* 27 March 2023) <https://www.mo.be/analyse/op-zoek-naar-waarheid-een-stroom-van-desinformatie?utm_campaign=emo&utm_medium=newsletter&utm_source=email> accessed 15 May 2023

109 Vandaele (n 108)

110 Over plichten van de overheid om eerlijk te zijn en ook met zwermen (spontane netwerken van wetenschappers en experts) rekening te houden, Rogier De Langhe, in 'De overheid wilde duidelijk niet dat mensen panikeerden, maar het probleem was net de ontkenning' (*De Morgen,* 23 April 2020) <https://www.demorgen.be/nieuws/de-overheid-wilde-duidelijk-nie...panikeerden-maar-het-probleem-was-net-de-ontkenning~b6b39de8> accessed 15 May 2023

111 Voor een korte bespreking van hun werk, P. De Hert, 'Waren het vooral Westerse welvaarstaten die polariseerden tussen wel en niet- gevaccineerden?' (*De Controversatie*, 15 March 2023) <https://www.decontroversatie.be/post/waren-het-vooral-westerse-welvaarstaten-die-polariseerden-tussen-wel-en-niet-gevaccineerden> accessed 15 May 2023

112 'we have called for directly treating low trust as a key pandemic risk factor' (Thomas J. Bollyky, Ilona Kickbusch, and Michael Bang Petersen, 'The Trust Gap. How to Fight Pandemics in a Divided Country' (*Foreign Affairs,* 30 January 2023) <https://www.foreignaffairs.com/united-states/trust-gap-fight-pandemic-divided-country>

nog lang zal blijven, is Petersens waarschuwing over de toekomst verontrustend: 'Polarization is likely in any crisis that entails massive behavior change such as the climate crisis. We need to think deeply about avoiding similar dynamics as we prepare to manage the extremely difficult crisis of climate change'.[113] De bijdrage van Thomas Goorden over het Belgische PFAS-schandaal toont aan dat immunisatiestrategieën van kritische stemmen zich doorzetten in het milieu-debat en wellicht versterkt zullen worden door de opkomst van artificiële netwerken zoals ChatGPT, dat manifeste voorbeelden bevat van geschiedenisvervalsing om een gewenste politieke gemeenschap te kweken. De pre-Popperiaanse consensuswetenschap is bijgevolg niet begraven na de pandemie.[114]

Een tweede voorstel richting overheid tot bestrijding van polarisering binnen de wetenschap is te werken aan meer betrouwbare overheidsdata. Academici van de University of California in San Francisco hebben een nieuw document gepubliceerd over de vele statistische fouten van de Amerikaanse *Centers for Disease Control and Prevention (CDC)* tijdens de COVID-19-pandemie.[115] De uitkomst van de studie is in het licht van al het voorgaande ironisch. Deze en soortgelijke overheidsdiensten worden zelden kritisch worden ondervraagd, maar beschuldigen zelf anderen van het verspreiden van onjuiste informatie. De studie noemt nauwkeurige en betrouwbare statistieken, zelfs in tijden van onzekerheid, een basisvoorwaarde voor het nemen van gefundeerde beleidsbeslissingen en beveelt aan dat overheidsinstanties bevoegd voor het rapporteren van gezondheidsstatistieken, afgeschermd worden van instanties met beleidsbevoegdheden. Op die wijze wordt tegemoetgekomen aan bezorgdheden over werkelijke of vermeende

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accessed 15 May 2023. Zie ook de tweet van Michael Bang Petersen (@M_B_Petersen) 16 February 2023 < https://twitter.com/M_B_Petersen/status/1626210539532877825> accessed 15 May 2023).

113 Bang Petersen (n 112)

114 Goorden (n 53).

115 K. Krohnert, A. Haslam, Tr. B. Høeg, & V. Prasad, 'Statistical and Numerical Errors Made by the US Centers for Disease Control and Prevention During the COVID-19 Pandemic' (2023) SSRN <http://dx.doi.org/10.2139/ssrn.4381627)> accessed 15 May 2023. Over dit rapport Arjun Walia, 'New Analysis Shows How The CDC Spread False Information That Exaggerated The Severity of COVID-19' (*The Pulse,* 29 March 2023) <https://www.thepulse.one/p/new-analysis-shows-how-the-cdc-spread> accessed 15 May 2023. Het document beschrijft 25 gevallen waarin de CDC statistische of numerieke fouten heeft gemeld. Twintig (80 %) van deze gevallen, aldus de onderzoekers, 'overdreven de ernst van de COVID-19-situatie'. Het artikel beschrijft hoe het CDC in zestien (64 %) gevallen over de fouten werd ingelicht en later in dertien (52 %) gevallen de fouten ten minste gedeeltelijk corrigeerde. Zoals in het artikel wordt opgemerkt, is het nogal ironisch dat 'onjuiste en misleidende informatie' werd vermeld op verschillende wetenschappelijke artikelen, berichten van deskundigen op dit gebied, enz. tijdens de pandemie, maar dat de CDC zelf meermaals werd beschuldigd van het verspreiden van verkeerde informatie.

systematische vertekening van fouten. Dataverzameling rond gezondheid en andere thema's door overheidsdiensten kan en moet beter, aldus de Californische wetenschappers.

Een laatste tegenstrategie tegen het uitsluiten van kritische wetenschappers richt zich op de regels voor wetenschappers en de ethische normering van hun werk. De zogenaamde ALLEA-code ('The European Code of Conduct for Research Integrity')[116] bevat meerdere nuttige regels over belangenvermengingen en transparantie. Meer uitdrukkelijke bepalingen tegen misbruik van het consensargument, tegen mediamonopolisering door overheidsexperten, en tegen de idee van publieke immunisering, zijn maar enkele verbetermogelijkheden. Het spreekt voor zich dat zo een belangrijk Europees document lessen trekt uit 'Amerikaanse toestanden' die de oceaan zijn overgestoken. Het document mist ook een openingscitaat. Een suggestie is Karl Poppers vrolijke verwerping van de notie van 'autoriteit', ten voordele van kritisch maar volledig open debat.[117]

Vanuit de hoek van mindfulness, brengt Joe Martino, schrijver en coach, een bijkomend aantal goede ideeën, waarschuwingen en aanbevelingen.[118] Een zo'n aanbeveling is op te passen voor *noble cause corruption*: slechte dingen doen in de naam van goede en het doel de middelen laten heiligen. Mensen zijn overtuigd van hun eigen gerechtigheid en zullen alles doen wat in hun macht ligt om het gewenste resultaat te krijgen. Die valkuil is duidelijk niet gezien tijdens de pandemie, met uitsluiting van wetenschappers tot gevolg.[119]

Voor Martino kan hier alleen door zelfsturing een verschil worden gemaakt. Vanaf het ogenblik dat trucjes worden ingezet om het goede doel te bereiken, brandt de oranje lamp.[120] Een tweede knipperlicht gaat branden bij te veel vertrouwen in experts. Het advies is hier om regelmatig verschillende nieuwsbronnen te onderzoeken en open te staan voor argumenten van tegengestelde

116 <https://allea.org/code-of-conduct/ > accessed 15 May 2023.

117 Vgl. Goorden (n 53)

118 Joe Martino, '8 Useful Tools for Discerning Truth in The Age of Information Warfare' (*The Pulse*, 5 April 2023) <https://www.thepulse.one/p/8-useful-tools-for-discerning-truth> accessed 15 May 2023

119 'We saw this deeply with censorship during COVID. Good and intelligent people got caught in a place of being certain about what their governments and health authorities were saying. They also deeply believed in government propaganda that stated 'those questioning things are bad' (Martino (n 118)).

120 'Keep an eye on and reflect on self-righteousness and ideas that seek to control other people in the name of 'the greater good.' If we have to trick people or force people into accepting ideas, they probably aren't well thought out and clear enough' (Martino (n 118)).

deskundigen.[121] De mooiste aanbeveling is ongetwijfeld deze over epistemische nederigheid ('epistemic humility'): 'in plaats van proberen gelijk te krijgen, probeer het minder fout te hebben'.[122] Deze nederige houding leert om meer comfortabel te worden met onzekerheid. 'Vaak is het moeilijk om een absolute waarheid te kennen. Het is beter te begrijpen hoe je er minder naast kunt zitten dan te proberen absoluut gelijk te hebben', aldus de mindfulnesscoach.

121 'Zet een deskundige niet op een voetstuk of maak er geen goeroe van. Vergeet niet dat zij zich misschien niet zo grondig hebben verdiept in iets wat zij zeggen als jij denkt' (Martino (n 118)).

122 (Martino (n 118)) met verwijzing naar José Medina.

Imagining another law and other rights

Mireille Hildebrandt

Crossroads and pathways (shared and bifurcating intellectual genealogies)

It has been my privilege to have known Serge Gutwirth since around 1994, when I joined the Department of René Foqué at the Law Faculty of the Erasmus University in Rotterdam. Serge was deeply immersed in environmental law at that point in time,[1] organising a series of seminars on the subject of the precautionary principle,[2] Ulrich Beck's risk society,[3] Hans Jonas's accountability concept[4] and the questions raised by deep ecology.[5] From the very beginning it was clear that Serge was not a one-topic scholar, having written an extensive dissertation on truth claims in the realms of law and science[6] geared to information law in the very broad sense of that term, thus including intellectual rights, privacy law and legal informatics. On top of that, he also had a strong background in and a deep concern for criminal law and criminal procedure,[7]

1 Serge Gutwirth & François Ost (eds), *Quel avenir pour le droit de l'environnement?* (Presses de l'Université Saint-Louis, 2019) <http://books.openedition.org/pusl/18592> accessed 24 February 2023.

2 Nicolas de Sadeleer, 'Le principe de précaution: du slogan à la règle de droit' [2000] *Droit de l'Environnement* 14.

3 Ulrich Beck, Risikogesellschaft. Auf dem Weg in eine andere Moderne (Suhrkamp Verlag, 1986).

4 Hans Jonas, Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation (9th edn, Suhrkamp Verlag, 2003).

5 Arne Naess, 'A defence of the deep ecology movement' (1984) 6 *Environmental Ethics* 265 <https://www.pdcnet.org/pdc/bvdb.nsf/purchase?openform&fp=enviroethics&id=enviroethics_1984_0006_0003_0265_0270> accessed 24 February 2023.

6 Serge Gutwirth, *Waarheidsaanspraken in recht en rechtswetenschap* (VUB Press and MAKLU, 1993).

7 Serge Gutwirth & Paul De Hert, 'To punish or to restore? a false alternative' in David J. Cornwell, John R. Blad and Martin Wright (eds), *Civilising criminal justice: An international restorative agenda for penal reform* (Waterside Press, 2013).

coupled with an in-depth knowledge of human rights law.[8] Serge lived at crossroads and delighted in exploring novel pathways.

At the end of 2001, Serge invited me to join a most peculiar, spectacular, risky and ambitious research project in Brussels, headed by him together with – among others - Isabelle Stengers and Bruno Latour. I remember telling him that to me the proposal read like a speculative undertaking that could turn out as either the emperor's new clothes or a new direction of research on the cusp of the sciences and the humanities. In other words, a precarious project. It stirred my longstanding interest in the history and implications of the 19th and 20th century *Methodenstreit* that ended in an enduring victory for the quantification of anything anywhere under the heading of "objectivity, efficiency and evidence-based science". Stengers' seminal *Order out of chaos*, co-authored with Nobel Prize winner Ilya Prigogine, had offered new ways of avoiding such disrespect for the methodological loyalties for another's scientific practice, instead celebrating a new alliance between the sciences and the humanities.[9] I decided to take the risk and join the project, in the form of a secondment from Erasmus University.

I cannot say I ever regretted that move, if only because I love Brussels as the most cross-cultural and cross-national metropole in Europe. But more so because it offered me the chance to further develop my research agenda in a way that matters in the real world (even if we should not cultivate illusions of measurable impact). Serge's project was titled "The Loyalties of knowledge. The positions and responsibilities of the sciences and of scientists in a democratic constitutional state".[10] It brought together key literature such as Latour's *Nous n'avons jamais été modernes*,[11] Latour & Callon's *Agir dans un monde uncertain*,[12] Stengers' *Cosmopolitiques*[13] and *Sciences et Pouvoirs*, as well as his own dissertation. I coordinated the work package on "correlated humans",

8 Paul De Hert & Serge Gutwirth, 'Data protection in the case law of Strasbourg and Luxembourg: Constitutionalism in action' in S. Gutwirth and others (eds), *Reinventing data protection?* (Springer, 2009).

9 The original title of their 1979 work was indeed *La nouvelle alliance*; see Ilya Prigogine & Isabelle Stengers, *Order out of chaos* (Bantam Books, 1984).

10 See <https://researchportal.vub.be/en/projects/the-loyalties-of-knowledge-the-positions-and-responsibilities-of->. The project developed a website under the heading of *imbroglio*; see the final section below.

11 Bruno Latour, Nous n'avons Jamais Été Modernes. Essai d'antropologie Symétique (La découverte, 1991).

12 Michel Callon, Pierre Lascoumes & Yannick Barthe, *Agir dans un Monde Incertain. Essai sur la Démocratie Technique* (Seuil, 2001).

13 Isabelle Stengers, *Cosmopolitiques. Tome 1. La Guerre des Sciences* (La Découverte/Les Empêcheurs de penser en rond, 1997); Isabelle Stengers, *Cosmopolitiques. Tome 7. Pour en Finir avec la Tolérance* (La Découverte/Les Empêcheurs de penser en rond 1997); Isabelle Stengers, *Sciences et Pouvoirs* (La Découverte, 1997).

which was reframed as "correlatable humans" in the course of the project.[14] The latter replacement signalled acknowledgement of the fact that humans can always be correlated in multiple ways, while the different ways of correlating their "attributes" may be incompatible – thus situating the playroom for humans to ignore, game or even reinvent the way that such correlations frame them. This is where my own development as a philosopher of technology emerged, as I turned to Don Ihde's post-phenomenological philosophy of technology, built on Ricoeur and other continental philosophers who value embodiment and the ability to perceive and act upon the same reality in different ways.[15]

I remember that Serge had some serious issues with my direction, which clearly deviated from the pathways of both Latour and Stengers,[16] though with all due respect and seeking crossroads to find joint interests and peaceful *inter-esse*.[17]

Inter-esse signalled a shift from "interest" as private profit-seeking to "interest" as a genuine engagement on the cusp of things, causes and humans, validating the in-between on which our human independence depends.[18] In my own work this in-between had been triggered by, for example, James Gibson's concept of an affordance and Wittgenstein's, Clifford Geertz's, Charles Taylor's and Peter Winch's understanding of the role of rules in human society, firmly grounded in my understanding of Helmuth Plessner's *Levels of organic life and the human: An introduction to philosophical anthropology*.[19] It rang many bells with Stengers' and Latour's work, though my own understanding of the in-between highlights the curious relationship between human autonomy and its dependence on other humans, other organisms and the world that humans share and navigate, reframing the subject–object conundrum rather than trying to overcome it. Nevertheless, at the end of my chapter on Japanese respect for

14 Mireille Hildebrandt, 'Profiles and correlatable humans' in Nico Stehr & Bernd Weiler (eds), *Who owns knowledge? Knowledge and the law* (Transaction, 2008).

15 See chapter 8 'Intricate entanglements of law and technology', in Mireille Hildebrandt, *Smart technologies and the end(s) of law. Novel entanglements of law and technology* (Edward Elgar, 2015) and, e.g., Don Ihde, *Technology and the lifeworld: From garden to earth* (Indiana University Press, 1990).

16 See chapter 3 'The onlife world' in Mireille Hildebrandt (n 15). See for the philosophical underpinnings 229.

17 See section 6.6., where I relate to Isabelle Stengers, 'Reclaiming animism' [2012] *e-flux* http://www.e <http://www.e-flux.com/journal/reclaiming-animism/> accessed 4 June 2014.

18 See also chapter 6 'The other side of privacy: Agency and privacy in Japan', in Mireille Hildebrandt (n 15).

19 Helmuth Plessner & JM Bernstein, *Levels of organic life and the human: An introduction to philosophical anthropology* (Millay Hyatt tr., Fordham University Press, 2019).

the in-between,[20] I made the argument for individual rights as establishing a – historically – new kind of human autonomy that should better protect both the in-between and the human personhood it affords.

Commonalities, commons and *commoning*

Serge and I have many "things" in common,[21] if only the fact that we share two pioneering intellectual ancestors who primed us into a rigorous respect for independent scientific research and a keen sense of the relational nature of law and the rule of law, including a sixth sense for the institution of countervailing powers. Joest 't Hart and René Foqué co-authored *Instrumentaliteit en rechtsbescherming*,[22] and while Serge followed 't Hart's lectures when he held the Theodore Verhaegen Chair at VUB, I followed the same lectures at Leiden University under the heading of "Literary studies and the concept of law", based on 't Hart's ingenious *Law and Perseus' shield*.[23] It would be interesting to trace the empowering intellectual influence of René and Joest on Serge's ventures into the *commons* and the *process of commoning* that is now the key focus of his research. While exploring this new domain with Isabelle Stengers,[24] Serge is focusing on the legal intricacies of property law in relation to commons and *commoning*, perhaps seeking to establish a link with the need for countervailing powers in the era of a global predatory capitalism that threatens to chase us into a catastrophic future that is already a "clear and present danger" for a large part of the world.[25]

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20 Chapter 6 'The other side of privacy: Agency and privacy in Japan', in Mireille Hildebrandt (n 15).

21 Where a "thing" or a "ding" (the Dutch term) may refer to the Icelandic "Thing" as the place where "things" are decided, "causes" are contested and new assemblages are forged, see, e.g., Bruno Latour, 'From Realpolitik to Ding Politik – or how to make things public", in Bruno Latour & Peter Weibel (eds), *Making things public – atmospheres of democracy* (MIT Press, 2005).

22 R. Foqué and A.C. 't Hart, *Instrumentaliteit en rechtsbescherming* (Gouda Quint Kluwer Rechtswetenschappen, 1990).

23 't Hart, *Recht als Schild van Perseus* (Gouda Quint, 1991).

24 Serge Gutwirth & Isabelle Stengers, 'Théorie du droit. Le droit à l'épreuve de la résurgence des commons' (2016) 41 *Revue juridique de l'Environnement* 306 <https://www.persee.fr/doc/rjenv_0397-0299_2016_num_41_2_6987> accessed 22 March 2023.

25 Alessia Tanas & Serge Gutwirth, 'Une Approche « écologique » Des Communs Dans Le Droit. An 'Ecological' approach to the commons in law. Insights on the transpropriative heritage, Usi Civici and the river-person: *Regards Sur Le Patrimoine Transpropriatif, Les Usi Civici et La Rivière-Personne*' [2021] *In Situ. Au regard des sciences sociales*.

What inter-ests me here is the way that territory, another of my interests,[26] is reframed as a non-commodifiable commons that grounds both a community of living organisms (humans included) and a shared responsibility for the development of the land and those who depend on it. Such responsibility also involves future generations and situates itself in deeply rooted communal practices that link back to previous generations. In their study of Italian and New Zealand communities built around cultivated land, Serge and Alessia Tanas point out that positive law attributes a right to such communities *to make law*, to rule themselves, thus creating a new source of law. This reminds me of the rise of the universities (universitas) in Bologna and elsewhere in medieval Europe, that were allowed to rule themselves, with their own jurisdiction, their own legal norms and their own courts to decide disputes.[27] It also recalls the rise of the medieval guilds in Europe, again fostering their own jurisdiction, norms and dispute resolution.[28] In both cases, however, the jurisdiction depended on membership of a dedicated association (of students and teachers, crafts persons or merchants) rather than a territory. The relationship between the state, power, democracy and territory has been well grounded in seminal works,[29] including, for instance, Connolly's *Democracy and territoriality* of the beginning of the nineties.[30] The same goes for the legal imaginary that ties jurisdiction to territory and to the idea of internal and external sovereignty. We should note that the idea and the practice of the rule of law depend on the idea and the practice of a modern state, as can be noted in the concept of the *Rechtsstaat* or *Etat de Droit*. The brilliant and ingenious paradox of the rule of law is that it was meant to offer protection against the arbitrary power of the state, while making that protection dependent on the internal division of that same state (by way of the institution of countervailing powers and checks and balances, such as an independent judiciary) – a precarious undertaking, if ever there was one. In the era where

26 Mireille Hildebrandt, 'The virtuality of territorial borders' (2017) 13 *Utrecht Law Review* <http://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.380/>accessed 27 August 2017.

27 Harold Berman, Law and revolution. The formation of the Western legal tradition (Harvard University Press, 1983).

28 Mark Cartwright, 'Medieval Guilds', *World history encyclopedia* <https://www.worldhistory.org/Medieval_Guilds/> accessed 29 March 2023.

29 Stuart Elden, *The birth of territory* (University of Chicago Press, 2013); Saskia Sassen, *Territory, authority, rights: From medieval to global assemblages* (Updated, Princeton University Press, 2008); Arjun Appadurai, 'Sovereignty without territoriality: Notes for a postnational geography' in Setha M Low and Denise Lawrence-Zuniga (eds), *Anthropology of space and place: Locating culture* (Blackwell, 2003).

30 William E. Connolly, 'Democracy and territoriality' (1991) 20 *Millennium* 463 <https://doi.org/10.1177/03058298910200030301> accessed 29 March 2023.

transnational corporations have managed to develop a type of economic power that allows them to compete with the state as *de facto* regulators, it seems key to explore – with some urgency – other imaginaries capable of inspiring new types of protection, countervailing powers and "practical and effective" safeguards. In light of increased awareness of planetary exhaustion and the inversion of the narrative of control over nature and the unbridled exploitation and manipulation of natural resources, a novel return to the relationship between humans and land is warranted as part of such new imaginaries.

In their paper on "when the commons put law to the test",[31] Serge and Isabelle Stengers trace how international law has become captive to a dedicated type of market fundamentalism, protecting corporations and their right to exploit resources, treating them as worthy of the equal concern and respect that governments should give their citizens. The authors speak of the rise of a new "natural" right that gives pride of place to commercial exploitation, thus limiting the rights (and duties) of states to protect the general interest or common good. They reject attempts to reconcile the imperatives of commercial exploitation with the kind of protection that law is meant to offer, steering free from revisionism, instead asking that market absolutism is dethroned and predatory capitalism eradicated.

This is argued by pointing out that the rule of law has been subjected to what are presented as the laws of economics, as if they were the laws of nature. In fact, the narrative that "naturalises" economic forces not only subjects the law to the supposedly inevitable imperatives of a carefully crafted economic science, but also subjects nature itself to the demands and loyalties of a specific type of capitalist logic. In their paper they show how law and the rule of law have been captivated by the double sovereignty of, on the one hand, the Leviathan (the absolute state) and, on the other hand, the owner of property (as an absolute individual right). That is, the state and the owner as epitomes of sovereign control, enjoying justified discretion to dispose of their power as they wish. This way democratic government is reduced to a balancing act between the powers of two sovereigns that will, supposedly inevitably, decide our fate.

Stengers and Gutwirth trace the beginnings of this particular understanding of private law to Locke's idea of a natural right to the fruits of one's labour and to the concomitant demise of the commoners in 18th century England who held land as a non-commodifiable commons, similarly to the New Zealand and Italian communities. Locke's natural right justified the identification of a discrete individual right to the discrete – commodifiable – outputs of human labour, presented as key to a new type of economy, no longer constrained by

31 Gutwirth & Stengers (n 24).

supposedly antiquated legacy models of legal entitlement. The right to alienate a piece of land became the hallmark of what was seen as the emancipation of individual owners, now ready to create and extract added value, even if those doing the actual work were thereby forced to sell their labour to survive – often not even capable of buying the fruits of their labour. The authors speak of a *connivence sympathique* between the state whose legal enactments protected entrepreneurial ownership and those who benefited from this new regime, crushing the third way of making a life in the process. That third way is what Gutwirth and Stengers call *commoning*, the shared care for a shared land.

In 1968, Garrett Hardin proved, with mathematical precision, that sharing a commons inevitably results in its destruction, based on the assumption that those who share are rational individual agents keen on optimising their own share even if that would diminish the share of others. Hardin presented the world with the dictates of rational choice theory in the context of collective decision-making, based on a number of ideological assumptions that remain controversial but nevertheless hegemonic in public policy, economic science and the regulatory paradigm of public management.[32] As Gutwirth and Stengers point out, however, modelling the claimed inevitability of this tragedy has enabled a more pointed discussion on the assumptions of the model, resulting in the 2009 Nobel Prize for Elinor Ostrom,[33] who demonstrated the untenable nature of those assumptions and thus paved the way for other ways of framing what Gutwirth and Stengers call *commoning*.

What is common to Ostrom and Gurtwirth and Stengers is their depiction of *commoning* as a third way of handling collective action or governing of shared interests, leaving both the market and the state behind as largely inadequate institutions to nourish, shelter and further common interests. What is interesting about Serge's concerns here is that he is rethinking law in the process, moving away from law as an indictment of the state or in instrument for market players. The law that he is seeking to unearth is a matter of slowly developing custom, a fabric of intricately woven vernacular norms that hold together a community of ancestors, future generations, land and all those dependent upon it. It is a *tricoterie* of norms that inform a practice that is forever in the process of becoming, hopefully sufficiently strong to serve as both a springboard for new ways of living together and as a fabric to protect old ways of what Amartya Sen

32 Florian K. Diekert, 'The tragedy of the commons from a game-theoretic perspective' (2012) 4 *Sustainability* 1776 <https://www.mdpi.com/2071-1050/4/8/1776> accessed 29 March 2023.

33 Elinor Ostrom, Governing the commons: The evolution of institutions for collective action (Cambridge University Press, 1990).

has called "beings and doings" or what Clifford Geertz called the "imaginative universe".[34]

Hardin's tragedy of the commons, the prisoners' dilemma it exemplifies and game theory more generally, had to frame humans in terms of what Latour coined as "the most provincial definition ever".[35] Hardin basically raised this definition to the level of a standard of conduct, collapsing the description of the way humans allegedly conduct themselves with how they should make up their mind. Gutwirth and Stengers note that Hardin's strategy of framing the commons is running out of steam, evoking "a return of the commons". The authors then set out to distinguish between different approaches to such a "return" and they do so by asking what different questions they would raise for lawyers. I will not move into a granular discussion but want to highlight that all these alternative approaches to the commons involve new ways of thinking property rights and their role in *commoning*. For instance, they extend from deploying intellectual rights in the context of open access and open source to Ostrom's lists of conditions for durable *commoning*, depicting property as a bundle of adjacent and overlapping rights instead of an absolute right to arbitrarily dispose of one's private property. Moreover, they include a discussion of rights claimed by indigenous people to protect their commons against the imposition of privative, exclusionary and monopolistic rights. Saliently, the authors point out that a bottom-up approach is key to *commoning*, asserting that imposing new types of property rights from above would miss the point. Their suggestion is, therefore, that a right to *commoning* should be articulated, developed and respected, that is, the right to institute a new type of jurisdiction that entails the power to foster, develop and change own norms as well as the power to adjudicate their violation. This should provide a new kind of countervailing power against (1) the right of the state to define the public interest that overrules the *acquis* of the commons and against (2) the right of the owner to dispose of their property as they see fit.

This right to *commoning* should be seen, Gutwirth and Stengers claim, as a new type of human right, to be provided, supported and protected by the state. They call on the legal imagination of lawyers to invent, articulate and defend such a right, giving it legal substance rather than leaving this up to the whims of states or private companies. Such legal imagination should also, according to the authors,

34 Amartya Sen, *Tanner lectures in human values: The standard of living* (Cambridge University Press, 1987) <https://www.cambridge.org/core/books/tanner-lectures-in-human-values/9EBCAD634275D7CE20C03B6AE8056B5B> accessed 29 March 2023; Amartya Sen, *Commodities and capabilities* (Oxford University Press, USA, 1999); Clifford Geertz, *Local knowledge* (Fontana Press, 2010).

35 Gutwirth & Stengers (n 24) 316.

endorse a law that is generative rather than extractive, local and contextual rather than global and abstract, built on actual and joint interaction rather than the imposed normativity that is typical of states and large corporations. They claim that a right to *commoning* cannot be "of the same kind" as a right to employment. I can imagine that the right to employment – other than that to *commoning* – is part and parcel of a capitalist economy, whereas their right to *commoning* supposedly is not. I am, however, not sure how it is "of a different kind" compared to *commoning*, if the state must guarantee its protection. A legal right has legal effect, otherwise it is a moral or a political right. So what is the legal effect of a human right to *commoning* and how does the fact that it is qualified as a human right connect with the idea of the commons as an assemblage (*agencement*) of humans, land and things? They write that the commons implies that those who share the commons can count on each other and thereby take the risk of depending on each other. They also quote Mattei and Capra, referring to an ecosystem as typical for such a commons, highlighting interdependence while asserting that an ecosystem lacks self-awareness, language, consciousness, culture and, as a result, democracy or justice. The good news is that an ecosystem lacks greed and dishonesty; the bad news is that it lacks what is constitutive for human rights: democracy and the rule of law. If the "otherness" of this new type of human right is situated in its lack of respect for or dependence on human agency, I am not sure what that means for *commoning*. Would those sharing and co-constituting a commons have rights to their own opinion on how best to serve the commons or would this depend on whatever those who share responsibility for the commons decide? Are democracy and the rule of law outdated concepts in the context of *commoning* or do we require these concepts to have effective meaning within the commons?

The *imbroglio* and the precarious nature of law and the rule of law

The right to *commoning* is meant to protect the generative nature of the commons. If I understand Serge well, the commons is not meant to be governed by static rules extracted from binding legal text but, as in the case of a justice of the peace, by a law that contributes to reconciliation, close to the local community and pragmatic as to its consequences.

For some reason, this reminds me of the restorative justice initiatives that both Serge and Paul De Hert opposed vehemently in the context of criminal justice.[36] This presents me with a challenge, because I don't think the right to commoning

36 Gutwirth & De Hert (n 7).

should be equated to restorative justice. What is key here is the idea of *commoning* as a matter of emergence and becoming, taking law seriously as something in the making or, rather, something that allows a commons to invent, shape, settle, change and follow its own rules, seen as generative of what is to be made possible. Part II of my doctorate thesis carries a motto of anthropologist Clifford Geertz, taken from his seminal *Local knowledge*,[37] which contains a part dedicated to law. The motto goes: "Law is part of a distinctive manner of imagining the real." I would couple that insight, based on longstanding research into the way "law" operates in non-state societies, with John Dewey's key insights into legal fictions. Dewey notes that "fictitious" should be understood in terms of its Latin root (*fingere*) which means creating or making, not feigning.[38] Both Geertz and Dewey emphasise (as Latour would) that the constructive nature of reality does not make it less real but more so. Imagination, artificiality or fiction do not equate to fantasy or the kind of confabulation that large language models (LLMs) such as ChatGPT exhibit. Imagining the world and the law are key to human flourishing and survival.

Serge and Isabelle Stengers introduce the notion of *precarity* to testify to the nature of a law that enables, safeguards, protects and preserves the *commoning* as a process that cannot be steered from above or before, as many will understand the rule of law in the context of the state. Instead, the path will be invented and developed while walking, staying on course while testing the grounds. And the grounds are an *imbroglio*,[39] a commons that is fabricated between humans, things, causes, stones, earth and all the organisms it hosts and feeds on. The *imbroglio* is made of different fabrics and it is created and transformed in the interstices that define the playroom,[40] requiring a law that is sensitive to the gaps, interruptions and incompatibilities of everyday life, perhaps not trying to overcome, rank or eradicate them but instead sustaining them, respecting the precarious nature of Neurath's boat,[41] while allowing it to become another boat in the process.

37 Clifford Geertz, 'Local knowledge: Fact and law in comparative perspective' in Clifford Geertz (ed), *Local knowledge. Further essays in interpretive anthropology* (Basic Books, 1983).

38 John Dewey, 'The historic background of corporate legal personality' (1926) 35 *The Yale Law Journal* 655-666n1.

39 The project with Stengers and Latour fostered an animated website under the heading of *imbroglio*; see, e.g., Isabelle Stengers, 'Ecology of practices and technology of belonging' (Imbroglio website, 2005), published as Isabelle Stengers, 'Introductory notes on an ecology of practices' (2005) 11 *Cultural Studies Review* 183 <https://epress.lib.uts.edu.au/journals/index.php/csrj/article/view/3459> accessed 5 April 2023.

40 On the concept of interstices in law, see Patrick Glenn, *Legal traditions of the world: Sustainable diversity in law* (Oxford University Press 2014).

41 Otto Neurath, 'Anti-Spengler', in Otto Neurath, Marie Neurath & Robert S. Cohen (eds), *Empiricism and sociology* (Springer Netherlands, 1973) <https://doi.org/10.1007/978-94-010-2525-6_6> accessed 5 April 2023.

Data: from "property" towards "commons"

Yves Poullet[*]

I am honoured to participate, together with all his other friends, in the redaction of this book offered to Serge Gutwirth at the moment of his retirement. Serge and I have shared so many nice moments around one (and often more than one) beer, notably but not only to exchange common or contrasted reflections on privacy issues or on the still-increasing protection of intellectual property (IP); we have together created the CPDP as it is today which knows a marvelous success. This article below aims to go forth with our thriving discussions, and especially with the article that Serge and Gloria have redacted in my own *liber amicorum*. In this regard, dear Serge, I quote your conclusion: "*le droit de propriété et l'information (ou des données) semblent tout simplement juridiquement incompatibles : si on veut tout simplement faire du droit, c'est impossible*"[1]. I totally share this point of view, and this modest contribution intends to enlarge the debate.

Hence, the first part of this contribution consists in analyzing how the 'Property' approach is defended by both the protagonists of the intellectual property field, and the data protection advocates. This first part also intends to show how this approach is leading to contradictory outcomes, that are incompatible with the societal and economic needs, and their imperatives in favor of data sharing. Then, the second part of the contribution uses an example of data collected through a connected object (*in casu*, a smart fridge), to illustrate how the Internet of Things creates data that can be used for different purposes and by numerous actors. Finally, the third part of this contribution intends to show how the Data Act, presently in discussion between the EU authorities,[2]

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1 Serge Gutwirth, Gloria González Fuster, 'L'éternel retour de la propriété des données: De l'insistance d'un mot d'ordre' in Cecile de Terwangne, Elise Degrave, Séverine Dusollier & Robert Queck (eds), *Laws, norms and freedoms in cyberspace*, *Liber Amicorum* Yves Poullet, (Larcier, 2019, pp. 117-141)..

2 Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), Brussels 23 February 2022, COM(2022)68

considers the legal nature of data as giving birth to a kind of "bundle of rights", according to the concept of commons developed by Ostrom's doctrine[3], which is very dear to my friend Serge[4]. The argument made by the present contribution is that the Data Act Proposal might indeed be perceived as an illustration of the notion of commons, which serves the development of innovation, while remaining respectful of the legitimate interests of the different actors at stake, and of their equilibrium.

I. From the 'proprietary' approach to its questioning by recent EU regulatory texts[5]

The 'proprietary' approach

As mentioned in the introduction, the 'proprietary' approach towards data has been developed by certain privacy advocates, to offer a better protection to data subjects and to their liberties. According to these authors, the so-called data subject, under the General Data Protection Regulation (GDPR)[6] vocabulary, would be the owner of his (or her) personal data. More precisely, the relationships between the data subject and data would have to be considered as a "property" right or as a right similar to IP, meaning that it would include the right to limit the use of personal data by third parties, and even to forbid it. In this context, the consent (and the correlative right to withdraw consent) might be viewed as

final. The European Parliament Internal Market and Consumer Protection (IMCO) committee adopted its opinion report on the draft Data Act on 24 January 2023.

3 See notably, Elinor Ostrom. 'Private and common property rights' in B. Bouckaert & G. De Geest (eds), *Encyclopedia of law and economics*, (Edward Elgar, 2000, p. 343)

4 Serge Gutwirth & Isabelle Stengers, « Le droit à l'épreuve de la résurgence des commons" (2016) *Revue Juridique de l'environnement*, 306-343. Also from Gutwirth, see: "Les communs: avec, malgré ou contre le droit?" (2022), 69132022/33, *Journal des tribunaux,* 33. It should be noted that the *Journal des tribunaux* devoted a whole special edition to the commons phenomenon, which highlights the relevance and interest of this concept nowadays.

5 We do not develop here the arguments in favour or in disfavour of the proprietary approach. The reader might see more developments in Yves Poullet, 'La propriété des données – Balade au "pays des merveilles à l'heure *Big data'*, in *Mélanges en l'honneur de Michel Vivant* (pp 339-356).(Lexis-Nexis 2020).

6 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ*. L. 119, 4/4/2016.

the right of the data subject to decide who is authorised to use their data.[7] The recent right established by the GDPR to require the portability of personal data is considered by these authors as supplementary evidence of the property of data subjects regarding their personal data. As Purtova has explained:

> Propertisation of personal data will respond to the individual preferences for Privacy as the individual has a chance to decide for himself to disclose data and benefit from it or to pay a higher price for e.g., mortgage in a more sensitive way than the current system does.[8]

Regarding now the collection of data and the exploitation of databases, the EU Directive on databases[9] created a *sui generis* right that benefits their makers by protecting the corresponding substantial investments made by these actors. Furthermore, the directive provides for the validity of technical and (to some extent) contractual means used by database-makers in order to protect their investments. Therefore, regarding databases and the individual elements that they contain, one might highlight that their "appropriation" can be eased by several protection schemes. This includes the protection offered by copyright and allied rights legislation (such as the *sui generis* right), but also by the contractual provisions imposed on users, or even the protections established through technical means, beyond the frontiers of the protection strictly offered by IP legislation. Therefore, contractual provisions might forbid or sanction any failure to comply with the limits placed on the use of protected works, while technical means (e.g., anticopying devices, watermarking technologies or digital rights management systems) are preventing "illicit" (or undesired) uses of protected works. On top of that, the circumvention of such technical protection measures is prohibited by the directive on copyright.[10] As demonstrated

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7 On that aspect, among other authors, see Gutwirth & Fuster (n 1) pp. 136ff, which is denying any analysis of the consent as argument in favour of the property approach and, in the same sense, our articles on the same topic.

8 Nadezha Purtova, Nadezhda, '*Property rights in personal data European perspective*' (Doctoral dissertation, University of Tilburg), Box Press.. In the same sense, notably: Corien Priens,, 'Property and privacy – European perspectives and the commodification of our identity', in L Guilbault & P. B Hugenholtz (eds), *The future of public domain*, (pp. 223-257) (Kluwer, 2006). For the rejection of the proprietary approach, see notably: Yann Padova,, 'Entre patrimonialité et injonction au partage', (2019) 155(1) & 156(2), *Lamy Droit de l'Immatériel* ; Thomas Hoeren , 'A new approach to data property?'(2019) *AMI*, 58 et 59

9 Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ. L. 77, 27 March 1996.

10 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on of certain aspects of copyright and related rights in the information society, *OJ. L.*

by Strowel,[11] rightsholders might jointly use three methods to reinforce the appropriation of works – and, in this way, of "data": IP legislation, technical protection devices or measures and contractual provisions.

Questioning of the "proprietary" approach

I am definitely not subscribing to that proprietary approach, for several reasons. In particular, regarding protected works and databases, it should be stressed that their appropriation through multiple ways (as described above) might go beyond the bounds of the protection strictly afforded by the intellectual property legislation. For instance, technical measures might hinder access to the content of a non-protected work or the use of a non-original piece of a generally original work. Such measures might also restrict access to and the use of a work by its legitimate users: for instance, in the case of a quotation or use for pedagogical purposes. Yet, on that point, it must be highlighted that the EU legislator has recently introduced a "correcting" principle in the Copyright in the Digital Single Market Directive.[12] In order to ensure a fair balance between rightsholders and legitimate users and to guarantee access to protected works for the latter, the directive clarifies that rightsholders should ensure "that the use of technological measures does not prevent the enjoyment of the exceptions and limitations" to copyright.[13] Furthermore, certain new exceptions to copyright

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167, 22 June 2001, p. 10. See, particularly, the recitals 47 and 48: "(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorized by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorized by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development …."

11 Alain Strowel, 'Les communs numériques modelés par les outils du droit privé'. (2022) 6913 *Journal des tribunaux*, 627.

12 Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ* L 130, 17/5/2019.

13 Directive 2019/790, Recital 7. The entire recital reads: "The protection of technological measures established in Directive 2001 remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightsholders

have been enacted, notably for research institutions, regarding data-mining.[14] In similar fashion, the European Court of Justice (ECJ) has recently decided that the *sui generis* right to a database could be used only in cases where there is a threat to the likelihood of amortisation of the investment that triggers the protection.[15] Finally, the Data Act Proposal, in its section 35, seeks to introduce a new limitation regarding the legal protection of databases:

> In order not to impede the exercise of the right of users to access and use data in accordance with Article 4 of this Regulation or the right to share such data with third parties in accordance with Article 5 of this Regulation, the *sui generis* right provided for in Article 7 of Directive 96/9/EC shall not apply to databases containing data obtained or generated through the use of a linked product or service.

All these advances are clearly denying the "absolute" character of IP (and allied rights) and point to the need to take other interests into account.

Regarding the assimilation of data protection to a type of property right, at least three main arguments against this approach should be stated precisely.[16] First, one might ask questions such as: "How to justify a property on data built outside of me, or even without me, and often unknown or incomprehensible to me, like certain medical analysis? Who is the author of these data?" Secondly, the extensive use of consent as a legal basis for processing personal data is counter-productive in respect of the protection of our liberties. This legitimises a "market" of personal data, characterised by an informational dissymmetry and libertarian capitalism, which increases the risk of discriminations and abuses, in particular due to the vulnerability of certain populations. Thirdly, this approach leaves aside the fact that data protection is only a mean, a tool, and not an end

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under Union law. Such protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and limitations provided for in this Directive. Rightsholders should have the opportunity to ensure that through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and limitations provided for in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject matter are made available to the public through on-demand services."

14 Directive 2019/790, article 3.

15 ECJ, 3 June 2021, *CV-Online Latvia SIA vs. Melons SIA*, C-672/19.

16 For more developments on this topic, see Yves Poullet, ',La « propriété » des données – Balade au « pays des merveilles » à l'heure du Big Data.' in *Mélanges en l'honneur de Michel Vivant* (pp. 339-356).(Lexis-Nexis 2020), and the authors quoted there.

in itself. In other words, the purpose of Acts such as the GDPR is to protect individuals' privacy – considered as the free development of each individual in a given society – in order to ensure their free and original expression, which is a necessary condition of a democratic society. Hence, data protection requires there to be a balance between different liberties and a need to consider, to a certain extent, the general interests of society.

Beyond these intrinsic defaults of the "property" approach in both fields (i.e., IP and data protection), the approach ought to emphasise that the concurrent application of these two approaches would lead to contradictions which might be prejudicial to the interests of all parties. For instance, the exercise of IP rights by the collector of personal data might limit the opportunities for third parties to benefit from the data collected in accordance with the legal protection of databases. In the same vein, the use of IP rights by the collector of personal data could to some extent prevent data subjects from accessing information regarding the "logic" behind the algorithmic processes and uses of their data. Conversely, the data subjects might oppose the lack (or withdrawal) of consent from the data collector to refuse (or stop) the use of their data. Therefore, it is important to harmonise the different interests at stake in the exploitation of data, in particular when it is collected autonomously by devices such as those developed in the context of the Internet of Things. But the two proprietary approaches discussed above cannot be reconciled when they are applied to data collected in a digital environment as they are going in contradictory directions: one is in favour of the data subject and the other benefits the collector of data. This observation highlights the need to find a balance between the two types of right; or, better still, to find an approach to these rights in which each considers the other. This equilibrium is all the more necessary due to the fact that developing the data market is in itself a necessity, which makes the data-sharing between actors present in data markets particularly important. That is the main aim of the Data Act, as I demonstrate later in this contribution, based on the second part of this article – which intends to illustrate, using the example of a smart fridge, the eco-system of data in the context of the Internet of Things, and to analyse the position of the different actors concerned with such data.

II. Eco-system of data: example of a smart fridge

From data to their usages

To discuss the eco-system of data, I propose the following use case: someone purchases the latest version of a smart fridge, sold by company A. Naturally, this smart fridge includes an operating system and the offering of (smart) services for this fridge requires the data that are collected through its use to be managed and exploited. Multiple scenarios might be imagined on this basis, implying different actors in each case. For instance, company A might perform all the tasks described, such as manufacturing and selling the product, developing the software, and managing the services associated with the fridge through data exploitation. Another contrary scenario would be that while undertaking A manufactures and sells the fridge, undertaking B develops its software, while undertaking C offers the services related to the exploitation of data collected by the fridge, based on appropriate contractual terms. A third scenario could be that while undertaking A manufactures and sells the fridge, undertaking B takes care of developing the software and managing the smart services based on data exploitation. In the result, the exploitation of the data collected by the fridge might be carried out by undertaking A, B or C. Furthermore, these three companies might either be subsidiaries or not. If this use case is analysed by using the legal categories proposed by the Data Act Proposal, the following developments could pertain.

The intelligent fridge is a "product", as defined by the article 2(2) of the Proposal:

> "product" means a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service and whose primary function is not the storing and processing of data.

Regarding the software managing the functioning of the intelligent fridge, this element would qualify as a "related service" under article 2(3) of the Proposal:

> "related service" means a digital service, including software, which is incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions.

Finally, turning to the notion of "data-holder", article 2(6) of the Data Act defines this concept as follows:

> "data holder" means a legal or natural person who has the right or obligation, in accordance with this Regulation, applicable Union law or national legislation implementing Union law, or in the case of non-personal data and through control of the technical design of the product and related services, the ability, to make available certain data.

In the above use case, and based on the three scenarios considered, the undertakings A, B and C could in turn qualify.

As regards, more precisely, the data that could be collected through the use of a smart fridge, one might consider the following elements: a camera records images of the content of the fridge systematically and regularly; a system of automated recognition determines the nature and potentially the brand of the food (or pharmaceuticals) placed in the fridge (e.g., using tags on the products and/or automated analysis of the images from the camera). Turning back to the legal categories proposed by the Data Act Proposal, these features of the smart fridge might qualify as a "virtual assistant". This concept is defined by article 2(4) as follows:

> "virtual assistants" means software that can process demands, tasks or questions including based on audio, written input, gestures or motions, and based on those demands, tasks or questions provides access their own and third party services or control their own and third party devices.

As a complementary remark, it should be noted that the user of the smart fridge might be either a natural or a legal person. For instance, this could be the case if a company offers the use of a smart fridge to its employees. In this regard, article 2(5) of the Data Act Proposal defines the notion of "user" as follows: "user" means a natural or legal person that owns, rents or leases a product or receives a service.

All the types of data discussed so far might be stored for some time if the final user wants to monitor the evolution of their consumption of the items contained in the smart fridge (e.g., to determine whether the weekly consumption of milk increases or is even). Furthermore, certain data about the functioning of the fridge might be kept automatically. For instance, this could be the case with the electricity consumption of the fridge, alongside the temperature inside and outside the fridge, to determine the optimal cooling intensity according to the

temperature of the room where the fridge is installed. Logs regarding remote access to and the use of "related services" offered with the fridge through a mobile app and a communication network, or the geo-location of the persons accessing it (and the precise moment of this access), might also be kept automatically by the fridge operating system.

On top of the operations of data collection and retention described above, one might also consider the processes of data related to the automated ordering of products. This type of ordering might be operated either by the fridge itself (e.g., by checking the imminent lack of certain products based on its programming by the purchaser of the fridge) or by a human intervention (e.g., through an order placed on the fridge's mobile app). In both cases, the orders are automatically transferred to a supermarket, which will pack the goods ordered and provide delivery details to the user of the fridge. This type of operation obviously implies the recording of traces regarding the orders, such as "What was ordered? Which customer is behind the order? When and where did the delivery take place? What was the amount of the order?".

Such a scenario definitively is not pure fiction, as this kind of "use case" regarding the Internet of Things already appears, and much more of these will quickly be taken to market. Based on the above description of the personal data potentially exploited in relation to the use of a smart fridge, I now analyse its ecosystem and potential uses. However, I must at the outset note that several uses of such data could be based on pseudonymised or even anonymised data.

Ecosystem and its stakeholders

On the one hand, it is quite clear that a great deal of the data collected will be of interest to the final user of the smart fridge. One might consider, from this perspective, the possibility of the user having a clear view of the contents of their fridge, the monitoring of electrical consumption and the corresponding environmental impact, and the related energy costs, the ease of ordering products and the control on the related expenses, etc. From this perspective, the possibility offered to final users of having a unique grocery supplier for most of the products automatically ordered by the smart fridge might be of interest, since it will be possible to negotiate discounts or other advantages with that supplier. On the other hand, all or part of the complementary services that make the fridge "smart" might be presented by the fridge supplier (or by any other service-provider) as separate services. In this case, all the additional services would probably have to be paid for in addition to the primary purchase of the fridge at a price that includes only the basic functionalities of a "regular" fridge. In this hypothesis, according to the terminology adopted by article 2(7) of the

Data Act Proposal, the provider of the additional services might be considered a "data recipient":

> "data recipient" means a legal or natural person, acting for purposes which are related to that person's trade, business, craft or profession, other than the user of a product or related service, to whom the data holder makes data available, including a third party following a request by the user to the data holder or in accordance with a legal obligation under Union law or national legislation implementing Union law.

The final user might also be a company, as shown above in the example of the company offering an opportunity for its employees to use smart fridges. In this case, the company might operate a certain surveillance of its employees through their use of their key access to the fridge (the products entered, the time of use of the fridge, the persons meeting around the fridge). It is quite clear that the employees have to be considered, in this context, as data subjects and must be protected under GDPR provisions. Their consent to see their data processed will not be considered as a valid legal basis because between employees and employer, consent is not considered as free, and it is not obvious that the "necessity of the contractual relationships" would legitimate that processing.

Regarding the stakeholders involved in the value chain of a smart fridge who might qualify as data recipients, numerous actors may obviously fall into this category. For instance, where the flow of data originating from the smart fridge is collected and processed by its supplier, the supplier will have to communicate (part of) this data to the supplier of the service that consists of the automatic ordering (and payment) of products that are missing in the fridge. Similarly, the supermarket that will take care of packaging the order, editing bills and delivering the products ordered will act as a data recipient that needs to interact with the upstream actors in the value chain. Incidentally, I note that the supermarket might also have an interest in using the dataflows and contractual relationships between the actors of the value chain to send advertisements to the final user of the smart fridge regarding specific products, based on their knowledge of the final user's consumption habits.

Turning back to the potential uses of the data by its collector, it is quite clear that the gathering of such diverse and abundant data and its potential aggregation with data from similar or related services create an opportunity to define the individual and/or collective profiles of the final users. For example, data collection and aggregation might lead to identifying any evolution in users' consumptions and tastes and the appearance or evolution of a medical situation such as an allergy to lactose or to seafood. Similarly, access to data regarding

food habits may lead to deductions about a final user's religion, membership of a specific ethnic group, etc. The socio-economic status of the final user (and its evolution through time) can also be easily deduced automatically by the fridge from the quality and price of the items ordered, as well as from the number of orders and their frequency. Furthermore, the evolution of the household can be deduced in the same way. Ultimately, data such as the location of the final user when they order via a mobile app, the moment when the user orders or even the frequency of the manual orders are all types of data that reveal the personal characteristics of the final user's identity and behaviour. Hence, it is quite clear that the collection of "trivial" data (as in the examples mentioned so far) has the potential to easily become "sensitive" data in the context of the services provided by the data collector or the data recipients – with all the attendant risks to individuals that come with the processing of their personal and sensitive data.

All such data, collected on a large scale, also give information to the supplier of the smart fridge (and potentially to all other service-providers) about the dynamics of the market and the relative power of its actors. For instance, the evolution of the market shares could be deduced from information consisting of the number of consumers placing orders in one supermarket or another; or ordering one specific product or another. In addition, the evolution of the market could also be foreseen, to some extent, through final user profiling, notably based on a similarity assessment between consumers, on the potential evolution of their tastes or on their responsiveness to targeted advertising. The use of these types of information is obviously important for the companies that can access and analyse them. Furthermore, in the hypothesis where these types of information would be communicated to rating agencies (in charge of the evaluation of the creditworthiness of market actors), the consequences could be severe. For example, such data processes might lead to accelerated bankruptcy or at least to a loss of confidence by the creditors of market actors.

Of course, to have the ability to infer all (or part of) the knowledge about final users or market players discussed above, both huge amounts of data and powerful data-processing technologies – such as machine learning – are needed. Regarding the provision of data-processing technologies and computing power, article 2(12) of the Data Act Proposal defines precisely the notion of "data processing service" as

> a digital service other than an online content service as defined in Article 2(5) of Regulation (EU) 2017/1128, provided to a customer, which enables on-demand administration and broad remote access to a scalable and elastic pool of shareable computing resources of a centralized, distributed or highly distributed nature.

In the light of this definition, another actor in the ecosystem should be pointed to: cloud service-providers. Indeed, cloud services might be of interest for storing the collected data and making it available to its users or to any other actors who are authorised to access it.

Finally, I need to highlight the role of one last type of actor: public authorities. Public-sector bodies, in the case of public emergencies,[17] might benefit from the data collected and stored to deal with these emergencies. For instance, in the case where certain edible goods or pharmaceutical drugs would be subject to withdrawal from the market, public-sector bodies might send an alert to the users who have such problematic products in their intelligent fridges, or require the data-holders to do so.

To summarise, I wish to underline the following elements:

- Even if certain companies would undoubtedly prefer to develop and offer, on their own, all of the potential services related to the products that they manufacture (i.e., vertical integration) as regards the Internet of Things, in most cases there would still be room for numerous actors to be involved in the ecosystems at stake and interactions between them would be necessary.
- The protections arising from IP could make this interaction difficult (or costly) for certain actors. On the one hand, the primary data-holder might consider that the data collected constitutes a database, protected (at least) by a *sui generis* right. Therefore, the data-holder might exclude all other actors from the benefits linked to the exploitation of data. On the other hand, it is quite easy for service-providers to invoke the incompatibility, or the proprietary nature, of their hardware and/or software systems to deny (or at least make it more difficult) final users the opportunity to switch to different service-providers (i.e., competitors). For instance, the supplier of the smart fridge software and associated services might exclude certain competing applications, arguing that they are not compatible with the operating system.
- The lack of technical and functional interoperability and the quasi-absence of standards in this sector create a high risk of making final users (and

17 These two concepts are defined by the Data Act as follows: "public sector body' means national, regional or local authorities of the Member States and bodies governed by public law of the Member States, or associations formed by one or more such authorities or one or more such bodies" (article 2(9)) and "public emergency' means an exceptional situation negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s)'. It is quite clear that the problem will be the inclination of the public authorities to extend the scope of these notions and to minimise the procedure for getting the proclamation of a state of emergency, as we discuss in Part III.

data recipients) prisoners of the product suppliers and the original service-providers. For instance, if the final user of a service consisting of the automatic ordering of food items seeks to switch to another service-provider, doing so might be difficult in the case where the original provider of the service refuses their competitor access to their platform (and therefore to the necessary data).

- The data collected by a smart fridge about its final users may seem trivial at first sight. But the variety and quantity of such data, together with the profiling capabilities offered by artificial intelligence (AI) technologies, imply that the data processes at stake will be quite sensitive to final users and companies. Even if natural persons are already protected by the GDPR, companies do not benefit from any similar protection, apart from competition law.
- Regarding the Internet of Things, the products and services offered are numerous and will keep on evolving, based on the needs and desires of final users and considering technical progress. Yet the complexity and opacity of the eco-systems surrounding such products and services are definitively problematic.

These elements demonstrate the absolute need for a regulatory framework that is able to manage the balance between the different actors discussed above in order to protect their respective legitimate interests but also to ensure the development of innovative services. This was precisely the main aim of the European Commission in its Data Act Proposal. The commission developed this proposal in response to the risks highlighted above, which were raised using data generated by the Internet of Things.

In the third part of this contribution, the concept of the "commons" is proposed as an explanation of the solution provided by the Data Act Proposal. This concept, launched by Ostrom[18] and since used by many other authors, might be useful to understanding the Data Act solution. This approach deviates from the model advocated by the proprietary approach proponents; it conceives of the legal nature of data as a "bundle of rights", as I explain below. Then I analyse the parallelism between this concept of commons and the framework sketched by the European Commission's Proposal.

18 Ostrom (n 3).

III.. About Data Act and commons

From commons …

As Isabelle Stengers and Serge wrote:

> C'est en 1990 qu'Elinor Ostrom publie son désormais célèbre: 'Governing the Commons'.[19] … Le titre même est un démenti au modèle du propriétaire de Hardin.[20] Les commons, contrairement à son pré, ne définissaient pas la ressource commune comme d' « accès libre » ni les commoners, comme un ensemble d'individus répondant à la norme idéale de l'homo oeconomicus, chacun animé par le souci exclusif de tirer le maximum de ce à quoi il a accès. La gouvernance, en effet, implique une « entente » et un souci partagé – ne pas détruire la ressource dont chacun dépend.[21] Il n'y a pas de « dilemme du prisonnier », qui vaille, les commoners agissent ensemble, organisent et produisent du droit vernaculaire qui exprime cette entente de façon contraignante.[22]

Definitively, Serge and Isabelle's approach considers the commons as a "bottom-up" alliance of individuals, driven by an altruistic will (or at least by a collective interest). In their view, these individuals self-regulate and define themselves the governance needed to achieve a common goal, considering their different interests. In my opinion, the original approach proposed by Ostrom seems to be more "open", since she not only discusses the rules established privately, on their own, by limited collectivities, but also the governance and adoption of rules by public entities such as states. What is important in her approach is the fact that these rules, whether issued by private or public entities, are defining institutional arrangements applicable to "rival resources" which are difficult to exclude. As Strowel points out, "l'intervention du législateur peut s'avérer décisive pour leur éclosion et développement."[23] Some authors, probably

19 Elinor Ostrom , *La gouvernance des biens communs: Pour une nouvelle approche des ressources naturelles*. (De Boeck,2010); see also, Erika Schlager & Elinor Ostrom, 'Property rights and natural resources: A conceptual analysis' (1992) 68 *Law and Economics*, 249-269; Elina Ostrom& Hess, Private and common property rights', (*Workshop in Political Theory and Policy Analysis*, 2008, 11 Indiana University).

20 GarettHardin, , 'The tragedy of commons' (1968) 162 *Science*, 1243-1248.

21 Peter Linebaugh, P.(2009), *The Magna Carta manifesto – liberties and commons for all*, (University of California Press, 2009).

22 Serge Gutwirth, & Isabelle Stengers, 'Le droit à l'épreuve de la résurgence des commons ' (2016), 2, *Revue Juridique de l'environnement* 315.

23 Strowel (n 11) p. 628. Strowel's reflection is even more justified in the case of the Data

including Serge, will regret the broadness of Ostrom's approach, to the extent that "mandatory commons" originating with public actors might not have the same "soul" and capacity to evolve as their private (i.e., voluntary) counterparts.

In any case, the essence of the commons doctrine is precisely the refusal of the property approach. A resource qualified as a common – in the context of this contribution, the data generated by the Internet of Things devices and services – belongs to nobody or, to be more accurate, it does not belong to a unique owner. Instead, such a resource constitutes a "bundle of rights" in the hands of different actors. The partition of different rights between different actors by their private or public enactments aims, on the one hand, to ensure a legitimate balance of the different interests claimed by each actor; on the other hand, this partition of rights also aims to maximise the value of the commons. The main idea behind the concept of commons is to attribute to different interrelated actors different rights to a common pool resource[24] such as the data collected. The principle is to recognise different rights that pertain to the same "good" (i.e., the data). In her work, Ostrom distinguishes five different types of right that pertain to commons:

- of access;
- to use and to subtract certain resources from the good;
- to manage the use of the good and to forbid certain uses;
- to exclude specific actors; and, finally,
- to alienate the good, either totally or partially, either temporarily or definitively.

Hence, contrary to the proprietary approach, there is no unique person who owns all the rights to a particular resource. In the case of data, the commons approach would imply that data-holders ought to consider fully the different rights afforded to other actors in the ecosystem. To achieve this, the commons require the adoption and governance of rules to be enacted by a collective discussion or, as in the case of the Data Act Proposal, in the context of a legislative framework.

Act Proposal, which arose after the failure of an attempt to self-regulate data sharing (e.g., with the so-called SWIPO (Switching Cloud Providers and Porting Data) code of conduct).

24 Regarding "common-pool resources", Ostrom evokes other examples linked with the environment, like drills, pastures, irrigation systems or fishing grounds. Creative commons is also invoked for explaining the way by which the exploitation of a work might be shared by different actors, in full respect of the authors' right. See, about "creative commons", the following articles: Gutwirth & Stengers (n 22); Strowel (n 11); and Séverine Dusollier, 'The master's house: Creative Commons v. Copyright' (2006) *Columbia Journal of Law and the Arts*, 271, 293.

The question is, then: to what extent could the provisions of the Data Act Proposal be interpreted as consecrating as commons, at least to a certain extent, data collected through Internet of Things technologies? To answer this complex question, I return to the use case developed in the second part of this contribution. But first I turn to the objectives of the Data Act Proposal as enunciated in the explanatory memorandum of the text:

> The proposal will help achieve the broader policy goals of ensuring EU businesses across all sectors are in a position to innovate and compete, effectively empowering individuals with respect to their data, and better equipping businesses and public sector bodies with a proportionate and predictable mechanism to tackle major policy and societal challenges, including public emergencies and other exceptional situations. Businesses will be able to easily switch their data and other digital assets between competing providers of cloud and other data processing services. Data sharing within and between sectors of the economy requires an interoperability framework of procedural and legislative measures to enhance trust and improve efficiency.[25] In this context, the Commission puts forward the proposed Data Act with the aim of ensuring fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data.[26]

This quotation of the European Commission constitutes a clear assertion of its will to foster data-sharing as a way of permitting, at the same time, the exploitation of the value of the data collected and the creation of innovative services by companies using the data collected or evolving into the ecosystem of the Internet of Things. It is also an assertion of the commission's will to protect the rights and interests of data subjects, consumers and companies from the risks they are incurring due to the information dissymmetry between them and data-holders.[27] The solution proposed in the Data Act Proposal intends to define and impose governance rules which allocate certain limited rights to different

25 Explanatory memorandum of the Proposal, p. 1

26 Explanatory memorandum of the Proposal (n 25).

27 This wish to ensure a balance between the development of economy and the protection of the interests listed in the text is also asserted by the President of the European Commission: 'L'Europe doit «équilibrer le flux et l'utilisation des données tout en préservant un haut degré de protection de la vie privée, de sécurité, de sûreté et d'éthique'. See Ursula von der Leyen, *Une Union plus ambitieuse – Mon programme pour l'Europe, Orientations politiques pour la prochaine Commission européenne 2019-2024* (2019).

actors. That partition is deemed to ensure that the different interests at stake are respected, even if they might lead to conflicts between actors:[28]

> In this context, the Commission puts forward the proposed Data Act with the aim of ensuring fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data. … Ensuring greater balance in the distribution of the value from data in step with the new wave of non-personal industrial data and the proliferation of products connected to the Internet of Things means there is enormous potential for boosting a sustainable data economy in Europe ... For this reason, the Data Act is a key pillar … in the data strategy. ... In particular, it contributes to the creation of a cross-sectoral governance framework for data access and use by legislating on matters that affect relations between data economy actors, in order to provide incentives for horizontal data sharing across sectors.[29]

The economic development objectives, as they are highlighted by the European Commission itself, may be achieved only by creating a legal framework that fosters and allows for data-sharing. This the framework should do in a way that is respectful of the legitimate interests of each of the actors in the ecosystem and, therefore, by balancing their respective rights. In other words, the Data Act asserts the nature of the commons of data – at least, that is, regarding the scope of the Proposal, which is limited to the data collected through connected devices. In order to achieve its goals, the European Commission does not hesitate to limit certain actors' prerogatives or to create other new rights, as clearly asserted in the Proposal, as it describes the need to give new rights to the consumer in order to ensure their freedom of choice. At the same time, it asserts the need to limit certain rights of the data-holder or of the manufacturer:

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28 See in this sense, the following recitals of the Data Act Proposal: 'In order to respond to the needs of the digital economy and to remove barriers to a well-functioning internal market for data, it is necessary to lay down a harmonized framework specifying who, other than the manufacturer or other data holder is entitled to access the data generated by products or related services, under which conditions and on what basis' (Recital 4); and: 'Data generation is the result of the actions of at least two actors, the designer or manufacturer of a product and the user of that product. It gives rise to questions of fairness in the digital economy, because the data recorded by such products or related services are an important input for aftermarket, ancillary and other services. In order to realise the important economic benefits of data as a non-rival good for the economy and society, a general approach to assigning access and usage rights on data is preferable to awarding exclusive rights of access and use' (Recital 6).

29 Explanatory memorandum of the Proposal (n 25) pp. 1 and 2.

> The Internet of Things data access right for third parties upon the user's request limits the freedom to conduct a business and the freedom of contract of the manufacturer or designer of a product or related service. The limitation is justified in order to enhance consumer protection, in particular to promote consumer's economic interests. The manufacturer or designer of a product or related service typically has exclusive control over the use of data generated by the use of a product or related service, which contributes to lock-in effects and hinders market entry for players offering aftermarket services. The Internet of Things data access right addresses this situation by further empowering consumers using products or related services to meaningfully control how the data generated by their use of the product or related service is used and enabling innovation by more market players. Consumers can therefore benefit from a wider choice in aftermarket services, such as repair and maintenance, and no longer depend on only the manufacturer's services. The proposal facilitates the portability of the user's data to third parties and thereby allows for a competitive offer of aftermarket services, as well as broader data-based innovation and the development of products or services unrelated to those initially purchased or subscribed to by the user.[30]

… to the Data Act

I now analyse the provisions of the Proposal in the light of the commons approach. The first provision to be mentioned definitively is the section 35 already quoted:

> In order not to impede the exercise of the right of users to access and use data in accordance with Article 4 of this Regulation or the right to share such data with third parties in accordance with Article 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC shall not apply to databases containing data obtained or generated through the use of a linked product or service.

30 Explanatory memorandum of the Proposal (n 25) p. 13. See, in the same sense, the following paragraph: "The limitation of the manufacturer's or designer's freedom to contract and conduct a business is proportionate and mitigated by the unaffected ability of the manufacturer or designer to also use the data, insofar it is in line with the applicable legislation and the agreement with the user. Furthermore, the manufacturer or designer will also benefit from the right to require compensation for enabling third party access. The access right is without prejudice to the existing access and portability rights for data subjects under the GDPR. Additional safeguards ensure a proportionate use of the data by the third party" (Explanatory memorandum of the Proposal (n 25) p. 13).

This provision is essential. It denies any "proprietary" rights to the data-holder that would have been deduced from the reference to the "*sui generis*" right established by the 1996 Directive on Databases; and it explains how the user will have the right to control and impose certain uses on the databases.

As regards the user specifically, the text establishes new rights for them. Article 3.1 requires that products and related services (e.g., the possibility linked to a smart fridge of ordering goods automatically) must be designed and manufactured "in such a manner that data generated by their use are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user".[31] In addition, article 3.2 adds to the list of information to be delivered to the user, under articles 13 and 14 of the GDPR, additional details that are quite important considering the opacity of the functioning of the Internet of Things products and services and their ecosystems.[32] At this stage, I note that this obligation to provide information not only benefits individuals, as in the case of the GDPR, but also legal persons. This increase in information beneficiaries, vis-à-vis the GDPR, can be explained by the risks incurred (especially by SMEs) that are discussed above and as spelt out in article 4.6:

> The data holder shall not use such data generated by the use of the product or related service to derive insights about the economic situation, assets and production methods of or the use by the user that could undermine the commercial position of the user in the markets in which the user is active.

31 See, however, the Explanatory memorandum of the Proposal (n 25) p. 16, which discusses the following restrictions regarding data to be made accessible to the user: "Data, which represent the digitization of the user's actions and events concerning the user's use of the product, should therefore be accessible to the user, while information obtained or inferred from such data, where lawfully held, should not be considered to fall within the scope of this Regulation'.

32 'Before concluding a contract for the purchase, rent or lease of a product or a related service, at least the following information shall be provided to the user, in a clear and comprehensible format: (a) the nature and volume of the data likely to be generated by the use of the product or related service; (b) whether the data is likely to be generated continuously and in real-time; (c) how the user may access those data; (d) whether the manufacturer supplying the product or the service provider providing the related service intends to use the data itself or allow a third party to use the data and, if so, the purposes for which those data will be used; (e) whether the seller, renter or lessor is the data holder and, if not, the identity of the data holder, such as its trading name and the geographical address at which it is established; (f) the means of communication which enable the user to contact the data holder quickly and communicate with that data holder efficiently; (g) how the user may request that the data are shared with a third-party; …'.

I agree with this inclusion of legal persons in the group of beneficiaries of information, although it should be noted that the protection of legal persons is justified by different grounds and reasons than those that apply to the protection of individuals (freedom to conduct a business vs. privacy and personal data protection). Yet this reasoning does not exclude the interest of considering that certain rights, as enacted by the data-protection legislation (such as the right of access or the right to oppose), might be extended to legal persons when there is a dissymmetry between the companies at stake. This dissymmetry creates a (likely) risk linked to the disequilibrium of information – for instance, in case of SMEs being confronted by large platforms, banks or insurance companies.

Precisely on that point, I note that article 4 affords users, be they physical or legal persons, the right to access their data generated by using the product, without undue delay, free of charge, of the same quality as that available to the data-holder and, where applicable, continuously and in real time. This right of access is to be combined, to a certain extent, with the right to use the data:

> The user should be free to use the data for any lawful purpose. This includes providing the data the user has received exercising the right under this Regulation to a third party offering an aftermarket service that may be in competition with a service provided by the data holder, or to instruct the data holder to do so.[33]

Regarding these user's rights, additional elements have to be mentioned: first, in relation to the data that can be accessed, Recital 17 excludes the "derivative data" that result from any software process. It is quite clear that the Proposal seeks to protect the added-value processes that data-holders might use to infer new information based on the data originally collected. The same concern justifies the wording of article 4.4:

> The user shall not use the data obtained pursuant to a request referred to in paragraph 1 to develop a product that competes with the product from which the data originate.

Secondly, trade secrets cannot be used as an argument to prevent a user from exercising their right of access. Thirdly, when the user is a legal person, the right of access to data related to natural persons is limited to cases in which a legal basis permits the processing of the data, based on the rules imposed by the GDPR.

33 Recital 28.

The Proposal contains other limitations on the prerogatives of the data-holders and data-recipients, to the benefit of users. For instance, article 5 imposes an obligation on data-holders (with the exception of micro or small enterprises) to share data with designated third parties at the request of users "without undue delay, free of charge to the user, of the same quality as is available to the data holder and, where applicable, continuously and in real-time". The same article correspondingly forbids data-holders to share such data without a legal basis under article 6. 1 GDPR (consent, necessity of the contract or legitimate interest).[34] Furthermore, as regards the communication of data to third parties, the Proposal elaborates on several safeguards in order not to harm the respective interests of other actors. For instance, the Data Act excludes the so called "gatekeepers" (the very large platforms as defined by the Digital Markets Act[35]) from the potential beneficiaries of data. These gatekeepers are forbidden to solicit users or data-holders to make the data collected available to them. In addition, pursuant article 6.1, any

> third party shall process the data made available to it pursuant to Article 5 only for the purposes and under the conditions agreed with the user, and subject to the rights of the data subject insofar as personal data are concerned and shall delete the data when they are no longer necessary for the agreed purpose.

In addition, based on article 6.2(*c*) and (*f*), third parties cannot use the data to compete with the products which generate the data accessed (i.e., in this way protecting the manufacturer or the first data-holder); nor can they make available the data received to another third party. Finally, under articles 8.3 and 8.4, no discrimination may take place between comparable categories of data-recipient, and hence a data-holder must not make data available exclusively to a data-recipient, unless the user requests them to do so. In the use case of the smart fridge, this means that the data-holder is not allowed to give an exclusive advantage to one supermarket over another where automated orders are placed by the fridge itself.

Over and above all these provisions, two more essential requirements imposed by the text to ensure data sharing should be discussed briefly. The first has already been touched upon. According to article 35 of the Proposal, there should be a limitation of the *sui generis* right consecrated by Directive 96/9 on the protection of databases …

34 Article 5.6 of the proposal.

35 Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L265, 12/10/2022.

> in order to eliminate the risk that holders of data in databases obtained or generated by means of physical components, such as sensors, of a connected product and a related service claim the *sui generis* right under Article 7 … and in so doing hinder the effective exercise of the right of users to access and use data and the right to share data with third parties under this Regulation.

The second one is even more important, pursuing as it does the same objective. Article 23 reads:

> Providers of a data processing service shall take the measures provided for in Articles 24, 25 and 26 to ensure that customers of their service can switch to another data processing service, covering the same service type, which is provided by a different service provider. In particular, providers of data processing service shall remove commercial, technical, contractual and organizational obstacles, which inhibit customers from terminating their contracts, concluding new agreements with other providers of comparable data-processing services (including cloud services) and porting data, applications or other digital assets. These operations require what the Proposal calls "functional interoperability".

This type of interoperability is defined in article 2(19) as "the ability of two or more data spaces or communication networks, systems, products, applications, or components to exchange and use data in order to perform their functions". It is interesting to note that an entire chapter of the Proposal, including articles 28 and those following it, is dedicated to different aspects of the concept of functional interoperability. As Recital 72 states:

> This Regulation aims to facilitate switching between data processing services, which encompasses all conditions and actions that are necessary for a customer to terminate a contractual agreement of a data processing service, to conclude one or multiple new contracts with different providers of data processing services, to port all its digital assets, including data, to the concerned other providers and to continue to use them in the new environment while benefitting from functional equivalence.[36]

36 The functional interoperability required by the Data Act Proposal is broader than the portability right created by Article 20 of the GDPR, which is limited to the sole data "provided" by the data subject. The interoperability concept developed by the Data Act encompasses all elements needed for the good functioning of the system: according to Recital 72, 'Digital assets refer to elements in digital format for which the customer has the right of use, including data, applications, virtual machines and other manifestations

In order to facilitate this set of provisions and ensure that they are respected, the text creates the possibility for the EU to define "essential requirements" and "common specifications" and to promote the voluntary (and even mandatory)[37] adoption of standards.[38]

Finally, according to the "commons" doctrine, the public interest must be taken into account. This consideration leads the European Commission to foresee the possibility of public authorities' requiring data-holders and data-recipients to make the data collected available to the public sector.[39] Nonetheless, the commission clearly requires such a prerogative to be limited in its Proposal. In this respect, Recital 61 provides that

> [a] proportionate, limited and predictable framework at Union level is necessary for the making available of data by data holders, in cases of exceptional needs, to public sector bodies and to Union institution, agencies or bodies both to ensure legal certainty and to minimize the administrative burdens placed on

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of virtualisation technologies, such as containers. Functional equivalence means the maintenance of a minimum level of functionality of a service after switching and, should be deemed technically feasible whenever both the originating and the destination data processing services cover (in part or in whole) the same service type. Meta-data, generated by the customer's use of a service, should also be portable pursuant to this regulation's provisions on switching'. Regarding the automated orders of products in the smart fridge use case, Recital 80 reads: 'To promote the interoperability of smart contracts in data sharing applications, it is necessary to lay down essential requirements for smart contracts for professionals who create smart contracts for others or integrate such smart contracts in applications that support the implementation of agreements for sharing data. In order to facilitate the conformity of such smart contracts with those essential requirements, …'.

37 By requiring, in a first step, the intervention of the EU standardisation organisations; and by adopting binding delegated acts on that basis in a second step.

38 See Recital 80 and article 30(4) regarding the advantages granted to the actors who are respecting the standards: 'it is necessary to provide for a presumption of conformity for smart contracts that meet harmonised standards or parts thereof in accordance with Regulation (EU) No 1025/2012 of the European Parliament and of the Council'.

39 This trend to see the public authorities not only as provider of data at the benefit of the economy according with the Open data directive (last version in 2019) but, henceforth, as beneficiary of data held by private sector, what the European Commission qualifies as "reverse PSI" (Public Sector Information), is pursued. The Data Governance Act recently adopted (Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) contains provisions about what is qualified as "data altruism". Data altruism is about individuals and companies giving their consent or permission to make available data that they generate – voluntarily and without reward – to be used in the public interest. Such data has enormous potential to advance research and develop better products and services, including in the fields of public health, environment and mobility.

> businesses. To this end, data requests by public sector bodies and by Union institution, agencies and bodies to data holders should be transparent and proportionate in terms of their scope of content and their granularity. The purpose of the request and the intended use of the data requested should be specific and clearly explained, while allowing appropriate flexibility for the requesting entity to perform its tasks in the public interest. The request should also respect the legitimate interests of the businesses to whom the request is made. The burden on data holders should be minimised by obliging requesting entities to respect the once-only principle, which prevents the same data from being requested more than once by more than one public sector body or Union institution, agency or body where those data are needed to respond to a public emergency. To ensure transparency, data requests made by public sector bodies and by Union institutions, agencies or bodies should be made public without undue delay by the entity requesting the data and online public availability of all requests justified by a public emergency should be ensured.[40]

On this topic, I note, however, that the EDPS and the EDPB[41] have drawn attention to the fact that the conditions foreseen by the Data Act Proposal regarding access to data by public bodies are not sufficient, considering the GDPR requirements. In this regard, the EDPB and the EDPS recommended, among other things, that the legal basis for processing personal data should be "adequately accessible and foreseeable and formulated with sufficient precision to enable individuals to understand its scope".[42] In particular, the concepts "emergency" and "exceptional" should be defined more narrowly. Similarly, the scope and manner of the exercise of the power to request access to data by the public sector should be more clearly defined so as to protect individuals against arbitrary interference. In the smart fridge use case, for instance, it would be very difficult for public authorities to have access to the data generated by the fridge, owing to the lack of proportionality of the public health justification advanced.

Conclusions

The Data Act Proposal clearly demonstrates how the EU intends to foreclose on the individualistic proprietary approach defended by several actors, such as

40 Recital 61.

41 EDPB/EDPS, *Joint opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)*, (2022).

42 EDPB/EDPS (n 41) p. 3.

some data-collectors and privacy advocates, at least regarding the Internet of Things ecosystems. But this text also demonstrates how the EU seeks to impose, by regulation, a design (or eco-functioning) that takes into account the dangers of unregulated uses of data and the legitimate interests (including economic) of the actors in the ecosystems at stake. This approach justifies the substitution of a right of ownership with rights of access, of limited use and of control and to allow or refuse the communication of data to third parties. Each of these rights might be exercised by one or more of the different actors involved in the functioning of the ecosystem of the Internet of Things: users, data-holders, data-recipients and public authorities. To explain and justify that partition of rights – or, rather, that "bundle of rights" – commons' doctrine indeed seems to be[43] an adequate way, one that recognises the added value of data to our economy, our individual liberties and our society.[44] "Data-sharing" or, rather, "sharing the data", is the natural consequence of commons' doctrine. On this point, it is quite clear that the techno-legal approach proposed by the text is necessary in order to offer functional interoperability between actors' systems and devices. This techno-legal approach is also needed to ensure, as far as possible, data subjects' direct and user-friendly access to data generated by the functioning of their "products".

Furthermore, to achieve that goal, it is noticeable that only a transverse legal approach which goes beyond the traditional division between branches of law is possible. The Data Act Proposal might not be analysed from one sole branch of law or point of view. It mixes not only contract law, IP law, administrative law and human rights law, but also competition law and legislation aimed at standardisation. It also suggests that distinctions such as those traditionally made between personal and non-personal data, between data related to individuals and data related to legal persons or between data held by public and private actors must be re-evaluated. And that this re-evaluation should be made in the context of an increasingly unbalanced informational power with risks linked to the technical dependency of users vis-à-vis the technical devices offered to them by the Internet of Things.

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43 ECJ (n 15). Compare with the text of the Explanatory Memorandum of the Data Act Proposal: 'In order to realise the considerable economic benefits that data, as a 'non-rival good', brings to the economy and society, a general approach to the allocation of data access and use rights is preferable to the granting of exclusive access and use rights' (§ 6).

44 See ECJ (n 15). See also the Recital 6 of the Data Act Proposal: 'In order to realise the important economic benefits of data as a non-rival good for the economy and society, a general approach to assigning access and usage rights on data is preferable to awarding exclusive rights of access and use'.

Les biens communs numériques. Résister à la prédation

Karim Benyekhlef[*] *et Aurore Troussel*[**]

Introduction

Serge Gutwirth s'est intéressé très tôt aux dimensions juridiques et politiques des communs.[1] Il a reconnu, avec d'autres, les difficultés d'assurer aux communs une véritable résurgence juridique au regard de la prégnance des intérêts propriétaires dans l'imaginaire des démocraties libérales. Examinons succinctement le cas des communs numériques qui se heurtent également à cet imaginaire, nourri et conforté bien entendu par les intérêts capitalistes, en premier lieu ceux des grandes plateformes d'Internet au cœur d'un régime de prédation des communs leur assurant une rente permanente de l'intangible.

La préposition latine « *cum* » aide à comprendre l'origine juridique et philosophique des communs : « *cum* » signifie « avec » ou « ensemble » et est la racine de *communia*, *communis* et *communitas*, qui sont la conjonction de *cum* et de « *munus* ».[2] « *Munus* » est un mot qui renvoie à la notion d'échange au sens large, et qui, au-delà d'une approche commerciale, relève d'un office, un service, un don, un présent, un devoir.[3] Ainsi, le mot « *communitas* » évoque une réciprocité désintéressée, un « esprit de société » qui supplante la logique de l'échange marchand et du modèle de marché. Le monde gréco-romain envisageait les communs comme une source de charges et de devoirs, ce qui suppose l'existence d'un réseau d'obligations mutuelles qui soient respectées

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1 Lire notamment Serge Gutwirth et Isabelle Stengers, 'Le droit à l'épreuve de la résurgence des commons' (2016) 2 Rev. jur. env., 306-343 ; et Serge Gutwirth, 'Quel(s) droit(s) pour quel(s) commun(s)?' (2018) 2 R.I.E.J. 83-107.

2 Marie Cornu et autres, *Dictionnaire des biens communs* (PUF 2017) 177-185.

3 Ibid.

par tous les membres de la communauté.[4] Il convient aussi de rappeler que les *Institutes de Justinien*, manuel d'enseignement du droit romain antique faisant partie du *Corpus juris civilis*, expliquaient que les « *res communes* » – les « choses publiques » – n'étaient pas susceptibles d'appropriation en raison de leur nature.[5] Ces présupposés philosophiques et juridiques gréco-romains se retrouvent dans la notion actuelle des communs.

Plus tard, les travaux de Paul Samuelson qui dressent une typologie des biens en fonction de critères d'exclusion et d'accès permettront de distinguer les biens communs des autres biens.[6] Selon Samuelson, les biens communs sont des biens rivaux (l'usage d'un bien par un individu réduit la quantité disponible de biens pour les autres individus) et non exclusifs, c'est-à-dire accessibles à tous.[7] Allant plus loin dans la réflexion sur les communs, le biologiste et écologue Garett Hardin développa la thèse de la « tragédie des communs » en 1968 pour dénoncer la surexploitation des ressources accessibles à tous. Hardin énonçait qu'un recours à la propriété privée ou à une réglementation publique était nécessaire pour gérer ces ressources, faute de quoi celles-ci seraient inévitablement surexploitées et vouées à disparaître.[8] Selon Hardin, pour assurer une exploitation durable des ressources communes, il est nécessaire de confier leur exploitation exclusive à une institution publique centralisée ou de privatiser intégralement ces ressources, éliminant ainsi l'hypothèse d'une gestion collective des ressources qui soit efficace.[9] Toutefois, cette thèse sera remise en cause par des travaux conduits sur les communs à partir des années 1980. Une œuvre fondamentale pour la théorie des communs est celle d'Edward Palmer Thompson, *Whigs and Hunters*, publiée en 1975. Dans ce livre, Thompson revient sur le mouvement des enclosures qui a eu lieu en Angleterre et en France aux XVI^e^ et XVII^e^ siècles, mouvement ayant conduit à l'accaparement des terres communales abandonnées par des propriétaires.[10] Ce mouvement a atteint son plus haut degré de développement avec le *Black Act*, adopté par le Parlement anglais en 1723, qui prévoit la peine capitale pour tout acte de

4 Ibid.

5 Lisiane Lomazzi et Marc Menard, 'Où en est la théorie du/des commun(s) ? Vers une économie politique culturelle' (2018) 12(1) Tic&société 69-93.

6 Paul A Samuelson, 'The pure theory of public expenditure' (1954) 36(4) The Review of Economics and Statistics 387-389.

7 Voir Lomazzi et Menard (n 5).

8 Francesca Cominelli et autres, *Dictionnaire des biens communs* (Au regard des sciences sociales 2021).

9 Garrett Hardin, 'The tragedy of the commons' (1968) 162(38) Science 1243-1248.

10 Henri Verdier et Charles Murciano, 'Les communs numériques, socle d'une nouvelle économie politique' (2017) 17(5) Esprit 132-145.

braconnage de cerfs dans les forêts royales.[11] Dans son analyse du mouvement des enclosures, Thompson explique que le droit n'est pas qu'un instrument de domination, mais qu'il peut aussi servir les intérêts des plus humbles au risque, sinon, pour la classe dominante de renoncer au puissant pouvoir de légitimation du droit.[12] Ainsi, les luttes sociales ayant eu lieu dans l'Angleterre du XVIII^e^ siècle montrent qu'il est possible, par la négociation et grâce au droit, de créer une forme de droit commun, défendue par le peuple, qui serait le fruit d'un compromis entre dominants et dominés.[13] Bien que le travail de Thompson ne porte pas directement sur les communs, celui-ci a éclairé les mécanismes de gouvernance à l'œuvre concernant les biens communs et a ouvert la voie à de futures recherches sur la gestion des ressources communes. Un renouveau de la pensée sur les communs a eu lieu dans les années 1980 aux États-Unis avec une remise en question de la théorie de la tragédie des communs de Hardin. Ce nouveau mouvement des communs est défini par David Bollier comme étant un « ensemble éclectique de mobilisations qui visent à protéger les créations de la nature et de la société que nous partageons en commun ».[14]

Un événement important pour le mouvement des communs est le lancement de la conférence d'Anapolis en 1983 par Elinor Ostrom et l'école de Bloomington qui proposeront une alternative à la vision malthusienne de Hardin.[15] Dans un article fondateur, en 1990, Ostrom adopte une approche institutionnelle et interdisciplinaire lorsqu'elle étudie les communs, dont la gestion et la gouvernance reposent sur la relation entre individu et collectif.[16] Ostrom étend la théorie des communs à une analyse des enjeux de gouvernance,[17] et

11 Edward Palmer Thompson, *La guerre des forêts : luttes sociales dans l'Angleterre du XVIII^e^ siècle* (La Découverte 2014).

12 Ibid. Thompson écrit à la p. 206 de la version originale de cet ouvrage : « *And the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules of the whole game would be thrown away.* » Il ajoute à la p. 208 : « *The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless*» (Edward Palmer Thompson, *Whigs & Hunters. The Origin of the Black Act* [Breviary Stuff Publications 1975]).

13 Jean-Pierre Jessenne, 'Edward P Thompson, La guerre des forêts Luttes sociales dans l'Angleterre du XVIII^e^ siècle [1975], Paris, La Découverte, 2014' (2016) 63(4) Revue d'histoire moderne & contemporaine 226-228.

14 David Bollier, 'Is the commons a movement?' (2004) Remarks at Wizards of OS3: The Future of Digital Commons.

15 Voir Lomazzi et Menard (n 5).

16 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

17 Denis Bocquet, 'Les communs comme concept et catégorie de pensée : complexité et polysémie du miroir historiographique' (2018) 175 (4) Espaces et sociétés 183-188.

elle identifie l'autogouvernance comme mode de gouvernance pertinent pour les communs, sous certaines conditions techniques, culturelles et politiques.[18] En outre, l'école de Bloomington propose de dépasser la typologie des biens proposée par Samuelson afin d'identifier de nouveaux types de ressources dont la caractéristique principale est leur propension à faire l'objet d'une gouvernance collective.[19] Dans cette acceptation, les communs sont définis comme des arrangements institutionnels, « des ensembles de ressources collectivement gouvernées, au moyen d'une structure de gouvernance assurant une distribution des droits entre les partenaires participant au commun (*commoners*) et visant à l'exploitation ordonnée de la ressource, permettant sa reproduction sur le long terme ».[20] Cette nouvelle approche des communs permettra notamment à Charlotte Hess et Ostrom d'étendre l'analyse aux communs informationnels qui sont des biens non rivaux et dont la collecte et la copie sont faciles.[21]

Un mouvement contemporain des communs en Italie mérite aussi notre attention: celui lancé par la Commission sur les communs présidée par Stefano Rodottà en 2007 et 2008. Les travaux de cette commission soulignent l'urgence de réorganiser le « système de la propriété publique » grâce aux communs. La Commission distingue trois types de biens : les biens publics, privés et communs. Ces derniers, les « *beni comuni* », ont des utilités fonctionnelles qui participent de manière décisive au développement des individus et à la protection de leurs droits fondamentaux.[22] La Commission propose de déclarer les biens communs inaliénables et inappropriables et discute des limites de la démocratie représentative et des avantages de la démocratie participative. Ces travaux fondateurs sur les communs considèrent qu'en droit, les communs s'inscrivent sous le régime de l'inappropriable et de l'indisponible. [23]

Les communs numériques sont une hybridation entre communs immatériels, communs informationnels et nouvelle technologie. Benjamin Coriat prolonge les travaux de Hess et Ostrom sur les communs informationnels en identifiant

18 Voir Cornu et autres (n 2).

19 Voir Lomazzi et Menard (n 5).

20 Benjamin Coriat, 'Communs fonciers, communs informationnels : comment définir un commun ?' in Benjamin Coriat (ed), *Le retour des communs : la crise de l'idéologie propriétaire* (Les Liens qui libèrent 2015) 39.

21 Charlotte Hess et Elinor Ostrom, *Understanding Knowledge as a Common: From Theory to Practice* (MIT Press 2007).

22 Voir Cornu et autres (n 2) et voir aussi, sur l'expérience italienne, Alberto Lucarelli, 'Les biens communs et la fonction sociale de la propriété à travers le rôle des collectivités locales' in Karim Benyekhlef (ed), *Vers un droit global ?* (Thémis 2016) 65-76.

23 Hervé Le Crosnier, 'Communs numériques et communs de la connaissance' (2018) 12(1) Tic&société [en ligne] http://journals.openedition.org/ticetsociete/2348, consulté le 5 avril 2023.

trois critères de définition pour les communs informationnels.[24] Premièrement, les communs informationnels regroupent des ressources non rivales et généralement non exclusives. Deuxièmement, ces communs font l'objet de droits de propriété intellectuelle qui ont construit une exclusivité artificielle pour ces ressources. Troisièmement, la gouvernance des communs informationnels ne vise pas à conserver les ressources, mais plutôt à les valoriser et à les multiplier.[25] Ces trois critères permettent de mieux identifier les communs numériques, en l'absence d'une définition consensuelle et définitive des communs numériques.[26] En effet, la littérature sur les communs numériques reflète un manque de consensus dans le concept de communs numériques qui ont, à la fois, des similarités avec les communs informationnels et des particularités qu'il conviendra de souligner dans les prochains développements.[27]

I. Les biens communs numériques : un renouveau des communs à l'ère du numérique

A. Contexte : la découverte des biens communs numériques (1990-2000)

À partir des années 1990, une nouvelle branche de communs se développe : celle des communs numériques. Selon Bollier, ces communs se composent notamment de logiciels libres et *open source*, de réseaux sociaux, d'archives ouvertes, de fichiers partagés, de forums de discussion et d'initiatives de recherche scientifique ouvertes.[28] Les communs numériques sont perçus comme bénéficiant d'un nouveau type de propriété qui serait partagée et médiée par des dispositifs sociotechniques.[29] Comme le constate Valérie Peugeot, le numérique est un vecteur naturel des communs, puisqu'il opère « un découplage entre les ressources de l'esprit et leur support, libérant ainsi les première des

24 Voir Coriat (n 20).

25 Ibid, et voir aussi les explications de Lomazzi et Menard (n 5).

26 Sébastien Broca, 'Communs et capitalisme numérique : histoire d'un antagonisme et de quelques affinités électives' (2021) *Terminal* [en ligne] http://journals.openedition.org/terminal/7595, consulté le 5 avril 2023.

27 Mélanie Clément-Fontaine, Mélanie Dulong de Rosnay, Nicolas Jullien et Jean-Benoît Zimmermann, 'Communs numériques : une nouvelle forme d'action collective ?' (2021) *Terminal* [en ligne] <http://journals.openedition.org/terminal/7509> consulté le 5 avril 2023.

28 Sébastien Shulz, 'Histoire sociologique d'un mouvement ambigu' (2021) *Terminal* [en ligne] http://journals.openedition.org/terminal/7684, consulté le 5 avril 2023.

29 Ibid.

contraintes inhérentes à un dispositif matériel ».[30] L'auteure souligne que la dématérialisation permet de faire des communs informationnels des biens non rivaux et reproductibles à moindre coût, ce qui modifie considérablement leur régime de propriété. De plus, Internet permet l'organisation de formes de gouvernance déterritorialisées, puisque les communautés qui gèrent les communs numériques sont dispersées partout dans le monde.[31]

Dès les années 1990, un premier débat anime les penseurs des communs concernant les droits de propriété intellectuelle. Les biens communs numériques s'opposent au renforcement des droits de propriété intellectuelle et à la privatisation de l'accès à l'information.[32] Plusieurs universitaires et informaticiens critiquent l'extension des droits de propriété intellectuelle aux logiciels et considèrent que l'État se rend « complice du capitalisme informationnel ».[33] Ces chercheurs sont en faveur de la libre circulation de l'information et du logiciel *open source*, et cette idéologie sera *a posteriori* interprétée comme une théorie des *opens commons*, ressources numériques dont le droit d'accès est universel. [34] Ainsi, les « pères fondateurs de l'Internet » avaient pour ambition de créer un réseau informatique ouvert et coopératif, deux caractéristiques renvoyant à l'idée de commun et conduisant Hervé Le Crosnier à considérer la création d'Internet comme celle d'un « gigantesque commun mondial ».[35]

À cet égard, il est intéressant d'observer que les règles d'utilisation et de partage des communs numériques étaient, au départ, écrites par les usagers eux-mêmes, grâce au code informatique. Un mouvement de soutien au développement de licences libres se forme assez rapidement dès le début d'Internet, même si celui-ci se trouve négativement impacté par l'extension du brevetable au vivant et à la connaissance (c'est-à-dire algorithmes et méthodologies).[36] Parmi les promoteurs du libre accès aux publications scientifiques, on retrouve Paul Ginspar qui créera le dépôt arXiv et Lawrence Lessig qui créera les licences *Creative Commons*.[37] Le mouvement intellectuel de promotion des communs repose aussi sur des travaux fondateurs qui chercheront à identifier les fondements juridiques d'un partage des savoirs, en opposition à la conception

30 Valérie Peugeot, 'Les Communs, une brèche politique à l'heure du numérique' in *Les débats du numérique* (Presses des Mines 2013).
31 Ibid.
32 Voir Broca (n 26).
33 Voir Shulz (n 28).
34 Ibid.
35 Voir Le Crosnier (n 23).
36 Ibid.
37 Ibid.

marchande de la culture et de l'accès à l'information (p. ex. voir les travaux de Yochaï Benkler sur les *commons-based peer production* et de James Boyle sur le domaine public).[38] La circulation entre « acteurs de terrains » et « théoriciens » à l'intérieur du mouvement de défense des communs en fait un mouvement hétérogène, et certains auteurs considèrent qu'il est difficile d'identifier une théorie unifiée des communs.[39] Toutefois, les communs numériques sont incontestablement à l'origine de l'émergence d'une nouvelle économie politique. D'une part, les pouvoirs publics se servent des communs pour mettre en place certaines politiques publiques. C'est, par exemple, le cas de la France qui a créé une base de données et une interface dédiées aux taxis afin que ceux-ci puissent concurrencer Uber grâce à un service d'appel géolocalisé en temps réel (c'est-à-dire, initiative « le.taxi » créée par une loi du 1er octobre 2014).[40] D'autre part, les acteurs privés se servent des communs numériques dans une logique de profitabilité puisqu'il s'agit d'une ressource stratégique.[41] Ainsi, les grandes entreprises du numérique utilisent et promeuvent les communs numériques afin d'améliorer leurs processus de production et d'accroître leurs revenus : par exemple, Elon Musk, le fondateur de Tesla et SpaceX, a contribué au projet *open source* de recherche en intelligence artificielle OpenAI et a ouvert l'accès à son projet de transport Hyperloop afin d'en faire un commun dont son entreprise bénéficierait.[42] Dès lors, bien qu'une théorie unifiée des communs numériques soit difficile à dégager, il est possible d'identifier les communs numériques existants et d'analyser comment ceux-ci ont renouvelé la théorie des communs.

B. La spécificité des biens communs numériques

Les biens communs numériques soulèvent de nouveaux questionnements et sont souvent perçus comme une catégorie à part entière de communs. Dans ce sens, Nicolas Jullien et Karine Roudaut identifient un « paradoxe de la ressource de la connaissance », et se posent la question suivante : puisque la connaissance n'est pas rivale ni exclusive, pourquoi est-elle abordée comme un commun nécessitant la mise en place d'un système de gouvernance ?[43] En effet, les travaux

38 Ibid, et voir Yochai Benkler et Helen Nissenbaum, 'Commons-based peer production and virtue' (2006) The Journal of Political Philosophy 14(4) 394-419, et James Boyle, *The Public Domain, Enclosing the Commons of the Mind* (A Caravan Book 2008).

39 Voir Broca (n 26).

40 Voir Verdier et Murciano (n 10).

41 Ibid.

42 Ibid.

43 Nicolas Jullien et Karine Roudaut, 'Commun numérique de connaissance : définition et conditions d'existence' (2020) Innovations 2020/3-63, 69-93.

antécédents sur les communs visent principalement à résoudre le problème de la surexploitation d'une ressource partagée et rivale, ce qui n'est *a priori* pas le cas de la connaissance. Et, pourtant, les communs numériques font bien l'objet d'un problème de gestion d'une ressource commune. Jullien et Roudaut identifient deux spécificités propres aux communs numériques qui font de ceux-ci des communs à part entière.[44] D'une part, la construction du commun numérique est simplifiée par l'aspect incrémental ou cumulatif des projets, et grâce à la participation facilitée de personnes compétentes et intéressées avec la création d'espaces spécialisés sur Internet.[45] D'autre part, la régulation de l'accès aux communs numériques se fait *a posteriori* et, souvent, grâce à des règles automatisées inscrites dans le code informatique.[46] Ces deux caractéristiques des communs numériques en font un objet d'étude intéressant pour la théorie des communs et permettent d'envisager de nouveaux modes de gouvernance des communs.

Les communs numériques se distinguent aussi des autres communs en raison des caractéristiques mêmes du numérique. Selon Yann Moulier-Boutang, le numérique a donné naissance à un « capitalisme cognitif » dans lequel la production de connaissances est le moteur de l'économie à l'instar de ce qu'était l'investissement matériel à l'ère du capitalisme fordiste.[47] Dans le même sens, Philippe Aigrain, le cofondateur de La Quadrature du Net, utilise la notion de « capitalisme informationnel » pour analyser comment l'appropriation de la fonction de reproduction de l'information est au cœur de l'économie numérique.[48] D'emblée, une caractéristique essentielle du numérique identifiée par la littérature est son caractère immatériel et reproductible. Ainsi, comme l'expriment Henri Verdier et Charles Murciano, « ce qui frappe en matière de communs numériques, c'est d'abord que ce ne sont pas des biens communs au sens des économistes ». Ceux-ci rappellent que les communs numériques, comme les lignes de code d'un logiciel libre, ressemblent au langage, dont l'efficacité provient de ce qu'il est utilisable par tous, modifiable par chacun et n'est aliénable par personne.[49] Toutefois, en pratique, des dispositifs technologiques (p. ex. chiffrement, contrôle d'accès, etc.) et juridiques (p. ex. droits d'auteur, brevets, droits des marques, etc.) permettent de restreindre l'accès aux et l'utilisation

44 Nicolas Jullien et Karine Roudaut, 'Commun numérique de connaissance: définition et conditions d'existence' (2020) Innovations 2020/3-63, 69-93.

45 Ibid.

46 Ibid.

47 Yann Moulier-Boutang, *Le Capitalisme cognitif. La nouvelle grande transformation* (Éditions Amsterdam 2007).

48 Voir Verdier et Murciano (n 10).

49 Ibid.

des communs numériques. Ainsi, certains auteurs considèrent les communs numériques comme un sous-ensemble des communs de la connaissances décrits par Hess et Ostrom, puisque les communs numériques sont immatériels et non rivaux, mais qu'ils doivent être protégés contre toute appropriation abusive.[50] Une des questions importantes identifiées par les chercheurs concernant les communs numériques consiste à savoir si le numérique est un outil qui soutient l'essor des communs informationnels, ou s'il donne naissance à des communs spécifiques, indissociablement liés à leur nature numérique.[51] La littérature sur les communs numériques ne permet pas de trancher définitivement cette question.[52] Toutefois, l'analyse des communs numériques montre que ceux-ci ont des caractéristiques propres qui les distinguent des communs informationnels (p. ex. antirivalité, intangibilité, etc.) au point que ceux-ci ne sont pas des biens communs au sens économique.[53] En outre, les arguments en faveur de la seconde thèse reposent sur le rôle du code informatique dans la gouvernance des communs numériques. Les communs numériques sont différents des autres communs en ce qu'ils portent en eux les outils nécessaires à leur propre gouvernance, puisque les arrangements institutionnels sont directement inscrits dans le code informatique (p. ex. *digital rights management systems*, etc.).[54] Les défenseurs des communs numériques cherchent à s'assurer que le code informatique et juridique qui gouverne les communs numériques facilite les usages et les échanges.[55] En ce sens, il convient de prendre en compte les interactions entre les règles juridiques et le code informatique dans la distribution des droits d'accès et de gestion des ressources communes.[56] À cet égard, certains chercheurs considèrent que les dispositifs de contrôle des droits d'accès sont de nouvelles formes d'*enclosure* qui menacent les communs numériques.[57]

C. Des exemples de communs numériques

Le logiciel libre « *free software* » a été créé par Richard Stallman en 1983 en opposition à l'extension des droits de propriété intellectuelle aux ressources informationnelles.[58] Stallman est en effet connu comme le créateur du système

50 Voir Clément-Fontaine et autres (n 27).
51 Ibid.
52 Ibid.
53 Voir Verdier et Murciano (n 10).
54 Voir Le Crosnier (n 23).
55 Ibid.
56 Voir Lomazzi et Menard (n 5).
57 Voir Clément-Fontaine et autres (n 27).
58 Broca (n 26).

d'exploitation GNU qui est totalement libre d'utilisation et de modification par les programmeurs. Grâce à ce mouvement, le partage des ressources informationnelles et du code informatique a été rendu techniquement possible et politiquement légitime. Cela explique pourquoi les promoteurs du *free software* étaient parfois taxés de communistes aux États-Unis, puisque ceux-ci s'opposaient frontalement à la dynamique d'accumulation fondée sur la privatisation de l'information.[59] Ainsi, un logiciel libre, un *free software*, offre quatre libertés à ses utilisateurs : la liberté d'exécuter le programme, la liberté d'étudier comment le programme fonctionne (le code source) et de le modifier, la liberté de distribuer des copies du programme pour aider les autres, et la liberté de distribuer des copies du programme tel que modifié.[60] Les licences *free software* permettent aux développeurs de faire un usage commercial du programme tel que modifié, bien que l'usage du terme « *free* » ait pu porter à confusion. Dans les années 1990, le mouvement du logiciel libre a donné naissance à l'*open source*, qui se définit comme une méthodologie de développement de logiciel permettant un partage et un accès libre au code source. Bien que le *free software* et l'*open source* soient souvent perçus comme identiques, il existe une différence de philosophie derrière ces deux concepts. Comme l'explique Stallman, les deux termes décrivent la même catégorie de logiciels, mais ils sont basés sur des valeurs différentes : l'*open source* est une méthode de développement et le *free software* est un mouvement social.[61] En effet, le terme *open source* a été proposé par des membres du mouvement *free software* afin de donner aux logiciels dont l'accès au code source était libre une appellation politiquement plus neutre que celle de *free software*, et notamment plus propice au commerce. Bien que cette différence conceptuelle entre *free software* et *open source* persiste, aujourd'hui, la plupart des *free softwares* sont *open source*. L'exemple le plus connu de logiciel libre et *open source* est probablement Linux, qui a été créé par Linus Torvalds en 1991. Conformément aux principes de l'*open source*, le code source de Linux peut être utilisé, modifié et distribué (commercialement ou non) en respect de sa licence d'utilisation. La licence *Creative Commons* fait aussi partie des inventions techniques permettant la création de communs numériques, puisqu'elle est devenue le support juridique du commun culturel sur Internet.[62] Cette licence est une innovation juridique qui s'oppose au *copyright* et permet à l'artiste de décider de la manière dont il

59 Ibid.

60 GNU, Free Software Foundation, 'What is free software?' [en ligne], <https://www.gnu.org/philosophy/free-sw.html≥ consulté le 6 avril 2023.

61 Scott K Peterson, 'What's the difference between open source software and free software?' (2018) opensource.com [en ligne] consulté le 6 avril 2023.

62 Voir Coriat (n 20).

souhaite partager sa création.[63] *Creative Commons* offre plusieurs contrats types encadrant la mise à disposition d'œuvres sur Internet. Le but de cette licence est de protéger les droits de propriété intellectuelle des auteurs d'œuvres, tout en permettant leur libre circulation.[64] Il existe plusieurs types de licences *Creative Commons* qui donnent plus ou moins de droits aux auteurs et aux utilisateurs (p. ex. licences commerciales/non commerciales, modifiables/non modifiables, etc.).[65]

Wikipédia est un des communs numériques les plus connus du monde. Cette encyclopédie généraliste en ligne est, en théorie, ouverte et libre de modification.[66] La partie anglaise de Wikipédia rassemble ainsi plus de 400 000 contributeurs par mois.[67] Bien que Wikipédia repose sur une communauté autogérée, celle-ci régule les contributions grâce à un système d'évaluation des contributeurs assez strict qui engendrerait même une forme de « bureaucratie » de gestion des contributions.[68] Cet exemple montre comment la taille d'un commun numérique peut influencer son mode de gouvernance et, en l'occurrence, requérir davantage de régulation.

Les autorités publiques se servent elles aussi du numérique pour créer des communs numériques qui servent l'intérêt général. Les données ouvertes, « *open data* », sont des données accessibles, disponibles dans un format numérique et pourvues d'une licence qui universalise leurs accès, partage et usage, à des fins commerciales ou non.[69] Un bon exemple est l'*Open Government Initiative* lancée par l'administration Obama aux États-Unis, qui visait à ouvrir les données du gouvernement au public.[70] La France fait elle aussi partie des pays ayant mis en place des politiques d'ouverture des données, notamment via son portail data.gouv.fr qui donne accès à des milliers de jeux de données.[71]

Ces quelques exemples montrent la diversité des communs numériques qui, pour autant, ont des spécificités qui les distinguent des autres communs. Ceux-ci sont en effet immatériels et reproductibles, mais surtout non rivaux, inaliénables et gouvernés par le code informatique. Dans une deuxième partie,

63 Voir Coriat (n 20).
64 Creative Commons, 'À propos des licences' [en ligne] <https://creativecommons.org/licenses/?lang=fr> consulté le 5 avril 2023.
65 Ibid.
66 Voir Le Crosnier (n 23).
67 Ibid.
68 Voir Le Crosnier (n 23).
69 Voir Verdier et Murciano (n 10).
70 Ibid.
71 Ibid.

il s'agit d'étudier comment les communs numériques et les théories afférentes ont évolué depuis les années 2000 avec l'émergence des plateformes numériques.

II. Les communs numériques : critiques et prospectives à l'aune du capitalisme numérique

A. La gouvernance des communs numériques

La gouvernance des communs numériques est vite devenue une préoccupation majeure, et notamment au regard du rôle croissant du numérique dans nos sociétés. Les ressources numériques (p. ex. code informatique, information, images, musiques, etc.) sont susceptibles d'être utilisées par une population plus large que la population qui produit et gère ces ressources.[72] Dès lors, il est nécessaire de protéger ces ressources contre toute appropriation abusive, ce que permettent les droits de propriété intellectuelle et autres modes de gouvernance des communs.[73] Par exemple, les licences permettent au détenteur du droit de propriété intellectuelle de choisir quels usage et accès donner à sa création. Ainsi, c'est seulement lorsqu'une ressource faisant l'objet d'un droit de propriété intellectuelle est diffusée sous licence libre qu'elle devient un commun numérique.[74] En effet, les licences libres (p. ex. *Creative Commons*, GNU, etc.) permettent aux auteurs d'une œuvre ou d'un logiciel d'octroyer aux utilisateurs des droits d'utilisation, de diffusion ou d'amélioration de l'œuvre.[75] Cet assouplissement des droits de propriété intellectuelle a permis la naissance de communs numériques de dimension mondiale, tels que Linux et Wikipédia. Ces exemples emblématiques de communs ont montré l'importance du respect de règles instituées par ces licences et des formes élaborées d'organisation collective pour préserver les ressources numériques.[76]

Il est intéressant d'envisager la gouvernance des communs comme ayant une dimension *interne*, qui régit la production de la ressource, et une dimension

72 Voir Clément-Fontaine et autres (n 27).

73 Ibid.

74 Ibid.

75 Direction des affaires juridiques – Mission appui au patrimoine immatériel de l'État, 'Focus : Licences libres : quelles spécificités ?' economie.gouv [en ligne] <https://www.economie.gouv.fr/apie/publications/focus-licences-libres-quelles-specificites#:~:text=La%20licence%20libre%20permet%20%C3%A0,l'am%C3%A9lioration%20de%20ses%20contenus> consulté le 3 avril 2023.

76 Voir Broca (n 26).

externe, qui en régit l'usage.[77] Concernant la dimension *interne* de la gouvernance des communs numériques, les travaux de Yochai Benkler sont particulièrement influents depuis les années 2000.[78] Benkler et Helen Nissenbaum, au-delà de concevoir les communs numériques comme des ressources informationnelles, les considèrent comme la base d'un nouveau mode de production : la « production par les pairs fondée sur les communs ».[79] Ce mode de production est rendu possible par l'infrastructure décentralisée d'Internet qui permet aux individus de collaborer en dehors des hiérarchies instituées par le marché ou dans un cadre managérial.[80] Pour résumé, Broca définit la production par les pairs fondée sur les communs comme « *radicalement décentralisée, collaborative et non propriétaire ; fondée sur le partage des ressources et des produits parmi des individus éparpillés, connectés de façon flexible, qui coopèrent les uns avec les autres sans s'appuyer sur les signaux de marché ou les hiérarchies managériales* ».[81] Ainsi, le mode de production proposé par Benkler représente bien l'opposition frontale qu'il y a entre les promoteurs des communs numériques et le capitalisme numérique. Toutefois, sa théorie s'est avérée inefficace pour résoudre certains problèmes de gouvernance interne liés à la production de communs numériques (p. ex. rémunération des producteurs, etc.). D'autres penseurs des communs numériques comme David Bollier et Maïa Dereva chercheront, quant à eux, à souligner le nouveau modèle politico-économique que permettent les communs ; un modèle fondé sur des pratiques démocratiques de partage et de collaboration qui consiste à « faire en commun ».[82] Bollier contribue notamment à mieux régir l'usage des communs (c'est-à-dire leur gouvernance *externe*) et considère qu'il faut faire du concept de commun un « langage commun » pour unifier les critiques contre le néolibéralisme et valoriser le « faire en commun ».[83] Ensemble, Benkler et Bollier ont proposé des modes de gouvernance *interne* et *externe* des communs numériques qui faisaient écho aux valeurs promues par les mouvements *free software* et *open source*. Toutefois, et depuis deux décennies, il semble que les modes de gouvernance envisagés par le mouvement des communs numériques n'aient pas résisté au capitalisme numérique gouverné par les grandes plateformes, et même que les communs numériques aient participé à l'émergence du capitalisme numérique.

77 Voir Clément-Fontaine et autres (n 27).
78 Voir Broca (n 26).
79 Voir Benkler et Nissenbaum (n 38).
80 Ibid.
81 Voir Broca (n 26).
82 Voir Shulz (n 28).
83 Ibid.

Les communs numériques ont été intégrés au capitalisme numérique et ont permis aux grandes plateformes de bâtir leur puissance en exploitant les communs. Sébastien Broca souligne à quel point les communs ont joué un rôle essentiel dans le développement des activités commerciales des plateformes, notamment avec les logiciels libres.[84] C'est le cas de Google avec l'utilisation du système d'exploitation Debian, d'Amazon avec la base de données Redis, et de Facebook qui fait tourner ses serveurs grâce à des logiciels libres.[85] Ainsi, Nicolas Eghbal dira que les logiciels libres sont « les routes et les ponts » du capitalisme numérique[86] et d'autres parleront de « communs du capital » pour désigner les communs numériques.[87] D'autres communs, comme Open Street Maps et Wikipédia, ont permis aux grandes plateformes de développer de nouveaux services (p. ex. réalité augmentée) et objets (p. ex. enceinte connectée). Le rachat de Github, une plateforme web qui permet d'héberger et de gérer des logiciels libres, par Microsoft en 2018 est aussi le symbole de la synergie entre communs numériques et entreprises privées. Selon Broca, l'hybridation entre les communs et le marché ne s'est pas complètement faite contre le gré des promoteurs des communs, mais, au contraire, a reçu la bénédiction de grands penseurs comme Lessig et Benkler.[88] Aujourd'hui, il est possible de constater que les plateformes ont usé des communs pour construire un modèle de capitalisme numérique basé sur l'exploitation abusive et l'appropriation des ressources numériques. Ce constat est partagé par certains acteurs des communs numériques, lesquels semblent regretter d'avoir été trop optimistes en célébrant le partage et la production par les pairs face à des acteurs privés guidés par une logique de profitabilité.[89] Les réflexions les plus récentes sur les communs portent donc sur la manière d'organiser des modes de productions autonomes et collaboratifs qui permettraient cependant aux producteurs d'assurer leurs conditions matérielles

84 Voir Broca (n 26).

85 Ibid.

86 Nadia Eghbal, *Sur quoi reposent nos infrastructures numériques ?*, [2017] OpenEdition Press, Framaboo [en ligne] <http://books.openedition.org/oep/1797≥ consulté le 5 avril 2023.

87 Calimaq, 'Les Communs numériques sont-ils condamnés à devenir des 'Communs du capital' ?', [2018] [en ligne] <https://scinfolex.com/2018/06/24/les-communs-numeriques-sont-il-condamnes-a-devenir-des-communs-du-capital/≥ consulté le 5 avril 2023.

88 Voir Broca (n 26), et voir, par exemple, Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Bybrid Economy* (Bloomsbury Academic 2008) 8-14, où Lessig explique comment des entreprises comme iTunes peuvent faciliter la libre circulation de la musique sur Internet.

89 Voir Broca (n 26).

d'existence.[90] En ce sens, les travaux de Michel Bauwens et Vasilis Kostakis sont particulièrement intéressants puisqu'ils proposent des modes alternatifs de gouvernance des communs numériques fondés, par exemple, sur un État partenaire, ou encore sur la nécessité de recomposer les infrastructures de production.[91]

B. Le rôle de l'État dans la gouvernance des communs numériques (2000-2020)

À l'origine des communs se trouvent une idéologie libertarienne, autorégulée, ainsi qu'une économie de l'innovation radicale et plutôt antiétatique. Toutefois, le constat de l'échec relatif des communs numériques et surtout de leur prédation par les entreprises privées de l'économie numérique a conduit les penseurs des communs numériques à envisager l'État comme un protecteur et/ou promoteur des communs numériques. Les projets gouvernementaux d'*open data* cités plus haut (c'est-à-dire l'*Open Government Initiative* d'Obama ou le portail français data.gouv.fr) traduisent bien le nouveau positionnement de l'État par rapport aux communs numériques.[92] Dans cette nouvelle approche des communs, l'État n'est pas seulement un protecteur, il est aussi un producteur, un régulateur et un usager des communs numériques. S'agissant de la gouvernance des communs, le développement d'Internet et de nouvelles technologies permet d'envisager la mise en place de politique étatique de gouvernance des communs plus fine (p. ex. traçabilité des usages via les adresses IP, règles de partage, de transaction et de tarification plus complexes, etc.).[93] S'agissant de la production et de l'usage des communs numériques par l'État, plusieurs politiques publiques reposent sur les communs numériques et visent à offrir de nouveaux services aux citoyens (p. ex. *open data* des collectivités territoriales,[94] projet « le.taxi » en France,[95] etc.). Cette tendance est analysée par Sébastien Shulz comme la préfiguration d'un État partenaire des acteurs des communs numériques.[96] Ainsi, en opposition à une alliance marché-État, certains penseurs des communs comme Michel

90 Michel Bauwens et Vasilis Kostakis, 'Towards a new reconfiguration among the state, civil society and the market' (2015) *Journal of Peer Production* [en ligne] <http://peerproduction.net/editsuite/issues/issue-7-policies-for-the-commons/peer-reviewed-papers/towards-a-new-reconfiguration-among-the-state-civil-society-and-the-market/> consulté le 5 avril 2023.

91 Ibid.

92 Voir Verdier et Murciano (n 10).

93 Ibid.

94 Voir Le Crosnier (n 23).

95 Voir Verdier et Murciano (n 10).

96 Voir Shulz (n 28).

Bauwens et Jean Lievens souhaitent que l'État soit « un État-partenaire qui crée les conditions optimales pour la constitution et la promotion des communs, stimule l'autoproduction, régule le marché, garantit la sécurité publique et l'intérêt général »[97]. Cette demande d'un État promoteur et protecteur s'est particulièrement renforcée depuis que des plateformes oligopolistiques se sont appropriées une grande partie des ressources numériques. Ceci est d'ailleurs paradoxal lorsqu'on se rappelle qu'à l'origine, les communs se sont développés en opposition à une appropriation étatique des ressources communes.

C. Les communs numériques face aux grandes plateformes numériques (2010-2020)

L'analyse historique de l'économie numérique permet de distinguer deux capitalismes numériques qui se sont succédés depuis les années 1990. Le premier était surtout fondé sur l'exploitation de rente de monopoles grâce à la propriété intellectuelle, tandis que le deuxième, apparu depuis les années 2010, repose sur le modèle de la plateforme et l'exploitation du travail et des données des internautes.[98] La crise de 2008 a accéléré l'émergence de plateformes numériques oligopolistiques qui gouvernent le capitalisme mondial et organisent un nouvel Internet très différent de l'*open internet* qu'imaginaient les théoriciens des communs numériques. Ces plateformes développent de nouveaux modèles économiques, leur permettant d'organiser et de contrôler les flux d'informations entre différents acteurs, tout en externalisant de nombreux coûts liés au travail et en capturant une large partie de la valeur économique produite.[99] Ainsi, Mélanie Clément-Fontaine et autres expliquent que « la dimension collaborative et de partage de ressources facilitées par ces plateformes masque bien souvent des stratégies de prédation sur lesquel[le]s de grands opérateurs fondent leurs modèles d'affaires. Ainsi, l'économie dite du partage, développée par Uber, Deliveroo ou Airbnb ne relève clairement pas du modèle de gouvernance des communs ».[100]

Ce constat du relatif échec des communs numériques face au nouveau capitalisme numérique a rendu nécessaire une nouvelle réflexion de la part des acteurs des communs numériques. Face à l'appropriation croissante des ressources numériques par les plateformes, il s'agit de créer un nouveau mode de gouvernance des communs numériques qui garantisse le libre accès et le partage

97 Voir Bauwens et Kostakis (n 90).
98 Voir Broca (n 26).
99 Ibid.
100 Voir Clément-Fontaine et autres (n 27).

des ressources numériques, tout en évitant que ces ressources ne soient captées par quelques entreprises oligopolistiques. À cet égard, et comme mentionné précédemment, la mise en place de politiques publiques de préservation et de promotion des communs numériques (p. ex. data.gouv.fr, le.taxi, etc.) est une solution envisageable.[101] En outre, la mobilisation des acteurs des communs numériques contre le capitalisme numérique pourrait aussi faire émerger de nouvelles solutions théoriques et technologiques afin de revigorer et de protéger les communs numériques. En ce sens, la campagne « Degooglisons Internet » de Framasoft a éveillé les consciences en passant de la défense du logiciel libre à une position plus globale qui envisage le logiciel libre comme un moyen d'achever un idéal de société plutôt que comme une fin.[102]

D. Les limites des communs numériques

Aujourd'hui, les communs numériques, comme tout commun, sont menacés par des formes d'*enclosure* et de réduction des usages communs. La menace majeure des communs numériques est probablement la concentration capitalistique des plateformes numériques qui se sont approprié les ressources numériques et ont créé un marché privé à partir des communs numériques. À cet égard, Cédric Durand explique comment les plateformes numériques ont transformé le principe d'organisation, de production et d'architecture décentralisé du *World Wide Web* en plaçant leur infrastructure hiérarchisée au centre des interactions sur lesquelles repose l'Internet d'aujourd'hui.[103] Ainsi, les plateformes numériques, au lieu d'encourager un mode de production collectif et collaboratif des communs numériques, ont fait prévaloir la prédation de ces communs numériques.[104] La prédation des communs numériques par les plateformes numériques a notamment donné naissance au capitalisme de la monopolisation intellectuelle, « *Intellectual Monopoly Capitalism* », qui permet aux plateformes numériques d'être des « rentiers de l'intangible ».[105] Cette situation souligne l'échec des projets *free software* et *open source* qui visaient à lutter contre l'extension des droits de propriété intellectuelle. En outre, d'autres menaces sont identifiées par la littérature, telles que les cyberattaques et les

101 Voir Verdier et Murciano (n 10).

102 Voir Broca (n 26).

103 Cédric Durand, *Technoféodalisme. Critique de l'économie numérique* (La Découverte 2020).

104 Ibid [227].

105 Cédric Durand et William Milberg, 'Intellectual monopoly in global value chains' (2020) Review of International Political Economy 27/2, 404-429.

atteintes à la vie privée par des entreprises privées ou des autorités publiques.[106] En outre, l'automatisation des règles de gouvernance des communs numériques grâce au code informatique peut, elle aussi, menacer les communs en réduisant la capacité de négocier et de modifier leurs règles de gouvernance.[107]

Finalement, l'incapacité des communs numériques d'aujourd'hui à faire face aux nouvelles formes du capitalisme numérique et aux menaces liées au numérique a conduit les penseurs des communs à réfléchir à de nouveaux enjeux. Ces enjeux sont, par exemple, la qualification du travail, le partage de la valeur et la lutte contre la surveillance généralisée mise en place par les plateformes numériques.[108]

Conclusion

Les communs numériques ont été perçus comme un moyen de faire renaître les communs et ont suscité beaucoup d'espoir au début d'Internet. Face à l'extension des droits de propriété intellectuelle, les praticiens et théoriciens des communs numériques ont créé des technologies (p. ex. logiciel, plateformes collaboratives, etc.) imprégnées des idéologies de partage et de libre accès qui trouvent leur origine dans le mouvement des communs. Ces communs numériques ont connu un grand succès, mais ont finalement été utilisés et, progressivement, accaparés par des entreprises privées guidées par une logique de profit. Face à ce nouveau modèle de capitalisme numérique gouverné par les grandes plateformes, les communs numériques se sont trouvés fragilisés, et les théoriciens des communs numériques ont procédé à une remise en question importante de la gouvernance des communs. Un mouvement intéressant qui découle de cette remise en question consiste notamment à envisager l'État comme un partenaire des acteurs des communs. Toutefois, la prédation des ressources numériques par les plateformes numériques amoindrit considérablement la capacité de l'État et des promoteurs des communs numériques à protéger et promouvoir les communs numériques telle qu'imaginée dans les années 1990. Plus récemment, de nouvelles menaces pour les communs numériques ont été identifiées par la littérature, telles la cyber-guerre, la surveillance de masse[109] ou encore l'exploitation des travailleurs du numérique.[110]

106 Voir Le Crosnier (n 23).

107 Voir Jullien et Roudaut (n 43).

108 **Voir** Broca (n 26).

109 Voir, par exemple, Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019).

110 Voir, par exemple, Antonio A Casilli, *En attendant les robots : enquête sur le travail du clic* (Points 2021).

What we hold in common: from legal personality to European data commons

Katja de Vries

This is a text about many things. One of its most important themes is that, even though my PhD defence (Vrije Universiteit Brussel, 2016) was quite a while ago and I nowadays live and work in Sweden (Uppsala University), Serge Gutwirth's writings continue to affect me. What makes Serge's more recent writings such a delight for me is that their content and themes are both familiar and radically surprising: close enough to engage me directly, but different enough to make me rethink my own ideas. I will illustrate this with two legal questions that I have recently been thinking and writing about. First, whether granting legal personhood to non-humans, more specifically AI systems and natural entities (rivers, trees, etc.), makes any sense.[1] Secondly, to analyse conceptually and legally[2] what is happening now that the EU is in the process of creating sectoral *Common European Data Spaces*[3] plus general infrastructures to facilitate data-sharing in the EU.[4] With regard to both legal questions, juxtaposing them with Serge's recent writings on legal personality and the commons[5] has challenged me to think more

1 Katja de Vries, Yaffa Epstein, Olga Goriunova & Niels van Dijk, "Rivers and robots as legal subjects? An imaginary encounter between Critical Theory and Law in four acts", in Rosi Braidotti, Emily Jones & Goda Klumbyte (eds), *Posthuman convergencies* (Edinburgh University Press 2023; forthcoming).

2 Katja de Vries, *Let the data flow, let yourself go – but how? Some reflections on the Data Governance Act and the proposed Data Act*. Invited seminar, 21 March 2023, TILT, Tilburg University, The Netherlands.

3 European Commission, *Commission staff working document on Common European Data Spaces*, SWD(2022) 45 final, Brussels, 23 February 2022.

4 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

5 Serge Gutwirth, "À quelles questions et à quels besoins répond la personnalité juridique? Une exploration juridique", in Marc Frère (ed.), Faire de la ville un sujet de droit. Actes de la 53e École urbaine de l'Arau, nr. 53 (23-25 March 2022, 9-16); Serge Gutwirth, "Les communs: avec, malgré ou contre le droit?", in (2022) 33(6913) Journal des Tribunaux, 582-594; Alessia Tanas & Serge Gutwirth, "Une approche 'ecologique' des 'communs' dans le droit. Regards sur le patrimoine transpropriatif, les usi civici et la riviere-personne", in

profoundly. Before I can dive into these *legal* questions of personhood (section 2) and European sectoral common data spaces (section 4), I must first give some basic *socio-philosophical* pointers about how multiplicity can be brought together under a common denominator in a semiotic togetherness (section 1) and how sometimes a particular "physical" togetherness is required to avoid overuse of resources, that is, a self-organization called "commoning" (section 3). The legal and the socio-philosophical are then related: in section 2 I relate semiotic togetherness to legal personhood, in section 4 I explore the potential relations between commoning and the European data spaces. Finally, in section 5, all parts come together in the question if one could conceive data commons that both build on a specific form of "physical" self-organized togetherness, commoning, as well as the semiotic togetherness of legal personhood.

1. What is it that holds the multiple together?

What is it that holds the multiple together? When we walk on the beach we can gather seashells in a bag and, *voilà*, a multiplicity is held together. And yet that is not all there is to it: next to the prosaic togetherness created by the fabric of the bag, there is also a semiotic togetherness. In spite of the fact that every seashell is unique, I see them all *as* seashells. They all seem to share a common seashell-ness, and it is what they *are*: seashells. What is this semiotic togetherness? A Platonic essence? Are they all imperfect copies of The Ideal Seashell? Or is the semiotic aspect under which they appear simply a word that has emerged over time as a tool to help us cope with a particular world: a semiotic tool that makes sense only as one possible answer to a particular world? Does the seashell exist *as seashell* for the trout, the salmon or the oyster? Most likely not. Nor is the seashell-ness the *only* togetherness. If I open a box that contains seashells, old metro tickets, a library card and a mug, this might at first appear to be a random collection. However, if there is a label on the box that says: "Nostalgic objects from when I lived in Belgium and worked at the Vrije Universiteit Brussel", it becomes clear there is a semiotic togetherness that makes perfect sense.

During my very first philosophy classes at university, I fell under the spell of the fundamental Platonic question: What is it that holds things together? If it is not a Platonic essence, but a semiotic tool shaped by pragmatic considerations,

(2021) 2 *In situ*, 1-26); Serge Gutwirth & Isabelle Stengers, "The law and the commons," *3rd Global Thematic IASC Conference on the knowledge commons* (Science Po – Ecole de droit, Paris, 20-22 October 2016); Serge Gutwirth & Isabelle Stengers, "Le droit à l'épreuve de la résurgence des *commons*", (2016) 41(1) *Chronique: Théorie de droit*, *Revue juridique de l'environnement*, 306-343.

why is it that certain things appear under certain and not other types of semiotic togetherness? Can we simply exchange one semiotic tool for another, in the same way as one would cast a rusty old hammer aside for a newer model? Why is it that there are words that steer us, words that we cannot get rid of and that seem glued to us as if they were our own skin? The semiotic togetherness of the seashells is pragmatic. Pragmatism instead of Platonic essentialism, however, does not mean that I can simply decide that from now on I will see them as the categories *blipblop*, *bapblap* and *sipsap* instead. Pragmatism is far from arbitrary or voluntarist. Given my body, the world in which I live, the languages and thoughts that I inherited and that envelop me, the categories *blipblop*, *bapblap* and *sipsap* simply will not work: they are as useless as a pile of butter or soap bubbles are for hammering a nail in a wall.

2. Legal fiction of personhood: pragmatism or more?

As illustrated by the many legal examples in Austin's *How to do things with words?*,[6] law is a field where the performative and pragmatic character of words is particularly clear:[7] contracts, declarations, etc. all are tools that aim to have a legal effect, to perform an act of semiotic transformation. When a civil servant declares a couple husband and wife, a new semiotic togetherness is established which is not simply a figment of the imagination but one that has very real legal bite. This is also exemplified by legal personhood, which is a *persona*, that is, a mask.[8] This mask is a legal fictive construction that attributes certain legal rights and obligations to an entity. In principle, it is irrelevant what the entity behind the mask is: it doesn't have to be a transcendent Cartesian or even a neuro-biological subject – and hence it is completely uncontroversial that companies and organisations can possess legal personhood.[9] Why? Because it serves certain pragmatic purposes: in our world, it is most helpful if a company or an organisation is able to contract or can be held liable. Almost all contemporary economies and societies rely on the legal fiction of legal personhood. Legal personhood is a semiotic umbrella that gathers multiplicity. For example, even

6 ' J.L. Austin, *How to do things with words* (Oxford: Clarendon Press 1962).

7 K. De Vries. & N. Van Dijk. "A bump in the road. Ruling out law from technology", in M. Hildebrandt & J. Gaakeer (eds), *Human law and computer law: Comparative perspectives*, (Springer 2013) 89-121.

8 Yan Thomas, "Le sujet de droit, la personne et la nature", (1998) 100(3) Le Débat, 85-107; Vinciane Despret & Serge Gutwirth, "L'affaire Harry. Petite scientifiction" in (2009) 52 Terrain. Revue d'ethnologie européenne/Etre une personne, 142-151.

9 De Vries et al. (n 1).

if it is one particular employee that causes me damage, I can sue the company that employs this employee. As a legal person, the company has legal standing in court and could possibly be held liable. By calling something a legal person we change the way an entity can act and be acted upon. Legal personhood can, for example, entail that an entity acquires the capacity to enter a binding legal contract, that an entity can be criminally or civilly liable, that an entity can legally be an inventor, author, etc., or that an entity is a bearer of fundamental rights. Which obligations or rights are included in legal personhood is flexible: it is "a cluster property"[10] (that does not require a minimal bundle or combination).

Does this mean that anything goes, and that any entity can be granted legal personhood if it serves some societal or economic purpose? This question has recently been heavily debated in regard to what is known as "Rights of Nature", where the question is whether a tree, river or mountain can have legal personhood, and in relation to AI systems, where the question is whether advanced robots should be granted legal personhood. Now, here things become interesting: What is the reason for attributing personhood in these cases? Both in relation to AI systems and Nature it has been claimed that this desire is not purely pragmatic but that it might also be based in an anthropomorphising and emancipatory gesture: legal personhood is then a tool to lift the status of an entity from a numb object to a sentient being that has legal standing and is given the capacity to speak, as it were, in its own voice and on its own account in court.[11]

Now all of this, given the extreme pragmatism of why one would grant legal personhood to any entity, should not matter: the nature of the entity behind the legal mask should in principle be completely irrelevant. If I follow the pragmatic legal understanding to its extreme, I can imagine that a stapler or a shoe could be granted legal personhood if it were to serve some societal or economic purpose. And yet, it is hard to imagine how this could ever happen. Why? In the same way as I cannot simply decide that from now on, I will view seashells as the categories *blipblop*, *bapblap* and *sipsap* instead, the attribution of legal personhood cannot be applied to just anything. It requires a setting in which this attribution makes sense and serves a pragmatic purpose. Such purposes are hard to imagine for staplers or shoes, but in the case of Nature or AI systems such purposes can exist. For example, in the case of a river it might be much easier to protect it if it could appear as a claimant in court on its own behalf, instead of having to go through the trouble of proving that its pollution has caused damage to particular human individuals. Or, in the case of an AI system, it could be attractive if an individual suffering damage would not have to dig

10 Visa A. Kurki, *A theory of legal personhood* (Oxford University Press 2019) 92.
11 Idem.

into the details of all the technical infrastructures and different companies but could simply sue the AI system as a whole, while the actors behind the curtain of an AI system might enjoy hiding behind a common legal umbrella of legal personhood, thus skipping direct personal liability.

In attributing legal personhood it is thus extremely important to keep in mind that the question is not "What does the robot or river really want?", but that legal personhood simply serves "as a locus of the interests of a collective consisting of human and/or nonhuman animals",[12] and that it does not matter if the wishes of the legal construct "robot" or "river" converge with those of the real robot or river. Legal personhood is therefore a semiotic tool that gathers a multiplicity under one common denominator and grants it a legal voice.

3. Commoning – how to do it?

There is togetherness that is a semiotic gathering tool, like the word seashell or the legal fiction of legal personhood and that does not imply that something is regrouped or repositioned in our physical world. There is also togetherness which does require that something is regrouped or repositioned: the seashells end up in a bag, my nostalgic memorabilia from Brussels in a box, etc. Sometimes semiotic and physical togetherness converge, sometimes not.

As a child of a Russian mother, I spent many of my summer and winter holidays in the communist Soviet Union. Most people lived in communal apartments, colloquially known as *kommunalkas*, where several families would share a bathroom and a kitchen. There was almost always a grim atmosphere of poverty and hatred in all shared spaces, which emerged between people who had nothing in common with each other apart from the walls of their common apartment. All possessed fewer square metres than they would have liked to, and the worn-down walls and the mess in the shared spaces seemed to illustrate the superiority of private property, individualism and capitalism. Later in life, when I lived in various student rooms with shared facilities, the mood tended to be much better, but nevertheless, at the end of their student years, most of my flat mates, including me, longed for a place to truly call their own, one where the level of cleanliness and noise, the choice of which newspaper and magazine to subscribe to, and the length of individuals' showers would not be an eternal point of negotiation and irritation. Similarly, the Swedish parent-cooperative preschool, attended by one of my children, is an eternal object of both love

12 Visa A Kurki, "Can nature hold rights? It's not as easy as you think", (2021) 66 Helsinki Legal Studies Research Paper, 19.

and hatred: the freedom resulting from state independence creates a unique pedagogical, caring climate for the kids and close ties between staff and parents, but the parents are simultaneously engaged in eternal negotiations about what should be done, irritation about free-riders who benefit from others who take a bigger share of the common workload, etc.

In 1968, ecologist Garrett Hardin coined the notion of the "Tragedy of the Commons"[13] to predict that every commons will in the end succumb to free-riders and the over-exploitation of common resources, because in a world of limited resources any rational individual will act selfishly. He also argued that state intervention or private property (enclosures) are the only ways to avoid this outcome. Was Hardin right? In our current age, where capitalism has lost its self-evident triumphant aureole and an increasing number of citizens are struggling to provide for basic needs such as housing and food, commoning has gained new popularity:

> Nowadays, more and more groups of inhabitants are increasingly involved in practices rooted into the local lands and territories they inhabit. We call this kind of action: "commoning". There is commoning when /1/ people get involved into /2/ practices of self-organization /3/ around a "thing", such as, for instance, a land or a watercourse, that concerns and makes them collectively responsible, and /4/ pursue activities marked by their generative nature, rather than by extraction."[14]

During my years in Brussels, while I was working on my PhD, Serge Gutwirth joined a collective vegetable gardening project. I remember asking him about which crops he was growing (the only part of the answer that stuck in my mind was "*aardperen*", Jerusalem artichokes, which he cheerfully described as good for soup although flatulence inducing) and how the group was fighting pests without chemicals. Only during more recent years have I realised that Serge was not just growing crops but also planting the seeds for a whole strain of fundamental writings about the law and the commons.[15]

Nowadays housing[16] and vegetable gardening[17] initiatives based in commoning abound and the seminal work *Governing the commons: The evolution of*

13 Garret Hardin, "The Tragedy of the Commons" (1962) 162 Science, 1243-1248.

14 Tanas & Gutwirth (n 5) 1; see also Gutwirth & Stengers, "Le droit à l'épreuve de la résurgence des *commons*" (n 5).

15 See note 5.

16 For example, https://nieuwemeent.nl/en/.

17 For example, the "Jardin essentiel" in Brussels, mentioned in Tanas & Gutwirth (n 5), one of the many "potagers collectifs" (collective vegetable gardens) in the Brussels region: https://asblrcr.be/collectifs-citoyens/potager-collectif/.

institutions for collective action[18] of Nobel Prize-winning economist Elinor Ostrom has been rediscovered. Ostrom described in empirical studies how small communities effectively govern shared natural resources collectively in a sustainable way and in this way she disproved that the tragic destruction of common-pool resources is an inevitable outcome. Instead, given certain "attributes of the resource system, resource units, and users",[19] commoning around a shared concern can be a sustainable strategy without requiring any enclosures by the state or private owners. In fact, preventing over-use and the preservation of the commons can be a cause that gathers people into commoning.[20] How to do commoning? What distinguishes successful commoning from its tragically failing variety?

"When will the users of a resource invest time and energy to avert 'a tragedy of the commons'?"[21] In 2009, some 19 years after the publication of *Governing the commons*, Ostrom published a concise article where she listed ten elements that could contribute to the success or failure of commoning:

1. The size of the resource system – "moderate territorial size is most conducive to self-organisation".[22]
2. The productivity of the system – if a resource is abundant or already exhausted, there is no reason for commoning, so some level of scarcity is needed.
3. The predictability of the system dynamics – "Forests tend to be more predictable than water systems. […] Unpredictability at a small scale may lead users of pastoral systems to organise at larger scales to increase overall predictability".[23]
4. Resource unit mobility – commoning something mobile, for example, wildlife or a river, is more difficult than something stationary, such as trees or a lake.
5. The number of users – the bigger the group, the more difficult it is to do commoning, but sometimes the common resource actually requires a large group of users.

18 Elinor Ostrom, *Governing the commons: The evolution of institutions for collective action* (Cambridge: Cambridge University Press 1990).

19 Elinor Ostrom "A general framework for analyzing sustainability of social-ecological systems" (2009) 325(5939) Science, 421.

20 Gutwirth & Stengers, "Le droit à l'épreuve de la résurgence des *commons*" (n 5).

21 Ostrom (n 19) 420.

22 Idem. 420.

23 Idem. 421.

6. Leadership – if some of the users have "entrepreneurial skills and are respected as local leaders"[24] success is more likely.
7. Norms and social capital – success is more likely if users "share moral and ethical standards regarding how to behave in groups they form, and thus the norms of reciprocity, and have sufficient trust in one another to keep agreements".[25]
8. Knowledge of the socio-ecological system – the more users know about the attributes and rules governing the socio-ecological system, the better.
9. The importance of the resource to users – when a resource is highly valuable to users, they are more likely to go through the trouble of creating a commoning practice around it.
10. Collective choice rules – when users "have full autonomy at the collective-choice level to craft and enforce some of their own rules",[26] success is more likely.

While Ostrom focuses mostly on classical commons such as fishes in a lake or trees in a wood, some of these ten elements are also very helpful in explaining why, for example, my Swedish parent-run preschool cooperative is more successful than the average Russian *kommunalka* – in contrast to the former, the latter was characterised by virtually no autonomy in rule creation and a complete lack of shared values or trust. Moreover, given that the self-organising element of the *kommunalka* in Soviet dictatorship was limited to possibly getting a better maintained bathroom and kitchen, the general gain of the commoning was clearly much lower than in the case of a set of engaged parents trying to create a better preschool for their kids.

4. European Common Data Spaces

How to manage a world where there is a global race for dominance in the field of AI, a scarcity of natural resources and an imminent climate crisis? One of the answers to this question is, according to the EU legislator, making better use of available data. Data can be used to train AI systems, to build intelligent systems that keep better track of all resources and optimise their use and re-use. Data hold the promise of feeding the multitude without a supernatural biblical miracle: unlike fish or loaves of bread, data are a non-rival good that

24 Idem. 421.
25 Idem. 421.
26 Idem. 421.

can be re-used infinitely. Yet data re-use is limited. Data are often locked away, monopolised by one single actor: sometimes out of laziness, sometimes out of greed or self-preservation, to stay ahead of the competition, sometimes out of a correct or misplaced fearfulness of infringing on data-protection or intellectual property regulations.

How can one stimulate economically and societally beneficial data re-use and make access and use fairer without infringing on data-protection and intellectual property rights? In February 2020 the European Commission tried to answer this riddle in their *European strategy for data*,[27] which is a roadmap for several legislative initiatives. It presents four types of measure. First, there are those measures that improve the data-sharing infrastructure and facilitate the creation of institutions which will intermediate between those who want to share and those who want to obtain data.[28] Second, there are those that improve by regulating and setting apart money for the creation of sector-specific infrastructures in certain key areas such as agriculture, finance, health, manufacturing, etc. Currently, 12 such sectors have been identified.[29] A third initiative attempts to introduce a normativity that is more inclined towards sharing, for example with notions such as "data altruism", that is,

> the voluntary sharing of data on the basis of the consent of data subjects […] or data holders […] without seeking or receiving a reward that goes beyond compensation related to the costs that they incur where they make their data available for objectives of general interest […] (Article 2(16), Data Governance Act).

Fourth, they can increase the number of actors who can access certain types of data (in particular industrial Internet of Things data) and in this way make access and use fairer, that is, less skewed in favour of one single monopolist.[30]

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27 Communications from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *A European strategy for data,* COM/2020/66 final, Brussels, 19 February 2020.

28 Data Governance Act (n 4).

29 European Commission (n 3). In the initial strategy, 10 strategic fields were identified: Health; Agriculture; Manufacturing; Energy; Mobility; Financial; Public Administration; Skills; the European Open Science Cloud, and Green Deal. Two later additions are Media and Cultural Heritage.

30 Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act). COM/2022/68 final. Brussels, 23 February 2022. Trialogues for this highly controversial proposal are expected to start in 2023.

In this contribution I focus on the proposed *sectoral* European common data spaces, and the question if the European legislator tries to incentivise a kind of commoning under the umbrella of such data spaces. I argue that the sectoral data spaces appear to differ from the other measures to stimulate data sharing in the sense that they aim to gather relevant actors around a shared, sectoral, concern that, at least partly, emerges bottom-up.[31] In comparison, other legislative measures are more *general* and *top-down* in nature, such as the aforementioned ones in the *Data Governance Act* and proposed *Data Act*, making certain types of sharing compulsory[32] or creating infrastructural, normative and financial nudges towards more data sharing. Obviously there is a common concern even in general measures. Take the proposed infrastructures of match-making through data intermediation services and data altruism organisations[33] which proposes a kind of *Tinder* for data: the common concern is to match those that want to share and those that want to access data. However, such rules or infrastructures exist as top-down, neutral structures – the absolute opposite of self-organization. .

Before delving into the question if *sectoral* data spaces are a form of commoning, a first question is: what is a data space? It is a rather broad term that does not mean gathering data in one big silo but a set of techniques and infrastructures to facilitate sharing:

> any ecosystem of data models, datasets, ontologies, data sharing contracts, and specialized management services (i.e., as often provided by data centres, stores, repositories, individually or within "data lakes"), together with soft competencies around it (i.e., governance, social interactions, business processes).[34]

What would make the European Common Data Spaces special compared to just any other data space, is that they would include data governance structures that are fully compatible with European law.[35]

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31 See, for example, the calls for sectoral proposals in preparatory actions (https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/digital/wp-call/2021/call-fiche_digital-2021-prepacts-ds-01_en.pdf) and webinars (https://joinup.ec.europa.eu/collection/open-data/event/data-spaces-experiences-strategic-data-spaces) to stimulate engagement.

32 Idem.

33 Data Governance Act (n 4).

34 Simon Scerri et al., "Common European data spaces: Challenges and opportunities", in Edward Curry, Simon Scerri & Tuomo Tuikka (eds), *Data spaces* (Springer 2022).

35 *A European strategy for data* (n 27).

Can the sectoral common data spaces envisaged by the EU legislator be understood in terms of commoning? This might seem ridiculous at first: commoning is about self-organization, while this is clearly something that is steered up from the top down. However, in contrast to the general rules proposed by the legislator, the attempts to create sectoral data spaces can be understood as top-down nudges to stimulate bottom-up self-organization. Is such nudged self-organization still self-organization? If we put the question of self-organization aside, what about the other characteristics of commoning? Commoning is normally organized around a shared concern to prevent over-use of a resource: but the whole *raison d'être* for the common data spaces is not preventing the over-use but the under-use of data. Moreover, it is clear that data do not suffer from the same scarcity problems as fish in a lake and that data commons are probably not exactly the shared grounds and territories Hardin and Ostrom had in mind when writing about commons. One might even wonder if the data-sharing practices organised around a data space should be qualified as an extractive practice or a generative one – the latter being one condition for calling something commoning according to Serge. However, the outcome from failing to create a commons for data might be equally tragic, as in Hardin's classic narrative:[36] economic and ecological collapse. In this sense, the practice is generative, aiming at maintaining a sustainable ecosystem. Moreover, the understanding of data as a non-rival good might not always be correct – there are instances where the re-use of data might interfere with the initial use and the sharing mediated by the data space can be seen as dealing with a particular type of data scarcity. Finally, the conditions for the success or failure of this sectorial data-sharing practice are also likely to be rather similar to those identified by Ostrom.[37] Thus, while there are distinct differences between the top-down nudged emergence of sectoral data spaces and any other form of commoning, it is worthwhile to explore to which extent there is an *aspiration* for commoning in sectoral data spaces, even though it is a distorted form of commoning, that is, a *commoning-through-the-looking-glass*,

How does the legislator from the top down nudge the bottom-up emergence of sectorial data commons? First, there is legislation. The only legislative proposal on a sectorial data space that is currently on the table is one about the European data space for sharing health data[38] (EHDS), which is therefore also a test case for all other data spaces. Given that health data are sensitive personal data, it is

36 Hardin (n 13).

37 Ostrom (n 19).

38 Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space. COM(2022) 197 final. Strasbourg, 3 May 2022.

a rather controversial proposal. While the legislation for sectorial data spaces is a top-down way of steering towards data commoning, and tries to provide a general and neutral framework, it also leaves space for bottom-up stakeholder initiatives to fill in the specificities. In October 2022 the Commission launched the *Data Spaces Support Centre* to provide technical and infrastructural support to anyone wanting to set up a European Data Space relating to any of the spear point sectors, and to ensure that the different sectorial spaces will be interoperable. Currently, many consortia have been given funding to develop bottom-up ideas for specific sectorial data spaces.[39]

In summary, what we see is a top-down general and seemingly neutral framework nudging the emergence of sectorial frameworks through economic and infrastructural support. The question is whether this is enough. One import factor influencing the success of commoning is that people gather around something that genuinely and substantially engages them, and the stakes should clearly be higher than merely obtaining the EU-provided funding to run a project. In a recent seminar on the EHDS[40] one of the problems that was identified in the discussion was that the EHDS is not a truly bottom-up movement, is often steered by a sector-non-specific bureaucracy (such as the ministries for Economy in the various Member States) and lacks the genuine engagement such as could be found in, for example, some bottom-up health data-sharing initiatives during the Covid pandemic. Moreover, it is questionable whether the pro-sharing incentives provided by the EU will be enough to overcome the incentives to avoid sharing and monopolise large amounts of data. To put it differently: Will big players such as Microsoft, Amazon, Google, etc. really be nudged into commoning or will they act as a rational *company economicus* and bring about Hardin's tragedy of the commons?

39 For example, see the *PrepDSpace4Mobility* consortium working on a mobility data space (https://www.eiturbanmobility.eu/17-partners-across-europe-to-lay-the-foundation-for-a-common-european-mobility-data-space/); the *Common Data Space 4.0 for European Manufacturing* project contributing to a manufacturing data space (https://digitalfactoryalliance.eu/moving-towards-a-common-data-space-4-0-for-european-manufacturing/) or the kick-off event organised by the Commission to engage stakeholders in the creation of the *European Collaborative Cloud for Cultural Heritage* https://research-innovation-community.ec.europa.eu/events/13RqOjrNgOrkH49gjMVavN/overview.

40 Santa Slokenberga & Signe Mezinska, *The European health data space: Law and ethics at the crossroads* (28 February 2023, high seminar in Medical Law, Department of Law, Uppsala University).

5. When does physical togetherness coincide with legal–semiotic togetherness? The impact of Serge Gutwirth's writings: the special case of commoning

As a PhD supervisor, Serge never forced his own ideas or writings onto me. In academia it is a rare quality to have this kind of generous openness that enables a PhD student to explore freedom, allowing for different perspectives. Serge's ideas and writings were there, available, and during my PhD I would often discover their relevance and I gladly drew upon them.

While studying the European Common Data Spaces, I realised that things have not changed and that I have to hang a little note-to-self on the fridge where it says:

> Katja, whenever you write something, check what Serge has been writing recently – even if there doesn't seem to be an intuitive thematic connection – you probably will find something that is much better: a non-obvious, startling connection that will enter into a dialogue with your own work.

In an article[41] dating from 2022, Serge engages with the question whether a city, not as a political unit but as a living entity and bottom-up movement, can be given legal personhood, analogous to the way the "Rights of Nature" movement wants to give rivers, lakes and trees legal personality in order for them to have legal standing in court and be able to be a claimant or other party in a legal dispute. The reason I read Serge's article was that I was co-authoring the aforementioned chapter[42] on legal personhood for AI systems and Nature. Yet, while reading Serge's article I realised that the ideas it presented were equally relevant to developing my own thoughts on the European Common Data Spaces: they were allowing me to reformulate the current regulatory effort as a strange form of commoning, a commoning-through-the-looking-glass. And by connecting these two strands of research (legal personhood and data spaces) to each other, also to my persistent philosophical interest in what it is that holds the multiple together (see section 1 above).

Here, Serge's observations are extremely relevant. The question that Serge explores is whether you can grant legal personhood to a city as a way to recognise the city as a collective or a living autonomous ecosystem. Here my understanding of legal personhood neatly aligns with Serge's: in principle, legal personhood is simply a pragmatic technique that can be granted to any entity as

41 Gutwirth (n 5).

42 De Vries et al. (n 1).

long as there is some societal purpose to be served with it. The problem lies not at the level of principle – whether legal personhood can be assigned to a non-human entity (it can) – but at a more practical level – who is going to speak about and represent this bottom-up entity and define its boundaries? Serge makes two very interesting observations: first, that the real legal problem lies in the fact that under the rule of law it is difficult to argue in favour of the ad hoc granting of legal personhood to bottom-up, emergent groupings. The second real legal problem is that Western law is based on the interests of human individuals and that it is badly equipped to protect or give voice to groups of non-humans and humans. Yet, reading other texts by Serge on commoning, I don't think Serge wants the reader to draw the conclusion that these obstacles mean that granting legal personality to an unexpected entity such as the-city-as-a-living-being-with-its-own-stakes would be completely out of the question if it would serve a good purpose. Elsewhere,[43] he and Isabelle Stengers call upon judges to think outside the box, that is, to use the law in more imaginative and creative ways to support commoning when important matters are at stake.

While it is not explicitly thematised in Serge's article on legal personhood for a city,[44] the article triggered me to think about how commoning can be conceived of as a particular way of creating physical togetherness: similarly to when I gather sea shells in a bag, commoning means that something is rearranged and repositioned, users are gathered around a commons and change their behaviour. If commoning is successful at this "physical" level, granting it legal personhood, that is, creating a legal–semiotic togetherness, might enhance its capacity to act even further. While it is not a given that a commons needs to have legal personhood to do whatever it has set out to do, there are definitely cases where it could help.

Here it becomes possible to understand that commoning – both the classical form and the strange practice of data commoning – is one particular form of creating physical togetherness. Legal personhood, on the other hand, is another particular form of legal–semiotic togetherness. Both commoning and personhood are pragmatic techniques used to achieve certain goals that can be seen in conjunction with one another. When facing a particular challenge that requires people to self-organise to prevent over-use or under-use leading to socio-ecological collapse, it can be worthwhile to look at the particular attributes of the users, the resource units and the resource system, and also the particulars of the common goal, and then see which tools are most helpful: the "physical", the legal–semiotic, or both? Can one togetherness reinforce the other, or does it

43 Gutwirth & Stengers (n 5).

44 Gutwirth (n 5).

not add anything? If the users of a data commons are knowledgeable, if there are users with leadership qualities among them, if the sharing of data is of genuine concern to all users, if the scale of the data pool is neither too big nor too small, etc. – then the data commoning is likely to be successful and perhaps it does not need to be supported by legal personhood. However, in some cases, data sharing could potentially be strengthened if those gathered in a data commons could have legal standing in court, make claims, be held liable, etc. Yet, granting legal personhood to a (data) commons should not be done lightly: it should be an *ultimum remedium*.

As Serge poignantly points out in his article on the city and personhood,[45] granting legal personhood to non-humans (or collectives of non-humans and humans) does not fit very well in Western legal systems. It is difficult to imagine how granting legal personhood, for instance, to a stapler or a shoe would ever be successful. However, in certain cases of commoning, one could imagine that legal personhood could be a mask that gives those gathered behind it a final push towards agency so as to be able to achieve a particular goal. While the legal mask is indifferent to who is behind it, the wearers of the mask might be invigorated by its magic legal spark and be affected in their self-understanding: "Sharing data – yes, we can!"

Giving legal personhood to a commons could in a very limited set of cases make sense: it wouldn't be a random semiotic attribution like the categories *blipblop*, *bapblap* and *sipsap*, but a "physical" and legal–semiotic togetherness converging and reinforcing each other.

Serge: thank you for always making me think twice! I hope to continue to exchange our thoughts on legal personhood and commoning, and on many other matters too.

45 Gutwirth (n 5).

Serge Gutwirth: an iconoclastic image of the academic mindset

Raphaël Gellert[*]

Early on, at the beginning of my PhD, I discussed with Serge Gutwirth how to approach scientific research in law, especially given my ambition not to limit myself to purely positivistic approaches but, on the contrary, to cover a broad range of disciplines (with a particular focus on what I referred to at the time as "philosophy"). I remember Serge telling me about the double bind this approach entails, since one must master not only positivistic legal knowledge but also the knowledge stemming from the other disciplines. One therefore runs the risk of always being an impostor.

Yet, even though I was aware of the challenge, I felt inspired by this double bind and the challenge it entails. In that I was encouraged by Serge's broad knowledge, as he covered various topics from a broad variety of perspectives. Leaving aside the foundational importance of Bruno Latour and Isabelle Stengers, his work touched upon issues of intellectual property (IP),[1] the right to privacy both from criminal-law and civil-law perspectives,[2] data protection

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1 Serge Gutwirth, *Waarheidsaanspraken in recht en wetenschap: Een onderzoek naar de verhouding tussen recht en wetenschap met bijzondere illustraties uit het informaticarecht* (Maklu; VUBPRESS 1993), pp. 552-593.

2 See, for instance, Serge Gutwirth, *Privacy and the Information Age* (Rowman & Littlefield 2002); Erik Claes, Antony Duff & Serge Gutwirth (eds), *Privacy and the criminal law* (Intersentia 2006).

law,[3] environmental law,[4] legal theory[5] and, more recently, the commons,[6] just to name a few.

In this sense, and to paraphrase Deleuze's concept of image of thought (*image de la pensée*),[7] Serge Gutwirth displays a certain image of the academic mindset: one that could be considered as iconoclastic.[8] That is, insofar as is at goes against the grain, given that it is at odds with the trend centred on an ever-increasing specialisation, the production of sometimes sterile, hyper-specialised expert knowledge, and the production of what one may politely refer to as "*vakidioten*".[9]

Serge's double bind (that is, one could argue, a type of knowledge spanning many fields and disciplines and anchored in a "legacy of thought" – *un heritage de pensée* – and therefore a not exclusively technical, expert knowledge), has been defining in my own research trajectory. Given my interest in the manifold notion of risk, he indicated a vast array of literature. This included (for as long as these distinctions make sense) legal theory,[10] political science[11] and so-called

3 Paul De Hert & Serge Gutwirth, 'Privacy, data protection and law enforcement: Opacity of the individuals and transparency of Power' in E. Claes, A. Duff & Serge Gutwirth (eds), *Privacy and the criminal law* (Intersentia 2006).

4 See, for instance, Serge Gutwirth & Éric Naim-Gesbert, 'Science et droit de l'environnement: Réflexions pour le cadre conceptuel du pluralisme de vérités' (1995) 34 *Revue Interdisciplinaire d'Études Juridiques,* 33.

5 See, for instance, Paul De Hert & Serge Gutwirth, 'Tussen vrijheid en grondrechten. Een paradigmastrijd met blijvende actualiteitswaarde' (2000) 29 *Nederlands Tijdschrift voor Rechtsfilosofie & Rechtstheorie,* 205.

6 See Serge Gutwirth & Isabelle Stengers, 'Le droit à l'épreuve de la résurgence des communs' (2016) 41 *Revue Juridique de l'Environnement,* 306.

7 See, for instance, Gilles Deleuze, *Pourparlers 1972-1990* (Les Editions de Minuit 1990), pp. 202-205. For the English translation of the term, see for instance Bernard Bénit, "The image of thought and thought without image in Deleuze & Guattari" 2021 99 Journal of the CIPH 52 (English translation by Priyanka Deshmukh).

8 The choice of the term "iconoclastic" is, of course, to be understood as a homage to Gutwirth's use of the term in his own homage to Deleuze and Guattari; see Serge Gutwirth & Paul De Hert, 'Human rights: A secular religion with legal crowbars. From Europe with hesitations' (2021) 33 *National Law School of India Review,* 420.

9 See, for instance, <https://www.standaard.be/cnt/dmf20130211_00466471>, last consulted 20 April 2023. Although this trend is of course by all means not a new one, see for instance, Stengers, *Une autre science est possible! Manifeste pour un ralentissement des sciences (Suivi de William James le poulpe du doctorat présenté par Thierry Drumm)* (La Découverte 2013), 95, and the references therein.

10 François Ewald, *L'etat providence* (Grasset 1986); François Ost, 'La responsabilité, fil d'Ariane du droit de l'environnement' (1995) 30/31 *Droit et Société,* 281; François Ost, *La nature hors la loi* (La Découverte 1995).

11 Pierre Lascoumes & Patrick Le Galès, *Gouverner par les instruments* (Les Presses de Sciences Po 2005); Michel Callon, Pierre Lascoumes & Yannick Barthe, *Agir dans un monde incertain. Essai sur la d*émocratie *technique* (Seuil 2001).

STS (science and technology studies) with a particular focus on epistemic issues (i.e., expert vs lay knowledge, public participation, etc.),[12] and on the politics of (techno)science.[13] Equally, it is with his guidance, based on his knowledge of various legal fields, that I started to investigate the concept of risk from the perspective of environmental law (with a focus on the precautionary principle),[14] before researching its application and theoretical roots in the field of data protection law.[15]

It is also keeping this broad approach in mind that I am currently working on a number of topics – including some from a private-law perspective, but not only that. In doing so, I am therefore pursuing this double bind: striving to build a broad(er) legal culture[16] and to tackle more fundamental theoretical issues (such as the constitution of the (autonomous) subject in a context highly permeated by digital technologies),[17] and in so doing trying to avoid becoming a '*vakidioot*' myself. After all, it is useful to remember that various classic data protection principles have a clear connection with private law: think only of consent in the GDPR, which directly refers to contract law,[18] or the "legitimate interests" ground, which is clearly inspired by private-law concepts such as reasonable expectations and good faith.[19]

There is, however, a second way in which Serge Gutwirth can be said to display an iconoclastic image of the academic mindset. That is, he takes seriously and is committed to the constraints required by academic knowledge. This has led him to reflect on the dangers created by the so-called knowledge economy and the concept of "fast science", which one could argue is coextensive

12 See, for instance, Angela Liberatore & Silvio Funtowicz, ''Democratising' expertise, 'expertising' Democracy: What does this mean, and why bother?' (2003) 30 *Science and Public Policy,* 146.

13 Bernadette Bensaude-Vincent, *Les vertiges de la technoscience: Façonner le monde atome par atome* (Editions La Découverte 2009).

14 See Nicolas de Sadeleer, *Environmental principles: From political slogans to legal rules* (Oxford University Press 2002).

15 See Raphaël Gellert, *The risk-based approach to data protection* (Oxford University Press 2020).

16 See, for instance, Raphaël Gellert 'De nieuwe consumentenkooprichtlijn en duurzaamheid: steeds relevant?', forthcoming on file with the author.

17 See Raphaël Gellert, 'De Europese regulering van *dark (commercial) patterns*: tussen technologiespecifieke bepalingen en een expliciet herkenning van autonomie', forthcoming on file with the author.

18 See GDPR, Recital 42 and the reference to the EU Directive on unfair terms in consumer contracts.

19 On legitimate interests and reasonable expectations and good faith see, for instance, articles 3:11 and 3:35 of the Dutch Civil Code.

to it.[20] He has done so from an external perspective, that is, by reflecting on the malpractices that this transformation of academic activity seems to push towards.[21] But he has also done so from an internal perspective, that is, reflecting upon the way in which bibliometrics and abstract criteria of excellence threaten scientific research's own criteria of validity (with a focus on legal research).[22] This endeavour to let scientists define their practice (on the basis of these disciplines' own constraints)[23] rather than leaving this task "to a private business called Thomson Reuters",[24] has also influenced the way I approach my own research as it led to a PhD supervision process that encouraged what one could refer to as a non-instrumental approach to knowledge. Emphasising for instance the development of intellectual curiosity, the non-linear relation between what is read and what is written, or the awareness of what the development of a thought process requires in order to properly sediment and mature.

At a time when academic work is being produced at such a rapid pace and is undergoing increased commodification, Serge Gutwirth reminds me that a text and its content are never a given but always multiple,[25] and subject to multiple (re)readings. And in so doing he also reminds me why I engaged in a PhD journey in the first place.

20 See, for instance, Stengers (n 9). Although, as Stengers points out, what we refer today as fast science can be traced back to a model of scientific research that has become dominant since the 19th century and that has made this contemporary fast science possible, see Stengers (n 9) 97 et s.

21 See Serge Gutwirth & Jenneke Christiaens, 'Reageren op problematisch wetenschappelijk gedrag voorbij de moralisering: Een ander wetenschapsbeleid is mogelijk' (2015) 5 *Tijdschrift over Cultuur & Criminaliteit,* 70.

22 See Serge Gutwirth, 'Le droit n'est pas une science mais la science juridique existe bel et bien' in G. Azzaria (ed), *Les nouveaux chantiers de la doctrine juridique* (Yvon Blais/ Thomson Reuters Canada 2016).

23 See Isabelle Stengers, *La vierge et le neutrino – les scientifiques dans la tourmente* (Les Empêcheurs de Penser en Rond 2006).

24 See <https://lsts.research.vub.be/books-of-the-year-2020>: Serge Gutwirth, book review of Graeber, David – *Fragments of an anarchist anthropology* (Prickly Paradigm Press 2004), last accessed 20 April 2023.

25 See, for instance, Gilles Deleuze & Félix Guattari, *Mille plateaux* (Les Editions de Minuit 1980).

Le distributif des *commons* et le redistributif étatique
Le trajet d'un possible contre-paradoxe vertueux ?

Dominique Nalpas

Avec Serge, nous nous sommes rencontrés sur le terrain des communs à plusieurs reprises. Notamment avec le projet de recherche-action participative commoning qui n'a malheureusement pas pu se déployer dans toute sa plénitude. Plus récemment, nous avons ensemble contesté un marché public pour une étude sur les communs imaginé sur une base compétitive entre bureaux spécialisés en proposant la création de l'Assemblée bruxelloise des communs (l'ABC) qui aurait imaginé une telle étude construite à partir du milieu des communs mêmes, de manière collaborative et avec le soutien de la Région de Bruxelles-Capitale.

Dans notre acception de la notion de communs, ce ne sont pas les biens qui seraient substantiellement définis comme étant communs, mais bien le fait que les personnes concernées par ces biens à gérer se donnent les moyens de définir collectivement leurs propres règles et de concevoir leurs propres solutions pratiques. Le sens fondamental des communs est précisément celui-là : agir et coopérer avec ses pairs, de manière auto-organisée, pour satisfaire ses besoins essentiels (David Bollier).

La générativité des communs se situe dans cette im-médiateté – le fait d'être sans médiation – où les *commoners* distribuent entre eux ressources, moyens, bienfaits, décisions, pouvoirs et responsabilités. Nous qualifions cette gestion de distributive à la source, afin que soit éradiquée, à tous moments dans les situations mêmes du *commoning*, toute forme de domination, d'extraction, de compétition excluante. Et point d'entités surplombantes telles que l'Etat pour définir ce que serait la bonne gestion de ces biens en-devers des *commoners* concernés eux-mêmes.

Si les communs sont distributifs, l'État qui se situe en surplomb d'une société entière se targue lui – dans certains cas, tout au moins – d'être redistributif, par l'impôt ou, par exemple, dans le cadre de la Sécurité sociale, au nom de l'intérêt général. Pour nombre d'acteurs – plutôt situés à gauche –, ce serait même la vertu centrale de l'État. Cette redistribution suppose qu'en amont de sa mise en

action se produisent des inégalités qui deviennent inacceptables. Ce qui est le cas : le monde d'aujourd'hui nous montre à l'envi les multiples formes d'inégalités qui continuent de se creuser. Les riches sont toujours plus riches, les enjeux environnementaux toujours plus brutaux n'ont pas les mêmes conséquences pour tout le monde, etc. Mais, avec la redistribution, il y a un paradoxe, un cercle vicieux même, qui se constitue. Pour redistribuer, il faut produire des richesses, mais sous une forme qui, inchangée, continue d'accroître les inégalités… à la source. Piège que nombre de gauches ne parviennent pas à visualiser et encore moins à éviter. Bien au contraire, elles semblent s'y engager toujours plus tel un nœud coulant qui se resserre.

C'est peut-être là qu'un contre-paradoxe vertueux pourrait agir pour desserrer ce nœud coulant du « toujours plus de la même chose ». Et, si nous osions poser cette hypothèse, peut-être un peu folle : la redistribution étatique des richesses aurait intérêt à irriguer les communs en les aidant à se constituer après des siècles de mouvement d'*enclosure* et de dépossessions auquel, pourtant, l'État aura largement contribué.

Il est vrai que la tâche pour renouer avec le droit à une résurgence des communs est incommensurable. Le travail de composition et de construction du « distributif à la source » est considérable. Il y a lieu d'apprendre ou de réapprendre une myriade de pratiques dans un monde pourtant structuré par les bornes de la propriété privée ou publique, les forces de l'extractivisme économique et de la compétition de tous avec tous, du découpage étatico-administratif et où même le juridique est extractif. Ce monde strié, cloisonné, parcellisé, aliéné qui, incessamment, fait obstacle à la résurgence des communs nécessite une charge de travail, une prise de risque et une inventivité considérables pour procéder à son dépassement. Expérimenter et apprendre dans les ruines du capitalisme, cela suppose une précarité qui pourrait être fatale aux communs ; encore et toujours, un soutien étatique pourrait avoir du sens...

Cela peut se faire de multiples manières et à de multiples échelles, dont l'exploration est infinie. Achats de terres pour des mises en commun, mises à disposition de lieux garantis et antispéculatifs, financements d'expérimentations, soutien à des formes de coordination, à des apprentissages multiples voire même constitution de partenariats publics communs ? Etc.

Ce contre-paradoxe s'éclairerait dès lors d'une lumière plus crue encore : l'intérêt général, cette intention étatique universaliste et abstraite, soutiendrait, par la redistribution des moyens, les pratiques distributives des communs et, *in fine*, se donnerait les moyens d'être toujours moins nécessaire. La transition, appelée des vœux de nombre d'observateur.trice.s et acteur.trice.s n'est donc pas une chose linéaire dans le temps, mais prendrait la forme d'une torsion de l'histoire, d'une révolution stratégique pour que les communs et les communs de communs en devenir s'instaurent, tel un réseau en extension.

Klimaaturgentie en de open democratische rechtsstaat

Jean-Marc Piret

1. Inleiding

Het sluitstuk van de rechtse machtspolitiek in de VS, zo beweren zelfverklaarde Europese progressievelingen, ligt in de verregaande politisering van het gerechtelijk apparaat door het benoemen van activistische conservatieve rechters, waarvan het meest in het oog springende gevolg drie recente spraakmakende arresten van het federale Hooggerechtshof zijn.[1] In het eerste en in Europa meest beruchte van die arresten wordt het eerder door het Supreme Court in *Roe v. Wade* erkende grondwettelijke recht op abortus door een ingrijpende ommezwaai in de hoogstrechterlijke rechtspraak weer afgeschaft, waardoor de keuze voor een meer of minder permissieve of zelfs ronduit criminaliserende abortuswetgeving opnieuw voor rekening van de staten komt, zoals dat vroeger ook het geval was. In het tweede arrest wordt het de staat New York op grond van ongrondwettelijkheid verboden om een zeer restrictief vergunningsbeleid te voeren voor het (op verhulde wijze) dragen van wapens op publieke plaatsen. In het derde arrest ten slotte wordt het de Biden-administratie onmogelijk gemaakt om een ambitieuze politiek van CO_2-emissiereductie door te voeren via bestuurlijke regelgeving (het *Clean Power Plan*) uitgevaardigd door het *Environmental Protection Agency* (EPA). Ik heb de drie genoemde arresten aandachtig bestudeerd, wat een feest voor het intellect is voor een rechtsfilosoof die niet

1 Dat rechters in de VS een politieke overtuiging hebben en politiek benoemd worden, klopt, maar geldt dus evenzeer voor democraten als voor republikeinen. Verder is het zo dat politieke benoemingen van magistraten niet automatisch tot politiek voorspelbare uitspraken hoeven te leiden, omdat het recht steeds ook zijn eigen zelfreferentiële en eigenstandige rechtvaardigingsvereisten en beslissingsmaatstaven behoudt. Veel Amerikaanse rechters volgen in hun vonissen en arresten daardoor een argumentatieve rechtvaardigingslogica die de politieke waan van de dag ontstijgt, en dat geldt des te meer voor de verdicten van hogere rechtscolleges. Ook zijn er voorbeelden van Justices van het federale Hooggerechtshof die, eens zij voor het leven benoemd waren, een veel onafhankelijkere koers gevaren zijn dan de partijgangers van de president die hen aangesteld heeft, graag hadden gewild.

houdt van abstracte luchtfietserij. Rechtspraak op dit niveau is immers vaak ook theorie en filosofie in actie, dat wil zeggen rechtsfilosofische reflectie gebaseerd op concrete, maatschappelijk hoogst relevante casuïstiek.

Over de drie genoemde arresten valt veel te zeggen, maar ik zal mij in deze bijdrage beperken tot de zaak *West Virginia v. EPA*.[2] Hoewel er goede redenen zijn om de uitkomst van de drie arresten politiek en ethisch te betreuren, worden er naar mijn oordeel bij het overrulen van *Roe v. Wade* en bij het EPA-arrest indringende constitutioneel rechtelijke en rechtstheoretische argumenten naar voren gebracht die het standpunt van de meerderheid in het federale Supreme Court stevig onderbouwen en die een grote rechtsstatelijke en democratietheoretische relevantie hebben.[3]

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2 *West Virginia v. Environmental Protection Agency* [2022] 597 U.S.

3 In de duidingsprogramma's van de Europese audiovisuele media en in de opiniepagina's van de 'kwaliteitspers', die zich kenmerken door een dominant weldenkende (en dus conformistische) 'progressieve' ondertoon, is daar weinig of geen aandacht voor. Niet alleen omdat het anders allemaal veel te ingewikkeld wordt, maar ook omdat de simplificaties die zogenaamd noodzakelijk zouden zijn voor een heldere mediatieke informatievoorziening ook verhinderen dat het bewustzijn van de eigen verlichte morele superioriteit aan het wankelen zou worden gebracht. En dan is het bijvoorbeeld in het geval van het abortusarrest veel gemakkelijker om zich te houden aan de simplistische clichés van een door opeenvolgende republikeinse benoemingen zwaar verrechtst Supreme Court dat (in dienst van de conservatieve *moral majority,* die al jaren lang op vinkenslag lag om de individuele zelfbeschikkingsrechten op tal van vlakken terug te schroeven) uiteindelijk zijn reactionaire dag des triomfs beleeft, dan aandacht te vragen voor het probleem dat verregaand rechterlijk activisme niet het monopolie van een door conservatieven gedomineerd Hooggerechtshof is en dat het *Roe v. Wade*-arrest (zelf een schoolvoorbeeld van progressief rechterlijk activisme) van meet af aan juridisch op zeer wankele gronden heeft berust en dat het de polarisatie van het abortusdebat alleen maar heeft aangewakkerd. Dat laatste vond overigens ook Ruth Bader Ginsburg, de onlangs overleden progressieve Justice van het Supreme Court). En evenmin is er dan nog aandacht voor de politiekfilosofisch fundamentele vraag of het wel zo democratisch was dat een federaal Hooggerechtshof voor een hele natie besliste dat anti-abortuswetgeving op het niveau van de staten ongrondwettelijk is, terwijl de grondwet met geen woord rept over abortus (en evenmin over privacy overigens) en de natie waarvan sprake zo groot is als een heel continent dat, afgezien van de kosmopolitische liberale bevolking van de staten aan de Oost- en Westkust, ook veel staten met overwegend religieuze en conservatieve meerderheden telt die sterk tegen abortus gekant zijn. Een dergelijke *gouvernement des juges constitutionnels* is vanuit het perspectief van het primaat van de democratisch gelegitimeerde wetgever bekeken steeds problematisch, ongeacht of de meerderheid der opperrechters rechts of links is. Een kritische houding tegenover het rechterlijke activisme in *Roe v. Wade* is overigens wat mij betreft volstrekt compatibel met de mogelijkheid een voorstander van de legalisering van abortus te zijn. Het enige echt interessante rechtstheoretische debat in verband met het overrulen van *Roe v. Wade* gaat dan ook niet over welk kamp het grote morele gelijk aan zijn kant heeft, maar wel over de vraag hoe ver het Hooggerechtshof kan gaan in het deduceren van niet expliciet genoemde rechten uit de in de grondwet wel opgesomde grondrechten en beginselen (het debat over 'unenumerated rights') en

Ik begin met een korte beschouwing over de urgentie van de aanpak van klimaatverandering en buig me aan de hand van het denken van de filosoof Hans Jonas over de vraag welk type van politiek systeem hier het meest effectieve antwoord op zou kunnen bieden. Vervolgens zal ik uiteenzetten waarom de klimaaturgentie in een open democratische samenleving vaak niet tot de voortvarende politieke actie kan leiden die de milieu-ethisch zuiveren zouden wensen. Die stelling zal vervolgens uitgebreid worden geïllustreerd aan de hand van het EPA-arrest, waarvoor we ons eerst ook zullen moeten onderdompelen in enkele (voor de liefhebbers boeiende) Amerikaanse adminstratiefrechtelijke en staatsrechtelijke doctrines. Ik sluit af met een summiere beschouwing over de rol die activisten in de democratische rechtsstaat niettemin ook kunnen spelen wanneer zij zich bedienen van de instrumenten die het recht hun ter beschikking stelt.

2. Milieuethiek, de urgentie te handelen en het meest effectieve politieke regime

Dat het wenselijk ware geweest dat de regering-Biden haar klimaatbeleid ten volle had kunnen doorzetten, behoeft in het licht van de inmiddels overweldigende toename van onze kennis op het gebied van de klimaatwetenschap weinig betoog. Ziehier daarom in sneltempo enkele argumenten die elke geïnformeerde mediaconsument zelf ook kan opnoemen en waar vanzelfsprekend ook de vlammende *dissenting opinion* van Justice Elena Kagan mee opent (en waar Breyer en Sotomayor, de twee andere 'liberals' van het federale Hooggerechtshof zich bij aansluiten). De klimaatcrisis heeft zich de afgelopen jaren en maanden dermate spectaculair geïntensiveerd dat ingrijpende maatregelen door de grootste mundiale uitstoters van broeikasgassen niet langer kunnen uitgesteld worden. IJskappen smelten zienderogen, zeespiegels stijgen, gletsjers krimpen dramatisch, woestijnen breiden zich als inktvlekken uit, door droogtes veroorzaakte misoogsten nemen toe. In alle delen van de wereld ontstaan steeds grotere en meer oncontroleerbare bosbranden, ondraaglijk hete zomers en catastrofale stormen en overstromingen nemen overal toe en het aantal klimaatvluchtelingen groeit wereldwijd.

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over de daarmee samenhangende vraag *of* en zo ja *welke* materiële rechten kunnen afgeleid worden uit de normen van procedurele billijkheid in het vijfde en het veertiende amendement (het debat over 'substantive due process'). Beide debatten worden in Amerikaanse rechtsgeleerde kringen op hoog niveau gevoerd.

In zijn diepzinnige boek *Das Prinzip Verantwortung* legt Hans Jonas[4] in het licht van de planetaire mileurisico's, de filosofische grondslagen van een nieuwe ethiek van de verantwoordelijkheid, niet louter begrepen als post factum te beschouwen toerekenbaarheid van handelingen en gedrag waarvan de gevolgen zich al gerealiseerd hebben, maar verantwoordelijkheid voor wat nog komen gaat en dus ook voor toekomstige generaties. De paradigmawisseling die Jonas bepleit, wijst in de richting van een mede op een 'heuristiek van de vrees' gestoelde ethiek van de catastrofenvermijding in plaats van een utopische ethiek van de hoop. Deze laatste was bereid om het geluk van huidige generaties op te offeren op het altaar van een toekomstig perfect 'rijk der vrijheid' of een 'klassenloze maatschappij' waar economische schaarste, uitbuiting en onderdrukking voorgoed uitgebannen zouden zijn. In de ethiek van de verantwoordelijkheid daarentegen primeert de onheilsprofetie op de heilsprofetie met het doel om alles in het werk te stellen opdat de eerstgenoemde zich niet zou realiseren. Ook het object van de nieuwe ethiek van de verantwoordelijkheid is historisch een absoluut novum: het gaat namelijk om de planetaire biosfeer in haar geheel, omdat de menselijke handelingsmacht met inbegrip van al haar niet-geïntendeerde nevengevolgen zich ook zover uitstrekt. Om een dergelijke gigantische verantwoordelijkheid operationeel werkbaar te maken, zal er bijgevolg ook substantiële vooruitgang moeten worden geboekt in het verhogen van de efficiëntie van internationale samenwerking.

In zijn beroemde boek vraagt Jonas zich daarom terloops ook af (zonder die vraag voluit te beantwoorden) welk type van politiek regime het best geschikt zou zijn om de wereldwijde milieuproblematiek en haar potentieel catastrofale gevolgen het hoofd te kunnen bieden. Toen Jonas zijn boek ongeveer veertig jaar geleden schreef, koesterden sommige intellectuelen nog de ijdele hoop dat de ethische grondslag van het marxisme (gericht op het uitbannen van uitbuiting en het realiseren van een collectivistisch gelijkheidsideaal) intrinsiek onaangetast bleef door de totalitaire ontsporingen van het 'reëel existerende socialisme'. Jonas spreekt in zijn boek aarzelend een voorkeur uit voor het communistische systeem omdat dit zowel machtstechnisch als door de dominantie van het gemeenschapsdenken dat er inherent aan is, een betere basis vormt om het tomeloze belangenpluralisme te temperen dat hoogtij viert in op individuele vrijheid gestoelde democratieën. Hij acht de kans zeer klein dat liberale democratieën waarin individuele en georganiseerde groepsbelangen en privaat ondernemerschap gemotiveerd door winstbejag legitiem geacht worden, de ethiek van de verantwoordelijkheid op een voldoende energieke wijze in praktijk zullen

4 Hans Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation* (4th edn, Insel Verlag 1985)

kunnen brengen. Om die ethiek wereldwijd politiek operationeel te maken, zal er bijgevolg een welwillende, wetenschappelijk geïnformeerde en machtstechnisch effectieve *tyrannis* nodig zijn die de beslissingen van de wetende elite ook zonder instemming van de basis kan doordrukken en eventuele weerstand kan breken.[5] Kortom, Jonas acht een gecentraliseerd autoritair staatsapparaat van communistische signatuur, maar dan uitgezuiverd van zijn utopische aspiraties, superieur aan liberaal-democratische representatieve politieke systemen om de toekomstige ecologische uitdagingen te lijf te gaan. De democratie, waar kortetermijnbelangen en de (materiële) welvaart van het kiezerspubliek steeds op de eerste plaats komen, is dus niet geschikt om de planeet van de ecologische ondergang te redden.[6]

Jonas benadrukte ook decennia geleden al herhaaldelijk dat de tijd dringt en dat hoe langer we zeer ingrijpende actie uitstellen, hoe drastischer er in de toekomst zal ingegrepen moeten worden. De ecologische problematiek gaat immers gepaard met cummulatieve verslechteringsprocessen, die aan gene zijde van ongewisse drempels opeens kunnen omslaan in onstuitbaar aanzwellende

5 Ibid 262-263. Jonas schrikt er zelfs niet voor terug om de idee te rechtvaardigen dat om de gewenste doelen te realiseren er door de welwillende technocratisch-tirannieke elite een politiek van de misleiding van het volk (Plato's 'edele leugen') kan ingezet worden. Hier wordt dus het beeld opgeroepen van de mogelijkheid van een nieuw ecologisch machiavellisme, dat om der wille van de realisering van het goede doel een streng geheime leer der *arcana imperii* zou kunnen ontwikkelen op grond waarvan de technocratische eco-elite het volk zou misleiden om hen het goede te laten doen. Hoewel Jonas het ontstaan van een dergelijke elite die alle eigenbelang opoffert voor de redding van de planeet niet a priori uitsluit, acht hij empirisch de kans daarop niet groot (cf. Ibid. 266-267). Jonas' politiek-filosofische speculaties over dit thema zijn een laattwintigste-eeuwse variant van het platoonse thema van de filosoof-koning die ondersteund wordt door een kennisaristocratie van wachters van de publieke zaak, die zich wars van elk eigenbelang geheel opofferen voor het welzijn van de gemeenschap.

6 Nu de door Jonas gerechtvaardigde eco-tirannie in het licht van de noodzakelijk door te voeren verkleining van de ecologische voetafdruk van de mensheid immers geen hedonistische maatschappij zal kunnen tolereren maar eerder zou afstevenen op een ideaal van frugaliteit, is het bij wijze van culturele zelfdisciplinering mooi meegenomen dat het reëel existerende socialisme door zijn economische inefficiëntie de burgers al gewoon gemaakt had aan een relatief schraal en ascetisch leven zonder overbodige luxe en waar het consumptieniveau op een veel lager pitje stond, wars van de verspilzucht die in kapitalistische wegwerpmaatschappijen hoogtij viert. Jonas kon nog niet vermoeden dat veertig jaar later, de enige efficiënt functionerende communistische tirannie niet de welwillende collectivistische en ecologisch-autoritaire technocratie is die hij bereid was te accepteren, maar een communistische dictatuur met een staatskapitalistische economie, China, die economisch naar een wereldwijde hegemonie streeft en die de acceptatie van zijn totalitaire macht door de burgers afkoopt tegen de prijs van een toename van hun materiële welvaart. En voor zover China al een voortrekkersrol speelt in de gewenste ecologische (r)evolutie, doet het land dit voornamelijk om bijvoorbeeld op het gebied van de productie van elektrische auto's en hun batterijen economisch wereldleider te worden.

lawine- of tsunamiachtige catastrofes. Kortom, de ethiek van de verantwoordelijkheid die de urgentie van de ecologische plicht radicaal au sérieux neemt, is niet echt compatibel met de liberale en democratische rechtsstaat waarin rekening moet gehouden worden met geïnstitutionaliseerde machtsevenwichten en waarin het eerder genoemde belangenpluralisme op moeizame en tijdrovende wijze moet gecompatibiliseerd worden met een collectief belang dat in dit geval zelfs ver uitstijgt boven het niveau van nationale staten. Of om de zaak van de andere kant uit op scherp te stellen: ecologische fundamentalisten zijn geen democraten en ecologisch activisme kan in variërende gradaties van radicaliteit op zeer gespannen voet staan met de wetten en met de democratische rechtsstaat.[7]

Wie zoals schrijver dezes vindt dat een open democratische samenleving waarin de politieke macht niet alleen verantwoording verschuldigd is aan het volk maar ook rechtsstatelijk ingeperkt wordt door juridische regels en beginselen, principieel te verkiezen valt boven de door Jonas ten behoeve van het afwenden van de planetaire eco-catastrofe gewenste ecologisch tirannieke (wereld) regering, zal moeten accepteren dat beleid dat door de meest rationele en wetenschappelijk geïnformeerde politici en burgers noodzakelijk geacht wordt, vaak niet ten volle, en meestal trager dan wenselijk, zal kunnen uitgerold worden. De eerste reden daarvoor is dat de effectiviteit van de handelingsmogelijkheden van de staat in de democratie, waar de macht niet wordt uitgeoefend door een kennisaristocratie die de waarheid in pacht heeft, maar door politici die verantwoording verschuldigd zijn aan hun kiezers, meestal rechtevenredig is met het vermogen om beleidsmatige compromissen te vinden tussen elkaar beconcurrerende belangengroepen. De tweede reden is dat de wetgever in hoogcomplexe open maatschappijen vaak niet meer doet dan enerzijds de door de politieke meerderheid gewenste doeleinden zo concreet mogelijk te omschrijven en anderzijds de ordeningspolitieke randvoorwaarden vast te leggen waarbinnen tal van actoren, zowel private ondernemingen als overheidsinstellingen, die doeleinden moeten proberen te realiseren. Dat wordt hen ook nog bemoeilijkt door de opposanten van dat beleid, want ook die opposanten staat het in de democratie immers vrij om al hun rechtsmiddelen uit te putten om zich daartegen te verzetten.

7 De meest radicale klimaatactivisten van het type *extinction rebellion* maken van allerlei acties van burgerlijke ongehoorzaamheid (die soms nog moeilijk te onderscheiden zijn van puur vandalisme) dan ook hun keurmerk en het ontstaan van een nog radicalere terroristische variant van ecologisme valt zeker niet uit te sluiten.

3.1 Democratie en machtsevenwichten in de VS

De open democratische rechtsstaat is zelfs tot in zijn grondstructuur ontworpen om rekening te kunnen houden met een diversiteit aan antagonistische belangen. Dat is zeker het geval in de VS, waar er niet alleen een complexe bevoegdheidsverdeling bestaat tussen het niveau van de staten en de federale regering enerzijds, maar waar die federale regeringsvorm op zijn beurt ook nog eens gekenmerkt wordt door geïnstitutionaliseerde machtsevenwichten (scheiding van machten, mogelijkheid tot constitutionele toetsing van wetten, tweekamersysteem waar politiek verschillende meerderheden mogelijk zijn en waar tal van belangenverenigingen via lobbying invloed op uitoefenen; en bovendien worden belangentegenstellingen in de VS ook nog extra aangezwengeld door een alom aanwezige particuliere procedeervreugde, in het bijzonder ook tegen de overheid). Thomas Madison stelde zelfs met verve dat een veelheid van (mogelijk antagonistische) belangen in een grote republiek een dijk zou opwerpen tegen het gevaar van een meerderheidstirannie.[8]

Laten we dan nu als aanloop naar onze uiteenzetting over het EPA-arrest van naderbij bekijken hoe de zojuist gesignaleerde manier waarop in de moderne hoogcomplexe Amerikaanse samenleving de wetgever, die de algemene politieke doelstellingen (in dit geval het tegengaan van klimaatopwarming) vastlegt, het uitvaardigen van de concrete regelgeving waaraan de verschillende betrokken maatschappelijke actoren bij het helpen realiseren van die doelstellingen gebonden zijn, delegeert aan 'government agencies'. Om duidelijk te kunnen maken welke rechtsstatelijke problemen zich daarbij stellen zal eerst de nodige aandacht gaan naar de relevante staats- en bestuursrechtelijke doctrines over delegatie van bevoegdheden door de wetgever aan het bestuur en de rol die de (constitutionele) rechter daarbij toekomt.

3.2 De non-delegation doctrine*: theorie en praktijk*

Deze leer zegt dat de wetgevende macht haar legislatieve bevoegdheid niet kan afstaan of overdragen aan andere organen en daarmee wordt dan vooral gedacht

8 In een brief aan Thomas Jefferson pleitte Thomas Madison voor een verbrokkeling van het staatsvolk tot een veelheid van partijen en tegenstrijdige belangen die elkaar in evenwicht houden en wisselende meerderheden noodzakelijk maken zodat 'no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit'. Cf. Jean-Marc Piret, '"We the people". De constitutie van een Amerikaans politiek subject tussen "federalisme" en "anti-federalisme"', in Paul de Hert e.a. (eds.), *De Federalist Papers. Bakermat van het moderne constitutionalisme* (Damon 2018) 25

aan de executieve (de President) en de rechterlijke macht.[9] In de Amereikaanse grondwet staat dit verbod nergens expliciet vermeld.[10] De doctrine werd ontwikkeld door interpretatie van Art. I, eerste lid, waarin gesteld wordt dat 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'. Het eerste woord van het artikel, '*all*' impliceert in die interpretatie dat er geen andere wetgevende bevoegdheid is dan die van het bicamerale Congres zelf. De rechtsfilosofische en juridisch-doctrinale grondslag voor deze leer kan teruggevoerd worden tot het *common law*-beginsel 'delegata potestas non potest delegari', omdat de door de grondwetgevende macht (het 'Volk' of om in de continentaal-Europese traditie met Sieyès te spreken: het *pouvoir constituant*) originair aan het Congres geattribueerde wetgevende macht berust op het representatieve karakter van zijn leden die deze bevoegdheid persoonlijk *toevertrouwd* kregen als een 'trust' en deze dus ook zelf moeten uitoefenen.[11] In dit verband moet ook de invloed van John Locke worden genoemd die in zijn *Two Treatises of Government* de wetgevende macht expliciet geconceptualiseerd had als *fiduciary power* en als delegatie door het volk van de specifieke bevoegdheid wetten te maken ('to make laws, and not to make legislators')[12], alsook Montesquieus beroemde uitspraak dat vrijheid onmogelijk is waar de wetgevende en de uitvoerende macht in handen van dezelfde personen of organen zijn.

Op het einde van de achttiende eeuw waren de *framers* van de Amerikaanse constitutie nochtans weinig begaan met beperkingen van de wetgevende macht

9 Maar het kan ook gaan om gevallen van delegatie aan de kiezer, waarbij de wetgever zijn wetgevende macht als vertegenwoordiger van het Volk in feite zou vervreemden aan een deelgemeenschap, die dan over bepaalde kwesties een rechtstreekse democratie zou in werking stellen. Daartegen wordt in negentiende-eeuwse rechterlijke uitspraken herhaaldelijk in strenge bewoordingen gewaarschuwd als een pervertering van een republikeinse representatieve regeringsvorm tot een democratische regeringsvorm waar demagogen, volksmenners en meerderheidsfacties vrij spel hebben om op tirannieke wijze hun groepsbelangen te laten triomferen. Niet zelden wordt daarbij ook het schrikbeeld van de terreurfase van de Franse Revolutie in stelling gebracht. Zie voor voorbeelden: Patrick W. Duff and Horace E. Whiteside, 'Delegata Potestas Non Potest Delegari. A Maxim of American Constitutional Law' (1929) 14 Cornell Law Review 168

10 Dat is echter wel expliciet het geval in de grondwetten van een tiental staten.

11 Zowel de leden van het Huis van Afgevaardigden als de senatoren die door de staten worden afgevaardigd, worden rechtstreeks verkozen (zie wat de senaat betreft het zeventiende amendement van de grondwet).

12 Cf. John Locke, *Second Treatise on Government*, par. 141: 'the legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others. (...) The power of the Legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make *laws,* and not to make *legislators*'.

en werd delegatie van regulatorische bevoegdheid door de wetgever aan de executieve onproblematisch op tal van gebieden doorgevoerd.[13] Naarmate de *non-delegation doctrine* in de tweede helft van de negentiende eeuw als een algemeen principe van constitutioneel recht steeds meer op de voorgrond treedt, laat de rechtspraak zien dat deze leer meteen ook pragmatisch ingeperkt wordt. Dat gebeurt door te benadrukken dat wetgevers algemene normen stellen waarvan de essentie gelegen is in het omschrijven van te realiseren doelstellingen, maar dat in moderne maatschappijen waar arbeidsdeling de regel is, de verdere uitwerking van de concrete regulatorische details noodgedwongen overgelaten moet worden aan actoren van de uitvoerende macht, aanvankelijk ministeriële departementen en later steeds meer speciaal daartoe opgerichte *government agencies* die bestaft zijn met deskundigen die het Congres meestal niet direct ter beschikking heeft.

Uit de rechtspraak blijkt dat het volstaat dat de wetgever bij de delegatie van regelgevende bevoegdheid aan de executieve de 'controlling power' over het domein in kwestie behoudt en niet de hele politiek betreffende die materie uitbesteedt aan de regeringsmacht om aan de maat te zijn van de *non-delegation doctrine*. Tevens mag het niet gaan om het verlenen van arbitraire discretionaire bevoegdheid, maar dient er sprake te zijn van duidelijke richtlijnen en dient er een 'intelligibel beginsel' aan de delegatie ten grondslag te liggen. Dat de wetgever zijn legislatieve bevoegdheid niet kan overdragen aan andere organen of personen, blijft op die manier in zijn algemeenheid een geldig fundamenteel beginsel van constitutioneel recht, maar zonder dat dit de opmerkelijke groei van de *administrative state* in de twintigste eeuw in de weg hoefde te staan. In veel rechtszaken heeft de lippendienst aan de *non-delegation* doctrine dan ook veel weg van een symbolisch ritueel dat zelden of nooit leidt tot nietigverklaring van wetten die de delegatie van regelgevende bevoegdheid mogelijk gemaakt hebben.[14] Het resultaat was dat het uitoefenen van een afgeleide en

13 Zie voor interessante voorbeelden Eric A. Posner and Adrian Vermeule, 'Interring the Nondelegation Doctrine' (2002) 69(4) The University of Chicago Law Review, 1735

14 Voor uitgebreide casuïstiek, zie Keith E. Whittington and Jason Iuliano, 'The Myth of the Nondelegation Doctrine' (2016) 165 University of Pennsylvania Law Review 379. Enkel wanneer het Congres helemaal geen specifieke doelstellingen en aanwijzingen geeft en de executieve volledig vrij spel geeft om bepaalde kwesties volledig zelf te regelen, zoals gebeurde in sommige *New Deal*-zaken (1935) onder president Rooseveld, zal het Hooggerechtshof de delegatie van bevoegdheid onconstitutioneel verklaren. De terughoudendheid van de rechterlijke macht om op grond van de *non-delegation doctrine* wetten nietig te verklaren, geldt zowel voor het federale Hooggerechtshof als voor lagere rechtbanken. Het zijn echter vooral de lagere rechtbanken die de doctrine gepreciseerd hebben en de vele uitzonderingen daarop nader omschreven hebben (zie ibid. pp. 405 e.v.).

ondergeschikte discretionaire bevoegdheid door een deskundig geïnformeerde ambtelijke staf die ook regelgevend optreedt, niet beschouwd werd als onconstitutionele schending van de scheiding der machten, zolang die ambtenaren niet buiten het kader van de door de wetgever gespecificeerde doelstellingen en randvoorwaarden treden.[15] In dat geval is er ook geen sprake van vervreemding of delegatie van *wetgevende* bevoegdheid, maar wel van *executieve* regulatorische bevoegdheid onder het gezag van de wetgever.[16]

3.3 Van Chevron deference *naar de* major questions doctrine

Maar wat als de doelstellingen in de wet vaag of *open-ended* geformuleerd zijn? Om in dergelijke gevallen te toetsen of de regelgeving door *government agencies* nog binnen de krijtlijnen blijft van de door de wetgever gedelegeerde bevoegdheid, heeft het federale Hooggerechtshof in de zaak-Chevron (1984) enkele criteria ontwikkeld die in de rechtsleer bekend geworden zijn onder de naam *Chevron deference.*[17] Deze leer zegt, kort samengevat, dat de interpretatie door een regeringsagentschap van vage termen of lacunes in de wet die het agentschap bevoegdheid verleent om een bepaald domein te reguleren, overgelaten kan worden aan dat agentschap zelf (inclusief 'filling the statutory gaps'), zolang die interpretatie toelaatbaar (niet in tegenspraak met expliciete wettelijke bepalingen), redelijk en niet willekeurig is. Zolang aan die criteria van marginale toetsing voldaan is, ligt het niet op het pad van de rechter om een alternatieve interpretatie van de vage wetgevende bepaling(en) door te drukken. Rechters hebben als generalisten immers in beginsel minder expertise in huis over zeer

15 Volgens sommigen dient de doctrine dan ook veel restrictiever te worden opgevat als een verbod aan het Congres en zijn leden om hun bevoegdheid om te stemmen over federale wetgeving te delegeren aan anderen. Cf. Posner and Vermeule (n 13) 1723. Maar er is nog een andere interessante interpretatie van de exclusiviteit van de wetgevende bevoegdheid van het Congres mogelijk, die veel beter in overeenstemming is met de feitelijke triomf van de *administrative state.* Meer bepaald gaat het om de interpretatie waarbij in Art. 1 niet een impliciet delegatieverbod gelezen wordt, maar juist een *exclusieve* delegatiebevoegdheid (als uitvloeisel van de exclusieve wetgevende bevoegdheid). Zo gelezen, kan *uitsluitend* het Congres opdracht geven aan regeringsagentschappen om over een bepaalde materie nader regelgevend op te treden. Cf. Thomas W. Merril, 'Rethinking Art. I, section 1: from non-delegation to exclusive delegation' (2004) 104, 8 Columbia Law Review 2097

16 Reeds in 1928 stelt W.H. Taft, de toenmalige Chief Justice van het federaal Hooggerechtshof in *J.W. Hampton* v. *U.S.* dat de *executive official* die regelgevend optreedt binnen het kader van door de wetgever gespecificeerde doelstellingen en randvoorwaarden, een 'mere agent of the law-making department' is, ongeacht hoeveel discretie er bij die wetstoepassing moet worden uitgeoefend.

17 *Chevron U.S.A Inc.* v. *Natural Resources Defense Council, Inc.* [1984] 467 U.S.

specifieke te reguleren domeinen (zoals bijvoorbeeld milieubescherming) dan de ambtenaren en deskundigen in gespecialiseerde regeringsagentschappen. En ook vanuit het oogpunt van politieke *accountability* is het, aldus het Hof in het Chevron-arrest, beter om, binnen de zojuist aangegeven grenzen, voorrang te verlenen aan de interpretatie door het regeringsagentschap, dat weliswaar niet rechtstreeks verantwoording verschuldigd is aan de burger, maar dat wel onder de verantwoordelijkheid van de regering en de president valt, die dit wel zijn.[18]

Nu zijn er echter gevallen waar de interpretatie door een regeringsagentschap van lacunes of vaagheden in de wet die hun de bevoegdheid verleent om regulerend op te treden over belangwekkende maatschappelijke aangelegenheden, de reikwijdte en impact van die regulerende bevoegdheid ingrijpend kan oprekken. Dat gebeurt dan zonder dat daar een expliciete toestemming van het Congres voor gegeven is, en dan stelt zich natuurlijk de vraag of ingrijpende beleidskeuzes op grond van het 'opvullen' van lege of het interpreteren van vage plekken in de wet, niet (ver) buiten de grenzen van de gedelegeerde bevoegdheid vallen. Om dergelijke ondemocratische uitwassen van de *administrative state* (waarbij de delegataris zich meer discretionaire macht toe-eigent dan oorspronkelijk door de wetgver bedoeld was) in te dijken, is het *Supreme Court* de aanvankelijk zeer royaal verleende *Chevron deference* langzamerhand weer gaan inperken op grond van criteria die men in de rechtsleer aanduidt als de *major questions doctrine*.

Een voorbeeld: omstreeks 1996 is de Food and Drug Administration (FDA) nicotine gaan beschouwen als een drug en is het agentschap op grond daarvan ingrijpende beperkende maatregelen gaan uitvaardigen om de verspreiding van tabak bij jongeren tegen te gaan terwijl het zich nooit eerder had bezig gehouden met de regulering van tabaksproducten. Het Hooggerechtshof oordeelde dat hier in beginsel *Chevron deference* diende verleend te worden gelet op het feit dat de FDA niet alleen moest geacht worden over de grotere deskundigheid te beschikken betreffende de evoluerende wetenschappelijke inzichten over de substanties die als drug moeten worden beschouwd. De verantwoordelijkheid om beleidskeuzes te maken op een gebied waarvan de nadere regulering opgedragen werd aan een regeringsagentschap en waarbij concurrerende maatschappelijke belangen in het geding zijn (in dit geval economie versus publieke gezondheid) is in beginsel geen taak van de rechter, zo stelde het Hof. Maar onder uitzonderlijke omstandigheden waar zeer fundamentele maatschappelijke vraagstukken met aanzienlijke economische implicaties ('major questions') ter discussie staan, zal het Hof er niet zonder meer kunnen van uitgaan dat het Congres de bevoegdheid om daarover knopen door te hakken, gedelegeerd heeft aan het

18 Ibid 865

regeringsagentschap, wanneer zulks niet expliciet neergeschreven is in de wet. Nu de handel in tabaksproducten in het midden van de negentiger jaren nog een van de grootste Amerikaanse industrietakken was met talloze nationale en internationale commerciële ramificaties, en de voorgenomen regulering door de FDA daar een ingrijpende economische impact zou op hebben, kon men er niet zo maar van uitgegaan dat de wetgever een dermate verregaande macht *impliciet* zou gedelegeerd hebben aan een regeringsagentschap. Het reguleren van de handel in tabaksproducten, aldus besliste het Hof, bleef bijgevolg, bij afwezigheid van een andersluidende expliciete wettelijke bepaling, een verantwoordelijkheid van het Congres zelf en niet van de FDA.[19]

Deze casuïstische inperking van de Chevron-doctrine ging gaandeweg ook gepaard met meer principieel geformuleerde bezwaren. Zo bekritiseerde (in een zaak van 2016) toenmalig appelrechter (en sinds 2017 Associate Justice bij het federale Hooggerechtshof) Neil Gorsuch de *Chevron deference* doctrine scherp als een door de rechterlijke macht zelf georkestreerde abdicatie waarbij deze haar constitutionele bevoegdheid om wetten uit te leggen en te interpreteren, doorschuift naar regeringsagentschappen die daarenboven ook beleidsbeslissingen mogen nemen en deze in een regelgevend kader vorm mogen geven. Op die manier oefenen zij in feite de drie functies van de trias politica tegelijk uit, wat volgens James Madison in Federalist n° 47 een zekere weg naar tirannieke machtsuitoefening is.[20]

In een viertal relatief recente arresten spitst het Supreme Court de *major questions doctrine* verder toe tot de vereiste dat regeringsagentschappen, wanneer deze maatschappelijk en economisch erg ingrijpende nieuwe reguleringen willen opleggen, daar een duidelijke en expliciete opdracht van de wetgever voor nodig hebben (*clear statement rule*) en zich daarbij niet kunnen baseren op de interpretatie van een lacune of een vaag en polyinterpretabel begrip in de relevante wet.[21] De zin die het Supreme Court ritueel herhaalt wanneer zij de zo toegespitste *major questions doctrine* in stelling brengt, is deze: 'We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance".'[22]

19 *FDA* v. *Brown & Williamson tobacco Corp.* [2000] 529 U.S.

20 Gorsuch heeft het over 'a judge-made doctrine for the abdication of the judicial duty'; geciteerd in het artikel over *Chevron deference* op de site *Ballotpedia.org.*

21 Zie over deze rechtszaken uitgebreid Mila Sohoni, 'The Major Questions Quartet' (2022) 136 Harvard Law Review 262

22 Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014)

4. De zaak *West Virginia v. EPA*

Voor de bepaling van regels betreffende de mate van reductie van CO_2-uitstoot door bestaande electriciteitsproducenten, gaf de *Clean Air Act* (CAA) het EPA op behoorlijk vage en ruime wijze de opdracht om uit te gaan van het 'beste systeem van emissiereductie dat op adequate wijze is aangetoond'.[23] Dat 'beste systeem' zou dan maatgevend zijn om de optimaal gewenste graad van emissiereductie vast te leggen. Op die wettelijke grondslag vaardigde het EPA het *Clean Power Plan* uit waarin bepaald werd dat kolen- en gasgestookte electriciteitscentrales ten eerste hun verbranding technisch moesten optimaliseren om de uitstoot te verminderen en ten tweede, om aan de opgelegde uitstootnormen te kunnen voldoen, aan 'generation shifting' moesten doen, wat wil zeggen dat kolengestookte centrales meer in hernieuwbare energie en gas moesten investeren en gasgestookte centrales meer in hernieuwbare energie om elektriciteit op te wekken. Dat konden zij doen door hun eigen productie af te bouwen en rechtstreeks in alternatieve productiemethoden met lagere emissieniveaus te investeren of door hun eigen traditionele productie gedeeltelijk te handhaven en ter compensatie daarvan uitstootrechten te kopen in een systeem van verhandelbare emissierechten die gaandeweg schaarser en daardoor duurder worden, zoals we dat ook binnen de EU kennen. Beide methodes zouden resulteren in substantiële verschuivingen van marktaandeel van electriciteitsproducenten gebaseerd op kolen en gas naar producenten op basis van hernieuwbare bronnen. Door eerst te beslissen dat het 'best mogelijke systeem van emissiereductie' bij de productie van electriciteit bestaat in 'generation shifting' (overstap naar productie op basis van zo veel mogelijk hernieuwbare bronnen), kon de EPA vervolgens de mate van emissiereductie die het de industrie zou opleggen, bepalen op grond van een redelijke inschatting van hoeveel groei er mogelijk zou

23 Section 111 van de CAA verleent het EPA de bevoegdheid om uitstootnormen vast te leggen voor elke substantie die 'luchtvervuiling veroorzaakt of daar op significante wijze toe bijdraagt' en 'die redelijkerwijze geacht kan worden een gevaar te vormen voor de volksgezondheid of het publieke welzijn' ('may reasonably be anticipated to endanger public health or welfare'). Hoewel CO_2 strikt genomen als natuurlijke substantie in 'normale' hoeveelheden geen polluent is, maar onrechtstreeks als overmatig aanwezig broeikasgas via de opwarming van het klimaat wel zeer negatieve gevolgen voor de volksgezondheid kan hebben, valt de regulering van CO_2-reductie dus onder de wet. Sectie 111 (d) van de wet bepaalt overigens dat er geen substanties met genoemde negatieve gevolgen op de volksgezondheid en het publieke welzijn door de mazen van het regulatorische net mogen glippen en dat polluenten die niet gereguleerd worden in andere reeds bestaande specifieke regulatorische programma's zoals de 'National Ambiant Air Quality Standards' en 'Hazardous Air Pollutants', op gezag van de CAA door het EPA gereguleerd behoren te worden.

zijn in de productie door zon en wind, zonder de bevoorradingszekerheid in het gedrang te brengen.

Om een complex verhaal zo kort mogelijk (en met weglating van alle procesrechtelijke ingewikkeldheden) samen te vatten en een kat een kat te noemen, besliste het EPA in feite dat het 'beste systeem van emissiereductie' erin bestond om door haar regulatorisch optreden (het drastisch verlagen van de toegestane emissieniveaus in combinatie met de gesuggereerde oplossingen om daaraan tegemoet te komen) het de fossiele brandstof gestookte (en vooral de kolengestookte) centrales dermate moeilijk te maken dat zij geleidelijk aan uit de markt geconcurreerd zouden worden. De EPA rekte daardoor zijn eigen bevoegdheid om 'standards of performance' voor bestaande energieproducenten vast te leggen, op tot de bevoegdheid om te beslissen dat kolengestookte centrales er op termijn beter geheel konden mee stoppen. Anders zouden zij toch niet kunnen voldoen aan de door het agentschap opgelegde uitstootnormen. Daarmee zou het Congres het EPA exclusief gemandateerd hebben 'with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy'. Er is weinig reden om te denken dat het Congres zulks zou gedaan hebben op de onduidelijke, cryptische en impliciete wijze van de wettelijke bepaling (sectie 111(d) van de CAA) waar de regering zich op beroept, aldus het Hooggerechtshof.

De rechtsvraag die uiteindelijk voorligt bij het federale Hooggerechtshof was of het Congres de EPA wel opdracht had gegeven om een dermate ingrijpende herstructurering van de gehele Amerikaanse energieproductie door te voeren. De Biden-regering vond dat dit zeer assertieve systeem van overheidsregulering (door het bestuur) dat aanstuurt op een voortvarende energietransitie een beleid was waar elke klimaat-geëngageerde burger achter zou moeten staan. Alleen zou die regelgeving, dat gaf ook de regering toe, miljarden aan kosten teweeg brengen voor de fossiele industrie, en daarenboven zou zij de elektriciteitsprijs fors doen stijgen en tienduizenden banen kosten. Ook dat is natuurlijk een prijs die een samenleving bereid kan (en velen zullen zeggen 'moet') zijn om te betalen, temeer daar de energietransitie ook nieuwe banen oplevert. Maar afgezien van dat abstracte 'behoren', waar men van mening kan over verschillen, moet wat een democratische samenleving wil, ook in alle duidelijkheid naar voren komen in haar representatieve gremia. En daar wrong het schoentje, want simpel gezegd: hetgeen hier door een regeringsagentschap zou worden opgelegd, was zo drastisch dat men er in het Congres nooit de vereiste meerderheden voor gevonden zou hebben. En dat komt dan toch neer op een vorm van wetgeving door de uitvoerende macht zonder de noodzakelijke democratische legitimering, want louter gebaseerd op een vage bepaling in de wet die dat agentschap machtigt om de uitstoot van polluenten te reguleren.

Op grond van de *major questions doctrine*, aangescherpt tot een *clear statement rule*, besliste het Hof dan ook dat in gevallen waar het gaat om het doorvoeren van ingrijpende en disruptieve wijzigingen in het beleid met verreikende maatschappelijke en economische consequenties, men er niet zomaar kan van uit gaan dat het Congres een regeringsagentschap daartoe opdracht gegeven heeft wanneer dit niet op een zeer duidelijke en expliciete wijze is neergeschreven in de wet die het agentschap daartoe bevoegdheid verleent.[24]

In zijn *Concurring opinion* onderstreept Justice Neil Gorsuch nog eens extra welke de rechtsstatelijke en rechtsfilosofische grondslagen zijn van deze hoogstrechterlijke beslissing en hij verwijst daarbij herhaaldelijk naar de *Federalist Papers*.[25] De *major questions doctrine* beschermt de constitutionele norm van de scheiding der machten door te eisen dat het Congres, wanneer het zijn regelgevende bevoegdheid in maatschappelijk zeer belangrijke kwesties niet zelf uitoefent maar delegeert aan regeringsagentschappen, dit op ondubbelzinnige wijze en met welomschreven doelstellingen behoort te doen, omdat de framers van de Amerikaanse republiek er van uit zijn gegaan dat billijke wetten in naam van het volk uitvaardigen in de regel de taak is van de representatieve en politiek verantwoordelijke gremia (het bicamerale Congres) en niet van een politiek onverantwoordelijke klasse van uitvoerders van centraal aangestuurd regeringsbeleid. Diegenen die in naam van het volk wetgevend optreden, dienen ook een verantwoordingsplicht tegenover dat volk te behouden, zoals Madison benadrukt (*Federalist n° 37*). De constitutie vertrouwt die representatieve functie daarom niet aan een kleine elite toe, maar geeft ze in handen van een veelheid aan personen zodat de diversiteit van het volk en de vaak tegenstrijdige belangen ook meerstemmig worden gerepresenteerd in de wetgever, zo vervolgt Gorsuch met Madison als zijn leidraad (*Federalist n°52*). Het gevolg daarvan is dat wetgeving tot stand brengen een brede consensus vereist; als die er niet is, dan kan immers één van de wetgevende kamers initiatieven van de andere tegenhouden of kan de president een veto uitspreken dat slechts overruled kan worden door een gekwalificeerde meerderheid in de wetgever. De constitutionele ordening zorgt er op die manier voor dat wetgeving voorzien wordt van de input van verschillende perspectieven bij haar totstandkoming en gegrondvest wordt op voldoende maatschappelijke acceptatie, waardoor zij ook beter zal weerstaan aan de tand des tijds (*Federalist n°10*). De noodzaak om compromissen te zoeken, beschermt zo ook minderheden tegen het gevaar overrompeld te woden door de

24 'Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to clear congressional authorization for the authority it claims.' *West Virginia v. Environmental Protection Agency* [2022] 597 U.S., (Syllabus, p. 4)

25 Zie voor het volgende vooral pp. 3-6 van Gorsuchs *Concurring Opinion*.

pletwals van meerderheidsfacties (*Federalist n°51*) en legt bovendien rekenschap af van de evenwichten die moeten worden gezocht tussen het federale (centrale) niveau van wetgeving en het (decentrale) niveau van wetgeving door de staten, aldus nog Gorsuch. De *major questions doctrine* voorkomt ten slotte ook dat actuele maatschappelijke debatten die ook in het Congres nog volop aan de gang zijn, eenzijdig beslecht worden door voortvarende beslissingen van ministeriële departementen of regeringsagentschappen gebaseerd op een onduidelijke wettelijke grondslag.[26]

Door dit complexe systeem van machtsevenwichten en belangentegenstellingen is het zelden of nooit mogelijk om zeer snel een energiek beleid door te drukken, ook al is dat in de ogen van bepaalde verlichte geesten hoog nodig. En ook Gorsuch verzucht dat geen van de argumenten in zijn *Concurring opinion* impliceren dat het EPA beleid (en dus ook de gehele door de Biden-administratie gewenste klimaatpolitiek) onwijs of onwenselijk zouden zijn, maar enkel dat voor dermate - ook economisch - ingrijpende koerswijzigingen in het beleid van een gehele natie op klaarblijkelijke wijze opdracht moet gegeven zijn door het Congres.

5. Overheidsregulering, democratische legitimatie en *accountability*

Justice Elena Kagan, penvoerder van de drie dissenters, benadrukt in haar afwijkende juridische opinie sterk dat wanneer het Congres breed geformuleerde delegaties van bevoegdheid naar regeringsagentschappen doorvoert, dit doelbewust gebeurt omdat de wetgever weet dat hij op al die zeer specifieke maatschappelijke terreinen minder weet dan de staf van regeringsagentschappen die uit gespecialiseerde professionals en deskundigen bestaat. De wetgever formuleert de taakstelling van regeringsagentschappen bovendien in brede en

26 Zo verbood het federale Hooggerechtshof in *Gonzales* v. *Oregon* [2006] 546 U.S. aan de minister van Justitie de criminalisering van het voorschrijven van lethale medicatie die in de staat Oregon door artsen legaal voorgeschreven kon worden ten behoeve van het uitvoeren van geassisteerde zelfdoding van terminale patiënten. En in 2022 (*NFIB* v *OSHA, 595 U.S.*) stelde het Hof regelgeving van de *Occupational Safety and Health Administration* buiten werking die bedrijven met meer dan 100 werknemers verplichtte om hun personeel te onderwerpen aan COVID-19-inentingen of, indien zij dit weigerden, aan het verplicht dragen van mondmaskers in combinatie met een wekelijkse test, omdat dergelijke ingrijpende regels over publieke gezondheid aan de wetgever voorbehouden zijn en de bevoegdheid van het regeringsagentschap verantwoordelijk voor het reguleren van de veiligheid op de werkvloer, ver te buiten gaan (ook hier een 6 tegen 3 beslissing met de drie 'liberals' Breyer (toen nog), Kagan en Sotomayor als dissenters).

algemene termen om niet het risico te lopen dat door veranderende maatschappelijke omstandigheden en wetenschappelijke evoluties die het Congres onmogelijk kan voorspellen, een wetgevend kader snel als verouderd moet beschouwd worden, aldus Kagan. Dat mag dan zo zijn. Maar het rechtvaardigt daarom nog niet de wijze waarop het EPA zijn macht in casu heeft uitgeoefend. Zelfs een ruim opgevatte discretionaire bevoegdheid om naar eigen inzicht te bepalen hoe de CO_2-uitstootnormen gereguleerd moeten worden, kan voor een agentschap immers toch niet de bevoegdheid impliceren om op eigen houtje het ritme van de gehele Amerikaanse energietransitie te gaan bepalen, met inbegrip van het obsoleet verklaren van een gehele economische sector van zeer grote omvang zonder dat daar door het Congres expliciet opdracht werd toe gegeven. Juist *omdat* open geformuleerde opdrachten met een ruime discretionaire bevoegdheid voor het agentschap ook onvoorspelbaar maken op welke wijze het regeringsagentschap zijn regulatorische bevoegdheid in de toekomst nog zal gaan gebruiken, is de rol van de rechterlijke macht als grensrechter over eventuele bevoegdheidsoverschrijdingen zo belangrijk.

Dat er vaak naar algemene wetgevende compromissen gezocht moet worden die dan nader ingevuld worden door het bestuur, is bovendien ook niet alleen te wijten aan de technische ingewikkeldheid van de te reguleren kwesties en het gebrek aan deskundigheid van de wetgever, maar niet in het minst ook aan de moeilijkheid om duidelijke politieke meerderheden te vinden over kwesties waar tegenstrijdige belangen mee gemoeid zijn in een Congres dat niet zelden disfunctioneel is wanneer in de beide kamers niet dezelfde meerderheid de plak zwaait. Soms schuift de wetgever de hete aardappel over gevoelige kwesties zelfs doelbewust door naar een *government agency* zodat het minder opvalt dat bepaalde al te scherpe beleidskeuzes, die mogelijk niet gesmaakt worden door een deel van de electorale achterban, rechtstreeks voor verantwoordelijkheid komen van bepaalde politici. De 'schuld' kan dan, om het wat simplistisch uit te drukken, gemakkelijker in de schoenen geschoven worden van 'politiek onverantwoordelijke, want onverkozen bureaucraten' in Washington, waar misnoegde burgers en belangengroepen vervolgens via de openstaande administratiefrechtelijke beroepsprocedures tegen op kunnen komen.[27]

Wanneer de president via zijn *government agency* in een bepaalde richting veel verder reikende beleidsdoelstellingen wil doordrukken dan degene waarvoor men in het Congres een meerderheid zou kunnen vinden, is er sprake van

27 En daarbij werd dan door de rechtbanken niet zelden ook expliciet getoetst of angstige wetgevers die bezorgd waren over hun politiek voortbestaan, geen misbruik hadden gemaakt van delegatie om hun eigen politieke verantwoordelijkheid tegenover het publiek te ontlopen. Cf. Whittington and Iuliano (n 14) 412

sluipende usurpatie van wetgevende bevoegdheid door de executieve en het afleiden en doen verwateren van de politieke verantwoordelijkheid van verkozenen door hun bevoegdheid door te schuiven naar technocratische en bureaucratische apparaten onder het gezag van de executieve.[28]

Critici van de *major question doctrine* stellen dat deze niet alleen het *Chevron deference* denkkader uitholt, maar op haar beurt ook problemen van machtenscheiding oproept door de interpretatiebevoegdheid over wetten die macht delegeren aan regeringsagentschappen naar de rechterlijke macht te halen. Daardoor zou deze laatste zich tegen de veronderstelde wil van de wetgever in, meer macht toe-eigenen om al dan niet wenselijk beleid te bepalen dan haar toekomt.[29] Dat verwijt wordt dramatisch opgedreven tot een klinkend finaal orgelpunt in de furieuze *dissenting opinion* van Justice Elena Kagan in de EPA-zaak.[30] Maar die kritiek overtuigt niet echt, nu het ten eerste toch de rechterlijke macht is die constitutioneel de taak kreeg toebedeeld om bij geschillen de wet bindend te interpreteren[31] en zij bovendien bij het niet-verlenen van voorrang aan de interpretatie van het regeringsagentschap, in tegenstelling tot wat Kagan beweert, niet zelf gaat beleid maken, maar in dat geval de wetgever (het Congres) op zijn verantwoordelijkheid wijst om ofwel dat beleid zelf in wetten te

28 In hun sterke argumentatiestijl proberen Posner en Vermeule (zie noot 13) de meest voorkomende kritiek op delegatie van regulerende bevoegdheid naar regeringsagentschappen te weerleggen. Over het democratie en *accountability*-probleem stellen zij dat het Congres bij regulering door agentschappen evenzeer politiek verantwoordelijk blijft als dit het geval is bij regelgeving die direct van de wetgever zelf uitgaat. 'If citizens have the capacity to sanction politicians that make bad policy, they should also have the capacity to sanction politicians who fail to punish agencies that make bad policy, or who delegate authority to such agencies in the first place.' (ibid. p. 1746) Het Congres kan tegenover de burger verantwoording moeten afleggen over slecht presterende agentschappen, of over de vraag waarom de wetgever het agentschap zoveel (of zo weinig) macht gegeven heeft, waarom het over zoveel (of zo weinig) geld beschikt etc. En bovendien kan het Congres de fouten van agentschappen ook gewoon corrigeren of hun macht en bevoegdheden opnieuw inperken of intrekken. (ibid. 1748). Dat mag dan waar zijn, maar dit alles maakt de politieke verantwoordelijkheid wel een stuk onrechtstreekser en dus minder direct en trager, waardoor zij ook kan verwateren en zelfs zoek raken in een diffuus bureaucratisch zwartepietenspel.

29 Zie bijvoorbeeld Kevin O. Leske, 'Major questions about the "Major Questions" doctrine' (2016) 5(2) Michigan Journal of Environmental & Administrative Law, 479

30 '...the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. (…) Whatever else this Court may know about, it does not have a clue about how to address climate change. Yet the (…) Court appoints itself –instead of Congress or the expert agency- the decision-maker on climate policy. I cannot think of many things more frightening.'

31 Zie art. III, par. 1 van de Amerikaanse grondwet en het beroemde arrest *Marbury* v. *Madison* [1803]*:* 'It is emphatically the province and duty of the judicial department to say what the law is.'

gieten, ofwel bij maatschappelijk belangrijke maar ook zeer controversiële kwesties de reikwijdte van de bevoegdheid om dat door het regeringsagentschap te laten doen, explicieter en duidelijker in de wet neer te schrijven. Toepassing van de toegespitste *major questions doctrine* bewerkstelligt dus een *inperking van executieve macht* om door regeringsagentschappen in maatschappelijk belangwekkende maar controversiële kwesties op eigen houtje ingrijpende en verreikende beleidsbeslissingen te laten nemen en regelgeving te laten uitvaardigen wanneer de wetgever het regeringsagentschap daartoe niet expliciet opdracht heeft gegeven. En tegelijkertijd wordt daarmee ter attentie van het Congres een beginsel van behoorlijke regelgeving geformuleerd.

Inmiddels heeft de wetgever zelf de excessief dramatiserende conclusie van de dissenters die de meerderheid in de *West-Virginia v. EPA*-zaak bijna persoonlijk verantwoordelijk stellen voor het torpederen van de klimaatambities van de Biden-administratie, gelogenstraft met de goedkeuring in beide kamers van het Amerikaanse Congres van het grootste publieke investeringsplan sinds de New-Deal, de *Inflation Reduction Act* (IRA). Deze wet die het presidentschap van Biden dan toch nog een gouden rand bezorgt, bevat een nooit geziene batterij van fiscale gunstmaatregelen, subsidies en publieke investeringsfondsen ten behoeve van de Amerikaanse energietransitie, de vergroening van de economie en de strijd tegen klimaatopwarming.[32] Een van de vele financiële voorzieningen is het *Greenhouse Gas Reduction Fund* (van 27 miljard dollar) dat beheerd zal worden door het EPA en waarvan de allocatie in duidelijke bewoordingen onder de discretionaire bevoegdheid van het agentschap wordt geplaatst door de IRA. Dat laatste illustreert zeer mooi dat het beginsel van behoorlijke regelgeving dat door het huidige als conservatief verguisde Supreme Court onder de vorm van een met een *clear statement rule* aangescherpte *major questions doctrine,* voorgehouden wordt aan de wetgever, een voluntaristisch (klimaat)beleid geenszins onmogelijk maakt op voorwaarde dat de politieke wil van de uitvoerende en wetgevende macht gecombineerd aanwezig zijn. En die politieke meerderheden zullen des te gemakkelijker gevonden kunnen worden naarmate in een open democratische rechtsstaat meer belangengroepen een voordeel zullen zien in het mee op de kar springen van de vergroening van de economie. Dat een mede door het algemeen belang gereguleerde en sociaal gecorrigeerde markteconomie hier een belangrijke rol in speelt, lijkt me een vanzelfsprekendheid.[33]

32 Ook in dit geval is het compromis-karakter van de wet manifest omdat de fossiele industrie er zeker niet door penaliserende maatregelen in benadeeld wordt.

33 Ter verdediging van de strenge normen van CO_2-reductie in het *Clean Power Plan* (CPP) benadrukt Justice Elena Kagan in haar *Dissenting Opinion* dat nadat dit plan (dat oorspronkelijk door de Obama-administratie was opgesteld) onder Trump al een eerste keer opgeschort was, de electriciteitsindustrie binnen enkele jaren uit eigen beweging

6. Welke rol voor klimaatactivisme in de democratische rechtsstaat ?

De afgelopen tien jaar wordt steeds duidelijker dat regeringen van open democratische rechtsstaten ook rekening zullen moeten houden met een ander soort klimaatactivisten dan het veel voorkomende larmoyante moraliserende type zoals Greta Thunberg, die hun levensdoel vinden in het aanpraten van een schuldcomplex aan westerlingen[34] of de burgerlijk ongehoorzame klimaatklevers en –iconoclasten die, door de aversie die zij in het publiek teweeg brengen, de ecologische zaak niet altijd een goede dienst bewijzen. De klimaatactivisten die ik bedoel, zijn pragmatisch en goed georganiseerd; ze laten zich begeleiden door advocaten (of zijn het zelf) gespecialiseerd in milieurecht, bestuursrecht, mensenrechten en civiel aansprakelijkheidsrecht. Dat leidt tot een snel groeiend aantal klimaatzaken waarbij internationaal ook steeds vaker successen worden geboekt door de klagers. De Urgenda-zaak is daarvan het meest tot de verbeelding sprekende voorbeeld.[35] Maar niet enkel staten worden door juridisch deskundige klimaatactivisten aansprakelijk gesteld, ook steeds vaker gebeurt dat met grote (multinationale) ondernemingen.[36]

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zoveel geïnvesteerd had in 'generation shifting' dat zij nog betere CO_2-uitstootresultaten bereikt had dan door het CPP zouden zijn opgelegd indien dit van kracht gebleven was. Het CPP had dus enkel op een (achteraf gezien) nog te bescheiden wijze geanticipeerd op een tendens die in de markt zelf al sterk aanwezig was. Dat illustreert dat marktfalen inzake ecologische doelstellingen niet steeds de regel is (zoals ideologische antikapitalisten ons willen doen geloven) maar dat de markt soms ook tendensen overneemt die eerder ook al opgepikt werden door een aanzienlijk deel van het publiek, juist *omdat* zij sporen met het algemeen belang, en bijgevolg ook door de democratische politiek zullen gestimuleerd worden. Dit is een interressant gegeven dat de wisselwerking tussen publieke opinie, markten en politiek in de verf zet. Als argument tegen de meerderheid in het EPA-arrest, snijdt het echter geen hout omdat het Hof het CPP niet verwerpt vanwege de te grote omvang van de daarin vooropgestelde CO_2-reductie, maar wel omdat beleidsdoelstellingen van een dermate grote omvang duidelijk door de wetgever opgedragen moeten zijn en dit laatste niet het geval was.

34 Op voorwaarde dat die een voldoende hoog inkomen hebben om zich überhaupt aangesproken te kunnen voelen door het klimaatgedram van deze onheilsprofeten (die niets toevoegen aan wat de wetenschap ons leert). Ironisch was bijvoorbeeld dat de Franse 'gilets jaunes' (voor de beweging gekaapt werd door relschoppers en hooligans) tezelfdertijd dat klimaatactivisten publiek veel heisa maakten, massaal op straat kwamen, niet voor het klimaat, maar voor lagere brandstofprijzen om dagelijks met de auto naar het werk te kunnen rijden en daarnaast van hun salaris ook nog normaal te kunnen leven!

35 *Netherlands t. Urgenda*, Hoge Raad 2019: 00135

36 Zie bijvoorbeeld de zaken *Milieudefensie t. Royal Dutch Shell*, rechtbank Den Haag 2021: 5337*; Notre affaire à tous v. Total;* of de zaak waarin mileuactivisten procederen tegen de supermarktketen Casino om hen te dwingen alle rundsvlees dat direct gelinkt

Toen ik enige jaren geleden voor het eerst hoorde over de Urgenda-zaak, dacht ik dat de klagers geen schijn van kans maakten en dat hun afgang terecht zou zijn. Hoezeer ik het ook nodig vind om maatregelen tegen de klimaatopwarming te nemen, is het mijns inziens immers niet de rol van rechters is om hierin de samenleving hun wil op te dringen en dat het primaat van het politieke in deze zaak gehandhaafd diende te worden. Maar dat bleek een inschattingsfout die, zo besefte ik nadat ik het arrest van de Nederlandse Hoge Raad bestudeerd had, berustte op een onvoldoende kennis van alle juridisch relevante aspecten van de zaak. Wat eerst de rechtbank en daarna het Hof doen, en wat in laatste instantie bevestigd wordt door de Hoge Raad (door de cassatieklacht van de staat te verwerpen), is immers niets anders dan de overheid te houden aan de door haarzelf aangegane verplichtingen tegenover de internationale gemeenschap, maar ook tegenover haar eigen burgers. Tegen de achtergrond van door de wetenschap voorspelde gevaren van de klimaatopwarming heeft de Nederlandse staat zich in internationale verdragen gecommitteerd om het hare te doen teneinde de voorspelde rampen te helpen afwenden via de reductie van CO_2-uitstoot (vertaald in harde gekwantificeerde procenten). Op grond van de artikels 2 (recht op leven) en 8 (recht op privacy en familieleven) van het EVRM en de jurisprudentie van het EHRM betreffende de positieve verplichtingen van de staat (onder art. 1 EVRM) om de in het verdrag vermelde grondrechten daadwerkelijk te garanderen en te voorzien in een effectief rechtsmiddel wanneer deze geschonden worden (art. 13 EVRM), kan de Nederlandse staat zich niet onttrekken aan de verplichting om op zijn minst de ondergrens van haar deel te doen in het bestrijden van de klimaatopwarming. En daartoe kreeg de Nederlandse staat dan ook een rechterlijk bevel dat tot in cassatie stand houdt.

Interresant in het licht van wat we in deze bijdrage ook in de Amerikaanse context aan de orde gesteld hebben, is dat de Hoge Raad het machtenscheidingsverwijt van de staat – met name dat het niet aan de rechter is om aan klimaat-

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kan worden aan de ontbossing van het regenwoud, blijvend uit de rekken te halen. Als men weet welke budgetten grote multinationale bedrijven inzetten om gespecialiseerde advocaten in te huren om de dans der aansprakelijkheid te kunnen ontspringen en welke genadeloze technieken zij soms inzetten om al wie het waagt om het tegen hen op te nemen, kapot te maken (zie bijvoorbeeld het geval van de Amerikaanse advocaat Steven Donziger die al dertig jaar probeert om Texaco/Chevron te doen betalen voor de gigantische vervuiling die zij aanrichtten in Ecuador, en daarbij zelf het gelag moest betalen en ook nog naar de gevangenis moest wegens 'contempt of Court' omdat hij weigerde zijn laptop in te leveren), kan men alleen bewondering hebben voor zoveel engagement, moed en doorzettingsvermogen. Men denke ook aan de advocaat milieurecht Robert Billot die al meer dan twintig jaar procedeert tegen DuPont (en daarna ook tegen 3M) voor de massale verspreiding in het mileu van de kankerverwekkende stoffen Pfas en Pfos. (Zie daarover ook de film *Dark Waters*).

beleid te doen en nog minder om de wetgever via een bevel tot wetgeving aan te sturen – verwerpt. De staat blijft immers vrij om de middelen en het beleid te bepalen om aan de door hemzelf aangegane verplichtingen te voldoen. Daaraan proberen te ontsnappen met het argument dat andere landen het ook niet, of nog minder doen, is evenmin aanvaardbaar als het – mede in het licht van de grootteorde van de gevaren en de urgentie te handelen – een optie is om nu minder te doen dan eerst afgesproken met de belofte om later meer te doen (wat de regering ook nog geprobeerd heeft).[37]

Uit de Urgenda-zaak blijkt dat grondrechten, zoals de in dit boek gevierde Serge Gutwirth (ondanks zijn in de loop der jaren nog radicaler en tegelijkertijd pessimistiser wordende systeem- en ideologiekritische rechtsfilosofie[38]) samen met Paul de Hert betoogt, inderdaad in sommige situaties kunnen functioneren als 'koevoeten' en 'breekijzers' [39] waarmee op disruptieve wijze kan worden ingebroken in de tot stagnatie leidende zelfgenoegzaamheid van staten die gemakshalve steeds terugplooien op het argument dat eerder gedane beloften in internationale verdragen louter als een inspanningsverplichting en nooit als een resultaatsverbintenis kunnen worden geïnterpreteerd.

Voor juridisch mondige klimaatactivisten is er in de open democratische rechtsstaat dus een mooie toekomst weggelegd. Maar zij zullen er wel rekening moeten mee houden dat ook juridisch geïnformeerde beleidsvoerders, die het primaat van het politieke willen vrijwaren tegenover tussenkomsten van de rechterlijke macht, terughoudender zullen worden wanneer het er bijvoorbeeld om gaat om al te ambitieus of vaag geformuleerde nieuwe internationale engagementen aan te gaan.[40]

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37 Een dergelijk succes om via het onrechtmatige daadsrecht in combinatie met mensenrechten de staat te dwingen zijn zelf aangegane afspraken na te komen, zou wellicht in de VS geen schijn van kans maken en daar wel afketsen op argumenten i.v.m. 'separation of powers' en op de *political questions doctrine* in combinatie met het argument dat het door de klagers geëiste rechtsherstel geacht wordt buiten de bevoegdheid te vallen van wat Amerikaanse Art. III rechtbanken toekomt om toe te wijzen. Zie *Juliana* v *U.S.* [2020] (uitspraak in beroep) 947 F.3d 1159 (9th Cir. 2020)

38 Hoewel er ook overeenkomsten zijn, zoals ons beider interesse in ideeëngeschiedenis of de verdediging van het principe van de scheiding van godsdienst en staat, heeft het linkse radicalisme van collega Gutwirth, dat reikt van antikapitalisme en een verlangen naar open grenzen tot pleidooien voor het verlenen van rechtssubjectiviteit aan de natuur *et j'en passe,* ons filosofisch en ideologisch ver uiteen gedreven. Maar dat heeft een langdurige hartelijke collegiale verhouding (aan de universiteiten van Brussel en Rotterdam) niet in de weg gestaan.

39 Serge Gutwirth and Paul De Hert, 'Human rights : A secular religion with legal crowbars. From Europe with hesitations.' (2021) 33(2) National Law School of India Review 420

40 Dat was op een ander terrein dan de klimaatpolitiek zelfs al het geval bij het nochtans strikt genomen niet-bindende migratiepact van Marrakech, dat voor de NVA de aanleiding was om de Belgische regering-Michel ten val te brengen.

Whose history? Some reflexions on the history of rights and freedoms

Frederik Dhondt[1]

If all legal history ought to be relevant to the present, in John Gilissen's view,[2] one could also twist this relationship for Serge Gutwirth: "thinking through" contemporary challenges involves rising to a higher conceptual level and taking a back seat, combining legal history, political thought, comparative law and legal anthropology.[3] Serge's research programme on the commons interrogates not only the link between human beings and their terrarium (*Gaïa*), but also the foundations of the societal and economic power underpinning our legal system.[4]

To a certain extent, Serge's publications illustrate the successive twists and waves in the humanities and social sciences, as well as their impact on the field of legal dogmatics: criticism of the "liberal state" and the narrative of progress since the revolutions of the seventeenth century[5] from a social history perspective[6] is succeeded by the postmodern turn with Foucault (1926-1984) and the environmental–scientific paradigm of Bruno Latour (1947-2022). Among the rich writings of Serge Gutwirth, an exceptional and iconic legal scholar at

1 My thanks to Stefano Cattelan and Vincenzo De Meulenaere for proofreading and suggestions, as well as to the editors and publisher of this volume.

2 Frederik Dhondt, 'John Gilissen and the Teaching of Legal History in Brussels' (2022) 99 *Folia Iuridica*, 19.

3 Cf. most recently: Serge Gutwirth, 'Les Communs: Avec, Malgré ou contre le droit?' (2022) *Journal des Tribunaux*, 582; Alessia Tanas & Serge Gutwirth, 'Le pluralisme juridique retrouvé au temps des désordres écologiques. Penser la relation entre le droit et les communs de la terre avec Paolo Grossi' (2021) 86 *Revue interdisciplinaire d'études juridiques*, 37.

4 See also Thomas Piketty, *Capital et idéologie* (Seuil 2019); Jacques Généreux, *La dissociété* (Seuil 2006); Katharina Pistor, *The code of capital: How the law creates wealth and inequality* (Princeton University Press 2019).

5 Gutwirth (n 3) 582; Serge Gutwirth & Paul De Hert, 'Human rights: A secular religion with legal crowbars. From Europe with hesitations' (2021) 33 *National Law School of India Review*, 421-426.

6 E.P. Thompson, *Whigs and hunters: The origin of the Black Act* (Allen Lane 1975); Heide Gerstenberger, *Die subjektlose Gewalt: Theorie der Entstehung bürgerlicher Staatsgewalt* (Westfälisches Dampfboot 1990).

our institution, the theme of fundamental rights is a recurrent one.[7] His recent reminder of the English *Charta de Foresta* (1217)[8] as a persistent testimony to the relationship between human beings and their environment is a fitting illustration of his syncretism of old and new.[9]

History is essentially the science of time, of continuity, change and memory. All those who practice it realise that it is impossible to resuscitate a past that is irredeemably lost.[10] Powerful ideas and principles should be studied in their reciprocal relationship with context, both for their origins and for their adaptation through evolution.[11] Of course, the hermeneutics of history are such that every author writes from his or her own situated contextual and generational position.[12] Professional historians have no right of exclusion against trespassers on the domain of history, but welcome them, in the words of John H. Elliott (1930-2002): "the past has become an open terrain over which representatives of all the humanist disciplines have felt free to roam at will."[13] The past is the inevitable "common" of mankind: no *ius disponendi vel vendicandi* exists for individuals.[14] If appropriation exists, we should see it more as *usus* or *fructus*, subject to criticism by peers, whose consensus collectively protects the study of written and unwritten sources.[15]

When lawyers delve into the past, multiple uses are possible. Some pursue a quest for authority, hoping to convince a judge or public opinion at large.[16] Some are animated by a desire to construct a pedigree, a "history of

7 Gutwirth & De Hert (n 5).

8 Discussed by Edward Coke in the same volume as the *Charta Libertatum* or *Magna Carta*: Edward Coke, *The second part of the Institutes of the Lawes of England. Containing the exposition of many ancient and other statutes* (Flesher & Young 1642) proemium. See also Colbert's solicitude for forests, intended to preserve woods and prevent illegal chopping, with his *Ordonnance sur le fait des eaux et forêts*, which remained in force from 1669 to 1827: Lucien Bély, 'Forêts, eaux et forêts' in Lucien Bély (ed.), *Dictionnaire Louis XIV* (Robert Laffont 2015), 515-516.

9 Gutwirth (n 3) 582.

10 Henri-Irénée Marrou, *De la connaissance historique* (Seuil 1954).

11 Richard Bourke & Quentin Skinner (eds), *History in the humanities and social sciences* (CUP 2022).

12 Yann Potin & Jean-François Sirinelli (eds), *Générations historiennes: XIX^e^–XXI^e^ siècle* (CNRS Editions 2019).

13 J.H. Elliott, *History in the making* (Yale University Press 2012), x.

14 Robert Feenstra, 'Dominium utile est chimaera: Nouvelles réflexions sur le concept de propriété dans le droit savant' (1998) 66 *Tijdschrift voor Rechtsgeschiedenis/The Legal History Review*, 382.

15 Richard J. Evans, *In defence of history* (Granta 2004); Zachary Schrag, *The Princeton Guide to Historical Research* (Princeton University Press 2021).

16 Randall Lesaffer, 'International law and its history: The story of an unrequited love', in Matthew Craven, Malgosia Fitzmaurice & M Vogiatzi (eds), *Time, history and international law* (Martinus Nijhoff 2006), 27-41.

texts", or a foucauldian "archaeology of knowledge",[17] while others prefer a bottom-up, contextual approach.[18] Serge's work is reminiscent of recent critical interrogations of the language of property and sovereignty and of claims to transcend the *summa divisio* between private and public law[19] in order to identify law as a discourse justifying the exercise of power by various actors.[20]

The present chapter is a modest reflection, based on an impressive recent work that focuses on the role of lawyers in creating fundamental rights. If we take Raoul Van Caenegem (1927-2018)'s triad "Judges, legislators, professors",[21] the judge-made nature of the common law seems essential in the latest state of the art to explain why the constitutional "moment" Magna Carta (1215) has come to be seen as declaratory with regard to higher rights enshrined in a legal order where … sovereignty resides with the "King in Parliament".

Magna Carta: a "reinvented" text

Sir John Baker, one of the most prominent if not the most prominent historian of English law,[22] published an intriguing study on the most venerated of all charters: King John II of England (1166-1216)'s *Magna Carta*, *Carta libertatum Regni*,[23] or "Great Charter" of 15 June 1215.[24] The *magnum opus* was intriguingly

17 Martti Koskenniemi, *To the uttermost parts of the earth: Legal imagination and international power, 1300-1870* (CUP 2021).

18 Dirk Heirbaut, 'A tale of two legal histories. Some personal reflections on the methodology of legal history', in Dag Michalsen (ed.), *Reading past legal texts* (Unipax 2006), 91-112.

19 The distinction between private law (*ad utilitatem singulorum*) and public law (*ad statum rei Romanae*) is attributed to the late Classical Roman lawyer Ulpianus (+ 223) in the Digest (I, 1.2) and Institutes (I, 1.4): Michael Stolleis, *Öffentliches Recht in Deutschland: Eine Einführung in Seine Geschichte, (16.–21. Jahrhundert)* (CH Beck 2014), 21.

20 For example, Martti Koskenniemi, 'What should international legal history become?', in Stefan Kadelbach, Thomas Kleinlein & David Roth-Isigkeit (eds), *System, order, and international law. The early history of international legal thought from Machiavelli to Hegel* (OUP 2017), 381-397; Ntina Tzouvala, *Capitalism as civilisation: A history of international law* (Cambridge University Press 2020); Tamar Herzog, *Frontiers of possession. Spain and Portugal in Europe and the Americas* (Harvard University Press 2015).

21 Raoul C. Van Caenegem, *Judges, legislators and professors: Chapters in European legal history* (CUP 1987).

22 Knighted by H.M. the Queen for services to legal history in 2003.

23 Coke (n 8) proemium.

24 Theodore F.T. Plucknett, *A concise history of the common law* (5th edn, Liberty Fund 2010), 22.

called "the reinvention of Magna Carta 1216-1616".[25] The eight hundredth anniversary was marked by a blaze of commemorative events, among which the British Legal History Conference in Reading.[26] The global significance of the English legal tradition goes without saying, as the British Empire (and thus its legal culture and legal education) reached to Asia, Australia, Africa and America.[27] This might come across as puzzling, since Magna Carta was in essence a feudal document, by which the King's vassals sought to exploit John II's military defeats across the Channel, and not necessarily a text addressing all of his subjects. In this respect it differs from later documents such as the powerful Bill of Rights (1689), the American Declaration of Independence (1776) or the French *Déclaration des droits de l'homme et du citoyen* (1789).[28]

Yet, the very first page reminds us that "the Charter of Runnymede [Magna Carta] itself had a short life […] were it not for its reinvention in the early-modern period, the charter would be known today only to a few medieval specialists".[29] Its influence "has been achieved more by reputation than by the operation of positive law".[30] Indeed, according to the elder work of Plucknett (1897-1965), the Charter had been positive law for only "nine weeks" before it was damned and annulled by Pope Innocent III (1198-1216).[31]

Magna Carta "timidly prefigurates"[32] the English tradition of the "rule of law",[33] the second of Dicey's distinctive characteristics of English law, transcending "language and culture and even history".[34] Dicey, writing in the 1880s, defined the "rule of law" as follows:

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25 John Baker, *The reinvention of Magna Carta 1216-1616* (CUP 2017).

26 Robert Hazell & James Melton (eds), *Magna Carta and its modern legacy* (CUP 2015).

27 On the impact on legal education: Jean-Louis Halpérin, 'Les circulations transnationales en matière d'enseignement du droit: une perspective globale', in Raphaël Cahen et al. (eds), *Les professeurs allemands en Belgique. Circulation des savoirs juridiques et enseignement du droit (1817-1914)* (ASP 2022) 28-30.

28 Tamar Herzog, *A short history of European law: The last two and a half millennia* (Harvard University Press 2018), 108. For the transnational effect of these declarations, see David Armitage, *The Declaration of Independence: A global history* (Harvard University Press 2007).

29 Baker (n 25) ix.

30 Ibid 1.

31 Plucknett (n 24) 23. Baker underlines the fact that the resurrection of the charter in a 'substantially pared down' version, was due to papal legate Guala. Innocent III had died in July 1216. His successor, Honorius III, whose authority is invoked for the resurrection of Magna Carta on 12 November 1216, 'himself knew nothing about it': Baker (n 25) 5.

32 Gutwirth (n 3) 582.

33 Albert Venn Dicey, *Introduction to the study of the law of the Constitution* (9th edn, ECS Wade ed/Macmillan and Co 1952) 183-415.

34 Baker (n 25) ix.

> *The rule or supremacy of law* […] *is well expressed in the old saw of the courts,* "la ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera". […] *the security given under the English constitution to the rights of individuals* […].[35]

In contrast with "Belgium, which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation [sic]", Dicey stressed the fact that personal liberty in England "is part of the constitution, because it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts".[36] When personal freedom is treated separately, Dicey started … with an integral quotation of the seventh article of the 1831 Belgian Constitution.[37]

To stress the differences with English law, where personal liberty is not attached to any specific text, Dicey cites provision 29 of Magna Carta[38]. He

35 Citing from the *Year books* of Henry VI (1421-1471): Dicey (n 33) 184. See also Baker, according to whom 'there is, admittedly, little agreement as to what precisely this [the rule of law] denotes': Baker (n 25) 449.

36 Dicey (n 33) 197.

37 Ibid 206. Article 12 since the Constitution's coordinated version of 1994. To add to the Constitution's fame, one could refer to what happened with the arrest of '*le docteur Marx, émigré allemand*' in March 1848, just weeks after the publication of the Communist Manifesto: Karl Marx (1818-1883) and his wife Jenny von Westphalen (1814-1881) were arrested by the local police at midnight in a pub near the St Gudula Cathedral, since they could not produce a passport at the hour of the pub's closure. The legal basis for the arrest was the Law of 10 Vendémiaire Year IV. The prosecutor, however, denied that the arrested persons could be detained, since their infraction was only administrative and not of a criminal nature. After interrogation by an examining magistrate, Marx and Jenny were immediately released (*Le Journal de Bruxelles*, 13 March 1848, https://uurl.kbr.be/1335779, accessed 6 April 2023). See also Els Witte, *Belgische Republikeinen. Radicalen tussen twee revoluties (1830-1848)* (Polis 2020) 272-277.

38 Section 39 of the original Latin Act of 1215: 'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land' (translation provided by The British Library, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation, accessed 5 April 2023). Baker (n 25) 32. Both the numbering and the phrasing differ from the 1225 Act, which was interpreted and used by the courts of law: 'No free person shall be taken or imprisoned, or disseised of any free tenement or of his liberties or free customs, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, except by the lawful judgment of his peers or by the law of the land; to no one shall we sell, to no one deny or delay, right or justice.' It should be noted that the 'trial by peers' is an essentially medieval idea: one should be tried by one's 'co-vassals', not by one's overlord: Van Caenegem (n 21) 142.

clarifies that this ought to be read "*in combination with the declarations of the Petition of Right* [7 June 1628]".[39] By the seventeenth century (ergo: four hundred years later), the charter's "*vague promise*" had come to be seen as a warrant for procedural natural justice, habeas corpus, the grand jury and jury trial.[40]

This first glance at one of English law's most famous treatises should warn us that rights and freedoms evolve, particularly so in the common law, which is largely judge-made law.[41] The *Petition of right* is a document originating in the reign of Charles I (1600-1649). It constitutes an intermediary stage in a long struggle between Parliament and sovereign, which radicalised under Charles' father James I of England/James VI of Scotland (1566-1625).[42] The ensuing *Habeas Corpus Act* (1679) and *Bill of Rights* (1689) anchor personal liberty in the seventeenth-century statute book.

Hence sir John Baker's *terminus ad quem* for "reinvention": the early seventeenth century, era of the famous common lawyer Sir Edward Coke (1552-1634), who commented elaborately on Magna Carta in his *Institutes of the Lawes of England*.[43] Coke, who became Chief Justice of the Court of Common Pleas in 1606,[44] opposed the expansion of royal prerogative.[45] In order to convince Parliament and courts effectively, the principles of Magna Carta had to be situated above positive law (which could eventually be revoked).[46] Baker's study concentrates on judge-made law, compensating for the tendency of "political

39 Dicey (n 33) 207; Willem Pieter Blockmans, *Mede-zeggenschap: Politieke participatie in Europa vóór 1800* (Prometheus 2020) 336.

40 John Hamilton Baker, *An introduction to English legal history* (Butterworths 2002) 472.

41 The English (British) parliament is still able to alter anything, and that sovereignty ultimately resides with the 'King in Parliament': Baker (n 25) 23. See Jeffrey Denys Goldsworthy, *Parliamentary sovereignty: History and philosophy* (OUP 2001). For a comparison of legislation as a source of law between England and the continent: Jean-Louis Halpérin, *Five legal revolutions since the 17th century: An analysis of a global legal history* (Springer 2014) 10-19. We should emphasise that medieval interpretations of statute law saw legislation as a clarification or confirmation of the common law and not as an alteration of it: Baker (n 25) 14.

42 Alain Wijffels, 'A British ius commune – a debate on the union of the laws of Scotland and England during the first years of James VI/I's English reign' (2002) 6 *Edinburgh Law Review*, 315. See John Miller, *Early modern Britain, 1450-1750* (CUP 2017), 174-201.

43 Coke (n 8) 1-79. The edition published in Coke is the reissued version in the 'ninth year of the reign of Henry III' (which began in 1216, dated 11 February 1225). This version of the text is on the statute book through its confirmation by 'Edward I (1239-1307) and subsequent Kings', underlining the nature of the Charter of Runnymede as 'a passing historical event': Baker (n 25) 3.

44 Baker (n 25) 351.

45 Ibid. 348.

46 Ibid. 349.

and constitutional historians" to consult statutes, and, conversely, the neglect of the study of public law by specialists of old English law.[47] In the short run, the Charter, granted by John II of England to his barons, had an "immediate" purpose: "to restore, declare and preserve the previous common law."[48] Its vague wording necessitated adjustment (1331), rewording (1354) and reinterpretation in Parliament (1377).

Dicey's interpretation of the rule of law is close to the option by which Magna Carta is not seen as a statute, as a feudal document directed at the King's vassals or as a grant by the sovereign to the groups of people identified in the text. No, it is viewed as a statement of earlier pre-existing principles of common law.[49] However, elevating the document to a "fundamental law", in the sense that it could preclude the legislator from changing its content in the future, was not conceivable, since all sovereignty resided with the "King in Parliament".[50]

Principles are neither fact nor myth nor fiction?

The "myth" of Magna Carta was deconstrued by historians of English law more than a century ago. Baker, however, vigorously pleads Edward Coke's case. It would be unfair to judge a seventeenth-century lawyer by the standards of twenty-first-century medieval historiography.[51] Provision 29 was:

> primarily understood […] as a codification of common law principles. Never mind that some of these principles were unknown in 1215.[52]

Reconstructing factual truth and the pedigree of legal reasoning do not abide by the same standards. This:

47 Ibid. ix.

48 Ibid. 1.

49 Ibid. 13. See for 'privilege and liberties' before 1215: James Clarke Holt, *Magna Carta* (2nd edn, University Press, 1992) 50-74.

50 Baker (n 25) 17. Citing first the restrictive interpretation of the interdiction to consider as void 'anything done contrary to the charter' (only 'governmental acts by the king and his ministers, not legislative acts by the king in Parliament') and then the uselessness of parliamentary (!) affirmation in 1368 that 'all statutes contrary to Magna Carta were void', since 'that may have been the intention, but it was never held by any court to have done so': Ibid. 21.

51 Ibid. 444.

52 Ibid.

> does not mean that the latter law was founded on deception, or on naïve Whig history. Principles of law are not facts and cannot therefore be mythical, any more than they can be fictional.[53]

Baker even affirms that "the long-term story" of Magna Carta through interpretation, doctrinal commentary and invocation as a political argument in the English constitutional arena:

> is just as factually true as the story of what happened in the early thirteenth century, and arguable much more important as a strand of world history.[54]

Coke's interpretative work on Magna Carta is depicted as one of "conservation", saving common law from James I's absolutist tendencies and the influence of continental "romanism".[55] Hadn't the author of the treatise known as Bracton,[56] a thirteenth-century treatise in Latin on English law, stated:

> Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem.

The King in England had always been "under" the law, since the law had made him. The American canon-law scholar Ken Pennington explains that this demonstrated that Bracton "did not understand" the thought of continental lawyers, who were, in his time, associating legislation and pure royal will.[57] In other words, for Baker, Coke intended to preserve this vital rupture between continental and English understandings of sovereignty and the rule of law, of which Magna Carta was just a specific example.

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53 Ibid.

54 Ibid.

55 Ibid. 446. For example, the reference to the prince's power as *patria potestas* or the introduction of *quod principi placuit legis habet vigorem* (royal decisions have the force of law) or *princeps legibus solutus* (the prince is above positive law): see Stolleis (n 19) 25. On Jean Bodin's writings (illustrative of early modern sovereignty) see: Howell A. Lloyd, *Jean Bodin, 'This pre-eminent man of France': An intellectual biography* (OUP 2017). On the intellectual pedigree of sovereignty and property and medieval adaptations see: Koskenniemi (n 17) 19-116; F.F.M. Maiolo, *Medieval sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Academic 2007).

56 The name of Henry de Bracton (+ 1268) appears on the treatise, but the attribution is not settled: Baker (n 25) 176.

57 Ken Pennington, 'Law, legislation and government 1150-1300', in J.H. Burns (ed.), *The Cambridge history of medieval political thought, c. 350-c. 1450* (CUP 1987), 429. See also Harold Joseph Berman, *Law and revolution. The formation of the Western legal tradition* (Harvard University Press 1983), 479.

Even though the Charter itself would not have been essential – as it merely stated pre-existent principles of common law – its "powerful emotional effect on the high as well as the low" served Coke's cause: Magna Carta was presented as a common "inheritance", which could be positioned against the "Continental learning" (i.e., Roman law-inspired absolutism) used by James I's advisers.[58] Remarkably, the document became an object of merely historical fascination after the *Petition of Right* of 1628, and lost its legal significance.[59]

No Magna Carta on the Continent, or no overarching common law?

Apart from their peculiar nature,[60] the English traditions of "sovereignty of parliament" and "rule of law" neither originated nor evolved in isolation from the continent.[61] Well-known examples from the territory of present-day Belgium were the constitutional documents of Brabant (Charter of Kortenberg (1312),[62] Joyous Entry (1356) and its reaffirmations[63]) and Liège (Paix de Fexhe (1316)).[64] Yet, the use of Magna Carta (ergo: its re-invention, as argued above) through the lens of judge-made common law singled out English constitutional history. Was this purely the result of a different theory of the sources of law?

Recently, the eminent specialist of fifteenth- and sixteenth-century Europe, Wim Blockmans, published a breathtaking survey of representative government (*Medezeggenschap*), labelling the participation of Estates and assemblies as the cradle of present-day European conceptions of the rule of law and parliamentary democracy.[65] The work returns to a major interrogation posited in the 1960s:

58 Baker (n 25) 447.

59 'Magna Carta was almost a spent force in England': Ibid. 449.

60 Dicey explains to his reader why Voltaire's, Tocqueville's or de Lolme's descriptions of England stress the protection of individual liberty, and why the distinction still prevailed in nineteenth-century Europe, when the first edition of his treatise was written (1886): Dicey (n 33) 188.

61 Plucknett (n 24) 25.

62 Pieter Gorissen, *Het parlement en de Raad van Kortenberg* (Nauwelaerts 1956).

63 Valerie Vrancken, *De Blijde Inkomsten van de Brabantse hertogen macht, opstand en privileges in de vijftiende eeuw* (ASP 2018); *Laetus Introïtus Brabantiae, 1356-1956* (Nauwelaerts 1960). The *Joyeuse entrée* of the Dukes of Brabant was confirmed at every accession, which gave rise – as with Magna Carta – to various versions; see the harmonisation table for 1356-1549 (Joan and Wenceslas to Emperor Charles V) in Vrancken 347-356. See also Blockmans (n 39) 182-187.

64 Edmond Poullet, *Origines, développements et transformations des institutions dans les anciens pays-bas* (Peeters 1883), 54-59.

65 Blockmans (n 39). See also Henri Buch, Paul Smets & Maxime Stroobant, 'Représentation

Were pre-revolutionary (often oligarchical)[66] institutions really separated from the "modern" liberal state as it developed from 1789 onwards (and has been criticised by Serge and others)?[67] Their decline around the seventeenth century is undeniable.[68]

However, the rise and fall of checks on monarchical power are attributed by Blockmans to

> phases of thorough economic and demographic expansion, coupled with urbanisation, which increases pressure on the existing political system to extend participation towards freshly ascending social groups.[69]

Curiously, Blockmans relativises big ruptures and reforms by pointing to the slower evolution of political culture and patterns of values:[70] Would the *opinio iuris doctorum* fall into this category? Baker's very thorough analysis of archives tends to suggest that not negotiation between the monarch and his representatives in times of crisis (as in 1215, 1628, 1679, 1688-1689, 1832 …) but the construction of an overarching legal order is the best guarantee to keep *Leviathan* in check.

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et députation en Belgique du XIII[e] au XVI[e] siècle', in *Standen & landen/Anciens pays & assemblées d'états* (Nauwelaerts 1965), 27-46; John Gilissen, *Le régime représentatif avant 1790 en Belgique* (La Renaissance du Livre 1952), 51-115; György Bónis, 'The freedom of the land in medieval Hungarian law', in *Standen & Landen/Anciens pays & assemblées d'états* (Nauwelaerts 1970), 56-96.

66 With the Flemish cities in the fourteenth century as an exception (as craft guilds obtained representation following insurrections): Blockmans (n 39) 212.

67 ibid 17.

68 Olivier Beaud, *La puissance de l'État* (PUF 1994).

69 Blockmans (n 39) 404 (my translation).

70 Ibid. 406-410.

The commons in the late medieval Low Countries: resource management, embedded individualism and risk control

Dave De ruysscher

In one of his latest writings, Serge Gutwirth takes into consideration the historical background of the demise of the commons, in reference to Paolo Grossi's work.[1] The Italian legal historian and lawyer has written several publications in which state formation and legalisation, which took place between the thirteenth and eighteenth centuries, stand central. In reference to those phenomena, Grossi argues to return to the past. He favours a medievalist turn in law. Lawyers should formulate rules that are closely connected to existing social realities and not, as is the case today, on the basis of abstract categories and individual rights. This latter, modern, approach, which is closely connected to an ideal of supremacy of legislation over doctrine, has resulted in a generalising and reductionist law, which does not serve public interests.[2] With regard to the commons, this reductionism went hand in hand with a misunderstanding of the diverse and layered rights on land and their recalibration to ownership.[3]

This contribution aims to question Grossi's argument on the eradication of the commons by extending the scope of the issue. It argues that the problem of the commons, and their crisis, should not be considered exclusively in terms of ownership and resource management but should also be assessed from a broader angle, one encompassing risk management and entrepreneurialism. "Common pool institutions" were not only involved with shielding resources from individualist and extractive behaviour but also typically embedded and enshrined individualism with the goal of public interest protection – and this

1 Alessia Tanas & Serge Gutwirth "Le pluralisme juridique retrouvé au temps des désordres écologiques. Penser la relation entre le droit et les communs de la terre avec Paolo Grossi'" (2021) 86 *Revue interdisciplinaire d'études juridiques* 37.

2 See, in particular, Paolo Grossi, *L'ordine giuridico medievale* (Rome, 2000); Paolo Grossi, *L'Europea del diritto* (Rome, 2007).

3 Paolo Grossi, "Une autre façon de posséder. Réflexions historico/juridiques sur les aménagements fonciers en Italie" (2021) 86 *Revue interdisciplinaire d'études juridiques* 55.

was within a strict framework of rules. The paper highlights some examples of cooperative ventures and common good associations in the Low Countries of the later Middle Ages. It will be shown that Grossi's argument on abstraction and ownership is a crucial part of the story but in a different way than was envisaged by this author.

1. Grossi, legal pluralism and ownership

Since the publication of "The Tragedy of the Commons" by Garett Hardin (1968)[4] the history of communal land and resources, as well as their organisation and protection, has attracted great interest from historians. Ecological concerns have been central in the subfield of historical commons studies ever since. It is therefore normal that most environmental historians have tackled this topic.[5] However, economics historians have searched as well to trace the organisational characteristics of boards managing common resources and to explain regional institutional differences.[6] It is indeed a puzzle why similar problems have yielded different solutions in different areas. This puts a strain on an explanatory model that takes general ecological factors as dominant variables.

Much of the historical literature that has explored this theme refers to *Kommunalismus*, which is the idea that self-organisation and self-regulation could emerge from societal needs, as the best fit for specific circumstances, in particular for the management of communal resources.[7] In addition to this, scholars have recently started focusing on deeper structures that explain shifts towards more individualistic modes of exploitation. Ownership has been highlighted as an important marker in this regard and, most naturally, the historical coming into being of ownership is then explained in functional terms.[8] In *The code of capital*, for example, Katharina Pistor makes a connection

4 Garrett Hardin, "Tragedy of the commons" (1968) 162 *Science* 1243.

5 A classic of environmental history, which inter alia addresses the enclosure movement, is Keith Thomas's *Man and the natural world. Changing attitudes in England, 1500-1800* (London, 1983).

6 Giangiacomo Bravo & Tine De Moor "The commons in Europe: From past to future" (2008) *International Journal of the Commons* 155.

7 The term *Kommunalismus* refers to publications by Peter Blickle. Arguing against the often-held assumption that water boards in the pre-modern Low Countries were "democratic" is Tim Soens, "Polders zonder poldermodel? Een onderzoek naar de rol van inspraak en overleg in de waterstaat van de laatmiddeleeuwse Vlaamse kustvlakte (1250-1600)" (2006) 3 *TSEG – The Low Countries Journal of Social and Economic History* 3.

8 See, for example, Susan J. Buck, *The global commons* (Washington DC, 1998), 25-27. Individual ownership was developed in response to commercial and capitalist needs.

between the enclosure movement of seventeenth-century England and the growing commodification of intellectual property rights today. Her argument is that throughout history elites have continuously pushed the boundaries of what can be brought under individual ownership. Paolo Grossi equally considers as reductionist the recategorisation of pluralist "rights" to communal resources into a mould of proprietary rights. He identifies this change as being at the core of the demise of the commons, the shift having been combined with processes of state formation and legalisation. The bourgeois state of the eighteenth century created the law that was best suited to the purposes of the emerging capitalist economy.[9] Therefore, considering all of the above, a large part of the literature on the commons is imbued with a division between individualism and communalism. Ownership is connected to the former and not to the latter category; as a result, in the histories of organisations of commons the part of individuals is typically not analysed.

However, during the past several years, a number of scholars have criticised this explanatory model. José Manuel Lana Berasain, for example, added the factor of power into the equation. He underscores the reality that institutions reflect power relations and that the imprint of elites is an important element in understanding the history of the organisation of commons. At the same time, this influence on the part of elites did not result in blunt extraction: rather, office-holders and administrators sought a balance between control, on the one hand, and catering to the needs of the community, on the other.[10]

Accounts of historical developments regarding the commons indeed often lack clear assessments of authority and power as variables. In Paolo Grossi's publications, one element that is crucial yet missing in this regard is regal authority. Grossi presents a medieval landscape of harmonious pluralism where jurists devised solutions that were close to the facts. They took into account the social aspects of the problems they aimed to solve. The outcome of their activities was a myriad of rules, each aligned to their purpose, without underlying schemas or dogmas. As a result, "ownership" (*dominium*) was multiplex. Legal scholars crafted several categories of property rights that were necessary in order to explain different situations.[11] Moreover, the category of *dominium*, which was derived from Roman law, expressed an objective reality, which was initially beyond the realm of individual will. According to Grossi,

9 Paolo Grossi, *L'Europa del diritto* (Gius. Laterza & Figli Spa, 2016), 103-107.

10 José-Miguel Lana Berasain, "From equilibrium to equity. The survival of the commons in the Ebro Basin: Navarra from the 15th to the 20th centuries" (2008) 2 *International Journal of the Commons* 2.

11 For a critique of Grossi's romantic medievalism, see Anna Di Robilant "Genealogies of soft law" (2008) 54(2) *The American Journal of Comparative Law* 499.

it was in the thirteenth century that for the first time connections were made between these two notions of *dominium* and will. This laid the foundations of modern commodified and negotiable ownership.[12]

However, the category of *dominium* was not only doctrinal, which Grossi seems to suggest. Since the end of the eleventh century, the idea was developing that the king had residual *imperium*; it was held to exist even without factual indications of it. As a result, "*bona vacantia*" (goods left vacant) were considered to be subjected to this authority. This was an enormously important idea with regard to non-private lands, forests and rivers. The new principle underpinned claims on unused and uninhabited areas. Moreover, categorising jurisdiction as being the ownership of the sovereign was regarded as most natural.[13] Therefore, royal rights in vague lands, forests and rivers were property rights; they were not described in terms of *res communes* or as *res extra commercium*. As a result, the labelling of rights over such territories as falling within the jurisdiction of one supreme prince was already announcing the commercial use of such rights. The rule of regal jurisdiction pertaining over uncultivated nature was written into the *Libri feudorum*, a compilation of rules on feudal relations that was made in the middle of the twelfth century. The rule was confirmed at the Diet of Roncaglia (1158) by Emperor Frederick Barbarossa and after that it was spread throughout Europe.[14]

2. Polders at the Flemish coast (10th–13th centuries)

In the Middle Ages, forms of collective exploitation emerged in several places in the Low Countries. These were accompanied by organisational forms in which the participants obtained benefits but at the same time their individual rights were restricted for the purposes of the project. These projects therefore served both collective and individual interests. A good example of communal enterprises accompanied by individual rights of use were (artificial) brooks and polders.

12 Paolo Grossi, "La proprietà nel sistema privatisco della seconda scolastica", in Paolo Grossi (ed.), *La seconda scolastica nella formazione del diritto private moderno* (Milan, 1973), 124, 135.

13 Daniel Lee, *Popular sovereignty in early modern constitutional thought* (Oxford, 2016), 79-120.

14 The rule is found in chapter 55 of the *Libri feudorum*. On the history of this chapter, see Paul Willem Pinsterwalder, "Die Gesetze des Reichstags von Roncalia von 11 November 1158" (1931) 52 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 1.

Since the tenth century, in the county of Flanders, dykes had been built along rivers and the coast. The coastal zones of Flanders were initially prey to the whims of the sea, but from the tenth century onwards, more dry zones (*schorren*) were created and large parts of the coast were systematically brought under control. The new polders provided protection from floods and at the same time allowed more land to be used for agriculture and the herding of sheep.[15]

The situation before the construction of polders and dykes offered other advantages for coastal dwellers: for one thing, the mudflats (*slikken*) and "wild" beaches provided natural resources. One could find shells and seaweed there; the local community could extract sand and use the beach for fishing and shipping. No authority restricted or controlled the use of the beaches. But then reclamations put an end to all this: the drying of large areas of previously unmanaged terrain inevitably led to the demise of the listed collective rights in those lands.

Poldering required the construction of dykes and the digging of canals to drain large areas. This went hand in hand with planning and investment. As a result, during the period from the tenth to the thirteenth century, such works were often initiated by sovereigns. Dykes and canals were first introduced in royal domains (*fisci*) owned by the prince – the count of Flanders. After that, from the twelfth century onwards, the count exercised authority over all wasteland by virtue of his *regalia*.[16] In both cases, abbeys and individuals cooperated. Rights over uncultivated terrains were granted to ecclesiastical institutions or persons in combination with the obligation to "enrich" the land. In addition, parts of the new lands were given in fief. This meant that, by way of compensation for the efforts of institutions or individuals, the use of the lands was leased out to those who did the actual work. However, the prince usually retained formal ownership; this reflected the investment he himself had made. An advantage for the participants in these projects was that peat deposits could

15 These developments have been analysed in Elisabeth Gottschalk, *Historische geografie van Westelijk Zeeuws-Vlaanderen,* 2 vols (Hilversum, 1958). See also Adriaan Verhulst, *Landschap en landbouw in middeleeuws Vlaanderen* (Brussels, 1995).

16 Georges Declercq, *Vlaanderen en de Vlaanderengouw in de vroege middeleeuwen* (Vlaanderen 44, 1995), 156-157 and 161, refers to the initiative of abbeys, which received rights on marshes from the Carolingian prince. See also Dries Tys, "Domeinvorming in de 'wildernis' en de ontwikkeling van vorstelijke macht: Het voorbeeld van het bezit van de graven van Vlaanderen in het IJzerestuarium tussen 900 en 1200" (2005) 7 *Jaarboek voor Middeleeuwse Geschiedenis*, 34, 51. Both authors date the rule of *imperium* on *bona vacantia* back to the Carolingian times, but there is little evidence supporting this. It is more likely that before the Roncaglia rule was widely imposed, in the tenth and eleventh centuries, the count first claimed lands, through usurpation, and not in reference to *regalia*.

be exploited. Salt was also mined and polders were used to herd sheep, which were raised for their wool.[17] In other words, those who entered into a project of reclamation were investors: they had to incur all kinds of expenses with a view to reaping expected profits.

The collective interests of the polder owners were very strong. From the moment a polder was completed, it was necessary to screen the dykes constantly and to repair them, if necessary. Moreover, dyke management was not only useful for the owners in the polders but also to their surroundings. The polders served as buffers against water; thus, the strength of the polders' dykes contributed directly to the safety of the land adjacent to them.

The maintenance of dykes required tight organisation. By the thirteenth century, the polders along the Flemish coast had lock-keepers (*sluismeesters*). They were responsible for carrying out maintenance and repair works, which were ordered either by a general assembly of owners in the polder or by the government. To this end, they drew up plans, purchased materials, hired laborers or outsourced works.[18] In addition, the polders were headed by aldermen, the representatives of the owners. These "*dijkschepenen*", led by a bailiff or "*dijkgraaf*", inspected the dykes and ordered the owners of landed properties to make repairs where necessary.[19] The collective interest here ran parallel to the individual interests of the polder inhabitants. The protection of the dykes was necessary to safeguard their property and other individual rights.

3. Managing riverbanks: the example of *broeken* (13th–14th centuries)

Similar works of embankment and reclamation took place along rivers. Because of increased tidal action on the River Scheldt in the eleventh and twelfth centuries, large areas along this river and its tributaries, which had previously been used for herding cattle, were no longer accessible.[20] In the centuries that followed, efforts were made to protect the land from the rising waters.

One example is the *Tielrodebroek*, at the junction of the Durme and the Scheldt in Tielrode, which still exists today. It was created as a tidal polder.

17 Tys (n 16) 47-48.

18 Soens (n 7) 11-12.

19 Soens (n 7) 11. The governance of water and polder boards is discussed in Beatrijs Augustyn, "Polders en wateringen in maritiem Vlaanderen", in Walter Prevenier & Beatrijs Augustyn (eds), *De gewestelijke en lokale overheidsinstellingen in Vlaanderen tot 1795* (Brussels, 1997), 594.

20 Hugo Thoen, *Temse en de Schelde. Van ijstijd tot Romeinen* (Brussels, 1989), 26-27.

A part of the river's banks was encircled with dykes. During the winter, with the help of locks, water from the Durme was let onto the impoldered land to fertilise its grass naturally with silt (in the local dialect this was called "*spier*").[21] Once the polder was dry, it served as grazing land for cattle (the "*spier*" ensured a high quality of grass and hay).[22]

The *Tielrodebroek* provided protection from high water but at the same time it brought areas adjoining the Scheldt into cultivation. Its construction was a cooperative undertaking: villagers participated in the works by way of investment. Against payment of a modest fee, they received a small plot of land, a "*reep*" (also called a "*reke*"), in the *broek*. The farmer on a plot could make hay there or dig for clay and peat. Holders of plots reaped the proceeds for themself. However, their rights of use were strictly regulated. In winter, for instance, the land was flooded without exception. In spring, the water was evacuated from the polder and no one was allowed to enter the *broek* for some time after that. After the cultivation of hay in the summer months, cattle were allowed to be let into the *broek*, but only under the supervision of a village shepherd. The communal character of the *broek* also lay in the fact that the dykes had to be maintained by the plot farmers. The bailiff of Tielrode organised regular inspections of the dykes and polders.[23]

Both the polders on the Flemish coast and the *Tielrodebroek* provide evidence that cooperative ventures, with communal rights of use, could replace common rights on undeveloped land. Use rights then accrued to investors in the project, who were involved in a combination of reclamation and protection. Such usage rights, as linked to a collective project, were not always a small affair: in fact, such projects could involve large groups of farmers. For example, the *Noubroek* in Hamme, which was a polder near the *Tielrodebroek*, was more than 240 hectares in extent and in the fifteenth century it contained several hundred plots.[24] Most of the village community could benefit from these polders. Peasants, for instance, combined agriculture on their own land with the exploitation of a small parcel in a nearby polder.

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21 Luc Peleman, "De Durme tussen gisteren en vandaag", (2013) *Braem: Driemaandelijks Tijdschrift voor Heemkunde* 37; André Verstraeten, *De Durme: van Tielt tot Tielrode. De meest gevarieerde Vlaamse rivier?* (Lokeren, 2017), 197-198.

22 Peleman (n 21) 37.

23 Marc De Wree, *Het domein van de abdij van Lobbes in Waas* (Destelbergen: De Wree, 2018), 268.

24 De Wree (n 23) 240; "Schorren van de Durme, de Bunt en monding van de Durme in de Schelde", January 2020, Inventaris onroerend erfgoed Vlaanderen, <https://inventaris.onroerenderfgoed.be/erfgoedobjecten/135065> accessed 12 May 2023.

The connection with the authority of the local lord is also clear. The polders came about in reference to *regalia* over the wastelands. The sovereign could take the initiative and grant rights in order to attract investors. In the *Tielrodebroek*, the bailiff in question was a representative of the owner of the village, namely the abbey of Lobbes. This abbey administered the *regalia* of the count of Flanders in Tielrode. The sovereign or local lord considered the creation of a polder to be an investment. Usually, a farm fee was paid, or the users paid taxes, which from the perspective of the lord or sovereign made the enterprise feasible.

The regulations of the *Saaftinghe* polder – another polder along the Scheldt –, which date from 1260, stipulated that "each man must not dig up too much peat and salt from his plot, so that the land may remain worth the tax and the cost of all reclamations to his lord."[25] In this regard, regulating individual behaviour not only served the communal interests of landholders in the polder and of those outside of it but equally ensured the lord's investment and wealth. The fear that extensive private development and digging would endanger the stability and security of a polder was coupled to stress about its economic viability. Works close to dikes could bring dikes to the point of collapse, but equally, digging in a polder triggered the risk that groundwater would well up from beneath the surface and flood the polder.

4. The demise of the commons: which route ahead?

Elinor Ostrom developed theories on the feasibility and underlying mechanisms of common pool institutions. She identified the characteristics of resources as an important variable in the features of commons' organisations.[26] On that note, the abovementioned examples can be considered as referring to non-exhaustible resources and therefore not as typical instances of the commons, which normally involve limited resources. Moreover, the restrictions on the free use of uncultivated beaches were not intrusive in an absolute sense because the locals could, for example, retain their access to the sea. However, Ostrom's division between renewable and non-renewable resources is based on an economic criterion, of potential depletion, which is missing important points. The problem of the demise of the commons is still mainly looked at from the angle of individual versus collective rights, and in this regard the differentiation

25 Henri Obreen & Adolf Van Loey (eds), *De oudste Middelnederlandse oorkonden voor onderwijs en eigen studie* (Leiden, 1934), 171.

26 Elinor Ostrom, *Governing the commons. The evolution of institutions for collective action* (Oxford, 1990). Ostrom considers common pool institutions as dealing with the risk of over-appropriation.

between renewable and non-renewable resources makes sense. But this perspective is probably determined by individualist assumptions, which for a large part exclude cooperative and reciprocal behaviour. In this regard, too, the demise of the commons can be considered as a triumph of individualism over collectivism only when these assumptions are maintained.

Historical examples do not match the theories here, though. Communalities have never been exceptional, and not the result of a *Kommunalismus* that slowly got eroded. Rather, they were "common" because they were not rooted in exclusively altruistic motivations. 'Bundled self-interest' best explains the collective enterprises which commons were. Individualism was embedded and steered: investors received plots of land in wastelands that were brought under cultivation; they could extract resources from those plots, but at the same time their rights were limited by the rights of the collectivity, and by extension the public interest. Moreover, the instrumental use of authority could go hand in hand with the recruitment of investors. And the protection of collective rights could coincide with the profit-making purposes of the elites. All of this did not in itself hamper the aims of protecting and serving the common good.

In this regard, it is important to analyse the demise of the commons from perspectives other than the traditional ones. For example, it seems that the polders and their organisation suffered from crises that started in the sixteenth century. The boards no longer functioned properly; the supervision over the dykes became superficial and this resulted in occasional mayhem.[27] Examining the way the crisis of the polders' organisations arose offers more promising routes towards historical accounts of the dwindling of the commons than any antagonism between individualism and collectivism.

Important elements of any explanation may be scale and distance. It seems that more plots in the polders were bought as investments, resulting in a separation of ownership and control. The polder boards were composed of professional agents; the owners of the plots in a polder were not directly involved, since they rented out their land. As a result, lock watchers and dike workers became *dijkschepenen*, the owners themselves refraining from taking on this responsibility.[28] In this respect, the history of the end of the commons is part of a broader story of societal change, one in which ownership became synonymous with detachment.

The part of legal theory in all this is crucial: abstract notions of ownership provided support for collective projects, which replaced one set of collective rights with another. The legal fiction of control, as encapsulated in the notion of

27 Soens (n 7) 22-25.

28 Soens (n 7) 27-33.

imperium, announced the factual bringing of "barren" lands under cultivation and into the culture. Therefore, Grossi's analysis is not correct. Abstract concepts of ownership (in particular, *imperium*) mattered greatly for the coming into being of commons. And it was not individualism as such, in law or beyond the law, that brought about the commons' demise.

Humour and surveillance: "That's not funny" (or is it?)

Gary T. Marx

Every joke is a small revolution.
George Orwell

The issues of privacy are full of twists and turns.
S. Gutwirth

Serge Gutwirth is a person for all seasons – a pioneering international scholar who has played a major role in creating the emerging interdisciplinary field of law, technology and society studies as this involves the protection of human rights. He has done this through his writing, the VUB research groups on human rights and later LSTS (Law Science Technology and Society). The last of these was among the earliest and the most prominent of the international groups concerned with these questions.[1]

His degrees in law, criminology and science and technology studies have provided him with a keen eye for complexity, for the historical, philosophical and social underpinnings of contemporary technical change and also for the risks of untethered technology. He is well aware of the partial (and often partiality of) stories told by those who control the megaphones. He has French and Flemish cultural roots, but is equally comfortable with Anglo-Saxon culture, literature and history. He has the cosmopolitan sensibility reflective of the best of the European spirit. He has been a mentor to students who have gone on to do important work at the intersection of his fields of study. The annual Computers, Privacy and Data Protection Conference is legendary for the exchange of ideas and the creation of communities of interest in Europe and far beyond. I know others will describe his academic record, from his PhD thesis showing the centrality of privacy to personal freedom in a democracy to his voluminous work on data protection and the European citizen.

1 A full list of his work can be found at <https://works.bepress.com/serge_gutwirth>, last accessed on 16 May 2023.

In 2000 I first became aware of his creativity and energy when reviewing *Privacy and the Information Age*[2] (his first book) for the eventual publisher. Then I wrote:

> Serge Gutwirth impressively draws on Dutch, German, French and English language sources to develop a strong argument regarding the centrality of privacy to personal freedom and the challenges to that sacred connection posed by new and increasingly omniscient, information technologies. A most welcome addition to the comparative literature on privacy and technology.

His professional merits apart, I value him as a warm and compassionate friend steeped in the European humanist tradition. His topics are deadly serious, but that does not preclude him from having a fine sense of humour. Sometimes the risible is our only refuge in a world seemingly hurtling towards destruction (note Orwell's potent use of satire about the most horrible of topics). To honour that sensibility and spirit, I was pleased to gather some of the lighter visual treatments of topics that have engaged Serge over the decades. Unfortunately, in this volume the images could not be used; the original article with images will be posted online.[3]

The article I wrote for this volume looks at privacy and surveillance through comical images bearing deeper truths than words alone. The images illustrate the complexity and contradictions of contemporary surveillance and rational, scientific and engineered forms of social control. Jacques Ellul writes:

> In *Guernica* Picasso expresses the tragedy that is taking place without showing piles of bloody flesh. *The important thing in art is after all to transpose reality into an image which is sufficiently enthralling and meaningful so that the viewer gets an even better grasp of that reality.*[4]

This also applies to humour.

Over the past 50 years, in the classic sociological tradition, I have been studying the production of social order with an interest in social control and the challenges to it. This started with an interest in undercover police as a result

2 Serge Gutwirth, *Privacy and the Information Age* (Rowman & Littlefield 2001).

3 Images of the cartoons and other humour is in the longer version of this paper at: https://web.mit.edu/gtmarx/www/humorandsurv.html.

4 Jacques Ellul & Patrick Troude-Chastenet, *Jacques Ellul on politics, technology, and Christianity: Conversations with Patrick Troude-Chastenet* (Wipf & Stock Publishers 2005), italics added.

of encounters with agents provocateurs in Berkeley in the 1960s when I was a student. Over the years, learning from Erving Goffman "it's all data", I have gathered popular culture items involving cartoons and songs as they apply to surveillance and privacy issues. These communicate in a different way from the ponderous data and texts we usually work with.[5] The Western individualistic hubris that exaggerate our control over nature and each other can be tempered with humour. There are also commonalities between science and humour, just as creativity and playfulness can be linked. In both cases the world is questioned and in principle nothing is beyond the irreverent or at least the sceptical eye. The seriousness and sometimes the hypocritical legitimation of official lines may hide and distort, inviting satire. Is it true that sacred cows make the best hamburgers? In short, humour must be taken seriously even, or perhaps especially, in the case of the momentous topics Serge has devoted his career to.

Whether (and under what conditions) popular culture serves more generally as soul training for compliance or as soulful messages encouraging questions and even resistance is a topic for research. Humour can undercut the taken-for-grantedness of communication on the topic (whether because of repetition or slant) which draws attention away from historical change and political meaning. There is a need for systematic comparisons between jokes, music, cinema, literature, art and advertisements in various contexts and across media and societies. This would look at the culture of surveillance not as practice in our daily lives, but as cultural productions.[6]

The article ends with a cartoon that summarises a central message of Serge's lifetime of work. It shows a man approaching a cottage bordered by a picket fence and a sign warning, "Be aware of the technology." Importantly, the sign does not imply "stop the technology" but rather, "be wary and wise." For that wisdom and for Serge I am most grateful.

5 Anton C. Zijerveld, "Jokes and their relation to social reality" (1983) 35 *Social Research* 286; Murray S. Davis, *What's so funny?: The comic conception of culture and society* (University of Chicago Press 1993); Giselinde Kuipers, *The primer of humor research* (De Gruyter Mouton 2008).

6 I explore the issues in greater depth in "Soul train: The new surveillance in popular music" and "The new surveillance in visual imagery" at <https://press.uchicago.edu/sites/marx/index.html>, last accessed on 15 May 2023.

Guerrilla lawfare: on the politics of the practical turn in law

Laurent de Sutter

A. Guerrilla pragmatism

In 1961, Ernesto "Che" Guevara published the first edition of what became his most famous book: *Guerrilla warfare*.[1] It was both a manual for the aspiring revolutionary and a report on the experience of the Cuban revolution – during which Guevara himself had applied the lessons he imparted to his readers. In his mind, the idea of guerrilla warfare was simple: it aimed to designate all the activities necessary to overthrow a state perceived as illegitimate where others had failed. When parliamentary politics or legal action was ineffective, it was necessary to resort to arms – and to do so in such a way that the police or military power of the state itself became irrelevant. For Guevara, guerrilla warfare should not be seen as a form of war, but as its opposite – as the *cancellation* of the ordinary technical and practical modalities of armed force. The refusal of fronts, concealment in difficult terrain, the confusion of living spaces and belligerence, sudden appearance and disappearance, etc.: the methods that Guevara advised others to adopt were all characterised by their desire to *unrule* war. With a wave of his hand, he swept away centuries of strategic advice and more or less accepted laws on armed conflict in favour of what could perhaps be called an *anarchist* conception of confrontation. This anarchism, however, was not without solidity or orientation; on the contrary, it unfolded under the guise of integral pragmatism – of a permanent reflection on what an action makes possible, on the continuation it allows. For Guevara, guerrilla warfare was not aimed at winning, at a victory, but at allowing the perpetuation of its own movement – until the official forces themselves collapsed. It was not about winning, but about *making the enemy lose* – and therefore surviving, moving, diffracting, multiplying until this loss occurred by itself in the exhaustion and panic of a suffocating inefficiency. In this context, it had to be acknowledged that Guevara, even though he defended the greatest tolerance of and respect

1 Ernesto Guevara, *Guerilla warfare*, transl. J.P. Morray (Monthly Review Press, 1961).

for members of the enemy forces, did not hesitate to recommend methods of extreme brutality. No prisoners were to be taken; no quarter allowed. The pragmatism of guerrilla warfare was a pragmatism of all means – or of almost not being one at all.

B. State of inception

The radicalism of guerrilla warfare has long troubled jurists, caught in the demands of a law of war whose primary objective was precisely to draw a clear distinction between official belligerents and the civilian population. Guerrilla warfare, in their eyes, constituted a kind of borderline case – an almost-exception, which could not, however, be such because a certain popular legitimacy had to be recognised for the actions of the *guerrilleros*. To reject guerrilla warfare outright would have implied recognising that the law of war concerned only recognised and formally accepted state authorities – to the detriment of any material reality. With the advent of guerrilla warfare, international law was forced to look at itself for what it was: a sort of list of advice that one could hope would be followed – but which required, for that, the acceptance of a heavy set of conditions in advance. In the debates that the popularity of guerrilla movements, especially those in South America, provoked, discussions therefore revolved essentially around two questions: that of the temporality of guerrilla warfare; and that of its respect for the rules relating to the humanitarian treatment of participants in the conflict.[2] Most often, the conclusions were predictable: guerrilla warfare cannot continue once official forces have been defeated; and guerrilla leaders are to be held responsible for the actions of those who act under their orders – under Article 3 of the Hague Convention.[3] As is often the case in matters of international law, though, the lessons were as tenuous as they were of little practical interest – mere *protest* aimed at making people believe, against all evidence, that war could be a clean and neat thing. But the embarrassment expressed by jurists went further. It also testified to the fact that the guerrilla model was situated in a space that international law could not quite integrate – even a space that law *in general* had difficulty thinking about. This space was that of what one could call *interior*

2 William H. Lawrence, "The status under international law of recent guerrilla movements in South America", (1973) 7(2) *International Lawyer*, 405 *sq*.

3 Lester Nurick & Roger W. Barrett, "Legality of guerrilla forces under the laws of war", (1946) 40(3) *The American Journal of International Law*, 563 *sq*.; Charles R. King, "Revolutionary war, guerrilla warfare and international law", (1972) 4(2) *Case Western Journal of International Law*, 91 *sq*.

outside – an outside that, precisely, would be the opposite of the exception by which the interior expels itself from itself. Unlike the state of exception, whose legitimacy is based on the suspension of all legitimacy, guerrilla warfare constituted a type of *state of inception* – an invagination, at the heart of law, of its own inability to be law all the way. Guerrilla warfare does not suspend the law; it is an affirmation that it is the law itself that never stops suspending itself.

C. Piracy through operations

From the 1980s, the model of guerrilla warfare inspired several legal theorists who were eager to give legal practice a new dimension, one that they considered more concrete and interventionist. In 1987, Guyora Binder attempted to produce an equation that he himself considered problematic between the Critical Legal Studies movement and the idea of guerrilla warfare.[4] More recently, Paul Harris used the guerrilla model to describe a possible turning point in legal thinking that would revive the project of its overthrow from a progressive perspective.[5] In both cases, the reasoning was the same: since the law presents itself to us as the monument to its own grandeur, and that that grandeur is in reality that of the power which guarantees it, we need new instruments to break the one and therefore the other. But this was a misunderstanding of the place that guerrilla warfare occupies in the law – that is, the fact that it does not constitute an exterior from which it would be possible to attack the fortress but the very place of its *inner weakness*. Just as it forms a problem that renders visible the fundamental ridicule of international law, guerrilla warfare designates the point where the law both itself and in general collapses in its own uprising. To speak of legal or lawful guerrilla warfare is therefore above all to designate an unexpected recourse *to the law itself* – which is understood in its weakness and not its omnipotence. Guerrilla warfare does not aim at the ruin of law, since it organises itself by pretending to be immune, but at the invention of new uses of the operations that belong to it – and that are not affected by the false narrative of its grandeur. To put it more plainly: guerrilla warfare, in law, *designates the hacking of legal operations* – hacking whose primary consequence is to make the rules that claim to govern their orientation or determine their foundation lie. If the law is, first and foremost, the catalogue of operations that make consequences possible, if the law is above all a machine for continuation, then

4 Guyora Binder, "On critical legal studies as guerrilla warfare", (1987) 76(1) *The Georgetown Law Journal*, 1 *sq*.

5 Paul Harris, "Guerrilla lawyering", (2004) 3(2) *Seattle Journal for Social Justice*, 561 *sq*.

juridical guerrilla warfare is the serious consideration of this dimension of the after. It is not the ruin or destruction of the law but the self-collapse of *laws* in the pirate use that it is possible to subtract from them by resorting to operations that do not touch them in any way. It is therefore not the *manipulation*, *instrumentalisation* or *diversion* of the law; on the contrary, it is its realisation – insofar as there is *only* law in guerrilla warfare.

D. What does "appropriation" mean?

There is a legal guerrilla warfare which is a guerrilla of operations. Among these operations, it is possible to take the example of *appropriation*. The history of property, because it remains indexed to a set of categories inherited from Roman law, remains grafted onto a space in which the world is divided into things, actions and persons – where things are considered as such in the name of their relationship to appropriation. The Roman operation of property is a strong connection between the holders of a capacity to act in case their property is challenged and things that, otherwise, would remain unanchored. In other words, it is an operation of *stabilising the world of things in the hands of persons* through the actions that are attributed to them – in other words, again, a cosmological operation. Through things, owners make a world hold – given that this world is never anything other than that of law: persons themselves are considered legal only from a legal standpoint, no matter how "physical" they may be. Recently, Sarah Vanuxem has been able to show that this ancient conception of the operation of appropriation, which leads to both the maximum stabilisation of the world but also implies that it can only be translated into the capacity to act for subjects, possessed no intrinsic necessity.[6] It is possible to retain the strong connection effect that appropriation has – but without necessarily counter-signing the requirement to give it the capacity to take effect into the hands only of "persons". It would be just as possible to reverse it and to support, as Vanuxem herself does, the contention that it is things which act – and constitute individuals as their representative in the space of actions. If there are persons, it is not because the sole purpose of appropriation is to gain *control* over things, but because things require a legal body authorising them to act for their preservation, transformation, etc. The continuities that the operation of appropriation constitutes are continuities in the becoming of things – which implies accepting that persons, as Vanuxem says, are content to "inhabit" them, to be in some way specific tenants. This tenancy can go as far as destruction

6 Sarah Vanuxem, *La propriété de la terre* (Wildproject, 2018).

– but this, once the point of view is reversed, becomes more problematic: destroying a thing is tantamount to destroying the possibilities of consequences that appropriation inaugurated. This cannot be done without explanation.

E. A world of things

Reversing the direction of the relationships involved in a legal institution leads to a new consideration of the consequences that can be expected from it – without necessarily abandoning it to the authorities of the moment. In the case of appropriation described by Vanuxem, such a reversal can even extend very far: up to the affirmation of a new form of "property of the land", which is to be understood in a planetary sense.[7] If it is no longer persons who act to defend their right to things but things that act through the fictitious persons who represent them, then the protection of the environment can take a new turn. But this turn, contrary to what is too often heard today, does not consist of granting new rights to trees, rivers or ecosystems (or even to the Earth itself), nor does it consist of granting them a "subject" status. In both cases, attributing supposedly specific attributes of persons to things only leads to additional problems for the things in question – since they are suddenly required to assert them. In the law of environmental protection, things, *because they are protected*, compel the authorities to ensure that this protection is maintained – and to act quickly if it is endangered. Turning a river, for example, into a "subject", on the other hand, implies that this protection is no longer self-evident – since it would depend on the river itself establishing its claim to protection in case it was endangered. The desire to subjectivise a thing does not protect it more, but less.[8] On the other hand, considering it as the actor of an appropriation can lead to an additional level of security being applied, without it needing to act, since the exercise of the owner's prerogatives is constrained by it. If the true actor of ownership is the thing (which was the fundamental idea of Roman law, as Yan Thomas has been able to recall[9]), then one must always start by asking the thing what it thinks of the treatment it is being subjected to. From an object capable of being destroyed freely, it becomes a *difficulty* – a trouble that prevents the action of persons from being absolute, since property is never *their* property. Persons are things in a world of things, and, in property, it is this primacy that can be defended.

7 *Ibid*., 63 *sq*.

8 *Ibid*., 93 *sq*.

9 Yan Thomas, "La valeur des choses. Le droit romain hors la religion", (2002) 57(6) *Annales. Histoire, sciences sociales*, 1431 *sq*. See also Laurent de Sutter, *Pour en finir avec soi-même. Propositions, 1* (PUF, 2021).

F. Outlaw law

Transforming what was taken for granted into a difficulty: that is what guerrilla warfare opposes in contrast to those who would like wars always to be conducted *according to the rules* – that is to say, in such a way that each blow is predetermined. Faced with the carefully defended illusion that property is an impregnable fortress, the understanding of which requires the acceptance of an entire set of specifications based on the primacy of the individual as owner, the guerrilla responds with a shrug. Never, nowhere, except perhaps in certain corners of the Western world, has property belonged to the owners; it is rather because they have properties that they can be called owners. In law, not only is the legal too often confused with the juridical, but also having is confused with being – as if it were possible to deduce a state from possession and from that state a nature of things. What Vanuxem's proposals revealed was that in matters of appropriation there is no nature of things, no state, no being, no rule that holds – but rather an arrangement of consequences resulting from the representation of things by people. What prevents this change of perspective from taking place is not the law itself but everything that supplements it and which, by supplementing it, claims to provide the final word: politics, doctrine, ideology, philosophy, economics, etc. What the guerrilla operations of law make visible, when they occur, is the possibility of the law escaping from the extrinsic adjustment by which it is reduced to being only *this* or *that*. Because it is too often considered as the pure expression of social, political, economic, religious normativity, etc., the law is also despised for its capacity to be more than any norm. Above all, it is underestimated in its very juridical nature, insofar as this juridical nature distinguishes it from all legality in that only it unfolds as a repertoire of operations. There is no operation but outlaw: this is the very ancient reality that the over-determination of the law by those institutions defending or criticising its normative inscription is incapable of accounting for.[10] And this is the reality with which juridical guerrilla warfare reconnects every time it deploys the law as that which makes the laws lie – regardless of its source, function or purpose. It should probably even be said every time the law is deployed, since, as we have said, from this point of view, there is no law but that of the guerrilla.

10 Laurent de Sutter, *Hors-la-loi. Théorie de l'anarchie juridique* (Paris: LLL, 2021). See also Laurent de Suter, *After law*, transl. Barnaby Norman (Polity, 2020).

G. The politics of war

Thinking about the law from the point of view of guerrilla warfare rather than conventional war implies not only reconsidering what is primary in it (operations) and what, on the contrary, pertains to attempts to attribute power to it. It also implies fundamentally rethinking the way in which the law is articulated with the practices by which one attempts to over-determine it – and one in particular: politics. In the legal theory of war, politics is considered as the milieu, the *ecology* of law – that is, as what would provide both the territory and the resources for its development. The fundamental thesis defended by those who believe that politics constitutes the determinant of law in the last instance is as radical as it is definitive: there is no law without politics.[11] If there is law, it is because, somewhere, there is a politics in whose eyes it could be useful – whether as an instrument of coercion, a tool of legitimation, an ideological machine, etc. Whatever the divergence of interpretations, one element runs through them all: taking politics out of law would be to take *everything* away from it – just as one would take all sense from a key if one removed the lock. In itself, the law would have no autonomy, whether practical or theoretical; everything that constitutes it would have its reason for being and its explanation in something other than itself – of which it would be the more or less conscious servant. This is why legal conflicts can be thought of as part of war: if the law is nothing more than the politics that activates it, then, indeed, its destiny should be settled at the level of political fronts. Within war, the law is just a *weapon*, so that its effects and capabilities are decided entirely on the side of the party that inscribes them in its programme and according to its interests. In the case of appropriation, this means that it would be possible to think of it in only two ways: as the framework for the preservation of a social order without which only the violence of *seizure* would reign; or in the context of its abolition in the name of a new sharing of things. However, each time, what is missing is the proper movement of appropriation – and therefore the question that accompanies it: *What can property do*? That is to say also: What can be done *with* property? In war, appropriation constitutes a kind of ammunition or target; in guerrilla warfare, it becomes a guerrilla fighter.

11 Laurent de Sutter, "Droit: Pour une Clinique", in Laurent de Sutter (ed.), *Postcritique* (PUF, 2019), 209 *sq*.

H. Critical legal fatigue

So let it be said: to consider law from the perspective of its determination by politics, and therefore by war, is to consider it from the perspective of its *impotence* – a desired, organised, chosen and even savoured impotence. However, this impotence comes at a cost. In *The code of capital*, Katarina Pistor showed what it was: the total abandonment of the law's inventive capacities into the hands of those who only *pretend* to play war with the law.[12] Since the early 1980s, large law firms serving big companies or conservative powers have not stopped pushing the limits of the law by using more and more inventive legal tactics. While defenders of progressive positions continued to want to win the war, legal technicians serving reactionary positions took over the entire space of the guerrilla war. It is therefore hardly surprising that they have made considerable advances for themselves – that, as Pistor writes, they have reconfigured the entire legal framework that affects them in such a way that finally satisfies them. Above all, they carried out this reconfiguration *away from all political spaces*, whether institutional (parliaments, governments, etc.) or not (civil society, social movements, etc.). They understood that the powers of the law had nothing to do with those that politics was willing to recognise – no more than with the laws that form its product. Law, because it is what eludes the laws, is also what eludes politics – except when politics also eludes the laws in the name of the pragmatism of the operations it wishes to carry out. Therefore, since the early 1980s, legal thinkers as politicians have abandoned the terrain of subtraction in favour of an ever-greater addition of politics and morality, whose only effect has been to leave the field open to the party they claimed to want to defeat. By abandoning the law to politics, these thinkers have abandoned both the law *and* politics themselves – in favour of a war game as anachronistic as a Napoleonic battle in the age of drones. Refusing to consider the law's own capabilities, as operational capabilities outside the laws, is to put oneself at the mercy of the very order of things that needed to be overturned – since that order held only *by other means*. And that is what happened.

I. The fabrication of uses

Rather than a policy *of* law, we need a policy *with* law – a policy that considers the law as an ally, a chance, an opportunity or a resource more than something

12 Katarina Pistor, *The code of capital: How the law creates wealth and inequality* (Princeton University Press, 2019).

that represents the order to be overthrown (since it always makes that order a lie). Such a policy, as Serge Gutwirth explained in his recent revival of the concept of legal guerrilla warfare in the area of social inequalities, can only be a policy of uses – and thus of their *fabrication*.[13] The first lesson that can be drawn from a conception of the law in terms of guerrilla is that the uses of the law are never given; they are not the mechanical products of a political, economic or other parameterisation. It is therefore always possible to invent new uses of the law, provided that this invention is carefully, fiercely, maliciously used, and without any sentimental compromise. A use is not something simple and generous; it is a small portable grenade, a dirty weapon, whose damage must be terrible in order to open a breach in the defence edifice that the law has erected in the name of war. A policy of legal operations can only be a policy of gritted teeth. In other words, it is a policy that combines the fundamental pragmatism of operations with what must be called *opportunism* of action. Guevara himself emphasised this: in guerrilla warfare, *all means are good* – that is to say, all means are good, *provided they have an effect*, are not useless or even counter-productive. But these means must still be fabricated – elaborated from the elements that constitute a certain state of the given: the given of what can be gathered around oneself, of what one has access to, etc. But a use, even if it is always possible, is not without constraint: those upstream of the given from which it can be derived and those downstream of the effects that can be derived from it, both are among the determinations that guerrilla warfare has precisely the mission to challenge. The first use of a use is first of all that of exceeding its own limits – of enlarging the repertoire of possibilities from which it was born, but which it is intended to leave or surpass. Every use, because it is guerrilla, is first and foremost a use of the fabrication of uses – a cracking of the framework of the possible and the impossible within which the law was supposed to be inscribed.

J. In praise of danger

For too long, the idea that the law is what *prevents* has indeed prevented us from thinking about it differently, from seeing that its action unfolds according to a different division than that of order and infraction. The laws, certainly, have not ceased to prevent; their inscription in deontics has always aimed to reduce

13 Serge Gutwirth, "Recht en sociale ongelijkheid: een pleidooi voor juridische guerrilla", in Harry Willekens & Mark Lambrechts (eds), *Recht en sociale ongelijkheid (*Die Keure, 2022), 41 *sq*. In the same sense, see Liora Israël, *L'arme du droit* (Presses de Sciences-Po 2009).

legal discourse to that on what is permitted, mandatory and prohibited. But this inscription was a way for other practices to try to domesticate the prodigious capacity of the *law* to redistribute everything through the simple functioning of its operations. In the time that separates us from its Roman invention, the law has resurrected the dead, redistributed natural filiation, reversed the course of time, conferred means of action on non-existent beings and overturned the boundaries between regimes of the living – and it can undoubtedly do even more. To refuse to consider that the law is on the side of the transgression of the impossible and not on that of the possible regulated by order, and that the inventions of use that have always made life lie, is still to refuse to consider the law "as such". Juridical guerrilla warfare, then, is guerrilla warfare on the front of ignorance of what the law can do – and, at the same time, on the front of curiosity about what this ignorance leaves in the shadow but does not foreclose. In other words, it is the assumption that not knowing the powers of the law does not constitute a limit but a field to be explored – or, in any event, a resource that cannot remain without consideration. The law is not good, nor great, nor beautiful; strictly speaking, it is without quality – except for its ability to *make real* what seems to belong only to fiction, and even to science fiction. Choosing juridical guerrilla warfare is therefore choosing this ability to realise – this pragmatic mobilisation of operations towards an addition to the world, an addition of the means of action, therefore of the horizon to its means.[14] Of course, because the law is neither good, nor great, nor beautiful, this choice does not determine in any way the possibility of a victory; on the contrary, guerrilla warfare is conducted by at least two parties – if not many more. In this game, the dead are numerous, the damage immense, the mistakes countless – the violence, brutality, torture, that's true. It also presents the danger of any construction, especially when it is explosive: it can blow up in your face.[15] So juridical guerrilla warfare, if, thanks to the law, it can do everything, it can only do so to the extent that we desire it – and to the extent that we accept to pay the price.

14 Laurent de Sutter, *Superfaible. Penser au 21ème siècle* (Flammarion, 2023).

15 Laurent de Sutter, *Eloge du danger. Propositions, 2* (PUF, 2022).