

(Re)presentation: pTA citizens' juries and the jury trial

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1. Introduction

The Society for Social Studies of Sciences (4S) and the European Association for the Study of Science and Technology (EASST) took the initiative to organise their 2004 common world conference around the theme of 'Public proofs – Science Technology and Democracy'. The conference addressed the crumbling of the traditional divide between scientific experts that are trusted to have access to uncontroversial knowledge and the general public that defers to such expertise. Policy makers, citizens and judges must learn to deal with scientific expertise that merits neither naïve confidence nor unwarranted distrust and this requires newly invented practices to agree on the imbroglia of matters of fact and matters of concern. The organisers summarised the issue as follows:

Thus, the question of providing public proofs has taken on a new prominence: those proofs inherit all the problems of the former scientific proof, but, in addition, they have to take into account all the problems of providing agreement.¹

This raised a host of questions around citizen participation in the assessment of emerging technologies, known as participatory Technology Assessment (pTA). One type of pTA is the citizens' jury, a group of citizens that is asked to form its opinion about the introduction of a particular technology, after consulting relevant experts. During the conference we presented a paper in which we compared some aspects of the 'fair trial', especially the jury trial, with pTA citizens' juries. In the ensuing article in *Science, Technology & Human Values* we argue that the long history of the fair trial has generated 'a set of constraints that protect those that speak truth against power, while at the same time providing authority for the verdict reached',² and suggested that pTA scholars and practitioners have something to gain by studying the 'fair trial' procedural safeguards.

In the course of writing and discussing the paper and the article we were confronted with the issue of representation, for instance regarding the question whether, and if so to what extent, pTA citizens' juries can claim to speak for the concerned public. What is – or should be – the

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1 http://www.csi.ensmp.fr/WebCSI/4S/index.php?page=public_proof, last consulted 5 June 2007. About expertise as an essentially contested concept, see N. Marres & G. De Vries, 'Tussen toegang en kwaliteit. Legitimatatie en contestatie van expertise op het internet', in H. Dijkstra & C. J. M. Schuijt (eds.), *De publieke dimensie van kennis*, 2002 (also via: <http://www.wrr.nl>, last consulted 5 June 2007).

2 M. Hildebrandt & S. Gutwirth, 'Public proof in courts and jury trials: Relevant for pTA citizens' juries?', 2008 *Science Technology & Human Values*, to be published.

impact of the outcome of pTA citizens' juries on policy making regarding issues of public interest and how can such an impact be legitimised if just a small sample of a population was involved? We found that similar questions have been discussed in debates about the legitimacy of the trial jury, providing answers which are relevant for the discussion of pTA citizens' juries.

In this contribution we will focus on the issue of representation in a court of law and a pTA citizens' jury, arguing that such structured forms of lay participation present important democratic practices not covered by aggregative or even deliberative models of democracy.

In Section 2 we will develop a conception of democracy as advocated by Dewey in his *The Public and its Problems*, complemented with a relational theory of law as argued by Foqué and 't Hart. In Section 3 we will provide a brief introduction to pTA citizens' juries and to the jury of the 'fair trial', elucidating similarities and difference between them. In Section 4 we will initiate a discussion of representation in constitutional democracy, advocating a move beyond statistical representation of the sovereign people (aggregative models of democracy) and representation of rational consensus (deliberative models of democracy). We argue that the trial jury and pTA citizens' juries present Dewey's publics under construction as well as the issues they concern, claiming them to be the kind of practices advocated by Mouffe in her agonistic conception of democracy. Section 5 will conclude with closing remarks.

2. Constitutional democracy and the construction of concerned publics

2.1. Democracy: The constitution of publics

In her doctorate thesis *No Issue, No Public. Democratic Deficits after the Displacement of Politics* Noortje Marres discusses the Lippmann-Dewey debate that gave rise to John Dewey's *The Public and its Problems*.³ Marres considers this debate to be topical for present deficits of democratic theory and we will follow her description of the controversy. Interestingly, Marres emphasises that the antagonists agree on the diagnosis of their time, as they both 'singled out the rise of "the Great Society" as the circumstance that necessitated a reworking of the concept of democracy'. The term referred to a type of society 'in which people are enmeshed in vast and impersonal webs of interdependent relationships', while 'public affairs are prone to transgress the boundaries of existing communities', thus generating a 'proliferation of "foreign entanglements" that require a new conception of democracy'.⁴ The sheer amount and the major complexity of decisions and interactions of both private and public actors that have serious indirect effects on citizens seem to disable traditional conceptions of democracy.⁵ This is the case because those affected often do not know each other, do not form a community and cannot easily grasp the complexity of the issues at stake, of which they may not even be aware. Lippmann is often portrayed as having responded with a technocratic solution, 'toning down our expectations of public participation in politics',⁶ while Dewey was an ardent advocate of renewed participatory democracy. Instead of dwelling on this opposition Marres explains *the common core* of Lippmann's and Dewey's reconceptualisation of democracy 'as a practice dedicated to finding a

3 J. Dewey, *The public & its problems*. 1927 (2005); N. Marres, *No Issue, No Public. Democratic Deficits after the Displacement of Politics*, 2005 (also available via: <http://dare.uva.nl>, last consulted 5 June 2007) and L. De Sutter, *Politiques de la représentation. Pour une pratique cosmopolitique du droit*, 2006, PhD thesis, Faculty of Law and Criminology at the Vrije Universiteit Brussel.

4 See Marres, *supra* note 3, p. 35. The rise of 'the Great Society' was first introduced by Lippmann, who took the term from Graham Wallis.

5 See B. Latour, *Politiques de la nature. Comment faire entrer les sciences en démocratie*, 1999; B. Latour, 'From Realpolitik to Dingpolitik. How to Make Things Public?', in B. Latour B. & P. Weibel (eds.), *Making things public. Atmospheres of democracy*, 2005; M. Callon, P. Lascoumes & Y. Barthe, *Agir dans un monde incertain. Essai sur la démocratie technique*, 2001; De Sutter, *supra* note 3.

6 Marres, *supra* note 3, p. 34.

settlement for affairs',⁷ highlighting the role played by affairs or *issues* in the democratic process. So, instead of opposing Lippmann's democratic realism (leading him to elitist technocratic solutions) with Dewey's participationism, Marres argues that they developed 'strikingly similar critiques of the modern *theory* of democracy'.⁸

First, in many cases there is a distance between the objects of democratic politics and those that are affected by them. This was the case at the beginning of the 20th century, after the industrial and media revolutions and is the case to an even further extent at the beginnings of the 21st century. Globalisation of economic markets and the rise of the internet have created a situation in which the price of sugar cultivated by a Latin-American peasant is determined on the world market, while the attack on the New York World Trade Center was made by suicide terrorists who may have developed their own version of a political islam based on internet recruitment. Iraqi citizens experience the consequences of the US decision to 'save' them from Saddam Hussein's dictatorship, while the US economy depends on China's willingness to finance the deficit in their balance of payments. All too often, those suffering the consequences of certain decisions are not in a position to choose representatives who can participate in the decision-making process. The relevant decisions are indeed taken outside the realm of one's national politics, either because the effects of a decision taken by a national government have a serious impact on the lives of citizens in other national states, or because the decisions are taken by stakeholders outside the political arena.

Second, many of the objects of democratic politics are highly complex, entangled with the technological infrastructure that has changed the scope and the direction of any decision taken anywhere to an extent previously unthinkable. Private investment in scientific research (and the subsequent patenting) of genes may lead to an increase in the genetic testing of unborn infants or in difficulties for peasants around the world to produce their own seeds; easy access to information on a global scale may augment awareness of the fact that most of the chocolate we buy has been produced with the help of slaves. The issues involved can be articulated as follows: who should have access to information about our health situation, derived from genetic testing (our healthcare insurance, our life insurance, our future employer)? Do we want farmers to become dependent on seed manufacturers; to what extent are we responsible for slavery when buying chocolate produced using slave labour, after being informed? Policy makers and experts may argue that the facts are too complex to be grasped by ordinary citizens, giving rise to false perceptions of the risks involved and/or biased emotional reactions instead of informed judgements. The public is deemed to be ignorant and can at most be educated in order to be convinced of the good judgement of the experts and the policy makers who are mandated to govern our shared world.⁹ Individual citizens may in fact share this opinion, claiming they have mandated their representatives to take care of such issues after consulting the relevant experts.

However, according to Marres both Lippmann and Dewey agree that the distance between those who initiate events and those who suffer or enjoy the consequences as well as the complex entanglement of scientific, technological and other actors often result in the formation of concerned publics. Even if many citizens have no intention of becoming involved, those who find themselves confronted with bad governance may get together *to make a difference*. The agreement between Lippmann and Dewey is based on their pragmatic approach of the problem, not

7 *Ibid.*, p. 36.

8 *Ibid.*, p. 38.

9 Compare B. Wynne, 'Public understanding of science', in S. Jasanoff *et al.* (eds.) *Handbook of Science and Technology Studies*, 1995, pp. 361-389 and the 'PABE report' discussed *infra*.

on their normative responses. Instead of following their normative theories of democracy, which depend on a community of citizens capable and willing to mind their public affairs, Marres follows the pragmatic strand of their discourse, which boils down to the fact that 'the emergence of complicated affairs that resist processing by established institutions is the occasion on which public involvement in politics becomes necessary'.¹⁰ Ordinary government rests on the fact that a people has delegated its competence to govern to their representatives. Only when people realise that their concerns are not taken into account will they form an alliance with others who are likewise affected, to raise their voice and initiate what both Lippmann and Dewey then call the democratic process. The issues that are at stake thus give rise to the formation of relevant publics: no issue, no public (and, equally important, no public, no issue).

One could rephrase this as follows: by means of representative democracy a people delegates the competence to govern to its representatives, but as soon as individual citizens become aware of the failure of their representatives to deal with a specific issue they will seek out their fellows, form a public and initiate participatory democracy. Other than a deliberative theory of democracy that builds on the idea of deliberation on matters of general interest aiming for a rational consensus, this type of participatory democracy builds on the idea that 'the general interest' is a highly problematic category in as far as it fails to acknowledge the impossibility of a view from nowhere.¹¹ The objects of participatory democratic politics are *matters of concern* rather than matters of general interest and the first step in the democratic process is to detect which actions have indirect consequences that require the formation of a public. This first step, then, cannot be taken for granted and does not involve the theoretical exercise of developing criteria of what counts as a public issue. This step can only be taken by those who actually consider themselves (or others) affected to an extent that warrants public action. *The legitimacy of this step is not theoretical but depends on the process that follows*:¹² does the public that has been formed manage to force those who (plan to) act in ways that concern this public to take their concerns into account? Do they manage to have a stake in the definition of the problem and the directions for the resolution of this particular problem?

For those of us who are familiar with traditional democratic theory this perception of democracy raises many urgent questions: is democracy not being reduced to a depressing power struggle between competing 'publics' and/or 'interests'?; how can we legitimise the outcome of this process if we do not know to what extent these 'publics' can speak for others likewise affected?; how can competing 'publics' with incompatible interests be expected to reach consensus if they are only interested in defending their parochial interests?; what is the difference between such issue-politics and NIMBY (not in my backyard) 'politics'?; how can we be sure that these lobbying publics restrict themselves to rational argument instead of manipulating public opinion by nourishing irrational fears? We will not attempt to answer these questions by means of a sophisticated refutation of the arguments they imply. Our point is not that representative and deliberative politics should be discarded, and we contend that many of the questions can be answered by referring to the standard democratic procedures of parliamentary democracy. Our

10 Marres, *supra* note 3, p. 49.

11 This is not to say that the notion can be discarded. We still need an institutional framework that can accommodate the competing claims made by different publics, see S. Gutwirth, 'De polyfonie van de democratische rechtsstaat', in M. Elchardus, *Wantrouwen en onbehagen*. 1998. Compare P. Lévy, *Collective Intelligence. Mankind's emerging world in cyberspace*, 1997, p. 67, about real-time democracy that 'tries to construct the richest collective voice possible, the musical model of which would be the improvised polyphonic chorus'. See also Section 4 *infra*.

12 Dewey's pragmatism thus moves away from a predefined categorisation of necessary and sufficient conditions to real time creative assessment of what needs to be done. Solutions are underdetermined and involve an element of invention. This does not mean that reflection is no longer required, or that anticipation is out of bounds. It rather emphasises the underdeterminacy and the need for creative invention.

point, however, is twofold: first, modern democratic theory takes for granted that the national state – or some supranational authority like the EC – governs itself and itself only; second, it takes for granted that policy makers are capable of an informed judgement on matters of fact based on scientific expertise. But both presumptions are problematic. As to the first point: many events, actions and decisions are taken by actors outside the national state (for instance, non-state actors or other states), and these events, actions and decisions often have major *public* consequences. This requires us to reinvent ways to involve those who suffer or enjoy the consequences of such interactions.¹³ Dewey and Lippmann merely point out that this already happens and we agree that this requires our attention rather than an outright rejection. As to the second point: expertise is an essentially contested concept.¹⁴ Mandating decisions on complex societal issues involving socio-technical infrastructures to experts ignores the fact that experts will probably disagree about the definition of the problem and its solution, while seeking out experts who are geared to consensus may not provide robust solutions.¹⁵ Getting citizens involved may provide unexpected perspectives, especially if these citizens are not just asked for their current opinion (like in an opinion poll) but are invited to (re)construct their opinion in a process of sustained interactive consultation and deliberation.¹⁶

In Section 4 we will return to the issue of representation which is crucial for an adequate understanding of the ‘construction of a concerned public’ discussed above.

2.2. *A relational theory of law*

Constitutional democracy depends on democratic processes that are limited as well as instituted by constitutional constraints.¹⁷ Constitutional democracy is therefore not equivalent to majority rule, but rather to majority rule subject to the condition that minorities can become majorities and legitimately take over. Both the rule of law and human rights and liberties protect individuals and safeguard the formation of minorities that may turn into majorities. Respect for individual persons and particular minorities cannot be a mere privilege in a society that aims to qualify as a constitutional democracy; this is what such a society builds on and nourishes. If we want to connect this conception of democracy with Dewey’s publics it may be interesting to realise that the formation of minorities need not necessarily refer to political parties or existing communities.¹⁸ Minorities can be constructed on the basis of a common predicament that brings together individual citizens who have not and may never meet, while their opinions may in fact be very diverse. Instead of speaking of minorities we can speak of publics, concerned with a specific issue. This implies that an individual person can partake in the construction of a variety of (overlapping) publics, depending on what she perceives to warrant her urgent attention. It does not imply that everybody is under any kind of obligation to be involved in the construction of a

13 The idea that democratic decisions are legitimate only if all those affected by them are included in the process of discussion and decision-making is typical for the deliberative conception of democracy, see I.M.Young, *Inclusion and Democracy*, 2000, p. 23. Dewey’s position is more pragmatic in as far as he speaks of the construction of publics, an event that cannot be orchestrated top-down and cannot automatically involve all those ever affected. This seems closer to Mouffe’s agonistic conception of liberal democracy, discussed in Section 4 below.

14 W.B. Gallie, ‘Essentially Contested Concepts’, 1955 *Proc. Aristotelian Society*, p. 167 and Marres & De Vries, *supra* note 1.

15 About the fact that science ultimately cannot provide certainty whereas law has to effect legal certainty, see M. Hildebrandt, ‘Wetenschap in rechte’, 1994 *TREMA*, pp. 187-196.

16 Callon *et al.*, *supra* note 5.

17 We use the term constitutional democracy instead of constitutional democratic state, because we seek to virtualise the basic tenets of the constitutional democratic state (the substantive conception of the German *Rechtsstaat*) beyond the territorial limitations of the national state. About virtualisation as deterritorialisation see P. Lévy, *Becoming Virtual. Reality in the Digital Age*, 1998.

18 An interesting analytic distinction can be made between communities with an ascribed or an inscribed identity. See e.g. R. Pierik, ‘Conceptualizing Cultural Groups and Cultural Difference: The Social Mechanism Approach’, 2005 *Ethnicities*, pp. 523-545. The formation of a community in Dewey’s sense of a public, requires inscription (self-categorisation). Ascription (categorisation by others) is not a condition for the construction of a public, but to be effective this should be a result.

public, but one could say that the institutional infrastructure of a constitutional democracy should facilitate and protect such involvement.

Constitutional democracy depends on a legal framework to sustain its constitutive features. This legal framework is a historical artifact, emerging after absolutist rule in 18th century Europe, heavily indebted to the nation state as it was consolidated in the 19th century.¹⁹ The nation state provided the institutional framework for the internal division of sovereign power, creating a democratically legitimised legislator, an executive that should follow the lead of the legislator and an independent judiciary that is constrained by the legislator's enactments even if it determines the meaning of such enactments in the last instance, while it can in fact call to account the government authorities on which it depends. One can wonder about the vicious circles between the competence of these three powers of government or claim a virtuous circle, but the least we can agree is that this legal framework aims to reiterate a system of checks and balances, providing countervailing powers whenever competence is attributed. What should interest us here is that the legal framework refutes simple majority rule by installing crucial constraints in the exercise of state powers: individual rights and liberties can overrule the claimed interest of the majority, thus steering clear of naïve visions of popular sovereignty.

For this reason we argue, as lawyers and legal theorists, that Dewey's conception of democracy calls for a rethinking of constitutional democracy both beyond the limits of the national state and beyond the limits of traditional representation. The legal framework that constrains majority rule to foster individual liberty and the formation of new minorities should be extended to the formation of concerned local and/or transnational publics that seek to construct *new common sense* concerning issues that cannot be dealt with at the level of the national state and/or at the level of expert knowledge. Rethinking the notion of representation will require the incorporation of checks and balances in processes of citizens' participation, to counter power play by dominant stakeholders. We contend that there is a lot of inspiration and ideas to be found in the jury trial of democratic constitutional states for the thinking of such checks and balances. We propose that they may serve as an inspiration for other types of citizen participation, less evidently linked to national state structures.

Before that we will first provide a survey of pTA citizens' juries and jury trials.²⁰

3. PTA citizens' juries and the jury trial

3.1. PTA citizens' juries

Participatory Technology Assessment (pTA) is a specific type of Technology Assessment (TA).²¹ TA began as a scientific evaluation of the potential effects of new technologies on society. PTA does not delegate the evaluation to scientists but involves lay people who are asked to develop an opinion or policy advice concerning the introduction of a specific technology. There is a whole range of pTA practices, for instance consensus conferences, citizens' juries, scenario

19 M. Hildebrandt, *Straf(begrip) en procesbeginsel. Een onderzoek naar de betekenis van straf en strafbegrip en naar de waarde van het procesbeginsel*, 2002; M. Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen', in A. Duff *et al.* (eds.), *The Trial on Trial. Judgment and Calling to Account*, 2006, pp. 15-37; P. De Hert & S. Gutwirth, 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power', in E. Claes *et al.* (eds.), *Privacy and the criminal law*, 2006, pp. 61-104.

20 Compare M. Lynch & R. McNally, 'Science, common sense and common law: courtroom inquiries and the public understanding of science', 1999 *Social Epistemology*, pp. 183-196, who investigate the trial from the perspective of 'public understanding of science', inspired by science and technology studies.

21 S. Joss, & S. Belluci (eds.), *Participatory Technology Assessment. European Perspectives*, 2002; TAMI: *Technology Assessment in Europe: between Method and Impact*, final report 2004 (at http://www.ta-swiss.ch/a/meth_tami/2004_TAMIfinalreport_e.pdf, last consulted 5 June 2007).

workshops, focus groups, voting conferences, stakeholder conferences and various forms of ‘interactive’ and constructive pTA. The laypeople involved may be a variety of stakeholders or may be restricted to ‘ordinary’ citizens. The citizens may be chosen at random, but are mostly carefully selected to generate a diversity of backgrounds to prevent initial consensus. The idea is that consensus or dissensus is *constructed* in a process of deliberation and consultation, thus involving a learning process for all those involved. The point is not to aggregate given opinions of separate individuals but to initiate and facilitate a process of building a new common sense around a particular topic, e.g. the use of nuclear energy, the introduction of genetically modified organisms, the development of nanotechnologies, or the societal impacts of brain sciences. Common sense – like an individual opinion – is not considered as a given that can be taken for granted, but as a shared understanding that needs reiterant fine-tuning to changing circumstances. Neither common sense nor shared understanding can be put on a par with rational consensus:²² one may share one’s viewpoint with others without them necessarily agreeing on the definition of the problem; one may develop a common sense of an issue without agreeing on the response this calls for. One may come to terms with the issue to the point of developing a policy advice, but one may also decide to raise a series of relevant questions that need to be answered before any kind of advice can be provided. For instance, in the PABE report (on public perception about agricultural biotechnologies in Europe),²³ the results were analysed of focus groups in 5 EU Member States regarding 10 ‘myths’ about citizens’ perceptions commonly adhered to by the relevant stakeholders. The ‘myths’ turned out to be incorrect and instead it appeared that a number of highly relevant questions were generated by the focus groups, demonstrating a keen awareness of the issues at stake. To illustrate the salience of the outcome of the process we note the stakeholder myths as well as the questions raised. The common sense of the stakeholders (policy makers, scientists) was that ‘(1) the primordial cause of the problem is that lay people are ignorant about scientific facts; (2) people are either ‘for’ or ‘against’ GMOs; (3) consumers accept medical GMOs but refuse GMOs used in food and agriculture; (4) European consumers are behaving selfishly towards the poor in the Third World; (5) consumers want labelling in order to exercise their freedom of choice; (6) the public thinks – wrongly – that GMOs are unnatural; (7) it’s the fault of the BSE crisis: since then, citizens no longer trust regulatory institutions; (8) the public demands ‘zero risk’ – and this is not reasonable; (9) public opposition to GMOs is due to ‘other – ethical or political – factors’; (10) the public is a malleable victim of distorting sensationalist media.’ But the questions raised suggest that most of these myths are rather beside the point: ‘Why do we need GMOs? What are the benefits? Who will benefit from their use? Who decided that they should be developed and how? Why were we not better informed about their use in our food, *before* their arrival on the market? Why are we not given an effective choice about whether or not to buy and consume these products? Do regulatory authorities have sufficient powers and resources to effectively counter-balance large companies who wish to develop these products? Can controls imposed by regulatory authorities be applied effectively? Have the risks been seriously assessed? By whom? How? Have potential long-term consequences been assessed? How? How have irreducible uncertainties and unavoidable domains of ignorance been taken into account in decision-making? What plans exist for remedial action if and when unforeseen harmful impacts occur? Who will be responsible in case of unforeseen harm? How

22 Common sense and shared understanding can be explained in terms of Wittgenstein’s life forms and family resemblance, rather than in terms of unified definitions reached after syllogistic rational argumentation. Cf. C. Mouffe, *Deliberative Democracy or Agonistic Pluralism*, 2000 (available at http://users.unimi.it/dikeius/pw_72.pdf, last consulted 6 June 2007).

23 C. Marris *et al.*, *Public Perceptions on Agricultural Biotechnologies in Europe*, 2002, Final Report of the PABE research project, funded by the Commission of the EC, Brussels.

will they be held to account?'²⁴ Although what the authors call myths sound like familiar common sense regarding the ignorant and emotional reaction of the public, the actual outcome of the consultation proved them wrong. This may indicate that pTA facilitates learning processes that generate highly relevant questions that are not dependent on specialised knowledge, drawing instead on three types of non-specialist knowledge: 'about the behaviour of insects, plants and animals (e.g. 'bees fly from field to field'), which they found was often ignored or obscured in specialised scientific discussions; knowledge about human fallibility, derived from their daily experience, which had taught them that formal rules and regulations, though well intended, would not, in the real world, be fully applied; and knowledge about the past behaviour of institutions responsible for the development and regulation of technological innovations and risks.'²⁵

However, obviously we cannot take for granted that putting together a set of 'ordinary citizens' will 'naturally' generate the kind of collective intelligence demonstrated above.²⁶ Paraphrasing Rip we believe that we need 'a normative theory of expertise (...) to look into the (emerging and/or designed) arrangements that are conducive to agonistic learning and robust outcomes'.²⁷ Though we agree with Rip that it seems better 'to go with such processes and grasp opportunities for improvement, rather than design a 'good' process beforehand', we also agree when he writes that 'there will be meta-learning about the relative merits of various arrangements'.²⁸ If we consider pTA citizens' juries to be a form of collective intelligence, involving the construction of concerned publics, then the learning process must be an experiment rather than the implementation of pre-existent rules.²⁹ However, even experiments depend on rigorous constraints, the rules of the game that allow the experimenter to draw conclusions worth taking into consideration outside the confines of his laboratory. We agree with Rip that pTA can be considered successful when it generates *agonistic* learning (experimentation presumes a willingness to take a risk, to sustain strong dissensus until seriously convinced) and produce *robust* outcomes (that survive the context of their conception). We mention four such rules of the game, regarding (1) the framing of the issue, (2) the burden of proof, (3) the testing of expertise and (4) the independence and impartiality of the 'facilitator' who accompanies the process. As to the framing of the issue there is the example of a jury that addresses the question: 'What conditions should be fulfilled before genetic testing for people susceptible to common diseases becomes available on the National Health Service (NHS)?'³⁰ The question whether genetic testing in itself is a good thing is passed over. Interestingly, the funding of this jury was largely provided by a pharmaceutical company. One can suspect that agonistic learning and robust outcomes depend on the extent to which a jury is allowed to rearticulate the question and/or formulate new questions (*cp.* the PABE report). As to the burden of proof, this may be implicit in the framing of the issue, as demonstrated above. One can refer to the political principle of precaution that would require those who intend to introduce new technologies that may seriously impact the life

24 *Ibid.*, p. 9.

25 *Ibid.*, p.10.

26 Compare Lévy, *supra* note 11.

27 A. Rip, 'Constructing Expertise: In a Third Wave of Science Studies?', 2003 *Social Studies of Science*, p. 427. Agonistic learning refers to adversarial, as opposed to antagonistic or hostile interactions. Antagonistic interaction takes place between enemies, agonistic interaction between adversaries. Compare C. Mouffe, *The democratic paradox*, 2000.

28 Rip, *supra* note 27, p. 427.

29 See Lévy, *supra* note 17, pp. 138-139, about the creative aspect of human collective intelligence.

30 T. Wakeford, 'Citizens Juries: a radical alternative for social research', 2000 *Social Research Update*; P. Glasner, 'Rights or rituals? Why juries can do more harm than good', 2001 *PLA Notes*, pp. 43-45.

of citizens to explain why they warrant introduction,³¹ involving considerations of proportionality and subsidiarity (*cp.* the PABE report). As to the testing of expertise one may expect the jury to be free to invite conflicting expertise, to take the lead in questioning them and to have access to relevant background literature. As to the independence and impartiality of the facilitator one may add that what is needed is an awareness of the complexity of the issue, including the capacity to introduce agonistic positions if a short cut threatens to halt the learning process. Short cuts run the risk of forestalling robust outcomes, because they avoid taking into account all relevant arguments.³²

An important point to make here is that the practice of pTA citizens' juries involves a process, rather than a procedure, *i.e.* the constraints involved are not formalised but (re)invented along the way. This is part and parcel of the experimental character of pTA, which is geared to a creative learning process that resists rigid implementation.

3.2. *The trial of the jury*

Other than pTA practices, the fair trial involves relatively strict adherence to procedure. In fact, one could say that the procedural safeguards (which do embody a substantive logic) form the core of the judicial trial. The principles of publicness, immediacy, equality of arms, contradictory proceedings, the independence and impartiality of the judge and the presumption of innocence should all contribute to a process that allows opposing parties to voice their disagreement, preparing the fairness and justice of the final verdict.

The trial jury embodies the participation of laypeople in the judicial process. In the common law jury trial the lay jury decides on the facts of the case (*e.g.* in a criminal trial the guilt of the defendant). Apart from the Netherlands most continental European jurisdictions entail some form of lay participation. In the wake of the French Revolution juries were introduced as checks on the powers of professional judges, distrusted for their alliance with sovereign government. Juries were praised as a reform of the criminal law, advocating transparency and immediacy (both pertaining to the oral character of the trial and to the need to proceed slowly and in real time).³³ The constraints that inform their involvement across the diversity of jurisdictions differ substantially,³⁴ for instance regarding issues like 1) the selection of jurors and their representativeness (are they selected at random? is there a quality check? is participation in the jury limited to local citizens? can the jurors be challenged by the parties? And, if so, is the challenge subject to motivation or does it take the form of a discretionary repudiation?); 2) the organization of the jury's work (is the jury totally passive or can the jurors ask questions or require further inquiries? is there cooperation between the judges and the jury or not? are jurors isolated from the world during the proceedings or are the limitations of their freedom rather shallow?); and 3) their powers and competencies (do the juries participate in other judicial actions than deciding upon

31 T. Christoforou 'The precautionary principle and democratizing expertise: a European legal perspective', 2003 *Science and Public Policy*, pp. 205-211. Thus we do not follow C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, 2005, who seems to equate the principle of precaution with risk aversion (abstention); we follow B. Latour, 'Douze thèses pour sauver les Verts d'eux-mêmes', *Le Monde*, 6 December 2001 (available at http://www.bruno-latour.fr/presse/presse_art/013.html, last consulted 5 June 2007) who suggests that the principle of precaution involves a 'call for experimentation, invention, exploration, and of course risk taking'.

32 H. Nowotny, 'Democratising expertise and socially robust knowledge', 2003 *Science and Public Policy*, pp. 151-156.

33 About the benefits of a 'slow' procedure see P. De Hert, 'Hervorming van het Assisenhof: België blijft Slow', 2006 *Panopticon*, pp. 1-11. From the same author about the jury, see P. De Hert, 'Leve de republiek, leve de jury. Historische, bewijstechnische, democratische en politieke argumenten', in M. Adams & P. Popelier (eds.), *Recht en democratie. De democratische verbeelding in het recht*, 2004, pp. 459-491 and P. De Hert, 'Jury en leken in Nederland: een identiteitsonderzoek', 2006 *Nederlands Juristenblad*, pp. 2232-2262.

34 T. Hörnle, 'Unterschiede zwischen Strafverfahrensordnungen und ihre kulturellen Hintergründe', 2005 *Zeitschrift der gesamte Strafrechtswissenschaften*, pp. 813-821.

the merits of the case, such as the determination of the punishment? *e.g. grand juries* decide whether a person can be accused and prosecuted, while *verdict juries* decide cases)?

Although, for a number of reasons, the role of the trial jury has been reduced significantly during the last century,³⁵ the survival of this form of lay participation merits an analysis of its successes. One of the major effects of the presence of a jury is that it obliges professional actors in court to cope with complexity in a manner that is understandable for laypersons. Though Edmond and Mercer warn against the dangers of 'the politics of simplification', involving 'the importation of broader metaphors and narrative strategies' instrumental to a particular point of view,³⁶ this should not disqualify the reduction of complexity in itself. If the relevance and validity of expert evidence is a construction of competent experts, to be tested by concerned citizens, the reduction of complexity seems preferable to the hiding of complexity behind the rethorics of trusted expertise. It may even be the case that lay people reveal complexities overlooked by mono-disciplinary experts. While the judge is an expert in legal practice, there is no reason to believe that she has special qualities providing her with better judgements on the facts of the case. In common law jurisdictions the judge functions as a gatekeeper for the admission and presentation of evidence, but the decision about the facts remains a matter of common sense, whether taken by a judge or a jury. However, opinions are voiced in favour of 'an exception of complexity' that would make it possible to remove a case from the jury and bring it before three professional judges; the appointment of 'special and qualified juries' in certain specific matters (notably financial and economic matters); the replacement of juries by competent administrative authorities or by experts (for example, in antitrust cases) and a splitting up of the question addressed to the jury in an elaborate questionnaire, making it possible to check the jury's reasoning.³⁷ Such proposals display an interesting distrust in the competence for sound decision-making by laypersons in the face of complex matters of fact. There are good reasons to resist such distrust. Apart from the naïve understanding of forensic expert knowledge that underlies such distrust,³⁸ we argue that the collective character of the decision-making process of the trial jury provides important guarantees of good outcomes. The obligation to agree on the decision and take responsibility for its impact on the defendant forces jurors to test their basic intuitions about facts, evidence, expertise and guilt in a process of discussion and negotiation. Initial ignorance will be transformed into a more balanced understanding due to the confrontation with adversarial understandings of the case's complexities. In terms of Rip: agonistic learning processes produce socially robust outcomes.³⁹

35 Especially in the UK, cf. R.C.A. White, *The English legal system in action. The administration of justice*, 1999. In the US the right to a jury trial is protected by the US Constitution, cf. K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 1998, pp. 271-275.

36 G. Edmond & D. Mercer, 'Scientific literacy and the jury: reconsidering jury "competence"', 1997 *Public Understanding of Science*, pp. 341-342.

37 A. Garapon & I. Papadopoulos, *Juger en Amérique et en France. Culture juridique et common law*, 2003, pp. 193 *et seq.* Compare: Edmond & Mercer, *supra* note 36, pp. 336-338.

38 About the social construction of forensic expertise see Edmond & Mercer, *supra* note 36, p. 340, referring to R. Smith & B. Wynne, *Expert Evidence: Interpreting Science in the Law*, 1989. Cf. S. Jasanoff, 'What Judges Should Know About the Sociology of Science', 1992 *Jurimetrics Journal*, pp. 345-359.

39 Rip, *supra* note 27, p. 427. Cf. Nowotny, *supra* note 32. Research in cognitive psychology confirms that diversity in groups enhances their performance, though this cannot be taken for granted, depending on the types of diversity. Cf. *e.g.* A.C. Homan, D. Van Knippenberg *et al.*, 'Interacting Dimensions of Diversity: Cross-Categorization and the Effects of Informational Diversity', *IACM 18th Annual Conference Social Science Research Network*, 2005 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=732663, last consulted 5 June 2007). An integrated study of cognitive psychologists with legal scholars about the conditions that are conducive to agonistic learning and robust outcomes could be very interesting.

3.3. *Process and procedure: The rules of the game*

The success of the participation of lay people in the evaluation of evidence in court seems to depend on the specific procedural safeguards of the ‘fair trial’. The real time *mise en scène* of the judicial event (the principle of immediacy) with its ritualised and organised distribution of positions and roles (equality of arms, contradictory proceedings), the transparency of its proceedings (external publicness) excepting the confidentiality of the jury’s deliberations, the delay and hesitation inherent in the suspension of judgement (the presumption of innocence) and the triangulation of the proceedings (an impartial and independent judge) all work to prevent a short cut from claims to proof. The judicial procedure combines the slowness of serious reconsideration with the necessity to decide and the force of law, thus integrating justice, purpose and legal certainty.⁴⁰ These procedural safeguards have evolved in part as a result of the introduction of lay juries in court, requiring specific guarantees to provide the jury with sound arguments from both sides of the conflict, under the guidance of an impartial and independent judge.⁴¹

Some of the procedural safeguards of the jury trial are equally essential for pTA practices like citizens’ juries: the immediacy of the process, involving a real time face-to-face discussion of the matter of concern; the equality of arms that allows participants to speak their mind without fear of being overruled; contradictory proceedings that nourish agonistic learning processes; the impartiality and independence of the facilitator of the process; the transparency of the process in terms of who took the initiative, who is financing, how are the results published even if they contradict received opinion, which experts have been consulted. The experimental dimension of pTA practices may resist the introduction of formal procedural constraints, but in as far as the results of these experiments are to be taken into account some rules of the game may need scrutiny. For instance, if focus groups are financed by one of the stakeholders of a particular issue, we should be ready to look into the framing of the question, the composition of the groups, the type of experts they were allowed to invite, the independence of the facilitator, the translation of the findings into the final reports etc. This regards business enterprise as well as NGOs and even government agencies, without even suggesting that a deliberate bias is built into the process. Studies in cognitive psychology demonstrate that group performance is enhanced by diversity, but there are specific conditions that apply, without which the outcome of group processes will still be biased and less robust than needed.⁴²

The most salient difference between pTA and trial juries is the fact that a trial jury decides, whereas the citizens’ jury advises. The most salient similarity is the fact that they form an opinion on a matter of concern and can for this reason be understood as ‘a public under construction’ in the sense discussed in Section 2. They both invest in a kind of collective intelligence that does not depend on individual rational reasoning.⁴³ The trial jury has been praised as an instrument of democratic deliberation, countervailing the powers of the professional judge. The democratic dimension of the jury trial has, however, been countered by the question of to what extent a jury is representative of the people. How can we trust them to speak for us? In the next Section we will explore the issue of representation, taking into account the findings of pTA scholarship and the quest to rethink democratic practice.

40 H. Leawoods, ‘Gustav Radbruch: An Extraordinary Legal Philosopher’, 2000 *Journal of Law and Policy*, pp. 489-516.

41 Such impartiality does not involve a view from nowhere, it requires what Lynch and McNally have called ‘a cultivated disinterest in the dispute at hand’, Lynch & McNally, *supra* note 20, p.183.

42 *Cf.* note 39. *Cf.* also Rip, *supra* note 27, p. 425: ‘Since learning takes effort and actors will often try to avoid agonistic interactions, learning will not occur automatically. Something like a ‘forceful focus’ is necessary to set actors in motion (and in interaction)’.

43 Compare Lévy, *supra* note 11, pp. 64-67, discussing the emergence of collective intelligence as the move from molar to molecular (mass to singular) expression, from unified collectives to polyphonic collectives. The singularity of the voices that tune in, constrained by the need to prevent cacophony is what constitutes collective intelligence. Compare Gutwirth, *supra* note 11, about constitutional democracy.

4. (Re)presentation

4.1. Representation and democratic theory

Democratic processes can be defined in terms of representation in different ways. One way to think of representation is in terms of a mandate, which allows one person to speak and act – legally – in the name of another. In private law this is a standard way of attributing the legal consequences of one person's legal actions to another person, provided that a set of conditions have been met (consent etc.). Another way to think of representation is in terms of delegation, which attributes competences of one (legal) person to another (legal) person. When thinking of political representation, delegation is the term which is mostly used, implying that the representatives derive their competence to govern from the sovereign people. In a democratic constitutional state of republican design politicians chosen in a general election are not deemed to speak in the name of those who voted for them, but to govern in the general interest, not favouring the individual constituents who cast their vote in their favour. This is what Claude Lefort has discussed in terms of the *empty place of government power in a democracy*: whoever are chosen to govern should not usurp this empty place as they must take into account the temporary nature of their rule. They are always the placeholder of their successors. Representation then follows the logic of the radical underdeterminacy of constitutional democracy, resisting the temptation to monopolise state authority. In terms of Foqué the general interest 'is indeed not a simple representation of a tangible, concrete and present instance, but a conceptual construction'.⁴⁴ From that perspective political representation must be understood as a counterfactual concept, in the sense of Foqué and 't Hart's notion of 'contrafaktische' conceptualisation.⁴⁵ Such counterfactual representation would imply that actions of politicians in a constitutional democracy must be comprehensible in terms of the general interest. To count as a legitimate action it must be possible to reconstruct the action as one in the general interest. This means, on the one hand, that actions cannot claim to be in the general interest just because they were performed by politicians or government officials. On the other hand, it means that our representatives are in fact constrained to act in ways that can be reconstructed as being in the general interest.

The category of the general interest is, however, highly problematic. As discussed in Section 2, transnational, private and socio-technical complexities paralyse the meaningful reconstruction of the general interest. Confronted with uncertainty about the consequences of a phenomenon or development no one knows what the general interest might be and it must be diplomatically constructed taking into account all the concerns about the issue at stake. It can however be argued that these are different points compared to the problematic character implied in the radical underdeterminacy of counterfactual concepts like the general interest. Radical underdeterminacy calls for creative solutions instead of mechanical implementations of predefined policies. The counterfactual – underdetermined and problematic – nature of the general interest in fact saves us from conceptualising democracy as a machinery capable of producing blueprints for the good life.⁴⁶ However, to achieve a creative solution that is also robust, relevant stakeholders need to enter the stage and initiate agonistic learning. Restricting oneself to national constituents, voting procedures or moral-political deliberation may result in a failure to (re)pre-

44 R. Foqué, 'Rechtsstatelijke vernieuwing. Een rechtsfilosofisch essay', in P. Kuypers, R. Foqué & P. Frissen, *De lege plek van de macht. Over bestuurlijke vernieuwing en de veranderende rol van de politiek*, 1993, p. 21 and C. Lefort, 'La question de la démocratie', in C. Lefort, *Essais sur le politique (XIXe-XXe siècles)*, 1986.

45 R. Foqué & A.C. 't Hart, *Instrumentaliteit en rechtsbescherming*, 1990; M. Hildebrandt, 'Contrafaktische begripsvorming en complexe argumentatie', in E.T. Feteris et al. (eds.), *Congres Juridische Argumentatie 22 juni 2007* (to be published in 2008).

46 D. Loose, *Democratie zonder blauwdruk. De politieke filosofie van Claude Lefort*, 1997.

sent the actual issues that are stake as well as the concerned publics. To develop a more adequate notion of (re)presentation we will briefly present the mainstream contemporary models of democracy and their claims regarding representation: aggregative models in line with public choice theory embraced to some extent by for instance Sen and Sunstein,⁴⁷ liberal deliberative models like Rawls' or Habermas',⁴⁸ and pluralist agonistic conceptions of democracy as propagated by Chantal Mouffe.⁴⁹ Our claim is not that these models should all be replaced by Dewey's conception of democracy, but we do claim that Dewey's notion of a *public under construction* provides some of the answers raised by other conceptions of representation and democracy.

Aggregative models of democracy build on the substantive notion of the equality of each individual citizen, translated into the procedural adage of one man one vote. Current versions of the model use the language of public choice theory that is based on the methodological individualism of rational choice theory.⁵⁰ Many objections can be made against the presumptions as well as the conclusions of such aggregative models, even if Goodin rightly points out that:

Even self-styled 'deliberative democrats' who adamantly oppose aggregative models of democracy in general thus occasionally find themselves resorting to a mere show of hands in the end.⁵¹

We think that the main problem of aggregative models lies in the fact that it takes citizens' preferences as given:⁵² the calculable input for opinion polls and elections that aggregate individual opinion. Interestingly, a similar technique prevails in marketing research, based on the notion of consumer preferences.⁵³ Opinion polls and marketing research provide politicians and service providers with information that allows them to act strategically, basing their policies on sophisticated monitoring of citizens' and consumers' expressed preferences. The representation involved is of a quantitative, statistical nature, which rules out a conception of a democratic public constituted by the interactions of subjects whose subjectivity is relational and interdependent, geared towards the creation of a new common sense.⁵⁴ The assumptions of such a notion of representation are also at odds with the need to cope with new problems and issues which have not yet been and could not have been the object of the 'choice' and 'preference' of citizens.

Deliberative models of democracy may involve a less shallow conception of representation, referring to collective learning processes and public reasoning that depend on individual liberty, thus reconciling liberalism and democracy as two sides of the same coin.⁵⁵ While the aggregative model presents itself as part of either empirical political theory or rational choice theory, deliberative models have a strong normative and discursive dimension. Interestingly, both emphasise procedural constraints to achieve the purpose of democratic politics, but the aggregative

47 For a critical discussion see R.E. Goodin, 'Input Democracy', in F. Engelstad & Ø. Østerud (eds.), *Power and Democracy. Critical Interventions*, 2004, pp. 19-21. The birth of the aggregative model is referred to Schumpeter's *Capitalism, Socialism and Democracy* of 1947, in Mouffe, *supra* note 22, p. 1.

48 Young, *supra* note 13; C. Farrelly, 'Deliberative Democracy and Nanotechnology', forthcoming in F. Allhoff *et al.*, *Social and Ethical Implications of Nanotechnology*, 2007, (at <http://politicalscience.uwaterloo.ca/Farrelly/DeliberativeDemocracy.pdf> last consulted 6 June 2007).

49 Mouffe, *supra* note 22 and 27; Young, *supra* note 13, Farrelly, *supra* note 48.

50 Young, *supra* note 13, pp. 20-21, speaks of a 'thin and individualistic rationality' that cannot conceive of collective intelligence in other terms than those of the economic rationality inherent in game theory.

51 Goodin, *supra* note 47, p. 9.

52 Young, *supra* note 13, p. 20.

53 Wakeford, *supra* note 30.

54 Young, *supra* note 13, p. 20.

55 Mouffe, *supra* note 22, pp. 4-5, refers to the tension between Constant's freedom of the ancients (Berlin's positive *freedom to*) and Constant's liberties of the moderns (Berlin's *negative freedom from*).

gative model seems to prefer calculations and compromise whereas the deliberative model prefers to stipulate the institutional arrangements that facilitate impartial reasoning (Rawls) or 'herrschaftsfreie' communication (Habermas) geared to authentic rational consensus among equally empowered citizens. This authentic rational consensus is the only thing that can represent the will of the polity in deliberative democratic theory.

Mouffe has identified the main problem of deliberative democracy as the unjustified negation of the tension that exists between liberal and democratic values, a tension which demands a reiterant creative solution that cannot be based on rational consensus, whether constructivist (Rawls) or communicative (Habermas). She reminds us that:

Following that line of thought we can realize that what is really at stake in the allegiance to democratic institutions is the constitution of an ensemble of practices that make the constitution of democratic citizens possible. This is not a matter of *rational justification* but of *availability* of democratic forms of individuality and subjectivity. (...) The failure of current democratic theory to tackle the question of citizenship is the consequence of their operating with a conception of the subject, which sees the individuals as prior to society, as bearers of natural rights, and either as utility maximizing agents or as rational subjects. In all cases they are abstracted from social and power relations, language, culture and the whole set of practices that make the individuality possible. What is precluded in these rationalistic approaches is the very question of what are the conditions of existence of the democratic subject. (...) To seriously tackle those problems, the only way is to envisage democratic citizenship from a different perspective, one that puts the emphasis on the types of *practices* and not the forms of *argumentation*.⁵⁶

As a matter of fact, Mouffe seems to move away from the notion that representation can save us from conflicting values or interests and should lead us to rational consensus. Her point is that a democratic politics that aims to protect liberal values nourishes conflict at its very core, requiring adequate presentation of the actual antagonisms that endanger the sustainability of a polity. The aim of democratic politics – according to Mouffe – is the transformation of antagonism (hostility between enemies) into agonism (a power struggle between adversaries), which means that one accepts another's right to defend her position, implying an active sustainment of dissensus that could be compared to a judge's obligation to suspend his initial intuitive judgement until the case has been thoroughly investigated. Mouffe's agonistic model of democracy thus seems to favour representation *as reiterant presentation*, seeking a solution that is not based on an ultimate rational consensus (determined by universal laws of rational argumentation) but on creative interaction (underdetermined due to the radical underdeterminacy of human interaction).⁵⁷

4.2. Laboratories of new common sense: Publics under construction

Legal and political theorists often think in terms of argumentation: which arguments could a judge use to justify her verdict and which arguments can support the institutional arrangements of liberal democracy. With Mouffe we think this may be a practice of legal and democratic

56 *Ibid.*, pp. 10-11 [italics of Mouffe, MH & SG]. Mouffe stresses that these [practices always involve power relationships, which she finds to be another important issue ignored in both aggregative and deliberative democratic theory. Her concept of practice is informed by Wittgenstein's forms of life rather than 'herrschaftsfreie Diskurs' or a veil of ignorance: radical impartiality or interaction outside the realm of power relationships are not of this world.

57 Reiterant presentation is not a matter of repetition, but implies both continuity and renewal: whatever is re-presented was not already given but co-created in the act of representation and every act of representation re-creates what is re-presented.

theorists that conceals the power struggle taking place at the heart of constitutional democracy, refusing to face the question which formal and informal practices have already developed around issues not easily resolved in (supra)national institutions.⁵⁸ We contend that both the trial and the pTA citizens' juries demonstrate what Dewey has termed the construction of a concerned public around a specific issue and we suggest that as agonistic practices they illustrate Mouffe's agonistic democracy. However, this raises the question in which way such publics challenge our notion of representation, and to what extent and in which way their interaction should be constrained to produce the kind of practices that nourish agonistic constitutional democracy.

PTA citizens' juries and trial juries cannot provide a statistical representation of the constituents of a democracy – in that sense they may challenge the traditional conception of representation in as far as it builds on an aggregative model of democracy.⁵⁹ We do not reject the empowerment and emancipation produced by general and anonymous elections, even though we are sceptical regarding the permanent monitoring of voting preferences by means of opinion polls. We do think that general elections are the starting point for a democracy, to be complemented with deliberative and participatory practices. Deliberative practices that aim to represent rational consensus are highly problematic in as far as their claim of being rational overrules arguments defined as irrational, emotional or biased, ignoring the fact that they may embody a different rationality that challenges the rational consensus presumed to represent the general interest. The idea that citizens' or trial juries may represent our common sense challenges the idea that only rational consensus is acceptable for democratic theory: we do not want to be represented by people we do not know unless we voted for them or unless they are thus detached from personal interests that their rational judgements must be in the general interest. The citizens involved in jury deliberation are not trained to achieve rational consensus; their expertise derives from their experience, tested in the course of the collective deliberation. Arriving at a conclusion – the articulation of a verdict, a set of questions or an advice – is not a mechanical or logical process. It is rather like an experiment in real time: everyone must take the risk of voicing her opinion, resisting short cuts to the final outcome, and contesting those that try to overrule others by imposing their viewpoint. Such deliberation can rightly be taken to constitute the laboratory of new common sense, a witness to the construction of a concerned public. The process will probably involve engaged argumentation and notwithstanding Mouffe's emphasis on *practices* over and against *argumentation*, we consider argumentation to be a powerful instrument to achieve the robust outcome of an agonistic learning process. The difference, however, between rational argumentation as promoted by deliberative democratic theory and argumentation in court or pTA citizens' juries lies in the presumption that consensus can be based on rational argument without taking into account desires, emotions, power relationships and other messy realities.

Do lay people who sit down together to form an opinion, advice or judgement *represent* the sovereign people, the general interest, the concerned public or the issue at stake? The trial jury is often thought to represent the sovereign people in the sense that the task of judging one's peer is delegated to the jury; like in the case of political representation this is not a matter of mandating individual jury members but delegating one of the competences of the sovereign people. The pTA citizens' jury has not been delegated any such competence and is not taken to represent the sovereign people. The trial jury is not involved in establishing the general interest, as the delegation concerns the judgement in the case at hand. The same holds true for the citizens' jury, which is not asked to survey all possible issues to be taken into account but to

⁵⁸ Latour, and, Callon *et al.*, *supra* note 5.

⁵⁹ De Sutter, *supra* note 5.

formulate an opinion, advice or set of questions regarding one particular issue (even if this may necessitate an investigation of related issues). Those juries do not represent something that already exists: they are new independent actors characterised by the fact that the jurors constituting them are learning by doing, in real time, in processes that demand responsible creativity. Both sorts of juries, however, do *present* a concerned public under construction that is involved in articulating the issue that is at stake. In fact, the public is constructed around the issue that is constructed by its public; they are mutually constitutive and in as far as this is a problem it is a problem that invites creative solutions.⁶⁰

To state that juries *present* a concerned public that is constituted by the issue at stake clarifies the fact that these juries do not represent the sovereign people or the general interest in the traditional way. In the case of pTA citizens' juries it also clarifies that what they present – bring into presence – are *new* issues as well as *new* publics, which both aggregative and deliberative models of democracy find difficult to accommodate. If, however, we acknowledge the counterfactual nature of the concepts that form the backbone of constitutional democracy, this presentation cannot be taken for granted. It is neither the presentation of a given fact, nor the presentation of incontestable local consensus; neither the universal truth about the case at hand nor disempowered local knowledge. Just like no government can usurp the empty place of government power in a democracy, no judge and no jury can usurp the empty place of judicial power in a democratic jurisdiction, claiming a monopoly on the new common sense generated in the process of deliberation. This calls for careful scrutiny of what role these publics are actually performing and how they can incorporate the checks and balances that constitute constitutional democracy. We contend that (1) pTA citizens' juries can learn from the legal constraints that constitute the 'fair trial' and (2) that the 'fair trial' can learn from Dewey's discussion of democratic politics. PTA scholars and practitioners should not claim an absolute singularity for their newly developed democratic practices and lawyers should not shrink from lay participation in court. Both should be aware of the pitfalls of professional knowledge claims as well as populist claims to represent the true voice of the people and both should recognise the experimental character of public construction, required for socially robust outcomes.

5. Closing remarks

In a fast evolving collectivity with a very high pace of innovations quite some questions and issues arise that were properly unthinkable at the moment of elections. In such situations the legitimacy of traditional representation becomes questionable.

Especially when these new issues are characterised by uncertainty and when no robust, uncontroversial expertise is available, aggregative and deliberative conceptions of democracy fail to account for the ways in which new publics are constructed around new issues, requiring politicians to build up politics in a 'precautionary way'. Precautionary politics imply that relevant actions must be undertaken collectively, with the participation of all those claiming to be affected, taking into account a maximum of both scientific and experience-based knowledge. The agonistic conception of democracy, advocated by Chantal Mouffe, and Dewey's pragmatic theory of democracy seem more apt to account for the way these new publics *present* their case. In this contribution we have examined pTA citizens' juries as such new 'publics under construction', constituted by the issues that concern them.

60 About the process of creating problems or questions that generate creative responses, see Lévy, *supra* note 11. Lévy builds on Deleuze's concepts of the virtual and the actual, to be distinguished from the possible and the real.

Like pTA citizens' juries, the trial jury consists of laypersons, required to develop an opinion on a specific issue. Besides obvious differences between pTA juries and trial juries their legitimacy seems to rest on the idea that in some way they present a people's common sense on the issue/case that is at stake. We have explained how the notion of political representation cannot be restricted to aggregative models or models of rational deliberation, arguing the need for agonistic learning processes to produce robust outcomes. Such learning processes take place in specific practices, involving a set of constraints – or rules of the game – that foster agonistic deliberation instead of taking a short cut to premature consensus. PTA citizens' juries could learn from the constraints embodied in the 'fair jury trial', as they are geared to providing the playground for adversarial procedure. Democratic theory as well as theories of adjudication could learn from the practices of pTA citizens' juries, to understand the legitimacy and the effectiveness of lay participation in public decision-making within constitutional democracy.