Vigilance as a habit of watching
An Aristotelean view on impact assessment

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the Research Group on Law, Science, Technology & Society (LSTS) at the Vrije Universiteit Brussel (VUB), created in 2003

- works predominantly in English
- ca. 50 full-time researchers

- 3 spin-off’s:
  - Brussels Privacy Hub
  - Privacy Salon
  - Brussels Laboratory for Data Protection & Privacy Impact Assessments (d.pia.lab), created in 2015

- 1st policy brief of d.pia.lab (framework) published in May 2017 [EN] [FR]
- 2nd policy brief of d.pia.lab (method) expected in June 2019 [EN] [FR]
1. Introduction: scope and motivation behind this research

2. Background and definitions

3. Substantive & procedural justifications to conduct an impact assessment
   1. Substantive justifications
   2. Procedural justifications

4. ‘Our’ method under the lens of virtue ethics

5. Conclusions
1. INTRODUCTION: SCOPE AND MOTIVATION
"VIRTUE, THEN, IS A STATE INVOLVING RATIONAL CHOICE, CONSISTING IN A MEAN RELATIVE TO US AND DETERMINED BY A CRITERION/METHOD (LOGOS) – THE REASON, THAT IS, BY REFERENCE TO WHICH THE PRACTICALLY WISE PERSON WOULD DETERMINE IT. IT IS A MEAN BETWEEN TWO VICES, ONE OF EXCESS, THE OTHER OF DEFICIENCY”

ARISTOTLE
NICOMACHEAN ETHICS [1107A]
Key premise: The **process** is as important as its **outcome**

**procedure**

- so far *less* focus on the importance of the **process** itself,
- incl. benefits of a solid procedure

**substance**

- so far *more* focus on the **values** (**objects**) to be protected (e.g. privacy, environment, ...)

1. Why new justification needed?
   - basic research: new ways of understanding, clarity, ...
   - applied research: to convince to undertake impact assessment, ...

2. Why now?
   - proliferation of impact assessments, e.g. data protection of impact assessment (DPIA)
   - new **grands récits**, e.g. **vigilance**
2. BACKGROUND AND DEFINITIONS
Risk deals with the future: anticipation thereof

Risk has been always there, yet after WW2: proliferation & emergence of risk studies

- More and more events, experiences, things, etc. are seen, described and treated in terms of risk, in individual, professional and public life
- More domains are subjected (by law) to risk analysis (chemistry, environment, health, economics, etc.) ...
- ... with the help of various methods

Most recently: personal data protection

- Article 35 GDPR: data protection impact assessment (DPIA)
- ‘riskification’
VIGILANCE THE ACTION OR STATE OF KEEPING CAREFUL WATCH FOR POSSIBLE DANGER OR DIFFICULTIES

OXFORD DICTIONARY OF ENGLISH
How to be vigilant?
METHODS

- risk analysis (management)
  - quantitative
  - qualitative
  - ...

- **impact assessment**

- business case techniques
  - cost benefit analysis
  - SWOT analysis
  - project management
  - ...

- ‘ethical’ methods
  - Value Sensitive Design
  - Responsible Research & Innovation (RRI)
  - ...

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[Logos]
3. SUBSTANTIVE AND PROCEDURAL JUSTIFICATIONS TO IMPACT ASSESSMENTS
Why are these tools used (even when they are not compulsory)?
**PROCEDURAL VS SUBSTANTIVE JUSTIFICATION**
**TO UNDERTAKE IMPACT ASSESSMENT**

- **Substantive reasons** concern the object whose protection and promotion is sought (e.g. better protection of privacy)

- **Formal reasons** concern the process, the procedure to follow, the method of protection and promotion (e.g. better evaluative techniques)

- Not all justifications for impact assessments might have legal significance/nature
An analogy could be drawn between substantive/procedural dichotomy and action-based/character-based ethical theories.

**Consequentialism & deontology** → action oriented (outcome) → IA should be undertaken because the stakes of a given initiative are high (the aggregated benefit of protecting privacy outweigh the negative impacts of not doing so).

**Virtue ethics** → character oriented (process) → the exercise of IA makes the individual ‘virtuous’.
1. Substantive Justifications to Undertake Impact Assessment

1. The progress of technology
2. The process of globalisation
3. The negative experience of the use and misuse of information in the past

Yet: insufficiencies of existing "tools" to address these societal challenges

Ethics: the stakes are high

Substance
2. PROCEDURAL JUSTIFICATIONS

1. rationalisation
   1. a tool for better protection and promotion
   2. for better decision-making
   3. for (regulatory) compliance
   4. ...
2. the need, or a desire, to overcome doubt in decision-making processes (philosophical scepticism)
3. a ‘thin red line’ between competing interests
4. corporate social responsibility
5. procedural justice
6. resilience
7. ...

ethics: almost absent...

procedure
How to fill in the gap?
ARGUMENT ABOUT VIRTUE

- The highest practical good is happiness (*eudaimonia* = good life, life well lived)
- How do we achieve happiness? By acting according to reason
- How do we act according to reason? By exercising the highest human virtues (*areté* = excellence)
- How do we achieve virtues?
  - through *long and constant exercise* (they become a *habit*)
  - by *reference to a ‘model’*
  - ‘*middle way*’ between *excess* and *defect*

WHY ARISTOTLE?

vigilance: a habit of watching
4. ‘OUR’ METHOD THROUGH THE LENS OF VIRTUE ETHICS
Phase I: Preparation

1. Screening
2. Scoping
3. Planning

Phase II: Assessment

4. Description
5. Appraisal (identification, analysis and evaluation)

Phase III: Recommendations

6. Recommendations
7. Documentation

(On-going phase)

8. Public involvement
9. Quality control

Revisiting

10. Revisiting
What would Aristotle say about this method?
"The activities of the virtues are concerned with what conduces to the end; virtue, then, is in our power, and so is vice" (1113b, p. 45).

- Focus on the character of the agent which is strengthened by the practice of IAs
- At first it is difficult, but then it becomes a habit

IA becomes a habit
vigilance: a habit of watching
"[T]he accounts we demand should be appropriate to their subject-matter [...] For they do not come under any skill or set of rules: agents must always look at what is appropriate in each case as it happens, as do doctors and navigators" (1104a, p. 25).

- Focus on appropriateness of means to an end
- IA provides a method, criterion to follow, which must be adapted, tailored to the specific circumstance

PHASE II: ASSESSMENT

IA adjusted to the context
"For one of the extremes is a greater missing of the mark, the other less so; and since hitting the mean is extremely hard, we must take the next best course, as they say, and choose the lesser of two evils" (1109b, p. 36).

- **Trial-and-error**: A chance to practice, exercise and make the correct choice in the specific situation (or at least get closer and closer to it)

- Ideally, the more IA one does, the more she acquires the ability to make the right choices in the right situations

**NB → Our own method will be revised**

IA is ‘learning by doing’

best effort obligation
5. CONCLUSIONS
POSSIBLE CRITIQUES

- Aristotle is de-contextualised
  - *ars pro arte*
  - not helpful in practice
- There is already plenty of justifications for IA
- Ethics is ethics, law is law, one should not overtake the place of another
- ...

...
Key premise: The process is as important as its outcome

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2. why now?
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   - new grands récits, e.g. vigilance
1. Basic research:
   - a (new) perspective offered: “procedural ethical justification” of IA
   - a (soft) law tool to practice the virtue of vigilance
   - on a condition that a good method (model) is provided

2. Applied research:
   - yet another reason to undertake IA

3. One year after GDPR became applicable, methods for DPIA are being made & each step therein has to be explained. Why not resorting also to Aristotle?

   homework: justify each step in the method
MERCI – DANK U – THANK YOU

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