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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-

ted¹ – 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 objectivity 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 pour que 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 Pouillet, 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 philosophy¹⁵ 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. On 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.