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Abstract:

The law as an abstract system of rules establishes the conditions under which people in large societies can live together in peace. This is not because they all have personal trust in each other (which is obviously impossible to establish) but because they trust that living up to the rules is what normally can be expected and will be approved – and also that contraventions will be disapproved or retaliated against. This embryonic rule of law was and is the condition for any sustainable society that is too large to know each other personally. The recognition of human rights and the constitutional setup of democracies based on equal citizenship create the context for mutual trust in the rule of law.

Terrorism, at least ideologically motivated all-out terrorism as we have seen it since the beginning of this century, is different: different both in its goals and in its methods, which determine each other. Its goal is to undermine trust in the rule of law in a way that is decisive for the future of the affected societies. And that might happen, regrettably, partly because some political responses to terrorism, while presenting themselves as firmly opposed to terrorism, actually give way to a destruction of trust in the rule of law. That happens when they, on their turn, also renounce the common pedigree of democracy and rule of law, arguing that the war against terrorism requires exceptional measures. The best possible, principled but also practical response to terrorism as well as to non-violent centrifugal forces can be clear: do not give up promoting the inclusive ideal of a constitution and rule of law for all.

Key Words:

Rule of law; terrorism; human rights; democracy; citizenship; trust; cultural essentialism

Restoring trust in the rule of law

The first time I dealt with the subject “trust in the rule of law” was when I started my academic work at Tilburg University, back in 1981.¹ I discussed this subject as a feature of the constitutional arrangements. Citizens must be confident that they will not be confronted with state power beyond the limits set by legislation based on a sufficient constitutional legitimation. Here we see that the rule of law and democracy are intimately connected with each other.

At that time, the full recognition of the legality principle was not yet an established viewpoint in Dutch constitutional theory. Some scholars still surmised that the government had a residual power to regulate the behaviour of the citizens. Now, this is almost completely a problem of the past. The actual challenges of trust in the rule of law are different. They arise from behaviour that presents itself as an outright denial of the validity of the constitutional order and the rule of law based on it, like terrorist acts.² In that respect terrorism is different from crimes like fraud, theft, and manslaughter. The grave crimes that law enforcement services usually have to deal with, do not amount to a full denial of the legal order. The perpetrators try to circumvent the rules, or breach the law at a specific point, but may nevertheless be happy with the rule of law when they go out for shopping.

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At this point, I want to go one step further, beyond sharing these cumbersome observations with you. Over the years, I have experienced and learned that trust in the rule of law involves more than the rational acceptance of the constitutional principles that were my subject in 1981. The German historian Ute Frevertz has demonstrated that trust has a

¹ E.M.H. Hirsch Ballin, *Vertrouwen op het recht. Over de plaats van de wet in de rechtsorde* (inaugural address Tilburg), Alphen aan den Rijn: Samsom 1982.

² EU Directive (EU) 2017/541 of 15 March 2017 on combating terrorism defines the aim of terrorist crimes as “(a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; [or] (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.”

rational and an emotional dimension.³ It depends on societal, political and economic constellations and is in so far historically contingent. Places and neighbourhoods develop their own conventions of trust and distrust. But that all does not mean that it is necessarily irrational. Trust can be reinforced by trust-promoting behaviour, e.g. at the level of a society by law enforcement, and at the individual level by reciprocal recognition and confirmation.⁴ At the intersection of personal experience and societal processes, we can identify the importance of the law. People who know each other personally, may trust or distrust each other because of their own experiences. Closed communities with firmly maintained codes of conduct and set of beliefs might come close to that; they view each other as “one family” and sometimes identify themselves as the descendants of single progenitor.

Developed societies however are different. They may include communities which share a single cultural, religious or ethnic denominator with each other, but their boundaries are not impermeable. Ancient tribes not only fought wars with each other, but they also traded goods and intermingled culturally and sexually. The Romans had their own Roman law, based on the disputable idea that their state was that of the *Populus Romanus*. Nevertheless, they understood very well that trading with other nations requires a legal framework that they could share with the barbaric nations: that was called the *ius gentium*.⁵ It is the *law* that allows people to live together without knowing each other in person.

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The law as an abstract system of rules establishes the conditions under which people in large societies can live together in peace. This is *not* because they all have personal trust in each other (which is obviously impossible to establish) but because they trust that living up to the rules is what normally can be expected and will be approved – and also that contraventions can will be disapproved or retaliated. This embryonic rule of law was and is the condition for any sustainable society that is too large to know each other personally. In the course of history, albeit with setbacks like 19th century and contemporary nationalism,⁶ ever more societies have transformed into legal communities of law-based trust. Human rights recognise the principle that every human being is equal in dignity and therefore deserves the same protection.

The recognition of human rights and the constitutional setup of democracies based on equal citizenship create the context for mutual trust in the rule of law. But that is not easy, and

³ U. Frevertz, *Vertrauensfragen: Eine Obsession der Moderne*, München: C.H. Beck 2013, Ch. 1.

⁴ The notion of mental disorder of frustration resulting from lack of confirmation was developed by the Dutch psychiatrist Dr. Anna Terruwe. See Baars, Conrad W. and Anna A. Terruwe, *Healing the unaffirmed* (rev. ed. Suzanne M. Baars and Bonnie N. Shayne), Staten Island, NY: Pauls/Alba House, 2002.

⁵ R. Lesaffer, *European Legal History – A Cultural and Political Perspective*, Cambridge / New York: Cambridge University Press 2009, p. 89.

⁶ E.J. Hobsbawm, *Nations and nationalism since 1780: Programme, myth, reality*. Cambridge: Cambridge University Press 1992.

certainly not uncontested. It has even never been uncontested, because of the simple fact that the behaviour of people with the same habits and forms of expression is more easily recognised as trustworthy than that of strangers. Accepting otherness appears to be difficult for many. Rationally everything may be well-considered, but strengthening the emotional side is hard work for leaders and educators. Amartya Sen, in the sharp analyses of his book on “identity and violence” has explained how easy it is to persuade people to the view that they – their religion, their people, their race – is superior and that they deserve to have the upper hand.⁷ It has time and again resulted in the denial of equality before the law, in discrimination, and ultimately in warfare, expulsions and/or genocide.

After the Second World War and especially after the end of the Cold War, many people in the West believed that the ideologies of group-supremacy were declining and would eventually fade away, making room for a world of cooperative individuals, based on the rationality of the rules. But trust can be undermined by the real-life experience of disappointment. The widespread individual and collective disappointment by the losers in free market economy,⁸ and by populations that were exploited or humiliated, created sentiments of anger and fear. Dominique Moïsi identified such emotions as the source of tensions within and between nations.⁹

In this context, reborn nationalisms and religious fundamentalisms came to the forefront. What they have in common is their self-understanding as a collectivity that is singular and supreme in its mission. Their identity must not be put on an equal footing with other identities or beliefs, and therefore it is legitimate – or even their historic mission – to reject equality before the law. Andreas Reckwitz calls their view on their own culture as culture essentialism (*Kulturessentialismus*).¹⁰ Ideologies of group supremacy based on a religious or ethnic identifier complete this ill-fated process. They are the “true believers”, the “true Fins”, or whatsoever. All these culture-essentialists recreate their foundational narratives, either vindicating a religious obligation to impose their will on others, or re-inventing a glorious phase in national history that should serve as the model forever. Collectivized hubris and lust for power can then seduce people to view the other and the other group as the enemy.

*

One of the most devastating offshoots of aggressive culture-essentialism is international terrorism, most recognisable in a number of movements that claim to be representatives of the “true Islam”, like Al-Qa’ida and Da’esh. M. Cherif Bassiouni, the internationally acclaimed scholar who died just a few months ago, himself a man of faith, accurately demonstrated that their claim to the multi-faceted notion of jihad is misleading and wrong:

⁷ A. Sen, *Identity and Violence. The Illusion of Destiny*. New York / London: W.W. Norton & Company 2006.

⁸ D. Rodrik, *Economics Rules: The Rights and Wrongs of the Dismal Science*, New York: Norton 2015.

⁹ D. Moïsi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*, New York: Doubleday 2009.

¹⁰ A. Reckwitz, *Die Gesellschaft der Singularitäten. Zum Strukturwandel der Moderne*, Berlin: Suhrkamp 2017.

“jihad”, he wrote, “in the name of the propagation of the faith can no longer be sustained in an era where freedom of religion, practice, thought, and speech are internationally guaranteed human rights.”¹¹ In 2014, leading Muslim scholars explained in a lengthy, accurately documented open letter to the self-proclaimed caliph of Da’esh that his violent-quasi-religious views and practices were, as a matter of fact, heretic.¹² But these movements are usually immune to voices that challenge their understandings.

The methods of international terrorism are effectively directed against the foundations of societies based on trust in the rule of law. Bombing, shooting and car attacks on innocent people instil fear, fear that goes widely above the statistical risk. In this way they undermine effectively the expectation that everybody, to some extent even wrongdoers, fits this behaviour into a commonly accepted framework. Such terrorist attacks intendedly destruct trust, and also appear to delegitimize the very idea that people coming from different ideological, cultural and religious backgrounds can share the public sphere of a democracy under the rule of law. The preferred place for these attacks are streets, concert halls, airports, which has a negative symbolic meaning: these are the places that, in the words of Walter Siebel, serve as urban spaces of transition (‘Übergangsräume’) in which people from different origins and identities connect.¹³

With their attacks directed against places of encounter where people used to feel protected by the law, terrorists are indeed able to instil fear. More worrying is their secondary success. Once trust in the law is battered, the door is open for political views that, while vehemently opposing such violent fundamentalists, mirror their culture essentialism: on their turn, populist politicians reject the idea of a free public space for all under the rule of law, and advocate an inward-looking nationalistic ideology. Thus, they undermine the idea of inclusive citizenship for all, even explicitly when they propose to exclude immigrants as much as possible from the nationality of their country of permanent residence. In effect, they paradoxically send out a message of confirmation to the terrorists that indeed a “clash of civilizations” unfolds. Implicitly, they confirm the cultural-essentialist view of their enemy, while embracing a view that organises allegiance between people with a pretended home-grown national identity.

The importance of confirming and strengthening trust in the rule of law could have been overlooked, until recently. Restoring trust is needed more than before. The best possible, principled but also practical response to terrorism as well as to non-violent centrifugal forces can be clear: don’t give up promoting the inclusive ideal of a constitution and rule of law for all.

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¹¹ M. Cherif Bassiouni & A. Guellali (eds.), *Jihad and its Challenges to International and Domestic Law*, The Hague: Hague Academic Press at Asser Press 2010, p. 37.

¹² <http://www.lettertobaghdadi.com>

¹³ W. Siebel, *Die Kultur der Stadt*, Berlin: Suhrkamp 2015, p. 391 ff.