

Interview Esther van Zimmeren

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Voice-Over: Welcome to TrustTalk. Our guest today is Esther van Zimmerman, associate professor in Intellectual Property Law and Governance at the Faculty of Law of the University of Antwerp and Coordinator of the Centre of Excellence GovTrust. We talk about the relationship between trust and law and the legal system focusing on trust in courts and judges. There is often confusion between trust and legitimacy, and it's not always clear who the trustor and the trustee are. She suggests using the concept of interpersonal and inter-organisational trust leads to a better understanding of trust in the judicial system while addressing the difficulty citizens face in assessing the trustworthiness of the court and judges without prior interactions. The concept of prosperity and its relationship with economic growth and well-being is debated. Lawyers believe good rules should be clear, predictable, enforceable, comply with fundamental rights and create legal certainty. However, trust is especially important in situations of uncertainty and vulnerability, creating tension between the role of trust and law. Your host today, Severin de Wit.

Podcast Host: Esther, welcome to TrustTalk. In the intro it was mentioned that you are involved at the Centre of Excellence GovTrust of the University of Antwerp. Can you tell us a bit what the Centre does?

Esther van Zimmeren: Yeah, so thank you for having me for this podcast. The Centre of Excellence GovTrust, it's an interdisciplinary centre of excellence, so it's a collaboration between social scientists, including political scientists, people from public administration, communication scientists, economists and lawyers. So also a group, including my colleagues and me from the research group Government and Law of the Law Faculty of the University of Antwerp. And so we're looking together in different projects, we're looking together at trust, but very much in a multi-level context. So not only looking at trust in the government, but definitely also more at a regional level within countries or also towards the European level or possibly even the international level, think of the World Trade Organization, think of the EU institutions, so when you're thinking about trust in those institutions, but of course also

between institutions as well. So it's quite diverse in terms of disciplines and in terms of the levels that we cover.

Podcast Host: Most remarkably, from all the 64 interviews I did for this podcast, preparation for this interview was a challenging one for reasons I cannot completely get a grip on. One would expect that the same area we both spent our professional lives in, namely the law, and in this case, the intellectual property law would be the easiest subject to discuss trust. It isn't. Maybe it has to do with the fact that law is not a social science. One of the reasons, I think, is that the concept of trust can play a role in many different scenarios. So let's try in this interview to explore a few, but maybe you have an idea of how it comes that we have been struggling with the subject trust in law.

Esther van Zimmeren: So I think that with legal sciences, increasingly we're also using methods of other sciences and we're learning from conceptualizations and different methods that are being used also in the social sciences. So you see that lawyers are also interested in these concepts. But if you look back at older literature, that people use trust in a very generic manner, not really conceptualizing or using clear definitions. So you often find the word trust as an important concept, but it's has no specific meaning or in some other cases there are concepts like mutual trust which are developed by the Court of Justice, but in a very isolated manner. So there seems to be some kind of disconnect or some isolation of how lawyers, practicing lawyers, but also academics are using the word trust. And so when I was looking into this and this was already when I was doing my PhD, focusing on the changing patent paradigm, so the changing way that people are using patents in the biopharmaceutical sector, and so I was looking at different contractual arrangements for intellectual property licensing. And so I was asking them, okay, what are your experiences with such more complicated licensing mechanisms? And I expected legal answers or legal concerns. But in the survey, often people were referring to trust and so that's when I got fascinated by the word trust and trying to understand better what it means, so both the lawyers and the academics are not really clearly conceptualizing what they mean, but they recognize the importance. So I understand where you're coming from in the sense of some kind of discomfort, it's very close to you as a topic, but at the same time you don't have a full understanding of what it really means.

Podcast Host: Yeah, and lawyers like definitions, right?

Esther van Zimmeren: Definitely.

Podcast Host: We come to this issue about trust in contracts later in the interview, but multiple disciplines, you mentioned a few, have generated a litany of beneficial consequences claimed to arise from trust within advanced industrialized societies. As far as the legal profession is concerned, we are talking mostly of underpinning the rule of law. Trust and the rule of law seems to be almost the only subject that you will find when you search for the role of trust in law. Why is that?

Esther van Zimmeren: I think that trust in the academic literature is still used in, as I already mentioned before, in a more generic manner, and it's linked a lot to trust in institutions, in the legal system or in the judicial system, so whatever really also the legal system is and then it's also quasi automatically linked to the rule of law without them necessarily also specifying what that really means and how what is the relationship between rule of law and trust and also legitimacy. You also see that often legitimacy is almost used as a synonym for trust, whereas if you look in the broader literature from other disciplines, it's not so clear what is the relationship between legitimacy and trust, whether it's more of a driver for trust or a consequence of trust. And so you see that these different concepts, people use them in a kind of automatic manner without necessarily specifying exactly what the relations are, where are the drivers, where are the consequences and what does that really mean in practice?

Podcast Host: Let us begin with a philosophical approach to trust and the law. John Locke, the English philosopher, argued that the people trust the government to act in their best interest and to use its power responsibly, while the government trust the people to obey the laws and respect the right of others. This mutual trust is necessary for the social contract to function properly and for the government to effectively fulfill its role as a protector of the people's rights

Esther van Zimmeren: So I think indeed that this mutual relationship is extremely important. And so what you describe is, and especially the social contract between the government and citizens, what you see also in more recent literature is also mutual relations, even in more complex situations such as a regulatory trust triangle. So looking more at the triangle where also regulatees are involved and for instance, agencies are involved and so there is a strong

intuition that all these relations and the trustworthiness of all those different actors is interrelated, which makes it very complicated. Also when you're looking into this and when you go beyond a more philosophical analysis and try to understand, so what does this then mean in practice? And I totally agree that trust is an important basis for building that framework, for building a stable environment where citizens can trust the government and also the other way around, because you want an environment where the government can actually trust their citizens to comply with the rules and where you also have a stable system to enforce the rules that are there.

Podcast Host: Next to the rule of law as a subject, we always also seem to arrive at subjects like the legitimacy of justice, institutions like the independence of judges, the trust people have in courts. That's another aspect of trust, right?

Esther van Zimmeren: That's indeed in the literature where there is literature more about this relationship between trust and the law, often there is a focus on trust in the legal system, trust in judges. It's actually also a field that I'm very much interested in and I've written some articles with colleagues Patricia Popelier and others about trust in courts, and what does that then mean? Again, also there you see a kind of mix up in a lot of the literature between trust and legitimacy that I already referred to. And also often it's not so clear who is the trustor who is the trustee, what is the relationship there, are we looking at trust of citizens in courts or are we looking at trust of companies in such systems? Then also often the term judicial system is used in a broad way, whereas I actually think and this is also coming from the broader trust literature, is that this relationship between interpersonal trust and inter-organizational trust is very helpful to understand better whether we trust a certain court, because often we don't really know as a citizen what the court is doing, we're not looking into the caseload, we're not making a very detailed analysis. So how can we decide as a citizen whether we trust the court, so there's a lot of surveys aimed at citizens where questions are asked about trust in the legal system, trust in the judicial system, but those questions are very difficult to respond to if there has never been any interactions with the court or with the judicial system. So also thinking more about boundary spanners, which is a term also coming from the trust literature where judges would act as representatives of a court, and thinking more about what is then the relationship between the trust in the judges and trust in the courts. It makes it much more concrete. Of course, still, there is the situation that citizens do not necessarily have the

knowledge to assess the trustworthiness of a court or the trustworthiness of a judge if they haven't been in interactions with the judicial system.

Podcast Host: Over time authors have described the interaction between trust, the rule of law and prosperity. If rules foster trust, then we would believe that societies with better rules will develop more trust, which allows for more economic interactions and therefore prosperity. So what do you think of the role between prosperity, the rule of law and trust?

Esther van Zimmeren: Of course this is a very, very broad question with many concepts where we could agree or disagree already of what is prosperity, is that economic growth, is it well-being? and there's a lot of discussion nowadays whether we should rather think of de-growth rather than growth. So that's already an open point for debate, but if we go back more to the importance also of better rules, also there, as a lawyer, I would immediately ask, so what is a good rule and how do we know whether a rule is good or not? And then most lawyers would say a rule which is clear and predictable, which is also enforceable and which complies, of course, with important fundamental rights and which creates legal certainty. And for me, the concept of legal certainty has been a way for struggling also with the concept of trust, because trust is especially important of situations of uncertainty and where people are vulnerable, where there is some risk. So whereas lawyers are pushing for clear rules, good rules, like you're asking for, to create more legal certainty, trust is especially very important in situations of uncertainty. So this probably also explains why there is that tension between a role for trust in law and law, which has different roles to play, but it's only one piece of the puzzle. It creates a certain environment, it creates maybe some legal certainty, but what the relationship is with trust within that context remains very complicated.

Podcast Host: You already mentioned in the beginning contracts: a good contract lowers the risk of working together. That's both good and bad for trust. Good as it lowers the risk of doing business with someone you don't know yet well enough, enabling new relationships, but strong and over-detailed contracts are bad for trust as too much control takes away too much risk. Relationships can't grow if there is no opportunity to demonstrate trustworthiness. Would you agree with that?

Esther van Zimmeren: Indeed, so I've started working on trust coming from contractual arrangements. So coming from a contractual arrangements for IP licensing and quite complicated licensing arrangements, with a lot of different players. So people refer to those as patent pools especially also used a lot in the consumer electronics and telecommunications sector, so we have a lot of different players and whether people would really be inclined to enter into such arrangements. And so often those arrangements imply a very detailed rules so maybe overly detailed, but that's also quite difficult to say when is something too detailed and when does it create legal uncertainty, as I just explained, because that's what lawyers are trained for, to create for their clients that type of legal certainty that they expect that clients want. The question is how much detail do we want? Of course, you want to have some clarity on what are the rights, what are the obligations and if something goes wrong, if one of the parties doesn't perform, what are the remedies? But how much detail do you want, especially if this is not a licensing arrangement, but more a research collaboration where you just get to know the other partner and you want to have clarity on the objectives and again, rights and obligations, but a lot of things will still be open because it's a context of innovation which inherently implies that there is uncertainty. So you want to set certain milestones, but those milestones also need to leave space for further communication and open communication where there is space for interaction so that indeed you can build some trust and where there is also space for the different parties to assess the ability and the benevolence and the integrity of the other party. I agree that the contract needs to leave some space, but maybe you can also set up the contract in such a way that maybe in the beginning there is a little bit more certainty created by imposing clear milestones so that both parties know what needs to be achieved, but at the same time also enabling open communication and agreeing on moments for consultation and maybe renegotiation of the contract when more space is needed. And maybe a final thing also to be as concrete as possible, you have at the end of every contract, often some clauses on the competent court and increasingly you see also an interest in alternative dispute resolution, arbitration, mediation, but especially mediation is an important grounding for long term relationships. So if there is a conflict between parties and you want to maintain those good relationships, solving that conflict through mediation could actually benefit a space where there is more space for trust rather than control. The other word that you also use in your question.

Podcast Host: We were just talking about contracts and the legal system and the role of trust. There are different views on the subject, like the view in the sociology of law that legal rules

and sanctions are marginal to contractual relations and this has led to skepticism concerning the role that the legal system can play in supporting trust. What do you think of that?

Esther van Zimmeren: There are different views in the literature, indeed the economic literature, social sciences. And I think a lot of lawyers still keep it open because lawyers typically what we say is it also depends on the circumstances of the case. So this is this is a sentence very popular amongst lawyers. But I think there is truth in it because I think the actual role for trust may be very context dependent. And what economists, social scientists often try to do, they want to measure things, lawyers. We also sometimes use indicators and try to measure things, but also by collaborating more with colleagues in the Center of Excellence. I also discovered that questions like What is a good rule? What or when are rules too detailed? Or what are the implications for this particular contractual relationship? In those sciences, they try to look at it from a more abstract level, whereas we also as lawyers, often or lawyers and legal researchers, really recognize the importance of the context. And so I think some of the explanations for why there are different outcomes may be related to the fact that there have been empirical research that is feeding the theoretical work of people, which has been very different. And so depending on the type of collaboration, depending on the type of contract, depending of the type of actors involved in this, maybe also the geographical scope of a contractual relationship, the outcomes may also be different. And I think that that may also be part of the story, which does not always get enough recognition in terms of trying to compare how people look at contracts and law and control and trust in this particular context.

Podcast Host: In his book *Why People Obey the Law*, Yale professor Tom Tyler explores the reasons why individuals comply with the law. His central argument is that people obey the law because they trust the legal system and the people who enforce it. He argues that the legitimacy of a legal system is based on the fairness and impartiality of the law and the procedures used to enforce it. Would you agree with him?

Esther van Zimmeren: I think to a large extent, I do agree with that. And I do think that legitimacy is an important driver, but in some cases may also be the consequence and also fairness, procedural justice are a very important considerations for people to trust a particular organization, to trust a particular institution, and then especially also within a regulatory governance context. But at the same time, what I try to do in my own research is try to be more

specific and not say too much at the level of trust in the legal system. But I try to translate this also to the patent system. So for instance, different organizations or specialized patent courts. So there is for instance, in Europe we will have a new specialized court, which is called the Unified Patent Court. Recently also judges have been appointed, there's a very extensive document with the rules of procedure that people have been discussing for a very long time, a very advanced case management system. And if you look at the rules, you would say, okay, it has it is very promising in terms of the fairness that will be there, the scope for procedural justice and a very independent system, impartiality and impartial approach by the court, but the court is not yet operating. So even though the rules are there and they may signal some trustworthiness in the court, what else do we need to actually be able to make this leap of faith and then when the court will be operating, this will really be a court that will be really trusted by the actors involved. And of course, this is more of an expert audience, not all citizens will be involved in the patent system, so in that sense, I've moved away from your question, which was more generic and this is more specific, but I think it's important to really look more at the details and this is maybe something that lawyers can contribute to the literature that is already there, trying to give more concrete examples and not talk about courts in general or about the rule of law in general or about fairness and justice, but giving examples of cases and also cases where maybe there maybe there could be problems, so I just mentioned that for the Unified Patent Court, judges have been appointed. They are both legally qualified judges and technically qualified judges, but these judges are hired on a part-time basis. And also the technically qualified judges, they are still working part-time for patent firms. And for some people, this has been a reason to say, okay, especially the big patent firms, they have a lot of important clients, a lot of multinationals for whom they are working, and so some people have been challenging the independence and the impartiality of these technically qualified judges. And so this is, of course, a risk ultimately also for the perception that people have from the court. So this is talking about individual judges, so more interpersonal trust, you could say, and the impact that that may have on ultimately the view that people would have of the court. So I hope that I didn't move too far away from your original broader question.

Podcast Host: No, no, it's very interesting because the relationship between risk and law is a nice example because this is what we discussed earlier, the more rules we think there is less risk and the risk that we don't trust this unified patent court because it's so detailed rules that if

the court needs to obey all those rules, things can't go wrong. And therefore, we hope that the trust we have will be bigger than if we would do otherwise.

Esther van Zimmeren: And what is also interesting is that in a lot of the blog posts that are written about the court, people highlight the importance of the judges and they actually also use words like confidence and trust without really explaining what they then mean by trust. And this is another reason why I like using this example because there's a lot of talking both by practitioners and legal academics, of the importance of trust in the Unified Patent Court and then the link with the judges and the persons of the judges, which for me then is really interesting to make the link with the broader trust literature and the discussion on the role of boundary spanners and the multilevel nature of trust, the interrelationship between interpersonal trust on the one hand and inter-organizational trust or organizational trust on the other hand.

Podcast Host: In your opinion, Esther, what steps can be taken to enhance and maintain trust in the legal system and its various actors, such as judges and lawyers and I ask this because a continuous discussion in continental systems is that court and judges should refrain from what is called interfering in politically sensitive dossiers like the use of fossil fuels and global warming, etc. What do you think of that?

Esther van Zimmeren: Yeah, so that's also a little bit the discussion regarding activist courts and what is the scope, what is the space for judges to also engage in a kind of policy making, I think this is probably a broader concern in continental and also common law systems to a certain extent, especially in such cases, these high-level cases, the climate change cases, often the kind of thoughts that I have, is again, trying to link it to the broader trust literature and do we trust judges to do this? You have always this kind of thinking in terms of trust, does the trustor trust the trustee to do something? And so we might have a strong confidence with respect to the ability and the competence, the skills and the expertise of those judges, but we also are concerned about their values and the integrity. And even though also within the system, there might be all kinds of safeguards in terms of procedural justice and fairness, but if it goes beyond the scope of how litigation was according to some originally intended or how we can use this enforcement system, then this may actually lead to some counter-reactions by people because it goes beyond what they expect the court to do. But I would also say maybe we should also

rethink what is the role of courts in these type of cases, which are about cases that have a very important environmental and societal impact. Maybe also the role of courts is developing over time, but that's a question rather than an answer.

Podcast Host: I conclude most interviews with the same question, and I would like to raise the question to you as well. What, in your view, are the challenges for future law researchers if it comes to the role of trust in law and the legal system?

Esther van Zimmeren: So you are asking for challenges and I'm a very positive person. So for me the cup is always half full. So I rather see a lot of opportunities because I think throughout this interview, I hope for also for the people who are listening, it became clear that there's a lot of open questions about the relationship between trust and law, trust and the rule of law, trust in different legal institutions. And I think lawyers can contribute to the work that has been done for decades by people in other disciplines by looking maybe in a more context-specific way as to what the relationship is between trust and control, trust and transparency, trust and legitimacy and law. So I would say a lot of opportunities, there's a big space to fill and some more thinking to do, and so I believe that especially centers of excellence like GovTrust are a great opportunity for legal researchers to collaborate, to learn from people in other disciplines that already have a lot of expertise to learn about the measures, the challenges, also in terms of the methodology, because often there's a lot of discussion about surveys and what questions to ask if you're asking questions in terms of trust, so this is also a question that I'm thinking about a lot within the context of the patent system, so those are maybe the challenges, but I first see opportunities because there's so much space to contribute to the trust literature for legal researchers and then some challenges, maybe more on the methodological side. But there we can learn from the big trust literature that is already existing.

Podcast Host: Esther, thank you very much for today's interview and being available for us. Wish you good luck in your work in Antwerp. I hope to talk to you maybe a couple of years and see what has changed in the thinking of the law profession, in the legal profession of the role of trust.

Esther van Zimmeren: Thank you. Thank you for inviting me. It was a true, true honor to be involved in this initiative.

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