

## **IV: The Impact of *Rechtsgefühle* on Politics**

## **IV: Die Wirkung von Rechtsgefühlen auf die Politik**



# Besmirching Judges, Undermining Authority: Populists' Carnavalesque Play with Feelings of Law and Justice

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Every provision which the people feel to be unjust, and every institution which they detest, is an injury to the national feeling of legal right and to the national strength, a sin against the idea of law, the burthen of which falls on the state itself, and for which it has not infrequently to pay dearly.<sup>1</sup>

## 1. *A Dutch Case of Populism: Legal Authorities Challenged*

In 2014, and for the second time, a case was brought against the nationally and internationally best-known Dutch right-wing populist: Geert Wilders. The latter is now the longest-sitting member in the Dutch parliament for the *Partij voor de Vrijheid* (PVV; *Freedom Party*), and the sole member and leader of it.<sup>2</sup> The party was called into life in 2005 and has since been hovering in Dutch elections and polls at between 7 and 25 percent of all votes.<sup>3</sup> The case brought against Wilders was conducted in the law court The Hague. The sentence, which was announced on 9 December 2016, found Wilders guilty of '*groepsbelediging*': group defamation. The court did not impose any punishment, though.<sup>4</sup> Wilders appealed, and the case went

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1 Rudolph von Jhering, *The Struggle for Law* [1879], trans. from the 5<sup>th</sup> edition in German by John J. Lalor, (New Jersey: The Union, 1997), 107.

2 To some it may be incompatible with a democracy that a party has only one member. Yet this is the case; see [https://www.parlement.com/id/vhnnmt7m4rqi/pa rtij\\_voor\\_de\\_vrijheid\\_pvv](https://www.parlement.com/id/vhnnmt7m4rqi/pa rtij_voor_de_vrijheid_pvv).

3 As of March 2021, shortly after the national elections, the PVV is the third largest party in the Netherlands, with 17 seats out of 150. In the years 2010-2012, the PVV was not officially part of the government but had participated in the coalition talks and agreed to make the government possible by helping it to a majority in parliament. This agreement was unilaterally stopped by the PVV. Since then, its participation in new coalitions has become unlikely. 'Politieke barometer'. *Ipsos*, n.d., <https://www.ipsos.com/nl-nl/politieke-barometer>.

4 See <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:15014>.

to the Court of Justice The Hague, at the second highest national level.<sup>5</sup> Its verdict found Wilders again guilty of group defamation on 4 September 2020. Once again, no punishment was imposed. In response, Wilders announced that he would appeal his case in the highest legal council of the Netherlands: the ‘Hoge Raad’ – the High Council. Its decision was made public on 6 July 2021. The High Council decided to leave the decision of the previous courts ‘intact’ and confirmed that Wilders was guilty but should not be punished.<sup>6</sup> Since its start in 2014, then, the affair was a matter of national concern for seven years.

In what follows, Wilders’s case will be considered as a paradigmatic instance of how populists try to undermine the authority of the judiciary. My conclusion will be that this has severe consequences for the collective, or rather disparate *Rechtsgeföhle* – the affective attachments to law and justice – of a populace. The case exemplifies much more than an attempt by the accused to avoid being declared guilty or facing punishment. It concerns a veritable struggle for what people feel to be just, both in a legal sense and in terms of a sense for justice. With regard to both, the case made me consider three semantic aspects of the German word *Kampf* that are only partly captured in the translation of Rudolf von Jhering’s *Der Kampf ums Recht* (1872) as *The Struggle for Law*. These three aspects are: ‘*sportlicher Wettkampf*’; ‘*intensive Bemühungen um ein Ziel*’; and ‘*Situation, in der Meinungen, Bedürfnisse usw. aufeinandertreffen, die nicht zusammenpassen*’. That is to say: *Kampf* may indicate a game of sports; intense efforts to achieve a goal; or a situation in which interests come together that are incompatible. The three aspects of *Kampf* were all at stake in the case that was brought against Wilders. So let me briefly sketch what the case entailed in terms of the three aspects, to then focus on the three separately.

The case against Wilders found its origin in an event that occurred on election night of 19 March 2014. The elections were held nationwide but were municipal ones. For the first time in its history, the national PVV party had participated on the local level – in two cities. In the city of Almere it

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5 The Netherlands has eleven courts of law, based in the capitals of the provinces; there are four higher level Courts of Justice: Amsterdam, The Hague, ‘s-Hertogenbosch, and Arnhem-Leeuwarden. As a result, The Hague has both a court of law and a Court of Justice. For an overview of the case, see the official website of the Ministry of Justice; <https://www.rechtspraak.nl/Bekende-rechtszaken/Strafzaak-Wilders>.

6 Case reference: ECLI:NL:GDHA:2020:1606; [https://uitspraken.rechtspraak.nl/inzie](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2021:1036)

had won the most votes; in The Hague, the country's governmental center, the party came in second. In a victory speech to voters in The Hague, Wilders asked whether they would want fewer or more Dutch Moroccans in the Netherlands.<sup>7</sup> The audience started to shout 'less, less, less'. Wilders responded with a dry: 'Ok, that's what we are going to organize then'.<sup>8</sup> The event caused general outrage, nationally and internationally. Due to the rhetorical build-up of the speech, it was compared in some German journals and by the German press agency, the DPA, to the infamous *Sportpalastrede* by Nazi leader Joseph Goebbels, with its recurring question 'Wollt ihr den totalen Krieg?' (Do you want total war?).<sup>9</sup> This comparison, in turn, led to indignation on Wilders's part.

At the time it was not yet possible to analyze the event as an instance of a more common tactic used by contemporary extreme political figures from the left and right. Cultural analyst Sara Polak defines this tactic in terms of a 'cartoon logic',<sup>10</sup> a logic that shifts the emphasis from politicians being the object of cartoons, to their using them. As Polak states, with regard to the case of Donald Trump:

Trump, of course, is not literally a cartoon character, but he seems to inhabit a universe that is governed by its laws. The recurring suggestion is that nothing he does or says can really harm him, like the cartoon cat who cannot die. This is a cartoonesque hyperreality enabled by social media. Translated to the extradiegetic reality of political communication, this becomes a cartoon logic that short-circuits traditional content-driven and consensus-seeking political communication. Instead, the logic enables the enjoyment of cartoon violence, and this response is rhetorically excused by the suggestion that there is no

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7 Around 409,000 Dutch are first- or second-generation Moroccan immigrants. This group constitutes the third largest ethnic community in the Netherlands, and constitutes 2.3% of the Dutch population. CBS 2020: <https://longreads.cbs.nl/integratie-2020/bevolking/>.

8 For the judicial background of the case, see Rb. Den Haag 9 December 2016, ECLI:NL:RBDHA:2016:15014, *NBSTRAF* 2017/8; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:15014>.

9 See, for instance, 'Wilders hetzt gegen Marokkaner', *Die Zeit online*, 20 Apr. 2014, <https://www.zeit.de/politik/ausland/2014-03/geert-wilders-niederlande-marokkaner>; or 'Wilders hetzt Anhänger gegen Marokkaner auf', *Frankfurter Allgemeine Zeitung online*, 20 Mar. 2014, <https://www.faz.net/aktuell/politik/ausland/europa/geert-wilders-hetzt-anhaenger-gegen-marokkaner-auf-12855232.html>.

10 Sara Polak, 'Posting the presidency: Cartoon politics in a social media landscape', *Media and Arts Review* 22, no. 4 (2018): 403-419, quote on 417.

real world impact – that it is all just a game, with the kind of teenage boy innocence that characterizes cartoons.<sup>11</sup>

Apparently, then, in following this logic political actors do not stick to the standards of seriousness that normally characterize politics. Instead, they use the much more fluid, satirical, clichéd but also combative logic of cartoons, in a game-like manner.

Whether Wilders was using cartoon logic or was simply being ironic (another tactic used by extreme right-wing politicians),<sup>12</sup> it was hard to assess whether he was being serious when he responded to his audience with the words: ‘Ok, that’s what we are going to organize then.’ In this context, the comparison with Goebbels’s speech from 1943 was out of order. At the time, Goebbels was a pivotal minister in the German Nazi regime and in the midst of a war that had become a total war. Whereas Goebbels was dead serious and was an acting minister, Wilders was provoking the center of power from the municipal margins. To many this was a nasty tactic, or a ‘deplorable’ one, as media scholar Viveca S. Greene terms this type of behavior.<sup>13</sup> It might have been a game, albeit one with serious consequences. Yet first and foremost, Wilders’s answer constituted a willful testing of the limits of what was, and is, socially and politically and legally acceptable.

The societal responses to Wilders’s remarks were immediate and proved that, indeed, a collective battle for law and justice was going on. Sixty-one charges were brought against Wilders, and forty of these charges were accepted. When the case was opened in the lower court in The Hague, the defense first challenged the sitting judge as not being independent enough. The Dutch term for this is ‘*wraking*’, the German *Ablehnung*. For a legally informed audience, *wraking* is formally clear. For a more general audience, *wraking* connotes the Dutch word ‘wraak’, meaning ‘revenge’ – and this has affectively charged connotations. When the judge refused to be excused from the case, a separate legal body – the so-called ‘*wrakingskamer*’ – had to assess the validity of the challenge. This chamber rejected

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11 Polak, *supra* note 10, at 416.

12 For instance, Noam Gal, ‘Ironic humor on social media as participatory boundary work’, *New Media and Society* 21, no. 3 (2019): 729-749. For a pre-populist analysis of the contemporary use of irony in the rapidly changing landscape of social media, see Ted Gournelos and Viveca Greene, eds, *A Decade of Dark Humor: How Comedy, Irony, and Satire Shaped Post-9/11 America* (University of Mississippi Press: Jackson, MS, 2011).

13 Vivica S. Greene, “‘Deplorable’ Satire: Alt-Right Memes, White Genocide Tweets, and Redpilling Normies”, *Studies in American Humor* 5, no.1 (2019): 31-69.

the challenge on 11 November 2016, and the judge delivered her verdict a month later. When the case then moved to the higher Court of Justice The Hague, the tactic by the defense was the same. This time the presiding judge was accused of having left-wing tendencies, because she had been the chair of a jury responsible for giving a prize to the student author of an MA thesis that was supposedly leftist. On this basis, the defense asked her to excuse herself. The refusal of the judge was broadcast on national television and this was the moment when a legally proper challenge acquired a carnivalesque aura due to an ambiguity in the Dutch phrasing by means of which the judge has to refuse to be excused. The German '*Ausschließung*', or the English 'to be excused' is '*verschoning*' in Dutch. So, whereas in English usage, a judge simply has to refuse to be excused, a Dutch judge has to say: 'Ik zal mij niet verschonen'. Whereas for any legal expert the formal meaning is clear, for a non-legally trained audience the phrase literally means: 'I will not put on fresh clothes', or more awkwardly still: 'I refuse to put on fresh underwear'. In this case, legally speaking, the challenge failed. Yet affectively speaking, it had its carnivalesque success.

The next move proved to be more controversial, legally speaking. The defense asked the court whether the prosecution had not been arbitrary in bringing Wilders to court. A phrase uttered by a left-wing politician (Alexander Pechtold) was presented as an analogous case; and this case, so the defense argued, had simply been dismissed by the prosecution. So why had the case against Wilders not been dismissed? The sitting judges did not consider the defense's request necessary for the defense's case; a criterion of necessity defined by law. The reasoning of the judges was that such a request should have been brought forward before the case had started, not during the trial. The defense did not like this, and the judges were challenged again. This time the Court of Justice in Amsterdam was used as a '*wrakingskamer*'. This court considered that the The Hague court's judges had failed to adequately motivate their decision not to recognize the defense's request; or, their motivation was defined as 'lacking'. Moreover, the Court of Justice in Amsterdam did not consider the defense's request a matter of a 'fishing expedition'. Consequently, the judges were taken off the case; a new set of judges was installed.

The decision of the Amsterdam court led to considerable legal controversy. One telling (and unusual) response by a former member of the High Council, Fred Hammerstein, held that the Amsterdam court had made

two fundamental mistakes.<sup>14</sup> The Amsterdam court had argued that there could be relevant ‘parallels’ between the two politicians’ cases. Hammerstein argued that the possible parallels were legally speaking superficial. Then, the defense had asked that the case be re-opened by hearing witnesses anew so that a comparison could be made between the two cases. The judges in the Court of Justice The Hague had refused this because the two cases were not identical, and because the case could not be re-opened from scratch. The Amsterdam court considered this a sign of the judges being biased, in Dutch: ‘vooringenomenheid’. The result was a flood of challenges to various cases in the Netherlands. This led the High Council to give a response on 25 September 2018 on the basis of a different case, though motivated directly by the Wilders case. The High Council decided that: ‘It does not fit the *‘wrakingskamer’* to judge on decisions or on the decision not to decide. This judgment is the prerogative [...] of the judge who is handling the case’.<sup>15</sup> The Amsterdam *‘wrakingskamer’* had been reprimanded, then. This constituted a legal correction but not a correction of the collective feelings of justice that had already been influenced by the handling of the Wilders case. In Hammerstein’s analysis, the Amsterdam court’s decision had severely damaged ‘trust in the judiciary’.

The Wilders case is paradigmatic for the three aspects of *Kampf* that I introduced above. Firstly, it shows how law and judges’ authority can be made subject to battle, or a *Kampf*, as part of a game and a tactic. Perhaps the defense was not on a ‘fishing expedition’, perhaps it was; otherwise, the Court of Justice Amsterdam would not have needed to mention it. In any case, the defense followed rules that cohered with the game of law, while also attempting to test those very rules. Secondly, the moves on the sides of both parties were not easy. They involved an intense effort to achieve a goal, or multiple goals. Thirdly, several of these goals proved to be incompatible, and this propelled an antagonism between parties. For instance, whereas Wilders was accused of inciting Dutch people against

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14 Fred Hammerstein, ‘Hoe wraking het vertrouwen in de rechtspraak kan ondermijnen’, 30 May 2018, *Verder denken, scherper zijn*, CPO website; <https://www.ru.nl/cpo/verderdenken/columns/wraking-vertrouwen-rechtspraak-ondermijnen/>.

15 In the original: ‘Wrakingskamer komt geen oordeel toe over juistheid van (tussen)beslissing noch over verzuim te beslissen. Dat oordeel is voorbehouden aan rechter die in geval van aanwending van rechtsmiddel belast is met behandeling van zaak.’ The case on which the High Council based its verdict can be found under ECLI:N:HR:2018:1413, the conclusion of the High Council under ECLI:NL:PHR:2018:736 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2018:1413>.



Dutch Moroccans, he used the case to incite his constituency against the judiciary by depicting it as elitist, and by suggesting that, if he were to be convicted, the Dutch *Rechtsstaat* would prove itself to be biased and dysfunctional.

So a struggle, or a *Kampf*, was clearly going on. Yet it was not the struggle that Jhering was talking about. To see this, let me first focus in more detail on the game aspect of *Kampf*.

## *2. Law as a Game: Carnival Politics and the Attempt to Carnivalize the Judiciary*

In response to a case brought against Wilders in 2011, a national newspaper called Wilders's and his lawyers' actions in court a farce and a bad one at that.<sup>16</sup> Apparently, the newspaper failed to take seriously that the actions purposely constituted a farce. For, besides cartoon logic or the use of irony, another model that would be applicable to the case in question is that of 'carnival politics'. In a study of two carnivalesque events in the UK – The Notting Hill Carnival that has taken place yearly since 1965 and the one-time Carnival Against Capital in 1999 –, cultural analyst Esther Peeren came to define them as forms of 'carnival politics'. The purpose of such a form of politics is the acquisition of territory, in these cases: the streets. In analyzing the struggles that were involved, Peeren considered the events to be

translations and displacements of the Bakhtinian carnival, effecting what Deleuze and Guattari call a deterritorialization: a movement of acceleration, rupture, change and multiple connectivities. Both events quite literally answer the injunction [...] to 'increase your territory by deterritorialization'.<sup>17</sup>

Forms of carnival are used, then, to infiltrate a space that is (considered to be) someone else's territory. First, this space is deterritorialized in a carni-

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16 Willem Schoonen, 'Het is een farce, en nog een slechte ook' *Trouw*, 16 April 2011, <https://www.trouw.nl/nieuws/het-is-een-klucht-en-nog-een-slechte-ook~bad9f82c/?referrer=https%3A%2F%2Fwww.google.com%2F>.

17 Esther Peeren, 'Carnival Politics and the Territory of the Street', in *Constellations of the Transnational* – Thamyris/Intersecting: Place, Sex and Race vol.14, eds. Sudeep Dasgupta and Esther Peeren (Amsterdam: Brill, 2007), 69-82. The quote is from Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987), 12.

valesque manner, to then be reappropriated. The carnival is not a matter of a counterworld à la Bakhtin, here. To Bakhtin, the carnival is the opposite of official culture and is as such extra-political.<sup>18</sup> The two worlds are very strictly separated, also in terms of the time in which the carnival rules take precedence; the very manifestation of carnival is officially controlled and allowed. Yet in both of the events that Peeren focuses on, a more complex simultaneity of worlds was at stake, and the events were only in part subject to official regulation.

The notion of ‘carnival politics’ is a productive heuristic tool that can shed a light on the actions of contemporary populists. The issue is not, then, how carnival is used politically, but how populists use forms of carnival. First of all, their persistent attacks on so-called elites who rule the political realm, or on official media that supposedly controls the news, constitute the dynamics of the carnival’s two-world system, in which the one forms the counterpart to the other. This tension could simply be marked as antagonistic, and as such serious. Yet although the attacks are indeed sometimes serious, they are often also carnivalesque in nature. Sometimes populist politicians themselves, like the Italian Beppe Grillo but also the Dutch Thierry Baudet, act in a carnivalesque way, for instance by dressing up, disguising themselves, or using memes, jokes, and forms of caricature. More often than not, their supporters act in this manner. In the Netherlands, the carnivalesque nature of this struggle is captured by one of the most influential right-wing news sites that calls itself *GeenStijl* – literally ‘no style’, or better: ‘BadForm’. Its mission is captured by the motto: ‘insinuating, unfounded and needlessly offensive’.<sup>19</sup> This may sound offensive in itself but it has venerable classical roots, as with the provocative and ruthlessly mocking figure of Momus, the most carnivalesque of classical gods.<sup>20</sup>

As Peeren argues, with ‘carnival politics’ there is a territory at stake. Here, populist policies are not just aimed at getting people out on the streets, whether these be real streets or the quasi-public realm of internet

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18 Michail Bakhtin, *Rabelais and his World*, trans. Hélène Iswolsky (Bloomington: Indiana University Press, 1993), 6.

19 In Dutch: ‘tendentieus, ongefundeerd en nodeloos kwetsend’; <http://www.geenstijl.nl/>. The site was first owned by official media companies but is now independent.

20 Frans-Willem Korsten, ‘Historical prefigurations of vitriol: communities, constituencies and a plutocratic insurgency’, in *Social Media: History, Affect, and Effects of Online Vitriol*, eds. Sara Polak and Daniel Trotter (Amsterdam: Amsterdam University Press, 2020), 87–108.

spaces, but to deterritorialize such spaces in order to enlarge their own territory. In the case of Wilders's remark about Dutch Moroccans, two territories were at stake simultaneously. With hindsight, these concerned the struggle about what can be said in public space politically, or as a matter of free speech – whether this be needlessly or ruthlessly offensive. It also concerned the struggle about who owns very real streets and public space in the city of The Hague, or any other city in the Netherlands. The struggle combined a more or less abstract constitutional and national issue with very concrete local ones. When the case was brought to court, another struggle consequently started that again used forms of carnival politics in the context of which the territory at stake was a symbolic territory: it concerned the authority of the judiciary.

The ability to challenge the law depends on the fact that law acts according to prescribed rules and rituals, or on the fact that legal cases intrinsically follow the logic of a game. The analogy was captured by cultural historian Johan Huizinga when he stated:

The arena, the card-table, the magic circle, the temple, the stage, the screen, the tennis court, the court of justice, etc., are all in form and function play-grounds, i.e. forbidden spots, isolated, hedged round, hallowed, within which special rules obtain. All are temporary worlds within the ordinary world, dedicated to the performance of an act apart.<sup>21</sup>

Before we move on to consider what Huizinga is arguing for, let us first note that in Dutch there is no distinction between play and game. In Dutch, for instance, several games are captured under the heading of 'bordspel', a 'boardgame'; but a literal translation in English would have to be 'boardplay'. If two chess players meet, they are evidently defined as players, yet one always speaks of 'a game of chess'. Dutch *spel* is close, here, to German *Spiel*, but different from *Kampf*, from English *play*, French *jeu*, or Spanish *juego*. The latter two have their source in Latin *iocus*, which means joke, but also amusement and sport. *Play* has its origin in *pleien* or *plegan*, which means to 'move quickly', possibly also 'dance'. *Spel* and *Spiel* have their origin in words that indicate the making of music or the state of being elated. *Game* has its origin in Old English *gamenian*, which means to play, jest, joke. German *Kampf* connotes the Latin *campus*, meaning 'fight'

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21 Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (Boston: Beacon Press, 1955), 10.

or 'struggle', and this is analogous to what in Dutch accords best with game, namely *wedstrijd* – German *Wettkampf*.

In what follows, I partly build forth on, but also sharpen the distinction between play and game introduced by Roger Caillois in *Les jeux et les hommes* (1958), translated as *Man, Game and Play* (1961).<sup>22</sup> In my use of the two terms, *play* is marked by its non-obligatory nature; its separateness from daily reality; its open, unpredictable outcome; its unproductiveness; and its ability to create worlds on the basis of make-believe. *Game* is marked by its dependence on rules that, once people engage in a game, are obligatory; it can be regular part of daily reality (like soccer); it will have a restricted outcome (like winning or losing); it can be very productive (there is a lot of money to be made); and it may follow the logic of what is the case in reality (like when games are competitive).

In relation to Huizinga's quote, law is not a play, then, but a game. And in conformity with what I distinguished above, law, in its following a game logic, is distinctly a serious matter (as Huizinga also argued). Law, enacted in courts of justice that embody its 'magic circle', may even be experienced as hallowed. Yet law's very hallowedness or seriousness may be precisely what populists want to ridicule. Their appearing before a court is marginally considered, then, as a personal, ethical or even political problem, but first and foremost as an opportunity to provoke the authorities dealing with them, thus enhancing the bond with their constituencies. The tactic followed does not consist in ignoring the rules of the legal game, but in using them to the extreme, or in exploring how and to what extent they can be tinkered with. A primary aim of this tactic is to not be declared guilty; another one is to undermine the authority of judges so that in the event of a guilty verdict, this loses its force. Effectively, such undermining will result in a fragmentation of the collective *Rechtsgeföhle* of people.<sup>23</sup>

There is a telling analogy, here, with a principle that made Jhering famous in the international legal field: the *culpa in contrahendo*. The pivot

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22 Roger Caillois, *Man, Game and Play* (Champaign: University of Illinois Press, 2001).

23 One notable example is the US American extreme right wing ideologue Steve Bannon, for whom societal disorder and the recalibration of legal authority are needed to get to a new situation, under a new rule; see Bridge Initiative Team, 'Factsheet: Steve Bannon', *Bridge*, 16 Sept. 2016, <https://bridge.georgetown.edu/research/factsheet-steve-bannon/>. An opposite yet very similar process is going on with regard to the legal systems of Poland and Hungary, where in the name of order the balance of interests is swapped for the sake of a legal system that is supposed to listen to one party alone.

of the principle was that if parties engage in a contract, their mutual relation is ruled by *diligentia*, a matter of good faith, which implies that parties know they need to care for one another. Jhering's idea, provoked by real societal problems, was that this is not only the case when a contract was officially established, but also in the pre-contractual phase. This shift in focus meant that a formally legal issue needed to be considered in its social context.<sup>24</sup> Now, obviously, when someone is brought before a court, this is not a matter of contract, if only because one of the parties may not wish to be there. Yet socially speaking, or in the context of a society, the presumption is that both parties will act in good faith, as would hold with any kind of game. If judges, for instance, ridicule the accused, this is considered a rightful cause for challenge or objection. On the other side, in general, people who are brought before a court are expected to behave decently, or in good faith, as well. All this of course only holds true if the judiciary, from its side, also behaves in good faith – and in the many histories of social activism, of anarchy, or revolt, in the histories of racism or feminism, legal systems and their judiciary were often considered with reason to be biased, prejudiced, and not acting at all in good faith.

Now, in cases of legal bias, a carnivalesque response could be a playful option, with play indicating the attempt to get beyond the rules of the game, or to open them up.<sup>25</sup> The same potential holds for right-wing populists. Yet in their case, this potential is explored not so much because judges are biased, but because the actors playing want to do away with the rules of the game and with legal authority.

In this context, law's theatricality contains a certain danger, as was noticed by legal scholar Julie Stone Peters. Whereas the seventeenth-century lawyer Giovanni Battista de Luca defined the trial as a 'theatre of Justice and Truth', the necessary implication was that this theatre was a serious one. At all costs, so Stone Peters argues, the courtroom should prevent that it become the site of a circus or carnival.<sup>26</sup> Instead, law is, and should

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24 Tim Hartman, 'Een schitterend jurist' – *Invloed en beeldvorming van Rudolf von Jhering in het Nederlandse privaatrecht (1861-1921): rechtsleer en culpa in contrahendo* (Weert: Celsus, 2020), 61.

25 There is an argument to be made that play is involved in the creation of new legal theories or new laws. Jhering's introduction of *Interessenjurisprudenz* as an alternative to *Pandektenrecht* has been considered as such. For this see: Edward J. Eberle and Bernhard Grossfeld, 'Law and Poetry,' *Roger Williams University Law Review* 11, no. 2 (2006): 353-401; especially p. 353. The point requires separate elaboration.

26 Julie Stone Peters, 'Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems', in *New Directions in Law and Lite-*

be, boring; also theatrically. It brought the jurist, critic and theatre-maker Klaas Tindemans to mark law's theatricality as an archaic phenomenon.<sup>27</sup> And indeed, whereas a legal case may offer surprises in terms of developments or verdicts, the procedures of law are all familiar, laid down and fixed. Considered thus, it would seem that the struggle for law does not concern procedures; the rules of the game are clear. Yet important aspects of the defense and of Wilders's use of the media were not about content but about the rules of the game. The game part of the tactic was to use them to their extreme; the play part of the tactic was to get outside of the serious, magic circle of the rules.

Law's rules have only gotten a stronger aura of being archaic due to a struggle between different media with their different rates of transmission, or speeds, and different desires and fears that propel them. In this context, the philosophically reassuring qualifier 'archaic' may easily shift into something that is felt to be 'out-dated'. As Tessa de Zeeuw analyzed it, the theatricality of law is distinctly in friction here with new, contemporary media.<sup>28</sup> To trace this, de Zeeuw compared the legal situation with the cultural theatrical one, which witnessed an important transformation in the last half of the previous century. The transformation was studied in Hans-Thies Lehmann's *Postdramatic Theatre*, in which he established the characteristically postmodern fascination of theatre makers with intermediality.<sup>29</sup> The 'postdramatic' indicated a break with especially the late 19<sup>th</sup> century and early 20<sup>th</sup> century form of theatre that worked on the basis of a strict separation of the audience from what was shown on stage; and what was shown on stage had a dramatic plot as its pivot. In postdramatic theatre, these two were reversed. Audiences came to be more and more involved with the action, and this action was no longer defined by a coherent plot. In the world of theatre, new media helped to tear apart the 'fourth wall' that had separated the audience and the action on stage, and helped to multiply or fragmentize the plot.

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ature, eds. Elizabeth Anker and Bernadette Meyler (Oxford: Oxford University Press, 2017), 193-209, 196.

27 Klaas Tindemans, 'De theatraliteit van het recht', *Etcetera* 150 (2017): 39 <https://etcetera.be/de-theatraliteit-van-het-recht/>. In the original it says: 'archaisch fenomeen'.

28 The confrontation between law's classic, theatrical form and new modern media is central to Tessa de Zeeuw, *Postdramatic Legal Theatres: Space, Body, Media and Genre* (Leiden, thesis, 2021).

29 Hans Thies Lehmann, *Postdramatic Theatre*. Translated by Karen Jürs-Munby (London: Routledge, 2006). The importance of Lehmann's analysis was assessed in Elinor Fuchs, 'Postdramatic Theatre by Hans-Thies Lehmann,' *TDR: The Drama Review* 52, no. 2 (2008): pp. 178-183.

In the context of legal theatricality, such intermediality may have a more devastating force than the aesthetically or politically functional disruption that Lehmann was studying. One archaic aspect of legal procedures has already been mentioned: their being boring, which connects to their being slow. When Wilders's case proceeded to the High Council, the law's dealings with this case since 2014 had come close to having lasted a decade long. Evidently, law works slowly, and rightfully so. Yet this aspect of law and legal procedures stands in sharp contrast with one of the most decisive, and already mentioned characteristics of social media: their speed. Whereas classic media such as newspapers or national broadcast corporations are interested in the news, obviously, their speed does not offer a serious provocation to the procedures of law, if only because the presence of these media in courtrooms is restricted by means of regulation. Yet social media, although they are not officially allowed to work in courtrooms, are present in courtrooms and around them, spiralling through them, before them, and after them. This does not mean they spiral erratically, though. Whereas newspapers, of whatever colour or political conviction, still cater to national or regional audiences, social media are more specific, in their getting the like-minded together in algorithmic bubbles. They also act more extensively in transcending national borders. As a result, constituencies have become much more flexible. They have also become more disparate. They are constantly affectively at work while being worked on. And they very much influence the ways in which people feel to be attached, or not, to law and justice.

Though the speed of social media has been researched in several areas, ranging from media studies to business, it has not yet been studied thoroughly in the legal context.<sup>30</sup> If this were to materialize, such study would have to address two forms of speed. Social media works by means of speed, as captured in the phrase 'going viral'. Yet the entire infrastructure itself that has made social media possible also developed with incredible speed. Here, media scholars José van Dijck, Thomas Poell, and Martijn de Waal noticed that 'many platforms have grown surprisingly influential before a real debate about public values and common goods could get

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30 See, for instance, Josep Rialp-Criado, María-del-Carmen Alarcón-del-Amo, Alex Rialp, 'Speed of Use of Social Media as an Antecedent of Speed of Business Internationalization', *Journal of Global Information Management* 28, no.1 (2020): 142-166.

started'.<sup>31</sup> The rapid development of platform 'ecosystems',<sup>32</sup> most of them privately owned, was helped by the fact that they could all use the same computational architecture.<sup>33</sup> And due to this, the speedy proliferation and interconnection of these platforms have, as to date, not been met by robust legal tools that regulate these platforms, or that regulate the technologies allowing them to exert their power.<sup>34</sup> It may be called the paradox of platforms, then, that they have greatly enlarged the agency of people, and have left them vulnerable to far-reaching forms of manipulation.

In this context, it now appears that to some constituencies law's being slow, boring, and serious does not have the desired effect of underpinning its authority and showing that law can be trusted. For these constituencies, law is felt to be slow, boring and serious because it wants to spoil the game. The judiciary, according to this feeling, is not willing to conform to a media-propelled quasi self-evident truth, but has decided beforehand that it will come to its desired verdict at the cost of the accused, while taking its time. In response, some constituencies no longer take the game of law seriously and desire to start to play with it. This brings me to the second aspect of *Kampf*: the intense effort to achieve something. As will become clear, such intense efforts do not just concern older media and newer social media forms but involve a much vaster landscape of different media, or cultural techniques.

### 3. *Media that Connect Rechtsgefühle with Legal Authority; the Postal and the Erotic*

Legal authority, and by extension the authority of judges, is in its core a matter of affect. Even if people realize that judges are supposed to be authorities, they are only so, effectively, when they are *felt* to be authorities – and authorities can only manifest themselves if they have the true potency to affect others. The affective force of authority has decisive effects, in turn, on whether people feel that they are being dealt with justly. Those individuals who are sentenced by judges to whom they did not grant

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31 José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford: Oxford University Press, 2018), 3.

32 The choice of 'ecosystem' as a descriptor for the networks formed by platforms is the target of critique, for instance in running research by Rianne Riemens (Radboud University, Nijmegen).

33 Dijck, Poell and de Waal, *supra* note 31, at 15.

34 Dijck, Poell and de Waal, *supra* note 31, at 46.



any authority, will tend to feel that they were dealt with unjustly. There is a marked distinction, here, between law's power and law's force. Max Weber's distinction between power and authority implies that power can be taken and executed but that authority is granted, both by higher powers and by the ones subjected to it, as a matter of force.<sup>35</sup> As a consequence, there is a distinctly different affective dynamic at stake between the power of law and law's force, or, between the power that judges have and the authority granted to them that characterizes the force of their judgments.

Issues like these were perhaps not central to Jhering when he dealt with the struggle for law, at least not in the reception of his work.<sup>36</sup> Yet conceptually speaking they were, or are. This is why they made legal philosopher Neil Duxbury speak of Jhering's work in terms of a 'philosophy of authority'.<sup>37</sup> If this is a slightly too grand way of putting it, there is indeed a philosophy of authority lingering in Jhering's thoughts. As for authority, he clearly did not belong to those who propagate divine or mysterious underpinnings of law. Rather, his problem was how law can have an authoritative force on its own account in practice, throughout its existence. When the already mentioned Weber defined this kind of authority as a rational-legal one, he meant an authority based on established and collectively agreed-upon rules. In Jhering's logic, legal authority can never base itself simply on a system of rules, nor on a system that was supposedly agreed upon collectively. Legal authority is always in the making in practice, and has never full collective consent due to the different interests that people have.<sup>38</sup> As a consequence, legal authority can never be self-evident and will always contain an element of fragility. Or, as Duxbury put it, Jhering's ideas on authority are based on 'the essentially Hegelian idea that the continuing life of the law depends on that which has the potential

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35 Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978); and 'Politics as Vocation' [1919], in *Weber's Rationalism and Modern Society*, ed. and trans. Tony Waters and Dagmar Waters (Basingstoke: Palgrave Macmillan, 2015), 129-198.

36 In recent years the issues were central to the work of Joseph Raz, who seems to have skipped the work of Jhering in this respect, but whose work can be considered in a similar vein, for instance with Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) and *Authority* (New York: New York University Press, 1990).

37 Neil Duxbury, 'Jhering's Philosophy of Authority', *Oxford Journal of Legal Studies* 27, no.1 (2007): 23-47.

38 On the value-relative nature of positive law, see Gaakeer in this volume, but also the work of the already mentioned Joseph Raz.

to negate it: namely, the human capacity for self-realization through self-assertion'.<sup>39</sup> Legal authority, that is, depends on a continuous struggle.

Although Jhering was mostly concerned with private law, he developed his arguments in the context of the *Sozialfrage* of a nineteenth-century Germany that witnessed massive inequalities due to its economic acceleration. In this context, economic, or private interest was a self-evident and pivotal concept. Yet the multiple meanings of interest, both then and now, ask us to consider Jhering's 'philosophy of authority' in a more general way. If we do so in the light of current circumstances and with regard to Wilders's case, it is clear that interests are again central, and private in not so much an economic as a political sense. When brought to court, contemporary populists may try to escape the rule of law. They may suggest that judges are biased, or they may want to mold a judiciary that into one that is subject to their demands. Yet, basically, they challenge the law on the basis of their private, political interests. The challenge is both serious, following the rules of the game, and it is playful, as a matter of carnival politics.

If a continuous struggle is needed in favor of law, this will both be motivated by feelings of justice, but will also influence the *Rechtsgeföhle* of people. As the very notion of 'influence' suggests, the issue is the ontological status of the motivation. As Duxbury argues, there is a disturbing or confusing ambiguity in Jhering's dealing with collective feelings, even to the degree that Duxbury calls Jhering's conceptualisation 'questionable by any standards'.<sup>40</sup> Sometimes Jhering appears to say that feelings of justice find their origin in a response when one's actual rights are violated, yet in other cases, he refers to 'violations of what one feels to be right'.<sup>41</sup> In the latter case, what is actually the case may topple over what is in the eye of the beholder, so Duxbury protests. To him, this could lead to a 'gangster psychology'. This may be true, yet the point that Duxbury in turn ignores, is that affective attachments to the rule of law are not organic or self-evident, but are the result of hard work, or the intense efforts to achieve the desired goal – one of the meanings of *Kampf*. Feelings of justice are not simply there, that is, they need to be nourished, tested, and trained. And they can be influenced. This is another reason why 'struggle is the eternal labor of the law'.

With respect to this, although Jhering acknowledged the implications of this struggle, he did not pay attention to the media that are needed to

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39 Duxbury, *supra* note 37, at 25.

40 Duxbury, *supra* note 37, at 46.

41 Duxbury, *supra* note 37, at 46.

make this labor effective. There is every reason to historicize his thoughts, here, because there are intrinsic connections between media and the affective bonds implied by *Rechtsgefühl*. The role of media in their ability to help organize the affective households of people made media philosophers and historians such as Sybille Krämer (to whom we will return below) or Bernhard Siegert speak of them as ‘cultural techniques’.<sup>42</sup> With this, they did not just mean regular ‘media’. Rather, as Siegert contended:

Harold Innis and Marshall McLuhan already emphasized that the decision taken by communication studies, sociology and economics to speak of media only in terms of mass media is woefully insufficient. Any approach to communication that places media exclusively within the ‘public sphere’ (which is itself a fictional construct bequeathed to us by the Enlightenment) will systematically misconstrue the abyss of non-meaning in and from which media operate.<sup>43</sup>

With the ‘abyss of non-meaning’, Siegert refers to the fact that media are not just tools of communication, but also mediators of affective attachments. This does not mean that what we generally understand ‘media’ to do is no longer applicable, but this doing needs to be considered in an affective context. Newspapers, for instance, functioned decisively differently in the nineteenth century – at the time of Jhering’s writings – or in the early twentieth century, or in the contemporary twenty-first century situation. Whereas Benedict Anderson showed that collective national feelings of community could not have existed without the work of newspapers in the nineteenth century, this is no longer the case.<sup>44</sup> Historically, newspapers connect to different spaces that in turn have acquired different functions themselves, whether these be coffee houses or private homes. The same medium does rather different things, then; or the question is more whether it is the same medium.

Secondly, the number of media that can be considered as ‘cultural techniques’ has become much broader. Examples that both Krämer and Siegert give, range from basic linguistic ones to computational techniques, to postal ones, and so forth. Siegert mentions the shift, for instance, from parchment to paper under the chancelleries of Emperor Frederick II of

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42 Bernhard Siegert, ‘Cultural Techniques: Or the End of the Intellectual Postwar Era in German Media Theory’, *Theory, Culture & Society* 30, no. 6 (2013): 48–65.

43 Siegert, *supra* note 42, at 51.

44 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* [1983] (London: Verso, London, 1991).

Hohenstaufen; a shift that connoted a shift in power.<sup>45</sup> It may also concern the ways in which the telescope changed modes of seeing and sensing and, consequently, also of epistemologies and ontologies.<sup>46</sup> Or, it concerns the ways in which postal systems were not just tools of communication but came to redefine the relations between people *per se* and the world they lived in.<sup>47</sup> In summary, Siegert states that within a ‘new media-theoretical and cultural studies paradigm, cultural techniques now also include means of time measurement, legal procedures, and the sacred’.<sup>48</sup> Siegert’s mentioning of legal procedures is telling here, especially in the context of *Rechtsgefühl*. Considering legal procedures as media or cultural techniques makes explicit what intense efforts are needed to achieve the desired goal: a people’s affective attachment to law.

In this more general frame, a consideration of populists’ play with law and the judiciary in terms of social media only, would be a mistake. Rather, it concerns a confrontation between, or a coincidence of different forms of cultural techniques. The question is not just what kind of contemporary media, as cultural techniques, underpin or threaten the current authority of the judiciary, but also how in terms of jurisprudence the judiciary’s affective force is constantly reinforced – or weakened – by the use of different cultural techniques. A distinction made by Krämer is pivotal, here, namely between what she called the postal or the erotic potential in media.<sup>49</sup> With the first she indicated their potential to bridge the distance between actors without annihilating the difference; with the second she indicated the potential in media to bring entities together by means of communication. The first is only possible due to the medium, and as a consequence emphasizes the existence of that medium. The second is more concerned with the effect of media and will, consequently, consider the medium as a marginal matter. The distinction may help us to see

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45 Siegert, *supra* note 42, at 52. Siegert bases his argument, here, on Cornelia Vis-mann, *Files: Law and Media Technology*, trans. Geoffrey Winthrop Young (Stanford: Stanford University Press, 2008).

46 In this case Siegert is referencing Joseph Vogl, ‘Becoming-Media: Galileo’s Telescope’, *Grey Room* 29 (2007): 14-25.

47 Here, Siegert is referencing himself: Bernhard Siegert, *Relays: Literature as an Epoch of the Postal System*, trans. K. Repp (Stanford: Stanford University Press, 1999).

48 Siegert, *supra* note 42, at 57.

49 Krämer’s work came relatively late to an international, English speaking audience; see Sybille Krämer, *Medium, Messenger, Transmission: An Approach to Media Philosophy* (Amsterdam: Amsterdam University Press, 2015).

how several media, as cultural techniques, define contemporary ways of influencing people's affective attachments to law.

In all Dutch legal cases, the legal verdict is pronounced 'in the name of the King', which is also why in every court room there is a picture of the Dutch king or queen. Obviously, the term 'King' in this phrase does not refer to a natural person in the legal sense, but to an institution (which is why when a queen is head of state, the phrase remains the same). Now, if royalty is considered as a source of order and justice, pictures or paintings in courtrooms are important media and forms of representation. They operate as indices to the body and voice of the king as both make themselves present and heard via the judge. In this case the representations of the king clearly fall under the heading of what Krämer called the erotic. Their being a painting or photograph does not matter; what matters is what they communicate, as a result of which a form of community makes itself felt. Yet the question is whether these representations – or the reality of the body and voice of the king – work in the same way in current circumstances, when royalty has been taken up in the circulation of news and gossip via different media. Or, if in previous times the king was considered more or less generally a stable source of authority, royalty has nowadays become subject to the same mechanisms that any celebrity is subject to. As a consequence, the king's authoritative force is severely weakened. Media that report on royalty and celebrities need their daily feeds. Here the postal is dominant.

Then, as was explored by legal scholar Cornelia Vismann, legal rule was embodied first in archives, during the Roman era, but shifted towards rule by document in the sixth century, to turn back to archives again from the twelfth century onwards.<sup>50</sup> To Vismann, records and documents follow a different logic and, consequently, are at the heart of different cultural techniques.<sup>51</sup> Whereas documents are not stored but kept by the recipient (the passport would be a primary example),<sup>52</sup> records are kept by an authority in order to transcend time and space and to embody law's stability. Historically, the law had a considerable monopoly, here, in its capacity to make and use archives officially and authoritatively. Here, again, and despite the neutral force of archives, Krämer's 'erotic' is dominant. It is not the archive

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50 Cornelia Vismann, *Files: Law and Media Technology*, translated by Geoffrey Winthrop Young, (Stanford University Press, 2008), especially chapters 3 and 4.

51 In the German original Vismann used *Urkunde* as a general term. The English equivalents are 'charter', 'deed' or 'certificate', but a general translation is 'document' (Vismann, *supra* note 50, at 175). The term 'logic' is mentioned on 71.

52 Vismann, *supra* note 50, at 72.

as a medium that is emphasized but what it makes possible in terms of establishing a community. The archive connotes what ‘we’ agreed upon. Yet with the advent of the internet, other, massive archives are at work that rather follow the logic of the postal. Affectively speaking, they exert the force of an archive as well, which is then a counter-archive, but one that leaves differences intact. For instance, whereas in the legal domain cases can be closed, or drafts will be cancelled, the internet provides people with an archive that does not work on the basis of legal cancellations. Rather it hosts a variety of documents that confirm or contradict one another, and that may keep on producing new confirmations and contradictions.

Thirdly, as we already discussed, legal procedures are still organised theatrically, which ensures that they work according to a fixed plan or plot, and that an audience may be present to check whether the game is played according to the rules. These rules are not the focal point, however; here the erotic is dominant again in that the medium is marginal to what is being communicated. Yet with the coming of modern media such as cinema and television, it would be foolish to underestimate people’s affective attachments to law and justice, or their *Rechtsgeföhle*, apart from the enormous impact that television and cinema have had on the representation and *feeling* for the legal system.<sup>53</sup> Many people will have a stronger sense and feeling for how the legal system works through televised or cinematographic forms of representation than through real cases, with the live, theatrical experiences these offer. At least one affective impact of this trend may be that real court cases are evaluated more and more in the light of their being some kind of a show. Here the postal is again dominant. Cinema and television have brought law closer than ever, but without lifting a pivotal difference.

In the light of the above, and if it is clear that feelings of justice do not just exist but are the result of intensive efforts to work on them, the question is what happens if contradictory forces are at work, or such a complex mixture of forces that feelings of justice become volatile instead of being the anchor in the struggle for law.

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53 One study addressing this is Peter Goodrich and Christian Delage, eds., *The Scene of the Mass Crime: History, Film and International Tribunals* (London: Routledge, 2012).

#### 4. From Value Relativism to Incompatibilities of Interest

In terms of the historical contextualization of Jhering's 'struggle for law', it is important to note that, next to the *Sozialfrage*, Jhering was developing his thoughts in a Germany that was rapidly growing towards becoming a coherent nation state, with the construction of modernized, codified, positive law as its necessary anchor point. When Jhering was considering the struggle for law, the frame that kept that struggle productively together was a nation-state that hosted or facilitated a variety of collectives and private entities that embodied considerable differences of interests and values, but did not threaten the communal frame that kept them together. There is a pivotal difference, here, between value relativism and legal plurality on the one hand, and value disparity and legal antagonism, on the other. In this context, the question is whether populists' tactical use of rules and procedures takes the rule of law to be an unquestionable frame, or whether this use holds and promises the potential of legal antagonism.

The struggles at stake appear to coincide with Chantal Mouffe's distinction between productive political agonism and the disruptive force of antagonism.<sup>54</sup> With the first, Mouffe indicated the forcefield of politics as a matter of relentless struggle. With the second she considered that in the domain of the political, incompatible positions may play a role, which can bring actors into a dynamic of antagonism. Translated to the domain of law, Jhering's struggle is a matter of productive agonism, and not of divisive antagonism. In fact, if law and justice are to be preserved, the struggle should never become an antagonistic one.

As for antagonism, in his analysis of extreme left-wing social media discourses in Israel, Noam Gal, an expert on visual culture, noticed their intensive efforts in terms of 'boundary work'.<sup>55</sup> This 'boundary work' concerns all of the more or less combative attempts to draw a boundary between one group and another. As Gal notes, irony has a dominant role in this work. This is in line with one of the most important studies on

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54 Chantal Mouffe, *On the Political* (London: Routledge, 2005).

55 Gal, *supra* note 12; Gal was building forth here on the pioneering work of T.F. Gieryn, 'Boundary-work and the demarcation of science from non-science: strains and interests in professional ideologies on scientists', *American Sociological Review* 48, no. 6 (1983): 781–795. Later the term was used in socio-cultural contexts, with S. Friedman and G. Kuipers, 'The divisive power of humour: comedy, taste and symbolic boundaries', *Cultural Sociology* 7, no. 2 (2013): 179–195; Naom Gal, L. Shifman L. and Z. Kampf, "'It gets better': Internet memes and the construction of collective identity", *New Media & Society* 18, no. 8 (2016): 1698–1714.

irony by Linda Hutcheon, which notes that irony has an ‘edge’ that makes it intrinsically dependent on an in- or out-logic. When Hutcheon argues that ‘the final responsibility for deciding whether irony actually happens in an utterance or not [...] rests, in the end, with the interpreter’,<sup>56</sup> she does so in the context of a group dynamic that separates the ones who recognise the irony from those who do not. The resulting in- or out-logic has a benign and an aggressive edge. On the one hand, it may allow people to live within a system ironically, as when, for instance, they do not fully agree with a legal system or the judiciary and can address the ones embodying it ironically as ‘your honour’. To those who understand the irony, the person addressed with an ironic ‘your honour’ is not considered to be honourable, really. So s/he is ‘out’, in a sense, but benignly so. Or, even though the use of irony ridicules authority, here, it still leaves it intact.

The more aggressive edge of irony resides in its potential to make others feel they are indeed ‘out’. This could still fall under the heading of agonism or struggle, in that the irony only has shifted from benign to being felt to be painful. In the latter case the authority of judges is questioned, but not lifted. As Gal noted, however, the ‘out’-part of irony can become antagonistic when groups or communities are drawn out of their context through the use of social media. If irony depends on an in- and out-logic, this in turn depends on group demarcations, or contexts, within which the irony is sensed. Yet the ‘context collapse’ studied in social media is the result of the fact that such media, like Twitter (to mention just one), ‘flatten out multiple audiences’.<sup>57</sup> That is to say: audiences that would act separately within their own context (family, neighbours, friends, colleagues, acquaintances, religious communities), are now brought together on one platform that takes people out of recognizable contexts. If irony is used in this context, it may work rather the other way around. Whereas with Hutcheon the recognition of irony creates an ‘in’-sphere with a benign or less benign attitude to someone who is considered to be ‘out’, the use of irony in what Gal defined as ‘collective context collapse’,<sup>58</sup> may have the effect of aggressively throwing others out, namely those who do not get the irony. With the phrase ‘collective context collapse’, Gal noted

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56 As Linda Hutcheon pointed out, irony is not a textual attribute but something that happens in relation to an audience. See *Irony's Edge: The Theory and Politics of Irony* (London/New York: Routledge, 1995), 45.

57 Alice E. Marwick and Danah Boyd, ‘I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience’, *New Media Society* 13 no. 1 (2010): 1-20.

58 Gal, *supra* note 12, 731; emphasis in the original.



that contemporary social media do not just gather certain groups, but the collective of a populace. Within that collective, then, irony has become a marker of exclusion; and struggle makes way for antagonism.

To be sure, the potential in social media to flatten out multiple audiences is countered by their potential to gather the like-minded. In their study on platforms Van Dijck, Poell, and De Waal noticed the ‘inextricable relation between online platforms and societal structures.’<sup>59</sup> Here, platforms may become vehicles for the like-minded who consider their own interests to supersede all others and no longer consider themselves or their own interests in light of a vast array of differences held together by a society. Yet this transforms the so-called collective context collapse into a collapse of collective context. There is no longer a shared horizon.

The collapse of a shared horizon may coincide with a shift from value-relativism to the relativism of values that is facilitated by social media bubbles and platforms and is used by powers who busy themselves with what Eyal Weizman called ‘dark epistemologies’. With this phrase, Weizman made a pivotal distinction between familiar modes of deception, on the one hand, and ‘ongoing attacks against the institutional authorities that buttress facts’ on the other.<sup>60</sup> As for the familiar modes of deception, it is a given throughout history that political powers on all levels will try to manipulate the facts. One could argue that a manipulation of facts is by necessity operative in any legal case, if we include the positive meaning of manipulation as a ‘skillful handling of’. Yet this is something else than what Weizman and others note, namely that currently some powers do not just manipulate but actually thwart facts in an ‘attempt to cast doubt over the very possibility of there being a way to reliably establish them at all’.<sup>61</sup> The given that facts will always have a relative edge to them is radicalized, in this case, beyond its extreme, when a consciously produced and systemic doubt ‘to reliably establish facts at all’ is easily combined with the undoubted establishment of, and belief in one’s private facts.

If the authority of judges depends on their capacity to stand above parties in an attempt to establish the facts, this capacity not only connotes, but in a sense depends on the existence of a collective context. In taking his case to the highest council of the Netherlands, the ‘Hoge Raad’, or ‘High Council’, Wilders appeared to suggest that he would trust the rule

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59 Dijck, Poell and de Waal, *supra* note 31, at 2.

60 Eyal Weizman, ‘An Impromptu Glossary, Open Verification’, in *Propositions for Non-Fascist Living, Tentative and Urgent*, eds. Maria Hlavajova and Wietske Maas (Cambridge/MA: MIT Press, 2019), 141–164, 148.

61 Weizman, *supra* note 60, at 150.

of law as a matter of collective context, and that he respected the task of judges to establish the facts to the max of their ability and in good faith. Yet, as became clear through his remarks earlier in the development of the case, or during a session of the Dutch parliament on 17 September 2020, he will only trust the rule of law if it rules in his favor. If it does not, the Netherlands are, according to Wilders, no longer a *Rechtsstaat*. In parliament he stated that, because courts had declared him guilty of group defamation, the Dutch *Rechtsstaat* is ‘broken and corrupt’.<sup>62</sup> Here he joins the chorus of populists in their ‘ongoing attacks against the institutional authorities that buttress facts’. The struggle *for* law does not simply shift into a struggle *against* law, as a consequence. Rather, the potential of plurality in any system driven by differences of interest is attacked and short-circuited in a desire to make one interest rule. Differences of interest make way for incompatibilities of interest.

Here, one final and pivotal element of Jhering’s analysis of the struggle for law needs to be addressed. To Jhering, the struggle for law was not simply propelled by private interests but by people who felt that they had been hurt and who considered it a threat to their character if they did not protest against this violation.<sup>63</sup> This point made legal scholars Carel Smith and Harm Kloosterhuis argue that the struggle for law concerns ‘the poetry of character’. The term ‘poetry’ might be slightly misleading, for the character at stake is not a matter of aesthetics. Basically, character is a matter of ethics, here. Jhering’s variant of the Anglo-Saxon ‘reasonable man’ concerned upright persons who did not attack the possibility of establishing facts but who instead wanted to set things straight legally, acting in good faith. Yet when feelings of justice become a material for populists to play with, in a skein of cultural techniques, algorithmic bubbles, and sometimes straightforward manipulations but also dark epistemologies, acting in good faith may no longer be a generally operative principle. In such circumstances, the rule of law is threatened, and so is society at large.

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62 In the original phrasing: ‘failliet and corrupt’; see PVVpers, ‘Geert Wilders: “De rechtsstaat is failliet en corrupt premier Rutte”’. *Youtube*, 17 Sept. 2020, <https://www.youtube.com/watch?v=mauSy2PPO2U>.

63 Harm Kloosterhuis and Carel Smith, ‘De strijd om het recht is de poëzie van het karakter’, *Ars Aequi* 69, April (2020): n.p.