

# The Judge On Facebook; Neglecting A Persistent Ritual?

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## **Abstract:**

*In many social realms, social media are employed by institutions to establish direct relations between their representatives and their clients or customers. In this article I explain why the civil law judge cannot be expected to begin using social networking sites to advance the transparency of the judicial decision-making process and establish a relatively open, form-free interaction with his or her 'clients'. The hybrid character of social media does not allow judges to utilize this form of communication to open up the 'backstage area', revealing the actual complex dynamics of the decision-making process, and transparently connecting the judicial 'onstage' performance in the courtroom session with the judicial 'onstage' performance when issuing a decision. On the one hand, social networking sites are direct, interactive, informal, and personalized communications media; but on the other, they are publicly available, open and basically perpetual record sites. Their direct, interactive, informal and personalized character is highly compatible with the multimodal, form-free self-representation of the modern judge in the courtroom. However, the media's public character makes them also part of the public performance of a judge issuing a decisions. This performance is characterized by a unimodal, formal self-representation. Legal sociologists as well as discourse scholars stress how heavily this continual process of public judicial self-representation is part of a persistent ritual that conflicts with direct, interactive, informal and personalized communication.*



## **Rezumat:**

*În multe domenii sociale, rețelele de socializare sunt folosite de instituții pentru a stabili relații directe între reprezentanții lor și clienții lor. În acest articol autorul explică de ce judecătorul de drept civil nu poate fi de așteptat să înceapă să utilizeze site-uri de social networking pentru a avansa transparența procesului de luare a deciziilor judiciare și a stabili o interacțiune informală relativ deschisă cu „clienții” săi. Caracterul hibrid al rețelelor sociale nu permite judecătorilor să utilizeze această formă de comunicare pentru a deschide „zona de culise”, dezvăluind dinamica complexă a*

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procesului de luare a deciziilor, prin conectarea transparentă a activității judiciare „pe scenă”, în sala de judecată, cu activitatea judiciară „pe scenă”, în luarea deciziei. Pe de o parte, rețelele de socializare sunt directe, interactive, informale și personalizate pentru comunicarea mass-media; pe de altă parte, acestea sunt disponibile publicului, deschise și permit înregistrarea practic perpetuă pe site. Caracterul lor direct, interactiv, informal și personalizat este foarte compatibil cu auto-reprezentarea multimodală, informală, a judecătorului modern în sala de judecată. Cu toate acestea, caracterul public al mass-media face ca ele să reprezinte o parte a activității publice a unui judecător care ia decizia. Această activitate este caracterizată de o auto-reprezentare unimodală, formală. Sociologii, precum și specialiștii în comunicare au subliniat cât de puternic este acest proces continuu de auto-reprezentare publică judiciară, parte dintr-un ritual persistent care intră în conflict cu comunicarea directă, interactivă, informală și personalizată.

**Keywords:** Judiciary, communication, legal sociology, civil law judge, social media, self-representation, decision-making process

### Introduction<sup>200</sup>

What would it be like if it were standard procedure in Dutch administration of justice to transparently communicate a court's decision by having a judge upload an interactive page to Facebook or some other widespread social networking site? In many realms, social media are employed by institutions to establish direct relations between their representatives and their clients or customers. In the Dutch judiciary, a debate ensues about the legitimacy of the administration of justice in the modern society, resulting in, amongst other things, a 500-page report of the Wetenschappelijke Raad voor het Regeringsbeleid (Scientific Council for Government Policy) (Broeders et al.,

2013) about the desirability for more transparency in justice. Although this report also includes voices that doubt whether increased transparency is the answer to the supposedly decreased legitimacy, it may nevertheless be interesting to reflect on a system in which the bench uses social media to give the general audience as direct and complete an insight as possible into its working methods, considerations, procedures and operations.

Imagine what this could look like: a judge, acting as the responsible 'case-manager', publishing a decision in the form of an interactive page on Facebook, recording the entire procedure – *onstage* in the courtroom as well as *backstage* in the black box of the courtroom offices<sup>201</sup>

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<sup>200</sup> I want to thank the anonymous reviewers as well as the editor for their vital comments; they really helped me to articulate the analysis.

<sup>201</sup> These terms *onstage* and *backstage* refer to the theatrical metaphor that Erving Goffman developed in *The presentation of self in everyday life* (1973, first published in 1959). In social interaction, as in theatrical performance, there is a front region where the actors (individuals) are on stage in front of the audiences. This is where desired impressions are highlighted. There is also a back region that can also be considered as a hidden or private place where individuals can set aside their role or identity in society. Using this analogy the judge

performs twice on stage: during the courtroom session and when presenting her or his (written) opinion. In between there is an backstage episode, taking place in the back-offices of the court, invisible for the 'audience' (the public) during which deliberations take place, a decision is reached, the opinion is produced, often in complex administrative routines. *Transparency* can be defined as an insightful and predictable relation between onstage appearances of the principal actors. If transparency is suboptimal it may be improved by re-enacting the backstage area as if onstage. Social media are known to enable this re-enactment (Sternheimer, 2012) and can therefore be considered fit for this purpose.

– making all non-confidential materials available, and inviting comments. Let us imagine the following format.

*Anchoring the case*

1. At the top of the Facebook ‘page’, we find core information about the court; in the left-hand margin there is a small number of buttons linking users to core information about legal tenets relating to the case, and to an outline of the standard court procedures.

2. The page links to statistics for this type of cases: how many of such cases are tried per year, what the outcomes are, what the differences between the courts are, and so on.

3. Options are provided to later add links, updating the page with information on further legal or social developments in this case.

*The decision as such*

4. The core content of the page can roughly resemble a written judicial decision, although all the information that is not relevant for a broader audience (such as the names of the parties, the account that formal prerequisites are met, and so on) is hidden behind hyperlinks, to be accessed as pop-up screens if one so wishes. The judge is encouraged to insert relevant images and spoken declarations in the main text.

*Access to the ‘front-office’*

5. In relevant places in the text, there are links to the filed arguments of the parties to advance opportunities to get a ‘non-judge-mediated’ access. The arguments of the parties may be built on multimodal materials; the parties are encouraged not merely to tell, but if possible and preferably to demonstrate their legal dispute in the context of the social problem that keeps them divided.

6. In relevant places, the text links to episodes of the video-recorded court

sessions, providing access to the first, front-office performance of the judge in interaction with the parties.

*Access to the ‘back-office’*

7. The page links to a timeline graphic that records the handling of the case, front-office as well as back-office: who has been working on this case, when, for how long, and doing what?

8. The page links to a graph of the timeline that displays who has been working on the writing of the decision, when, and how? The text of the decision reveals its own back-office origins, at a minimum defining the case processing standard steps for this type of cases which are automatically generated by the system, and which parts are specifically written for this opinion.

*Access to the judge*

9. In the top right-hand corner there is a photo of the judge, which can be clicked for a brief introduction of the judge, written by the judge him or herself, frequently updated to show other social media activity and links.

10. The judge uploads a video clip in which he or she summarizes his or her opinion and adds his or her evaluation of how the court’s actions resolved the legal dispute and how these actions relate to the underlying issue that keeps parties divided.

11. The judge as the responsible ‘case manager’ explicitly invites ‘visitors’ to like or dislike the publication as a sign of public support. The audience is invited to add comments.

In this article, I explore why this still rather common idea appears to be at odds with certain essential features of administering justice, in particular in the civil law tradition. This explanation is rooted in the hybrid character of social networking sites. Social media sites are on the one hand direct, interactive,

informal, and personalized, but on the other hand they are open public sites and basically perpetual. Their direct, interactive, informal, and personalized character is compatible with the *multimodal, 'actor network-embedded'*<sup>202</sup>, *form-free self-representation* of the modern judge in the courtroom, discussing issues that keep parties divided. But the media's public character makes them also part of the public performance of a judge issuing decisions. The image of the judge here is currently characterized by the *unimodal, 'punctualized'*<sup>203</sup>, *formal self-representation*. I will argue that this self-representation of the judge accounting to the public is part of a persistent ritual that renders it incompatible with direct, interactive, informal and personalized communication. Therefore utilizing social networking sites to increase transparency by connecting the courtroom performance with the judicial 'onstage' performance when issuing a decision, partly revealing the *backstage* decision making processes, is as yet not an option.

In section 2, the two contrasting 'onstage' self-representations of the administration of justice will be discussed. In the courtroom during the hearings, one observes the flexible use of many modalities of communicating (*multimodal*), the judge showing awareness that the conflict results from complex

dynamics determined by a large network of human and non-human actors (*'actor-network embedded'*), often deliberately using and allowing free formats in the interaction between participants (*relatively form-free*).

However, in conveying the adjudication, judges tend to restrict themselves solely to (written) verbal argumentative discourse, working towards one final paragraph in which the legal issue is decided (*unimodal*), thus hiding the insights of complex back-office processes in a black box emblematically represented by the Judge (*punctualized*), and the entire process leading up to the decision being sublimated in the Judge applying Law on Facts, almost entirely determined by formalisms (*formal*). We see this unimodal, punctualized, formal face reflected in press-mediated representations. It also dominates when the judiciary presents itself in public (section 3).

In section 4 the sociological explanation for this dual self-representation is reviewed, more specifically the explanation provided for the dominance of the *unimodal, punctualized, formal* self-representation when accounting to the public for what is done. French legal sociologists (Latour, Bourdieu, Legendre) as well as discourse scholars (Mazzi) develop a sociological and semiotic perspective on this ritual of universalization.

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<sup>202</sup> I adopt this concept of *actor-network* from Actor Network Theory (Latour, 2005). In this theory, the construction of meaning is in and of itself considered the product of an element of heterogeneous networks of human and non-human, material and semiotic entities, existing in a constant making and remaking.

<sup>203</sup> Punctualization is a central concept in ANT. Temporarily, or for certain purposes or in certain contexts, parts of complex dynamic networks may be considered, treated, approached, or even function as a kind of input-output unity, its further network connections being 'neglected', its internal

complexity being treated as a black box. John Law writes (1992): "Punctualization is always precarious; it faces resistance, and may degenerate into a failing network. On the other hand, punctualized resources offer a way of drawing quickly on the networks of the social without having to deal with endless complexity". In the administration of justice we see the judge represented in the written decision as Judge, a substitute for the social and institutional complexity of the processes in the back-office. Making the black box transparent, as the Facebook judge is supposed to do to a certain extent, affects this image of the Judge (see section 4).

In section 5 we will return to the Facebook proposal. By now we can understand this as a proposal that increases transparency, but conflicts with the necessity of an ideologically and sociologically embedded ritual of the judiciary. From the analysis, it follows that the relation between the judiciary and social networking sites as a means to enhance transparency will have to be ambivalent, as will be the relation between the judiciary and all proposals to increase transparency that are incompatible with the performance of the persistent ritual of universalization.

### **1. The Image of the Administration of Justice in Court**

The administration of justice is traditionally symbolized by the blindfolded Lady Justice, a sword in the one hand, balance scales in the other, referring to the act of administering justice. Another image might also be suitable: a person resembling the two-faced Janus, though without any negative connotation. The one face is the face of the judge presiding over court sessions; the other face is that of the decision maker as she or he appears in her or his written decision. The one face is open, inviting and empathic; the other face is formal, detached and stern. Obviously, our imaginary Facebook publication would partly reflect the first face and therefore profoundly affect this second face. That is why it is important to try to understand the underlying dynamics that determine the current two-faced identity.

First, we focus on the empathic image presiding over court sessions. Courtroom procedures result from dispute that originates in the outside world. Additional time periods and events are added to the dispute that obviously maintains numerous relations with extra-courtroom discourses. Afterwards, but also simultaneously with the court room

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actions, the dynamics may continue elsewhere. This 'open network' in which the dispute is embedded is recognized and acknowledged by (Dutch) practicing judges in general, and even more specifically among single-speaking judges: judges in administrative law, police court judges, cantonal judges ('kantonrechters'), magistrates of the juvenile courts, and so on.

It is recognized explicitly in Dutch administrative legal procedure, due to a project called 'De nieuwe zaaksbehandeling' ('the new (way of) case processing'), where administrative judges are instructed and trained to expand beyond the legal issue that parties bring to court, and to explore and investigate the underlying issue that keeps parties divided. The process is defined and must be completed through specific techniques employed in preparation of and during the court sessions: the judge being active, open, listening, investigating, and if possible mediating between parties. An administrative judge in a one judge session in the Netherlands, particularly in his or her approach to the civil party, will often employ an almost form-free interaction, giving a lot of explanation or inviting the representative of the administrative body to do so. The judge may show signs of compassion to some extent, propose directions for a solution, and may directly raise issues that touch upon the underlying problem.

This first image (largely the result of consistent self-representation) can be observed on a daily basis in Dutch, one judge single hearing sessions. Several cases, which are considered relatively straightforward in a technical legal sense, are dealt with in a single morning or afternoon, each case scheduled to take up no more than about 30-45 minutes.

Rephrased in more technical terms, such courtroom performances make use of numerous flexible semiotic modalities and rather free forms of narration in which a plurality of human and non-human 'actors' can find a place. Courtroom procedures are thus far-removed from what one may characterize as *unimodal, punctualized, formal* discourse. This is not to say that all 'actors' that co-determine the network can and will be overtly discussed. The assumption of the judge being 'unconnected' in whatever sense with the issue, specifics of the case, the parties and with underlying issues is usually maintained, as is the assumption that procedural 'actors' such as time pressure, court policies affecting judge and clerk, the interrelation between them, and so on, do not influence the dynamics of the network. However, characterizing the front-office processes as *actor-network embedded* indicates a luminous contrast with the second face, to be discussed in section 3.

Generally speaking, the front-office performance of the judge is appreciated, according to the significant results of a long series of customer satisfaction surveys held in the Netherlands. In six surveys held between 2002 and 2011, all with large numbers of respondents,

professionals as well as lay persons were asked about their experiences immediately after their participating in a court session. They all showed constant high scores on questions concerning the front-office procedures.<sup>204</sup> It is clear that these data do not show a decrease in legitimacy. Scores reporting clients' evaluation of many aspects of the procedure stay constant or slightly increase. The onstage, front-office image of the judge is mostly well-appreciated.

## 2. The Public Image of the Administration of Justice

Mediation can be inappropriate for settling a dispute (for which there may be many reasons) and a judicial decision on the legal issue may be required. That is the moment where 'the box closes'. Parties are sent home, and physically leave the court. The files are sent to the back office and a period of silence ensues. Some weeks later, the 'backstage' judicial face appears onstage again, in the form of a written decision, as parties often waive a right to require an open court session where the decision is read. Barring infrequent exceptions, this second performance can be characterized as predominantly *unimodal, punctualized and formal*.

Civil law judicial written decisions share a standardized format. The first part focuses on the history of the process and the formal legal issues involved. What follows is the identification of the 'factual' issues. After this, the formal, often paraphrased arguments of the parties are summarized and recorded, along a legally relevant criterion. Relevant legislation and

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<sup>204</sup> 2002: *Open voor publiek: klantwaarderingsonderzoek in zes rechtbanken*; 2004: *Een ogenblik geduld alstublieft...: analyse van klantwaarderingsonderzoeken bij de gerechten, 2001-2004*; 2006: *De zaken meer op orde. Klantwaarderingsonderzoek in tien rechtbanken*; 2006: *Iets duidelijker a.u.b. Klantwaarderingsonderzoeken*

*onder gerechten in de periode 2003-2005*; 2008: *Tevreden genoeg... Klantwaarderingsonderzoeken onder gerechten in de periode 2005-2007*; 2011: *Klantwaardering Rechtspraak 2011. Onderzoek onder professionals en justitiabelen bij gerechten*. Also compare Van den Hoven 2013 for an overview and basic analysis.

jurisprudence are mentioned, mostly in few selective paraphrases. If complicated, this format is repeated for each issue and structured to record the argument, issues of the matter in controversy. At the end of the treatise, we get the decision. The decision is first presented as a conclusion, resulting from the arguments, and is subsequently repeated as a declarative statement, constituting the valid legal position. Formalisms dominate the opinion, in particular those that hide interpretative elements, making abundant use of nominalizations and passive constructions. The order is predominantly that of positions leading to a conclusion; seldom will a standpoint be conveyed first and argued for thereafter. The court is sometimes visible as an actor, but the judge as a person is absent in the opinion. All in all, as far as the black box of administering justice is made seemingly transparent, one can observe a mechanism of deductive logic, subsuming established facts under valid rules, resulting in inevitable inferences (Mazzi, 2007; Van den Hoven, 2011). In this way, the judge monopolizes the narrative and all dynamic network relations are seemingly absent; basically the opinion does not overtly show any dynamics at all.

The administration of justice most often and specifically presents itself 'publicly' in these judicial decisions for individual cases. However, although a portion of these documents are published, they are hardly noticed by the general public. Speaking about 'public image' is therefore meant in a technical sense of the judge performing the declarative act of creating a written judgment geared to the legal

community. This is clearly indicated in the double presentation of the decision, as a conclusion from arguments as well as a declaration of the legal findings.

More relevant for issues concerning legitimacy is the representation of the judge and the judiciary in the public media, because that image is visible to an audience at large. Here, the image the administration of justice presents of itself (*self-representation*) in the public media is largely buried by the mediated image constructed by journalists<sup>205</sup>. An analysis of Dutch newspapers, magazines, TV shows, relevant Internet debates and responses in social media shows a massive media attention toward the administration of justice, dominated in particular by criminal law. Though often triggered by high-profile cases that draw attention of the public media and by viral social media hypes around individual cases, the discussion tends to immediately generalize the issue. Thus a specific sanction in a criminal case, for example, may result in general and predominantly critical opinions on the sanctions policy in general.

In 2010, seven Dutch newspapers published as many as 18,242 articles about the adjudication of justice, 7.3% of the total number of articles, many with a length above average (Ruigrok et al., 2011). The press-mediated image is very much that of the punctualized, formal face in front of the formal judicial written decision. Journalists typically jump in at the moment a high-profile decision is rendered, so the formal written judicial opinion tends to be their focus. Reports about a new or ongoing trial seldom focus

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<sup>205</sup> Another complication is that there may be an inference between representations of the judge in fictional television/ films and actual representations of judicial practice in the media. This is one of the main issues investigated in the Judicial Images Project <http://judicialimages.org/>. In this project there is specific attention to the blurred boundaries that we also observe in some Dutch

television programs (see below).

<sup>206</sup> An interesting sub-issue, not to be dealt with here but entirely in line with the argument, is the semiotics of the drawings accompanying articles about criminal cases in progress. These drawings usually put the judge in a very traditional, authoritative position, similar to the way judges are depicted on official portraits (compare Moran, 2009; Moran, 2011).

on the judge(s) but instead on the suspect, the circumstances or the issues<sup>206</sup>. There may be a self-perpetuating mechanism working here: journalists, like most citizens, and even law students, are socialized in accepting the punctualized face as the 'officially valid face' and tend to interpret what they observe and report from within this framework. This official face is legitimately available as it is consistently communicated by the institution itself in its written decisions. Journalists may readily accept it as it 'explains' why the administration of justice is so distant from 'what lives in the society'.

Content analysis reveals that most of the articles appear to be slightly negative in character (Ruigrok et al., 2011: 25). It is here that the public legitimacy issue seems to originate (although, because these results are arrived at through automatic content analysis and many articles deal with negative phenomena such as crime, one must be careful in interpreting these results). What is perhaps most significant is the diversity of criticisms. All aspects of the institution are criticized: its capacity to respond adequately, competence of punishment and penalties, the court's ability and preparedness to listen, the political position of the administration of justice, the administrative role of the judge in juvenile law, the internal organization of the courts, and a number of individual decisions. However, seldom would an individual judge, as a person, be criticized. Indeed the formal, punctualized face makes the human being obscured in the institution.

The institutions of the administration of justice rarely respond publicly to this

mainly critical media debate. If the judiciary comments on incidental issues, we mainly see responses that reflect the ideologically-based punctualized face, mainly by the court's press officers. Judges involved in cases discussed do not participate, if only because of the principle that a judge is supposed to speak exclusively through her or his formal decision. Where institutional issues are concerned, the image is somewhat more diverse. However, here too, the formal, punctualized face still tends to dominate. To give just one example, on April 12, 2009, in *Buitenhof*, a national Sunday morning TV-program, the chairman of the Council of the Judiciary is asked to comment on Promis (Project Motiveringsverbetering in Strafvonnissen = improvement of reasons/grounds stated in judgments)<sup>207</sup>, after criticisms were voiced that the project has not succeeded in silencing objections to the judicial policy on sanctions in criminal cases. His response is that if that is indeed the case the judges will need to even better justify and explain their decisions. A response like that implicitly confirms the ideological punctualized image, suggesting that determining a sanction is an entirely systematic and therefore fully explicable act. While this may not have been the man's intention, an audience already framed in the punctualized image may well interpret it that way.

The institution's image in many more specialized, predominantly digital media is much richer – the majority of these being established especially for the purpose of providing more insight into the functioning and the development of the institution. The citizen who wants to know more can get a great deal of information

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<sup>207</sup> This ambitious project has been running since 2004 to improve the intelligibility of the ruling on the evidence and the determination of the punishment. Promis reports (in Dutch) can be found on <http://www.rechtspraak.nl/Organisatie/Raad->

[Voor-De-Rechtspraak/Kwaliteit-van-de-Rechtspraak/Pages/Project-Motiveringsverbetering-in-Strafvonnissen-\(PROMIS\).aspx](http://www.rechtspraak.nl/Organisatie/Raad-). Compare also Van den Hoven 2013.



about the internal developments discussed above. However, the threshold to enter the world of [www.rechtspraak.nl](http://www.rechtspraak.nl), [www.rechtblog.nl](http://www.rechtblog.nl) (started May 2013), to name just two of the Dutch sites, is obviously high and requires initiative on the part of the public. Again we see that the closer the image comes to the *internal, non-public* face, the more the depunctualized it becomes; the more public, the more punctualized and formal.

Today, all Dutch courts are on Twitter. Twitter accounts are basically used to announce items on the agenda and to refer to (summaries of) decisions. Facebook pages are created for all courts, but several courts have only published their address on it and do not show any activity at all. Incidentally, Facebook pages provide some insight to how a court works, and post some human interest information about judges and other court employees. Incidentally, a court reveals part of what actually happens in the front-office, using for example YouTube to upload fragments of the court in session (but only when orally conveying the decision, thereby largely confirming the 'second face' due to framing and the positioning of the camera). Also, they provide some information about the social context of cases, showing a partial image of a network-embedded face.<sup>208</sup> Judges acting in judicial decision making processes are almost invisible.

A wide impact can be observed in the case of popular non-fiction television programs that show judicial front-office practice. Here a question is whether we can consider this as actual images or as mediated examples. The most popular show of this kind in the Netherlands is *De rijdende rechter*. Formally speaking, we are not dealing with the trial level judicial

administration, but with binding mediation, inspired by the American TV show *The People's Court*. In this show, cantonal judge Frank Visser decides small cases. The program does show the front-office face. However, it also confirms the back-office punctualized face. After hearing the arguments of the parties to the dispute (usually next-door neighbors) and visiting the location relevant to the case, the judge rather abruptly ends the hearing, promising to decide soon. Then there is a shift of location to the studio, where the judge gives his decision on the case, and closes with a standard phrase: „This is my decision and you'll have to accept it". He briefly introduces his verdict, but does not elaborate on his decision any further. Both the abrupt ending and the final sentence predominantly confirm the punctualized face of the decision maker.

A much more advanced type of TV show is *De Rechtbank*. Here a variety of cases are dealt with, filmed in several courts in the Netherlands. We are shown excerpts from the front-office sessions. Parties give their comments. And, significantly, the judges give a brief comment. This certainly opens up the black box somewhat. However, the real back-office remains closed. Comments are exclusively given by the judges; the actual 'production process' stays invisible. The preparation of the case before the session, the deliberations, and the recordkeeping and participation with the court clerk all remain invisible. The actual decision making disappears in time-ellipses and the dynamics of the bureaucracy are absent. The step made is substantial, and the program will certainly have a positive impact by giving the judges a face, but at the same time it

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<sup>208</sup> See for example <https://www.youtube.com/watch?v=9OuxIWmHEs0>. The court of Gelderland seems most advanced and active, posting a new

item on average every 3 or 4 days, <https://www.facebook.com/rechtbank gelderland>; also compare <https://nl-nl.facebook.com/Rechtspraak>.

confirms the image of the Judge as the gatekeeper of Justice.

With regard to the presence of individual judges on social media, our main topic, we predominantly observe absence. One of the reasons is a functional one. Judges tend to assume a relation between a high social media profile and for example the chance to be challenged in future cases or increased risk of cyberstalking (Keyzer et al. 2013). There are, however, some judges with a personal face on Twitter for instance. Most famous in the Netherlands – but largely among peers and media professionals it seems – is „Judge Joyce”, an administrative judge with about 7500 followers<sup>209</sup>. But Judge Joyce exercises restraint when it comes to her own cases and courtroom practice. Some judges actively investigate how open a judge can be in this respect. An extreme example is the Romanian judge Cristi Danilet. Besides being very active on Twitter, he runs Facebook pages, a YouTube channel and a blog<sup>210</sup>. But even Danilet, although occasionally commenting on issues that relate to decisions made under his responsibility, never crossed the borders of a direct reference to decisions he was involved in himself.

In sum: in public media, in journalist-mediated representation, as well as in self-representation, the *unimodal, punctualized, formal* face of the Judge dominates.

### 3. The Persistent Ritual

Summing up so far, we see that judges show two faces in dealing with individual cases: the multimodal, network-embedded, form-free self-representation of the modern judge in the courtroom and

a unimodal, punctualized, formal image when accounting publicly for decisions made. In journalist effectuated images, we see that as yet the punctualized, formal representation dominates. Both are valid, sincere, and serve their own specific goal. The courtroom face represents the recognized participant in an open, complex, socially embedded process. The public face represents predominantly the institutionalized authority applying the Rule of Law on the established facts of the case, often characterized as distant from society, closed (punctualized), somewhat alien (formal, unimodal).

To understand ‘the judge on Facebook’ we need to recognize the persistency of this second public face. Even though nowadays the tension between the two images has increased due to impressive developments regarding the front-office face, the second face seems frozen and adamant. This remarkable feature is discussed by legal sociologists as well as discourse scholars. It is explained as representing the judge as a participant in an ideologically constructed process, founded upon deep-rooted, essential values that underlie our concept of the constitutional state. This ideology requires a ritual, emblematic self-conceptualization and self-representation. Latour in his ethnographic study on the dynamics in the French Conseil d’État (Latour, 2011, first published in 2002) provides empirical materials to elaborate on the fact that the complex social identities of courtrooms and the people working therein do not simply mirror this complex actor-network embedded face in their written discourse. Latour, rephrased in our terminology, attempts to uncover and understand why these professionals construct a self-

<sup>209</sup> [https://twitter.com/judgejoyce\\_](https://twitter.com/judgejoyce_).

<sup>210</sup> <https://www.facebook.com/cristi.danilet?ref=ts>; <https://www.youtube.com/channel/>

[UCS3VI9zwXLTjfy9UcG0bzbz;](https://www.cristidanilet.ro/)

<https://www.cristidanilet.wordpress.com/>; <http://www.cristidanilet.ro/>

image of a punctualized institution that flourishes in ritualized unimodality. Writing about a commissioner of law who in fact pleads for a major change in direction according to social dynamics, Latour observes: „He wants the judges to ‘make a significant move’ while asking them to do nothing more than ‘draw the consequences’ of ‘their’ decisions of 1906!” (2011: 187), „making them say nothing other than what they have always said, even if it was not clearly today” (2011: 188), „the only thing that is supposed to have happened is the clear affirmation of something that had already existed” (2011: 191), „everything has changed and yet nothing has changed at all” (2011: 191). Latour compares the modernistic Enlightenment institution of the Law with that other institution that is considered a product of the Enlightenment, Science. „[U]nlike scientists, who dream about overturning a paradigm [...], commissioners of the law invariably present their innovations as the expression of a principle that was already in existence, so that even when it deeply transforms the corpus of [...] law it is ‘even more’ the same as it was before” (2011: 219)<sup>211</sup>.

Although these quotes do not cover all the issues (Latour in this case, studying this specific institution, focuses on decisions concerning rather fundamental points of law), they do illustrate aptly the discrepancy between the *modus operandi* in the front and that in the back office, and the dynamics that lead to the characteristic of the self-representation in the written justification. He uncovers this as a discrepancy (or as he would probably

prefer to call it, a dynamic transition) between practice and ideology. These dynamics of the legal institution as well as its self-perception and corresponding self-(re)presentation, are based on the modernistic Enlightenment ideology of an anonymous, abstract Justice, with a claimed right to preserve its discourse monopoly, and demanding that this monopoly be respected, even by the legal subjects being judged about. This claim is based on the Platonic metaphor that legal Truth is ‘found’<sup>212</sup> instead of a legal decision being the product of a constitutive act of a subject embedded in a huge actor-network. When a concept of True Knowledge is presupposed, legal authority implies a reasonable claim on a discourse monopoly; Truth can only be told in one single way<sup>213</sup>. Such Truth is at odds with mediation; True Justice is all-embracing and therefore punctualized and formalistic; and importantly, the unimodal verbal, emblematic, non-interactive mode is an integral part of that formalism. Exactly this metaphor is also called upon by Mazzi (2007) to explain the discursive legal writing format of judicial written decisions as well as by Van den Hoven (2011) to explain the extreme resistance against reform of these discursive structures.

Pierre Bourdieu in his study of the legal field (1986) explains the endurance of these rhetorical formats on a deeper level. He considers – consistent with his theoretical framework in a section titled *La force de la forme*, Bourdieu pithily formulates the function of what he calls a rhetoric of autonomy, neutrality and universality: „Forme par excellence du

<sup>211</sup> I do not fully agree with Latour's description of the scientist, observing how conceptual systems are ‘saved’ by absorbing empirical tensions too, but I do consider his characteristic of the judicial practice evocative.

<sup>212</sup> *Legal construction* is ‘rechtsvinding’ in Dutch,

literally *justice-finding* (finding of law, conclusion of law – *Kluwer Juridisch-economisch lexicon*)

<sup>213</sup> I will not elaborate here on this claim about the ideological foundation of the European system of the administration of Law. See Israel (2001), Toulmin (1990).

discours légitime, le droit ne peut exercer son efficacité spécifique que dans la mesure [...] où reste méconnue la part plus ou moins grande d'arbitraire qui est au principe de son fonctionnement." (1986:15); „As the quintessential form of legitimized discourse, the law can exercise its specific power only to the extent [...] that the element of arbitrariness at the heart of its functioning [...] remains unrecognized." (1987: 844). In the courtroom the modern judge leads a dynamic process of problem solving; in the public presentation of her or his decision she or he represents the rhetoric of the Rule of Law. <sup>214</sup> – the juridical field as the site for a competition for monopoly of the right to determine the law. In this competition it is essential for the judiciary to symbolically emphasize the total separation between its judgments based upon the law and naive intuitions of fairness. Control of the legal text is the prize to be won in interpretive struggles. This competition between interpreters is constrained by the fact that interpretations „se présentent comme l'aboutissement nécessaire d'une interprétation réglée de textes unanimement reconnus" (1986:4); „can be presented as the necessary result of a principled interpretation of unanimously accepted texts" (1987: 818).

The psycho-analytically inspired sociologist and historian of law Pierre Legendre places this emblematic behavior into what he believes to be a general framework of how power is constructed. He considers the discourse format essential in the construction of judicial authority (Heritier, 2014). The judge's formalistic, ritualistic, emblematic discourse format can be said to represent his unique connection to that which cannot be known without interpretation,

his unique prerogative to interpret the Law to determine Justice. Legendre claims that this mechanism can be observed in the writing of the Corpus Iuris Civilis under the emperor Justinian, in the writing of the Corpus Iuris Canonici under Pope Gregory VII, right up to Kelsen's Grundnorm, the establishment of fan cultures, global branding, modern management, and, as we can see, modern courtroom practices. It is a necessity of ritualized standardization.

Judges have truly and deeply internalized this second face, just as they honestly practice the other contrasting multimodal, network-embedded, form-free face in the courtroom. However, when the two faces at the two levels create conflict, the theoretical explanations reviewed here clearly predict that the second face will persist. Proposals for innovations always need to justify themselves against the ideology underlying 'the punctualized face', the internalized model of Justice Done.

#### **4. The Judge on Facebook**

This analysis and reflection finally leads us to an answer to the initial question: why does our judge's participation on Facebook intuitively appear to be at odds with certain essential features of administering justice and what does this teach us about the place of social media in the administration of justice in a more general sense?

Social media platforms have a double identity. On the one hand, they are fast, direct and interactive. Much of the communication uses free formats, in design as well as in voice. Messages follow each other up rapidly, participants jump in and out. At the same time, however, they are public and basically

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<sup>214</sup> See Dezalay & Madsen (2012) for an excellent introduction in this framework directly related to Bourdieu's La force du droit.

perpetual. The Internet storage capacity is virtually unlimited; contributions can be forwarded, copied, embedded in new contexts. The occasions where participants have underestimated this public side of their Tweets, Facebook posts, blog comments, and so on are numerous. On the one hand social media connect to the multimodal, depunctualized, form-free, front-office public face, but at the same time they relate to the unimodal, punctualized, formal records face.

We find this reflected in the Facebook proposal. On the one hand, it is a straightforward continuation of the front-office face of the judge in individual small cases. It fully fits into the idea of increased transparency. Indeed, it opens up the black box to a higher degree than the TV program *De Rechtbank* does (but it is conservative in that the responsible judge controls the publication from the side of the institution). For that reason it should be warmly embraced. On the other hand, however, due to the double identity of social media, such a publication is inevitably also part of the public face of judge. It belongs to that part of the judge's identity that requires emblematic, ritual behavior. This seems incompatible with the multimodal, network-embedded, interactive and informal identity of social platforms, even if the black box essentially remains closed. Of course, one can develop a more 'traditional, punctualized' presence on Facebook. Choosing that side of the dilemma confirms the second face to the public at large.

If we go back to the Facebook-procedure outlined at the beginning, we see that some elements create a tension between the two identities of social media platforms. The informal, interactive character conflicts with the emblematic, ritual behavior required. Items 7-8 somewhat open up the back-office and items 9-11 reveal something of the judge

as the decision maker, but more important seems to be the clean break from the ritualized formats. Reflecting on the imaginary proposal makes clear why the relation between the administration of justice and the social media is necessarily ambivalent; ambivalent not in a shallow way, but deeply rooted in the double face that, as yet, seem inherent to the civil law administration of justice.

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