Rule of Law Programme Middle East/North Africa

KONRAD ADENAUER STIFTUNG

Impartiality of Judges and Social Media

Approaches, Regulations and Results

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INTRODUCTION

Strengthening judicial independence and impartiality is one of the key priorities of the work of the *Rule of Law Programme Middle East/North Africa* of the Konrad-Adenauer-Stiftung. Impartiality of judges constitutes an essential element of the principle of Rule of Law.

Justice cannot be rendered without competent, unbiased and impartial judges that are applying the law and serving the law only. According to Art. 47 of the Charter of Fundamental Rights of the European Union "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." A judge may not rule on cases in which he or she has an interest or is biased towards one party.

Social media has become increasingly important in recent years. As quickly as social media has integrated itself into home life, business, politics and more, it has also progressively embedded itself within the judiciary. However, the use of social media by a judge - also in his or her capacity as a private individual - must always be considered in light of judicial impartiality and integrity.

While the use of social media by judges may lead to the perception of the latter being biased or subject to inappropriate outside influences, and thus taint the image of the judiciary as a whole, it may also create opportunities to increase the public´s understanding and trust in the judiciary. The question is relevant for public statements by judges, but has gained a momentum with the easy and wide-spread use of social media. Under what conditions and to what extent is the use of social media by a judge permissible, what are the limits for a judge still being considered unbiased and impartial?

The question of whether and under what conditions the use of social media by a judge is being met with the perception of bias, is assessed differently from country to country. Reasons vary and are related to different legal tradition, the way that individual rights and freedoms are balanced with other principles, the specific structures of the judiciary and its administration, and the role and function attributed to a judge as such.

Overall, two interpretations seem to prevail: According to one interpretation, judges are deemed impartial even if they have made partial statements – in publications or for example on social media – before the trial as long as certain standards are kept (*i.e.* no family relation to a party, no financial interests *etc.*). This definition is favored in Germany, Austria and many other European countries.

In Germany, a judge may be rejected by one of the parties if there are grounds to suspect partiality in any kind of proceeding.[1] Grounds for suspecting impartiality include closeness of the judge to one of the parties, participation of the judge in pre-trial rulings or gathering of evidence, procedural errors, statements about the parties, ideology of the judge, and vested interests in the outcome of the trial. Petitions for rejecting a judge are particularly common on the basis of statements made by the judge during trial. Such petitions are granted only if the statements leave no room for interpretation. Statements made before the trial, including written statements in published papers or statements in the social media, are not a sufficient basis for rejecting a judge, however. Judges are deemed to be researchers who continually seek to shape their opinion on legal matters (Bundessozialgericht). This is particularly the case for judges of the constitutional court (Bundesverfassungsgericht) who have done research on a legal question before that question is brought before them (Art. 18 *Bundesverfassungsgerichtsgesetz*). Doubting impartiality on the grounds of ideology – including political and religious affiliation - is rarely accepted as a basis for rejecting a judge. Rare exceptions include a case in which a lay judge refused to take off her headscarf for ideological reasons (Landesgericht Dortmund 2007, 3013).

In Austria grounds for recusal of a judge or for rejecting a judge have to be based on objective facts, not on the subjective impression of the judge himself or the impression of a party. Differences in the interpretation of laws and statements made by the judge – including in the social media - are not deemed sufficient (Oberster Gerichtshof 14 Os 189/87 and 13 Os 181/01).[2] Regarding political activity and statements, as a general principle, protected by the German Constitution and similarly by the Austrian Constitution, a judge may express his political opinion as any other citizen and may engage in

[1] For cases of civil law see Art. 41 ff. of the *Zivilprozessordnung*, for criminal cases Art. 22 ff. *Strafprozessordnung*, for administrative cases in Art. 54 *Verwaltungsgerichtsordnung*, and for constitutional cases Art. 18 *Bundesverfassungsgerichtsgesetz*.

[2] For a comparative overview on the regulations of all EU countries regarding impartiality (including the use of social media), see Tanja Maier: *Befangenheit im Verwaltungsverfahren: die Regelungen der EU-Mitgliedstaaten im Rechtsvergleich*. Berlin 2001; a comparative view on judges' rights to freedom of expression in Sweden, Austria and Germany, including other European countries: Report on the Freedom of Expression of Judges. Adopted by the Venice Commission,at its 103rd Plenary Session (Venice, 19-20 June 2015).

political activities as well. Nevertheless, professional service has also its demands regarding the conduct of judges, and ultimately, the expression of a political opinion of a judge has to be distinguishable from an official statement.

A second interpretation can be distinguished, commonly favored for example in Great Britain, the United States and Canada. Here, it is more widely considered that public statements – including on the social media - may provide grounds to suspect partiality and may force a judge to recluse himself.

In Great Britain partial statements made by the judge before trial are deemed grounds for suspecting his impartiality[3], particularly if the judge has written an expertise on a question before trial (Re Godden). The question whether a judge may hold a political mandate is discussed.

In the United States, two sections of Title 28 of the Judicial Code provide standards for judicial disqualification or recusal. Section 455 provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The section also provides that a judge is disqualified "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding"; when the judge has previously served as a lawyer or witness concerning the same case or has expressed an opinion concerning its outcome; or when the judge or a member of his or her immediate family has a financial interest in the outcome of the proceeding. Section 144 provides that under circumstances, when a party to a case in a United States District Court files a "timely and sufficient motion that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favour of an adverse party," the case shall be transferred to another judge. In general the "extra-judicial source rule" applies, meaning that, to warrant recusal, a judge's expression of an opinion about the merits of a case, or his familiarity with the facts or the parties, must have originated in a source outside the case itself, as per the U.S. Supreme Court decision in Liteky et al. v. United States.

In Canada, judges must avoid words, actions or situations in their personal lives that might make them appear to be biased or disrespectful of the laws they are sworn to uphold. Outside the courtroom, judges do not socialize or associate with lawyers or other persons connected with the cases they hear, or they may be accused of favouritism. Involvement in the political and civic life of the country is not banned outright. In fact, according to the Ethical Principles of the Judiciary “the judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments.”

While judges have been more willing in recent years to make public speeches or agree to media interviews, they refrain from expressing opinions on legal issues that could come before them in a future case. “In short, a judge who uses the privileged platform of judicial office to enter the political arena puts at risk public confidence in the impartiality and the independence of the judiciary. …a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally” (Ethical principles for the judiciary of Canada). This, in Canada, has entailed a more restrictive environment for judges regarding their use of social media.

Whilst different interpretations and approaches to what may still be permissible for a judge to still be considered impartial, a general trend to resort to ethical principles and court internal codes of conduct can be observed - the need for them, their use and consequences not being undiscussed.

To better understand the reasons behind the different interpretations and approaches, one may consider the fundamental differences between the continental European systems where judges are bound by a dense and systematic “net” of codified laws and regulations, and the Anglo-American case law systems and its inherent expectations towards the judge as a person.

Given the fact, that no systematic analysis or comparative exists, and that many jurisdictions in the region and beyond are struggling with situations that are considered critical when it comes to judges making statements on social media, an initial and limited attempt has been undertaken and its results are being presented here.

In March 2019, the *Rule of Law Programme Middle East / North Africa* organized an international expert meeting in Cadenabbia, Italy, on *Impartiality of Judges and Social Media: Approaches, Regulations and Results*. In the course of the event, legal scholars, law professors, lawyers and judges from the US, Canada, Germany, Lebanon, Tunisia, and Morocco traced, compared and evaluated different approaches that may be or already have been implemented to deal with the

[3] Cf. William Wade and Christopher Forsyth, *Administrative law*, 10th edition, New York 2009.

challenges resulting from statements made by judges on media - especially social media. Among the key topic of discussion was the question of how a judge's freedom of expression and the requirement of impartiality should be balanced.
We have tried to adopt a comparative approach, including experts from countries that differ in legal traditions and regulatory concepts and shed light on systematic differences and the variety of approaches on the relatively new phenomenon of social media and its impact on the judicial function.

The results of this expert meeting have been assembled in this publication:

In "*Judicial Ethics in a World of Social Media",* Keith R. Fisher, Principal Court Consultant and Senior Counsel for Domestic and International Court Initiatives at the National Center for State Courts in the US, examines if and how already existing US-rules of judicial ethics and international rules, such as the Bangalore Principles of Judicial Conduct, are applicable to the social media use of individual judicial officers. He describes the challenges resulting from the use of social media by judges as "new wine in old bottles" as the social media are "ultimately an extension of public fora that already exists". The author, therefore, suggests applying traditional judicial ethics scenarios and standards to the social media phenomenon, while highlighting that judges need to be particularly cautious and circumspect in order to participate responsibly in social media activities.

The modern challenge for Canadian courts to reconcile the tension between protecting the principle of impartiality is developed by Michelle M. Somers, Employment Adjudicator, Somers Arbitration in Toronto, Canada, in her paper "*The Impartiality Principle and Judges Online: Too Dangerous to Speak, Too Dangerous Not to?"* It is this tension that places limits on judicial expression, and is heeding the call for greater transparency about the work of judges and courts. The relationship between the courts and the media, including social media, is seen as playing a significant if not singular role in the attempt to meet this challenge. Thus, in a departure from a "history of silence", courts themselves have taken the opportunity to increase public trust by communicating directly to members of the public using various media channels. However, a similar engagement with social media by individual judges has not followed. In her article *The Impartiality Principle and Judges Online: Too Dangerous to Speak, Too Dangerous Not to?* Michelle M. Somers explores why that is, also shedding light on the Canadian process of sanction against federally appointed judges who are investigated for misconduct where a media presence is involved.

Also on Canada, Lisa Taylor, Assistant Professor and Undergraduate Program Director School of Journalism, at Ryerson University in Toronto, Canada, presents the findings of a survey conducted by the Canadian Centre for Court Technology in 2013 in "*The Use of Social Media by Canadian Judicial Officers".* The survey identifies, in particular, the nature and extent of social media use by judicial officers in Canada, the degree to which best practices (guidelines, rules and advisory opinions) have been developed and finally gives recommendations concerning the use of social media by judicial officers. Its findings point to a general lack of social media policies for judicial officers in Canadian courts and tribunals and a lack of awareness by chief judges or justices of use of social media by members of their courts or tribunals.

With regard to the use of social media by judges of judicial courts and the constitutional court in Morocco, Nadir El Moumni, Professor at University Mohammed V, Faculty of Law, Economics and Social Sciences-Souissi-Rabat, Morocco, highlights that the current legal framework in Morocco is based on the assumption that social media are a neutral tool of communication and therefore only the content and the circumstances of its use may be subject to regulation. In his paper *"Use of Social Media by Judges, Pertaining Definitions and Regulations: A Normative View from the Moroccan Context"* he thoroughly draws from the constitutional and legal framework, explaining in what way the legal and ethical frameworks in force would be sufficient to deal with the matter judicially as well as disciplinary. Nadir El Moumni also notes, that under Moroccan law, the *Superior Council of Judicial Power* in consultation with professional associations of judges, has the competence to establish a code of judicial ethics, which may theoretically include regulation of social media use by judges. The author establishes in the last part of his paper key elements for a possible approach to regulate the use of social media by judges, arguing for the "alignment approach". As it is impossible to predict or to circumscribe all the situations or frame the infinity of factual cases, especially in the current context of technological evolution, the alignment approach, that focuses on guarantees, proceeds from fact to norm by continuous codification, would ensure, in his opinion, a correct balance between the judge as a user of social media, the judge as a judge and the judge as a citizen.

"Online Freedom of Expression of Judges in Tunisia", by Aymen Zaghdoudi, Assistant Professor of public law at Carthage University in Tunisia, is based on the understanding that the use of social media by judges is part of their right of freedom

of expression, while referring to Art. 19 of the ICCPR[4]. Restricting their freedom of expression in absolute terms would be unjustified and should in any case respect the principles of necessity and proportionality. To regulate the use of social media among judges, the author suggests that self-regulation would be the most compatible system in the light of the international standards related to the right of freedom of expression. In Tunisia, the Judicial Council or the judges' association could be competent to develop a toolkit on the use of social media by judges to be used in line with judicial ethics.

In "*The Professional Law Governing the Private (Social) Media Statements of Judges in Germany*", Johannes Schmidt, Chairman of the Federal State of Hessen Judges Association (Deutscher Richterbund Landesverband Hessen e.V.), gives an overview on the German courts' interpretations of what judges may or may not do. German courts have interpreted the underlying concept of §39 on preserving independence of the German Judiciary Act governing the do's and don'ts of judiciary with regard to public statements, both political and nonpolitical, made by judges in Germany. Johannes Schmidt explains how by the *ratio decidendi* of the case law regarding statements on traditional media outlets also applies to statements made by judges via social media, and presents a set of recent judgments that specifically deal with the statements made by judges on social media in Germany, that have been at the basis of disputes. In his view the advantages of the existing standards-based system outweigh a detailed rule-based approach, arguing that social media haven't affected the principles of independence and impartiality and that the existing provisions and case law are sufficient to determine judicial bias.

Also, on Germany, Jannika Jahn, Associate Attorney at Freshfields Bruckhaus Deringer, examines the current principles guiding judicial behavior in Germany in *"The Use of Social Media by Judges in Germany"*. After outlining specific problems arising due to the use of social media by judges, she observes that the use of social media is not only a challenge for the behavioral orientation of the judges, but also the public trust in an independent and impartial judiciary. The author argues that the use of social media by judges requires new approaches. She suggests, in particular, the extension of the principle of judicial restraint, as well as the introduction of codes of judicial conduct while safeguarding the judges' exercise of fundamental rights and independence from the executive branch.

On behalf of the Konrad-Adenauer-Stiftung and the Rule of Law Programme Middle East/ North Africa I wish to thank all the authors for sharing their expertise and experiences during the expert meeting, for their inspiring input and contributions that have made the discussions so vivid and fruitful, and for their commitment to producing this publication. We hope this contribution would stir more discussions and lead to a much-needed more comprehensive analysis of the different existing approaches to the phenomena, and to linking the discussions on judicial independence and impartiality held in Europe and North America to those initiated in the Middle East and North Africa.

For the wonderful time we had in Villa La Collina in Cadenabbia I owe many thanks to its staff for making our retreat a nice and welcoming one in the magnificent and reclusive environment of the Lago di Como. Last, but not least, my gratitude goes to all members of my team for their unmatched cooperation and team spirit in all projects, and especially to Anja Finke for her continuous, responsible, and efficient support in organizing and carrying out this somewhat daring and challenging undertaking from the beginning to the end.

Anja Schoeller-Schletter

[4] International Covenant on Civil and Political Rights.

JUDICIAL ETHICS IN A WORLD OF SOCIAL MEDIA[5]

Keith R. Fisher[6]

Abstract: *In "Judicial Ethics in a World of Social Media", Keith R. Fisher examines if and how already existing US-rules of judicial ethics and international rules, such as the Bangalore Principles of Judicial Conduct, are applicable to the social media use of individual judicial officers. He describes the challenges resulting from the use of social media by judges as "new wine in old bottles" as the social media are "ultimately an extension of public fora that already exists". The author, therefore, suggests applying traditional judicial ethics scenarios and standards to the social media phenomenon, while highlighting that judges need to be particularly cautious and circumspect in order to participate responsibly in social media activities.*

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As of 2019, there are anywhere from 2.77 billion[7] to 3.196 billion estimated social media users[8] worldwide, up 13% from the previous year. To put this seemingly large number in some context relating to technology use, it represents approximately 79.48% of an estimated 4.021 billion internet users and 58.83% of an estimated 5.135 billion mobile device users.[9] In the United States alone, there are currently an estimated 207 million social media users.[10]

"It is safe to assume that many judges can be counted in these figures."[11] According to one source, in the span of one minute on the internet, there are 973,000 Facebook logins, 4.3 million YouTube videos viewed, 481,000 tweets, and 2.4 million snaps created.[12]

This paper considers only the use of social media by individual judicial officers, not by other court officials or by courts themselves (whether officially or unofficially). Also, for convenience when reference is made to U.S. rules of judicial ethics, citations will (unless the context otherwise requires) be to the current (i.e., 2007) version of the American Bar Association's Model Code of Judicial Conduct.[13] The Model Code is not binding law anywhere unless, and only to the extent that, it is

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[6] A.B. Princeton University, J.D. Georgetown University. A former professor of law and an expatriate from private practice in what is nowadays referred to as "Big Law," Mr. Fisher is currently Principal Court Consultant and Senior Counsel for Domestic and International Court Initiatives at the National Center for State Courts ("NCSC"). He has served on the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (A.B.A.) and is a former chair of the Professional Responsibility Committee of the A.B.A. Business Law Section. The author of two treatises on banking regulation and numerous articles on that subject and legal and judicial ethics, Mr. Fisher lectures frequently on U.S. and international ethics issues for NCSC's Center for Judicial Ethics. The views expressed herein are the author's own and do not necessarily reflect those of NCSC or any related entities.

[7] *See* statista, Number of social media users worldwide from 2010 to 2021 (in billions), *available at* https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ (last visited May 2, 2019).

[8] *See* emarsys, Top 5 Social Media Predictions for 2019, *available at* https://www.emarsys.com/en/resources/blog/top-5-social-media-predictions-2019/ (last visited May 2, 2019). This higher estimate, if accurate, represents approximately 42% of the world's population. *Id.*

[9] These latter two ratios are likely significantly lower in reality, because the figures of internet and mobile device users perforce include people who may have multiple internet accounts and more than one mobile device.

[10] This is out of a total U.S. population of 328,285,992 as of January 12, 2019.

[11] Cal. Judges Ass'n Advisory Opinion 66 (2010). The same year that California advisory opinion was issued saw a survey of state court judicial officers in the United States (federal judges were not included in the survey pool) on social media use, conducted by the Conference of Court Public Information Officers ("CCPIO"), in which approximately 40% of responding judicial officers reported they are on social media profile sites, the majority of these on Facebook. This was found to be almost identical to the percentage of the adult U.S. population using those sites at that time. *See* CCPIO, New Media and the Courts: The Current Status and a Look at the Future 8 (Aug. 26, 2010), *available at* https://ccpio.org/wp- content/uploads/2012/06/2010-ccpio-report.pdf (last visited May 2, 2019). By 2012, that percent of social media use by state judicial officers responding to the survey had increased to 46.1%, with the majority (86.3%) on Facebook. CCPIO, New Media and the Courts: The Current Status and a Look at the Future 5 (July 31, 2012), *available at* http://ccpio.org/wp- content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf (last visited May 2, 2019). These CCPIO surveys have been conducted by that organization's New Media Committee, in collaboration with NCSC and the E.W. Scripps School of Journalism at Ohio University.

[12] *See* Jeff Desjardins, *What Happens in an Internet Minute in 2018*, VISUAL CAPITALIST (May 14, 2018), *available at* https://www.visualcapitalist.com/internet-minute-2018.

[13] A.B.A. MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter referred to as the "Model Code" or the "MCJC"]. The Model Code has no binding legal force unless, and then only to the extent that, its provisions are adopted by a U.S. state or territory.

adopted by individual States;[14] nevertheless the MCJC serves as a model for the majority of state codes of judicial conduct, as well as the federal code.[15]

International efforts at regulating judicial conduct are an integral part of international and domestic initiatives to promote the rule of law around the world, in both emerging and mature democracies alike. Emblematic of this pluralistic approach is the amalgam of widely-shared tenets known as the Bangalore Principles of Judicial Conduct.[16]

The Bangalore Principles are intentionally broad and general in scope so as to be adaptable to various jurisdictions and provide a framework for regulating judicial conduct.[17] Unlike the MCJC the Bangalore Principles are not a "code" per se,[18] but their adoption by a country certainly does not preclude its adoption of a code as well.

These regulatory regimes, despite some differences at the margins, largely encompass the same principles: (1) independence, impartiality, integrity;[19] (2) propriety; [20] (3) fairness and diligence;[21] extra-judicial activities;[22] and inappropriate political activities.[23] In none of them, however, is there any specific reference to judges' use of social media.

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[14] Systematized codification of judicial ethics principles began in the United States with the 1924 *Canons of Judicial Conduct*, promulgated by the ABA under the aegis of a blue ribbon commission chaired by Chief Justice (and former U.S. President) William Howard Taft. Responding to criticisms that the 1924 *Canons* were often aspirational and hortatory in nature, the ABA in 1972 promulgated a new *Code of Judicial Conduct* (predecessor to the Model Code), and this incarnation became the model for the judicial ethics code adopted by Congress for the federal judiciary (*see infra* n.8). Subsequent, significant amendments to the 1972 Code were made in 1990 and 2007, and the Model Code, as it is now denominated, serves as a prototype; nearly all of the States, and the District of Columbia, have adopted either the 1990 or 2007 version of the MCJC.

[15] CODE OF CONDUCT FOR UNITED STATES JUDGES (2019), *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective _march_12_2019.pdf (last visited May 31, 2019).

[16] THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002) (adopted, Judicial Group on Strengthening Judicial Integrity; revised, Round Table Meeting of Chief Justices 2002), *available at* http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf (last visited June 22, 2019) [hereinafter referred to as the "Bangalore Principles"]. The Bangalore Principles 10 represent the culmination of years of work and the input of senior and chief justices from over seventy-five countries, who considered over thirty judiciary codes, when developing the document. *See* Shelby A. Linton Keddie, *Outsourcing Justice: A Judge's Responsibility When Sending Parties to Mediation*, 25 PENN ST. INT'L. L. REV. 717, 733 (2007).

[17] The statements on the application of each of the Bangalore Principles "have been designed not to be of so general a nature as to be of little guidance, nor so specific as to be irrelevant to the numerous and varied issues which a judge faces in his or her daily life." *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 36 (2007) *available at* https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentary_on_the_ Bangalore_principles_of_Judicial_Conduct.pdf [hereinafter "BANGALORE COMMENTARY"].

[18] In that sense, the Bangalore Principles resemble in structure, though not in detail, the 1924 A.B.A. Canons of Judicial Ethics, which were largely aspirational in character.

[19] *Compare* MCJC Canon 1 *with* Bangalore Principles Values 1-3.

[20] This is aggregated, in part, with independence, impartiality, and integrity in MCJC Canon 1 and covered in Value 4 of the Bangalore Principles.

[21] *Compare* MCJC Canon 2 with Bangalore Principles Values 5-6.

[22] *See* MCJC Canon 3. Extra-judicial activities are not separately addressed by the Bangalore Principles but are incorporated as general principles under previously identified headings, e.g., Bangalore Principles 1.3 (freedom from inappropriate connections with other branches of government), 2.3 (minimizing occasions where disqualification may be necessary), 4.2 (as subject of constant public scrutiny, judge must accept personal conduct restrictions, consistent with the dignity of judicial office, that might be burdensome for ordinary citizens), 4.8 (family/social relationships not permitted to affect judicial role), Bangalore 4.9 (not using prestige of judicial office to further private interests).

[23] MCJC Canon 4. Canon 4 includes rules necessitated in large part by the phenomenon in the United States of judicial elections, which take place in some form in 39 of the 50 States. Yet the U.S. is apparently not alone in this regard, and this, as well as other systems prevalent in other countries, prevented achieving a consensus on the subject of political activities when the Bangalore Principles were drafted. The balance struck has been described as follows:

The main divergence . . . was in respect of political activity that the principal divergence occurred. In one European country, judges are elected on the basis of their party membership. In some other European countries, judges have the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended). Civil law judges, therefore, argued that at present there was no general international consensus that judges should either be free to engage in, or should refrain from, political participation. They suggested that it would be for each country to strike its own balance between judges' freedom of opinion and expression on matters of social significance and the requirement of neutrality. They conceded, however, that even though membership of a political party or participation in public debate on the major problems of society might not be prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality.

BANGALORE COMMENTARY, *supra*, at 16.

Towards a Definition of Social Media

To begin with, it is important to arrive at a reasonably succinct yet comprehensive definition of the term "social media." To be sure, it involves websites that are distinguishable from pre-existing forms of communication in that they enable users instantly to disseminate information almost instantaneously to millions of people. Popular uses include cultivating social connections,[24] locating people, facilitating romantic interactions, and generally sharing personal information with either a pre-selected or, in some cases, indeterminate number of people. Some studies also suggest that there may be gender-based differences in usage,[25] but any such differences do not affect any comprehensive, working definition of social media, which must, at a minimum encompass the following representative – though by no means exhaustive or encyclopedic – examples (arranged, solely for convenience, in alphabetical order):

- *Blogs/Vlogs*
- *Chat sites**
- *E-mail*
- *Facebook*
- *Flickr*
- *Flipboard*
- *Forum and message boards*
- *Google+*
- *Instagram*
- *Internet dating sites*
- *LinkedIn*
- *Pinterest*
- *Podcast*
- *Quora*
- *Reddit*
- *Skype*
- *Snapchat*
- *TripAdvisor*
- *Twitter*
- *Vivino*
- *WhatsApp*
- *Yelp*
- *YouTube*

*These include chatrooms (multilateral) and software enabling one-on-one chat.

Another way of describing social media websites is by category:

- Social Networks, *e.g.,* Facebook, Twitter, LinkedIn, Tinder;
- Media Sharing Networks, *e.g.,* Instagram, Snapchat, YouTube. Discussion Forums, *e.g.,* Reddit, Quora, Digg;
- Bookmarking and Content Curation Networks, *e.g.,* Pinterest, Flipboard. Consumer Review Networks, *e.g.,* Yelp, Zomato, TripAdvisor Blogging and Publishing Networks, e.g., WordPress, Tumblr, Medium Interest-based Networks, *e.g.,* Goodreads, Chess.com, Houzz, Last.fm Social Shopping Networks, *e.g.,* Amazon, Etsy, Fancy, TrendMe, UrStyle.

To accommodate such multifarious sites and categories, I propose the following working definition:

Social Media: *Technology-based applications, including without limitation one or more pages of information published on the internet by a natural or juridical person, whether or not about a particular subject, that enable users to create or share content electronically or otherwise participate in internet-based communication using a computer, tablet, mobile phone, or other device.*

New Wine in Old Bottles

Social media, as the statistics cited at the beginning of this paper demonstrate beyond peradventure, have turned into a vital part of interpersonal communication and the dissemination of information. Given the nature of judicial office and the vital – indeed, paramount – importance of public confidence in the integrity and impartiality of the courts, the use of social media by judges implicates specific ethical risks that should be thoroughly considered.

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[24] *See* James Grimmelmann*, Saving Facebook*, 94 IOWA L. REV. 1137, 1154 (2009) (observing that "a social network site lets you make new friends and deepen your connection to your current ones").

[25] A 2010 study sampled habits of 1,605 adults using social media and revealed that women between the ages of 18 to 34 primarily use Facebook. Fifty-seven percent of the female subjects admitted that "they talk to people online more than face-to-face," 39% proclaimed themselves Facebook addicts, 34% disclosed that they "make Facebook the first thing they do when they wake up, even before brushing their teeth or going to the bathroom" and "21% check Facebook in the middle of the night." *See* Ben Parr, *The First Thing Women Do in the Morning: Check Facebook [Study]*, MASHABLE (July 7, 2010), *available at* http://mashable.com/2010/07/07/oxygen-facebook-study (last visited May 2, 2019). A roughly contemporaneous article in the business magazine Forbes likewise observed that women comprise approximately 57% of the social media population; the article claimed that whereas women use it primarily for connecting with people, men use it primarily as a means to obtain information and improve social status. *See* Jenna Goudreau, *What Men and Women Are Doing on Facebook*, FORBES (Apr. 26, 2010), *available at* http://www.forbes.com/2010/04/26/popular-social-networking-sites-forbes-woman-time-facebook-twitter.html (last visited May 2, 2019).

When compared with traditional forms of communication, social media present some novel considerations of which judges need to be aware. First, some online networks would permit other members to post content onto a judge's site. Second, a judge participating in a social networking site arguably loses control over the privacy of his own communications with others. Third, some social media use various labels *(e.g.*, "friends," "followers") that under certain circumstances connote a closer personal relationship than actually exists. Finally, communications and relationships on social media are considerably more public than more traditional media and relationships and pose a greater risk of creating in the public mind an appearance of impropriety. When contemplating judicial (and hopefully judicious) uses of social media (as defined above), we are not writing on a completely clean slate. To be sure, social media is different in terms of its immediacy, breadth, and intensely public spotlight. Nevertheless, a particular technology may be novel and part of a dynamic, ever-changing landscape, but from the judicial ethics point of view we are, to a large extent, looking at new wine in old bottles. Social media are "ultimately an extension of public fora that already exist. . . [T]he same principles that apply to judges in other public settings will apply to judges in a 'virtual' setting." [26]

From the U.S. (*i.e.*, Model Code) perspective, judges' use of social media implicates some of the following traditional ethics issues:

- Confidentiality;
- Avoiding impropriety inside and outside of the office;
- Diminishing the prestige of judicial office or dignity of the court;
- Avoiding bias/prejudice and the appearance of bias/prejudice;
- Sending a message of favoritism or special access to the Court Commenting on matters pending before the Court;
- Supporting fund raising efforts;
- Supporting a commercial venture/private interests of another;
- Discussing matters that may be litigated before the Court;
- Taking a political position.

This new wine of social media needs to be decanted and permitted to breathe. Thus, before rushing to judgment on whether new ethics rules are appropriate, we must understand and apply traditional judicial ethics scenarios and standards to the social media phenomenon. Judges participating in social media must keep in mind that codes of judicial conduct apply with equal force to virtual actions and online comments. "A judge must understand the requirements of the Code of Judicial Conduct and how the Code may be implicated in the technological characteristics of social media in order to participate responsibly in social networking. Members of the judiciary must at all times remain conscious of their ethical obligations."[27]

The manner in which an individual judge uses social media may have an impact on public perception of not merely that judge but all judges and confidence in judicial systems generally. The topic is complex, and the propriety of judges using social media has garnered mixed reviews.

On the one hand, particular instances of judges using social media have led to situations where those judges have been seen as biased or subject to inappropriate outside influences. A variety of concerns have been identified in connection with

[26] Utah Courts Ethics Adv. Comm., Informal Op. 2012-1 (Aug. 31, 2012), *available at* https://www.utcourts.gov/resources/ethadv/ethics_opinions/2012/12-1.pdf (last visited May 2, 2019). *Accord,* Arizona Comm'n on Jud'l Conduct, Adv. Op. 2014-1 (rev. Aug. 5, 2014), *available at* https://www.azcourts.gov/Portals/137/ethics_opinions/2014/Revised%20Advisory%20Opinion%2014-01%20(8-5-14).pdf?ver=2014-08-05-154033-003 (last visited May 2, 2019); Connecticut Comm. on Judicial Ethics, Informal Op. 2013-6 (March 22, 2013), *available at* https://www.jud.ct.gov/Committees/ethics/sum/2013-06.htm (last visited May 2, 2019); Florida Sup. Ct., Jud'l Ethics Adv. Comm. Op. 2009-20 (Nov. 17, 2009), *available at* http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html (last visited May 2, 2019); Oklahoma Jud'l Ethics Adv. Panel Op. 2011-3 (July 6, 2011), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147 (last visited May 2, 2019); South Carolina Adv. Comm. on Standards of Jud'l Conduct, Op. 17-2009 (Oct. 2009), *available at* https://www.sccourts.org/advisoryOpinions/html/17-2009.pdf (last visited May 2, 2019); Tennessee Jud'l Ethics Comm. Adv. Op. 2012-1 (Oct. 23, 2012), *available at* https://www.sccourts.org/advisoryOpinions/html/17-2009.pdf (last visited May 2, 2019).

[27] State v. Thomas, 376 P.3d 184, 199 (New Mexico 2016). The same point has been made in disciplinary proceedings. *See, e.g.,* In re Whitmarsh, Determination at 9 (New York State Comm'n on Judicial Conduct, December 28, 2016) (observing that the Code of Judicial Conduct applies "in cyberspace as well as to more traditional forms of communications"), *available at* http://cjc.ny.gov/Determinations/W/Whitmarsh.Lisa.J.2016.12.28.DET.pdf (last visited May 2, 2019).

social media, ranging from juror misconduct[28] to ever more insidious invasions of privacy[29] to outright deception/misrepresentation.[30]

"[P]articipating in social networking sites and other [electronic social media] clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions . . ." [31]

On the other hand, social media can create unparalleled opportunities to expand the reach of judges' legal expertise to encompass and educate potentially vast swaths of the lay public. Using social media, it is possible, as never before with more traditional media, for judges to increase the public's understanding and appreciation of law and legal policy and to foster an openness and appreciation by the community at large of how judges – their fellow citizens – promote justice and the rule of law. Moreover, judges may be well advised actively to engage in social media the better to gain an understanding of how the vast majority of those who appear before them communicate on a daily basis.

Now that the new wine has had some opportunity to breathe, let us consider how traditional applications of judicial ethics rules can be applied in the social media context. Three varietals are offered for purposes of illustration.

1. **Avoiding Actual or Perceived Bias or Prejudice**

MCJC Rule 2.3 (B) under Canon 2[32] provides:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

> Traditional Applications: This principle has traditionally arisen in the context of remarks (whether careless or deliberate) made by a judge that would to a reasonable person evince bias or prejudice of the sort expressly prohibited by the rule.[33]
>
> Social media extension: Here the obligation is not merely to refrain from making or "liking" inappropriate comments but to expurgate such comments made by others from the judge's own page (and perhaps "unliking" them) in order to avoid creating the impression that the judge agrees with them.[34] (N.B. There is no comparable responsibility in the traditional setting for exercising caution or monitoring other people's comments).

2. **Prestige of Judicial Office**

MCJC Rule 1.3 under Canon 1[35] provides:

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

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[28] *See, e.g.,* Martha Neil, Oops. *Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J. (Sept. 2, 2010), *available at* http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_thou gh_verdict_isnt_jn (last visited May 2, 2019).

[29] *See, e.g.,* Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 74 (2007) (observing that "privacy harms are no longer short-lived and innocuous.... [because] information's digital permanence, searchability, replicability, transformability, and multitude of often unintended audiences make its effects more damaging than ever").

[30] *See, e.g.,* Monroe H. Freedman*, In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006); Steven C. Bennett, *Ethics of "Pretexting: in a Cyber World*, 41 MCGEORGE L. REV. 271 (2010).

[31] Connecticut Informal Op. 2013-16. *Accord*, Massachusetts Letter Op. 2016-1; Missouri Advisory Op. 186 (2015); New Mexico Advisory Op. Concerning Social Media (2016).

[32] "A judge shall perform the duties of judicial office impartially, competently, and diligently." Model Code Canon 2.

[33] *See, e.g.,* In re Goodfarb, 880 P.2d 620, 621 (Ariz. 1994); In re Haugner (Cal. Comm'n on Jud. Performance, Apr. 11, 1994).

[34] *See, e.g.,* California Judges' Ass'n Advisory Op. 66 (2010).

[35] "A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Model Code Canon 1.

Traditional Applications: Unlike celebrities and unlike other government officials, judges may not use their personal or professional stature (including being a speaker or guest of honor) to encourage donations to fundraising efforts of an organization.[36]

Social media extension: Judges must be cautious about "liking" Facebook pages of individuals where doing so could create in the mind of a reasonable person the impression of bias, favoritism, or (in the case of lawyers and politicians) the potential for undue access.[37] Judges must also refrain from any social media conduct that could reasonably be seen as promoting or endorsing the commercial venture of another, including family members.[38]

3. "Friending" Lawyers

MCJC Rule 2.4 (C) under Canon 2[39] provides:

A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

In addition MCJC Rule 3.1 under Canon 3[40]provides, in pertinent part:

[W]hen engaging in extrajudicial activities, a judge shall not participate in activities that will (A) interfere with the proper performance of judicial duties, (B) lead to frequent disqualification, (C) appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Traditional Applications: Judges frequently have practiced law in the very same jurisdiction in which they preside, and during their careers it would be unusual if they had not made friends[41] who are lawyers. If any such person should appear before the judge, the judge should disclose the relevant facts on the record and provide the other parties and their counsel the opportunity to seek to disqualify the judge; in some cases, the judge may prefer sua sponte to recuse himself. At all times, the judge must promote both the actuality and appearance of impartiality and avoid impropriety or the appearance of impropriety. In most U.S. jurisdictions, however, as a matter of law traditional friendships do not – absent some additional showing –create a cognizable basis for disqualification.[42]

Social media extension: There has been some disagreement on this issue with respect to Facebook "friending" of lawyers if they appear before the judge. Ten years ago, an opinion of the judicial ethics advisory committee appointed by the Florida Supreme Court[43] reasoned that selection of some lawyers as Facebook friends, rejection of others, and implicit communication of these choices on the network conveyed, and permitted others to convey,

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[36] *E.g.,* Pennsylvania Conference of State Trial Judges Ethics Committee Advisory Op. 2015-03; Colorado Advisory Op. 2013-04 (2013); Florida Judicial Ethics Committee Advisory Op. 03-16 (2003); Illinois Judicial Ethics Op. 99-1 (1999); Arizona Judicial Ethics Advisory Committee Op. 94-4 (1994). *See also* U.S. Advisory Op. Nos. 32, 35, 42 (2009) (interpretations of Code of Conduct Committee for U.S. federal judges).

[37] *See, e.g.,* Order of Private Reprimand, Kentucky Judicial Conduct Comm'n (April 2, 2015) (judge "liked" Facebook pages of lawyers, law firms, and candidates for elective office); Massachusetts Advisory Op. 2016-1 (2016) (judge must not endorse commercial entities by liking or following them on Facebook); New Mexico Advisory Op on Social Media (2016) (cautioning against Yelp reviews, liking of lawyers' posts on Facebook, retweeting on Twitter tweets of attorneys and parties). *See also* U.S. Advisory Op. No. 112 (2017) (omnibus opinion on federal judges and social media).

[38] *See, e.g.,* Public Reprimand of Uresti and Order of Additional Education, Texas State Comm'n on Judicial Conduct (Oct. 11, 2016) (judge's Facebook profile, which identified her as a judge, included links, photos, and posts promoting daughter-in-law's real estate business).

[39] *See supra* n.26.

[40] "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." Model Code Canon 3.

[41] By "friends," I mean to include not only people with whom the judge socializes but also professional acquaintances (*e.g.,* colleagues in the same law firm or government office where the judge practiced law), and other members of the Bar whom the judge has known in various professional capacities.

[42] *See, e.g.,* Ervin v. Collins, 85 So.2d 833 (Fla. 1956); Matthews v. Rodgers, 279 Ark. 328, 651 S.W.2d 453, 456 (1983). Cf. United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985), decided under 28 U.S.C. § 455, a federal statute based on the disqualification requirements of the 1972 Model Code (opining that test in determining whether the judge should recuse himself under this statute is whether the judge feels capable of disregarding the relationship (which addresses whether there is bias in fact) and whether others can reasonably be expected to believe that the relationship will be disregarded (which addresses whether the judge's impartiality might reasonably be questioned)).

[43] Florida Advisory Op. 2009-20 (Jud. Ethics Adv. Comm. 2009).

> the impression that they are in a special position to influence the judge. In the intervening years, a contrary view emerged in ethics advisory opinions in the majority of other states that considered the issue.[44]

But late in 2018 that view was undone by the Florida Supreme Court, which, by a vote of 5-3, disagreed with its own advisory committee.[45] The Court held that "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, is not a legally sufficient basis for disqualification."[46] Social media friendships, the 5-member majority found, were more casual, less permanent, and do not imply any significant relationship, and the way they are communicated is not conceptually significant vis-à-vis the way traditional friendship is communicated.

> [T]raditional "friendship" involves a "selection and communication process," albeit one less formalized than the Facebook process. People traditionally "select" their friends by choosing to associate with them to the exclusion of others. And people traditionally "communicate" the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension.

The three dissenting judges concluded that traditional and Facebook friendships were not comparable:

> [A Facebook friend] gains access to all of the personal information on the user's profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public . . . [and] Facebook "friends" to be privy to considerably more information, including potentially personal information, on an almost daily basis.

The reader may decide for himself which side has the better argument.

Some Concluding Suggestions

Social media's potential pitfalls and constant evolution require judges to be cautious and circumspect. In erring on the side of caution, judges should:

1. Be aware that many provisions of applicable ethics rules could be compromised – should monitor content on their webpages more or less constantly to assure compliance with ethical requirements.
2. Periodically audit past and present social media accounts, review content – regardless of who put it there – and review relationships.
3. Develop, or receive training on, an appropriate etiquette for removing or blocking friends, followers, etc., especially where failure to do so would create for a reasonable observer an appearance of bias or prejudice.
4. Familiarize themselves with the security and privacy policies, rules, and settings of each social media platform used and take responsibility for reviewing them periodically.
5. Avoid accepting or sending friend requests from or to parties, lawyers, and witnesses during any pending court proceeding.
6. Educate family members and close friends about judicial ethics obligations and how their own, separate use of social media can undermine the judge's compliance with those obligations.
7. Receive periodic training on social media, even if not a user, to develop an awareness of how others may use and photos or recordings in a manner that would be embarrassing to the court or a potential ethical problem were they to "go viral."

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[44] *To wit:* Arizona, Kentucky, Maryland, Missouri, New Mexico, New York, Ohio, and Utah. The minority position – that Facebook "friendship" between a judge and an attorney appearing before the judge, standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge – has been adopted in California, Connecticut, Massachusetts, and Oklahoma.

[45] Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Ass'n, 2018 Fla. LEXIS 2209 (Nov. 15, 2018).

[46] *Id. at * 2.*

THE IMPARTIALITY PRINCIPLE AND JUDGES ONLINE: TOO DANGEROUS TO SPEAK, TOO DANGEROUS NOT TO?

Michelle M. Somers[47]

Abstract: *The modern challenge for Canadian courts is to reconcile the tension between protecting the principle of impartiality, which places limits on judicial expression, and heeding the call for greater transparency about the work of judges and courts. The relationship between the courts and the media, including social media, plays a significant but not singular role in the attempt to meet this challenge. In a departure from a history of silence, courts themselves have taken the opportunity to increase public trust by communicating directly to members of the public using various media channels. However, a similar engagement with social media by individual judges has not followed. This article explores why that is, and also touches briefly on the Canadian process of sanction against federally appointed judges who are investigated for misconduct where a media presence is involved.*

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It is difficult to speak of the principle of impartiality without touching on its relationship to the principle of judicial independence. In 1985, the Supreme Court of Canada identified impartiality with both a state of mind and an independence from relationships between judges and others. Mr. Justice Le Dain said that: "Both [principles] are fundamental, not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation." [48] If an impartial state of mind is fundamental to fair adjudication, then independence may be considered as one condition for judicial impartiality. It has been said that the purpose of judicial independence is to promote judicial impartiality.[49]

In 1991, the Supreme Court of Canada again affirmed the relatedness of the two principles. Lamer J. said that judicial independence was but a means to an end… "[J]udicial independence is critical to the public's perception of impartiality."[50] The institutionalization of judicial independence, and impartiality as its sister principle, assures citizens that its judges can be trusted not to favour special groups, promote personal interests, or decide cases arbitrarily on the basis of whim or pique.

At the crux of the concern with judges' use of social media, indeed of any media, is its high potential for erosion of the public's perception of the integrity of the judiciary as a whole. A central tenet of the impartiality principle is that the judge come to court with an openness of mind towards the claim to be adjudicated. Public trust in the impartiality of the judiciary, and in the administration of justice as a whole, is easily undermined by the expression of opinions which may lead to the perception that even a single judge's mind is made up. Extra-judicial expression on the state of the law, on social values, or on political affairs may lead to a belief that the case has been pre-judged, or may signal a predisposed mind, at least in respect of issues on which the judge has expressed an opinion.

This is true whether the judge speaks in print or in broadcast, on Twitter or on a professional blog. In any discussion having to do with restrictions on judicial speech, we need only distinguish between modes of communication to the extent that social media spreads more quickly, more widely, and with less nuanced meaning. The danger to public trust in the administration of justice is the same regardless of the mode of communication but may be greater on new media. It can be said that when judges in Canada accept an appointment to the Bench, they give up the right to speak their minds.

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[48] Valente v The Queen, [1985] 2 SCR 673, at p. 685 and p. 689.
[49] Greene, Ian, *The Doctrine of Judicial Independence Developed by the Supreme Court of Canada*, Osgoode Hall Law Journal 26.1 (1988): p. 177-206.
[50] R v Lippé [1991] 2 S.C.R. 114 at p.139.

Guide to Principle of Impartiality

In Canada, the main source of guidance on impartiality for federally appointed judges is a 1998 guide to judicial conduct, the Ethical Principles for Judges.[51] The guide was drafted by the Canadian Judicial Council, a national body that regulates the services of federally appointed judges.

Unlike those in many other jurisdictions across the world, Canadian judges are not regulated by rules or a code that define the requirements of impartiality. The categories of judicial activity that are listed in the Ethical Principles are broadly defined and general enough to allow for individual discretion. However, they are undergirded by the fundamental and widely recognized reality that, in a liberal democracy, the only real authority the judiciary possesses rests on public confidence in its integrity and competence. Out of this reality arises the need that judges not only act impartially, but that they appear to do so in the eyes of citizens.

Two main Statements in Ethical Principles address the principle of impartiality. On Judicial Independence: "An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects." And on Impartiality: "Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary." [52]

The guide identifies five areas of judicial activity germane to the principle of impartiality: General Conduct, Judicial Demeanour, Civic and Charitable Activity, Political Activity, and Conflicts of Interest.

The difficulties posed by engaging in judicial speech are explained in the Commentaries that follow each area of activity. For example, the Commentary under the heading of Political Activity cautions that the actions of one judge may affect the reputation of the whole judiciary:

"Principle D.3(d) recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely: when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. Even with respect to these matters, however, a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally."[53]

As one legal academic noted, restrictions placed on judges' public expression means they are faced with having to strike the correct balance between, on the one hand, preventing judicial isolation and, on the other hand, diminishing the risk that public speech may tarnish the image of judges individually and as a whole. Reconciling these two competing currents presents the greatest challenge to developing guidelines for judicial use of the internet and social media in particular.[54]

From Silence to Communication

Because the principle of impartiality places limitations on judicial expression, the courts were historically almost always silent. "Judges may not comment on matters that are before the court." "Judgments speak for themselves." Although restraint on speaking about matters that are being adjudicated remains essential to the integrity of the judicial role, these "mantras" allowed courts and judges to shelter from the risks of speaking out on any topic lest something be said that might lead to an apprehension of bias or a mind pre-disposed to issues they might adjudicate in the future. Meanwhile, in the face of an increasingly legalized, and perhaps mistrustful, society, sustained and implacable judicial silence led to complaints, especially by media, that courts were not transparent. In turn, this gave rise to suspicions that judges were operating behind closed doors and therefore unaccountable, and by implication unfettered, in the performance of their role.

[51] Canadian Judicial Council, Ethical Principles for Judges, Part 6. As of March 7, 2019, the Ethical Principles were under review for future updating. Ethical obligations of judges in their use of social media are included in the review.
[52] Ethical Principles for Judges, Sections 2 and 6.
[53] Ethical Principles for Judges, Section 6, Commentary D.6.
[54] Eltis, Karen, *Does Avoiding Judicial Isolation Outweigh the Risks Related to 'Professional Death by Facebook'?* 2014 Laws 636: http://www.mdpi.com/2075-471X/3/4/636.

It is said that the first movement towards a more open court was the aphorism coined in 1924 by the Lord Chief Justice Hewart. In a well-known case which established the principle that the appearance of bias was sufficient to set aside a judicial decision, he said: "… a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[55]

A century later, we are still trying to balance the competing demands of telling the public how justice is done while avoiding the dangers of speaking too much.

In 2015, Ipsos Reid conducted a survey in Canada for the purpose of rating the trustworthiness of a number of professions in the eyes of the public. It discovered some surprising facts, among them that only 42% of those polled rated judges as "extremely trustworthy". By comparison, some of the other groups that were perceived to be extremely trustworthy were pharmacists (70%), farmers and soldiers (58%), and police officers (46%).[56]

It had not gone unnoticed by courts that the interest of citizens in legal and court matters had been increasing for at least the past three decades. The English lawyer and writer, John Mortimer, speaks of "a general decrease in the awe and wonder with which the population looks at its established institutions," a view from which the courts are not exempted. This change in public sentiment led to the pull between the traditional limitations on judicial speech -- and the courts' obligation to protect some types of information from public access -- and their sensitivity to the fact that the authority of the judiciary, and indeed of the justice system as a whole, rested on a level of public confidence that was eroding.

Nevertheless, the courts were slow to change their protectionist stance. In part, this may have been the outcome of a rigorous exercise of the principle of impartiality, and in part because the supervisory role of courts over the record of proceedings was deeply embedded in court culture. Today, the balance between open courts and the restrictions on what information may be made public is a continually evolving one, made more urgent by public and media demands which provoke a more acute awareness that the court is no longer "a world apart".

It is apparent that new media provides on-demand, instant, omni-present, interactive and democratic access to information. In the courts' movement towards outward communication, the nature of new media presents challenges to the traditionally careful and considered methods that courts used to disseminate delimited information about court operations, cases and judicial decision-making.

Beginning in the 1990s, the media propelled the impetus for change by becoming more insistent on broader and easier access to information. Applying the constitutional right of freedom of the press under s. 2(b) of the Canadian Charter of Rights and Freedoms, print media outlets mounted increasing numbers of legal challenges against the indiscriminate use of publication bans and sealing orders and successfully broadened the scope of that freedom. The ensuing jurisprudential green light from various Supreme Court of Canada cases enabled courts to institute communication to the public with more clarity about what information was accessible by the public without compromising its supervisory obligations.

In large part, this change of heart was due to a call in 1996 by the Canadian Judicial Council to all courts, at the urging of the then-Chief Justice of the Supreme Court of Canada, Antonio Lamer, to become aware of the need to educate the public about judicial decision-making, and of the media's central role in providing it.

In response, Canadian courts have increased access by media and the transparency of their operations. Although the communication between courts and the public is not reciprocal, almost all Chief Justices and Chief Judges are now willing to give media interviews on limited topics, usually relating to court administration issues. A few judges, in the service of public education, are willing to provide interviews on their professional lives as a judge or their careers before appointment to the Bench. At the Provincial Court level in particular, there are judges who have become media personalities, able to stick handle their way through its challenges.[57] As the demographic of the Bench changes, familiarity with the new media increases, as does the willingness to venture with confidence into new media territory.

Conversely, the use of social media by judges individually has been very limited. A recent report by the Canadian Centre for Court Technology found that judicial officers, a group that includes judges, Masters, tribunal members, and justices of the

[55] R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233).
[56] Ipsos Reid and Reader's Digest Release Annual Trusted Brand™ Survey, January 18, 2015. https://www.ipsos.com/en-ca/ipsos-reid-and-readers-digest-release-annual-trusted-brandtm-survey.
[57] "Family Matters With Justice Harvey Brownstone", radio and TV, Ontario 2010-2011; "Homestretch" radio interviews with Judge Sean Dunnigan, Alberta 2012 to present: https://j-source.ca/article/sean-dunnigan-calgarys-talking-judge/.

peace, use social media at a significantly lower rate than the general population. They make up 48% compared to 67% of members of the general population. This may be a function of cohort over preference, as well as the demands of office, since the mean age for federally appointed judges is 62 years old.[58]

Little guidance on the use of social media for legal professionals has been published in Canada. The Canadian Judicial Council website has a few articles about using Skype or Facebook, on Social Networking Security, and on other largely technological issues.[59] The National Judicial Institute website, the body responsible for providing continuing education programs for judges, publishes some material on the use of social media. The Canadian Centre for Court Technology published its "Guidelines on Use of Social Media in the Courtroom" in 2015. Education resources in this field are rapidly evolving.

In Canadian courts, the judicious use of social media such as Twitter has been successful at conveying information about its operations and successful in skirting its dangers through diligent control over content and assignment of dedicated personnel.[60] Interviews with Chief Justices, which would have been denied as little as a few years ago, are now held without controversy at all levels of the court system.[61]

Without question, individual engagement with social media by judges and other judicial officers has occasionally proven to be somewhat more perilous. In one law blog, a federally appointed judge was disparaged for his "provocative digital trail". This was a reference to political opinions he had posted on a university law blog and on a public court news website before his appointment to the Bench, one of which had been published just one year prior.[62]

In a case involving a judicial officer, the Federal Court ordered the recusal of an arbitrator who had been appointed by the Federal Government to choose between final offers made at the bargaining table during collective agreement negotiations on the basis among others that his social media activities created a reasonable apprehension of bias, or at least the appearance of bias. The evidence was that his Facebook page included links to a Conservative riding association and that of a Conservative MP, and his Facebook "friends" included the Labour Minister whose office had appointed him as arbitrator.[63]

In Quebec, a judge was asked by defence lawyers to recuse herself from presiding over a multi-defendant drug trial because many of her Facebook friends were Crown prosecutors. In another case, an Ottawa Provincial Court judge retired in late 2014 and apologized rather than face a disciplinary hearing over comments she apparently inadvertently posted on Facebook about two other judges.[64]

In a recent interview with the Canadian Press, the Chief Justice of the Supreme Court of Canada, Richard Wagner, said he did not favour judges engaging on social media and potentially compromising their status as aloof from social and political debate. He did say that courts and other judicial entities should use social media to disseminate their messages and decisions.[65]

Complaints Procedure

In the absence of legislation, rules or codes dealing with the use of social media by judges, the regulation of judicial misconduct arising from its use is mandated through a complaints process.[66] Anyone may file a complaint alleging misconduct. For federally appointed judges, the ensuing investigation is administered by the Canadian Judicial Council. Its authority to investigate is established by statute.[67] At the time of this writing, the current judicial conduct process is being reviewed following charges the current process is too long and too costly.

At present, a complaint lodged with the Canadian Judicial Council triggers a Review Procedure carried out by the Chairperson of its Judicial Conduct Committee. The Chairperson is a federally appointed judge from a jurisdiction other

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[58] *The Use of Social Media by Canadian Judicial Officers*, Canadian Centre for Court Technology, May 2015, p. 8.
[59] Canadian Judicial Council, *"Is Skype Safe for Judges?"* and "*Facebook and Social Networking Security*": https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_publications_en.asp.
[60] For example: https://www.albertacourts.ca/qb/resources/media/social-media-terms-of-use.
[61] *See* for example, a recent interview with Richard Wagner, Chief Justice of the Supreme Court of Canada: http://www.cpac.ca/en/programs/conversations-avec-esther-begin/episodes/65917245#.
[62] https://www.thecourt.ca/on-russell-browns-appointment-to-the-supreme-court-of-canada/.
[63] Canadian Union of Postal Workers and Canada Post Corp., 2012 FC 975.
[64] *The Use of Social Media by Canadian Judicial Officers*, Canadian Centre for Court Technology, May 2015.
[65] https://www.theglobeandmail.com/canada/article-chief-justice-richard-wagner-urges-major-reforms-to-judicial/.
[66] CJC Complaint Process: https://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp#whaymc.
[67] Judges Act, RSC 1985, c J-1, p. 63.

than that of the subject judge. If the matter is considered to be serious, it is referred to a Review Panel whose role is to determine whether it is necessary to constitute an Inquiry Committee. An Inquiry Committee engages in a public process regulated under by-law.[68] The judge may be represented by counsel, and the Committee may retain counsel to provide advice.

Public inquiries into judges' conduct are rare. By 2019, they had been held a total of 14 times in the last 29 years, six of these within the last four years. The sanction for judges who meet the test for incapacity is a recommendation by the Canadian Judicial Council to Parliament that the judge be removed from office. Section 65 of the *Judges Act* sets out the test:

> "Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> (a) age or infirmity,
>
> (b) having been guilty of misconduct,
>
> (c) having failed in the due execution of that office, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

If such a recommendation is accepted, Parliament will institute impeachment proceedings. Few such recommendations have been made and, when they have, the impugned judges have resigned before an impeachment proceeding could take place. To date, there have been five misconduct-related resignations in Canadian judicial history. To date, Parliament has never held an impeachment proceeding.

Of the 14 misconduct complaints that were referred to an Inquiry Committee, two involved elements of media exposure.

The first, in 2008, concerned a complaint against a judge who had vigorously opposed increased transit development in his neighbourhood, and was assigned to hear an application related to the same project. His interviews with media criticizing the project had been published, and he had engaged in political lobbying at the municipal level. When a city solicitor became aware that the same judge would be presiding over an application directly related to the issue he had publicly criticized, he lodged a formal complaint with the Canadian Judicial Council. At the end of the complaint procedure, 17 of the 21 members of the Council recommended in its report that the judge not be removed from office. Four members wrote a dissenting opinion. The majority affirmed that implicit in the test for removal is the concept that public confidence in the judge should be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date.[69]

The second concerned a judge about whom graphic photos of a sexual nature had been posted online by a third party. Although she had had no control over the posting, she had been aware of their publication at the time she filled out the application to be appointed to the Bench. One of the questions in the application, to which she answered no, was whether there was anything in the applicant's past or present which would reflect negatively on her or on the judiciary and which should be disclosed. This fact became a significant factor in the Council's assessment of whether the judge was guilty of misconduct. However, before the complaint process had run its course, the judge stepped down from her duties as a sitting judge and, after some time, resigned from the Bench.[70]

In the end, underlying the s. 65 test is a fundamental concern that judicial action will adversely affect the public's perception of the integrity of the administration of justice in Canada. That concern is at the heart of the principle of impartiality, and consequently of the limitations, both institutional and self-imposed, on judicial engagement with social media.

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[68] Canadian Judicial Council, Inquiries and Investigations By-Laws: https://www.cjcccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_bylaw_en.asp.
[69] Inquiry Committee Regarding Mr. Justice Theodore Matlow: https://www.cjcccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inq_matlow_en.asp.
[70] Inquiry Committee Regarding the Honourable Lori Douglas: https://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inq_douglas_en.asp.

THE USE OF SOCIAL MEDIA BY CANADIAN JUDICIAL OFFICERS

Lisa Taylor[71]

Abstract: *In the "use of social media by Canadian judicial officers" Lisa Taylor presents the findings of a survey conducted by the Canadian Centre for Court Technology in 2013 on "The Use of Social Media by Canadian Judicial Officers". The survey identifies, in particular, the nature and extent of social media use by judicial officers in Canada, the degree to which best practices (guidelines, rules and advisory opinions) have been developed and finally gives recommendations concerning the use of social media by judicial officers.*

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Introduction

Canada is a networked society, with internet connectivity present in 91 per cent of the nation's households[72] and with 94 per cent of online Canadian adults having an account on at least one social media platform.[73] Given this undeniably high penetration rate among the general population, the Canadian Centre for Court Technology, a federal not-for-profit organization created to promote the modernization of court services through the use of technology solutions, sought to better understand the degree to which social media was used by Canadian judicial officers.[74] This was done through a survey of individual judicial officers in the fall of 2013. Findings from the survey were presented in a discussion paper[75] that:

1. Identified the nature and extent of current use of social media by judicial officers in Canada;
2. Identified the extent of current use of social media by judicial officers in other jurisdictions;
3. Identified the extent to which best practices (such as guidelines, rules and advisory opinions) for the use of social media by judicial officers in Canada and elsewhere have been developed; and
4. Made recommendations concerning the use of social media by judicial officers in Canada.

This paper will focus exclusively on the survey findings and the working group's recommendations. It should also be noted that the focus of the original research was on the use of social media by individual judicial officers and not by courts or tribunals themselves, some of which use social media to distribute information on their processes, judges and rulings. The limited scope of the original project also precluded an exploration of the potential for problems arising from a judicial officer's presence on and/or use of social media prior to their appointment, a phenomenon commonly referred to as "digital baggage."[76]

Survey methodology and limitations

Email invitations were sent out in two waves: one in early November 2013, and a second in the middle of December 2013. The survey, conducted via an online Google form available in both English and French, yielded a sample of 678 participants (474 English, 204 French).

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[71] Former lawyer and Canadian Broadcasting Corporation journalist who teaches journalism law and ethics to undergraduate and graduate students at Ryerson University in Toronto, Canada.

[72] International Telecommunications Union, Measuring the Information Society Report Volume 2 (Geneva: ITU, 2018), 33,

[73] Anatoliy Gruzd, Jenna Jacobson, Philip Mai and Elizabeth Dubois, "The State of Social Media in Canada 2017" (Toronto: Ryerson Social Media Lab, 2018), https://doi.org/10.5683/SP/AL8Z6R.

[74] The term "judicial officers" is used to encompass the following categories of judicial and administrative decision-makers: members of provincial and federal tribunals; justices of the peace; provincial and territorial court judges; provincial and federal tribunal members; masters; prothonotaries; superior court and court of appeal justices.

[75] This paper draws extensively – and in many instances verbatim – from that original report. I was a member of the working group that conceived of the survey and contributed to the resulting discussion paper, which is available in full here: https://www.cacp.ca/law-amendments-committee-activities.html?asst_id=844. I would like to thank my colleagues from that working group, in particular Justice Fran Kiteley, who chaired the Canadian Centre for Court Technology, and working group members Stephen Bindman, Adam Dodek, Olivier Jaar, Diana Lowe and Bruce Laregina, who took the lead on the authorship of the original report.

[76] Lorne Sossin and Meredith Bacal, *"Judicial Ethics in a Digital Age,"* UBC Law Review 46.3 (2013): p. 629–664.

There are a number of limitations to the study that should be clearly set out at this juncture. First of all, although a range of judicial officers from all but one jurisdiction responded to the survey (there were no responses from the Yukon), the questionnaire results lack quantitative validity by virtue of the fact that respondents were self-selected. The reported findings describe only the group that participated in the survey. Findings should be regarded as indicators of trends and factors that are present for at least some of the participants. Given that the response rate varied greatly between jurisdictions, and that some groups of judicial officers responded much more actively than others, the following data will always represent Canadian judicial officers as a whole, unless specified otherwise, because the distribution of the responses might not always be representative of a certain level of court or jurisdiction.

Despite these limitations, the questionnaire results represent the first-ever survey of Canadian judicial officers on social media issues. The authors are confident their work is an important first step to understanding social media use by judges and other judicial and quasi-judicial decision-makers and encourage further research in this area by others.

General use of social media

The survey results suggest that, in 2013, 48 per cent of Canadian judicial officers visited or contributed to social media sites (such as Facebook, LinkedIn, Twitter, YouTube and blogs) in a personal or professional capacity, to some extent. By way of comparison, a 2017 survey suggests an overwhelming majority of online Canadian adults (94 per cent) have an account on at least one social media platform.[77]

The apparent wide gap between social media uptake by judicial officers versus social media use by the general public needs to be put in context. First of all, there is the temporal gap between the two surveys, which is significant given that social media use is, overall, increasing with each passing year; for this reason, it is reasonable to expect that, if Canadian judicial officers were surveyed again today, the percentage using social media would be greater than it was in 2013. Second, while respondents to our survey were not asked to give their age, when compared to the general population, judicial officers tend to represent an older group of individuals; for example, 2009 data from Statistics Canada indicated the mean age for a Canadian judge was 58.[78]

At the time of our survey, it was clear that judicial officers did not visit social media websites as frequently as the general population. For example, in 2013, while 54 per cent of Canadians indicated that they "log onto Facebook at least once every month,"[79] our survey revealed that only 23 per cent of Canadian judicial officers reported the same activity.

[77] Gruzd et al., "*The State of Social Media in Canada 2017*".

[78] Mathieu Charron, Racha Nemr and Roxan Vaillancourt, "*Aging of Justice Personnel*," Juristat 21.1 (March 2009), https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2009001/article/10782-eng.pdf?st=XZ1TywvT.

[79] Michael Olivera, "*10 Million Canadians Use Facebook on Mobile Daily*," The Globe and Mail, February 19, 2014, https://www.theglobeandmail.com/technology/10-million-canadians-use-facebook-on-mobile-daily/article16976434/.

Purposes of social media use by judicial officers

The data below presents percentages of Canadian judicial officers who reported using social media (n = 325). Only those who did were invited to provide answers to the following questions:

Why do judicial officers visit social media?	Personal	Professional
Follow your contacts	61%	21%
Follow the news	56%	40%
Find online content (e.g. articles, reports)	46%	34%
Follow events	41%	26%
Find online multimedia content (e.g. photos, videos)	41%	15%

Why do judicial officers contribute to social media?	Personal	Professional
Other	6%	3%
Send private messages to contacts	47%	11%
Comment on contacts' online activity	26%	5%
Maintain one's own social media profile(s)	23%	8%
Share text-based content (e.g. articles, reports)	20%	9%
Share multimedia content (e.g. photos, videos)	18%	5%
Organize events	11%	4%
Publish original multimedia content (e.g. photos, videos)	8%	3%
Publish original text-based content (e.g. articles, reports)	3%	1%
Other	2%	2%

Social media policies

Our survey suggests that chief judges/justices or tribunal presidents/chairs do not tend to be advised of their judicial officers' online networking habits. In fact, only 19 per cent of judicial officers who visit social media websites report that their superiors are aware of their social media usage, whether personal, professional or both (8 per cent personal, 6 per cent professional and 5 per cent both).

Organizational policies on reporting social media use are not common. Only 7 per cent of judicial officers who reported using social media are obligated to inform their superior when they use it in a professional capacity, and 2 per cent need to divulge both personal and professional habits. Comparatively, when asked "Should you be obligated to inform your president/chair or chief judge/justice about your social media usage?" 22 per cent of judicial officers who reported using social media answered "Yes" for professional usage only, and 14 per cent for both personal and professional. Surprisingly, 1 per cent of respondents indicated that there should be a disclosure obligation solely for personal use of social media.

Out of the 85 per cent of judicial officers who visit social media sites and preside in a court or tribunal that does not have a policy on personal use – whether official or unofficial – 42 per cent believe that it would be useful for their organization to develop such a policy (34 per cent disagree, 24 per cent are unsure). As for the 79 per cent presiding where there is no policy on professional use of social media, a stronger 73 per cent believe a policy would be useful (13 per cent disagree, 14 per cent are unsure).

Security and privacy

Participants were questioned on both actual and perceived security risks while using social media. Where precautions can be taken to ensure the security of social media accounts, it seems the majority of judicial officers do not expose themselves to risk in the workplace. Only 1 per cent of judicial officers have provided someone else with permission to make changes to any of their social media accounts – in which cases that person is always an assistant. However, 12 per cent of social media-using judicial officers reported individuals who have regular access to their computer – generally department IT staff or assistants, and in rare occurrences a colleague or a superior.

In regards to perceived risks where limited precautions can be taken by the user of social media, the survey results appear to reflect an elevated concern about security and privacy amongst judicial officers. When asked about major social media websites like Facebook and LinkedIn, 36 per cent of judicial officers who use social media felt that their computer and the electronic documents it contains are secure while using such sites (32 per cent disagree, 31 per cent are unsure). As for the online account itself, including its content, only 24 per cent of the respondents who use social media feel that they are secure (45 per cent disagree, 31 per cent are unsure).

Ethics of networking interactions

Judicial officers responding to the survey tend to believe that using social media websites in a personal capacity is more acceptable than engaging in similar activities from a professional standpoint. Having a personal profile page (e.g. Facebook) is acceptable to 41 per cent (36 per cent disagree, 24 per cent are unsure), while having a professional profile page (e.g. LinkedIn) is only acceptable to 21 per cent of those same respondents (56 per cent disagree, 23 per cent are unsure). To a lesser degree, that same tendency can be observed for contributing to social media (e.g. writing blog posts or articles); 37 per cent find it acceptable in a personal capacity (39 per cent disagree, 23 per cent are unsure) as opposed to only 23 percent who find it acceptable to do so in a professional capacity (50 per cent disagree, 26 per cent are unsure.

In regards to professional interactions with a lawyer who is a social networking contact, 33 per cent of judicial officers who reported social media use believe that it would be acceptable for a “LinkedIn contact” to appear before him/her (37 per cent disagree, 31 per cent are unsure). However, a small, yet clear, distinction is made if the lawyer is a “Facebook friend,” in which case only 23 per cent of judicial officers find it acceptable for the lawyer to appear before him/her (53 per cent disagree, 25 per cent are unsure).

Although the above comparisons suggest a tendency for judicial officers to discriminate between personal and professional social media interactions, data distribution suggests an underlying phenomenon. Both the absence of a well-defined majority on one side or the other and the relatively high levels of uncertainty at every question might reflect a lack of understanding or knowledge about the social media concepts at play, the risks involved or the ethical issues they may or may not raise in a professional context. This hypothesis is supported by the fact that the vast majority of individuals surveyed here almost never use social media in a professional capacity.

Ethics of using social media for case-related factual research

Respondents were also queried about the use of social media by judicial officers to research background information, other than legal issues, for a particular case they are hearing – i.e. making use of factual information found through social media. When asked if they do such research, 85 per cent of judicial officers indicated they did not. Those who responded in the affirmative were asked in a subsequent question the frequency with which they disclose this fact to the relevant parties.

Three-quarters of the respondent judicial officers who sometimes use social media for non-legal research indicated that they “rarely” or “never” disclose this information to the parties, and only 11 per cent indicated that they “always” disclose such activity. When asked whether doing such factual research while judgment has been reserved raises ethical or legal concerns, 79 per cent of reported users believe that it does (9 per cent disagree, 12 per cent are unsure). Furthermore, 89

per cent consider that doing so without disclosing it to the parties raises ethical or legal concerns (10 per cent disagree, 12 per cent are unsure).

Summary of survey findings

Overall, the survey findings were informative. Judicial officers responding to the survey reported using social media at a significantly lower rate than the general population; although, as previously stated, it is reasonable to assume this is largely a factor of the average age of the judges.

By far, most use of social media by judicial officers is in a personal capacity. Judicial officers visit social media most often to follow contacts, follow the news, find online contacts, follow events and find online multimedia content such as photos and videos. A negligible minority of judicial officers contribute to social media sites in a professional capacity, while a small minority contributes to social media sites such as Facebook in a personal capacity.

The survey findings indicate a high level of concern about security and privacy amongst judicial officers. In terms of ethics, judicial officers believe that using social media in a personal capacity is more acceptable than engaging in the same activities from a professional standpoint. Judicial officers are unsure about many of the ethical implications of social media use, such as the propriety of professional interactions with social media contacts. In terms of conducting non- legal research through social media for professional purposes, a strong majority of respondents do not do so. Amongst the minority that does, almost half never disclose this information to the parties, a quarter rarely does so and another quarter always or often disclose.

The survey findings found a general lack of social media policies for judicial officers in Canadian courts and tribunals and a lack of awareness by chief judges/justices of use of social media by members of their courts/tribunals. We venture to suggest that the concerns and lack of clear understanding about ethical implications noted above all point to the need for social media policies and education for judicial officers.

Recommendations

There are currently few specific rules or guidelines in Canada dealing with the use of social media by judicial officers, although 7 per cent of judicial officers in our survey who reported using social media said they were obligated to inform their superiors. However, some guidance about conduct in the realm of social media may be available through more general ethics codes for judges and tribunal members and members of the Bar.

As demonstrated by the results of the survey, this discussion paper addresses a timely, if not urgent, topic. Not only must individual judicial officers participate in addressing the implications of the use of social media in personal and professional contexts, but given the constitutional context – in which there are both provincial and federal courts and tribunals – there are many institutions and organizations that are or should be involved. The members of our working group agree that it would be in the public interest if recommendations were made that might assist in grappling with the complexities that the medium of digital communication adds to the traditional expectations that judicial officers manifest independence and impartiality.

The following recommendations are directed at judicial officers as individuals and to the institutions, organizations and associations that should be involved in addressing the implications of social media use by judicial officers. Along with these recommendations, we have included comments and suggestions relating to the institutional use of social media.

Part 1: Personal and professional use of social media by judicial officers

1. All judicial officers have a duty to ensure that they understand the advantages, disadvantages and risks of the use of social media in personal and professional contexts and conduct themselves accordingly;
2. Existing policies, principles, codes of conduct or guidelines are inadequate to respond to that duty; and
3. Until such time as more guidance is provided, judicial officers should use social media with caution, keeping in mind the above principles.

Part 2: Consideration should be given to policies and programs by judicial officers

Consideration should be given to developing a series of policies and programs by the chief judges or chief justices of provincial and territorial courts; the Council of Canadian Chief Judges or the Canadian Judicial Council in conjunction with the National Judicial Institute; the chair, president and chief judge of all federal tribunals and all provincial/territorial tribunals; the Council of Administrative Justice in Quebec. These considerations should include:

1. Creating mandatory education programs to address the advantages, disadvantages and risks of the use of social media in personal and professional contexts for all judicial officers;
2. Creating one-on-one or small group on-site training programs to address the advantages, disadvantages and risks of the use of social media by judicial officers in personal and professional contexts;
3. Developing "promising practices" in the use of social media in personal and professional contexts. For courts that include per diem deputy judges (such as in small claims courts and municipal courts) and for tribunal members, these promising practices should take into consideration the fact that these appointments are often time-limited and the judicial officer may eventually return to the legal profession where a social media presence may be more appropriate.
4. Amending codes of conduct for all judicial officers to incorporate social media issues relating to personal and professional use.
5. Ensuring that human and technological resources are made available to all judicial officers to respond to the risks of using of social media in personal and professional contexts; and
6. Developing a policy to respond to unfair, defamatory or inappropriate attacks against judicial officers using social media.

Part 3: Associations of judicial officers

Professional associations, such as the Society of Ontario Adjudicators, the Canadian Council of Administrative Tribunals, the British Columbia Council of Administrative Tribunals, the Canadian Association of Superior Court Judges, and the Canadian Association of Provincial Court Judges, should consider:

1. Offering to assist their leadership in the development of codes of conduct and promising practices; and
2. Contracting with educational institutions such as the National Judicial Institute to offer training and programs to address the advantages, disadvantages and risks of the use of social media for their members.

Part 4: Institutional use of social media

As indicated in the introduction, this discussion paper focuses on the use of social media by individual judicial officers and not by courts and tribunals as institutions. However, some respondents to the survey raised concerns about the use of social media by courts and tribunals, which gives rise to the recommendation that courts and tribunals should consider developing and implementing an institutional policy for the use of social media by the court or the tribunal that could, among other things:

1. Alert the parties, counsel and the public to the release of all decisions;
2. Provide information on the court or tribunal;
3. Provide access to interactive videos or FAQs to assist members of the public and users of courts and tribunals; and
4. Possibly create a forum for feedback by the public and users of court and tribunal services.

As the nature and extent of our social-digital communications adapts to changing times, the authors of the original study are optimistic that this important work will prompt further research into the concerns identified in their discussion paper and as outlined in this brief overview of the original paper.

USE OF SOCIAL MEDIA BY JUDGES, PERTAINING DEFINITIONS AND REGULATIONS: A NORMATIVE VIEW FROM THE MORROCAN CONTEXT

Nadir El Moumni[80]

Abstract: *Nadir El Moumni highlights that the current legal framework in Morocco is based on the assumption that social media are a neutral tool of communication and therefore only the content and the circumstances of its use may be subject to regulation. In his paper "Use of Social Media by Judges, Pertaining Definitions and Regulations: A Normative View from the Moroccan Context" he thoroughly draws from the constitutional and legal framework, explaining in what way the legal and ethical frameworks in force would be sufficient to deal with the matter judicially as well as disciplinary. El Moumni notes, that under Moroccan law, the Superior Council of Judicial Power, in consultation with professional associations of judges, has the competence to establish a code of judicial ethics, which may theoretically include regulation of social media use by judges. The author establishes key elements for a possible approach to regulate the use of social media by judges, arguing for the "alignment approach". As it is impossible to predict or to circumscribe all the situations or frame the infinity of factual cases, especially in the current context of technological evolution, the alignment approach, that focuses on guarantees, proceeds from fact to norm by continuous codification, would ensure, in his opinion, a correct balance between the judge as a user of social media, the judge as a judge and the judge as a citizen.*

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Introduction

From a normative perspective, any attempt to circumscribe the scope of the definitions and regulations pertaining to the use of social media by judges, in a specific country study, should take into account, at least, five considerations:

- Normative recognition of impartiality as a fundamental guiding value in judicial litigation, and as a requirement in performing judicial functions;
- Conditions of recusal of judges provided for in procedural law;
- Main choices adopted by domestic legislation regarding the legal framework for social media, especially the use of social media by judges within the context of performing their judicial duties and the related challenges (preventing the risks of bias, partiality, improper ex-parte communication, breach of equality of arms, imbalance of adversarial procedure…);
- Solutions provided for by domestic legislation and jurisprudence in striking balance between constitutional-legal guarantees of freedom of expression for judges and the probable restrictions on the aforementioned right in relation to judicial duties;
- Compliance of domestic legal framework with relevant international human rights instruments, standards and other related outputs (recommendations of relevant special procedures mandate holders). Regarding the use of social media by judges and the question of impartiality, the elements to take into consideration, but not exhaustively, are: the provisions of Articles 14 and 19 of the International Covenant on Civil and Political rights, as interpreted by the Human rights committee in general comments n°32[81] and n°34[82], the "Basic principles on the independence of the judiciary"[83] (in particular §8), the "Guidelines on the role of prosecutors"[84] (§8), the "Bangalore principles of judicial

[80] Professor at University Mohammed V, Faculty of law, Economics and Social Sciences-Souissi-Rabat.
[81] General Comment N° 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007.
[82] General comment N° 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.
[83] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[84] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

conduct"[85], essentially values n°2 (impartiality) and n°4 (propriety), and the relevant reports and recommendations of the UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression and on the independence of judges and lawyers.

In accordance to elements evoked, the following paragraphs try, as a first step, to sketch an outline of the constitutional and legal framework related to the use of social media by judges, **(I)**, before drawing some preliminary conclusions from this descriptive attempt **(II)** and presenting some key features, to be considered in an approach to regulating the use of social media by judges **(III)**.

Constitutional and legal framework

First, it is worth mentioning that the use of social media by judges is not regulated by a specific legal rule, but is framed by constitutional and legislative provisions which could be described in following way.

Basically, a distinction should be made between the statutes of judges of Judicial courts and members of the constitutional court.

The statute of judges of judicial courts is defined mainly by the provisions of Title VII of the Constitution[86] as well as by the organic law n°106.13 on the Status of judges. The Superior council of judicial power, is in charge, in virtue of Article 113 (§1) of the Constitution, of applying the guarantees accorded to the magistrates including their discipline. The organization of the Superior council of judicial power, as well as the criteria relative to the management of the career of the magistrates, is defined by the organic law n° 100.13 on the Superior council of judicial power.

The status of the members of the constitutional court is defined by the provisions of Articles 130 and 131 of the Constitution. The organic law n°066.13 on the constitutional court, determines, inter alia, the situation of its members, the incompatible functions and the procedure to be followed before the Court[87].

This above mentioned distinction justifies addressing the issue of legal framework in two points, dedicated successively to judges of judicial courts and members of the constitutional court.

1. Concerning the judges of judicial courts

Impartiality is constitutionally required in performing judicial duties. By virtue of Article 109 (§3) of the Constitution "Any breach on the part of the judge of his duties of independence and of impartiality, constitutes a grave professional fault, without prejudice to eventual judicial consequences". Breach of professional secrecy, disclosure of secrecy of deliberations, deliberate forbearance of ex-officio disqualification in cases provided by law, expression of a political position, are serious disciplinary misconducts[88], which entail suspension from duty (Article 97 of the organic law n°106.13 on the Status of judges), following a disciplinary procedure whose steps and guarantees are defined by Articles 85 to 102 of the organic law n° 100.13 on the Superior council of judicial power. Proportional disciplinary sanctions are provided (Article 99 of the organic law n°106.13 on the Status of judges) for breaching the duties of "honor, honorability or dignity" (Article 96 of the organic law n°106.13 on the Status of judges).

Freedom of expression is constitutionally guaranteed for judges by the first paragraph of Article 111 of the Constitution[89]. Judges shall enjoy this freedom, in compatibility with their duty of reservation and the judicial ethics. In application of Article 37 of the organic law n°106.13 on the Status of judges, freedom of expression should be enjoyed in respect of reputation, prestige and the independence of justice. Judges undertake to respect the principles and rules set out in the

[85] Adopted by the Judicial Group on Strengthening Judicial Integrity, UNODC, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.
[86] In particular, the provisions of Articles: 57, 108, 109, 110, 111, 112, 113, 114, 116 (§s 3, 4 and 5) of the Constitution.
[87] According to Article 131 of the Constitution "An organic law determines the rules of organization and of functioning of the constitutional court, as well as the procedure which is followed before it and the situation of its members. It determines equally the incompatible functions, of which [,] notably [,] are those relative to the liberal professions, establishes the conditions of the two first triennial renewals and the modalities of replacement of the members impeached, [who] have resigned, or [who] have died in the course of the mandate."
[88] The former Constitutional council, defined the serious disciplinary misconduct as "a voluntary action, omission or disregard, which denotes dereliction by the judge, in a serious and unpalatable manner, of his duties in performing his functions" (Decision n°992/16, March 15th, 2016).
[89] Article111 (§1): The magistrates enjoy the freedom of expression, in compatibility with their duty of reservation and the judicial ethics.

code of judicial ethics[90]. In accordance with the provisions of Article52 of the organic law of the Superior council of judicial power, a standing committee of ethics and support of judges' independence is created[91] in the Council in charge of[92] "watching over the respect and monitoring the judges' commitment to respect the principles and rules of the Code of Ethics".

Judges ensure, further, compliance with customs and practices of the judiciary (Article 44 of the organic law n°106.13 on the Status of judges). Within this framework, judges may participate in scientific activities and conferences, provided that such participation does not affect their professional performance. The opinions they express within this context are personal and do not reflect in any case the opinion of an official institution, unless they are authorized (Article 47§3).

In reviewing the constitutionality of the organic law on the Status of judges, the former constitutional council, has established an interpretation based on the difference between the adoption, by a judge, of a political position, which is incompatible with impartiality, and consists, henceforth, a serious disciplinary misconduct, and the expression of a political statement, also an ethical misconduct, which is considered as such, according to its content and to its scope. The constitutional council considered the formula "expression of a political statement" as "vague" which does not meet the requirements of clarity of legal provisions, and declared it, therefore, unconstitutional[93].

The recusal of judges, can be requested by the parties in case or by the judge itself in a litigation, the motivations for recusal are defined in Article 295 of civil procedure[94], and its equivalent, Article 273 of criminal procedure, and are grouped around some forms of family relationship, financial links, present or past professional relationship and, as the Article states, "known friendship or enmity between the judge and one of the parties".

2. Concerning members of the constitutional court

"Recognized impartiality" as stipulated in §4 of Article 130 of the Constitution[95], a formula which indicates the idea of "perceived impartiality", is a requirement, among others , to eligibility for the membership of the constitutional court.

The oath taken by members before the King, and before taking office, in application of Article 4 of the organic law n°066.13 on the constitutional court, contains a commitment to perform the duties "impartially ". Members of the constitutional court are submitted to reserve and discretion, and must refrain in application of Article 8[96] of the mentioned organic law

[90] The code is to be developed by the Superior council of judicial power, in consultation with professional associations of judges, in application of article 106 of the organic law n° 100.13.
In application of article 103 of the Organic law 100.13 of the Superior Council of judicial power: The Council shall ensure respect for and attachment to judicial values and promote a culture of integrity and moralization in order to strengthen the independence of justice. To that end, it shall take any measures it considers necessary.
[91] Article 18, SCJP internal regulation.
[92] Article 21, SCJP internal regulation.
[93] (Decision n°992/16, March 15th, 2016).
[94] Any magistrate may be challenged:
- when he has, or his spouse has, a direct or indirect personal interest in the challenge;
- when there is a relationship or alliance between the judge or his spouse and one of the parties up to and including the degree of first cousin;
- when there is a trial in progress or when there has been a trial concluded less than two years between one of the parties and the magistrate or his spouse or their ascendants or descendants;
- when the magistrate is the creditor or debtor of one of the parties;
- where he has previously given advice, pleaded or postulated on the dispute or has known of it as an arbitrator; if he has testified as a witness;
- when he had to act as a legal representative of one of the parties;
- there is a relationship of subordination between the judge or his spouse and one of the parties or his spouse;
- there is a "known friendship or enmity between the judge and one of the parties".
[95] The members of the constitutional court are chosen from among the notable persons disposing of a high attainment of knowledge [formation] in the juridical domain and of a judicial competence, doctrinal or administrative, having exercised their profession for more than fifteen years, and recognized for their impartiality and their probity. (§4, Article130 of the Constitution).
[96] Article 8 of the Organic Law n°066.13 on the constitutional court.
The members of the constitutional court are bound by the obligation of reservation and generally to refrain from anything which might compromise their independence and the dignity of their duties.
They shall be prohibited, inter alia, during the duration of their duties:
-to take public position or to consult on matters which have been or may be the subject of decisions by the Court,
-to occupy within a political party, a trade union or any political or trade union group whatever its form and nature,
-any position of responsibility or direction, and generally to exercise an activity irreconcilable with the provisions of the first paragraph above,
-to allow their status as a member of the constitutional court to be mentioned in any document likely to be published and relating to any public or private activity.

"from anything which might compromise their independence and the dignity of their duties". Within this general obligation, the members of the constitutional court, shall be prohibited, inter alia, during the term of their duty" to take public position or to consult on matters which have been or may be the subject of decisions by the Court" and to "allow their status as a member of the constitutional court to be mentioned in any document likely to be published and relating to any public or private activity". A regime of blanket incompatibility is strictly defined in Articles 5 to 11 of the organic law on the constitutional court aforementioned.

Preliminary conclusions

Some preliminary conclusions could be drawn from this short description of the legal framework; it is possible to summarize them as follows:

The regulations regarding the use of social media by judges and the question of impartiality are based on the assumption that social media, like all means of communication, are neutral in itself, and consequently, only content and circumstances of its use by judges within the context of performing their judicial duties can be subject to regulation. This assumption is not only the basis of the legal framework previously described, but is assumed in other legal texts. The Moroccan criminal code, for example, uses, in a variety of legal contexts, a series of terms indicating the neutrality of social media as a support: "electronic way", "electronic means", "electronic or digital form", "electronic messages". The same choice is adopted by the Law n° 09-08 of 18 February 2009 on the protection of individuals with respect to the processing of personal data, and the law n°53.05 related to electronic exchange of legal data. Established jurisprudence of the former Constitutional council and the present constitutional court, in electoral litigation, has always examined the use of social media, as communication support, from two angles: the content transmitted through and the circumstances of use.

Considering, social media as neutral technical support of communication, logically implies that, there is no legal need, from this point of view, to provide a specific regulation for the use of social media by judges. The legal and ethical frameworks, presently in force, are sufficient to deal, judicially and disciplinary with the matter.

This legal choice, as described, permits: 1) to guarantee the freedom of expression of the judge as a citizen, 2) to strike the balance, on a case-by case basis, between the rights of the judge as a citizen and the constraints linked to his function, 3) to consolidate some well-established principles like the presumption of the judge's subjective impartiality until there is proof to the contrary, 4) to assess the existence, on a case-by case basis, of sufficient guarantees to exclude any legitimate doubt about the impartiality of the Court or the judge, from both personal and objective angles 5) to ensure relevant legal description of cases of breach by a judge of legal and ethical requirements related to impartiality, reserve and discretion, within the context of the use of social media.

This legal choice is also based on the precautionary principle. The nature (either public or private) of social media cannot be preliminary defined. From a comparative perspective, in a decision of the constitutional court of the Czech republic, rendered in 2014, the Court considered, that "The nature of the facebook social network is not clearly private or public; it is up to individual users to determine the degree of privacy protection to set on their profiles"[97]. In a decision of 5 January 2017, the French court of cassation considered that the "term "friend" used to refer to persons who agree to communicate through social networks does not refer to friendships in the traditional sense of the term", and that "the existence of contacts between these persons through social networks is not sufficient to characterize a particular partiality". The Court defined social networks as "a simple mean of communication between people who share the same interests"[98]. The examples of jurisprudence cited, show that there is no consensus, until now, on the nature of social networks.

Finally, it is important to note that the regulation of social media may encompass some specific matters, which are hardly conceivable, from a legistic point of view, as part of a rigid legal framework regulating the use of social media by judges. It is possible to evoke, for example, the questions of data protection and privacy, users' rights, disclosure and third party endorsement, oversight, archiving, retention, the right to be forgotten, etc. A soft ethical regulation by codes of conduct remains, however, possible. The two last versions (2016 and 2019) of the French code of judicial ethics[99], developed by the "Superior council of the magistrature", states a new commitment which consists of a "duty of vigilance", considering that

[97] CZE-2014-3-009, 30-10-2014, http://www.codices.coe.int.
[98] Arrêt n° 1 du 5 janvier 2017 (16-12.394) - Cour de cassation - Deuxième chambre civile - ECLI :FR : CCASS:2017:C200001.
[99] Recueil des obligations déontologiques des magistrats (2016, 2019).

the judge "is not an internet user as others". The judge has a "duty of vigilance" in "using social networks especially when he expresses under his identity or in his quality of judge"[100].

Key elements of an approach to regulating the use of social media by judges

In application of Article 106 of the organic law n° 100.13 on the Superior council of judicial power, the code of judicial ethics, which can theoretically include regulation of social media use by judges, is to be established by the Superior council of judicial power, in consultation with professional associations of judges. The scenario of elaborating a code of conduct by law is not conceived within the current legal framework.

On this basic assumption, a description of some key features, to be considered in any approach to regulating the use of social media by judges, in this specific legal context, could be presented as follows:

The mode of regulation should be sufficiently soft to be adaptable to technological changes, suitable to incorporate new principles developed by disciplinary jurisprudence, but sufficiently rigid to be applied as a secondary source of liability. As the main source to establish the legal or disciplinary liability of the judge should remain a hard norm (Constitution or law).[101]

The model should transcend the dichotomy public/private, not only for reasons related to the technical conditions of use of social media, but also for problems related to the establishment of proof, which can impact negatively the guarantees accorded to judges in disciplinary process. The crucial challenge is to absolutely safeguarding the substantial procedural guarantees within the disciplinary process related to the use of social media by judges.

The model should be based on an assessment, by an independent and impartial body, the Superior council of judicial power, of breaches or disciplinary misconduct that can occur within the context of the use of social media by judges.

In evaluating breaches or disciplinary misconduct related to the use of social media by judges, the model should permit the assessment of a combination of factual elements, and according to an approach of case-by-case, the nature, the content, the scope, the purpose of content published, the circumstances of use, position assumed by the judge. The elements cited should be taken as a combination and not separately, in order to strike a balance between the rights of the judge as a citizen and the constraints linked to his function, between constitutional-legal guarantees of free expression for judges and the probable restrictions on the aforementioned right in relation to judicial duties. The basic requirement indicated, could ensure a correct application the tests of proportionality and necessity, in a specific disciplinary case.

The design of the model should be guided by some ethical and practical values: prudence, precaution, reserve, discretion, duty of vigilance. It is highly recommended to provide specific interpretation of these ethical duties, within the context of the use of social media by judges, but it does not imply necessary the creation of new or specific rules. If the particularity of social media is, in fact, fully recognized, a normative alignment on the common regime is still an eventuality. Acts as liking, disliking, sharing and commenting, could be assimilated and legally qualified, under certain circumstances, as publication. One of the advantages of "the alignment strategy" is that it preserves some fundamental principles as presumption of judicial impartiality, from both objective and personal perspectives, including the appearance of impartiality to reasonable observers[102] . It ensures, furthermore, respect of fairness and equality of arms[103]. Established internal mechanisms as recusal and disciplinary procedures could deal, even within the context of accelerated technological evolution of social media, with some complicated facts like the omission by the judge to delete a commentary on his facebook page, for example, or the signification of friendship or the impact and the influence of messages published through social media. The alignment approach supposes the respect of the main fundamentals in defining disciplinary sanctions: legality, proportionality and the possibility of review. It accords, from a legal coherence perspective, to specific legal texts, rather than judicial codes of ethics, the task to regulate general questions like data protection, and other new legal questions raised by social media.

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[100] Chapter II : Impartiality, point 13 : « Le magistrat, qui n'est pas un internaute comme un autre, doit être vigilant dans son utilisation des réseaux sociaux, en particulier lorsqu'il s'exprime sous son identité et en qualité de magistrat ».

[101] For comparison, point 1.2 of the European charter on the statutes of judges. "1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level."

[102] GC 32 §21.

[103] GC 32 §62.

Finally, if it is impossible to predict or to circumscribe all the situations or frame the infinity of factual cases, especially in the current context of technological evolution, the alignment approach, that focuses on guarantees, proceeds from fact to norm by continuous codification, can ensure a correct balance between the judge as a user of social media, the judge as a judge and the judge as a citizen.

Online freedom of expression of judges in Tunisia

Aymen Zaghdoudi[104]

Abstract: "*Online Freedom of Expression of Judges in Tunisia", by Aymen Zaghdoudi, is based on the understanding that the use of social media by judges is part of their right of freedom of expression, while referring to Art. 19 of the* International Covenant on Civil and Political Rights*. Restricting their freedom of expression in absolute terms would be unjustified and should in any case respect the principles of necessity and proportionality. To regulate the use of social media among judges, the author suggests that self-regulation would be the most compatible system in the light of the international standards related to the right of freedom of expression. In Tunisia, the Judicial Council or the judges' association could be competent to develop a toolkit on the use of social media by judges to be used in line with judicial ethics.*

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No one can deny the impact of social media sites, such as Facebook, Instagram, Twitter, and WhatsApp, on our lives. They became a privileged place of freedom of expression because of their intrinsic characteristics such as proximity, rapidity, anonymity and the ease of use.

The Human Rights Committee has issued in 2011 a General Comment concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[105] It is mentioned that "*States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto*." [106]

The right of freedom of expression is a fundamental right. It is also closely linked to the other rights and allows them to thrive. This right includes, as it's mentioned in Article 19 of the ICCPR, the *freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

The aforementioned definition includes freedom of expression offline and online which means that individuals have the right to express themselves through internet by sharing their opinion, information or ideas, commenting on other one's or on public affairs. But how about judges?

A judge shares a political opinion of a leader of the opposition. A general attorney likes a post of a lawyer that might appear before him in court. A president of the court shares photos of himself with a group of lawyers when they were in school together. A judge uploads a profile picture where he is wearing the jersey of a famous sport's club that regularly appears before him in court. A judge at the penal court shares videos considering homosexuality as a sin.

Are these actions on social media legal? Do judges have the same degree of freedom of expression as other individuals? How can judicial ethics and freedom of expression on social media be conciliated?

The answers are different from country to country and depend on various factors such as the political regime or the social perception of the role of justice.

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[104] Assistant professor of public law at Carthage University and international expert in media regulation and content moderation.
[105] Article 19 enshrines that "*1. Everyone shall have the right to hold opinions without interference.*
[106] United Nations, Human Rights Committee, 102nd Session, 11-29 July 2011, General comment No. 34 concerning Article 19: Freedoms of opinion and expression.

In the first part we will explain the legal framework of freedom of expression in Tunisia. Then, the second part will contain the main recommendations and remedies concerning the use of social media by judges.

The legal framework of freedom of expression of judges in Tunisia

After the revolution of January 14, 2011, Tunisians elected the National Constituent Assembly (NCA) charged to elaborate a new Constitution.

On January 27, 2014, the NCA adopted the Constitution and emphasized in chapter 2 that fundamental rights and freedoms are the cornerstones of the constitutional architecture. Freedom of expression is one of the most important freedoms that the Tunisian Constitution enshrines in Article 31, which provides that "*Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship*."

Freedom of expression is a vital ingredient for the success of the Tunisian democratic transition and any threat to it will certainly harm the democratic process. It is defined by the European Court of Human Rights that "*Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"*. [1071] Therefore, freedom of expression and democracy are deeply linked to each other and any restrictions have to comply with international human rights law and the Tunisian Constitution.

Second, it is important to stress that the internet has significantly enlarged worldwide communications and the possibility for human beings to express their opinion and to share information. Moreover, political speech is considered by many as one of the main elements of the right of freedom of expression and many States are committed not to set up liberticidal laws that might deter public debate about matters of public interest.

We conclude that all individuals, including judges, have the right to enjoy fully the freedom of expression either offline or online.

However, Tunisian law concerning judges has set up various obligations which judges are obliged to observe not only during their duty but also out of it.

The Office on Drugs and Crime at the United Nations issued a document in 2002 called "the Bangalore Principles of Judicial Conduct" in which the main principles are: independence, impartiality, integrity, propriety, equality, competence and diligence.

The aforementioned document is the result of a long discussion between experts and States on what could be universal standards of judicial conduct. The main dissimilarity between them was related to political activities. In some countries, judges have the right to be elected on the basis of their party affiliation, whilst in other countries, it is forbidden for them to present themselves at elections. In other countries, judges have the right to be elected in the parliament but their judicial quality will be suspended.

Additionally, Opinion No 3 of the Consultative Council of European Judges states that "*[t]he judicial system can only function properly if judges are not isolated from the society in which they live (…). As citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc.) (…). However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable*

[107] European Court of Human Rights, Case of Handyside V. The United Kingdom, 7 December 1976.
Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]}
For more details about the European Court of Human Rights jurisprudence concerning freedom of expression, see: Jean-François, Flauss (2009) "The European Court of Human Rights and the Freedom of Expression," Indiana Law Journal: Vol. 84: Iss. 3, Article 3.
Available at: http://www.repository.law.indiana.edu/ilj/vol84/iss3/3.

balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties".[108]

It appears, referring to the Tunisian Constitution, that none of its provisions provide for particular limitations on the freedom of expression of judges. At the same time, there are statutory obligations that impose restrictions on the freedom of expression of judges including their political activities.

The Judicial Authority is regulated basically by four laws:

a) *Law No. 29 of July 14, 1967 on the judiciary system and the Supreme Council of the Judiciary and the basic status for judges*;

b) *Decree No. 6 of September 26, 1970 relating to the basic law of the members of the Financial Department*;

c) *Law No. 67 of August 1,1972 concerning the administration of the Administrative Tribunal and the statutes of its members*;

d) *Law No. 34 of April 28, 2016 concerning the Supreme Judicial Council*.

The obligations of judges are regulated in Tunisia under the Articles 14 to 24 of the *Law No. 29-1967 of July 14, 1967 on the judiciary system and the Supreme Council of the Judiciary and the basic status for judges.*

A judge may stand as a candidate for local, legislative or executive elections. If he or she is elected, the right and the duty to hold judicial office is suspended (Article 17). A judge must not disclose information concerning parties to a dispute, their rights, obligations or legal interest, which has come to his/her knowledge in the course of the performance of his/her judicial duty (Article 23). A judge's behaviour must not be detrimental to the dignity of judicial power (Article 24). In case of a culpable violation of an official duty or the honour or dignity of the judiciary, a judge can be subject to disciplinary proceedings (Article 50). Also, according to Article 7 of the *Decree Law No. 87-2011 of September24, 2011 on organisation of political parties,* a judge cannot be a member of a political party.

It is important to mention, that there are no special provisions on the use of social media by judges. However, any restrictions have to respect the Constitution and the international commitments of Tunisia.

The conciliation between freedom of expression of judges and the requirements of impartiality has to be made on the basis of Article 49 of the Tunisian Constitution[109] and Article 19 of the ICCPR.

Referring to the above mentioned provisions, it is possible to restrict the freedom of expression of judges to satisfy the requirements of impartiality of the judiciary and the dignity of judges. These provisions lay down particular conditions and it is only subject to these conditions that restrictions may be imposed. The restrictions must be provided for by law, they may only be imposed for one of the grounds set out in those articles (respect of the rights or reputations of others or the protection of national security, of public order or of public health or morals) and they must conform to the strict tests of necessity and proportionality.

The freedom of expression of judges cannot be restricted in absolute terms since any restriction should respect the principles of necessity and proportionality. It is unjustified to prohibit judges from sharing or posting their political opinion through social media since hiding or expressing political opinions has no real impact on the impartiality and neutrality of judges. In the Tunisian context, it is important to let judges express their political opinion to rationalize the public debate, especially, because judges have a distinguished and respected position based on the social perception.

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[108] Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (November 2002). *Available at*: https://rm.coe.int/16807475bb.

[109] "*The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution*".

It is also important to take various factors into account to evaluate judges' expressions through social media such as the judicial office held, the content of the impugned statement and the context in which the statement is made.

For example, public opinions by a president of the court that are linked to the administration of justice or to a pending case could raise public interrogations about his/her impartiality. Such expression may reduce the public trust which must be respected by the courts in a democratic State.

Recommendations and remedies of the use of social media by judges

Tunisia has no code of conduct to date, but according to Article 43 of *Law No. 34 dated April 28. 2016 concerning the Supreme Judicial Council*, the Supreme Judicial Council is charged with preparing a code of judicial ethics for judges.

Moreover, we would suggest that self-regulation is the most compatible system to regulate social media use by judges in the light of the international standards related to the right of freedom of expression. Self-regulation is understood as a system where judges are regulating themselves through a specific institution (*e.g.* a Judiciary Council) and on the basis of an ethical code (soft law).

The principles of professional conduct should be drawn up by the judges themselves "*to resolve questions of professional ethics, giving them autonomy in their decision-making and guaranteeing their independence from other authorities. Secondly, they inform the public about the standards of conduct it is entitled to expect from judges. Thirdly, they contribute to give the public assurance that justice is administrated independently and impartially*."[110]

Based on the code of conduct, the Judicial Council or the judges' associations should develop a toolkit to be used in training in order to disseminate ethical rules among judges, especially the new ones. These rules shall be amended on the basis of disciplinary decisions of the judicial authority.

Finally, training on digital hygiene and social media culture is vital and aims to provide a framework to access, analyze, evaluate, create and participate through social media and to build skills and knowledge concerning the balance between freedom of expression and public trust in the judiciary.

[110]Opinion No. 3 of the Consultative Council of European Judges, *Op. Cit.*, p.8.

THE PROFESSIONAL LAW GOVERNING THE PRIVATE (SOCIAL) MEDIA STATEMENTS OF JUDGES IN GERMANY

Johannes Schmidt[111]

Abstract: *In "The Professional Law Governing the Private (Social) Media Statements of Judges in Germany", Johannes Schmidt gives an overview on the German courts' interpretations of what judges may or may not do. German courts have interpreted the underlying concept of §39 on preserving independence of the German Judiciary Act governing the do's and don'ts of judiciary with regard to public statements, both political and nonpolitical, made by judges in Germany. Johannes Schmidt explains how the ratio decidendi of the case law regarding statements on traditional media outlets also applies to statements made by judges via social media, and presents a set of recent judgments that specifically deal with the statements made by judges on social media in Germany, that have been at the basis of disputes. In his view the advantages of the existing standards-based system outweigh a detailed rule-based approach, arguing that social media haven't affected the principles of independence and impartiality and that the existing provisions and case law are sufficient to determine judicial bias.*

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Introduction

The professional law governing the private media statements of judges in Germany is based on case law. The core statutory provision of paragraph 39 Deutsches Richtergesetz (German law on the judiciary) is brief and abstract: "In- and outside office a judge shall conduct him- or herself, also in relation to political activity, in such a manner that confidence in his or her independence will not be endangered."[112] Detailed regulations, binding or non-binding codes of conduct, best-practice recommendations, principles, binding precedents or other publications of an official nature do not exist. The case-by-case interpretation of paragraph 39 Deutsches Richtergesetz therefore lies in the hands of the courts that deal with cases relating to the personal conduct of individual judges.

In this article I shall look at the way German courts have interpreted the underlying concept of paragraph 39 Deutsches Richtergesetz with regard to private public statements made by judges in Germany. Many of these cases deal with 'classic' offline press statements. The *ratio decidendi* of these cases also applies to social media statements.

This paper focuses on statements given in a private capacity. It does not relate to official statements e.g. by press spokespersons. The case law presented here does not discuss statements of an academic nature in law reviews. I also do not analyze the standards that apply to public statements made by high-ranking federal judges. However, it is noteworthy that the Justices of the federal constitutional court have given themselves a code of conduct for their appearance in public.[113] In the concluding section, I discuss the advantages of the existing standards-based system against a detailed rule-based approach.

Case law

In a set of older case law judgements, it was necessary for the courts to define the limits for appropriate conduct relating to judges' statements in the media in general.

[111] Dr. iur, MJur (oxon). Chairman of the Federal State of Hessen Judges Association (Deutscher Richterbund Landesverband Hessen e.V.).
[112] *See* https://www.gesetze-im-internet.de/englisch_drig/index.html.
[113] *See* Code of Conduct for the Justices of the Federal Constitutional Court, General Principle No. 12, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/Verhaltensleitlinie.html.

Political statements

The first group of cases comprises disciplinary sanctions relating to political statements. When reviewing these cases, it is necessary to bear in mind the specific historical background of the early 1980s when there was felt to be a genuine threat of political destabilization by GDR/Soviet agents and a widespread fear of nuclear war following NATO's Double-Track Decision in December 1979.[114]

The M.W. case[115]

This case saw a judge in Lower Saxony reprimanded for participating in a solidarity campaign for the schoolteacher Mr. M.W.[116] during the early 1980s. Mr. M.W. had been dismissed under the "Radikalenerlass" (radicals decree) for communist activities. Mr. M.W. contested his dismissal and appealed to the labor court. During the trial, the judge in question, along with around 700 other campaigners, had signed a petition which was published as a newspaper announcement urging the labor court "to respect the constitutional rights and do justice by allowing M.W. to resume his job".

The Disciplinary Court for Judges for the State of Lower Saxony held that the attempt to influence an ongoing trial before another court had reached its decision was a breach of official duties. The court also reasoned that it was inappropriate for a judge to make explicit reference to his or her position in a political statement with the appearance of a commercial advertisement. The court also disapproved of the judge one-sidedly supporting the campaign without presenting a full discussion of the facts.

The *ratio decidendi* applied here to any media statement is that judges have an official duty not to make biased statements and not to comment on pending trials.

The 35 judges' case[117]

In a similar case, 35 judges and state attorneys had published a newspaper article with the headline "35 judges and attorneys against nuclear stationing". They stated that nuclear stationing – from their professional perspective as judges and attorneys – was a breach of the constitution and therefore illegal. The lengthy statement presented a mixture of emotional and legal arguments. The judges were reprimanded and their appeals to the Federal Administrative Court were rejected.

The Federal Administrative Court held that an independent judiciary was vital and that judges should remain impartial and restrain themselves while in office. Judges were free to publish their political opinions in a private capacity and in doing so were protected under the right of freedom of expression. In this case, however, freedom of expression did not apply because the judges had explicitly connected their political statement to their office. The court stated that the judges had misused their office as a political instrument to reach a wider audience and to appear more convincing to the public. They were bound by the principal of independence and impartiality in full effect and prohibited from publicly making political statements because it would compromise the image of an independent judiciary.

The Federal Administrative Court emphasized the boundary between public office and the political battlefield. When expressing a personal political opinion, a judge must not refer directly or indirectly to his or her office.[118]

The 554 judges' case[119]

A different approach was taken in a case where 554 judges and attorneys protested against nuclear stationing in a newspaper announcement in 1987. The judges declared their solidarity with other judges who had previously been convicted for participating in illegal road blockades against military convoys. Although the declaration was very moderate

[114] *See* https://www.nato.int/cps/en/natolive/official_texts_27040.htm.
[115] *See* Niedersächsischer Dienstgerichtshof für Richter, Deutsche Richterzeitung 1982, p. 429; Bundesverfassungsgericht, Deutsche Richterzeitung 1983, p. 492.
[116] The published decision only tells us his initials for personal data protection.
[117] *See* Bundesverwaltungsgericht, Deutsche Richterzeitung 1988, p. 180; Bundesverfassungsgericht, Deutsche Richterzeitung 1988, p. 301.
[118] Where this boundary is not respected, not only disciplinary measures can be justified but also motions of challenge if there's a link between the political matter in question with the relevant facts of the case. This aspect is illustrated by the case „Wiesbadener Juristen" (*see* Verwaltungsgerichtshof Kassel, Beschluss vom 18. 10. 1984 - 2 TE 2437/84).
[119] *See* Niedersächsischer Dienstgerichtshof für Richter, Deutsche Richterzeitung 1990, p. 62.

in content and style, the judges were reprimanded, and the Disciplinary Court for Judges for the State of Lower Saxony held that they were in breach of official duties.

The court emphasized that the blockades were illegal and held that the judges were on no account permitted to approve of the illegal behavior of other judges. The judges had suggested to the public that it was tolerable to break the law if pursuing legitimate political goals. The court said that statements of this kind could damage the principle of rule of law and mislead the public about the binding character of the law. Judges who approved of illicit behavior were also endangering the trust in their personal ability to consequently apply the law in an impartial way.

The decision showed that public statements may violate official duties because of their content, even if a moderate style is kept, and that judges should not publicly sanction legally questionable or illegal behavior.

Non-political statements

A second group of cases illustrate that the duty to act independently even outside office is not limited to political activity, and that similar principles apply to any public statement.

The tenure track case[120]

In 1996 the Federal Administrative Court had to decide the case of a newly appointed judge who had expressed harsh criticism in a public speech on a draft proposal to reform the immigration law. When a tenure track position became available at the higher administrative court (which has jurisdiction over immigration cases), his application for that specific branch of the judiciary was rejected *inter alia* because of his public statement. The judge's appeal to the courts was unsuccessful (for other reasons) but the Federal Administrative Court emphasized that his critical views were protected by the right to freedom of expression because he did not present his views in an inappropriately hostile or emotional way.

The *ratio decidendi* of this decision was that a judge has the right to freedom of expression as long as he or she does not criticize other state bodies or other members of the civil service publicly in an emotional or hostile manner.

The They will probably lose all five cases case[121] **and the Lawyer K. has disappeared case**[122]

In the following two cases, motions of challenge were successful on the grounds of preceding media statements:

In the first case the presiding judge in a civil case had given a newspaper interview at a stage when the court had not yet taken final deliberation on the case. In the written interview he was cited as saying "in preliminary deliberation the court has come to the conclusion that the claimant will probably lose all five pending cases." The Disciplinary Court for Judges for the State of Lower Saxony held that the judge had shown that he was determined to reject the claim.

The second case, a criminal matter, relates to a motion of challenge that came before the Federal Court of Justice in 1953. A newspaper article with the title "Lawyer K. has disappeared" speculated on whether the defense counsel had pretended to be a fully qualified lawyer and traveled to East Berlin. The underlying facts had been leaked to the press by the presiding judge. The defense responded by filing a motion of challenge. The court stated that the extent to which a judge's press statement is quoted correctly or the statement is misinterpreted does not matter. A judge should anticipate changes made by the press and it is his or her duty only to maintain impartiality. This duty took precedence over the need to inform the press about pending cases. Judges must therefore not tell the press anything that might appear to influence the hearing and the judgment. Because of the danger of violating impartiality by informing the press, the court held that judges should always let the official spokesperson speak to the press. Press statements of the spokesperson would and could not be taken as a statement of the bench that determined the outcome of the trial.

The *ratio decidendi* in both cases is that there is no legitimate interest in talking about pending cases in a private capacity. If a judge feels that the press needs to be informed, he or she should refer the press to the press spokesperson.

[120] *See* Bundesverwaltungsgericht, Deutsche Richterzeitung 1997, p. 1248.
[121] *See* Oberlandesgericht Celle, Monatsschrift für deutsches Recht 2001, p. 767.
[122] *See* Bundesgerichtshof, Entscheidungssammlung des Bundesgerichtshofes in Strafsachen, Vol. 4, p. 264.

Statements on social media

The ubiquity and accessibility of social media has generated a new group of cases that illustrate the perils and pitfalls of judges' personal social media use.

The We give a home to your future case[123]

The presiding judge of the 2nd Criminal Division of the Regional Court of Rostock presented himself on his public Facebook site drinking beer and wearing a T-shirt bearing the words "Wir geben ihrer Zukunft ein Zuhause - JVA" (We give a home to your future – the abbreviation JVA stands for "prison"), which – excluding "JVA" – is a widely known advertising slogan for a bank that specializes in small loans for the purchase, construction or renovation of private homes. The picture bore the caption "2nd Criminal Division of the Regional Court of Rostock– since 1996". On the comment page the judge had written "This is my *I will be retired when you are released*-face". Another user had commented "So says a professional jailer", which the judge had then "liked".

One of the counsels for the defense in a robbery trial, which the 2nd Criminal Division of the Regional Court of Rostock was hearing, challenged the judge on the grounds of doubting his impartiality. The court's division sitting on the motion of challenge asked the judge to make an official statement concerning the grounds for the challenge. The judge refused to make a statement and argued that the matter related to his private life only. The court accepted the judge's position and rejected the motion as unfounded. It held that the Facebook site was a matter for the judge's private life and he was "obviously just joking".

The defendants were convicted to eight- and five-year's imprisonment and appealed to the Federal Court of Justice. The 3rd panel of the Federal Court of Justice's criminal division quashed the verdict and referred the matter back to a different regional court. The Federal Court of Justice considered the judgment to be based on a violation of the law because the motion for challenge had been erroneously rejected. The court held that the publicly accessible content of the Facebook site clearly demonstrated that the judge had an opinion that gave reason to doubt his impartiality. Instead of making an impartial ruling, he seemed to enjoy punishing defendants and subjecting them to long-term imprisonment. He also had inappropriately made fun of the defendants. The Federal Court of Justice stated that the social media appearance was not a matter of the judge's private life because he had referred explicitly to his profession. The court concluded that the way the judge had portrayed himself on Facebook was totally incompatible with the necessary impartiality of a criminal judge.

What we learn from this case is that the *ratio decidendi* given in the M.W and the 35 judges cases also applies to private social media accounts, that a sense of decorum must be maintained and that any reference to the office should be avoided.

The Nazi lay judge case[124]

This case involving a lay judge being discharged for praising the Nazi regime on Facebook recently came before the Higher Regional Court of Saxony. A lay judge posted an approving comment on an article that contested the existence of the Federal Republic of Germany. The article was written in a manner typical for the *Reichsbürger*, a right-wing extremist group that spreads conspiracy theories encouraging violence towards civil servants for serving the non-existent Federal Republic. In addition, the judge's profile picture was a photograph of a uniform cap of the SS Totenkopf Division, worn by the military division in charge of the concentration camps in World War II and responsible for war crimes and genocide. He commented this picture with the words: "Dear migrants, this cap allows you to identify the official in charge of your application for asylum". In a comment posted on the upcoming general elections he wrote: "Germany will no longer be Germany. The established parties will rig the election to destabilize the country. There will be civil war to get rid of those in charge. They will be tried by the people." This was taken as evidence of a Nazi attitude and substantiated the decision to discharge the lay judge for grave violations of his official duties. The court held that the lay judge had clearly shown that he was not loyal to the constitution and favored violence towards others and discrimination of migrants. Loyalty to the constitution was considered to take priority over freedom of expression. Due to his biased and inhuman views he was incapable of acting as an impartial judge.

The case demonstrates that private statements of an anti-constitutional nature on social media may (and should) result in discharge proceedings – bearing in mind that the legal requirements are higher for professional judges than for lay judges.

[123] *See* Bundesgerichtshof, Neue Zeitschrift für Strafrecht 2016, p. 218.
[124] *See* Oberlandesgericht Dresden, Der Strafverteidiger 2018, p. 403.

The dismissed prosecutor case[125]

The following case shows that even personal messages can result in dismissal if they contain content inappropriate to the office.

The judge in question had been newly appointed as a judge on probation and was employed at a public prosecution office. Four months later, a woman contacted the judicial administration and said that she did not know the prosecutor personally, but that he had been sending her a variety of unwanted messages through various social networks since 2010. Her lawyer had previously, unsuccessfully asked him to refrain from this in 2010. Even after entering the civil service, the prosecutor sent her unwanted messages on Facebook. Two of them were: "I was seconded to the public prosecutor's in the district of Hagen because of my outstanding performance." And "Hey Melanie? What are you doing? Where were you today? If you want, go to Hanover :). My investigative powers extend nationwide and even worldwide, if I want to…". In consequence the Attorney General dismissed the prosecutor from the judicial service during the probation period (paragraph 22 Deutsches Richtergesetz) because of serious doubts about his suitability as a public prosecutor.

The dismissed prosecutor contested this decision, but the Federal Court of Justice found that there were serious doubts as to his suitability because of the content of the two messages cited. The decisive factors were the boastful reference to his professional investigative powers and the implication that, no matter where she was, the woman could not escape the influence of his public prosecutorial powers. This latter declaration could be understood by a layperson (in this case the woman concerned) as a subliminal threat. The court stated that unwanted declarations that intrude on someone else's private life were neither covered by the fundamental right to freedom of expression nor could the prosecutor rely on civil law provisions that also permit the use of the title of office in private life. The prosecutor's right to privacy, protected by Article 8 of the European Convention on Human Rights, was also not violated. By referring to his official duties, the prosecutor had made a clear reference to his office meaning the statement could be construed as being of an official nature.

The prosecutor would certainly have been dismissed if he had written letters on paper to "Melanie" but social media allows the private lives of others to be intruded upon much more easily than in the pre-digital age.

The lawyer joke case[126]

The most recent case concerns a motion of challenge. The defense attorney in a human trafficking criminal case challenged the presiding judge because he had retweeted the following joke about lawyers on his private twitter account: "What is the difference between a dead dog and a dead lawyer on the street? You will find skid marks on the road in front of the dog." The application for bias was rejected by the court.[127] However, the retweeted joke (which was not marked with a "like") had consequences for the judge concerned. The case was reported in the newspaper with the judge's full name and a portrait photo, and the judge deleted his private Twitter account in the course of the motion of challenge.

The case shows that apparently harmless social media activities can have unpleasant and unpredictable consequences for judges.

Conclusion: the case against regulation of private (social) media statements of judges

The basic interpretations and definitions of the principle of judicial independence were defined between the 1950s and 1980s and have not changed fundamentally since. Once the Federal Courts had determined the limitations on freedom of expression for judges the number of cases declined. The cases discussed above are the only published precedents.

As the leading judges' association in Germany, the Deutscher Richterbund therefore does not see the need for additional regulation in Germany. From our perspective the existing provisions on challenging judges in the procedural codes and the provisions on the independence of judges in the constitution and in the German law on the judiciary have been sufficiently clarified by case law to determine whether a judge's private behavior is inappropriate. Even the courts are reluctant to formulate different rules of behavior and prefer an approach that takes all circumstances of the case into account and avoids the need for a fixed set of do's and don'ts.

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[125] *See* Bundesgerichtshof, Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report 2019, p. 525.
[126] *See* newspaper article in Kölner Stadt-Anzeiger, https://www.ksta.de/koeln/-mangelnder-respekt--koelner-richter-teilt-witz-auf-twitter-waehrend-schleuser-prozess-36240256# (14/02/2020).
[127] The exact wording of the reasons behind the decision has not been published yet and therefore cannot be assessed here.

The reason for a standards-based approach in Germany is as follows: A judge's independence is both a duty and a right. A canon defining (in)appropriate behavior could interfere with the right to act freely and independently of outside influence. The higher the density of regulation for judicial behavior, the greater the risk that political players, other state bodies or the judicial administration may use it to discipline and exercise control over judges in their professional conduct. Unlike other jurisdictions, the German judiciary is not self-governed. The Ministry of Justice plays a vital role at state level in the selection and promotion process of judges and in disciplinary proceedings. The concept of judicial independence as an official right is not provided with strong institutional safeguards in Germany.

The potential disadvantage of the existing standards-based approach might be that it creates uncertainty among judges on the extent to which their statements are subject to limitations to freedom of expression. This uncertainty might mislead them into feeling free to make any public statement if it is made in a private capacity or, conversely, make them abstain from using social media altogether.

These disadvantages, however, do not outweigh the advantages of the existing standards-based approach. In particular, the personal integrity of German judges is usually a powerful disincentive against inappropriate media practices. My personal investigation of German judges' activities on Twitter and Facebook has revealed that very few comments could be construed as questionable or out of bounds. The vast majority of judges either do not use social media actively or publicly or, when using it, respect the values stated in the Bangalore Principles of the judicial integrity group.[128]

Any remaining uncertainty among judges regarding questions of judicial ethics can most effectively be clarified with specialized guidance and training. I will be offering special 2-day training courses for judges on the use of social media in Germany in 2020. Training that addresses judicial ethics in general already exists at state and federal level.

The technical revolution in communication that social media has triggered has not affected the principle of independence or impartiality. Neither has it fundamentally altered human psychology and the interest of the parties or defendants in a trial situation. Social media has, however, introduced new styles of expressing and publishing opinions, pictures or videos and increased the visibility of judges in the public eye. These new phenomena are capable of being assessed using the pre-existing case law standards by taking all circumstances of a case into account.

The Deutscher Richterbund has therefore deliberately chosen not to draft guidelines or codes of conduct on professional ethics for its members. As stated in our association's brochure Judicial Ethics in Germany: "Internal independence, cannot be prescribed but must be practiced. Every judge must decide for him- or herself how to shape such independence. Laws and general societal values are only helpful to a limited extent here. What is necessary is a sense of duty which distinguishes judges from mere legal technicians."[129]

[128] *See* The Judicial Integrity Group, The Bangalore Principles of Judicial Conduct, https://www.judicialintegritygroup.org/jig-principles.
[129] *See* Deutscher Richterbund, https://www.drb.de/fileadmin/DRB/pdf/Ethik/1901_DRB-Broschuere_Richterethik_EN_Judicial_Ethics.pdf.

EXTRAJUDICIAL USE OF SOCIAL MEDIA BY JUDGES IN GERMANY

Jannika Jahn[130]

Abstract: *In "The Use of Social Media by Judges in Germany" Jannika Jahn examines the current principles guiding judicial behavior in Germany. After outlining specific problems arising due to the use of social media by judges, she observes that the use of social media is not only a challenge for the behavioral orientation of the judges, but also the public trust in an independent and impartial judiciary. The author argues that the use of social media by judges requires new approaches. She suggests, in particular, the extension of the principle of judicial restraint, as well as the introduction of codes of judicial conduct while safeguarding the judges' exercise of fundamental rights and independence from the executive branch.*

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In Germany the "*Facebook* judge" case was in every mouth and legal journal. A criminal judge had posted a picture on his publicly accessible *Facebook* page, on which he could be seen with a T-shirt printed with the sentence: "We give your future a home – prison". He further commented on his picture stating, "this is my when you get out, I will have retired – look". According to the Federal Court of Justice (FCJ), this statement raised a reasonable apprehension of bias regarding the criminal judge.[131]

This case indicates that individual judicial presence in social media is a new challenge for the German judiciary. A German press judge publicly posts personal assessments of certain legal matters on *Twitter*.[132] In France, judges occasionally run their own blogs, in which they inform about legal developments or advertise events.[133] This has led European Judiciaries[134] as well as the European Networks of Councils for the Judiciary (ENCJ)[135] to examine the challenges of judicial use of social media and to propose certain behavioural guidelines.

Against this backdrop, this contribution addresses the question, how judges can reconcile their use of social media with their duty to be independent and impartial. It first examines judicial independence and impartiality as guiding principles for extrajudicial behaviour (**1.**), then demonstrates how the interests of judges and the media conflict in terms of the objectives they pursue and the requirements that are placed on them in the context of public communication (**2.**), and lastly, points out ways how judges could effectively preserve their own interests, especially with respect to extrajudicial communication in social media (**3.**).

The guiding principles for extrajudicial behaviour

Extrajudicial behaviour[136] is regulated both directly, by disciplinary law, and indirectly, by the rule against bias. Statements made by judges inside or outside their office may constitute grounds for finding bias in court proceedings.[137] A biased judge is excluded from the respective proceedings (*cp*. section 24 German Code of Criminal Procedure). The dogmatic yardstick for the "apprehension of bias" is if a party to the proceedings has reason to doubt a judge's freedom from bias and

[130] Doctoral student of Prof. Anja Seibert-Fohr, research assistant of Prof. Anne Peters at the Max-Planck-Institute for Comparative Public Law and International Law; attorney at Freshfields Bruckhaus Deringer LLP in public economic law. This contribution reflects my own presentations and takes up some discussions at the seminar. An in-depth analysis of the topic is going to be published this year in my phd-thesis.

[131] Federal Court of Justice (FCJ), dec. of 12.01.2016 - 3 StR 482/15 -, NStZ 2016, 218, 219.

[132] *See e.g.* the Twitter-account of one (press) judge of the Regional Court of Cologne, Jan F. Orth.

[133] Portelli, president of the chamber of the Cour d'appel de Versailles and member of the Judicial Council; Barella, former head of the Judicial Council; Bilger, investigating magistrate, Advocate General, and nowadays magistrat honoraire; Rosenczveig; president of the Tribunal pour Enfants de Bobigny.

[134] The French and the English Judiciaries have created or updated their codes of conduct to cover behavioural rules for the use of social media, see eg UK Guide to Judicial Conduct, 2019, p. 18-19; UK Supreme Court Guide to Judicial Conduct, 5.20.; or the Recueil des Obligations, 2010, a.11; d.16; f.9; specifically for administrative judges, the Charte déontologie 2018, no. 47, p. 34-36.

[135] ENCJ, Justice, Society and the Media Report 2011-2012, p. 8-9, 11, 21.

[136] For the sake of completeness, it should be noted that the use of social media is also an issue for judicial behaviour inside the office which is, however, not part of this contribution.

[137] Exemplary, Scheuten, in: Hannich (eds.), Karlsruher Kommentar zur StPO, 8th ed. 2019, sec. 24 para. 22; Stackmann, in: Rauscher/Krüger (eds.), Münchener Kommentar zur ZPO, 5th ed. 2016, sec. 42 para. 24 et seq.

prejudice.[138] In addition, disciplinary law lays down the general duty of judicial restraint and moderation in section 39 German Judiciary Act (Deutsches Richtergesetz, ***DRiG***). When infringing this duty, judges may receive a reprimand usually by the court president.[139] The duty requires judges to behave inside and outside their office in a way that does not impair public confidence in their independence. For a judge to be and appear independent, it is decisive that he performs his duties irrespective of extraneous considerations and without prejudice.[140] A judge is encouraged to manifest "distance, neutrality and impartiality" through his behaviour.[141] This standard goes beyond that of impartiality, since it demands general restraint in political and social discourse regardless of specific court proceedings. At the same time, it is important for maintaining the public trust in the judges' capacity to objectively judge an individual case. Altogether, these judicial duties are intended to safeguard the individual right to a "lawful judge" pursuant to Art. 101 para. 1 sentence 2 German Basic Law.[142] A "lawful" judge makes his decisions free from any extraneous considerations which allows him to guarantee a fair trial that meets the requirements of the rule of law.[143]

Problems arising from the use of (social) media

These principles seem to come under pressure when judges use social media for communication: (**a**) judges are required to preserve the public perception of them as being independent and impartial also, when communicating via media. This proves to be challenging due to the (**b**) objectives the traditional media, and even more so the social media (**c**) pursue in their communication practice.

a) Speaking in the media – guiding principles for judges in Germany

After initial reluctance regarding the development towards a "publicly involved judiciary" (ie the willingness of judges to participate in public discourse[144]), the debate about a "political judge"[145], from the late 1960s to the mid-1970s, and reviving in the 1980s, fostered the understanding, that judges should be able to participate in public debates as critical observers of political developments, thus abandoning the concept of *strict* judicial restraint in public debates.[146] Accordingly, judges are allowed to express political views[147] and to hold a political office (section 36 DRiG).

However, the principle of judicial restraint and moderation, as it has been enshrined in section 39 DRiG and applied by courts, demands that, when making a statement, judges separate between their professional duty and their political involvement. According to the leading judgment of the Federal Administrative Court (FAC), a judge should refrain from making statements that suggest an inner predetermination about certain (value) judgments that are relevant to pending or ongoing court proceedings, show distance and objectivity in the wording of all of her public comments, and not use her office to obtain political attention with a certain statement.[148] As representatives of the state, and even more so than civil servants who are subject to instructions by the executive, judges are obliged to display an inner openness towards other points of view, value judgments and ideologies when making a comment inside and outside their office so as to preserve public confidence in their capacity to decide individual cases free from any extraneous considerations.[149] Bias, prejudice

[138] Federal Constitutional Court (FCC), dec. of 11.10.2011 - 2 BvR 1010/10, 2 BvR 1219/10 - para. 17 et seq. (Di Fabio). The apprehension is justified if the impression arises that the judge has a predetermined inner attitude towards a party to the proceedings. For criminal proceedings, the yardstick is whether the judge gives the "objectified" (ie informed and reasonable) accused person the impression that the judge has already made up his mind about the questions of guilt and adequate punishment. *Ibid*, with reference to FCJ, dec. of 12.03.2002 - 1 StR 557/01 -, NStZ 2002, 495.

[139] On the basis of section 26 para. 2 DRiG, the supervisory competences are stated in the Federal and the *Länder* Implementation Act of the Courts Constitution Act (Ausführungsgesetz zum Gerichtsverfassungsgesetz); *cp*. FCJ (Disciplinary Tribunal), dec. of 29.10.1993, DRiZ 1994, 141, 142; Staats, Deutsches Richtergesetz, 1st ed. 2012, sec. 26 para. 14, 19; Wittreck, Die Verwaltung der Dritten Gewalt, 2006, 143.

[140] Federal Administrative Court (FAC), dec. of 29.10.1987 – BVerwGE 78, 216 -, NJW 1988, 1748, 1749.

[141] *Ibid.*

[142] FCC, dec. of 08.02.1967 - 2 BvR 235/64 -, NJW 1967, 1123, 1124.

[143] *Ibid;* Jachmann-Michel, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 2019, Art. 101 para. 5.

[144] *See* the description of Dürholt, ZRP 1977, 217-220.

[145] For an overview of the debate, *see* Hager, *Freie Meinung und Richteramt*, 1987, 73 et seq.; prominently advocating for a "political judge" who may participate in public debates, Wassermann*, Der politische Richter*, 1972; similarly, Dürholt, ZRP 1977, 217-220.

[146] *Cp*. FAC, dec. of 29.10.1987 - BVerwGE 78, 216 -, NJW 1988, 1748, 1749.

[147] *Ibid*. Schmidt-Räntsch, DRiG, 2009, sec. 39 para. 8, considers the DRiG to require a judge who participates in public debates and who acts as guardian of the democratic state; similarly, Hufen, Jus 1990, 319.

[148] FAC, dec. of 29.10.1987 - BVerwGE 78, 216 -, NJW 1988, 1748, 1749*; cp*. FCC, Vorprüfungsausschuss, dec. of 30.8.1983 - 2 BvR 1334/82 -, NJW 1983, 2691.

[149] FAC, dec. of 29.10.1987 - BVerwGE 78, 216 -, NJW 1988, 1748, 1749, deducing this assessment from the synopsis of Articles 97, 20 para. 3, 92 and 101 para. 1 sentence 2 German Basic Law; *see* also the confirmation of this decision by FCC, dec. of 06.06.1988 - 2 BvR

and a manifest dependence on non-governmental institutions and other societal forces (including associations, the press, political parties and churches) are incompatible with a judge's inner independence.[150] The reason is that in a democratic state, governed by the rule of law, it is important that the public confides in the judges' capacity to abide by the rule of law.[151]

A handful of judgments and academic literature have developed standards for the extent to which judges may express their opinion in the media. A judge is not allowed to publicly comment cases on which he has to decide.[152] The limits to judicial freedom of expression regarding all other matters move along a scale of time and content: the closer a judicial statement is linked to court proceedings in terms of time and content, the more likely it is that the statement may reasonably lead a party to proceedings to doubt the judge's impartiality or the public to lose confidence in the judge's independence.[153] The decisive factor for determining whether a judge is to be held impartial and independent is, above all, the specific wording of a statement: While for the rule against bias the decisive yardstick is whether the judge seems to have taken a "final stance" on questions that still await a decision in pending or ongoing court proceedings, [154] the rule of restraint and moderation requires a general objectivity and distance in the wording of a statement in order to avoid the impression that a judge does not clearly differentiate between the judicial office and her political activity.[155] Since media reports frequently exaggerate or potentially misrepresent certain legal facts, judges are advised to prudently consider their choice of words.[156] In addition, judicial conventions demand that judges exercise a certain degree of respect and sensitivity towards other views in society when making public comments.[157]

b) The communication objectives and parameters of media reporting

Legal literature and courts have conceived of the media as a means for the public to be informed and to have a public watchdog guard over the exercise of public authority.[158] Communication theories have taken a more critical view. They have underlined that the media act as a functional subsystem of society that does not only act as a neutral transmitter of information, but also constructs realities by collecting and processing information according to its own parameters.[159] Media follow the news value, which they assign to information, when selecting, interpreting and presenting information.[160] To a great extent, news value is assessed by the (potential) public attention it obtains.[161] This is seen to correspond to the mass media's democratic function to generate attention for common societal topics.[162] Attention-focused media reporting

111/88 - 2 BvR 111/88 -, NJW 1989, 93; *see* also Schmidt-Räntsch, DRiG, 2009, sec. 39 para. 8, underlining that this duty is reasonably imposed on a judge, as he is a representative of the state.

[150] FAC, dec. of 29.10.1987 - BVerwGE 78, 216 -, NJW 1988, 1748, 1749.

[151] FAC, dec. of 29.10.1987 - 2 C 72/86 -, NJW 1988, 1748, 1748-1749.

[152] FAC, dec. of 29.10.1987 - 2 C 72/86 -, NJW 1988, 1748, 1749.

[153] *See* FCC, dec. of 11.10.2011 - 2 BvR 1010/10, 2 BvR 1219/10 - para. 23 with further references; FCC, dec. of 16.06.1973 - 2 BvQ 1/73, 2 BvF 1/73 -, BVerfGE 35, 246, 253 et seq.; Staats, DRiG, 1st ed. 2012, sec. 39 para. 10.

[154] FCJ, dec. of 09.07.1953, BGHSt 4, 264, NJW 1953, p. 1358, 1359.

[155] FCC, dec. of 30.08.1983 - 2 BvR 1334/82 -, NJW 1983, 2691, the statement was „purely onesided", and included a request that was made with an „absolute claim to validity"; FCC, dec. of 16.06.1973 - 2 BvQ 1/73, 2 BvF 1/73 -, NJW 1973, 1268-1269; FCC, dec. of 06.06.1988 - 2 BvR 111/88 -, NJW 1989, 93-94; Higher Administrative Court Kassel, dec. of 18.10.1984 - 2 TE 2437/84 -, NJW 1985, 1105, 1106-1107: „legal opinion expressed with an absolute claim to validity"; Staats, DRiG,1st edition 2012, para. 12; Sodan, *Der Status des Richters*, in: HStR V 2007, sec. 113 para. 91, both stating that judicial freedom of speech may be limited, if the judge pretends to make a personal statement in his / her official capacity; for an overview of the relevant case law, *see* Schmidt-Jortzig, NJW 1984, 2057 et seq. and Hager, NJW 1988, 1694, 1698.

[156] FCJ, dec. of 18.10.2005 - 1 StR 114/05 -, BeckRS 2005, 13660.

[157] Sendler, NJW 1984, 689, 692 et seq.

[158] FCC, dec. of 05.08.1966 - 1 BvR 586/62, 610/63, 512/64; NJW 1966, 1603, 1604; FCC, dec. of 25.01.1984 - 1 BvR 272/81 -, NJW 1984, 1741, 1743; FCC, dec. of 13.06.2006 – 1 BvR 565/06 – para. 15; FCJ, dec. of 30.09.2014 – VI ZR 490/12 -, NJW 2015, 782, 784; FCJ, dec. of 10.03.1987 - VI ZR 244/85 -, NJW 1987, 2667, 2669; FCJ, dec. of 19.12.1978 - VI ZR 137/77; NJW 1979, 647, 648; applying the watchdog-function to court proceedings and decisions, Schultze-Fielitz, in: Dreier (ed.), GG Kommentar, part 3, 3rd ed. 2018, Art. 97 para. 46; Classen, in: v. Mangoldt/Klein/Starck, GG Kommentar, 7th ed. 2018, Art. 97 para. 33.

[159] Exemplary, *see* Schulz, *Die Konstruktion von Realität in den Nachrichtenmedien*, 1976, p. 28 et seq*; ibid*, *Politische Kommunikation,* 1997, p. 41 et seq.; Strohmeier, *Politik & Massenmedien*, 2004, p. 121; Luhmann, *Soziologische Aufklärung 5,* 4th ed. 2009*,* p. 163, 167 with respect to the presentation of public opinion in the press and the radio. These descriptions refer to the relationship between media and politics.

[160] Schulz, *Die Konstruktion von Realität in den Nachrichtenmedien*, 1976, p. 29 et seq.; Meyer, *Mediokratie*, 2001, p. 45 et seq.

[161] Meyer, *Mediokratie*, 2001, p. 46 et seq.; Strohmeier, *Politik & Massenmedien*, 2004, p. 120; Schulz*, Politische Kommunikation*, 1997, 40, other parameters are the limitations to media reporting, *ibid*.

[162] Meyer, *Mediokratie*, 2001, p. 45, at the same time, he underlines that media thereby seek to secure their market share, *see* also *ibid*, p. 57 et seq.; Strohmeier, *Politik & Massenmedien*, 2004, p. 75 et seq.

strives for topical information, customer proximity, surprise effects, a confrontational character of reporting and a focus on people and events.[163]

This short conceptual synopsis suggests, that the parameters of extrajudicial behaviour – distance, neutrality and objectivity – and those of media reporting – proximity, personal involvement and subjectivity – find themselves at conceptually opposing ends. However, the general behavioural guidelines for judges largely address the challenges that media communication holds for their duty to be independent and impartial in fact and appearance. In essence, they demand that judges do not succumb to the objectives of media reporting, but that they stick to their own behavioural guidelines and prudently choose theirs words when communicating with the media in order to preserve their image of independence and impartiality.

c) Communication objectives and parameters specific to social media

More so than traditional media, social media bears some specific challenges for judges. Before developing this thought, it should be pointed out that social media accounts are considered as unproblematic if they are used for private communication and if they are exclusively accessible to a private and reliably discreet group of contacts.[164] If, however, accounts of judges are publicly accessible and refer to the official status of a judge, they attract scrutiny.[165] The same applies to publicly accessible accounts that do not refer to the judge's office, if judges happen to be so well-known that people will not distinguish between the judge in his official capacity and the judge as a private person.[166] The latter particularly applies to constitutional judges.

In cases of publicly accessible social media communication, complying with the duty to publicly demonstrate an inner independence and impartiality may prove to be difficult for judges.[167] Social media motivates users to communicate in a more personal manner than traditional media. It is defined as serving, often profile-based, the networking of users and their communication across the Internet.[168] Social media helps people to interact, using text, pictures and tone.[169]

What makes social media special is that it encourages users to make private information available to a potentially unlimited readership. If judges mention their profession when posting private information, this could convey to the public observer that the they do not distinguish between their private agendas and their function as independent and impartial arbiters. Furthermore, social media communication is considered to be associative,[170] but rather than with all kind of different groups only with those that share common views.[171] Hence, the group of "friends" or "followers" as well as debates in social media could lay open judges' personal affiliations and convey a picture of a judge who is so deeply socialised and ingrained in these communities that he will not be able to leave the commonly shared views aside when deciding cases in court.

Another challenge of social media communication is its partially dialogic nature. The closer to pending proceedings social media debates take place, the more the public might get the impression that it could "participate" in taking judicial decisions. Judges could be provoked by a debate to respond to remarks and position themselves in a way that makes them appear decided on certain subject matters.

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[163] These parameters roughly cluster the criteria that *Schulz* has identified as guiding the media's choice regarding the information they report, Schulz, *Die Konstruktion von Realität in den Nachrichtenmedien*, 1976, p. 31 et seq.; *ibid*, *Politische Kommunikation*, 1997, 70 et seq.; Strohmeier, *Politik & Massenmedien*, 2004, p. 124; *cp*. also Meyer, *Mediokratie*, 2001, p. 47 et seq.

[164] *Cp*, Charte de déontologie of French administrative law judges, Para. 47.1. It generally classifies social fora as public domains in which the principle of judicial restraint applies. Only if a judge can guarantee the limited number and reliability of his contacts can a publication be classified as private. *See* also Eibach/Wölfel, Jura 2016 (8), 907, 911-912.

[165] The Charte de déontologie, 2018, recommends not mentioning the status of judges in social fora, para. 47.2. For professional fora, the judge is obliged to remain vigilant with regard to direct and indirect exchanges with his contacts*, ibid. See* also Eibach/Wölfel, Jura 2016 (8), 907, 911.

[166] In such a case, the use of a pseudonym does not protect the judge either. *Cp* Charte de déontologie, 2018, para. 47.3.

[167] The following assessment is my own; for a similar assessment, *see* ENCJ, Justice, Society and the Media Report 2011-2012, p. 9. For an assessment of social media as platform for personal communication, associative activities and self-presentation, see Rowbottom, Modern Law Review, vol. 69, no. 4, July 2006, p. 489, 498 et seq.; note, that this is a general overview which concentrates on the common challenges of social media use for judges. For specific behavioural guidelines, it might me worthwhile to distinguish between the different platforms and the different types of judges.

[168] Gablers Wirtschaftslexikon, "Soziale Medien", last accessed 27 April 2020.

[169] *Ibid*.

[170] Rowbottom, Modern Law Review, vol. 69, no. 4, July 2006, p. 489, 498-501.

[171] For such an assessment, see Sunstein, *Republic.com*, 2001.

Moreover, the pace of communication in social media is rapid, as is best demonstrated by the pace of debates on *Twitter*. Partly because of the velocity and, partly due to the platform constraints on content, users usually formulate their comments in a short and pointed manner. This makes it harder for judges to express opinions with adequate "distance, neutrality and impartiality".

Finally, a challenge that is intensified by social media platforms such as *Facebook* or *Twitter* is that individual posts and data that are publicly available on social media channels remain present. Moreover, they create "digital profiles" on the basis which technical programs might help to predict decisions of certain judges in the future.[172] If judges thereby lose their openness to new perspectives in the public eye, this may adversely affect public confidence in independent judges who are capable of objectively judging individual cases. Even more, this may create an inner pressure for judges to live up to the expectations that are linked to such statements or public profiles, so as not to lose their credibility in the view of their social community or in the public eye. This reinforces the attitudes displayed in the public profile, jeopardizing the actual inner independence and impartiality in a given case. In this respect, the use of social media is a challenge both for inner independence and impartiality in fact and in appearance.[173]

New approaches

Does this lead us to the conclusion that social media require new behavioural rules and instruments for the judiciary? This article suggests that there is no need for materially new rules, but that the existing rules of judicial restraint and the rule against bias must be adapted to the specific challenges of social media communication (**a**). To this end, the introduction of codes of judicial conduct, along the lines of those developed in other European countries such as France and the United Kingdom, seems useful (**b**).

a) Judicial restraint and the rule against bias for the extrajudicial use of social media

To begin with, courts and legal literature have not considered the mere communication of judges with the press to reasonably create an apprehension of bias. [174] Similarly, the mere use of social media should not in itself be a cause of concern regarding the judges' impartiality. Even if social media communication provokes the impression that users making statements are seeking approval (eg by gaining "followers" or "likes" by their "friends"), this vague impression is not enough to require judges to dispense with using such social media channels. As can be deduced from the case law and academic writing on public extrajudicial statements, the circumstances which may give rise to reasonable doubts as to a judge's impartiality or independence, need to be directly connected to the judge's specific conduct (that is, a specific statement or post of a judge), and not merely to the fact that a judge received public approval or disapproval as a reaction to a certain statement or post.[175] In the same vein, the mere connection through "friendships" or "professional contacts" will not suffice to raise reasonable doubts as to a judge's freedom from bias.[176]

However, by motivating users to publicly display their personal attitudes, judges may come under strain if these attitudes are not compatible with their official duties. This was the problem in the initially mentioned "*Facebook*-judge" case. The FCJ set aside the Regional Court's judgment because it had made the decision that the "*Facebook*-judge" could remain as presiding judge, although he was clearly biased.[177] On his *Facebook*-page, the judge had suggested that he "enjoyed

[172] For the possibilities of personal data processing, *see* Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data, Report on Artificial Intelligence, T-PD(2018)09Rev, 15.10.2018.
[173] The ENCJ underlines limits to the contents of judicial communication through social media due to the importance of the role played by judges in a democracy, ENCJ Report, Justice, Society and the Media Report 2011-2012, p. 9. It considers social media to be too personal and intimate in its manner of communication. The case of the *Facebook*-judge is no exception. A similar case occurred in England. In *Attorney General v Davey* (2013), the UK Supreme Court condemned a jury member for contempt of court because he had commented on a case of sexual child abuse on his *Facebook*-page with the words: "I've always wanted to fuck up a paedophile and now I am within the law," [2013] EWHC 2317.
[174] *See* FCJ, dec. of 09.08.2006 - 1 StR 50/06, NJW 2006, 3290, 3295, beck para. 51; Scheuten, in: Hannich (eds.), Karlsruher Kommentar zur StPO, 8th ed. 2019, sec. 24 para. 22.
[175] Media criticism has, thus, also not been considered a reason for finding bias, FCJ, 18.12.1968 - 2 StR 322/68 -, BGHSt 22, 289, 294; Scheuten, in: Hannich (eds.), Karlsruher Kommentar zur StPO, 8th ed. 2019, sec. 24 para. 22.
[176] Real-life friendships or a professional connection are not enough in themselves to justify an apprehension of bias. This requires an additional moment of personal exchange and close friendship, *see* FCJ, dec. of 21.12.2006 - IX ZB 60/06, NJW-RR 2007, 776, 777; OLG Hamm, NJW-RR 2012, 1209; OLG Frankfurt a. M., NJW-RR 2008, 801, 803; OLG Hamburg, MDR 2003, 287; Rojahn/Jerger, NJW 2014, 1147, 1150 draw the same conclusion for social media "friendships."
[177] FCJ, dec. of 12.01.2016 - 3 StR 482/15 -, NStZ 2016, 218, 219.

imposing high penalties and making fun of the accused."[178] The FCJ held that this "internet presence [...] was not compatible as a whole with the absence of prejudice required of a judge working in the field of criminal law." [179] The judge had clearly documented "an inner attitude which raised reasonable doubts as to his capacity to objectively decide the criminal case at hand."[180] Furthermore, the judge's *Facebook*-page made reference to his judicial function. Thus, the post could not be exclusively ascribed to the judge's private sphere. Under these circumstances, the FCJ did not require an "even closer" connection of the post to the *present* proceedings in order to hold that the presiding judge was clearly biased.[181]

In this decision, the FCJ abandoned the requirement of a specific connection between the judicial behaviour or statement and the respective court proceedings for the finding of bias.[182] Given the specific circumstances of the case, the Court's application of the rules against bias is convincing. An accused person will most probably be shaken in his trust in the impartiality of a judge, if he sees such a post. Even if the judge did not specifically refer to the present proceedings, he revealed an attitude that no one would reasonably expect him to change in imminent or pending criminal proceedings. The FCJ rightly found that the gravity with which the judge expressed his inner predetermination combined with the close connection in time and content between post and proceedings would raise reasonable doubts as to the judge's impartiality in the eyes of an accused person. These are doubts that parties to proceedings should be effectively protected from. Rules against bias deliver the procedural tool for this protection.

In the legal literature the question was raised how the "*Facebook*-judge" should be dealt with, especially whether he would have to be considered biased for any future criminal proceedings.[183] In his official statement which he had to submit in the context of the challenge for bias, the judge kept silent.[184] Hence, he did not actively try to resolve any doubts regarding his capacity to sit as a criminal judge at present and in the future.[185] Under these circumstances, only the lapse of time and the absence of similar behaviour could resolve doubts regarding his freedom from bias. Concerning the question, how the judge should be dealt with, supervisory measures under section 39 DRiG come to mind. In judicial circles some people did not consider disciplinary measures to be necessary.[186] However, as public sources ascertain, disciplinary measures were finally imposed on the judge.[187]

This consideration begs the question, which limits the duty of restraint draws for the judges' use of social media. No court decision has so far dealt with this question. The case law relating to the "political judge" (*see* **2. a**)) reveals that the duty of judicial restraint and moderation is concretized by balancing the judges' interests in exercising their constitutional freedoms as individuals and citizens on the one hand, and on the other hand the interests of the state in preserving public confidence in an independent judiciary.[188]

Regarding topics of public interest, the European Court of Human Rights (ECtHR) has considered judicial statements and criticism to contribute to the public debate.[189] Particularly with respect to matters affecting the judiciary, i.e. the functioning of the justice system, separation of powers, judicial independence, the ECtHR has emphasized that judges should be able to speak out.[190] Since the Court considers such judicial statements to reinforce the functioning of democracy or the rule of

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[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] Eibach/Wölfel, Jura 2016 (8), 907, 910 referring to the group of case law regarding a judge's personal relationships; with respect to extrajudicial behaviour and comments, *see* Conen/Tsambikakis, Münchener Kommentar zur StPO, 1st ed. 2014, § 24 Rn. 31-32, and Scheuten, in: Karlsruher Kommentar zur Strafprozessordnung, 8th ed. 2019, paras. 12 et seq.
[183] Eibach/Wölfel, Jura 2016 (8), 907, 913-914; Ventzke, NStZ 2016, 218, 220.
[184] Ventzke, NStZ 2016, 218, 220.
[185] The FCJ has acknowledged that such doubts can be resolved by a statement in which the respective judge apologizes for her behaviour, FCJ, dec. of 18.08.2011 - 5 StR 286/11; FCJ, dec. of 13.10.2005 – 5 StR 278/05 -, NStZ 2006, 49; *see* also Sommer, NStZ 2014, 615 with further references.
[186] https://www.lto.de/recht/nachrichten/n/lg-rostock-trotz-facebook-post-befangener-richter-bleibt-im-dienst/.
[187] https://www.tagesspiegel.de/gesellschaft/panorama/wir-geben-ihrer-zukunft-ein-zuhause-jva-facebook-richter-darf-strafrichter-bleiben/13652892.html.
[188] FCC, dec. of 30.08.1983 – 2 BvR 1334/82 -, NJW 1983, 2691; FCC, dec. of 16.06.1973 - 2 BvQ 1/73, 2 BvF 1/73 -, NJW 1973, 1268-1269; FCC, dec. of 06.06.1988 - 2 BvR 111/88 -, NJW 1989, 93-94; FAC, dec. of 29.10.1987 - BVerwGE 78, 216, NJW 1988, 1748, 1749; Higher Administrative Court Kassel, dec. of 18.10.1984 - 2 TE 2437/84 -, NJW 1985, 1105, 1106-1107; section 39 DRiG concretizes the constitutionally enshrined duties of public servants (Article 33 para. 5 German Basic Law), *cp*. FCC, dec. of 03.12.1985, BVerfGE 71, 206 219; Staats, DRiG, 1st ed. 2012, sec. 39 para. 4.
[189] *See*, ECtHR (GC), *Baka v. Hungary*, dec. of 23.06.2016, Application no. 20261/12, §§ 165, 171 with further references.
[190] *Ibid*.

law, it places great weight on the judge's freedom of expression, scrutinizes the interference strictly, and affords only a narrow margin of appreciation to Convention states.[191]

According to these guidelines, judges should generally be allowed to use social media also in their official capacity. Social platforms offer a new, publicly accessible communicative space. Thus, having a profile is a condition for being able to fully exercise the right to freedom of expression in all existing spaces for public communication. In addition, social media has gained importance for the democratic opinion-forming process, including the sharing of information as well as the exchange of opinions. In line with this, German courts have generally allowed judges to make public statements on all matters of public debate without excluding any specific communicative spaces provided by the media or prohibiting judges to refer to their profession. German courts have also closely scrutinized the specific expression, its objective, its wording and context so as to attribute adequate weight to freedom of expression in each case.[192]

On the other hand, while serving the judges' self-fulfilment,[193] social media communication, such as the public display of certain personal preferences or dislikes, will not always have the same weight as political statements in the balancing exercise. Neither the principle of democracy nor the rule of law provides reasons, additional to that of the judge's exercise of her individual freedom, to support the presentation of purely personal opinions on private, socio-political or legal issues. Such comments neither materially contribute to a public debate, nor could they be deemed to serve the purpose of holding judges to account. Judges, unlike politicians, are not held to be personally responsible for making a bad decision, unless this decision breached the law in a serious way.[194] They do not represent a certain electorate. Hence, their behaviour does not require the same transparency and personal accountability that is required by politicians. Regarding the rule of law, such comments might, quite to the contrary, irritate public trust in an independent judiciary if judges give the impression that the exercise of their duties is largely influenced by their personal views and attitudes, or by the societal acceptance of their views. Judges would not appear to be guided by law in performing their official duties which would shake the rule of law to its very foundations.

The question arises, if social media communication requires stricter judicial restraint or moderation. The particular time and content restrictions of social media communication do not justify the need to adapt the obligation of judicial restraint. They might indeed provoke judges to post comments which convey a pre-determination in certain areas of law. However, they do not require a higher degree of restraint or moderation than is required in traditional media. Yet, some aspects speak in favour of demanding a higher degree of vigilance of judges for social media communication as opposed to that in traditional media:

Firstly, owing to the data storage capacity of social media platforms judges' comments remain "present". Even if the lapse of time will still be relevant for assessing whether a certain comment could have a negative bearing on the judges' performance of duties, the internet presence will nevertheless bring forth statements that would otherwise have vanished with the fading public memory. This requires judges to think further into the future when considering whether a comment could negatively affect the impression of their independence and impartiality and, in some cases, show stricter constraint as to the subject matters they address.

Secondly, a new challenge to preserving judicial independence and impartiality is the fact that judges might create social media profiles that associate them with certain interests, points of view and ideologies and, in combination with that, impart private opinions under disclosure of their profession. This could create the impression that these judges cannot distinguish between their private and professional assessments. Requiring judges to generally refrain from sharing private information under disclosure of their official function on social media platforms would, however, be disproportionate. German case law on the sharing of private information usually requires a connection to proceedings or – as in the "*Facebook* judge" case – to the judge's general capacity to judge impartially to become relevant.[195] This is in line with the ECtHR's case law that requires evidence of a negative effect on the performance of the judge's duties in order to justify an interference

[191] ECtHR (GC), *Baka v. Hungary*, dec. of 23.06.2016, Application no. 20261/12, § 171.
[192] FCC, dec. of 30.08.1983 – 2 BvR 1334/82 -, NJW 1983, 2691; FCC, dec. of 06.06.1988 - 2 BvR 111/88 -, NJW 1989, 93-94; Higher Administrative Court Kassel, dec. of 18.10.1984 - 2 TE 2437/84 -, NJW 1985, 1105, 1106-1107 (without reference to the ECtHR's judgments, however, which were passed much later).
[193] For an in-depth analysis of the different paradigms applicable to freedom of expression in traditional and social media, see Rowbottom, Modern Law Review, vol. 69, no. 4, July 2006, p. 489, 498-501.
[194] *Cp*. sec. 839 para. 2 German Civil Code and Article 98 German Basic Law.
[195] FCJ, dec. of 23.02.2016 - 3 StR 482/15 -, NStZ 2016, 218 f.; *Eibach/Wölfel*, Jura 2016, 907 ff.; *Rojahn/Jerger*, NJW 2014, 1147 ff.; *Schulze-Fielitz*, in: Dreier (Hrsg.), GG Kommentar, Bd. 3, 3rd ed. 2018, Art. 97 para. 47.

with the judges' freedom of expression.[196] Hence, a proportionate response to that challenge would be requiring judges to be wary to make comments which, read against the background of
the judges' "friends" and "followers" and their social profile, would associate them with specific interest groups, points of view or ideologies and thus make them appear biased or prejudiced in a specific case.

Tying in with this, particular caution should be expected with respect to open social media discussions of subject matters that could be relevant for a judge's decision-making practice. Judges could compromise their image as independent and impartial arbiters if they started "discussing" topics that they might have to judge on with associated social media users.

Finally, in line with the FAC's delineation of the limits to judicial free speech[197] and highlighted by the "*Facebook* judge" case, judges should not be allowed to use their office in order to gain public attention in social media, if this might have a negative bearing on the performance of the judge's function.[198]

Applying these guidelines to the "*Facebook*-judge" case, the decision to impose disciplinary measures on the judge is convincing: If a judge shows a generally negative attitude towards accused persons, that judge clearly lacks the characteristic of an inner openness that allows him to decide the individual case without inner predeterminations or prejudice.

b) New instruments – implementing codes of conduct

The German legal system adopts a case-based approach with regard to the disciplining of judicial conduct. Section 39 DRiG stipulates in general terms that judges should exercise restraint both inside and outside their office. The (disciplinary) courts develop precise limits in their decisions. In England and France, the judges have developed codes of conduct.[199] In England the behavioural rules that are stated in the codes of conduct are also used as bases of reference to interpret disciplinary law; in France these rules are part of the disciplinary framework.[200] The German Judges' Association has compiled values which are characteristic to the profession. This compilation is, however, not intended to be used as a code of conduct. The Judges' Association takes the view that the inner independence of judges cannot be enshrined in law but must be understood as part of the official ethos.[201] Presumably, this stance is based on the fear that judges' independence from the executive could be adversely affected by a code of conduct. In a legal system that does not have judicial self-administration, such a code of conduct could in fact deliver a tool for the executive branch to exert influence, especially by bringing a disciplinary action against a judge.[202]

However, this concern can be countered by the fact that a (disciplinary) court takes the final decision in a disciplinary matter. In addition, more precise guidelines for extrajudicial behaviour could make it more difficult for the executive to exert influence on the judiciary. A general guideline of "judicial independence", as stated in section 39 DRiG, is more-easily instrumentalized for other purposes than concrete guidelines. Precisely, specific rules of conduct help to determine more clearly which behaviour is not relevant under disciplinary law. Ultimately, the disciplining of extrajudicial behaviour would

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[196] ECtHR [GC], *Wille v. Liechtenstein,* 28 Oct. 1999, No. 28396/95, para. 67; ECtHR, *Albayrak v. Turkey*, 31 Jan. 2008, No. 38406/97, para. 46.

[197] FAC, dec. of 29.10.1987 - BVerwGE 78, 216, NJW 1988, 1748, 1749. The FAC did not ask for a connection to cases that the judge might have to decide on. It is questionable, if this is compatible with the ECtHR's case law which asks Convention states to justify restrictions of judicial free speech with a proven negative bearing on their performance of judicial duties. The German standard is underpinned by the assumption that citizens will not necessarily understand whether a specific statement risks to negatively affect the judge's performance of duties and that the failure to correctly make this distinction could prejudice the public confidence in the judiciary. Considering the margin of appreciation afforded to Convention states for delineating judges' duties under Art. 10 (2) ECHR, this line of case law might still be reconcilable with the Convention.

[198] The thesis paper on judicial ethics for judges in Germany thus states that judges should not use the media for self-portrayal, Thesenpapier zur richterlichen Ethik, X, *available at* the website of Deutscher Richterbund. *See* also, Schmidt-Räntsch, DRiG Kommentar, 6th ed. 2009, sec. 39 para. 16, requiring judges not to place their own personality into public focus in an inappropriate manner. The appropriateness depends on whether the judge can preserve his image as being independent in the public eye.

[199] *See* footnote 134.

[200] UK Guide to Judicial Conduct, 2019, p. 5. In France, these codes were enacted on the basis of statutory authorizations, enshrined in Art. 20 de la loi organique no 94-100, 05.02.1994 sur le Conseil supérieur de la magistrature modifié par la loi no 2007-287, 05.03.2007 (Recueil des Obligations 2010) and Art. L.231-4-1 of loi no 2016-483, 20.04.2016 (Charte de déontologie 2018).

[201] German Judges' Association, *Richterethik in Deutschland*, 2018, p. 3, *accessible at* their website.

[202] The ministry of justice is permitted to bring such a motion, for the federal level, *see* sections 63, 46 DRiG in connection with sections 17 para. 1 sentence 2, 2nd part, 52 para. 1 Federal Disciplinary Law and section 3 para. 1 Federal Civil Servants Act; exemplary for the *Länder*, *see* sections 73 para. 2, 103 Berlin Judiciary Act; sections 4, 63 Judiciary Act Thuringia; sections 28, 29 Abs. 1 Nr. 3 Judiciary Act Saxony; section 80 para. 3 Judiciary Act Northrhine-Westfalia; section 72a para. 1 Nr. 3, 2 Judiciary Act Baden-Württemberg, each explicitly providing for the minister or ministry of justice to be responsible for filing a disciplinary motion against a judge.

rest, to a greater degree, in the hands of the judiciary, and be taken away from the executive branch, if judges were legally empowered to establish codes of conduct, specifying their duty of judicial restraint.[203]

In favour of using codes of conduct, it would make transparent (for judges and the public) which behavioural expectations are placed on them, thus helping them to fulfil their task of meeting the demands of independence, in fact and in the eyes of the public.[204] Another argument in favour of codes of conduct is that they can proactively establish rules of conduct irrespective of whether this matter has been submitted to a court for decision and thus cover areas that courts have not yet dealt with. The FCC has already set a good example here.[205]

Conclusion

The manifestation of judicial independence and impartiality is an imperative that applies to judges who use social media. The rules against bias, and the duty of judicial restraint and moderation, play a pivotal role in preserving the confidence of a party to proceedings in the judge's impartiality and that of the public in the independence of judges. If a judge refers to his office or is publicly well-known to be a judge, personal representations in social fora may conflict with the image of a judge who is openminded and free from prejudice. For this purpose, the rules against bias and the duty of judicial restraint and moderation have to be interpreted in a way that accommodates the challenges which social media communication bears for judges as well as for preserving public confidence in the judges' capacity to act as impartial and independent arbiters.

In this context, not only the content, but also the means of regulating extrajudicial behaviour come in focus. Codes of conduct can be used to address threats to the independence and impartiality of judges, and the public trust placed in them, by providing guidelines for judicial conduct in areas that have not been addressed by courts. When using codes of conduct, it should be noted, however, that care must be taken to ensure that judges are not disproportionately restricted in their exercise of fundamental rights or even in their independence by the executive.

[203] Alternatively, non-binding guidelines for extrajudicial behaviour could be created. However, it could be problematic if these guidelines were used to interpret section 39 DRiG, since they would then - without legislative legitimacy - indirectly become the basis for interference with judicial freedoms.
[204] *See*, e.g. UK Guide to Judicial Conduct, 2019, p. 3 (foreword); UK Supreme Court Guide to Judicial Conduct 2019 (foreword by the President of the Supreme Court Lady Hale); for France, *see* Conseil supérieur de la Magistrature, Rapport annuel, 2007, p. 122.
[205] Guidelines to the Conduct of Judges of the FCC, November 2017, *accessible at* the Website of the FCC. These rules are non-binding.

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