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I. INTRODUCTION

Over the past decade, we have witnessed the creation and impressive expansion of social media, which include social network sites (“SNSs”) such as Facebook, Twitter, YouTube and LinkedIn, Internet forums, webcasts and blogs. Social media have undoubtedly altered the way millions of people communicate with each other, by allowing their users to quickly access, frequently update, and instantly share and exchange information, ideas, pictures or videos. As of December 2014, Facebook had 1.39 billion monthly active users, while in April 2014 LinkedIn had 300 million registered users. A recent American study showed that over 40% of American state court judges utilize social media.¹ Although there are no Pan-European statistics available, it is safe to assume that European judges are also making increasing use of social media.² Participation in the new media forms by judges, however, gives rise to special ethical concerns related to their interaction with third parties and challenges the public’s traditional perception of courts and judicial officers. The aim of the present paper is to identify and address some of the fundamental ethical implications of social networking for members of the judiciary.

II. JUDICIAL IMPARTIALITY & FREEDOM OF EXPRESSION

Judges’ social activities manifest the tension between judicial impartiality and freedom of expression. Thus, before examining social media etiquette, we must revisit these traditional values: The request for impartial judges has longstanding historical roots. Impartiality is mentioned in the early Greek societies of Homer and Hesiod as a substantial element of a fair trial and an essential virtue of those delivering justice.³ In the same vein, Socrates, addressing some judges, mentions, *inter alia*, that “[t]he purpose for

¹ Conference of Court Public Information Officers, CCPIO New Media Survey (2012), available at <http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf>.

² Courts around the world have also started to use social media. See European Network of Councils for the Judiciary (ENCJ), Justice, Society and the Media, Report (2011-2012), p.8-9, *A. Blackham & G. Williams*, Australian Courts and Social Media, *Alternative Law Journal* Vol.38, Issue 3 (2013), *R.A. Ferreira Zanatta & M.R. Oliveira de Souza*, Brazilian Courts in Social Networks: Setting a Research Agenda for Socio-Legal Studies (2013), available at www.ssrn.com, *N.H. Meyer Jr.*, Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators, *IJCA*, Vol.6 No 1 (2014).

³ «ὄς...δίκην ἰθύντατα εἶπο», Homer *Iliad* Σ (18) 508, «ἰθεῖα (δίκη)» Ψ (23) 580. See also Σ (18) 503, Ψ (23) 573-574, Homer *Odyssey* Γ (3) 244 & *D.M. MacDowell*, *The Law in Classical Athens*, Cornell University Press (1993), p.10.

which a judge holds that position is not to favour but to judge."⁴ Today, the principle of judicial impartiality is proclaimed in article 6 of the European Convention on Human Rights (ECHR) (1950) as a central element of a fair trial.⁵ At an international level, it is established in article 10 of the Universal Declaration of Human Rights (1948) and article 14 of the International Covenant on Civil and Political Rights (1966). According to the Consultative Council of European Judges (CCJE), "*...the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts...Judges should therefore discharge their duties without any favouritism, display of prejudice or bias...*"⁶ The above mentioned principle also has unique ramifications for a judge's social life. Judges are expected to "*conduct themselves in a respectable way in their private life*" and "*avoid impropriety and the appearance of impropriety in all of the judge's activities.*"⁷ Much like Caesar's wife who must be above suspicion, it is not enough for a judge to be impartial; she⁸ must also appear as such.⁹

In accordance with articles 10 and 8 of the ECHR, members of the judiciary enjoy freedom of expression and are entitled to develop their personal life and communications.¹⁰ The exercise of these freedoms ensures that judges are actual and equal members of society. Ethical duties should not be perceived as requiring a judge to alienate herself from her community.¹¹ Participation in social activities is essential for the effective exercise of her judicial duties, which requires increased social awareness and sensitivity. Yet, a balance must be struck between social participation and avoiding impropriety and the appearance thereof. Pursuant to the Universal Declaration of Human Rights, "*members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such*

⁴ Plato, The Apology of Socrates, 35c.

⁵ See also art. 47 of the Charter of Fundamental Rights of the European Union.

⁶ CCJE Opinion No (2002) 3 on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behavior and Impartiality, recitals 22-23.

⁷ Id., recital 29 & The Bangalore Principles of Judicial Conduct (2002), Value 4.1.

⁸ All references to members of the judiciary cover both sexes.

⁹ See Lord Duce Hewart, "*Justice should not only be done but should manifestly and undoubtedly be seen to be done*" at N. Mpouropoulos, The Notion of Jurisdictional Function (*in Greek*), To Nomikon (1951), p.98.

¹⁰ See also art. 1 & 19 of the International Covenant on Civil and Political Rights & art. 11 of the Charter of Fundamental Rights of the European Union.

¹¹ D.Th. Tsatsos, Constitutional Law (*in Greek*), Vol. 2, A. Sakkoulas Athens-Komotini (1993), p.552.

rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”¹²

III. THE ETHICAL IMPLICATIONS OF SOCIAL MEDIA

By enabling instantaneous and omnipresent online public social interaction, social media complicate the upholding of ethical duties by members of the judiciary. Social networking carries with it the potential for creating ethical minefields which in several instances may even lead to disciplinary proceedings. For example, in Greece, the Supreme Civil and Criminal Court disciplined a member of the judiciary who strongly protested against austerity measures and accused cabinet members of being traitors via a public blog;¹³ a French prosecutor and a judge using twitter pseudonyms kept exchanging their impressions of an ongoing trial in which they participated, thereby sparking public outrage and consequently incurring disciplinary charges;¹⁴ and in the U.S., a judge was reprimanded after sharing comments about pending proceedings with the attorney appearing before him via Facebook.¹⁵

A. Social Media Characteristics

Before exploring the ethical issues related to judges who participate in online social networking, one must apprehend the unique nature and associated risks of social media. First of all, as information posted on social media is easily accessed and readily disseminated, it may not remain private despite the strongest privacy settings. For example, although a Facebook user may choose to keep her “friends” identities private, she has no control over their decision to make their list of “friends” publicly accessible, a decision which exposes all SNSs relationships. In addition, although users may be selective as to whom they befriend on SNSs, they cannot prevent their “friends” from sharing information they posted with their respective “friends” or even the general

¹² United Nations Human Rights, Basic Principles on the Independence of the Judiciary (1985), § 8, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

¹³ Supreme Civil and Criminal Court’s Disciplinary Board (information omitted due to privacy policy).

¹⁴ *Le Monde* journal (29.4.2014), available at http://www.lemonde.fr/societe/article/2014/04/29/pour-le-csm-un-magistrat-ne-doit-pas-tweeter-en-plein-proces_4409355_3224.html.

¹⁵ *J.G. Browning*, Why Can’t We Be Friends? Judges’ Use of Social Media, 68 U. Miami L. Rev. 487 (2014), p.502-503.

public.¹⁶ SNSs users may even find it hard keeping their personal information private. Although some use pseudonyms in order to avoid identifying themselves, there is no real guarantee that they will be able to maintain their anonymity.¹⁷ Second, users must not forget that social media postings, unlike spoken words, but like any other written document, remain in time (*verba volant, scripta manent*). Due to the technology advances employed, social media postings are permanent; they can be retrieved, circulated and shared at any time, even after their deletion.¹⁸ Third, people who use social media accept the risk of their postings being taken out of context. Expressing one's views in a virtual environment where information is exchanged in a hasty fashion is inherently different from *in natura* interpersonal interaction, thus, leaving room for misinterpretation, or even ill-intentioned miscommunication. Moreover, although users may exercise caution when expressing their personal views online, they cannot under all circumstances prevent other users from posting undesirable or even inappropriate comments on their social media page. It is not unlikely that such comments, regardless of their endorsement or deletion, will be associated with the social media account holder.¹⁹

Keeping in mind these unique ramifications of social media users, we have conducted a first of its kind survey in Greece to empirically measure the perceptions of future Greek judicial officers toward social networking. 67 out of the 80 students of the National School of Judges, each of whom will be appointed to tenure-track positions (civil & criminal judges, administrative judges, prosecutors), have participated in the survey anonymously. As we proceed to examine what constitutes acceptable ethical social media conduct, we will complement our presentation with the relevant survey data and conclusions.

B. Should judges participate in social media?

¹⁶ *B.P. Cooper*, Judges and Social Media: “Friends” with Costs and Benefits, ABA Vol. 22 No. 3 (2014), p.2-3.

¹⁷ A Greek judge allegedly posted racist comments on her pseudonymous blog, but her identity was revealed. *Enet.gr* Greek journal (5.12.2010), available at <http://www.enet.gr/?i=news.el.article&id=230315>.

¹⁸ *B.P. Cooper*, supra at 16, p.3-4. For the ‘right to be forgotten’, see CJEU, Case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González (2014).

¹⁹ *B.P. Cooper*, supra at 16, p.3-4, *K. Eltis*, Does Avoiding Judicial Isolation Outweigh the Risks Related to “Professional Death by Facebook”?, Open Access Laws 3 (2014), p.638-639.

The primary question that one must address in a rapidly changing media environment is whether judges should be allowed to make use of SNSs. Upon assuming the bench, “a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary” and “shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”²⁰ In addition, judges “should be mindful at all times of their duty to uphold the standing and reputation of the Court.”²¹ In other words, judges, being central and public figures, are required to be sensitive to the appearance of relationships and need to exercise caution when interacting with others in both their professional and personal lives.²²

Social media constitute a new form of public interaction that has become a part of daily life and culture. Judges are certainly encouraged to maintain a social life and everyone agrees that they should, and are not expected to become ‘isolated and sterilized’ from the community in which they live. Judges who lack knowledge of the public are less likely to be effective.²³ Also, a total ban on social networking would inadvertently conflict with judges’ freedom of expression and encroach beyond acceptable limits on their private life, which includes the right to develop a social identity and form relationships with other human beings (Articles 10 and 8 of the ECHR).²⁴ Judges should be allowed to stay abreast of and utilize the new technology and cultural features while embracing the potential benefits which emerge from new media communications.²⁵ Most

²⁰ The Bangalore Principles of Judicial Conduct (2002), Values 2.2 & 4.1. “*The judge...adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality.*” ENCJ, Judicial Ethics Report (2009-2010).

²¹ ECHR, Resolution on Judicial Ethics (23.6.2008).

²² A. Wilson, Let’s Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary, Wash. J.L. Tech. & Arts, Vol.7 Issue 3 (2012), p.228.

²³ J.M. Miller, Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance), 33 Pepperdine L. Rev. 575 (2012), p.578, United Nations-Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (2007), § 31-32.

²⁴ See ECHR, Harabin v. Slovakia (No 58688/11, § 149, 20 February 2013), Özpınar v. Turkey (No 20999/04, § 45, 69, 71, 19 October 2010), Wille v. Lichtenstein (No 28396/95, § 48-51, 28 October 1999). On the content of these freedoms, see Pretty v. United Kingdom (No 2346/02, § 61, 29 July 2002), C. v. Belgium (No 21794/93, § 25, 7 August 1996). See also ENCJ (2011-2012), supra at 2, p.9 & CCPE Opinion No (2013) 8 on Relations between Prosecutors and the Media, recital 19 and fn 7.

²⁵ J. Phillips, Best Practices in Training Judges and Prosecutors in Europe, EJTN’s Conference of Directors (2014), p.7, available at http://www.ejtn.eu/Documents/News%20articles/J_Phillips_Conference_Directors_2014.pdf.

advisory U.S. state ethics committees that have addressed the issue of social media suggest that the current ethical standards do not prohibit a judge from using SNSs, provided that she otherwise complies with her ethical duties (e.g. California, Kentucky, Massachusetts, Ohio, Oklahoma, New York, South Carolina, Florida).²⁶ For example, according to the South Carolina Ethics Commission (Opinion 17-2009), social networking by judges promotes public outreach and confidence (“*Allowing a magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge*”);²⁷ similarly, according to the California Judicial Ethics Committee (Opinion 66), “*a judge’s participation in an online social networking site does not per se cast reasonable doubt on the judge’s ability to act impartially, demean the judicial office, or interfere with the proper performance of the judge’s judicial duties anymore than any other type of social activity.*”²⁸ Indeed, we must not forget that the actual nature of a judge’s behavior, not its online manifestation, is the one that violates ethical duties. If online ethical violations would have been just as improper had they occurred over the telephone or in-person, then it’s the content, not the medium (social media) that should be condemned.²⁹

In light of the above, we argue that members of the judiciary should be able to participate in social media, provided they exercise an appropriate degree of caution and discretion so as not to infringe upon their duties of impartiality, integrity, and propriety.³⁰ In other words, although the use of social media by judges should not be prohibited, their use must adhere to certain limitations essential to the judicial profession, which we examine in the following sections.

The above conclusion is confirmed by our survey data. 86% of the judges under training who already use social media will continue doing so, when appointed to tenure-

²⁶ A. Wilson, *supra* at 22, p.229.

²⁷ NCSC, Social Media and the Courts, State Links, available at <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx>.

²⁸ California Judges Association, Judicial Ethics Committee, Opinion 66 (2011), p.4.

²⁹ C. Estlinbaum, Social Networking and Judicial Ethics (2012), available at www.ssrn.com, p.14-15, American Bar Association (ABA), Formal Opinion 462 (2013), p.4.

³⁰ “*Participation in social media is a matter of personal choice, but it demands great prudence so that a judge’s independence, impartiality and integrity are not questioned.*” (Belgium’s) Conseil Supérieur de la Justice & Conseil Consultatif de la Magistrature, Guide for Magistrats (*in French*) (2012), p.10.

track positions, 4% are likely to do so, while 12% of those who currently don't use social media, plan to participate in the future. Thus, 70% of all survey participants plan to use social media when appointed to tenure-track positions, with the vast majority preferring Facebook. 40% of all participants stated that their future profession has affected their perception toward social media, i.e. they a) will maintain their account, but will exercise more care; b) will delete their current account; or c) will not open a new one. The percentage of survey participants who strongly agree that judges should be allowed to use social media, provided that they use them reasonably and cautiously, reaches 61%.

C. How should judges comport themselves when participating in social media?

i. Should judges list lawyers appearing before them or litigants as *Facebook friends*?

Given the ubiquity of social media, it is not unlikely that lawyers and opposing parties will search Facebook to obtain background information about the judge presiding over their case. In conducting such a search, litigants might discover that the opposing advocate or party and the judge are listed as “friends” on SNSs. There is no ethical rule prohibiting judges from interacting with lawyers, as social contact with the legal profession is regarded as proper and beneficial to both members of the judiciary and of the legal profession.³¹ However, according to the Bangalore Principles of Judicial Conduct, “*a judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge’s court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality.*” (Value 4.3).³² This ethical duty pertains to the appearance of bias or undue influence and

³¹ Commentary on the Bangalore Principles of Judicial Conduct, supra at 23, § 119-127, CCJE Opinion No (2013) 16 on the Relations between Judges and Lawyers.

³² National ethical rules may treat friendship with a party’s legal representative differently from friendship with the party herself. For example, in England and Wales, friendship or past professional association with counsel or solicitor is not generally regarded as a sufficient reason for disqualification. Judiciary of England and Wales, Guide to Judicial Conduct (2013), p.19. In Greece, friendship with a party’s attorney does not constitute grounds for disqualification, unless the attorney repeatedly appears before the judge or the case at issue is extensive. *M. Margaritis*, Interpretation of the Code of Criminal Procedure (*in Greek*), P.N. Sakkoulas (2008), p.32. The reasons behind this distinction could be that: i) an outside observer may perceive more direct and tangible stakes in the judicial outcome, when the judge and party are friends, than compared to when the judge and attorney are friends; ii) attorneys may appear with frequency in front of a judge but with a mixed bag of results. A party is less likely to appear frequently before the same judge; iii) members of the judiciary and attorneys have an established set of professional ethical guidelines by which they must comport themselves, whereas parties to cases have no such standards.

prohibits interaction with a legal practitioner which would convey to a reasonable observer the impression that she is in a special position to influence the judge. On the other hand, personal friendship with a party is generally viewed as a compelling reason for disqualification.³³ Friendship may be perceived as equaling loyalty and loyalty to one side of the case is the antithesis of impartiality.³⁴

According to the ECHR case-law, the existence of impartiality (which is required by virtue of Article 6.1 of the ECHR) is determined on the basis of a) a subjective test, where regard must be had to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case, and b) an objective test, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (*Micallef v. Malta*).³⁵ There is no watertight division between the two tests, since a judge's conduct may not only prompt objectively held misgivings as to the impartiality from the point of view of the external observer, but may also affect her personal conviction (*Kyprianou v. Cyprus*).³⁶ In applying the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*Micallef v. Malta*).³⁷ As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to her impartiality. In doing so, the standpoint of the person concerned is important, but what is decisive is whether this fear can be held to be objectively justified (*Wettstein v. Switzerland*).³⁸ As the Court has emphasized even appearances may be of certain importance as "*justice must not only be done, it must also be seen to be done*" (*De Cubber v. Belgium*).³⁹ What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (*Castillo Algar v. Spain*).⁴⁰

³³ Bangalore Principles of Judicial Conduct (2002), Values 2.1, 2.5, 4.8 & Commentary on the Bangalore Principles of Judicial Conduct, *supra* at 23, § 90.

³⁴ *J.M. Miller*, *supra* at 23, p.579.

³⁵ No 17056/06, § 93, 15 October 2009.

³⁶ No 73797/01, § 119, 15 December 2005.

³⁷ *Supra* at 35, § 94.

³⁸ No 33958/96, § 44, 21 March 2001.

³⁹ No 9186/80, § 26, 26 October 1984.

⁴⁰ 79/1997/863/1074, § 45, 28 October 1998.

Moreover, when the objective test concerns professional or personal links between the judge and other actors in the proceedings, it must be decided in each individual case whether the relationship in question “*is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal*” (Pullar v. the United Kingdom).⁴¹ For example, the close family ties between an opposing party’s advocate and the Chief Justice of a small country (Micallef v. Malta),⁴² or the regular, close and long-lasting professional relations between the opposing party and the judge which provided “not negligible” regular income to the latter (Pescador Valero v. Spain),⁴³ sufficed to objectively justify fears of impartiality.⁴⁴ Comparably, in Pétur Thór Sigurðsson v. Iceland, the Court found that a judge’s involvement in the debt settlement of her own husband with the opposing party-bank (which involved securities in her properties that were by no means negligible and without which the debt settlements would not have materialized), the favors received by her husband as well as his links to the opposing party were of such a nature and amplitude and were so close in time to the court’s examination of the case that the applicant could entertain reasonable fears that the court lacked the requisite impartiality.⁴⁵

In order to apply the “appearance of impartiality” standards to judges’ social media connections, we must first examine what constitutes and what is meant by social media “friendship”. As the Ohio Board of Commissioners on Grievances & Discipline (Opinion 2010-7) successfully articulated it, “[a] rose is a rose. A friend is a friend is a friend? Not necessarily. A social network ‘friend’ may or may not be a friend in the

⁴¹ No 22399/93, § 38, 10 June 1996.

⁴² Supra at 35, § 102.

⁴³ No 62435/00, § 27, 10 July 2003.

⁴⁴ The court is not partial when the victim is another judge belonging to the same jurisdictional unit or a member of the parquet attached to the court, as the *esprit collegial* does not appear to form links so strong to warrant a finding of violation (App. No 8930/80 D’Hasse and Le Compte v. Belgium, App. No 556/59 v. FRG). Active participation in the past by the judge and the accused does not create a presumption of bias, unless the members of the tribunal were appointed because of the views they would adopt (App. No 8603/79 v. Italy). The alleged links between the jurors and the parties were rather tenuous in the few applications the issue arose before the Commission (App. No.3444/67 v. Norway, App. No7428/76 v. Austria). *S. Stavros*, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights, Martinus Nijhoff Publishers (1993), p.146-147.

⁴⁵ No 39731/98, § 42, 45, 10 April 2003. In contrast, in Walston v. Norway (No 37372/97, § 1, 3 December 2003), the applicant’s fears were not objectively justified, given that considerable time had elapsed since the judge was employed by the opposing party-bank, he had not occupied a senior position, he had no prior involvement with or knowledge of the case, and he had not maintained any special links with the bank.

traditional sense of the word.”⁴⁶ Indeed, being “friends” with someone on social media does not necessarily signify that special affection, mutual trust, and esteem are involved, and may in fact mean very little. While some have a handful of Facebook “friends”, others have thousands of them. Consequently, a Facebook “friendship” may actually amount to mere acquaintanceship, which alone may not engender a sufficient reason for disqualification. Thus, a total ban on Facebook “friending” could over-broadly cover an extensive cross-section of individuals with whom communication in the real world would not have served as basis for withdrawal or disqualification.⁴⁷ Such frequent and over-inclusive disqualification would inevitably lead to unreasonable burdens upon the judge’s colleagues and could bring public disfavor to the bench.⁴⁸

Taking into account the unique nature of Facebook “friendship” specifically, the New York State Advisory Committee on Judicial Ethics rejected the appearance of impropriety based solely on previous “friendship” with individuals involved in some manner in a pending action (Opinion 13-39).⁴⁹ The California Judicial Ethics Committee (Opinion 66) identified a number of factors for contemplation of the appearance of impropriety, such as: i) the nature of the particular social media page, ii) the number of friends the judge has (with a lower number suggesting a closer relationship), iii) the judge’s practice as to accepting “friendship” requests, and iv) how regularly the particular “friend”-lawyer appears before the judge.⁵⁰ This approach was recently affirmed by the American Bar Association’s Formal Opinion 462, stating that “*Context is significant. Simple designation as a [social media] connection does not, in and of itself, indicate the degree or intensity of a judge’s relationship with a person.*”⁵¹

In view of the above, we argue that Facebook “friendship” should not be understood in the typical sense of the word. In assessing whether a judge lacks

⁴⁶ The Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline, Opinion 2010-7, p.2. See also *M. Pampalk, S. Raab, N. Scheickl*, Richter und der Umgang mit Medien (*in German*), Österreichische Richterzeitung 2 (2014), p.32.

⁴⁷ *C. Estlinbaum*, supra at 29, p.21.

⁴⁸ Commentary on the Bangalore Principles of Judicial Conduct, supra at 23, § 66.

⁴⁹ NCSC, supra at 27. U.S. judicial ethics opinions on Facebook “friendship” are divided. *J.G. Browning*, supra at 15, p.510-527. For U.S. courts’ views, see p.491-497, 507-509, 527-532.

⁵⁰ Supra at 28, p.8, *D. Hricik*, Technology and Judicial Ethics, available at www.ssrn.com, p.7.

⁵¹ ABA, Formal Opinion 462 (2013), p.2-3.

impartiality on the basis of online “friendship(s)”, we contend that the judge’s social media “friendship(s)” must present/demonstrate objective manifestations of a close and personal relationship in order to substantiate grounds for disqualification. As the ECHR has stressed, the fact that a member of a tribunal has some personal knowledge of an actor in the proceedings does not necessarily mean that the judge will be prejudiced in favor of that person (*Pullar v. the United Kingdom*).⁵² It must be determined in each individual case whether the familiarity in question, i.e. Facebook “friendship”, is of such a nature and degree as to reasonably precipitate fears that the judge will not be able to act impartially. Only intimate communications with a party or a counsel repeatedly appearing before the judge give rise to an actual or perceived-as-problematic relationship that requires withdrawal. The above conclusion is supported by our survey data, according to which 91% of the survey participants who plan to use social media after their appointment will not disrupt their Facebook “friendship” with lawyers, while 57% of them would accept a new “friendship” request originating from a legal practitioner.

ii. Should judges be allowed to make use of social media in order to *investigate parties or facts of the case*?

Social media make it easy for judges to independently obtain information on the particular litigants and to conduct factual research. In addition, SNSs may provide conflicting information from what is being sworn under oath by parties in court. Imagine, for example the following situation: a party claims they were injured by the criminal and/or tortious activity of another party, but the judge sees on Facebook pictures of the “injured” party performing athletic activities.

According to the Bangalore Principles of Judicial Conduct a judge is required to disqualify herself if she has personal knowledge of disputed evidentiary facts concerning the proceedings (Value 2.5.1). This rule does not exclude knowledge that comes from prior rulings in the same case or information that represents common knowledge, but it applies to information acquired from an extra-judicial source or personal inspection by

⁵² *Supra* at 41.

the judge while the case is ongoing.⁵³ In adversary systems, therefore, judges should refrain from viewing party's pages on SNSs, as consideration of facts without adversary presentation could create ethical and due process concerns.⁵⁴ In inquisitorial systems, the judge conducts a public investigation of a crime and may collect evidence (e.g. question witnesses, interrogate suspects, order searches) in order to reach a verdict, whether incriminating or exculpatory. Under no circumstances, though, may she decide the case based on her personal knowledge or evidence which she has not called to the notice of the parties and has not allowed the parties to comment on.⁵⁵ As a result, we hold that if a judge, while the case is ongoing, independently investigates facts of the case by navigating parties' social media pages and comes across information of immediate interest to the case, she should place such information on the record for examination and comment by the parties. Otherwise, such knowledge is not only inadmissible, but the judge's behavior constitutes a breach of her ethical duty to act without favor, bias or prejudice.⁵⁶

iii. Should judges post/tweet about *pending cases* or *their careers/work* on their personal profiles?

There are a number of issues pertaining to a judge's career or everyday working environment and activity that may warrant sharing with her colleagues and superiors. Such issues include legal discussions arising out of cases pending before her, the exchange of information and advice regarding internal administrative matters, and even complaints and allegations about internal issues not essential to the public interest.

It is well established that a judge may not publicly make statements or comment on a pending case either via social media or via any other means of public communication. Similarly, a judge must not enter into *ex parte* communications regarding pending cases.⁵⁷ We stress that a judge who engages in factual disclosures or *ex parte* communications with regard to pending cases 'transfers' the hearing outside the

⁵³ Commentary on the Bangalore Principles of Judicial Conduct, *supra* at 23, § 93.

⁵⁴ *D. Hricik*, *supra* at 50, p.14, ABA Formal Opinion 462 (2013), p.2.

⁵⁵ *Kerojärvi v. Finland* (No 17506/90, § 39, 19 July 1995), *Foucher v. France* (No 22209/93, § 36, 18 March 1997), *Kuopila v. Finland* (No 27752/95, § 35-38, 27 July 2000).

⁵⁶ Bangalore Principles of Judicial Conduct (2002), Value 2.1.

⁵⁷ *B. P. Cooper*, *supra* at 16, p.4-5.

courtroom, possibly tampering with the adversarial principle and the safeguards of the trial's fairness.⁵⁸

Additionally, we hold the view that best practice is for members of the judiciary to avoid social media communications that are open to the public, insofar as career and work issues are concerned. It is rightly observed that social media posts and comments intended to be viewed by the judge's online "friends" may be disseminated by them without her consent and may be disclosed to third parties, with often embarrassing consequences.⁵⁹ Apart from that, social media profiles are not trustworthy as to the true identity of their users, since many use pseudonyms. The lack of an identification policy in social media discussions could lead to interferences by third users. In our view, the need for online communication between members of the judiciary with regard to career and work-related issues could be perfectly satisfied by means of a special online forum intended for and accessible only to members of the judiciary. Such a secure forum could be set up alongside the official website of every judicial body and could authenticate members' identities through a registration process. This way, judges would be able to communicate online with their colleagues and promote their professional interests without the ethical pitfalls that accompany the use of openly public social media.⁶⁰

iv. Should judges share through social media information and comments about matters concerning/affecting the judiciary as an institution?

The ECHR has had the opportunity in *Guja v. Moldova* to clarify that public servants' freedom of expression is limited in a democratic society with a view to ensure their adherence to their duties of loyalty, reserve and discretion.⁶¹ Therefore, if a public

⁵⁸ *M. Harrison & K. Swisher*, When Judges Should Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct, *NYU Annual Survey of American Law*, 64 (2009), p.559, 581 et seq. For real examples of judges posting comments on pending cases, see *E.M. Janoski-Haehlen*, The Courts are all a 'Twitter': The Implications of Social Media Use in the Courts, *Valparaiso University Law Review*, 46 (2011), p.11, *The Daily Mail* journal (26.4.2009), available at <http://www.dailymail.co.uk/news/article-1173575/Magistrate-quits-posting-updates-ongoing-cases-Twitter-court.html> & supra fn 14.

⁵⁹ ABA Formal Opinion 462 (2013), p.1-2.

⁶⁰ The Ethical Challenges of Social Media, *Business Ethics Briefing*, Issue 22 (2011), available at https://www.ibe.org.uk/userassets/briefings/ibe_briefing_22_the_ethical_challenges_of_social_media.pdf, p.2.

⁶¹ *Guja v. Moldova* (No 14277/04, §§ 70-72, 12 February 2008).

servant discloses information concerning misconduct or wrongdoing within the bounds of her public service, such disclosure would be protected by article 10 of the ECHR only if the balance between keeping to her professional duties and the public's interest to be informed of the allegations involved points to the latter.⁶² In striking that balance, the Court examines a series of factors pertaining to each case, namely: a) the allegation should be confidentially disclosed to a superior post holder or competent authority if such an authority exists and can ensure the effective handling of the relevant misconduct, b) the allegation should be verified for accuracy and be as well-founded as possible given the circumstances at issue, c) the public interest in having the allegation revealed and accordingly scrutinized has to outweigh the 'moral damage' which the public authority is going to sustain as a result of the disclosure and d) the motivation of the "whistleblower" should not be ill-founded, i.e. deriving from an antagonism, personal vindictiveness or the expectance of a pecuniary gain. In essence, the test is one of proportionality.⁶³ In applying this test, the Court has held that a disciplinary penalty against a judge for publicly disclosing an accurate allegation of misconduct on the part of her Court's President constituted a breach of article 10.⁶⁴ In contradistinction, the Court refused to grant the protection of article 10 to a Ministry of Justice official who publicly commented on the content of a confidential report drafted in the course of disciplinary proceedings against a judge, which had been leaked to the press. The Court's reasoning focused on the fact that the Ministry official failed to show the required duty of self-restraint and discretion, which adversely affected the public's confidence in the Court where the judge under disciplinary proceedings belonged.⁶⁵

The Court's findings are of particular value in our attempt to set the frame within which members of the judiciary can use social media as a means of imparting information and comments concerning the institutional function of the judiciary. In essence, judges' duty of discretion requires them to refrain from disclosing information and making comments online about the internal operation of the judicial body, not only to ensure respect of confidential data, but also to avoid exposure of the judiciary to bad faith

⁶² *Supra*, § 74.

⁶³ *Supra*, § 73-78, *Kudeshkina v. Russia* (No 29492/05, §§ 85 et seq., 14 September 2009).

⁶⁴ *Supra*, § 101-102.

⁶⁵ *Poyraz v. Turkey* (No 15966/06, 7 December 2010; Chamber decision – not final).

criticism without profound reasons. Any such comments and allegations can and should be confidentially discussed with other colleagues, superiors and competent bodies entrusted with handling incidents of non-compliance, or even within Judge Associations. However, a judge wishing to share in an appropriate social media forum an allegation of judicial or institutional misconduct may and should do so, provided that: a) the allegation was not effectively confronted at an internal institutional level, b) its accuracy is verified to the best of her knowledge and ability, c) the importance of the allegation for the public interest outweighs the damage caused by its disclosure to the public's confidence in the judicial body involved and d) the motivation behind the disclosure is not censurable.

v. What *personal information, photos and private life comments* are acceptable?

Articles 10 and 8 of the ECHR undoubtedly hold that judges have the right to express themselves as well as to self-define and develop their personal life and communications. This generally suggests that judges may use SNSs in order to communicate with their kin and friends, for example, by posting comments, photos and other data concerning their personal and family life. However, judges' freedom of expression is restricted by special ethical duties aiming at ensuring public confidence in the impartial, neutral and reasonable delivery of Justice.⁶⁶ Indeed, the Court has found that *“the ethical obligations of judges might encroach upon their private life when their conduct – even though private in nature – tarnishe[s] the image or the reputation of the judiciary...a conduct which renders the judge unworthy of the confidence and the esteem he should enjoy can have a certain effect on the judiciary.”*⁶⁷ In line with these guidelines, judges have to preserve dignity when sharing comments, photographs etc within SNSs⁶⁸ and exercise great caution when disclosing personal information on controversial issues.⁶⁹ Revealing ‘sensitive’ personal preferences,⁷⁰ such as religious

⁶⁶ “A judge ensures that his private life does not affect the public image of the impartiality of his judicial work” (impartiality), “A judge makes every effort not to offend, in exercising his functions and in his private life, the trust that individuals hold in him” (reserve and discretion), ENCJ (2009-2010), supra at 20, p.5. See also the Bangalore Principles of Judicial Conduct (2002), Value 4.6, the Commentary on the Bangalore Principles of Judicial Conduct, supra at 23, § 134 & *E.M. Janoski-Haehlen*, supra at 58, p.12.

⁶⁷ *Özpınar v. Turkey* (No. 20999/04, § 71, 76, 19 January 2011).

⁶⁸ The Supreme Court of Ohio, supra at 46, p.1, *B.P. Cooper*, supra at 16, p.5.

⁶⁹ ABA Formal Opinion 462 (2013), p.1-2.

⁷⁰ *C. Estlinbaum*, supra at 29, p.23, *The Ethical Challenges of Social Media*, supra at 60, p.2.

views⁷¹ and sexual preferences,⁷² may challenge common stereotypes or even prejudices broadly considered as *reasonable*⁷³ within society. It is questionable, though, whether and how often such preferences have any actual impact on a judge's professional competence and honesty. Besides, societal norms are not static in time and place, but are defined in relation to the cultural milieu where judges are called up to serve. It is characteristic that in 1979 a Greek judge underwent disciplinary proceedings for not wearing his wedding ring in office, which, at that time, suggested his availability for an extra marital affair with another woman.⁷⁴ Notwithstanding that it would be anachronistic to require judges to live in strict pursuance of the prudery that characterizes part of the society,⁷⁵ the need to retain public confidence in the judiciary persists,⁷⁶ since it supports its democratic legitimization. Clearly, there are some hard dilemmas to confront in attempting to strike a balance here.

Furthermore, the visibility of a judge's personal information by third parties may jeopardize her impartiality and integrity in more ways than one. For example, the over-exposure of her personal data could lead to cases where parties put pressure on or even threaten a judge to adjudicate in their favor. For instance, leaving profile information

⁷¹ See *Kurtulmus v. Turkey* (No 65500/01, 24 January 2006), where the Court upheld the ban on a State University teacher wearing an Islamic headscarf when teaching as a justified restriction on her freedom of religion (article 9) in view of ensuring "*neutrality in the public service and, in particular in the State education system, and to the principle of secularism*" [The Law, A(2)], *Özpinar v. Turkey*, supra at 24, § 71.

⁷² See Ethics Committee of the Kentucky Judiciary, *Judicial Ethics Opinion JE-119* (2010), p.4, where the Committee brought about the example of a judge who was publicly reprimanded for maintaining a website with sexually explicit and offensive material: *In re Complaint of Judicial Misconduct*, 575 F. 3d 279 (3d Cir. 2009). In its relevant decision, the Third Circuit Court of Appeals observed that "[a] judge's conduct may be judicially imprudent, even if it is legally defensible." (p.291).

⁷³ The subjective criterion of *reasonableness* is employed by the ABA Model Code of Judicial Conduct, Canon 3, Rule 3.1(A) & (C): "*when engaging in extrajudicial activities, a judge shall not... (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.*"

⁷⁴ *I. Mandrou*, *The Limits of Judges' Private Life*, *To Vima* Greek journal (7.12.1997), available at <http://www.tovima.gr/relatedarticles/article/?aid=93796>.

⁷⁵ *M.N. Pikrammenos*, *Classic Safeguards and Invisible Aspects of Judicial Impartiality: from Institutions and their Historic Evolution to the Judge's Forum Internum (in Greek)*, *Helliniki Dikaiosisini*, 46 (2005), p.1612.

⁷⁶ See *Kudeshkina v. Russia*, supra at 63, § 86, where the Court characterizes the Judiciary "*as the guarantor of justice, a fundamental value in a law-governed State,*" which "*must enjoy public confidence if it is to be successful in carrying out its duties*" & *Morice v. France* (No 29369/10, § 129-130, 23 April 2015). See also relevant concerns in *J. Doyle*, *Should Judges Speak Out?*, *Judicial Conference of Australia Uluru* (2001), p.2 & *B.P. Cooper*, supra at 16, p.5-6.

such as the judge's residential address accessible to everyone can render easier an attempt to contact her privately. The same could happen if a judge uses posts to state that she is at a certain place in real time or to comment on her everyday activities and whereabouts. Such situations pose an impartiality risk that has to be appropriately addressed, by keeping such information limited to persons who belong to the judge's social and family circle and to whom she can show actual reliance.⁷⁷ A strong majority (76%) of the survey participants who agree with maintaining personal data in their social media profiles restrict their accessibility to their online friends. This shows sensitivity towards these concerns, although it remains questionable whether all of their online "friends" count as within their close circle of friends.

vi. "Like", "dislike", "follow", "posting", "comments" by the user and by third individuals , joining internet-based distinct groups: what are the implications?

Apart from the 'conventional' ways of engaging in written communication via text messages, social media offer new ways of expressing one's (dis)approval ("like" and "dislike") and interest ("follow") as well as initiating or taking part in an open discussion on a specific topic (timeline/wall posting with comments enabled). In fact, "posts", "comments" and "(dis)like" buttons constitute a communication system that purports to serve as an open online discussion. However, it should be noted that such a "discussion" features some significant limitations. Firstly, it is not a live debate, but one that is confined to written comments and/or single word ("like"/"dislike") indications. This inevitably renders more difficult the explanation of one's views, thus giving rise to misunderstandings. This is especially the case for "like", "dislike" and "follow" indications, which are inherently vague and have no commonly accepted meaning.⁷⁸ For instance, liking a commercial company's webpage on social media could be perceived as an attempt by the judge to promote the economic interests of that company, thus causing concerns about her compliance with her ethical duties. As a result, a judge who uses these seemingly 'harmless' indications may find herself in breach of her duty not to convey nor

⁷⁷ Judiciary of England and Wales, *supra* at 32, p.26-27. It should be mentioned, though, that limiting access to one's profile friends does not ensure privacy. *B.P. Cooper*, *supra* at 16, p.2-3.

⁷⁸ *B.P. Cooper*, *Judges and Social Media: Disclosure as Disinfectant*, available at www.ssrn.com, p.17, Ethics Committee of the Kentucky Judiciary, *supra* at 72, p.2.

permit others to convey “*the impression that any person or organization is in a position to influence the judge,*”⁷⁹ or under suspicion of violating the prohibitions of abusing the “*the prestige of judicial office to advance personal or economic interests of herself or others.*”⁸⁰

On their face, “posts” and “comments” may be more elaborate and clearer than “(dis)like” indications, but the danger for misunderstandings remains. Most importantly, if a judge comments on issues of public interest which inherently carry certain political charge, third parties could assimilate her views in order to detect her political profile and orientation.⁸¹ Thus, the judge may inadvertently find herself in breach of her duties of impartiality and discretion which prevent her from openly expressing her (dis)approval of a specific political party or a party leader.⁸² In an attempt to address this problem, the English Judiciary Guide to Judicial Conduct suggests that “*judicial office-holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary.*”⁸³ It is, though, questionable whether anonymity serves responsibility and accountability in public discourse, while concerns are expressed by the Guide’s authors as to the discoverability of someone who blogs anonymously.⁸⁴ In line with these concerns, only 36% of our survey participants who plan to use social media when appointed to tenure-track positions state that they will use a pseudonym.

On the other hand, the circle of persons who can view a judge’s comments and can be involved in a relevant online discussion is unpredictable, and so are the number and the content of their comments and observations. Additionally, some users may feel like endorsing or rejecting others’ comments to an initial post or even commenting further on such original comments. This often leads to a multilevel and multi-topic

⁷⁹ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.4 (C), *A. Wilson*, supra at 22, p.231.

⁸⁰ ABA Model Code of Judicial Conduct, Canon 1, Rule 1.3, *B.P. Cooper*, supra at 16, p.6.

⁸¹ See the idea of a “jigsaw research” in Judiciary of England and Wales, supra at 32, p.26.

⁸² Commentary on the Bangalore Principles of Judicial Conduct, supra at 23, § 136, *B.P. Cooper*, supra at 16, p.6. Notably, art. 29 § 3 of the Greek Constitution and art. 91§ 5 b of Act No 1756/1988 prohibit any expression in favor or against a political party by members of the judiciary. See also the Greek Supreme Civil and Criminal Court’s Opinion on the interpretation of this prohibition: Areios Pagos (Full Bench), Opinion No. 4/1991 (*in Greek*), Dioikitiki Diki (1991), p.469.

⁸³ Judiciary of England and Wales, supra at 32, p.27.

⁸⁴ *Id.*, p.37. See also *The Guardian* journal (14.8.2012), available at <http://www.theguardian.com/law/2012/aug/14/judiciary-banned-blogging-tweeting>.

discussion. At the same time, all those comments appear attached to the initial post of the user on her timeline. In direct recognition of this phenomenon, the California Judicial Ethics Committee (Opinion 66) has opined that a judge “*is obligated to delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge’s social networking site. Moreover, a judge has an obligation to be vigilant in checking his/her network page frequently in order to determine if someone has placed offensive posts there.*”⁸⁵ The Committee has reasoned that if a judge leaves such comments on her timeline, she may give the impression of tacitly endorsing them.

Similar problems arise in regards to the practice of becoming an online member of a social media group, since such groups operate mainly through online “posts” and “comments”. When a judge becomes a member of such a group, she is at risk of being perceived as endorsing all its “posts,” “comments” and activity, although she may be unable to check all of them as to their propriety and withdraw or change them. Even worse, the mere membership of a judge in certain social media groups may again give rise to suspicions of partiality or misuse of her authority so as to advance individual interests. At a political level, joining a group related to a candidate for public office for instance, ostensibly might amount to “*publicly endors[ing] or oppos[ing] a candidate for any public office.*”⁸⁶ For these reasons, we postulate that membership in such social media groups should be discouraged, unless judges uphold and remain cognizant of the aforementioned propriety and privacy standards.

In view of the above, a judge posting on her timeline, “(dis)liking”, “commenting” on others’ “posts/comments” and joining groups should bear in mind the associated risk of public scrutiny and all the implications that these social media communication tools entail for her public image and integrity. It is remarkable that most of the survey participants who hold (or will hold) social media accounts use the “(dis)like” indication (81%) and join social network groups (79%). Yet, 84% of the survey participants who use “(dis)like” and 73% of those joining groups choose that this appears only to their social network friends. It is doubtful, though, whether “(dis)like”

⁸⁵ California Judges Association, *supra* at 28, p.5.

⁸⁶ ABA Model Code of Judicial Conduct, Canon 4, Rule 4.1 (A) (3).

indications and comments can be hidden from view under all circumstances with the exception of being visible to the user's friends. In fact, according to the Facebook privacy basics, *"anyone who can see a certain post will also be able to see any likes or comments people have made on it, including if you've liked or commented."*⁸⁷

IV. CONCLUSION

This analysis raises substantial concerns about the ethical implications of social networking by judges. In a world where social media have become mainstream means of communication and continue to grow, members of the judiciary should not be prevented or discouraged from taking part in online communities. Socialization through SNSs does not merely guarantee judges' freedom of expression, but it ensures their active participation in social life, thus acquiring direct experience of its problems and the dilemmas which they will be called upon to confront in their professional capacity.⁸⁸ Drawing on this essential admission, the present paper aspires to alert judges to the factors that they should take into account when engaging with social media, so that they effectively meet their ethical duties. Informing members of the judiciary of the unique perils that communication through social media entails, increasing familiarity through training (e.g. SNSs workshops, case briefing and discussion) and establishing bright-line rules that reflect the common understanding of social media are critical for maintaining judicial impartiality and integrity.⁸⁹ It is our hope that European ethics committees will soon address the issues arising from judges' online social activity and will adopt transparent and technologically up-to-date guidelines of good practices for contemporary members of the judiciary. Beyond disciplinary ethics, enforcing such guidelines could be proactively achieved through independent ethics councils within the Judiciary competent to advise and educate judges on modern ethical dilemmas, monitor their implementation and prevent potential abuse of online social connections.⁹⁰

⁸⁷ See <https://www.facebook.com/about/basics/what-others-see-about-you/likes-and-comments/>.

⁸⁸ C. Estlinbaum, supra at 29, p.11-12.

⁸⁹ B.P. Cooper, supra at 16, p.10, K. Eltis, supra at 19, p.644, J. Phillips, supra at 25, p.7.

⁹⁰ For the need for distinct professional ethics committees, see CCJE Opinion No 10 (2007) on the Council for the Judiciary at the Service of Society, p.11-12.