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Subject:

THE ETHICAL CHALLENGES OF INTERNET USE BY JUDGES

French team:

Julien GOLDSZLAGIER - Hugues JULIÉ - Florence LARDET

Trainers: Gilles BOURDIER — Amanda GEDGE-WALLACE — Jérôme HARS

INTRODUCTION

In February 2012, Facebook announced that it had 845 million users worldwide[1]. Among Europeans, 27.5% of the population are Facebook users. As underlined by Daniel Smith, "*it is apparent now more than ever that Facebook, like the Internet, is here to stay. It is not a fad or niche, but rather something that is becoming increasingly ubiquitous, in all spheres of society, including one of our more revered institutions: the judiciary*"[2]. The Internet offers all citizens - including judges - a new outlook for expression (blogs, forums)[3] and communication (personal or professional social networks)[4].

Judges, because they represent the Judiciary, are bound by specific constraints - their ethical rules – such as the obligation of reserve, the obligation of discretion, the duty of impartiality or propriety. These standards aim at preserving the image of the Judiciary by creating a climate of confidence among citizens towards the judicial system. As stated in the preamble of the Bangalore Principles of Judicial Conduct, "*public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society*".

With the advent of the Internet, questions have arisen with regards judges being present in this media. Can the image of the Judiciary be harmed by awkward use of the Internet by judges?

There are few materials on this subject. The international and European principles of judicial conduct[5] do not specifically tackle this question, nor do national rules. This issue does not seem to be subject of much prospective analysis. Should they exist, they are not publicly

[1] Information provided, in February 2012, by Facebook Inc. to the Security Exchange Commission.

[2] "*When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard*", Daniel Smith, J.D. candidate, 2012, Case Western Reserve University School of Law, p.1.

[3] Blogs and forums contain descriptions of events, thoughts and comments written by the author or by readers. They are dedicated to personal expression of thought, artwork or private life.

[4] Social networks (such as Facebook, MySpace, LinkedIn, Viadeo) are websites on which users create a personal profile and share information (such as pictures, video and thoughts) with the public or a restricted number of acquaintances, commonly known as "*friends*". They are basically social: contents are used to feed connexions between acquaintances rather than thoughts or debate.

[5] See "The Bangalore Principles of Judicial Conduct" (2002), reports by the Judicial Ethics Group of the European Network of Councils for the Judiciary (2008-2009, 2009-2010).

disclosed. The question of the presence of judges on the Internet nevertheless occurs when a judge is publicly involved in a specific case that jeopardizes his/her propriety or impartiality. In the United States, several cases have already emerged and therefore have led to specific thoughts about the presence of judges on the Internet with regards to ethical rules, especially at a disciplinary level. Yet it is important to underline that the American situation is a specific one, since judges are elected. Due to this fact, the Internet is frequently used as a communication tool for campaigns and American judges are more inclined to use this media than judges who are not elected.

Despite the lack of materials, it may be noted that, in many countries, judges do not stay totally away from the Internet. On the one hand, means of expression (such as blogs, forums) are used by some judges. Among these tools, Twitter seems to be favoured in particular and several judges have Twitter accounts[6]. This is the case for the Spanish judge Baltasar Garzon or for the Swiss judge Laurent Kasper-Ansermet. On the other hand, means of communication (personal and professional social networks) are also used by judges. South Korean judge Benedic Seo Gi-Ho and Maltese Magistrate Scerri Herrera have become famous because of their use of such tools.

From an ethical point of view, the presence of judges on the Internet has raised different questions. Some are traditional ones, which are amplified by the Internet phenomenon (for instance, freedom of expression versus obligation of reserve and obligation of discretion or duty of propriety). Other questions are more original, and appear due to the specific nature of the Internet itself. This is the case for the Facebook discussion regarding the duty of impartiality, which raises a further question: should a judge use social networks? If so, is it acceptable that a judge, who has a public profile, should befriend with a lawyer or will this jeopardize the public confidence? In the Internet age, what is expected from a judge by the citizens? If the Internet is considered as a place of vitality for democratic debate, should a judge stay away from it (in other words should he/she remain in his/her "ivory tower") or contribute to this debate?

[6] In the area of blogging, micro-blogging applications are a combination of instant messaging and blogging. Twitter is the most famous. It enables its users to send and read messages known as "*tweets*" (text-based posts of up to 140 characters displayed on the author's profile page).

This paper will try to make a contribution to the question "what can a judge do or do not on the Internet with regards ethical principles?". In order to reach this goal, the first part of this paper will describe how judges are present on the Internet by making a distinction between the use of the Internet as a means of communication and of expression with regards ethical principles (I). The second part will reflect on the relevance of the presence of judges on the Internet and upholds that the choice of the "ivory tower", that is to say the desertion of the Internet by judges would not be the right solution to promote. Therefore, after justifying that the presence of judges on the Internet is relevant, some recommendations for this presence will be made (II).

PART I: THE ETHICAL CHALLENGE OF INTERNET USE — FROM TRADITION TO FASHION

Two uses of the Internet may be distinguished. On the one hand, as a means of expression, the use of the Internet by judges brings up traditional ethical questions (A). On the other hand, as a means of communication, it can raise more original questions (B).

A - Traditional ethical questions

A judge, as a citizen, is entitled to freedom of expression recognized by international conventions protecting human rights. As a member of the Judiciary, he/she is subject to constraints. As considered at a European level, "*the obligation of reserve and that of discretion which constrain judges are a compromise between the rights of the judge as a citizen and constraints imposed on him as a judge*"[7]. This principle seems to apply, without specific difficulty, when a judge expresses him/herself on the Internet.

1) The obligation of reserve

The obligation of reserve is a restriction on the freedom of expression of the judge, justified by public interest. In order to maintain public confidence, "*a judge must avoid any conduct likely to promote the belief that their decisions are driven by motives other than the fair and reasoned application of the law: citizens have the right to an impartial judge (...). In his reserve, he should simply keep to the judiciary a character such that the individual can have confidence in him without worrying about the opinions of the judge*"[8]. Members of the

[7] Report by the Judicial Ethics Group of the European Network of Councils for the Judiciary (2008-2009), p.14.
[8] Report by the Judicial Ethics Group of the European Network of Councils for the Judiciary (2008-2009), p.14

Judiciary have begun to use the Internet in order to express themselves, either individually or collectively. When they do so, the obligation of reserve and the obligation of impartiality are fully applicable.

Examples of the use of the Internet as a means of expression. On the Internet, judges may express their opinions either collectively or individually.

From a collective point of view, judges are present on the Internet and express their opinion mainly through trade union or association websites. This is the case for instance for the "*Magistrates' Association*", that is a membership organisation for magistrates in England and Wales with over 28,000 members which represents over 80 % of serving volunteer magistrates. A part of the website is dedicated to the association's views on different subjects such as reactions to bills on consultations on judicial matters[9]. Another example is given by the "*European Judges and Prosecutors association*" that aims at organizing meetings and seminars on judicial matters at a European level[10]. Some trade unions have also decided to join the Internet by creating their own websites. As far as France is concerned, the three trade unions for judges ("Union Synidicale de la Magistrature"[11], "Syndicat de la Magistrature"[12], "Force Ouvrière Magistrats"[13]) are on the Internet.

From an individual perspective, some judges do not stay away from the Internet and its tools. Some of them have created Twitter accounts. This is the case for instance for the Spanish judge Baltasar Garzon. Some others have created their own blogs. For instance, Philippe Bilger, a former French prosecutor, has created a blog named "*Justice au Singulier*"[14]. This blog was launched by him while he was still a judge. It aims at exchanging points of view with citizens on society and justice. Another example is given by another French judge, Michel Huyette, who has created a blog entitled "*Paroles de juges*"[15]. This blog aims at sharing questions on the judicial system and its organization. These kinds of blogs show that some judges are eager to participate in the democratic debate and to use their freedom of

[9] See www.magistrates-association.org.uk/
[10] See www.amue-ejpa.org
[11] See http://www.union-syndicale-magistrats.org
[12] See http://www.syndicat-magistrature.org/
[13] See http://fomagistrats.force-ouvriere.org/
[14] See http://www.philippebilger.com/
[15] See http://huyette.over-blog.net/

expression to express views on subjects they know well, due to their professional practice. They also reveal two kinds of blogging. If Philippe Bilger willingly feeds the public debate with personal views on extra-judicial issues — such as political or societal ones — Michel Huyette keeps his remarks mainly technical.

The freedom of expression on the Internet with regards the duty of reserve. On the Internet, where ethical principles are concerned, rules seem to be simple: judges shall not cross the line and behave as active agents of a political party. A difficulty arises however: where is the limit between objective consideration of a society debate and impartial behaviour? If a judge expresses him/herself on the Internet by, for instance, supporting a specific policy, how should his/her behaviour be appreciated? Is there a risk that bias is obvious or is it merely an educational point of view for the public? A judge that is openly critical of his/her government may be sanctioned. Such is the opinion of some observers about a South Korean judge, Benedic Seo Gi-Ho. On February 2012, this judge was not reappointed by the Supreme Court due to his poor professional performance. According to observers, this sanction is more likely due to the criticisms made by the judge about the government's move "*to regulate judges' use of social networks such as Twitter and Facebook, claiming it was a restriction on freedom of expression"* and also to his use of Twitter *"to criticize President Lee and the Korea Communications Standards Commission's announcement that it would begin monitoring social networks*"[16]. This example underlines the fact that judges have to use the Internet cautiously and keep in mind that, as judges, their freedom of expression through this media is not the same as other citizens.

2) The obligation of discretion

According to the obligation of discretion, a judge shall respect the confidentiality of court hearings and proceedings discussed in his/her presence. In other words, from a European perspective, "*the right or duty of expression of the judge may not extend to the explanation or justification for his/her decisions. The judge can express his/her views but is limited to giving reasons for his/her decisions. The judge refrains from commenting on his/her decisions, even if they are frowned upon by the media or by academic or if they are overturned*"[17]. Furthermore, according to the Bangalore Principles, "*a judge shall, so far as is reasonable,*

[16] See http://www.ucanews.com/
[17] Judicial Ethics, Report 2008-2009, European Network of Councils for the Judiciary, p.15.

conduct himself/herself as to minimise the occasion on which it will be necessary for the judge to be disqualified from hearing or deciding cases"[18].

No examples in which judges comment their own decisions have been found. Even if he/she does not strictly comment on a case of which he/she is in charge, a judge shall be cautious when he/she expresses his/her opinion on the Internet. He/she shall keep in mind that what he/she says may be used by a party to challenge his/her impartiality. Such an example may be found in the Laurent Kasper-Ansermet case. Laurent Kasper-Ansermet was a former judge at the Khmer Rouge Tribunal. This Swiss judge was notably criticized for his controversial use of Twitter[19]. Before explaining the twittering issue, it is necessary to briefly explain the context. The Khmer Rouge Tribunal was established both by the United Nations and by the Royal Government of Cambodia in order to judge senior members of the Khmer Rouge. The procedure was divided into different cases, referring to several former Khmer Rouge leaders. In 2011, the Tribunal experienced significant public controversy (accusation of attempting to bury cases 003 and 004 because of political pressure). At the end of 2011, Laurent Kasper-Ansermet was appointed a judge and expressed his will to open cases 003 and 004. The Cambodian Government then expressed its "*ethical concerns*" about Laurent Kasper-Ansermet's Twitter posts and his use of Twitter. In one tweet, readers were asked: "*What's your answer about criticism (OSJI) for UN handling of a controversial case at the #KhmerRouge Tribunal? #asktheSG #Cambodia*"[20]. This case was discussed at an international level. The United Nations indicated that they had "*thoroughly reviewed*" the "*ethical concerns*" held by the Cambodian Government in relation to the posts, and "*determined that they were unfounded*"[21]. In an analysis entitled "*The extraordinary Chambers in the Courts of Cambodia, a failure of credibility*", the International Bar Association also estimates that Judge Kasper-Ansermet has exercised appropriate restraint[22]: "*Judge Kasper-Ansermet has not overstepped the line. Involving himself publicly in a controversial debate might be considered unwise, particularly given his pending position as*

[18] "*The Bangalore Principles of Judicial Conduct*" (2002), p.4.

[19] See *The extraordinary Chambers in the Courts of Cambodia, a failure of credibility ?*, International Bar Association, February 2012

[20] See Laurent Kasper-Ansermet Twitter account, 2011 September 13. The "#" symbol is called a "*hashtag*". It is used to mark keyword or topic in a Tweet. It helps any user to follow specific topics on the Twitter service.

[21] See *Statement by UN Secretary-General, 'Secretary-General Says Decision by Cambodia not to Appoint Current Reserve Judge to Position on Extraordinary Chambers « Matter of Serious C*oncern », (SG/SM/14072), 20 January 2012

[22] See *The extraordinary Chambers in the Courts of Cambodia, a failure of credibility ?*, op. cit.

international co-investigating judge. But his Twitter posts fall short of either lobbying the government or indicating his position regarding the guilt or innocence of suspects in Cases 003 and 004. Rather, he drew the public's attention to the controversy at hand, and expressed his eagerness to investigate Cases 003 and 004. He exercised appropriate restraint and one can conclude that Judge Kasper-Ansermet's actions should not be used as a reason to justify his rejection by the Supreme Council of Magistracy". Despite this ethical whitewashing, on March 19, Laurent Kasper-Ansermet announced his resignation. This example underlines the fact that judges have to use the Internet cautiously since if they behave in an ethical way on the Internet, some of their words may be used to question their impartiality.

B – New ethical questions

According to Daniel Smith, "*common sense has frequently lagged behind the pace of social-networking innovation (…). Many users have unwittingly blurred the line between what ought to be public and what should stay private*"[23]. Indeed, it is obvious that the Internet is a place which can be widely open to the public, even if information is shared with a restrictive number of acquaintances, commonly known as "friends" in Facebook terminology.

From an ethical perspective, the use of social networks (and especially Facebook) has already begun to call ethical principles into question, such as impartiality, independence and integrity, especially for American cases[24]. As "*Friendship is constant in all other things save in the office and affairs of love"*[25], judges shall be cautious on their use of social networks since the Internet is much more public that one could imagine and makes these affinities public.

1) The main social networks — a brief introduction

Social networks can be divided into two categories: professional and private. Professional social networks (such as LinkedIn or Viadeo) share business interests among users and are

[23] "*When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard*", Daniel Smith, p.5.

[24] See "*To friend or not to friend ? Judges, lawyers and social media* », John K. Guice & Courtney T. Joiner;
"*Should judges "friend" you? Judicial Ethics in the age of social media"*, Ido J. Alexander;
"*When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard*", Daniel Smith

[25] "*Much Ado About Nothing"*, William Shakespeare

often used by human resources for headhunting. Private social networks have various purposes. Some of them for example are specifically dedicated "*to help people find love*", such as "Match" or "Meetic"[26]. Others are dedicated to provide a means of social interaction between real friends or simple acquaintances.

The most famous one is Facebook. Users create a profile page with personal information including their interests, relationship status, hometown, affiliated employers and schools. Contents on Facebook are made to provoke a quick reaction in the network. Therefore, they are preferentially funny and/or positive, rather than sad or serious. Funny or positive content is broadcast much more widely than sad or negative content. Facebook's users have the possibility to "friend"[27] other users. Once two people become "Facebook friends", they generally gain increased access to each other's profile page, although the extent of that access is subject to each user's privacy settings (such as pictures, videos, the "Wall"). The "Wall" displays a variety of contents including other users' comments. Users can comment on other users' comments. Apart from the "Wall", two users can communicate through private messages or chat with other online friends. Users can also see the list of users who are friends with their own friends[28]. In the matter of ethics, being a "friend" in digital life (the opposite being IRL, *in real life*) can be considered as a serious issue. Because judges are required to be impartial and impervious to influence, the Judiciary is greatly concerned by the risk of bias. Will a judge who is a "Facebook friend" with politicians or with a lawyer who regularly appears before him be considered by the public as impartial and independent?

2) The main social networks — ethical precedents

As regards social networks, one question has been largely debated, mainly in the United States, that of the "Facebook friend". Some European countries (the United Kingdom or Malta) have also decided to take social networks into account in their ethical principles. Answers given to this matter vary from one country to another. Some countries plead in favour of prohibition while others are not opposed to this presence on the Internet but plead in favour of cautious use.

[26] See www.match.com or www.meetic.fr

[27] To friend, i.e. the action of adding somebody as a friend for social networking sites or social community sites.

[28] See for more details "*When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard*", Daniel Smith, p.5.

The choice of prohibition. Several opinions have been considered by the Judicial Ethics Advisory Committee of the Florida Supreme Court on ethical problems arising from judicial Facebook friendships. In November 2009, the Committee answered the question whether "[a] *judge may add lawyers who appear before the judge as "friends" on a social networking site, and permit such lawyers to the judge as their "friend"*". It considered that judges and lawyers could not "friend" each other on Facebook. The motivation is that "*listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge*". The Committee reiterated this position in 2010[29]. Malta has also adopted a strong stance on this question since members of the Judiciary have been told to keep away from social networks. A new paragraph has recently been inserted in the Code of Ethics for Members of the Judiciary: "*Since propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge, membership of 'social networking internet sites' is incompatible with judicial office. Such membership exposes the judge to the possibility of breach of the second part of rule 12 of the Code*." This insertion was decided after case of Magistrate Consuelo Scerri Herrera. The columnist, Daphne Caruana Galizia, strongly criticized Scerri Herrera on her online blog[30], notably because of her links to certain policemen, politicians and journalists. The journalist refers to different pictures posted on Facebook by the judge or by some of her acquaintances.

The choice of carefulness. In the United States, some states have issued opinions allowing judges and lawyers to establish relationships on social networking sites such as Facebook. For example, the Ethics Committee of the Kentucky Judiciary admits that a judge is able to utilize social media sites and have "friends" who are lawyers who appear before him/her in court. According to the Committee, "*while the nomenclature of a social networking site may designate certain participants as "friends"... such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge (...) While social networking sites may create a more public means of indicating a connection ... The designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the*

[29] See Judicial Ethics Advisory Committee, Florida Supreme Court, opinion number 2009-20 (November 17th 2009), opinion number 2010-04 (March 19th 2010), opinion number 2010-05 (March 19th 2010), opinion number 2010-06 (March 26th 2010)

[30] See http://daphnecaruanagalizia.com/2010/10/no-wonder-judge-herrera-bought-a-big-house-and-threw-parties/

"friend" Terms [such] as "friend", "fan" and "follower" [are] terms of art used by the site, not the ordinary sense of those words"[31]. The Committee however recommended that judges should be "*extremely cautious*" on Facebook. Other states have issued opinions similar to Kentucky's. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has also recommended that "*as with any other action a judge takes, a judge's participation on a social networking site must be done carefully*". Some guidelines are detailed by the Board for judges who use social networks. The Board insists on the fact that "*Following these guidelines as to social networking will require a judge's constant vigil"*[32]. In conclusion, in most of these cases, it seems that being on a social networking site does not, in itself, establish such a relationship as to imply that the lawyer has special influence over the judge. This is also the position of the United Kingdom where social networking has been clearly taken into account. According to the UK Guide to judicial conduct 2011, "*the use of social networking is a matter of personal choice*". Some guidelines are then given to judges about the information about themselves disclosed on the Internet ("*be wary of publishing more personal information than is necessary*"), about privacy settings of social networks ("*you can restrict access to your profile to ensure your information is kept to a restricted group"*)[33].

PART II: THE ETHICAL CHALLENGE OF INTERNET USE — WHY AND HOW TO BE ON THE INTERNET

The presence of judges on the Internet may be considered as problematic from an ethical standpoint. As judges are the embodiment of Justice, they should not undermine public confidence by being involved in any turmoil or controversy. To do so, the easiest way seems to desert the Internet in order to prevent hypothetical ethical issues. At the same time, this desertion does not seem to be realistic (A). As the presence of judges on the Internet is a tricky exercise, it may useful to make proposals for a reasonable presence on this media (B).

A- To be or not to be on the Internet?

Being on the Internet makes it very likely that members of the Judiciary will face ethical issues, They could be tempted to avoid all this problems by simply avoiding the use of

[31] See Ethics Committee of the Kentucky Judiciary, formal judicial ethics opinion JE-119 (January 20, 2010).

[32] See Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2010-7 issued December 3, 2010.

[33] See UK Guide to judicial conduct 2011, paragraph 8 « *activities outside the court* »

Internet. Judges belong to a community whose members may be judged by them, though. They cannot simply refuse to share some of the casual activities of those around them to prevent hypothetical ethical issues. Furthermore, in so far as the principle of propriety is at stake, ethical issues could arise from an embarrassing past being made public through the Internet.

1°) Should Judges simply avoid using Internet tools such as blogs, forum or social networks ?

The propriety Challenge. The Bangalore Principles of Judicial Conduct state (Value 4: Propriety) that: "*Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge"*[34]. Consequently, a judge should adopt high standards of conduct in his/her public life, as in his/her private life. "*As a subject of constant public scrutiny, a judge must accept pe1rsonal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.*"[35]

The principles of integrity and propriety imply that judges have not only to control their public behaviour, but also their private conduct. More specifically, judges are asked to protect the public against the publicity of their private conduct, if the latter jeopardizes public confidence in the Judiciary. This pragmatic compromise leads to burdening judges with a reinforced duty of restraint. If *Justice must be seen to be done*, everything that challenges the ideal of Justice *being done* must not come into sight. "*The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.*"[36]

Unfortunately, it seems that the Internet and more specifically social networks sites make these expectations very difficult to fulfil. Indeed, the Internet makes all content uploaded to a website available to everyone, whether it be commentaries, photographs, pictures or sound recordings. Social networks furthermore ensure a large and viral spread of any content, with

[34] See The Bangalore Principles of Judicial Conduct, 2002, p. 4
[35] See The Bangalore Principles of Judicial Conduct, 2002, p. 5
[36] Therrien (Re), 2001 SCC 35 (CanLII), [2001] 2 SCR 3, <http://canlii.ca/t/521j> , paragraph [111].

very little opportunity for control. Once a picture has been released on the Internet, it can be reproduced and communicated to anyone without any control. In this environment, a constant and early appearance of superior dignity is a tough challenge.

The Lori Douglas case. This is a sensitive but telling example of the ethical problems that may arise from the disclosure of private materials on the Internet. In July 2010, a complaint was filed with the Canadian Judicial Council against Lori Douglas, Associate Chief Justice of the Manitoba Court of Queen's Bench (family division). The complainant alleged that Lori Douglas' husband harassed him in 2003 by pressing him to have sex with his wife, who was at the time a lawyer. Indeed, Lori Douglas was appointed as a judge in 2005. In order to convince him, Lori Douglas' husband showed the complainant sexually explicit photos of Judge Douglas that he had posted on a pornographic website. Since then, Judge Douglas has temporarily stopped hearing cases pending the resolution of a complaint and has kept press silence[37].

As noted by commentators[38], the case raises a few other ethical problems than the mere posting of pornographic pictures of a judge on the Internet. Lori Douglas had to face 1) her implication in a sexual harassment when she was a lawyer, 2) the racist aspect of this harassment[39] and 3) the fact that she may have lied during the appointment process. Applicants are indeed supposed to answer the following question: "*is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?*". Lori Douglas' answer to this question is not known yet, but her silence on the matter during the application process could be sufficient for disciplinary sanction.

Nonetheless, the specific question of the photographs is a *per se* issue, as observed by Professor Sébastien Grammond[40]: "*If pictures of you naked end up on an internet site, it's*

[37] For further information See http://www.cbc.ca/news/canada/manitoba/story/2010/08/31/judge-manitoba-douglas.html

[38] For instance, Alice Woolley, Associate Professor at the Faculty of Law, University of Calgary in the National Post, *The Problem with Judges and kinky sex*.
See http://fullcomment.nationalpost.com/2010/09/02/alice-woolley-the-problem-with-judges-and-kinky-sex/

[39] The photographs were posted on an interracial meeting website. The ad requested a "*smooth **black** male or **Mexican** (...) to seduce <DOUGLAS> with the intent of getting her enmeshed in the submissive, multi-partner, **interracial** sex scene.*"

[40] Dean of Civil Law at the University of Ottawa.

quite difficult to say you have the credibility to be a judge"[41]. He adds that the judge ultimately represents the ideal of justice. Therefore the judge's conduct and image reflects on the justice system as a whole. This strict position is shared by the Judicial Ethics Committee of the California Judges Association, as issued on November 23, 2010 in its Opinion 66: "*Online activities that would be permissible and appropriate for a member of the general public may be improper for a judge. While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so.*" [42]

At this point, the very question of the compatibility of judicial ethics and the Internet comes into play. Certainly, a judge should avoid publishing embarrassing photographs of himself/herself on the Internet; and he/she should also be careful not to be photographed (or recorded) in a situation that may be inappropriate. But what can he/she do to avoid old photographs or recordings of any kind being published by others?

The Internet never forgets. Nick Cohen, journalist, wrote a paper in February 2012 entitled "*Where are the judges fit for the Internet age?*". He considers that Twitter and Facebook are having a transformational effect on the nature of secrecy and access. In his opinion, the web is making global what was local. He adds that it "*makes that evidence of faults, which once would have been forgotten, permanently available to the malicious and small-minded*" and that "*potentially anyone with access to the web can find embarrassing photos, evidence of minor crimes and foolish Facebook updates or tweets*".

It is therefore tempting to advise judges to stay away from the Internet because, in this form of media, a wrong choice by a judge may be very costly for his/her own reputation and for the image of Judiciary. This is the position defended by Daniel Smith in a 2012 Paper[43]: "*The best way to avoid creating such an appearance of impropriety is to abstain from maintaining a presence on social networking sites. It is justified by the fact that judges are expected to make certain sacrifices that would be burdensome if applied to other citizens.*"

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[41] See http://www.cbc.ca/news/canada/manitoba/story/2010/08/31/judge-manitoba-douglas.html

[42] See http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf

[43] "W*hen everyone is the judge's pal : Facebook friendship and the appearance of impropriety standard*", Daniel Smith.

According to this author, "*abstaining from participation in social networking is a small price to pay for the preservation of judicial integrity*".

2) Why judges should be on the Internet

There are three reasons nonetheless why judges should not avoid the Internet. Firstly, because they cannot. Secondly, because they do not have to. And thirdly, because they should not.

a) If there is nothing inappropriate about an average student being photographed in a drunken revelry, he/she should not be blamed years later for a breach of judicial ethics if those photographs are made public, when he/she has become a judge. Regarding ethics, the perception of what is — or not — appropriate is also a matter of time and culture. Thus, the Internet makes time and distance flat. And in the Internet age, ethics compel us to reckon distant conduct of yesterday with here and today's eyes. What would have appeared perfectly innocent for a teenager thirty years ago could appear dramatically inappropriate for a judge today. But tomorrow's judges cannot be asked to behave today in a way they would guarantee the dignity of their office in the distant future, basically because they are generally unaware that they will be judges later.

b) A judge is also a citizen who cannot simply be deprived of his/her fundamental rights. The right to privacy ensures both control over information about oneself and control over one's ability to make personal decisions. It allows people to behave in a way that may appear inappropriate — or even offensive — to other people. According to the Judicial Ethics report 2009-2010 of the ENCJ working group, "*like any person, a judge has the right to his private life. His duty of reserve does not preclude him from having a normal social life: it is enough if he takes some common sense precautions in order to avoid undermining the dignity of his office or his ability to exercise it*". There is no doubt that a judge must give up a part of his privacy to compel the duty of his office. Ethical principles are an ideal that judges must aim to achieve. As an ideal, judges try to behave in compliance with such principles. Ethical principles require the judge to conform his/her image to the expectations of the community, but not the substance of his/her private life. Surely judges' individual rights have to be balanced with the compelling public interest of confidence in the Judiciary, but there is no way such a balance could imply depriving judges of their right to privacy. The *proportionality principle* — which is the core of any rule-of-law based system — prohibits

such excessive measure. Under the European Convention, confidence in the Judiciary cannot allow a Government to infringe so deeply the judges' right to privacy.

c) Judges belongs to a community, from which they originate, in which they fulfil their duties. This is why a commentary to Canon 4A of the Code of Judicial Conduct indicates: "*[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives*"[44]. And this is peculiarly true in systems where judges are elected, notes the Ethics Committee of the Kentucky Judiciary, in its 2010 Opinion[45]. In a world where the Internet has been taking such an importance in everyday life, it would certainly not be appropriate for judges to isolate themselves from common use of the Internet.

Beyond the necessity of being part of the community in all activities that comply with common decency, judges might also use the Internet as a means to promote the judicial system itself. It is now commonly known that the Internet modifies hierarchies and power in organisations. And this evolution is increasingly innervating society as a whole. Government and institutions have to face new expectations from the public, as regards transparency, access to information, and accountability. In this environment, it is hardly imaginable that Justice avoids answering these expectations. This position is supported at a European level. Indeed, the judicial ethics report indicates that "*the judge has an educational role to play in support of the law, together with other institutions in charge of the same mission*"[46]. According to this statement, judges will have to comply with a didactic mission towards the public; and there is no other place to do this better than the Internet. An interesting example of such a didactic activity of judges is given by Anne Sy Cheung, who has written a study[47] on Internet practices of judges in China based on the analysis of 42 judges' blogs. The author explains that judges "*have made use of their unique roles to open up a professional public sphere on the Internet*"[48] and therefore play an educational role.

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[44] See Code of Conduct for United States judges Canon 4: "*A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office*."

[45] See Opinion JE-119, January 20, 2010, *Judges' membership on Internet-based social networking*. http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf

[46] Judicial Ethics, Report 2008-2009, European Network of Councils for the Judiciary, p.14.

[47] Anne Sy Cheung, *Exercising Freedom of Speech behind the Great Firewall : a study of judges' and lawyers' blogs in China*, Harvard International Law Journal, Vol. 62, April 2011 pp. 251 - 291.

[48] "*Exercising Freedom of Speech behind the Great Firewall: a study of judges' and lawyers' blogs in China*", op cit.

B – Being on the Internet — a "how-to"

As judges cannot escape or bypass the Internet by hiding themselves in their "ivory tower", they have to rebuild an "ivory tower" within the Internet. But this tower has to answer the necessities of the age of transparency brought about by the Internet. On the one hand, judges have to adapt their conduct to the challenges of the Internet. But on the other, judicial institutions also have to take into account the disturbance the Internet provokes in judicial ethics. It is what Nick Cohen underlines in the conclusion of his paper: "*we will need judges and lawmakers fit for the Internet age, who know that just because the web makes people's information publicly available does not mean that public or private authority has a right to punish them. In fact, we need them now*".

1) Judges fit for the Internet age

There is no doubt that judges remain subject to ethics in the sense of the Bangalore Principles, "*as a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office*". Consequently, because of Internet-enhanced public attention, a judge must be especially cautious.

In his/her personal life, a judge should be aware that new technologies and the Internet surround him/her and that his/her private life is subject to invasion and publicity. In the "global village", the judge should live as if he/she were actually living in a very small village, where everyone watches everyone else.

In his/her virtual life on the Internet, a judge should adopt a principle of great caution. Firstly, he/she has to be aware that every piece of personal information disclosed by himself/herself or others is susceptible to be used by anybody. The UK Guide to judicial conduct warns: "*Although there is no specific guidance on this matter, judges are encouraged to bear in mind that the spread of information and use of technology means it is increasingly easy to undertake 'jigsaw' research which allows individuals to piece together information from various independent sources.*" Secondly, in the use of blogs, forums and social networks, judges should heighten a *Chinese wall* between their professional and personal life. For instance, personal profiles on social networks should be restricted to personal relations and

not accessible to the public. In a public forum debate, judges should be take great care of the context: they should be aware that the disclosure of their quality capacity as a judge can either be ethical — if they are requested so — or unethical — if they may get undue benefit from it (even moral). One should keep in mind that every statement on the Internet comes under a virtual microscope.

In Canada, the Canadian Judicial Council has not yet drafted rules for judges. Nevertheless, it published a paper on this matter on its website, focusing on security and on the control of information published by the user. "*Facebook must be used with caution and shall we say judiciously. One of the key dangers of Facebook is that while you have a fair bit of control over your own workspace, you have very little control over what others say or do. For example, people can upload a photograph of you and then tag it so your name is searchable. (Unless you take steps to stop it – if you can figure out how)*"[49]

2) Judicial Ethics Authorities and Guidelines fit for the age of Internet

Nobody may reasonably deny the changes caused by Internet social networks. All issues raised by new technologies can be solved within the principles of judicial ethics. Of course, this would suppose adjusting practices of ethical institutions and authorities.

Distinction between ethics and disciplinary rules: uncertainties about what is ethical behaviour on the Internet - The difference between disciplinary rules and ethics should be made. If ethics aim at painting an ideal picture of the judicial office, disciplinary rules are made to ensure that the judicial community respects minimal standards of conduct. Such a distinction between disciplinary rules and ethics calls into question a narrow description of practices, behaviour and conduct that may be a cause for disciplinary action.

The requirement of specific guidelines in the use of the Internet - Beyond disciplinary rules, guidelines for ethically complying use of the Internet would be advantageous for judges — especially inexperienced ones — and for the public as well. "*[G]uidelines are non-legislative instruments which purport to assist with decision-making, rather than defining permitted or*

[49] See "*Facebook and social networking security*", Martin Felsky, November 2009, published on the Canadian Judical Council website.

prohibited conduct"[50]. Prohibition *per se* is neither necessary nor desirable. But uncertainty about what is tolerable or not certainly worries judges and disturbs the public. Indeed, both judge and public need to rely on solidly based ethic rules. And those rules will have to adapt ethical principles to the specific issues of the Internet. The option of a "clean sheet" given to new judges, as far as the Internet is concerned, may be considered. Because another solution would imply that the past of a judge in office might be evaluated in a way he/she could hardly anticipate. It would imply a "right to be forgotten" for applicant judges; not in a sense that they could claim to expunge the Internet of any embarrassing content, but in the way they could claim immunity from Internet recollection.

For now, only a few guidelines have been settled upon, mostly in the United States. These guidelines are relevant for the US judicial system but can hardly be transposed to others judicial traditions. As is highly foreseeable though, cases will multiply around Europe, as the number of social networks users grows. To prevent malpractice and set up good practices in this matter would be a suitable project for European ethics and disciplinary Authorities. But they have to face issues of methodology.

When it comes to ethics and technology, it is reasonable not to consider rules and regulation set in stone. Technology changes, as do the uses of technology. Wisely, medical ethics regulations are supposed to be accommodating and temporary. So should the rules governing ethical uses of the Internet. Furthermore, a less top-down approach should be favoured. The building of rules adapted to Internet use should be based on practical cases, rather than blind adaptation of ethically-grounded principles. An inductive method should be preferred to a deductive one. With this in mind, a first step could be to collect cases from all over Europe in order to build a Casebook. As a second step, an instruction manual on ethical use of Internet tools would be of practical use. The guidelines would consist of the Casebook and the manual. Casebook and manual would be fed regularly with new items, because as far as technology is concerned, *living* guidelines are required.

[50] Lorne Sossin and Charles W. Smith. Hard Choices and soft law: *Ethical codes, Policy guidelines and the role of the courts in regulating Government*, in 40 Alta. L. Rev. 867 2002-2003.

Conclusion

For better or worse, the Internet reduces the distance between judges and the public. Their lives, whether personal or professional, may be easily exposed to everyone. This challenges ethical principles. In fact, as far as the Internet is concerned, judges are under scrutiny throughout their lives. This new challenge requires adaptation on the part of judges, judicial authorities and ethical practices. In our opinion, specific guidelines about the use of the Internet should be implemented. A large and collaborative debate should be set in motion. Such a debate, at a European level, would be a source of reflection for judges, helping them to adjust their conduct on the Internet. It would also be a way of reinforcing public confidence in the Judiciary.

As the Internet shatters traditional relationships between citizens and political powers, the judicial s system faces the challenge of being set apart from the digital revolution. One way to avoid this should be a willingly exposure of judges on the Internet, under the safe harbour provisions of ethical provisions, clarified by specific guidelines.

"*For things to remain the same, everything must change.*"[51]

[51] *The Leopard*, Luciano Visconti (1963)

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