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**SOCIAL MEDIA AND ETHICAL LIMITATIONS
TO MALAYSIAN JUDICIARY**

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ABSTRACT

The use of social media is widely accepted as an important tool to spread information easily and quickly. Judges must read and share opinions towards current and latest information using social media. As such, compliance with the adoption and exchange of information through the responsible use of social media for joint discussions is expected from judges and judicial members. The public confidence in the judicial system will diminish if the judges display improper online conduct. Therefore, the objective of this article is to identify the ethical limitation of the judges' capacity in using social media for the maintenance of judicial integrity. By summarizing and reviewing the existing relevant framework, this article proposes a persistent and reasonable guideline on the use of social media for the judiciary following the growing risks posed by social media. Furthermore, judges and judicial officers might better exercise extreme care while requesting and accepting friend requests, including social media postings to avoid the manifestation of safety. Local judicial ethics

advisory opinions are needed to prepare revised guidelines following the changing social media features.

Keywords: Ethical limitation, guidelines, judges, public confidence, social media.

INTRODUCTION

Social media has increasingly and inevitably become an important tool for interpersonal communication and the discovery of information in the current digital age. Given the pervasiveness of social media, social media is no exception to the judges for personal communications and legal practice use. It has concomitantly become useful to the judiciary as a direct channel to bridge public communication without intermediaries that make visible the court accessibility to promote public confidence towards the administration of justice. The presence of social media leads to increased transparency and accountability of court processes. With greater use of social media, it would be possible to prevent corruption, which ensures the judiciary is independent and free to decide the cases under the law (Bertot et al., 2010). Improper social media opinion posts, if posted by the judges, may generate conflicts that may affect the ability of the judiciary to perform its judicial function and devalue the judicial institutional integrity from the public perception. The social media provision is a double-edged sword that consists of advantages and disadvantages.

In facing the emerging uses of social media, it is important to raise concerns about the growing recognition of the risk of breaching the judicial conduct limitation. For example, judges who engage in online discussion via social networking platforms such as Facebook, Twitter and YouTube. Online discussion is addressed as an activity that consists of conveying, transmitting, or routing messages through the networks between persons and persons in the form of sound, data, text, visual images, signals, or other forms or any combination of those forms (Hussein, 2014). The Global Judicial Integrity Network (Network) was launched under the United Nations Office on Drugs and Crime (UNODC) Global Programme for the Implementation of the Doha Declaration in 2018. The Network was adopted by the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice in 2015 to reinforce judicial integrity and combat corruption in the entire justice system. The programme's initiative

thereafter brought for an Expert Group Meeting in Vienna, Austria, in November 2018, that convened to discuss among the Network participants the challenges faced by judges in using social media and develop a non-binding guideline to inform the judges of the risks and opportunities when using social media (UNODC, 2018).

In the Expert Group Meeting, former Federal Court Judge, Zainun Ali (as she then was) expressed that the Malaysian Judiciary would support the Network in the endeavours of promoting and strengthening judicial integrity (UNODC, 2018). The Network underlines and sets out the practical guides on appropriate judicial conduct in using social media to maintain accountability and independence from ‘the eyes’ of society in accommodating unprecedented change in social media. The matters of different cultures and legal traditions are noteworthy. The guidelines emphasizing judicial content inspired the judiciary to consider providing other comprehensive, practical guidance in place involving effective social media use among judges under the auspices of the Network (UNODC, 2018).

RESEARCH METHODOLOGY

This article investigated the rationale for adapting online social networking in the present justice administration. Specifically, the article identified the ethical limitation of the judges’ capacity in using social media for the maintenance of judicial integrity. By summarizing and reviewing the existing relevant framework, this article proposed a persistent and reasonable guideline on the use of social media for the judiciary following the growing risks posed by social media. The insights of this article are based on library research from existing works or materials, including academic articles, textbooks, journals, dissertations, and relevant miscellaneous documents available on the internet. After collecting information, a critical analysis was used to review, examine, and assess the materials systematically before the qualitative finding was described (Hill & Spittlehouse, 2003).

WHY SHOULD THE JUDICIARY HAVE SOCIAL MEDIA ACCOUNTS?

Social media permeates the daily life of modern society in a new way. The new form creates a new relative discourse for online interactive

communication among people to exchange ideas or share information with each other by posting comments with just a click of a finger. The ideas and information could also be shared with other individuals from outside the scope of original posts to view on a large scale (Manning, 2014). The Malaysian judiciary has established a few official social media platforms, such as Facebook (@The Malaysian Judiciary), Twitter (@MYJudiciary), YouTube (@The Malaysian Judiciary) and Instagram (@MYJudiciary), which are handled by appointed court information officers. First, social media aims to increase public accessibility to the court to establish public confidence in court systems (Blackham & Williams, 2013). The current Chief Justice of Malaysia, Yang Amat Arif Tun Tengku Maimun, said in her interview with journalists that the viral, unverified comments written by people on social media without having actual knowledge could generate a negative perception of the court institution (Palansamy, 2019). Some of the comments which are usually associated with the judges are misconstrued and if no responses are provided from the judiciary, the criticisms could subvert the administration of justice.

Judges are accountable to the public and therefore, must be prepared to accept criticism, respond appropriately to baseless claims within reasonable parameters, display the greatest tolerance to earn public respect (*The State v Mamabolo* (2001) 3 SA 409); and, not accord the privilege to absolute silence that may subvert the reputation of the judiciary (Lord Hope, 2010). Hence, it becomes necessary for the court to engage with social networking platforms to reach out to the public easily and educate them about the court justice system. In this aspect, greater direct involvement of the two-way communication between the judiciary and community through social media can also dispel the idea of judges' inviolability that the judges are always 'out of touch' as an enigma (Browning, 2016). However, the Malaysian judiciary currently focuses on immediate reporting of the court decisions to enhance the public understanding of the court activities. It is believed that through the full and strategic utilization of social media, judges can choose to respond to criticism individually or collectively and contribute legal knowledge to online community members (*Judiciary of England & Wales*, 2014). For instance, judges could create a personal Facebook page or judicial blogging (Kopf, 2015)¹, as a

¹ Senior United States District Judge Nebraska, Hon, Richard G. Kopf wrote a blog entitled *Hercules and the umpire* from 2013 to 2015 to provide the public with useful information and foster transparency. Judge Kopf then decided to

form of innovation to provide greater court system visibility to the public (Foster, 2013). In the digital era, social media accounts have become a good channel for sharing online information relating to the court's practice among a wider virtual community to reach more people (Özkent, 2022). Netizen deserve the right to understand how the judicial office operates and its function in the administration of justice.

According to the Special Court of Review of Taxes, it was found that Judge Michelle Slaughter's comments which were related to her case information on Facebook, only contained verified and publicly available information. The comments were directed to educate the public about court transparency, if no comments were published regarding the pending trial. It indicates that the judges should be cautious in the posting factual statements about a pending proceeding that may invite any derogatory comment causing the appearance of judicial impartiality and capacity (In re Slaughter 480 S.W. 3d 842, Tex. Spec. Ct. Rev. 2015)². As time passed by, social media are essential to demonstrate the effective court administration of justice by connecting the court and public. Furthermore, live social media platforms could improve public participation in the open justice concept as opposed to physical courtrooms which could only house a limited number of people. Through digital technology, the public could freely access court hearings virtually anywhere at one's convenience, as the best recourse for winning public confidence (Stepniak, 1995).

end blogging when he found out the court employees questioned his blogs and he could not tolerate that the thought he had lost the confidence of the court employees through publishing the blogs. In an interview later, Judge Kopf urged others to reassume where he left off and stated the judges will do far better than harm to blog (Note from Martin J. Siegel, Editor in Chief).

- ² In this case (In re Slaughter, 480 S.W. 3d 842), Judge Michelle Slaughter posted one of the comments on April 29, 2014: "Opening statements this morning at 9.30am In the trial called by the press 'the boy in the box' case"; "After we finished Day 1 of the case called the 'Boy in the Box' case, trustees from the jail came in and assembled the actual 6' x 8' 'box' inside the courtroom!". The Commission on Judicial Conduct issued a public admonishment to her in April 2015 and ordered her to obtain additional training in social media ethics. She then appealed the sanction and got a new trial before a special court of review composed of 3 appellate justices appointed by the Supreme Court of Texas. After hearing the case, the Special Court of Review found that Judge Slaughter's comments "were ultimately proven not to be suggestive of her probable decision on any particular case".

For example, a substantial development was observed when the Malaysian Judiciary conducted virtual court hearings by adapting to a new norm to ensure continued public access to justice in mitigating the COVID-19 pandemic (Office of the Chief Registrar Federal Court of Malaysia Palace of Justice Putrajaya, 2020). The new norm has made the court operate in the usual way during the pandemic. Moreover, it was equally important to note that the Malaysian Judiciary has embraced the advancement of technology to live-stream certain selected court proceedings on YouTube from 23 April 2020 onwards (Prof Datuk Seri Dr. Ashgar Ali Ali Mohamed, 2020; Inquest into death of Nora Anne at the Coroner Court, 2020). Earlier, the televised court applied to the increasing number of cases, for example, in the United Kingdom Supreme Court and Chinese Court (Howe, 2020).

The broadcast live hearings online must be able to effectuate openness and transparency of the judicial process that simultaneously maintains the independence of the court. As such, the public knowledge is stabilized concerning the reasoning process made by the judges, except in instances that involve national secrecy or juvenile delinquency that would not be openly tried (Arundhati, 2020). Court cases live streaming through social networking engages public scrutiny, enhances the public understanding of the administration of justice (Vancouver Sun (Re), 2004 SCC 43; [2004] 2 SCR 332), and safeguards the procedural integrity of the justice system's proper functions. By using live streaming, judges, counsels and witnesses act "intellectually honest" as could be seen through the technologically-supported public records (Hall-Coates, 2015). Therefore, the open court concept may reassure the public appreciation of judicial impartiality operation and appears consistent with the maxim that, "justice can only be truly done if it is seen to be done" (R v Sussex Justices, [1924] 1 KB 256).

ETHICAL LIMITATIONS FOR THE JUDGES' CAPACITY IN USING SOCIAL MEDIA

Existing Guidelines and Codes

Currently, the Chief Registrar Office of the Federal Court of Malaysia, by its motion, has issued Social Media Guidelines (Office of the Chief Registrar Federal Court of Malaysia, 13.8.2018) to direct the conduct of the officers and staff of the courts in Malaysia concerning

social media use. The officers herein are inclusive of Sessions Court Judges, Magistrates and presiding Registrars, excluding the Judges of the High Court, Court of Appeal and Federal Court. It must also be read together with the latest Judicial Officers' Code of Ethics 2019 (The Chief Registrar of the Federal Court of Malaysia, 2019) according to the Public Officers (Conduct and Discipline) Regulation 1993 [P.U.(A) 395/1993] as an additional model to the *Kod Etika Pegawai dan Kakitangan 1999* (Office of the Chief Registrar Federal Court of Malaysia, 20.9.1999) applied to the Sessions Court Judges, Magistrates and presiding Registrars to uphold the integrity and independence of the judiciary. However, there are no specific guidelines that establish the same principle applies to the judges of the High Court, Court of Appeal and Federal Court, but the Malaysian Judges' Code of Ethics 2009 (Government Gazette, 2009) has always been the primary reference that guides the judges' use of social media to avoid any impropriety.

Ethical Concerns for Judges' Social Media Friendship with an Attorney

Given the rising sophistication of social media usage over recent times, it has fundamentally reshaped societal manner of communication using electronic networking sites such as Facebook, Twitter, MySpace, Instagram and miscellaneous innovations. In judges' private lives, the judges can be participants across social media networks. It is undeniable that the legal profession is not vast and it is considered normal for judges and attorneys with the same legal backgrounds to acquaint themselves online. On another level, a question arises regarding fairness: is it fair when judges preside in pending court cases, having known that the attorneys are the judges' Facebook friends? An analysis carried out across the American Jurisprudence revealed that clear ethics advisory opinions on the judicial use of electronic social media were issued. The advisory opinions highlight that the judges' freedom of social media coincides with the issue of public scrutiny to maintain public confidence in the judiciary (Kurita, 2017). In particular, as noted, only American jurisprudence developed practical guidance for judges using social media rapidly, which is why the authors pose the question of the emergence of social media risk to Malaysian judges' professionalism. In the long run, the guidance must provide a clear overview to warn the judges repeatedly about the risk of participating in their social media accounts without being familiar

with that site's privacy settings (Browning, 2022). In addition, it is necessary to have a clear local advisory opinion to avoid the impression that the judges are being influenced by social media, which might allow for the blurring of the boundaries between the professional and the personal. This issue is of fundamental importance to guarantee that judicial practice appears neutral on social media use.

This article provides an account of the discussion against two approaches the international forum to examine the matter of the practicality of implementing it and the need to choose between the two approaches to the domestic forum. The two approaches have been explored in placing the contemporaneous burden on the judges in using social media. The first approach entails the restriction and prohibitions of judges from connecting online with attorneys who may appear in the courtroom as issued by several states (Kurita, 2017; Singh, 2016)³. It is based on such a restricted view that the social connection between judges and attorneys would convey the impression the attorneys are in a special position to influence judges. To encounter this, recusal from the judges is necessary to prevent the perception from others that there is a possibility to predispose the judge to give favour since the attorney is a social friend to the judge.

Meanwhile, the second approach of several other states (Kurita, 2017; Singh, 2016)⁴ entails the consideration based on a permissive view. This approach is planned based on the reasonable opinion of the judges' ability to maintain a relationship with others in the same profession but with greater caution. In this premise, a reservation has been made regarding the status of friendship between judges and the attorneys who appear before the same court. The following factors are to be considered before determining if it is permissible for judges to hear cases from attorneys whose online friendships with judges are visible, among others:

- (i) The nature of social networking sites, for instance, the depth of personal relationships that may generate a greater doubt about unfairness on the part of judges;

³ Florida, Connecticut, Oklahoma, and Massachusetts' ethics advisory opinions. Referred from Kurita (2017) and Singh (2016).

⁴ Arizona, California, Kentucky, Maryland, Missouri, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Washington plus ABA Opinion 462, and the U.S. Court Opinion were permissive. Referred from Kurita, M. (2017); Singh, S. (2016).

- (ii) The number of friends found on the social page in the sense that if more friends are added to judges' account page, the lesser the likelihood of the privilege of judge-attorney relationships;
- (iii) Judge's practice in determining who to include by inspecting the judges' control in the selection of friends. When judges are found to exercise more control upon such selection of friends, it may provide the impression judges have affection over attorneys since requests of "Facebook Friendship" from attorneys with pending cases are accepted by the judges at that point;
- (iv) The frequency of attorneys who appear before judges might better appear in the manner that attorneys are less likely to appear before the same courtroom. Thus, it will cause a greater likelihood of social friendships between them than what is permissible; and
- (v) The judges also bear the burden to do disclosure and recusal if they think such social connections can reasonably lead to inquiries concerning judges' capacity to act impartially.

Compared to the above, in Malaysia, the existing guidelines and codes do not express the apparent position on whether judges may befriend attorneys who appear before the same court, either restrictively or permissively. Thus, a concern is raised in the Malaysian Judges' Code of Ethics 2009 and Judicial Officers' Code of Ethics 2019 that urges judges to exercise such freedom of friendships in social media, with care under the requirement that the judges (including judicial officers) shall act at all times in a manner which promotes integrity and impartiality of the judiciary, by prohibiting any relationship to influence judges' decision and diminish the impression that the other is in a special position to influence judges (Sections 6(1) and 6(2), Judges' Code of Ethics 2009; Sections 3 and 4, Judicial Officers' Code of Ethics 2019). In addition, there is a provision for judges (including judicial officers) from both codes that prohibits close associations with practising members of the legal profession, particularly individuals who practise in the same courtroom, where such association might give rise to a reasonable suspicion or appearance of favouritism (Section 8(2), Judges' Code of Ethics 2009; Section 17, Judicial Officers' Code of Ethics 2019). Specifically, the codes may suggest 'close association' in a restrictive approach to include judges' acceptance of social contacts as judges might better distance themselves from making friends with everyone in cyberspace. However, if the issue of

online networking is being treated permissively, the mere friendship between judges and the attorneys of indeterminate nature cannot be considered as sole evidence to make up the existence of intimacy (Florida Bar News, 2018). There is no definite outcome that could be reached without local judicial ethics advisory opinions concerning the parameters of judges' use of social media. The interpretation emphasizing judges' social media conducts relate to attorneys who sit for pending cases to maintain the propriety and high standards of personal and judicial conduct.

So far no complaints have been received concerning judges' misconduct due to online network friendships with attorneys who appear before the same court. Following the increasing use of social networking sites, this issue might be handled to prevent ethical violation for judges who utilize current and prospective social media accounts. Reference can be made to Judge Terry who befriended one of the attorneys who appeared before the court in a child custody case as could be seen on a Facebook platform (In re Terry, 2009). It was claimed that Judge Terry and the said attorney were engaged in online discussions related to the pending case heard before the same court. Having known about this, subsequently Plaintiff's attorney filed a motion to seek the removal of Judge Terry and requested for a new trial. As a result, the Judicial Standards Commission of North Carolina ordered a public reprimand against Judge Terry because the commission made the finding that Judge Terry's online discussions were deemed to have caused disrepute to the judicial system. Thus, a clear direction is required under the local jurisprudence to provide explicit guidance to judges and judicial officers that regulate their online *ex parte* communication in any event due to the two different approaches. The regulation emphasizing judicial conduct could bolster impartiality based on compelling approach and reasoning.

Ethical Concerns for Judges' Comments on Social Media

It is now common for some judges to use social media as a tool to post comments and share information. The enthusiastic expansion of social media has become apparent to the judges. Just like any other online users, judges may update and regret Facebook statuses without full consideration given to impartiality which may generate careless conduct, as such the potentiality of undermining the confidence of the judicial system is unbecoming (Jones, 2011). Essentially, judges

shall enjoy the right of expression of free speech in democratic countries. However, in reality, judges' freedom of expression is always vulnerable to public scrutiny when the posts could be re-transmitted or re-interpreted by a wide range of public people other than the judges' friendship lists (Gray, 2016). The code is available to regulate judges' online activity to safeguard the public confidence in the judicial institution as the judges are perceived as a visible symbol of the rule of law. Thus, security measures are provided to protect the privacy of the judges (Kurita, 2017), for example, Judges Matthew A. Sciarrino, Jr. (Jones, 2011; Annese, 15.10.2009)⁵ and Judge Jonathan MacArthur (Jones, 2011; The Register, 2007)⁶. Considering this, it is unforeseeable how others might perceive judges' posts as biased and suspicious (Wang et al., 2013). Corollary to that, although judges traditionally refrain from speaking out against public criticisms even if these are unfounded (*R v Commissioner of Police, ex parte Blackburn* [1968] 2 QB 150, Lord Denning), social media functions as a public channel to allow the judges to make an explanation.

Although local judges and judicial officers are exposed to the existing guidelines and codes, nothing is clearly said concerning the freedom to use social media. For instance, both codes stipulate that the judges, with the written approval of the Chief Judge and, Judicial Officers, with the written approval of the Chief Registrar, 'may' write or speak or engage publicly on non-legal subjects in social activities (Section 5(d), Judges' Code of Ethics 2009; Section 20(d), Judicial Officers' Code of Ethics 2019). Even though the stipulation is associated with the ability to write, lecture, teach and participate in activities concerning the law, the regulation to obtain written approval from the Chief Judge and Chief Registrar still stands (Section 5(a), Judges' Code of Ethics 2009; Section 20(a), Judicial Officers' Code of Ethics 2019).

⁵ Judge Matthew A. Sciarrino, Jr. (Staten Island Criminal Court Judge) was involuntarily transferred to Manhattan because of his Facebook activity. The Judge had updated his Facebook status about his personal life and while sitting on the bench with a photo of his crowded courtroom. Referred from Jones, S. (2011); John M. Annese. (15.10.2009).

⁶ Judge Jonathan MacArthur (North Las Vegas Judge) was removed from office after he posted inflammatory language on his MySpace page. The Judge wrote his interests included "breaking my foot off in a prosecutor's ass... and improving my ability to break my foot off in a prosecutor's ass" which showed his comment had against a judge's duty to be unbiased in all matters. Referred from Jones, S. (2011); The Register (14 Aug 2007).

Thus, the stipulation addresses concern on the wording ‘may’ which is construed as permissive or otherwise gives rise to confusion since the discretion is given to the judges (including judicial officers) to decide whether it connotes a mandatory obligation and compliance for them to adhere to such directive. Furthermore, the relevant provisions in the codes note that the judge and judicial officer shall abstain from giving any public comment about pending or impending proceedings which may be heard before the judicial officers’ court in a manner that may suggest to a reasonable person their probable court case decision (Section 7(5), Judges’ Code of Ethics 2009; Section 14, Judicial Officers’ Code of Ethics 2019). Subsequently, the codes have advised the judges (including judicial officers) that they could participate in social media with the capacity of the judges with the exception that no remarks are made about pending court cases. It seems unclear whether the judges may post on social media with a restricted approach and use anonymity or pseudonyms instead of their original names liberally, which may destabilize judicial office prestige and dignity.

The guideline expresses and justifies the following questions as ‘test’ emphasizing factors for the judicial officers and staff to consider before posting opinions or status updates via social media. The factors are listed as follows (Paragraph 12, Social Media Guidelines):

- (i) Will you feel comfortable if the communication is posted in mass media?
- (ii) Will you feel comfortable if such communication is viewed by the Chief Registrar’s Office?
- (iii) Is it necessary for you to continue the communication?
- (iv) What is the best medium of communication to share the information?

The questions emphasizing judges and judicial officers provide a way to weaken ethics violations among officers and staff because they are viewed as representatives of the judiciary in the eye of the public. However, it is recommended that judges and judicial officers be given the freedom to engage in social media without restrictions, for example, obtaining written approval from the Chief Registrar as long as the information does not diminish the judiciary’s reputation. The above key ‘test’ questions do not appear in the Code of Ethics to the judges. For further analysis, the said test tends to be examined in light of individuals’ sense of ‘self-comfortable’. At the core, a modified

test is required to be planned by the local judicial ethics advisory opinions for the improvement and preservation of judges' affirmative obligation. By focusing on the improved 'test', apprehension of prejudice is weakened, public understanding of justice administration is provided, and social media evolution is aligned. A set of guidelines is required to place judges' onus on maintaining public respect towards the legal system by placing diligent and competent etiquette in online communication.

Judges' comments on social media platforms are highly inevitable in the current society, but they need to be circumspect when expressing their opinions about the gap in a particular decision and the development of the law. If inappropriate language is used, it may give rise to legitimate apprehension of impartiality extending to their judgment writing. Such detrimental prejudice may cause attacks on the judgment and add to the potential risk of the very consideration that judges tend to pay greater attention to what social media thinks rather than what the law actually mandates (Outlook India, 2022). The influence of social media today must have made the judiciary rethink whether the judges must not participate in social media discussions. It is because, following the unpredictable development of social media, the judges are in a world in which they must be more open about what they are doing and why they are doing it to boost judicial openness (Lord Neuberger, 2015).

The key here is that the selective approach of using social media with a judicial thought must be demonstrated, irrespective of on or off-the-bench circumstances. The judges' interpersonal aspects are guided because judges represent the judicial institution. In brief, judges shall be barred from: 1) posting comments on specific pending or impending court cases; and, 2) responding to political scandals and commercial corporations' interests. Instead, social media platforms are used wisely to understand better how Facebook generally works before posting and disallowing statements that could jeopardize judicial independence (Safiyat, 2021). While the regulations are in place, the misuse of social media among judges has not been reported in the local context. This marks why Malaysians should be proud of the local judiciary institution, which is trained to lay important emphasis on remaining cautious in their online activity. Judges' opinion in contributing to the improvement of local law is essential. In keeping up with social networking, the Malaysian institution welcomes the

precaution ‘better safe than sorry’, in thinking ahead of the potential abuse of judges and judicial officers’ ethics limitations when engaging via social media (Spahn, 2011).

JURISPRUDENCE FOR JUDGES’ USE OF SOCIAL MEDIA

As a foundation, judges and judicial officers should exercise greater care when posting comments and photographs about their personal lives, family members, and close friends’ information through social media mainstreams. Similarly, judges and judicial officers also need to advise and educate their family members and close friends about the ethical use of social media security and ethics by not giving a bad influence on their judicial obligations (Fisher, 2019). Furthermore, the simple rule here is that judges must control online social activities, individually and collectively to promote the impressions of independence and impartiality. Specifically, the crux of the impartiality principle of the judges’ freedom to express their opinions is to assure the public perception that judges’ minds are not predisposed; judges only uphold a fair adjudication (Somers, 2019).

Netizens might prefer responsive decisions from judges by seeing how the law develops in society, acknowledging the living laws to achieve substantial justice, and attaining public trust (Ali, 2009). As such, this may give rise to further consideration by the judiciary to think of departing from being silent to conveying information that the administration of the justice system is transparent and accountable across the networks. It concerns the good use of the internet which can enlarge worldwide communication by allowing all individuals, inclusive of the judges, to express the freedom of expression by sharing their opinions and information. This development of the internet stresses the importance of having a guideline to regulate the social media use by judges to strike a balance between the freedom of speech and public trust towards the judicial authority (Ayman, 2019).

By upholding the principle of justice, it is believed that the judiciary considers the risk of speaking too much, which may cause apprehension of bias when delivering decisions to the public. Suspicions that are raised may have both advantages and drawbacks, just like the two sides of a coin. Similarly premised on the above, it is reasonable that current concerns are addressed concerning judges and judicial

officers' social networking use. If social media platforms are used properly, they shall be able to 1) disseminate their legal philosophy that can be developed to bind the people and 2) respond to unfair criticisms against the judiciary system professionally. At the very least, a mere silence does not represent court decisions, as judges' minds are made up behind closed doors. It is worth noting that upon taking the oath to serve as judges and judicial officers, one is well aware of the required judicial obligations to perform: to strike a balance between precautionary measures and freedom of expression as guaranteed under the Federal Constitution is to be observed. It is of greater assistance to build judicial integrity in the community when social media are used to inform the public about the philosophy behind decisions made by judges and the importance accorded to the rule of law (Meyer, 2014).⁷

Currently, there are no specific case laws involving judiciary members' social media use in the local context. A reference is made to the report made by the European Commission for Democracy through Law (Venice Commission) to the guidelines on judges' use of social media prepared by UNODC Global Judicial Integrity Network (2019). For example, amongst others, the judges of the Swiss Federal Court published a written guideline for judges' adoption detailing participation in social networks to which they conform on 18.11.2018, and in another context, the United Kingdom Supreme Court issued Judicial Conduct Guidance on the use of social networking, blogging and Twitter (European Commission for Democracy through Law [Venice Commission], 2019). Both documents accorded the privilege to the personal use of social media among judges. It simply means that no rules or policies compel judges' participation in social media use and the same condition applies to the Malaysian context. Social media guideline was issued in 2018 by the Chief Registrar Office of the Federal Court of Malaysia, applicable to the court officers and staff, while the Judges' Code of Ethics 2009 was published to accord the judges' conduct of neutrality and impartiality in which shall include the social media use.

Nevertheless, the focus of this article is to extend the regulation and explanation of the challenges of judges' social media use following

⁷ Remarks of the Hon. Marilyn Warren AC, Chief Justice of Victoria, Australia, on the occasion of the 2013 Redmond Barry Lecture on Open Justice in the Technological Age, 21 October 2013, See from, Norman H. Meyer, Jr. (2014).

the development of social media functions in the form of advisory opinions. The court is to be placed under an obligation to contribute its advisory opinions on this subject matter. The registrar functions to circulate and publish such a collection of updated guidance to its members related to their future social networking activities. The advisory opinion is not a formal source of law but it has persuasive authority to present arguments towards particular conduct in question in observance of customary law (Oellers-Frahm, 2011). In this sense, the judicial ethics committee discusses, clarifies, and determines the complexities associated with the content of acceptable conduct and violation of judicial duties in the context of social media use with its reasoning (Teressa & Jelka, 2016). For instance, California Judges Association Formal Opinion No. 66. Online Social Networking (2011), Florida's Opinion Number: 2009-20, Washington's Opinion 09-05, South Carolina's Opinion No.17-2009, New York Advisory Opinion 08-176 (2009) address a judges' online friendships with attorneys who appear before his Lordship. The codes consider social network use as a new development and that may impact the judicial duties (National Center for State Courts, n.d.).

One cannot doubt the possibility of discouraging judicial members from signing up their social media accounts or using pseudonyms in order to avoid problems. As social media functions develop, the judiciary members have the freedom to own social media accounts without fearing problems by referring to the comprehensive regulation of social network use that is at the judges' and disciplinary board's disposal. Empirically, judges and judicial officers should tend to use social media to 1) engage with the community, 2) keep up with the developments that occur in the societies, 3) enhance court procedures, and 4) correct misinformation about the trial process (Keyzer et al., 2013). This could not be done with the absence of personal accounts or under the pretense of a nickname not familiar within the capacity of representing the judicial institution. It bears a different purpose compared to institutional social media accounts. Under the official social media account of the judiciary institution, inevitably, it is used to report the latest court decisions and the recent practice directions issued to the public and legal practitioners.

In contrast, by having individual social media accounts that are made known to the public, judges can deliver speeches derived not only from personal but also from the justice system standpoints (Morice

v France [GC], no. 29369/10, 23 April 2015). This is a powerful tool that could bring improvement to the public understanding of the rule of law. Meanwhile, judges can use this forum to uphold their judicial duties that require moderation in explaining their judgments with prudence when necessary in responding to unfounded attacks against the judiciary. Relatively, it is significant to protect judges' freedom of expression in the Malaysian democratic society and alleviate unnecessary and demeaning comments to maintain the judiciary's reputation and acts of impartiality. Nevertheless, judges at any time must avoid having social media posts that might raise reasonable doubt about their impartiality. Social interaction in social media platforms has also raised the risk to the judicial obligation due to their staff's online behaviour, which may comment about their workplace (court) like other general public members. The efforts resulted in the recent development in the judicial ethics advisory opinion that was issued extending to cover the conduct of the court staff. For instance, the California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issued its CJEO Oral Advice Summary 2020-037 entitled "*Judicial Obligations Relating to Social Media Comments by Appellate Court Staff*" and "*Colorado Judicial Ethics Advisory Board Opinion 2020-02*" regarding the judges, as supervisors, to supervise their staff that comments must not give the appearance of impropriety and to exercise reasonable direction over the online conduct of the staff (Browning, 2020). In comparison, Malaysian Social Media Guidelines and *Kod Etika Pegawai dan Kakitangan 1999* have not been specific to stipulate to what extent the court staff may use social media to make public posts on matters of the legal system, political issues, or any other controversial issues. From this analysis, social media communication amongst the court staff, as well as the judges and judicial officers, require a comprehensive direction to necessitate uniform standards in need of regulating online conduct since Malaysia, as a member of e-ASEAN, has an initiative to ensure secure and effective use of ICT (Manap et al., 2013).

Furthermore, guidance on the disciplinary procedures against judges' misconduct on social media use is necessary to control and monitor their management skills. The regulations concerning the use of social media ensure public confidence in judicial integrity. Therefore, the importance of judges' roles in expressing their views in connection with their judicial functions and being mindful of conducts that may generate doubts on judicial independence might better be

emphasized. When information is shared, open discussions are held, and indications are exhibited (by clicking ‘like’, ‘dislike’ or ‘follow’), misunderstandings related to the impression that judges are being influenced could occur (Blitsa et al., 2015). As such, disciplinary sanctions through up-to-date practices for the contemporary use of social networking by the judges could proactively provide a transparent ethical implication and guideline to educate the judiciary members. By focusing on the guidelines, a bright-line limitation drawn for their online social activities could be established. Hence, the guidelines are also able to save the judges from discriminatory conduct that can undermine judicial independence.

In this context, it may prompt public certainty that disciplinary sanctions will be imposed on judges when elements of prejudice are found across online postings or comments that display a fear of lack of impartiality (Jannika, 2016). Therefore, the manifestation of good practices, supervisory measures, and disciplinary sanctions on judges’ use of social media is imperative to strike a balance between judges’ constitutional right to express with caution and the preservation of judicial integrity when judges decide the cases independently. By privilege to societal expectations, preference to any particular group of people should not be exhibited (Tamanaha, 1999). The structure of this overall approach is to comply with the codes of conduct, guidelines and most importantly, a more precise up-to-date advisory opinion. Through the suggestions and discussions across the core matter, challenges that pose ‘threats’ to judiciary members’ stability could be reduced from time to time across social media. Based on the existing discussions, contributions are made to the explicit implementation and impact of monitoring the extent of judges’ participation in online social networking. The regulation on social media may prevent the rise of blind spots to what amounts to misconduct.

CONCLUSION AND RECOMMENDATIONS

As the use of social media becomes prevalent, it increasingly permeates simultaneously with the new norm by encouraging the virtual appearance of attorneys through video conferencing such as Zoom or Skype, as opposed to physical appearance in courtrooms (Gibson, 2017). The idea of privileged court services that cut across geographical boundaries has contributed significantly to the establishment of e-Court with greater frequency of judicial

engagement in social media. In this circumstance, the expansion of electronic court services generates the legitimate expectation that judges are highly capable of dealing with social media to exercise their judicial functions. Therefore, judges could no longer isolate themselves from the community they serve by staying connected to emerging technology and adapting to the use of social media with extreme caution (Hamilton et al., 2019). Since judges and judicial officers belong to members of societies, they shall be reminded to enjoy the freedom of expression respectably.

Both existing codes (Judicial Officers' Code of Ethics 2019 and Judges' Code of Ethics 2009), including the guidelines in question, do not touch specifically on the challenges of social media use among the judiciary. For example, judges' making online friends with witnesses and attorneys, and participating in open discourses, and judges' blogging may appear relegated. It is acknowledged that the practice of setting ethical limitations on the judges' acceptable conduct will change by complying with the changing social media landscape features. As such, a growing local advisory body of judicial ethics is needed to update the details of the issue in an ongoing fashion. For example, the American Bar Association's (ABA) Committee on Ethics and Professional Responsibility issued a formal opinion 462 in 2013 to guide judges' use of social media with proper care to uphold judicial integrity (Kurita, 2017). Consequently, an advisory ethics opinion in the local context is recommended to provide persistent and reasonable guidelines for judges for clarity with future judicial ethical standards across social media use. Other than that, continuous training is equally important and is recommended to be held by Judicial Academy Malaysia (Judicial Appointments Commission) or *Institut Latihan Kehakiman dan Perundangan (ILKAP)* to ensure the online conducts of the judges, judicial officers and court staff can always be carried out with due diligence in compliance with the gist of the ethical rules. Finally, judges and judicial officers might better participate in relevant international conferences to share the model emphasizing the rules of professional conduct. By exchanging ideas openly and confronting existing issues, conferences such as the Conference of Court Public Information Officers present improvement solutions (CCPIO Home Page, 2022).

Pursuant to the above, the merit behind requiring a detailed formal opinion is only based on one utmost aim: to promote public confidence in the administration of justice through judges' unique features for

expressing and improving legal opinions and laws. To inspire public confidence, judges and judicial officers need to participate in social networking and provide comments on social media platforms in a manner that maintains judicial impartiality and social media posting ethical limitations. With comprehensive local advisory ethics opinions, judges and judicial officers should be encouraged to participate in social networking sites by allowing public outreach to better understand the judges' communication. However, restrictions might better be placed to prevent open communications among judiciary colleagues that might involve work problems. If any, a special forum is suggested through the provision of specific, registered personal IDs to permit private and confidential discussions among the members (Blitsa et al., 2015). In the premise of conduct, the Malaysian judiciary is doing good and ethical issues are addressed to the fullest following social media pervasiveness. By focusing on the ethical issues, potential misuse is advised, and effective online activities are encouraged.

Indeed, the enormous use of social media has posed challenges to the judiciary practice as their fundamental human rights of friending and commenting on the platform are under attack. Nevertheless, their interest in protecting their privacy right must not be the hurdle to protecting the related digital human rights concept to the very access to justice around the world (Yulia et al., 2022). The use of social media diligently with detailed local advisory ethics opinions is able to provide the judiciary with a powerful platform to avoid posting improper comments caught with favouritism, and what is more, it can feed the public a clear insight into judicial accountability (Safiyat, 2021). The judiciary must be warned that 'nothing is private' on social media and suggest starting to keep track regularly if there are any judges accused of breaching online ethics protocols (Ortiz, 2021).

In short, the formal advisory opinion can prevent judges and judicial members from overlooking during their use of social media, which reinforces the judiciary's public character and facilitate the form of productive integration between citizens' logical claim and the court's general communications according to a model that is user rather than institution-centric (Ure, 2019). The need for the issuance of a detailed formal opinion specifically on judges' social media use is in line with the position presented by the Global Judicial Integrity Network that marks the importance for judges and judicial officers to gain a basic knowledge of social media use. Certainty through a clear regulation

can, therefore, guide the judges and judicial officers in making a prior ethical assessment on how to present themselves and publish opinions and behaviour that they made public in the social networks as members of the judiciary (Commission CGPJ, 2019).

In summary, participating in social networks such as Facebook, Twitter, or LinkedIn could not be made as a general rule to lead to an affected appearance of impartiality but the danger actually comes from each comment made across these social networks that becomes a form of public speaking. Through this discussion, local judicial ethics advisory opinions are practical to serve as reminders to judges of their responsibilities to maintain the dignity of their judicial office at all times. It further strengthens the consensus on norms to democratize the judiciary and subsequently affects the public perception that justice is being conducted in a fair or equitable manner (Nicola, 2014), when judges and judicial officers can rely on a precise, up-to-date advisory opinion to preclude themselves from misconduct on social media use. Therefore, it will guide the judges on what they can and cannot say on the social media platform when dealing with legal or non-legal issues.

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