SOCIAL MEDIA AND THE JUDICIARY

Over the past decade, we have witnessed the creation and impressive expansion of social media, which include social network sites such as Facebook, Twitter, YouTube and LinkedIn, Internet forums, webcasts and blogs. Social media have undoubtedly altered the way millions of people communicate with each other, by allowing their users to quickly access, frequently update, and instantly share and exchange information, ideas, pictures or videos.¹

Social media has become a very powerful tool that makes information easily accessible and available to the public. The information whether, good or bad is derived from primary and secondary sources. As can often be seen, people post information on social media without properly thinking about the consequences and ramifications of releasing such information into the public domain. In some instances, it is evident that such information was released in haste, or while the person was highly emotional at the time. One must at all times apprehend the unique nature and associated risks of social media postings. Information posted on social media is easily accessed and readily disseminated, it may not remain private

¹ The stats below were obtained from https://www.brandwatch.com/blog/amazing-social-media-statistics-and-facts/ (Accessed on 17 July 2019)

- For context, as of May 2019, total worldwide population is 7.7 billion
- The internet has 4.4 billion users
- There are 3.499 billion active social media users
- On average, people have 7.6 social media accounts
- The average daily time spent on social is 142 minutes a day
- 91% of retail brands use 2 or more social media channels
- 81% of all small and medium businesses use some kind of social platform
- Social media users grew by 202 million between April 2018 and April 2019.
- That works out at a new social media user every 6.4 seconds.
- Facebook Messenger and Whatsapp handle 60 billion messages a day.
- When asked 81% of teenagers felt social media has a positive effect on their lives.
despite the strongest privacy settings. In addition, although users may be selective as to whom they befriend on SNSs, they cannot prevent their “virtual friends” from sharing information they posted with their respective “friends” or even the general public. People who use social media accept the risk of their postings being taken out of context. Expressing one’s views in a virtual environment where information is exchanged in a hasty fashion is inherently different from in natura interpersonal interaction, thus, leaving room for misinterpretation, or even ill-intentioned miscommunication.

The primary question that one must address in a rapidly changing inter-connected environment is whether, judges should be allowed to make use of SNSs. Members of the Judiciary are not only required to be independent in their judgment and conduct, they should also be seen to be independent in order to strengthen the public’s confidence or trust in the judiciary. When one occupies a public office, it is difficult to differentiate their private from their official roles. Due to the crucial role played by members of the judiciary within society, it is desirable that their actions as private persons are also beyond reproach. ²

With the above in mind, let’s try to look at certain aspects of social media and the judiciary.

1. It is unethical for a Judge to answer any comments of his or her actions appearing on social media, this is because what is said on social media can often be misconstrued and taken out of context. Expressing emotions of anger can only dig you deeper into a hole and that is not a wise career move. To respond to unfair comments, a Press Conference must be called

² The Bangalore Principles of Judicial Conduct (2002), Values 2.2 & 4.1. “The judge...adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality. “Upon assuming the bench, judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary” and “shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.
and all the questions ought to be handled by a qualified media officials who deals with the public image of Judges within the National Department of the Office of the Chief Justice. Chief Justice Mogoeng once said “Judicial Officers must never seek to be celebrities in the way they deal with cases; instead they should ensure they are independent and uphold their oath of office”.

2. A Code of Judicial Conduct was published and the principles contained in the Code of Conduct are also applicable to social media interaction by Judges. Article 11 provides that:

A Judge must save in the discharge of judicial office, not comment publicly on the merits of any case pending before or determined by that Judge or any other court.

Judges must not enter into a public debate about a case irrespective of criticism levelled against the judgment.

They must protect the courts to ensure their independence. The legitimacy of the judicial depends on the public understanding of and confidence in the judicial process.

This Code of Conduct is binding on all Judicial Officers, and any wilful, or gross negligent breach of the Code may amount to misconduct which will lead to disciplinary action in terms of section 14 of the Judicial Service Commission Act.

3. South African courts don’t use social media as a means of communication. Judgments from all courts or legal information is

3 He was delivering his keynote address at the presentation of the first Judiciary Annual Report 2017/21 at the Constitutional Court in Johannesburg on Friday.


4. Judges can use social media in their private lives although it has its advantages and disadvantages.⁶ Those opposed to judges using social media, as well as those who favour serious restrictions on it, are all too often guilty of not understanding the technology itself, or its benefits as a means of social engagement. Even more fundamentally however, such critics operate under a flawed understanding of the nature of relationships in the digital age⁷ The South African Judiciary has adopted a communication policy which includes a section on social media. The policy determines how the Judges and Magistrates must express themselves on their personal media sites, it states that:⁸

- Judges may not represent the judiciary on their personal media sites; they must make it clear that they are contributing as private individuals not representatives of the judiciary.⁹
- They must not disclose any judicial information that they are not authorised to disclose.
- Judges and Magistrates when using social media in their personal capacity should be aware of their responsibilities under the Judicial Code of Conduct and Code of Conduct for Magistrates.¹⁰

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⁶ https://theitcountryjustice.wordpress.com/2012/08/18/social-media-and-the-judiciary/
   “Blogging by members of the judiciary is not prohibited. However, officer holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.” (accessed on 16 July 2019)

⁷ This approach is what might be called the cautiously integrative or “permissive approach.” This gives cautious consent to the concept of judicial use of social media, albeit with considerable trepidation, while imposing multiple caveats on such use. Advocates of this approach have even called for social media-specific rules of judicial ethics.

⁸ See the Judiciary Social Media and the Judiciary March 2019 p27 (accessed on 15 July 2019).
⁹ Accessed on 17 July 2019 https://theitcountryjustice.wordpress.com/2012/08/18/social-media-and-the-judiciary/ “As long as judges are using blogs to enhance public education and understanding of our justice system and not compromising the integrity of cases, then judicial blogs could serve and promote a greater understanding of the challenges and difficulties judges face in advancing justice”
➢ When engaging on social media, they must use a private e-mail address rather than official e-mail address.
➢ They must always act honourably and their activities must be compatible with their status of judicial office.
➢ Judicial officers should be careful about whom they befriend on social media.
➢ Judges must not make political statements on their personal social media sites.
➢ They may also not tweet or post any material about matters before them or any other court.

5. In 2015, a gross misconduct complaint brought to Judicial Service Commission (JSC) against a Pretoria High Court Judge Mabel Jansen on her statement she made on Facebook about race and black culture. Judge Jansen made a series of comments including that 99% of the criminal cases she heard were of “black fathers/uncles or brothers raping children as young as five”.11 In 2017, Judicial Conduct

10 Articles 10 and 8 of the ECHR undoubtedly hold that judges have the right to express themselves as well as to self-define and develop their personal life and communications. This generally suggests that judges may use SNSs in order to communicate with their kin and friends, for example, by posting comments, photos and other data concerning their personal and family life. However, judges’ freedom of expression is restricted by special ethical duties aiming at ensuring public confidence in the impartial, neutral and reasonable delivery of Justice. “A judge ensures that his private life does not affect the public image of the impartiality of his judicial work” (impartiality), “A judge makes every effort not to offend, in exercising his functions and in his private life, the trust that individuals hold in him.”


12 Pretoria High Court Judge Mabel Jansen must face a tribunal to investigate whether her statements on Facebook about race and black culture amounted to impeachable conduct, the Judicial Service Commission (JSC) has decided. In a 2015 Facebook discussion on the public page of film maker Gillian Schutte, Jansen made a series of comments, including that 99% of the criminal cases she heard were of “black fathers / uncles / brothers raping children as young as five”.She said: “Want to read my files: rape, rape, rape, rape, rape, rape of minors by black family members. It is never-ending.” In private direct messages — later publicly released by Schutte — Jansen said that in black culture, “a women is there to pleasure” men, that women tell their children it is their father’s birthright to be the first, and that gang rapes of baby, mother and daughter were a “pleasurable pass time”. The comments were met with a public outcry and a gross misconduct complaint was laid against her, saying that no black man accused of rape could have the comfort that Jansen would treat his case impartially.
Committee was recommended by the JSC to investigate the allegations. The Judge was suspended and later resigned as Judge of the High Court.

In 2019, we had another public outcry about a Goodwood Court Magistrate who’s now being investigated and dismissed by the Ethics Committee of the Magistrate’s Commission following a complaint regarding his conduct. A video of the Magistrate texting on his cell phone during court proceedings went viral on Facebook and YouTube. A member of the public who posted that video was unsatisfied about the way the Magistrate was so engaged in his cell phone even while the cases presented before him required his undivided attention. The Magistrate is currently undergoing a disciplinary process.

According to Judicial Service Commission Act 9 of 1994, the Constitution assigned powers to the Judicial Service Commission to remove a Judge from office only if:

a) The JSC finds that the Judge suffers from an incapacity, is gross incompetent or is guilty of gross misconduct and;

b) The National Assembly calls for that Judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

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A Cape Town magistrate is in trouble for allegedly texting during a court hearing. TimesLIVE report notes that the Magistrates’ Commission yesterday confirmed that it has launched a probe into Goodwood Magistrate Sean Lea after he was filmed glued to his cellphone while on the Bench last week. An appalled Fazloen Hoffman posted pictures and videos of Lea, seemingly disengaged from the proceedings, on Facebook and YouTube. According to Hoffman, the incident happened on Friday. She described Lea and staff at the court as ‘unprofessional, disrespectful and blatantly abusing taxpayers’ money and the privilege of being employed’. Hoffman said she confronted the prosecutor after the court proceedings for ‘benefiting from a distracted magistrate whose lack of apparent interest leaves wide-ranging opportunities for success’. Hoffman said Lea told her he was texting his boss, a Mr De Beer, and even briefly showed her a WhatsApp chat. She said Lea tried to shove his phone in her face in front of people and she ‘told him to back off from me as his aggressiveness was threatening’. Hoffman said she had lodged formal complaints with the Office of the Public Protector, the provincial Head of Justice, the Magistrates’ Commission and Justice Minister Michael Masutha. Advocate Hishaam Mohamed, head of Justice Department in the Western Cape, confirmed that he had received the complaint. He said an investigation into the magistrate’s alleged misconduct is the job of the Magistrates Commission, but said he had launched an investigation into the court staffer, a stenographer, who is seen dozing in the videos. ‘We know that Hoffman’s son was sentenced to two years’ imprisonment and she is very angry. Or it could be that the magistrate is out of order,’ said Mohamed. (accessed on 16 July 2019)