

## Political activity of judges in the light of judicial ethics

### **A. Introduction**

Is a judge<sup>1</sup> supposed to be a judge and a judge only? Or should he or she be allowed to be politically active and if so, to what extent? Can a judge hold a mandate in a city council? Can he or she distribute flyers for a political party? Political activity might change the public's perception of judges. It can influence the level of trust of individuals in their judicial system. Is political neutrality in this context not only an ideal but a necessity for peoples' confidence in a fair trial? How are the common values of judges' independence and impartiality interpreted in European countries and how so on an international level? What are the chances of a common European understanding to be achieved and what could be the advantage?

The paper at hand will try to find answers to these questions.

The relationship between the judiciary and politics varies in the jurisdictions of the European Countries where the specific influences by the particular circumstances of each legal system need to be taken into consideration.

The paper begins by setting out a comparative examination of the political involvement of judges in Germany and other European countries. After examining the different systems it outlines the approaches in international legal documents on the matter. It continues by listing arguments for and against political activity of judges in the light of the principles of independence and impartiality. Finally the paper tries to elaborate on a possible solution of this disputed topic on the European level.

It is important for judges to be perceived as being independent and impartial adjudicators free from undue influence, especially from political influence. This results from the citizen's right to fair trial guaranteed in Article 6 ECHR.

“Independence is the right of every citizen in a democratic society to benefit from a judiciary which is, (and is seen to be), independent of the legislative and executive

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<sup>1</sup> Judge here and in the following refers to both sexes

branches of government, and which is established to safeguard the freedom and the rights of the citizen under the rule of law.”

“It is up to each judge to respect and to work to maintain the independence of the judiciary....” “This independence leads him to apply the law without fearing to please or to displease all forms of power, executive, legislative, political...opinion.”<sup>2</sup>

“The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment.”<sup>3</sup>

“A judge ensures that his private life does not affect the public image of the impartiality of his judicial work. He is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organisation.”<sup>4</sup>

Depending on the realization of the separation of the powers, the public trust and confidence in the judiciary varies significantly. Therefore it is a necessity for the judiciary to be distinct from the other institutions of state.

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<sup>2</sup> ENCJ WORKING GROUP’s Judicial Ethics Report 2009-2010, page 2.

<sup>3</sup> as under 1, page 4.

<sup>4</sup> as under 1, page 5.

## **B. Political Activity of Judges – Legal Framework and Practice**

### **I. GERMANY**

We will first describe recent cases and the legal framework and practice in Germany.

#### **1. Recent cases**

In Germany two cases of political activity of judges raised the discussion about the legitimacy of judges being politically active and the applicable legal boundaries.

In the first case Ronald Schill, a local court judge, started his political activity after he ended his career as a judge by becoming the senator of the Interior in Hamburg one year later and founding his own political party. As a criminal judge he was known for his merciless judgment and strongly expressed opinion about violence against police officers. These topics were on the agenda of his party and caused great attention in the public.

The second case involved Peter Müller, who was elected as Judge of the Federal Constitutional Court (“Bundesverfassungsrichter”) in December 2011. He is a former German politician, who was Prime Minister from 1999 to 2011 and from 2009 to 2011 Minister of Justice of the Saarland State. Even a member of his party criticised the change to become a Judge of the highest German court. He pointed out there would be no difference in the conflict of interest of politicians in the first rank becoming a board member of a major commercial enterprise after ending their political careers. Furthermore, the political opposition feared damage to the public image of the Constitutional Court, if a politician in office became a judge of the highest court without any waiting period.

#### **2. German legal framework**

The legal framework in Germany gives a clear rule on political activities of judges.

Section 4 (1) of the German Judiciary Act (“Deutsches Richtergesetz – DRiG”) provides the separation of powers. In order to abide by that rule, judges should not simultaneously perform duties of adjudication, legislation or executive.

The Federal Constitutional Court Act („Bundesverfassungsgerichtsgesetz – BVerfGG“), section 3 (4) states explicitly the incompatibility of being a judge at the Constitutional Court and being a member in a constitutional body at the same time, to guarantee the independence and neutrality from political influences.

Under section 36 (2) of the German Judiciary Act it is allowed for judges to run a political mandate at a federal level or at a state level under the condition the judge ceases to hold his judicial office when being elected to parliament or appointed as part of the executive.

In accordance with the existing rules in Germany, holding a political mandate is generally incompatible with the judges’ profession as long as in office. To the contrary, section 36 (2) determines the legitimacy to run a political mandate after ending the career of a judge in particular.

Even though this is the legal framework, cases similar to those of Judges Schill and Müller show that the public heavily criticised judges becoming politicians and vice versa.

Contrary to the clear legal framework, judges at local courts in Germany are allowed to hold a political mandate at a local level while in office. This practice is questionable regarding the principle of separation of powers, since political activity on a local level is qualified as executive power (indirect public administration).<sup>5</sup> But the consistent common practice of the superiors of judges and the prevailing opinion in the legal literature permit judges to hold local political mandates.<sup>6</sup> German courts did not make an explicit decision regarding this political activity so far. The reason for the

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<sup>5</sup> Eike Ingwer Schmidt – Politische Betätigung von Richtern – Ein Beitrag zur Unabhängigkeit der Richter am Beispiel des § 4 DRiG, ZRP 2008, 242.

<sup>6</sup> Johann-Friedrich Staats, Deutsches Richtergesetz, 1. Auflage 2012, § 4, Rn. 8.

legal admissibility of political activity on the local level is seen in the legislative background and the history of the rule.<sup>7</sup>

Moreover, impartiality of judges in Germany does not exclude judges from expressing their political opinion, as long as they make clear, that they are acting in personal capacity beyond the professional conduct as a judge. The German Constitutional Court<sup>8</sup> decided that it is allowed for judges to form and express their political opinion in public, without a breach of their appearance of impartiality.

The executive and judiciary in Germany are at some points interwoven.

The appointment procedure of judges on a federal level, set out in Art. 95 II BL (Basic Law = Grundgesetz) is characterized by major political influence. The law determines that judges of federal supreme courts must be chosen jointly by the competent Federal Minister (usually the Federal Minister of Justice) and a committee consisting of State Ministers and an equal number of members elected by the Bundestag (the lower house of the German legislature), members of the represented political parties. A certain influence on the political party affiliation can therefore not be excluded.<sup>9</sup>

Practically, judges at the higher levels are selected on the basis of their political commitments and affiliations.<sup>10</sup> Because of this practice, judges might even feel that it can be an advantage for their career to be member of a certain political party.

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<sup>7</sup> Günther Schmidt-Räntsch/Jürgen Schmidt-Räntsch, Kommentar zum Deutschen Richtergesetz, 6. Auflage 2009, § 4 Rn. 19.

<sup>8</sup> See Decision of the Constitutional Court 06.06.1988– NJW 1989, 93.

<sup>9</sup> See DS Clarke, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, S. Cal. L. Rev. (1987-1988). At 1825.

<sup>10</sup> See, John Adenitire „*Judicial Independence in Europe – The Swedish, Italian and German Perspectives*“.

<https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf>.

## II. OTHER EUROPEAN COUNTRIES

The principle of judicial independence and impartiality in relation to political activities of judges is treated differently in various European countries.

There are countries that do not see a threat to the principle or even an issue in judges' political activities alongside their profession as a judge. In other cases, a number of European countries handle the principle strictly.

In **Sweden** there are no restraints to political activities judges are able to undertake. As a result, a number of judges run political campaigns and in the past were elected to Swedish parliament. There were two Minister Presidents who sat as full-time judges.<sup>11</sup> Permanent judges in Sweden are often appointed to work in a ministry or administration for legal advice.<sup>12</sup>

The **Italian** royal decree of 30 January 1941 states that judges may not have a "job or public or private office except as member of parliament..." A number of magistrati run political campaigns and sit in the Italian Parliament. At the end of their term they are allowed to return to their judicial functions. In Italy, magistrates used their popularity to gain political positions. One example is the case of *Magistris*. He gained popularity as a magistrate who was fighting corruption. After being banned from his judicial function, he made use of his popularity to gain a position as a European Member of Parliament and then became Mayor of Naples.<sup>13</sup> It has been argued that this use of media popularity to gain political power violates the principle of separation of powers and of the ideal of pursuing the rule of law without outward motives.<sup>14</sup> The compatibility of this practice with regards to the appearance of impartiality required from a magistrato is questionable.<sup>15</sup>

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<sup>11</sup> One of them was Anti Avsan who sat in Parliament for the Moderate Party. Due to his political engagements he was on leave from his job as a judge in Stockholm. Susanne Eberstein, for the Social Democrats, was also a judge in administrative court of appeal.

<sup>12</sup> J. Bell *Judiciaries within Europe*, Cambridge 2006, at 276.

<sup>13</sup> J. Adenitire, *Judicial Independence in Europe The Swedish, Italian and German Perspectives*, page 17.

<sup>14</sup> D. Piana, *Speaking Aloud Would Make You Better? Courts and Politics in the Italian Media*, in Matthew Barker, *The Court of Public Opinion: Justice, the Media, and Popular Will*, FLJS Report 2011.

<sup>15</sup> cf. J. Adenitire as under 3.

In **Switzerland** judges are generally elected for a certain period by the cantonal parliament. The parliamentary groups can make election proposals in accordance to their seats, which are followed by the parliament. This results in higher chances of success for the more popular party members.<sup>16</sup> This leads to a politicization of the election. Supposedly in practice the political affiliation does not play an important role.<sup>17</sup> But due to periodical re-election, judges in Switzerland might be under political control<sup>18</sup> also because judges usually stay in their parties during their terms.

Although countries like Sweden, Italy and Switzerland find that judicial and political functions are not compatible, they seem to be willing to risk the appearance of judicial independence for reasons of convenience or because they do not consider the exercise of certain political functions and activities as potentially undermining the independence of judges.<sup>19</sup>

The answers of a questionnaire of the Consultative Council of European Judges (**CCJE**) in 2002 on the principles and rules governing judges' professional conduct (in particular incompatible behaviour and impartiality) made clear, that the general idea of separation of powers is a well-known concept in European countries. This concept is handled strictly in **Eastern European countries**. Regarding incompatibilities, Slovenia, Slovakia and Czech Republic answered that judges may not have a political post. Moldova's judges may not even belong to political parties. No political mandate or activity is allowed in Estonia, Romania or Hungary. The Hungarian constitution in this regard states in Article 26 (1): "Judges shall not be affiliated to any political party or engage in any political activity."

The association of **Austrian** judges in 2003 initiated a discussion process in Wels. In this context every judge in the state could participate. The further development of the principles of the "Salzburger Beschlüsse" from 1982 resulted in a decision in principle known as the "Welser Erklärung" (2007). This declaration advises judges in order to safeguard their appearance of impartiality not to be a member of a political party or

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<sup>16</sup> Hans-Jakob Mosimann, Richterliche Unabhängigkeit und Leistungsbeurteilung: Schweiz, page 2.

<sup>17</sup> Niccolò Raselli, Richterliche Unabhängigkeit, in: «Justice - Justiz - Giustizia» 2011/3, page 4.

<sup>18</sup> as under 7, page 6.

<sup>19</sup> as under 3, page 29.

be active in a party-political context during their services. This recommendation is based on § 63 RDG, which similar to § 4 DRiG prohibits the judge to perceive tasks of the executive or legislative.<sup>20</sup>

In the **United Kingdom** judges are not permitted to participate in political activities and even after they have left office they are subject to substantial restrictions.<sup>21</sup>

The 2006 Guide to Judicial Conduct has been drafted by a working group of judges set up by the Judges' Council following extensive consultation with the judiciary. It is a written Guide for England and Wales in accordance with international practice of setting up written codes of conduct. It states that impartiality is essential to the proper exercise of the judicial office. Therefore a judge should make sure that his behaviour in court and in his private life maintains and enhances the public's confidence in the impartiality of the judge and the judiciary.<sup>22</sup> The judge's primary task is to fulfil the duties of his office. Extra judicial activities should therefore be avoided if they can cause the judge to not sit on a case because of his decision seeming biased due to his extra-judicial activities.<sup>23</sup> "A judge must forego any kind of political activity and on appointment sever all ties with political parties. An appearance of continuing ties such as attending political gatherings, political fundraising events or through contribution to a political party, should be avoided."<sup>24</sup> The code of conduct even goes as far as to state that "where a close member of a judge's family is politically active, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process."<sup>25</sup>

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<sup>20</sup> Welser Erklärung 2007: „Die Wahrung eines Abstandes, auch zu politischen Parteien und ähnlichen Gruppierungen, ist daher eine Anforderung an den Richter zur Wahrung der Glaubwürdigkeit seiner Unabhängigkeit.“

„Das Verbot der Nebenbeschäftigung in Sinne des § 63 RDG untersagt vor allem solche Tätigkeiten, die die richterliche Unabhängigkeit bedrohen können. Der Richter darf neben seinem Amt keine Stellung annehmen, die die Vermutung der Befangenheit in Ausübung seines Dienstes hervorrufen könnte. Die Vereinigung empfiehlt daher den Richtern, während des aktiven Dienstes keiner parteipolitischen Betätigung nachzugehen und eine Mitgliedschaft bei den politischen Parteien zu meiden.“

<sup>21</sup> Consultative Council of European Judges (CCJE) Op. No.3, Strasbourg, 19 November 2002, page 29

<sup>22</sup> Guide to Judicial Conduct, England and Wales 2006, Published by the Judges' Council October 2004

First Supplement published June 2006 , page 9

<sup>23</sup> as under 12, page 9

<sup>24</sup> as under 12, page 9

<sup>25</sup> as under 12, page 10



Thus in Austria and the United Kingdom the judiciary made efforts to set up codes of conduct for judges, which explicitly entail that in order to ensure the independence and impartiality of judges as well as their appearance in this respect, it is necessary to entirely exclude judges from political activities.

### III. INTERNATIONAL APPROACHES TO THE ISSUE

Since the 1980s, several international documents were published which deal with rules for the judiciary. They are of different origin and importance, but they all have their non-binding character in common.

The first document that contained a code of conduct was a private piece of research adopted in 1982 by the IBA (International Bar Association) and called **IBA Minimum Standards**<sup>26</sup>. Its rule 37 of the chapter Standards of Conduct provides that “Judges shall not hold positions in political parties.” This rule is rather precise compared to the documents analyzed below. It does not exclude the possibility for a judge to be a party member, but only to hold a position therein. The notion does not explicitly forbid a judge from holding a mandate, but from the argument *a minore ad maius* it can be deduced this equally should not be the case.

The **European Charter on the Statute for Judges** was published by the Council of Europe, but it is to be qualified primarily as a private document by three experts<sup>27</sup>. It sees a risk of intertwining the judiciary with politics only concerning the appointment of judges by political bodies. In this respect the Charter considers that “Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.” It can be concluded that the Charter takes a skeptical stand on judges’ relations to politics, although it does not elaborate on the questions at hand.

The **Bangalore Principles**<sup>28</sup> were the result of the work of a global group of high level judges (“Judicial Integrity Group”), initiated by the UN and published in 2001. Principle 4.6 states the following: “A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.” The official commentary to the Principles specifies this general and

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<sup>26</sup> [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

<sup>27</sup> From Poland, France and the UK, published in 1998.

<sup>28</sup> <http://www.unrol.org/doc.aspx?d=2329>.

abstract principle by saying that “a judge’s duties are incompatible with certain political activities, such as membership of the national parliament or local council.” This is the most concrete official interpretation of an international code of conduct that can be found: It prohibits a judge from taking a seat in representative institutions of the state, no matter on which level. However it does not exclude membership in parties or extra-legislative activities either.

The **Universal Charter of the Judge**, published by the International Association of Judges in 1999, is of a very general character and does not contain any provision on political involvement or activities of judges. It only holds that “the judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.”<sup>29</sup> “The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.”<sup>30</sup>

In 2002, the **CCJE** (Consultative Council of European Judges) published an **Opinion**<sup>31</sup> to the attention of the Council of Ministers at the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality. This document was elaborated with the help of a questionnaire the CCJE sent to the Member States asking about the situation of judges in each state. In its conclusions on the standards of conduct<sup>32</sup> the CCJE phrased the rule no. xii: “[judges] should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.” This rule does not clearly define the boundaries of political activities, but it offers an abstract formula that has to be applied to each individual case. The criterion of “causing detriment to the image of impartiality” is rather vague, but it seems to be useful to include it in the provision as a benchmark for acceptable political activities.

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<sup>29</sup> Art. 2 (Status) Universal Charter of the Judge,  
<http://www.domstol.dk/om/otherlanguages/english/publications/Pages/default.aspx>.

<sup>30</sup> Art. 7 (Outside Activity) Universal Charter of the Judge.

<sup>31</sup> CCJE (2002) Op. N° 3, Nov. 19th 2002.

<sup>32</sup> P. 9 et seq. of CCJE (2002) Op. N° 3.

The Council of Europe gave two recommendations on the matter so far, the **Recommendation on the Independence, Efficiency and Role of the Judge**<sup>33</sup> in 1994 and more recently the updated **Recommendation**<sup>34</sup> in 2010. Neither gives advice on whether a judge can be politically active, but they repeatedly make reference to the importance of independence of the judge.<sup>35</sup> The only reference the latest Recommendation makes to politics is the following: “There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status.” At first glance, this suggests a rather liberal approach, because it protects judges’ political opinion. Taken into consideration that the other categories belong to the personal sphere of the judge, the provision’s primary goal seems to be to protect the judges’ individual rights. However, this does not necessarily mean that the recommendation also seeks to encourage judges to share their political opinion or become politically active.

The **ENCJ** (European Network of Councils for the Judiciary) is equally engaged in the question. In its **Report on Judicial Ethics**<sup>36</sup> the ENCJ states on the principle of impartiality: “In politics, the judge, like any citizen, has the right to have a political opinion. 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. A judge cannot behave as an active agent of a political party.”<sup>37</sup> This leaves the judge the possibility to be a member of a political party and even to be involved in the background, but he should not appear as an active representative of a party in public.

In summary, international approaches to shape an international code of conduct contain rather few and partly incongruent remarks on political activities of judges.

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<sup>33</sup> From the Committee of Ministers to the Member States, adopted Oct. 13<sup>th</sup> 1994, No. R (94)12.

<sup>34</sup> From the Committee of Ministers to the Member States, adopted Nov 17<sup>th</sup> 2010, CM/Rec (2010)12, <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

<sup>35</sup> E.g. Principles I 2) b) and V 3) a) of the first Recommendation, Chapters II and III of the second Recommendation (differentiating between Internal and External Independence).

<sup>36</sup> Approved by the London Declaration on Judicial Ethics, July 2<sup>nd</sup> – 4<sup>th</sup> 2010.

<sup>37</sup> 2008-2009, p. 14.

Given the different national approaches to the matter outlined in the previous section, it is not surprising that states have their difficulties finding a shared opinion, let alone a binding agreement on the question. However, in the process of ongoing European integration, harmonization might not be mandatory yet, but should be the goal.

## C. Discussion in the light of the principles of impartiality and independence

In order to find a balance between judges' civil rights and the requirement of independence and impartiality, all arguments have to be taken into consideration. We will first elaborate on the arguments for the option of political activity by members of the judiciary, then against this activity.

### I. ARGUMENTS IN FAVOUR OF POLITICAL ACTIVITY

Firstly, judges remain citizens when in office and should be allowed to exercise the political rights enjoyed by all citizens, especially freedom of expression. A prohibition from voicing political opinions or even from becoming a member of a political party severely restricts these rights. Especially when it comes to participating in a public debate on major problems of society, it can be useful and enriching to hear the opinion of practicing judges. This is even more true if the debate concerns an issue that involves the judiciary (which is quite often the case). Judges should at least be able to be consulted and play an active part when it comes to preparing legislation concerning their statute and, more generally, the functioning of the judicial system.

Moreover, political activity can also have a positive effect on the competence of the judge. Working in a different field offers judges an opportunity to broaden their horizons and gives them awareness of problems in society. This can supplement the knowledge acquired from the exercise of their profession.<sup>38</sup> „The advantage is that the justices' few and meager contacts with the real world do little harm and perhaps occasionally some good.“<sup>39</sup>

Furthermore, no judge is free from opinions, influence from his personal history and environment anyway. The „monk-justice, innocent of worldly vanities, free of political connections and guided only by the gem-like flame of inward conscience“<sup>40</sup> probably does not exist. Despite this, society should trust him to exclude all these exterior factors when making a decision in office.

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<sup>38</sup> Cf. CCJE (2002) Op. N° 3, Nov. 19th 2002, para 30 et seq.

<sup>39</sup> Noah Feldman, Sometimes –Justice can play Politics, New York Times, Feb. 12<sup>th</sup> 2011, <http://www.nytimes.com/2011/02/13/opinion/13feldman.html>

<sup>40</sup> Noah Feldman, Sometimes –Justice can play Politics, New York Times, Feb. 12<sup>th</sup> 2011, <http://www.nytimes.com/2011/02/13/opinion/13feldman.html>

## II. ARGUMENTS AGAINST POLITICAL ACTIVITY

As already outlined in the introduction, political activity of the judge might jeopardize his **impartiality**. The judge is supposed to decide on the basis of the law only. Yet, clear political standpoints are likely to cause a judge to sympathize with a party in court when similar questions occur.

Also, his **independence** is at stake, when he feels an obligation towards a political party and political convictions, even if it is only a moral obligation. Especially when an opinion was shared publicly, one usually feels the urge to act consistently. Particularly in administrative courts, judges who are or have been politically active in public cannot seem independent in cases related to political questions.<sup>41</sup>

It should be more effective to prevent a conflict of interest at the beginning by setting up specific rules of conduct than to try to fix the situation once a judge already appeared to be biased.

The principles of impartiality and independence aim to secure a fair trial. The citizen cannot choose the judge but he has to trust the judge's neutrality. Therefore it is highly important to preserve **public confidence** in the judicial system. Even if a judge's political affiliation does not influence his decision-making in court, the public can think it does and thereby lead to a declining trust in the neutrality of the judiciary. Legitimate public expectations concerning their impartial and independent appearance should therefore be met by judges, meaning that some sort of restraint is necessary in the exercise of public political activity.

The Italian experience illustrates the strong link between public confidence in the judiciary and the protection of the independence of courts from legislative attacks. It

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<sup>41</sup> J Adenitire, Judicial independence in Europe, p. 10.

serves the public image of the judiciary to isolate it from external and internal politics.<sup>42</sup>

There is clearly a need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. Although it is not preventable for judges in their private lives to have their own political preferences and opinions, in their capacity as a judge this should not have any influence. It is also crucial that the judiciary establishes and maintains confidence by at least screening the individual judge's political opinion.

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<sup>42</sup> J. Adenitire, *Judicial independence in Europe*, p. 18.



## D. Conclusion

Confidence in judges' independence and impartiality is an essential precondition for the rule of law. Trust of one's judicial system is in the first place based on its appearance. Since judges are the faces of justice they have to be perceived by citizens as being neutral. Of course, there should be a certain level of trust of society that judges act lawfully and neutral even if they have certain political affiliations but it cannot be denied that the appearance of a judge is basis for the interpretation of his decision making.

A judge who - before his judicial mandate commenced or during his mandate - speaks up for the legalization of drugs can and will be viewed by the society as someone handling cases of drug abuse in court less strictly than a judge who publicly in a political function asked for a harsher punishment of drug offenders. The idea of having an independent and impartial judge is that the outcome of a trial will be the same regardless of the person judging it. Of course in practice this is unlikely to happen but this ideal is what people ask for in order to be able to trust the judiciary.

The strong effect of public political statements and/or activities of judges results from them being viewed as not just their mere ideas at some point in time but as the ideals they stand for. This is because standing for something in public already requires a certain level of seriousness. Even more in the case of a judge being politically active while in office since then he stands for something in public despite his knowledge of the enormous effect of such publicity.

The precondition the German Constitutional Court asks of judges in this context to make clear that their political opinion is expressed in their private capacity does not seem to change the appearance of the judge as not being completely impartial and independent. To differentiate between personal and judicial capacity seems artificial since at the end of the day a judge is just one person and in public also just viewed as such.

Impartial and independent appearance is already an issue when a former politician - after terminating his political career- becomes a judge as the scepticism towards the German Constitutional Court judge Müller shows. But it is even more problematic in situations where a judge is actively involved in politics while in office. In this case the fear of a political party influencing decisions can play an important role that prevents trust in the judiciary. This reaches its climax where a judge is politically active in the executive on a local level and sits as an administrative judge in cases of the executive against an individual. The appearance of independence could be achieved by asking judges to terminate their membership in the political party and having a waiting period before entering their office as a judge.

A very strict handling of judges' political activities going as far as even putting restrictions on them after leaving office -as in the United Kingdom- seems to be rather extreme, since the principles of independence and impartiality do not apply anymore after the termination of the judicial mandate.

In most European countries "measures to combat easily identifiable sources of undue influence in adjudication are provided at constitutional level and in ordinary legislation. However, outside this core, divergent institutional arrangements support the thesis that the understanding of the principle of judicial independence depends on normative arguments."<sup>43</sup> At the moment, the understanding of the exercise of the principles of independence and impartiality is handled very differently in various European countries as shown above. A common minimum standard is that during the time of a mandate in parliament the profession as a judge has to pause. Other than that there are no common handlings to be observed. Even though common European ideas exist in theory as can be seen by the ENJC report, as for now they are mere ideas.

In the process of ongoing European integration, it is desirable to harmonize the codes of conduct in this respect. Europe is in an ongoing process of becoming closer and closer, which makes cases of citizens being tried in front of foreign courts everything but an exception. For this reason not just trust in one's own judicial system but in that of the countries surrounding us is desirable. A common standard

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<sup>43</sup>J. Adenitire, *Judicial Independence in Europe - The Swedish, Italian and German Perspectives*, page 30.

of the understanding and practice of judicial independence and impartiality before this backdrop is desirable.

Realistically of course it will be difficult to find an agreement that every state abides by, because of the very different handling of the problem in various European countries.