Impartiality of legal professionals

Legal and ethical obligations

by

Carmen Isele, Claus Gawel, and Katharina Müller

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A. Introduction

A small justice scandal, titled "love chamber" by the media, shook the Regional Court (Landgericht) Augsburg in Germany in December 2018: the 10th criminal section had to rule on a case of tax fraud in the amount of approximately 1 million Euro. However, the scandal did not revolve around the potential crime but around the composition of the court: two members – the presiding judge and one of the professional associate judges – out of the five-member chamber are a couple. The defense filed a motion of challenge for fear of bias at the beginning of the trial. Their main concern was that the two involved judges were unable to reach an impartial decision because their relationship and their natural want for harmony in their private lives would make it impossible for them to form contradicting opinions.

The notion of impartiality of a court is a crucial element in a democratic society where the rule of law is predominant. Though embedded in many international as well as national laws and regulations, it is not purely a legal phenomenon but is also strongly connected with ideas of ethics. The principle itself as developed by the jurisprudence of national as well as international courts sets out guidelines for the professional conduct of certain legal groups. Although most regulations regard judges as the professional group most closely related to the final decision, the principles can be transferred onto the professional obligations of other legal professions. Thus, the principle of impartiality sets out a code of ethics for a broader group of professions engaged in the legal decision-making process other than judges alone.

This paper aims to point out in which legal professions bias can occur, how impartiality is defined by European Courts and which concrete obligations can be derived from this definition for the professional groups. The findings obtained in this analysis will be applied to the example of the German "love chamber" case.

I. Bias in the light of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union

Article 6 § 1 of the European Charta of Human Rights (ECHR) reads:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by* ***an independent and impartial tribunal*** *established by law.*

A similar provision can be found in Article 47 § 2 Charter of Fundamental Rights of the European Union (CFR):

Everyone is entitled to a fair and public hearing within a reasonable time by ***an independent and impartial tribunal*** *previously established by law.*

Since Article 47 CFR is based on Article 6 ECHR[1] this section will mainly focus on the interpretation of the guarantee as it was set forth by the European Court of Human Rights (The Court) in the light of the ECHR.

As a general clause for the guarantee of a fair trial, Article 6 ECHR contains several procedural rights and guarantees, the right to be heard by an impartial tribunal being one of them. By explicitly listing a tribunal's impartiality as one pillar of the fair trial guarantee, the protection against biased authorities has been granted the status of a human right equally important as the other procedural guarantees.

II. Impartiality and independence – definition of terms

Together with the requirement of independence of the tribunal and its establishment by law, impartiality can be categorized as a so-called institutional guarantee. The notions of independence and impartiality are widely interlinked and are often considered together by the European Court of Human Rights (ECtHR). To better understand the meaning of the term "impartiality" it is, therefore, necessary to cast a quick view upon the meaning of the term "independence".

1. Independence

Independence of a tribunal refers to its autonomy, especially from the legislative and executive branches of power and the parties of the case.[2] When examining a tribunal's independence, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[3] These are mainly objective criteria which focus on the external circumstances of the judicial system as such rather than at the behavior of individual judges. Impartiality, on the other hand, can be assessed on an objective as well as a

[1] Draft Charta of Fundamental Rights of the European Union, p. 40.
[2] Schabas, p. 294.
[3] Findlay v. The United Kingdom, Application no. 22107/93 of 25 February 1997, § 73.

subjective test (details below). The resemblance of the objective criteria forms the main link between the two notions and the reason why the Court often addresses them together.

A recent example where independence of tribunals is at issue is Poland's 2017 reform to its legal system, introducing a disciplinary system for judges and by thus subjecting them to the political control of the executive. Having to fear a review by instances which might be politically rather than legally motivated obstructs judges in finding objectively just solutions to the cases presented to them. While this fear is plausible on a human level, it is especially conflict between fear and duties like this which requires ethical decisions of the individual and him or her to step up where the state fails to fulfill its task.

2. Impartiality

Impartiality normally denotes the absence of prejudice or bias.[4] This definition, as well as a distinct test for the determination of impartiality, have been developed by the Court in its jurisdiction over the years.[5] When assessing the impartiality of a tribunal, the Court has adopted two different approaches: a subjective and an objective approach. The subjective approach looks at the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case.[6] The objective test, on the other hand, determines whether, apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality.[7] The Court may depending on the facts of the respective case, apply either one test or both to make its determination. Also, there is no "watertight" distinction between the two tests,[8] meaning that certain facts may constitute impartiality or its lack under both tests alike.

There is a difference, however, in the scope of protection of the guarantee as it is understood under the subjective and objective test. While the subjective test primarily ensures that the parties to the individual proceedings agree on the impartiality, the objective test guarantees the upholding of the outer perception of impartiality of the proceedings by the general public. This results in the possibility that a tribunal can be held to be biased even if none of the parties involved in the respective proceedings have concerns regarding the tribunal's subjective

[4] Kyprianou v. Cyprus, Application no. 73797/01 of 15 December 2005, § 118.
[5] Piersack v. Belgium, Application no. 8692/79 of 1 October 1982, § 30.
[6] Micallef v. Malta, Application no. 17056/06 of 15 October 2009, § 93.
[7] Micallef v. Malta, § 96.
[8] ECHR, Guide on Article 6, § 96.

impartiality. What is decisive is whether fear can be held to be objectively justified.[9] Following the rule "justice must not only be done: it must also be seen to be done",[10] the application of the objective standard when determining the impartiality of a tribunal thus does not only serve to guarantee a fair trial in the respective individual case but also to uphold the general public's confidence in the rule of law in state courts as a key element of democracy.

As mentioned above, the subjective test looks at the individual judge and at whether his person or behavior give rise to concerns about his impartiality. Under this test, the focus lies on the question of whether the judge thinks of himself to be able to reach an unbiased decision. According to the ECtHR, personal impartiality of a judge is to be presumed until there is proof to the contrary.[11] The burden of proof, therefore, lies on the party who seeks to challenge the judge for bias – a burden which is hard to overcome. The presumption of subjective impartiality demonstrates that great confidence and trust is being put in European judges under the ECHR which members of this profession should always keep in mind and honor.

The objective standard serves as a corrective with regard to the high burden for proving the subjective test by offering a second limb on which a party can base its claim of partiality. Under the objective test, the impartiality of a tribunal is assessed in the light of objective factors which are apt to raise the concern of bias. Besides the internal organization of a court, which is a structural question rather than one concerning the individual judge, these factors can again be categorized into different groups, such as functional reasons or personal reasons.[12]

A key example of a functional reason why a tribunal can be held to be biased may be the preoccupation of a judge with the case in a different role. There is extensive case law of the ECtHR on this question, especially in the field of criminal law, which cannot all be recited here. The cases range from criminal judges who worked on a certain case as a prosecutor before to trial judges who also exercised some functions as an investigating judge in the pre-trial stage of the proceedings.[13] Especially the latter example shows that not every form of preoccupation necessarily constitutes objective bias but that it can well depend on the extent of involvement in the case. This may lead to uncertainties because (especially in smaller court districts due to lack of manpower) it cannot always be avoided that one person has to handle

[9] Kyprianou v. Cyprus, § 118.
[10] De Cubber v. Belgium, Application no. 9186/80 of 26 October 1984, § 26.
[11] Piersack v. Belgium, § 30; De Cubber v. Belgium, § 25.
[12] ECHR, Guide on Article 6, § 108.
[13] ECHR, Guide on Article 6, § 110.

one case in different functions. There are situations in which professionals find themselves dealing with the same case in different roles; they call for caution and a diligent examination whether one of his professional duties applies (see below).

The category of personal reasons has to be distinguished from the subjective test: the subjective test looks at the judge's own impression of whether he is able to reach an impartial decision despite the existence of facts that might make him appear biased, while the objective test concerns the public's view. A personal reason for lack of impartiality under the objective test can be seen in certain conduct of the judge relating to the case, such as inappropriate comments about the case towards the media.[14] Also, personal links such as family ties of the judge to other parties of the proceedings may cause objective bias (had the German "love chamber" case been tried before the Court, this would likely have been the category the Court would have addressed in detail).

The primary obligation to provide rules and regulations which provide for the structural preconditions lies with the state. In fact, the mere existence of such rules in a country's legal system is necessary to guarantee impartiality.[15] Many states have rules in their different procedural codes containing specific examples of situations in which objective bias regularly exists. Moreover, many procedural codes provide for a general clause which opens the door for the rejection of a judge on the grounds of bias in cases which are not already specifically listed. This is where the individual professional's duties to act according to his or her own morals come into play in order to guarantee the standard of impartiality as foreseen by the ECHR.

B. The application of the principles of impartiality and independence within the criminal and civil limb of Art. 6 ECHR

How Art. 6 ECHR is interpreted within the criminal and civil limb is subject to a growing body of ECHR legislation. According to its wording, the provision imposes an obligation of impartiality on a tribunal in civil and criminal matters. "Tribunal" thereby refers to the body responsible for the decision and thus primarily addresses professional as well as lay judges and jurors. However, far less attention has been attributed as to how the essential principles of impartiality and independence are applied to actors other than judges (i.e. magistrates, etc.).

[14] ECHR, Guide on Article 6, § 127.
[15] ECHR, Guide on Article 6, § 104.

The differentiation and exact determination of the scope of Art. 6 ECHR is critical because whenever it is applicable to other than classical criminal or civil proceedings, the general considerations regarding independence and impartiality for judges will also apply to persons chairing those other proceedings in the same way, i.e. once Art. 6 ECHR is applicable, it is applicable in full within each limb. It is crucial for professionals working in the respective fields to understand when they are subjected to the obligations set forth by Art. 6 ECHR.

I. Art. 6 ECHR's criminal limb

While the wording of Art. 6 ECHR specifies the scope of its application to "[…] an independent and impartial tribunal […]", the legislation of the European Court of Human Rights (ECtHR) has developed in its case law several principles with expands the scope of the article to "non-(criminal-)tribunals", and in consequence to individuals chairing those proceedings. Art. 6 ECHR applies to these in the same manner.

1. Persons chairing disciplinary proceedings

In **Engel and Others v. Netherlands**[16], the ECtHR differentiates between light punishments not subject to a criminal penalty and those of an "imposition of serious punishments involving deprivation of liberty" in the context of **offenses against military discipline**. The Court set up three criteria which are known as the "**Engel criteria**" in order to determine if a sanction falls under the scope of Art 6. These criteria are

(1) the **legal classification** under the national law,

(2) the **nature of the offense**, and

(3) "**nature and degree of severity** of the penalty that the person concerned risks incurring", with the latter two being alternative not cumulative.

In the same vein, the Court stated in that in military disciplinary proceedings a promotion ban and salary cut (**R.S. v. Germany**[17]), but not a discharge from the armed forces (**Suküt v. Turkey**[18]) would not fall under Art. 6, as in the latter case, the State could show that unsanctioned breaches of discipline would call in question military authorities.

In **Albert and Le Compte v. Belgium,**[19] the Court stated in a case on professional disciplinary proceedings that it saw civil and criminal aspects of Art. 6 is **not mutually exclusive**. In

[16] Engel and Others v. the Netherlands, § 85; Schabas, W. A. (2015), p. 271f.
[17] R.S. v. Germany, § 33.
[18] Suküt v. Turkey, B. 3.(a)(ii).
[19] Albert and Le Compte v. Belgium, § 30.

Müller-Hartburg v. Austria,[20] the case of a disciplinary proceeding against an attorney and member of the Bar, the Engel criteria were applied. The Court concluded that the national Disciplinary Act belongs to the sphere of disciplinary law, did not address the general public but only members of a professional group with a special status, and – while the Act could also lead to criminal charges – the person subject to the sanction was not "charged" with them.

In **Moullet v. France**[21], a case about a **compulsory retirement**, the Court considered the sanction to be the "harshest measure in the scale of disciplinary sanctions", however, not determining a "criminal charge". Furthermore, in **Trubić v. Croatia**[22], a case regarding the dismissal of a policeman, the Court held it would not fall under the criminal limb of Art. 6 ECHR to determine whether the proceeding was fair as he was not given the chance to cross-examine witnesses like the police. The Court asserted that States would have "greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases". Likewise, a substantial fine for a judge could be "punitive in nature", nevertheless was without "severity bring[ing] the offence to the criminal sphere" (**Ramos Nunes de Carvalho e Sá v. Portugal**[23]). A judge's dismissal is considered a "classic disciplinary measure for professional misconduct" (**Oleksandr Volkov v. Ukraine**[24]).

With regard to offenses against **prison discipline**, the Court did not accept that the special status of prisoners would "render the nature of the offenses prima facie disciplinary" and even saw a "loss of remission" as being of criminal nature in **Ezeh and Connors v. the United Kingdom**[25]. However, a sanction would need to be considered disciplinary as in **Štitić v. Croatia**[26] if neither the prison term was extended, or the prison conditions were "seriously aggravate[d]".

2. Persons chairing administrative proceedings

There is a considerate body of jurisdiction which considers penalties for **road-traffic offenses** under Art. 6 ECHR stating that "minor-offence proceedings concerning road traffic offences fall to be examined under the criminal limb of Article 6 of the Convention"[27]. With "fine and

[20] Müller-Hartburg v. Austria, §§ 42-49.
[21] Moullet v. France, B.2.a.
[22] Trubić v. Croatia, § 26.
[23] Ramos Nunes de Carvalho e Sá v. Portugal, §§ 124-128; Aubry, A. (2019).
[24] Oleksandr Volkov v. Ukraine, § 92.
[25] Ezeh and Connors v. the United Kingdom, [GC] §§ 82, 103f., 126f.; another case from the UK: Cov. L.J. 2010, 15(2), 58-60; with Foster, S. (2010) coming to the same conclusions.
[26] Štitić v. Croatia, § 61.
[27] Marčan v. Croatia, § 33.

penalty points […] [being] punitive and deterrent in nature"[28], Article 6 ECHR is applicable under its criminal head. Imposed fines and costs of proceedings after **being a nuisance** to neighbors as in **Lauko v. Slovakia**[29], are punitive and intended to "prevent reoffending", and hence, are criminal in nature.

Furthermore, even minor fines for offenses against **social-security regulations** fall under the criminal head of Art. 6 ECHR**,** being preventive and regressive, and by this notion, criminal in nature[30].

3. Persons chairing proceedings against tax and customs offenses

Surcharges on taxes were considered to fall within the ambit of Art. 6 ECHR as they were "deterrent and punitive" in the context doubling the amount of taxes due in **Steininger v.Austria**[31]**,** but also starting from moderate surcharges, for example in VAT offenses of 10% as in **Jussila v.Finland**[32].

4. Persons chairing financial and competition-law proceedings

In **Lilly France S.A. v. France**, the Court found that administrative, but important financial consequences regarding the capital requirements, but likewise the Banking Commission's acts would have a "blaming function" which radiates into the market[33]. Like in this in **Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia** it is in the public interest that **inspections are not obstructed**, and severe fines were not established to compensate for damages but prevent and punish unlawful conduct[34]. Similarly, **market manipulations** contravened the public's interests in the transparency and effectiveness of the marked and severe fines and sanctions were criminal in nature, **Grande Stevens and Others v. Italy**[35].

5. Conclusion

As for officials to know whether their proceedings are within the ambit of Art. 6 ECHR, it is paramount to follow the "Engel criteria" set out by the Court. While there appears to be some variation regarding these principles vis-à-vis tax proceedings, there is a general applicability from disciplinary and administrative proceedings, to financial, and competition-law related

[28] Igor Pascari v. the Republic of Moldova, §§22f.
[29] Lauko v. Slovakia, § 58.
[30] Hüseyin Turan v. Turkey, §19.
[31] Steininger v.Austria, § 37.
[32] Jussila v. Finland, § 38.
[33] Lilly France S.A. v. France, § 37.
[34] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, § 45.
[35] Grande Stevens and Others v. Italy, §§ 96.

proceedings. Further special proceedings regarding political issues, expulsion, or extradition could not be examined due to limitations of the submission. However, the authors expect that relevant case law would show that the outlined criteria will equally apply to different stages of criminal proceedings, ancillary proceedings, and subsequent remedies.

While the Court outlined the "detailed normative framework for the enforcement of criminal law" within the regular trial context, it has not done so "outside"[36] of it.

II. Art. 6 ECHR's civil limb

Art. 6 ECHR "civil rights and obligations" are mostly classical disputes which are civil in the very meaning of "civil", i.e. being concerned with proceedings between two individuals. In addition to these, cases which result in private rights and obligations for individuals fall within the ambit of Art. 6 ECHR's civil limb[37]. This means that also administrative proceedings can fall under Art. 6 ECHR and have done so in the past ranging from a negligence claim[38] against the State to alleged discriminations in public tenders[39]; and equally the principles of Art. 6 ECHR regarding independence and impartiality would apply to them.

However, some actors outside the classical court structures require a closer examination.

1. Persons chairing proceedings before professional bodies

Proceedings before **professional bodies** regarding the **right to practice a profession** fall under Art. 6 ECHR. In **Le Compte, Van Leuven and De Meyere v. Belgium** and **Philis v. Greece (no.2)**, the Court decided that it did not need to decide whether the concept of "civil rights" extends beyond those rights which have a private nature, as it sees doctor-patient relationships being private[40].

[36] Vriend K. (2016), p. 262.

[37] Guide on Art. 6, p. 12 with further references to Ringeisen v.Austria, § 94; König v.Germany, § 94f.; Sporrong and Lönnroth v. Sweden, § 79; Lupeni Greek Catholic Parish and Others v.Romania [GC], §§ 71-73; Benthem v. the Netherlands, § 36; Tre Traktörer Aktiebolag v. Sweden, § 43; and Chaudet v. France, §30.

[38] X v. France.

[39] Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom; regarding the compatibility of the land use planning system with Article 6 of the European Convention on Human Rights see Loveland, I. (2001).

[40] Le Compte, Van Leuven and De Meyere v. Belgium, § 48; Philis v. Greece (no.2), §45; regarding arbitration clauses in sport governing bodies see Łukomski, J. (2013) while Rawat, M. (2019), p. 42f. pointed out that ECHR jurisdiction has and will continue to shape the proceedings before the Court of Arbitration; Loya, K. A., Desai, V. (2019); regarding e-ADR see Schiavetta, S. (2004); regarding barristers' chambers see Stuart, A. (2019) und Foty, F., Clanchy, J. (2019) without reference to Art. 6 ECHR, but illustrating a set of differentiated ethics and rules in terms impartiality and independence in international arbitration. Regarding the ICSID dispute resolution system see Vidyarthi, A., Khan, S.H. (2019).

Regarding public servants, the Court developed a test in **Vilho Eskelinen and Others v. Finland.** In essence[41], Art. 6 would apply if

(1) the individual **does not have access to a court** to challenge a decision, and

(2) this **deprivation of access is in the interest of the State** and **not objectively justified**.

As a general rule, it is presumed that Art. 6 ECHR applies, reversing the onus of stating the facts and bearing the burden of proof. The **Eskelinen test** can, therefore, be considered to be the equivalent to the "**Engel criteria**" within the criminal limb of Art. 6 ECHR.

2. Persons chairing disciplinary procedures in the workplace

In the past, there has been a tendency for national courts to interpret Art. 6 for workplace related proceedings narrower, while the ECtHR was widening its scope[42]. According to the ECtHR, Art. 6 ECHR would furthermore apply to a **dismissal of an employee** by a private firm[43] and regarding **social-security benefits** - even if they are only **compulsory**[44]. Applying the **Eskelinen test**, the Court found the personal and economic nature of the asserted rights, the connection with the contract of employment and affinities with insurances under ordinary law being "predominant"[45], and cumulatively these factors create a civil right as under Art. 6 ECHR. As for public servant, it would not suffice to exempt a case from the scope of Art. 6 by the virtue of an individual's special relationship with the State, but the dispute would have a direct connection to the exercise of State power or this special relationship itself[46]. The ECtHR applies these principles from cases ranging from proceedings regarding dismissals to disciplinary sanction[47].

3. Persons chairing other than main proceedings

Apart from the main proceedings, there can be preliminary, interlocutory, interim, and other proceedings. For the "other than main proceedings", the Court established in **Micallef v. Malta** a basic rule for when Art. 6 applies. It applies to other than main proceedings if the matter is

(1) "**civil**" within the meaning of Convention, and

[41] Kamenos v. Cyprius, § 55.
[42] Sanders, A. (2013), p. 819; Lemmens, Paul. (2011), p. 313.
[43] Buchholz v. Germany.
[44] Schouten and Meldrum v. the Netherlands.
[45] Feldbrugge v. the Netherlands, § 40.
[46] Vilho Eskelinen and Others v. Finland [GC], §62.
[47] See Guide on Article 6 of the Convention – Right to a fair trial (civil limb) for further references to the case law, p. 14 ff.

(2) the **result** of the proceedings is "**directly decisive for the right in question**"[48].

4. Conclusion

Far from being able to exhaust the constellations in which the civil limb of Art. 6 ECHR is applicable to persons chairing proceedings other than civil proceedings, some universal basic principles could be identified. As the Court did with the "**Engel criteria**" within the criminal limb of Art. 6 ECHR, it created two sets of principles/tests for evaluation whether a dispute falls within the civil limb of Art. 6 ECHR: the "**Eskelinen test**" for main proceedings and the "**Micallef principles**" for "other than main proceedings".

C. Professional conducts that arise out of Art. 6 ECHR

The previous section shows that the principle of impartiality applies to many legal professional groups. Above this, even if not directly listed by Art. 6 ECHR or included thereunder in the jurisprudence of the ECtHR, several professions can get in conflict with the problem of partiality which is the reason why they are tied to a differentiated set of rules and obligations. Individuals who are affected by a judge or public prosecutor can file an intervention. The rules for intervention are different among the ECHR Member States, as there are different solutions in the various areas of law. Subsequently, this thesis will look at various sets of rules for professional conduct according to the demand of impartiality that is required in Art. 6 ECHR.

I. Judges

In a first step, regard shall be had to the work of judges and their professional conducts. It is the profession that requires most of the attention because by rendering the decision a partial judge has the largest impact on people, and his partiality can easily lead to a biased and unjust judgment. Therefore, and furthermore, most of the rules in the Member States that focus on impartiality and independence, regulate the profession as a judge.

Art. 6 ECHR states the obligation of the judges to be impartial and independent. The outcome of this is the professional conduct of judges, if there are serious doubts in terms of impartiality, the individual has to declare himself as partial and biased (subjective impartiality, see above).

[48] Micallef v. Malta, § 74.

This obligation was confirmed by the Court in several judgments[49]. Comparable obligations can be found in many Member States' national rules and regulations, for example in Germany, where a member of a tribunal, who recognizes his own partiality, has to report every situation affecting his or her impartiality to the director.[50] Additionally, there has to be a decision by other judges, whether the impartiality exists or not. There is no automatic decision after the report of existing impartiality, due to the conflict of the guarantee that everybody has the right of a lawful judge and a judge has not to leave a tribunal on the basis of personal feelings.

In the case **Micallef vs. Malta**, the Grand Chamber of the Court criticized the Maltese approach, because an obligation for judges to „[…]withdraw in cases where impartiality could be an issue […]"[51] does not exist in Maltese Law. Therefore, the national Law „[...] did not give adequate guarantees of subjective and objective impartiality [...]"[52]. Questionable is, whether it is necessary that the judge is obligated to withdraw himself with a constitutive effect, as the judgment can be understood. Otherwise, it is a moot question, if a report to the director of the judge like in German law is adequate. It depends on, how the Court interprets the coverage of impartiality. Moreover, Art. 6 ECHR guarantees the right to a lawful judge as well. Even though, the right is not as extensive as it is guaranteed in the German constitution. Certainly, with an obligation to recuse in case of apprehension of partiality, the judge or the chamber receive the possibility to decide upon the commitment of one particular judge.[53] With an obligation to recuse oneself in case of apprehension of partiality the judge or the chamber receive the possibility to decide upon the commitment of one particular judge.[54] Thus, Art. 6 ECHR does not determine an obligation for the judge to withdraw autonomously. Nevertheless, it constitutes at least an obligation to report the problem. Regarding the phrasing of the Court, this is a procedural obligation in favor of all parties and not only one official duty.[55]

[49] De Cubber v. Belgium; Hauschildt v. Denmark, Application No. 10486/83, of 24.05.1989, § 48; Sara Lind Eggertsdottir v. Iceland, Application No. 31930/04 of 05.07.2007, § 42.
[50] Thomas/Putzo ZPO commentary *Hüßtege* § 48 No. 1.
[51] Micallef v. Malta, § 100.
[52] Micallef v. Malta, §100.
[53] Die Unparteilichkeit des Richters in Europa, Gabriele Steinfatt, p. 193.
[54] Die Unparteilichkeit des Richters in Europa, Gabriele Steinfatt, p. 194.
[55] Die Unparteilichkeit des Richters in Europa, Gabriele Steinfatt, p. 194.

The impartiality must be presumed until there is proof to the contrary[56] which is why the report of the judge is really important. For the judges in the regular tribunal, there has to be a conduct of the judge reporting that there might exist an apprehension of partiality or in case he/she feels impartial due to personal reasons. There has to be a reaction not only if the person in front of the judge or the chamber feels partiality of one of the judges, because the whole system bases on the trust in an impartial law system[57]. Therefore, the report of the judge by himself is a conduct of the judge doing this if the requirements exist.

In German criminal law the judges can be declined if there is an apprehension of partiality. Another chamber decides if an apprehension exists or not. This chamber has to decide impartially too, what might be difficult if, for example, another judge is confronted with the apprehension of impartiality. Some judges might see this as an attack on their professional honor. For this reason, it might be difficult for other judges to decide impartially. But their professional conduct requests to decide objectively. Nevertheless, there is the opinion of the public, that judges decide with a different scale, whether they have to decide about judges or ‚other people'. In public, it seems like they are more likely to stick to their own profession group[58]. In fact, they have to deal restrictively with the rejection concerning impartiality, because everybody needs to get a legal judge which highlights the importance that neither judges nor the state should decide who handles the case, but a system that regulates which case is handled by whom.

To complete the general rule out of Art. 6 ECHR, there are several European rules concerning the conduct of professionals working for the European Union.
The Treaty on European Union declares rules for judges and Advocate-Generals at the European Court of Justice. Art. 252 of the Treaty on European Union reads:

> *„It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make […] reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.* "

Furthermore, Art. 253 claims independence of the judges and Advocate-Generals of the Court of Justice.

[56] Hauschild v. Denmark, § 47; *Piersack* v. Belgium, § 30; *Kyprianou* v. Cyprus, § 11; Grabenwarter/Pabel - Europäische Menschenrechtskonvention § 24 Z. 48; *Wettstein* v. Suiss, Applicaiton No. 33958/96 of 21.12.2000, § 44.
[57] Grabenwarter/Pabel - Europäische Menschenrechtskonvention § 24 Z. 45.
[58] https://www.spiegel.de/spiegel/print/d-14346342.html.

In addition, there are also rules for the Court of Justice of the European Union that can be used as basic model for all judges, because they include the rules and conducts which focus on impartiality.

Art. 18 of the statute of the Court of Justice of the European Union says:

> *„No Judge or Advocate General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity. If […] any Judge or Advocate General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If […] the President considers that any Judge or Advocate General should not sit or make submissions in a particular case, he shall notify him accordingly. […]*

Accordingly, the Court of Justice of the EU it is necessary to be impartial. If there is any apprehension of impartiality by a judge or Advocate General himself he must inform the President, who then has to decide, whereupon he or she has to decide objectively.

This principle is applicable for the EU members in their own law system, as it is done in Germany. But it is not only necessary because of European rules, but also or moreover due to the moral and ethical principle and the ideal of a fair trial and suitable state.

In 1997, the European Association of Judges declares in the „Judges' Charter in Europe" in No. 3:

> *„Not only must the Judge be impartial, he must be seen by all to be impartial. "*

Thus, so this rule is set additionally to general rules by themselves. One year later, the Council of Europe passed the European Charter of the statute for judges, which also creates the obligation of controlling the own impartiality by every judge.[59] In 2010, the Consultative Council of European Judges set up the Magna Charta of Judges with the rule of impartiality and independence.[60] The impartiality is named in both documents as a general principle.[61]

In conclusion, there are federal rules of judges' behavior. First, they have to decide impartially and without favoritism, but also without fear of anything, because this could lead to impartiality. In work, as well as in private life, it is necessary to scale down behavior that might increase apprehension of impartiality, and instead to show a conduct that might increase the trust in the justice. Conflicts between private life and judicial duties should be minimized.

[59] Art. 1.1 European Charter of the statute for judges.
[60] Art. 2-4 Magna Charta of Judges (2010).
[61] Art. 1 European Charter of the statute for judges.

It is important to try preserving the free opinion without prejudice. And finally, to report situations where the apprehension of impartiality exists, or the judge feels not free to decide.

II. Experts

There are other professions that get in touch with the problem of partiality - such as experts. An expert is someone who helps the tribunal or judge with the final decision by introducing his knowledge. For this reason, the expert has to be as impartial as a judge himself, as it is ruled in Germany referring to the rules for a judge. The same rules are applicable for an interpreter and a translator[62]. If one knows already, that one might be partial one has to report it to the court immediately.

Partiality can base on previous work for one party. But not only previous work by the expert himself, also if the expert's institution already worked in this case, there still exists apprehension of partiality. Often, the problem is not the behavior of the expert in a specific case, but in his or her previous work as a private expert[63]. The German Federal Supreme Court (BGH) decided, that if the expert already set up a survey for a tribunal with a similar question it does not matter, but if he set up a private survey the concern of prejudice exists.[64]

A particular problem is the communication between judge and expert. The system of experts in German law states, that they are advisers of the judges, but bound by the latter's instructions. In general, instructions have to be communicated to the parties but there is no obligation for the judge to notify every contact to an expert that exists. A communication between judge and expert is not affecting the impartiality[65].

III. Public Prosecutors

As a public prosecutor, there may be the same issue at hand. A partial prosecutor might be not that questionable as a partial judge, because he does not decide finally. However, a prosecutor has a critical impact on the trial by the virtue of his role during the trial.[66] As well as a partial judge, a partial prosecutor can equally affect the trust in the law system. If the prosecutor notices his impartiality, or if he or she thinks there might be an apprehension from an objective viewpoint he or she has to report this to the director.

[62] Thomas/Putzo ZPO commentary *Reichold* § 406 no. 1.
[63] BGH, resolution 10.01.2017 – VI ZB 31/16.
[64] BGH, resolution 10.01.2017 – VI ZB 31/16.
[65] OLG Hamm 13.06.2016 - 32 W 7/16.
[66] BVerfG 16.4.1969 – 2 BvR 115/69.

In many legal systems in Europe, as well as in the German legal system, there is no particular rule for the partial prosecutor or a prohibition to participate a trial in such a situation. But there is the moral and ethical idea which is based on Art. 6 ECHR requiring that a prosecutor has more or less the same distance to the case as a judge has to have. In Germany there was the question, whether the rules for an impartial judge are equal or analog applicable for the prosecutor. The Higher Regional Court Frankfurt in Germany had to decide about this and came to the conclusion, that it is not the same situation as an impartial judge.[67] The prosecutor will not decide anything, so he has different tasks than a judge[68]. On the other hand, there might be a conflict with oneself which is the reason why there is the possibility to suggest a change by reporting it to the director. In contrary to the decision of the judges director, a partial prosecutor cannot lead to a biased and wrong judgment, wherefore the rules of the judges are not applicable.[69] Thus, the impartiality of a prosecutor is an official duty but no procedural obligation contrary to the conduct of the withdraw of a partial judge.[70] The requirement of Art. 6 ECHR demands an objective and fair decision, regarding the substitution of a prosecutor.

IV. Lawyers

Moreover, for Lawyers there are rules to deal with situations that might be uncomfortable, because of a personal connection to one of the parties. Those rules are usually not based on a decision of the legislative power, but on the rules the lawyers gave themselves because of an ethical and moral decision.

In the Code of Conduct for Lawyers in the European Union[71], lawyers describe conducts they need to respect in their job, in particular the need of independence that connects to impartiality. Independence of Lawyers is really necessary for the trust of the public in the justice.[72] Therefore, lawyers have to be independent from other influences, particularly regarding personal interests an external pressure. Of course, on personal experience every decision is determined, as well as the work of the lawyers is.

To save the independence, it is a conduct of the lawyers to expound to the clients, if there seem to be any reason that justifies doubts. That includes, for example, the situation when a lawyer

[67] OLG Frankfurt, resolution 10.11.1998, 3 VAs 37/98; NStZ-RR 1999, p. 81-82.
[68] BVerfG 16.4.1969 – 2 BvR 115/69, BGH 25.9.1979 – 1 StR 702/78.
[69] BGH 25.9.1979 – 1 StR 702/78; Munich commentary StPO *Brocke* § 145 GVG, No. 8.
[70] Die Unparteilichkeit des Richters in Europa, Gabriele Steinfatt, p. 194.
[71] „Code of Conduct for Lawyers in the European Union“ - Council of the Bars and Law Societies of the European Union.
[72] „Code of Conduct for Lawyers in the European Union“ - Council of the Bars and Law Societies of the European Union p. 7 no. 2.1

already worked for the other party, how the German Supreme Court decided in 2007.[73] To execute the lawyers duties, it is necessary to be independent and only committed to the interests of the own client.[74] These properties are mandatory.[75] Furthermore, there are rules for the lawyers concerning the independence in § 43a IV BRAO. The mutual trust between lawyer and client is fundamental to the work of the lawyer and the law system. This trust could be destroyed by the apprehension of partiality of the lawyer.

V. Concluding remarks

Independence and impartiality are essential to the protection of individual rights within before any authority or body[76]. Through its extensive jurisdiction defining the legal professions which fall within the categories of a "civil or criminal tribunal" and which by this are bound by the obligations of Art. 6 ECHR, the ECtHR secures the far-reaching protection of this guarantee. However, also professional groups which do not directly fall within the scope of Art. 6 ECHR shall act according to the ethical principle behind this provision when exercising their professional obligations. Specific rules of professional conduct arising out of this obligation especially concern a critical examination of one's ability to handle a case objectively and fairly and full disclosure of the situation.

In the German "love chamber" case, the domestic court ruled that the two judges were impartial despite their relationship to another, reasoning especially that the deciding body was composed of overall five judges guaranteeing an open exchange of views. While this decision is to be welcomed not only from a practical point of view, upholding the working ability especially of smaller courts, its presence in the German media shows how even if the presumption of subjective bias was not successfully rebutted, outer appearance of bias can influence the public's confidence in the legal system.

Legal professionals should therefore always be aware of the role they play not only in the life of the individual whose case they are working on but in the system of a democratic society and should adjust their professional conduct accordingly.

[73] BGH Az. IX ZR 5/06 = NJW 2008, 1307.
[74] BGH zu Offenbarungspflichten von Anwälten, Moritz Pohle.
[75] AnwZ (Brfg) 35/11 - BGH, resolution 23.04.2012.
[76] Andreevska, E. (2014), p. 244.

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