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From Bench to Parliament and Back: Resilience of the Judiciary and Safeguarding Judicial Independence in Germany

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Abstract

The goal of this Article is to contribute to the broader discussion on strengthening the resilience of the rule of law in Germany by focusing on how to protect trust in the judiciary and judicial independence against (possibly) radicalized judges. The Article provides an introduction to the current legal situation in Germany regarding judges' active involvement in politics, as well as an overview of the historical background. It addresses the regulation governing the right to return to a post as a judge after having been a member of parliament, and disciplinary rules regarding appropriate behavior of judges. It illustrates the current legal status quo and considers possible consequences for judicial independence and public trust in the judiciary. The Article concludes with proposals to improve the resilience of the judiciary.

Keywords: Resilience of the judiciary; political engagement of judges; German Courts; judicial independence; rule of law

A. Introduction

The relationship between the judiciary and politics has historically been a challenging one. The independence of judges is a fundamental pillar of the rule of law and public trust in the judiciary. Based on this principle, it could be argued that only individuals without political views should be appointed as judges. However, it is unlikely that any judge will be an island without political views of their own. Should judges—in the spirit of a strict understanding of the separation of powers—at least be politically neutral and thus not allowed to be politically active? Alternatively, should they—in the spirit of democracy—be permitted to express their political opinions, join political parties, and even stand for election? If so, how can the public be assured that such judges will act neutrally in their office, particularly if these judges belong to authoritarian right-wing parties? These questions have become pressing since 2022, when two right-wing Members of Parliament (MPs) demanded to return to their original posts as judges in Germany. They had been unsuccessful in holding onto their seats as MPs for their political party, the Alternative for Germany (*Alternative für Deutschland*) (AfD), during the federal elections of 2021.¹

In 2024, when Germany marked the 75th anniversary of its Basic Law, and in 2025, when the authoritarian right-wing party won an unprecedented number of votes in the early federal elections in February, these events have formed part of a broader discussion about the resilience of democracy

¹See *generally* DAVID SCHWARZENBÖCK, RECHTSEXTREMISMUS IN DER JUSTIZ?: DAS RICHTERAMT ZWISCHEN UNABHÄNGIGKEIT UND VERFASSUNGSTREUE [RIGHT-WING EXTREMISM IN THE JUDICIARY?: THE JUDICIAL OFFICE BETWEEN INDEPENDENCE AND LOYALTY TO THE CONSTITUTION] (2026).

and the rule of law in Germany. The discussion not only addresses the implications of right-wing judges in the judiciary, but also the potential for authoritarian political forces to utilize and abuse the constitution as a tool for exercising power. Despite an extensive body of research in the broader field of “militant democracy,” there has often been a lack of findings relating to concrete measures. In order to address potential and specific challenges, the *Verfassungsblog*—a forum at the nexus of legal academia and journalism—initiated the “Thuringia Project” (Thüringen Projekt)² and the “Judiciary Project” (Justiz Projekt),³ illustrating that after the authoritarian right-wing party won a blocking majority in the state election of Thuringia in September 2024, it immediately started blocking the judicial selection committee of the Thuringian Constitutional Court.⁴ The two initiatives aimed to assess the implications of an authoritarian populist party assuming power in one federal states and on the federal level. In this context, a number of legal measures designed to enhance the resilience of the rule of law are being considered.⁵ These include inter alia enshrining the regulations of the constitutional courts of the federal states⁶ and the regulations of the Federal Constitutional Court⁷ in the constitution, introducing new disciplinary measures,⁸ and reforming the process for electing judges.⁹ At the end of 2024, some legal and political measures were taken to strengthen the resilience of the Federal Constitutional Court of Germany (BVerfG) by amending Articles 93 and 94 of the German Basic Law (*Grundgesetz*, GG).¹⁰ Still, questions regarding further measures persist.

²See *Das Thüringen-Projekt*, VERFASSUNGSBLOG, <https://verfassungsblog.de/thuringen-projekt/> (last visited Aug. 20, 2024); Hannah Katinka Beck, Etienne Hanelt & Vanessa Wintermantel, *Was wäre, wenn . . . ? Zur Verwundbarkeit der Demokratie in Thüringen* [What If . . . ? On the Vulnerability of Democracy in Thuringia], APuZ (Aug. 7, 2024), <https://www.bpb.de/shop/zeitschriften/apuz/fokus-ostdeutschland-2024/551117/was-waere-wenn/>.

³See Anna-Mira Brandau, Emma Bruhn, Etienne Hanelt, Lennart Laude, Juliana Talg, Jakob Weickert & Friedrich Zillesen, *Wir starten das Justiz-Projekt: Wie verwundbar ist die deutsche Justiz?* [We are Launching the Justice Project: How Vulnerable is the German Justice System?], VERFASSUNGSBLOG (Feb. 14, 2025), <https://verfassungsblog.de/wir-starten-das-justiz-projekt/>; ZILLESSEN, FRIEDRICH, ANNA-MIRA BRANDAU & LENNART LAUDE, EDS. *DAS JUSTIZ-PROJEKT: VERWUNDBARKEIT UND RESILIENZ DER DRITTEN GEWALT* [THE JUDICIARY PROJECT: VULNERABILITY AND RESILIENCY OF THE THIRD BRANCH] (2025).

⁴See *id.*

⁵See Klaus Gärditz, *Resilienz des Rechtsstaates* [Resilience of the Rule of Law], 77 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 407 (2024); Anne Sanders, *Schutz des Rechtsstaats – Jetzt!* [Protect the Rule of Law – Now!], 51 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZFR] 92 (2024).

⁶See generally Anne Sanders, *Stärkung der Resilienz des Rechtsstaats in den Ländern* [Strengthening the Resilience of the Rule of Law in the Federal States], 102 DEUTSCHE RICHTERZEITUNG 188 (2024). See also Werner Reutter, *Wie der Verfassungsgerichtshof sich selbst schützen kann: Risiken und Nebenwirkungen einer Schutzstrategie* [How the Constitutional Court Can Protect Itself: Risks and Side Effects of a Protection Strategy], VERFASSUNGSBLOG (Mar. 5, 2024), <https://verfassungsblog.de/wie-der-verfassungsgerichtshof-sich-selbst-schutzen-kann/>; Ulrich Karpenstein & Stephan Kirschnick, *Offene Flanken der Brandenburger Justiz* [The Exposed Flanks of the Brandenburg Judiciary], VERFASSUNGSBLOG (May 6, 2024), <https://verfassungsblog.de/offene-flanken-der-brandenburger-justiz/>.

⁷See Felix W. Zimmermann & Helena Schroeter, *Bundesjustizministerium schlägt Grundgesetzänderung vor* [Federal Ministry of Justice Proposes Amendment to the Basic Law], LTO (Mar. 28, 2024), <https://www.lto.de/recht/nachrichten/n/resilienz-schutz-bverf-gesetzesentwurf-bmj-grundgesetz-nderung-verfassung/> (stating that there was an extensive ongoing discussion). See also Gabriele Britz & Michael Eichberger, *Mehr Widerstandskraft* [Greater Resilience], FRANKFURTER ALLGEMEINE ZEITUNG (Oct. 1, 2024), <https://www.faz.net/einspruch/mehr-widerstandskraft-fuer-karlsruhe-19438606.html>; Werner Reutter, *Wer wacht über die Wächter? Anmerkungen zu aktuellen Vorschlägen zum Schutz von Verfassungsgerichten* [Who Watches the Watchers? Notes on Current Proposals for the Protection of Constitutional Courts], VERFASSUNGSBLOG (Jan. 30, 2024), <https://verfassungsblog.de/wer-wacht-uber-die-wachter/>; Michael Eichberger, *Die erste von drei Säulen: Zum Arbeitsentwurf des BMJ zur Stärkung der Stellung des Bundesverfassungsgerichts* [The First of Three Pillars: On the BMJ's Working Draft to Strengthen the Position of the Federal Constitutional Court], VERFASSUNGSBLOG (Apr. 16, 2024), <https://verfassungsblog.de/die-erste-von-drei-saulen/>; Fabian Michl, *Schutz des BVerfG – Sichern mit Augenmaß*, 57 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZFR] 33 (2024).

⁸See Andreas Voßkuhle, *Extremismus im Öffentlichen Dienst – Was tun?* [Extremism in the Civil Service—What to Do?], 41 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1841 (2022).

⁹See Juliane Talg & Fabian Wittreck, *Physiotherapie für die Richterwahl: Wie sich Blockaden lösen lassen* [Physiotherapy for Judicial Selection: How to Resolve Blockages], VERFASSUNGSBLOG (Apr. 9, 2024), <https://verfassungsblog.de/physiotherapie-fur-die-richterwahl/>.

¹⁰See generally *Grundgesetz* [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/index.html. See *Gesetz zur Änderung des Grundgesetzes* [Law Amending Basic Law], Dec. 27, 2024, BGBl. I § 93, 94, no. 439 (Ger.).

The aim of this Article is to contribute to the broader discussion on strengthening the resilience of the rule of law in Germany by focusing on how to protect trust in the judiciary and judicial independence against possible radicalized judges. The Article will discuss cases of judges who have been MPs for the right-wing party, Alternative for Germany (AfD), and wanted to return to their judicial posts after losing their seats. The Article will also discuss an example of a judge who may be “just” a supporter of that party. This Article provides an introduction to the current legal situation in Germany regarding judges’ active involvement in politics, as well as an overview of the historical background. It addresses the regulations governing the right to return to a post as a judge after having been an MP and disciplinary rules regarding appropriate behavior of judges. It illustrates the current legal status quo and considers possible consequences for judicial independence and public trust in the judiciary. We wish to highlight, through this discussion, how important, but also how difficult, it is to strike the right balance between preserving the status of individual judges in the interests of their independence, and preserving trust in the independence of the judiciary in general. Still, with greater comprehension and insight, attacks against the rule of law and democracy can be more effectively defended against, and potential reforms—including those for an independent judiciary—can be proposed. We therefore conclude with proposals to improve aspects of the German judiciary.

In light of the prevailing authoritarianism and the threats to democratic institutions that are observable in Germany and elsewhere, it is important to include the judiciary and its role in the discussion on strengthening the rule of law. With scenarios of potential threats to the existing constitutional system and the rule of law becoming frighteningly real, it is increasingly important to develop strategies to make the rule of law more resilient.

B. Political Engagement of Judges in Germany

1. Political Engagement of Judges in Germany: Current Regulations

It is expected that judges will act impartially in accordance with Article 97(1) GG. Still German law does not require judges to abstain completely from politics.¹¹ Consequently, judges who engage with the democratic process are typically regarded as more desirable than those who reject democratic principles. Jutta Limbach, a professor of law, politician, and former president of the BVerfG, has expressed this view.¹² The assertion that “judicial independence cannot be abused against democracy” highlights the significance of a robust democracy that engages active civil servants and judges.¹³ The German legal system is designed to ensure the separation of powers between the judiciary and the executive, while also maintaining the independence of the judiciary itself. This is also achieved by requiring judges to uphold the principles of democracy. While judges may be party members, they are obliged to refrain from any action that might erode public confidence in their independence. Judges are permitted to remain politically active while in office and may even stand in elections.¹⁴ This exemplifies a conflict between the acceptance of the concept of a “political judge” and the preservation of judicial independence. Balancing these two factors poses a significant challenge. It is possible for judges to stand for election, yet they, like all members of the public service, remain subject to the general duties of the judicial office.

¹¹See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Mar. 22, 2025, BGBl at § 97(1), no. 94 (Ger.).

¹²See JUTTA LIMBACH, IM NAMEN DES VOLKES [IN THE NAME OF THE PEOPLE] 425, 426 (1999). See generally GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 17–18, 26 (8th ed. 2023).

¹³LIMBACH, *supra* note 12, at 426.

¹⁴See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Mar. 22, 2025, BGBl at § 137(1), no. 94 (Ger.); Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl at § 36(1), no. 320 (Ger.) (“If a judge consents to be nominated as a candidate for election to the Bundestag or to the legislative body of a Land, that judge is, on application, to be granted that unpaid leave in the last two months before election day which is necessary to be able to prepare for his or her election.”).

1. *The Right to Stand for Election and its Consequences*

As a judge, an individual may be elected to the German Federal Parliament (Bundestag) or a parliament of any one of Germany's sixteen states. Being elected as an MP leads to the suspension of the judge's duties and rights, including those arising from salaried membership of the permanent civil service, because judges are not expected to remain neutral while engaging in political debates. Thus, in the event that a member of the civil service is elected to parliament, specific obligations, such as the obligation of impartiality, the responsibility to exercise moderation and restraint in political activity, and the duty to obtain permission for secondary employment—Section 5(1) of the Members of the Bundestag Act (AbgG)—no longer applies.¹⁵

Section 4(1) of the German Judiciary Act (DRiG) stipulates that judges may not simultaneously perform adjudication duties and legislative or executive roles.¹⁶ In order to guarantee the separation of powers, judges are obliged to take leave of absence during an election campaign and must be suspended during their tenure as an MP.¹⁷ However, although legislative documents prohibit dual activity, they do not prohibit dual status.¹⁸ This implies that although individuals are unable to occupy positions in different branches of government concurrently, the underlying status of the position in question, for instance the judgeship (*Richteramt*), may persist even while the judge is suspended.

Section 6(1) and Section 8(1) of the AbgG establishes the right to reinstatement following the expiration of a political mandate.¹⁹ A general legal right to reinstatement remains in effect if the individual files for reinstatement within three months of the termination of their parliamentary mandate.²⁰ This means that the underlying—albeit temporarily suspended—judicial office can be reactivated, and the individual can resume their position as a regular judge.

2. *General Duties of Judges in Office*

Judges must uphold the free, democratic, federal, and social basic order and dedicate themselves fully to their profession. They must maintain confidentiality and may not accept any rewards or gifts related to their office.²¹ The aforementioned duties are enshrined in Article 33(5) GG and

¹⁵See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 7/5531, <https://dserver.bundestag.de/btd/07/055/0705531.pdf> (Ger.). See also Abgeordnetengesetz [AbgG] [Members of the Bundestag Act], Oct. 28, 2025, BGBl at § 5(1), no. 258 (Ger.).

¹⁶See Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl at § 4(1), no. 320 (Ger.).

¹⁷See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 03/516, <https://dserver.bundestag.de/btd/03/005/0300516.pdf> (Ger.).

¹⁸See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 03/516, <https://dserver.bundestag.de/btd/03/005/0300516.pdf> (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 780/16, (Mar. 22, 2018), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/03/rs20180322_2bvr078016.html#:~:text=Beim%20Verwaltungsgericht%20Schwerin%20waren%20zum,für%20Asylrecht%20zuständigen%20Kammer%20zugewiesen (stating that the BVerfG stipulates that the simultaneous performance of duties is excluded but that a presumption of a lack of independence due to previous employment may not be justified).

¹⁹See Abgeordnetengesetz [AbgG] [Members of the Bundestag Act], Oct. 28, 2025, BGBl at § 6(1), 8(1), no. 258 (Ger.).

²⁰See SABINE LEPEK, ABGEORDNETENRECHT [LAW ON MEMBERS OF PARLIAMENT] § 6, Rn. 7 (Philipp Austermann & Stefanie Schmahls eds., 2nd ed. 2023) (stating the right to return was included for civil servants, despite the fact that the legislative documents articulated potential risks and problems); Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 7/5531, <https://dserver.bundestag.de/btd/07/055/0705531.pdf> (Ger.). (“The return of the civil servant to his or her former employment, which is included in principle in this draft, may lead to problems in individual cases from the point of view of the employer for organizational or various other reasons. It is justified and required by the principle of equal opportunities for parliamentary candidates and the equality of MPs.”).

²¹See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 03/516, <https://dserver.bundestag.de/btd/03/005/0300516.pdf> (Ger.); JOHANNA SCHMIDT-RÄNTSCH, DEUTSCHES RICHTERGESETZ [GERMAN JUDICIARY ACT] § 39, Rn. 4–8 (6th ed. 2009); CLAUDIUS FISCHER, DISZIPLINARRECHT UND RICHTERAMT [DISCIPLINARY LAW AND THE JUDICIAL OFFICE] 70 (1st ed. 2012); See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], BVerfG, Case No. 2BvR 337/07 (May 6, 2008); NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 962, 963–64 [hereinafter BVerfG, Case No. 2BvR 337/07].

Section 39 of the DRiG stipulates the duty of political caution, which applies to both official and non-official duties.²⁵ This duty complements Section 9 of the DRiG.²⁶ The duties are based on the principle that the independence of the judge should not be compromised.²⁷ The legislative documents argue that the public expects judges to exercise a higher degree of internal independence and restraint than other public servants.²⁸ In order to ensure the impartiality and independence of the judiciary, judges must abstain from personal, political, and economic ties, as well as political relations. In addition, judges must not only be impartial in their judgment but must also present the “required appearance of independence.”²⁹

A general anti-democratic tendency within the population and specifically among conservative

²³See SCHMIDT-RÄNTSCH, *supra* note 21, at § 39, Rn. 14.

²⁴See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Mar. 22, 2025, BGBl at § 20, 97, no. 94 (Ger.).

²⁶See SCHMIDT-RÄNTSCH, *supra* note 21, at § 39, Rn. 18.

btd/03/005/0300516.pdf (Ger.).

²⁹*See id.* (discussing how the term “required appearance of independence” is used by the ECtHR jurisprudence) (citing Findlay v. the United Kingdom, App. No. 22107/93, para. 37 (Feb. 25, 1997), <https://hudoc.echr.coe.int/eng/%7B%22itemid%22:%5B%22001-58016%22%5D%7D>) (citing McGonnell v. the United Kingdom, App. No. 28488/95, para. 48 (Feb. 8, 2000), <https://hudoc.echr.coe.int/eng/%7B%22itemid%22:%5B%22001-58461%22%5D%7D>)).

³¹See Kurt Sontheimer, *Antidemokratisches Denken Wesen und Wirkung in der Weimarer Republik* [Anti-Democratic

³²See Donald Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S.

³³See Dieter Obendorf, *Germany's Militant Democracy: An Attempt to Fight Incitement Against Democracy and Freedom*

³⁴See Tim Wihl, *Die verfassungsrechtliche Aufklärung des Extremismusmodells* [The Constitutional Analysis of the

to prevent a recurrence of the injustice that characterized the years between 1933 and 1945.³⁵ The GG, which came into force in 1949, is “thoroughly pervaded by this desire.”³⁶ A constitution that cannot be easily amended, should be binding for all state powers and establish a democratic order to comprehensively protect fundamental rights. These are key characteristics of a social, democratic, constitutional state under the rule of law. The GG protects fundamental rights—Article 1 to Article 19 GG—and stipulates the principle of the rule of law (*Rechtsstaatsprinzip*),³⁷ all of which are safeguarded by Article 79(3) GG, known as the “eternity clause” (*Ewigkeitsklausel*).³⁸ Article 79(3) GG prohibits amendments to Articles 1 and 20 of the GG.³⁹ Some argue that this clause is based on the idea of a strong and “militant democracy” that requires the state to actively oppose individuals and groups who seek to use the rights and institutions of a free society to undermine or destroy democracy.⁴⁰ It should entail provisions “to ensure enemies of democracy will never again be able to exploit the freedoms inherent in democracy,”⁴¹ such as Article 21(2) and (3) GG.⁴² Despite these dominant narratives which still shape the understanding of militant democracy today, it should be kept in mind that the violent and illegal coup d’état of the National Socialist Party in 1933 should have indicated a robust control and containment of executive power.⁴³

After 1945, there was a need to implement constitutional and other legislative acts. Questions arose—again in 1958—regarding the regulation of the German judiciary and how the relationship between judges and the other two state powers should be structured, especially concerning the political activity of judges.⁴⁴ This issue was also discussed during the drafting of the GG in 1948. These discussions took inter alia place during the drafting of the GG, where Dr. de Chapeaurouge during the 11th meeting of the Combined Committee October 7, 1948 noted: “I see this exclusion of civil servants and judges from the right to stand for election as a very serious impairment of the German people’s political rights, and above all I see in it the danger of parliamentary work being stunted” and “let me remind you that ever since German parliaments have existed, judges have always played a very important role in the parliaments, and civil servants in general have done so since 1918 in any case, and that without this cooperation, I am convinced that the proper functioning of parliaments is simply impossible, even more so today than in the past.” The involvement of judges during the Nazi regime was only worth a side note: “I am in favor of giving judges and civil servants the right to stand for election under all circumstances. I do not deny that certain slight abuses developed in the representation of the interests of mid-level judges and civil servants in the Weimar period and that there were connections from the extreme right to the extreme left which were not always entirely desirable for judges and civil servants. However, these minor disadvantages cannot be considered decisive in comparison with the many considerations that speak in favor of granting civil servants this passive eligibility again.”⁴⁵ Legislative documents, which can be a resource for determining the intent of the legislator in German law,

³⁵See ROBBERS, *supra* note 12, at 17.

³⁶See *id.* at 36–37.

³⁷See ROBBERS, *supra* note 12, at 17.

³⁸See Donald Kommers, *German Constitutionalism: A Prolegomenon*, 20 GERMAN L.J. 534, 540 (2019).

³⁹See *id.* at 540.

⁴⁰See *id.* at 544.

⁴¹DONALD KOMMERS & RUSSEL MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 285 (2012).

⁴²See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Mar. 22, 2025, BGBI. at § 21(2), (3), no. 94 (Ger.) (“Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.”).

⁴³See generally SARAH SCHULZ, *DIE FREIHEITLICHE DEMOKRATISCHE GRUNDORDNUNG* [THE FREE, DEMOCRATIC, FEDERAL, AND SOCIAL BASIC ORDER] 83–120 (2019).

⁴⁴See SCHMIDT-RANTSCH, *supra* note 21, at § 39, Rn. 1, 18.

⁴⁵See Edgar Büttner & Michael Wettengel, *Dok. Nr. 14, TOP 4b* [Doc. No. 14, Agenda Item 4b], in *DER PARLAMENTARISCHE RAT* [THE PARLIAMENTARY COUNCIL] 1948–1949, at 399–400 (Deutscher Bundestag/Bundesarchiv eds., 2002).

engage in a comparative debate on the extent of political activity among judges during the reform of the DRiG.⁴⁶ The documents discuss the legal situation in Switzerland, Ireland, the United Kingdom, and Canada, all of which have established different regulations concerning the political activity of judges.⁴⁷ Switzerland permits political engagement and membership. The latter is even “needed” for nominations and elections to the Federal Supreme Court.⁴⁸ Additionally, judges are expected to make donations to their party after the election.⁴⁹ Unlike Switzerland, Ireland prohibits any political activity, as stated in Article 35(3) of the Irish Constitution.⁵⁰ The regulations in the United Kingdom and Canada are even stricter. The House of Commons Disqualification Act 1975 disqualifies individuals from membership of the House of Commons if they currently hold judicial offices⁵¹ and recommends avoiding “improper entry into the political arena.”⁵²

In contrast to these approaches, the German legislative documents for the DRiG emphasize that judges have been active in German politics since 1848⁵³ and that consequently the path to Parliament shall not be prohibited.⁵⁴ After 1945, Germany has sought judges who identify with the free, democratic, federal, and social basic order (*freiheitlich demokratische Grundordnung*) governed by the rule of law.⁵⁵ The decision in favor of a “political judge,” who advocates for the

⁴⁶See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 03/516, <https://dserv.bundestag.de/btd/03/005/0300516.pdf> (Ger.). See also SCHMIDT-RÄNTSCH, *supra* note 21, at § 39, Rn. 17–18.

⁴⁷SCHMIDT-RÄNTSCH, *supra* note 21, § 39, Rn. 17.

⁴⁸See Reto Walther, *Banna Republic Switzerland?: On Recent Attempts to Further Politicize Elections to the Federal Supreme Court*, VERFASSUNGSBLOG (Sep. 3, 2020) <https://verfassungsblog.de/banana-republic-switzerland/> (discussing how the influence of parties on the nomination and election of supreme court judges is also high in Germany and the unofficial regulation on the right of nominations for parties).

⁴⁹See CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT, JUDGES AND PROSECUTORS, GROUPS OF STATES AGAINST CORRUPTION (GRECO) (Jun. 10, 2021), <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a2c9d1> (discussing that European organizations have raised concerns regarding the independence of Swiss judges); Anne Sanders & Elisabeth Faltinat, *Independent Selection of Judges via Competence Evaluation and Lot*, VERFASSUNGSBLOG (Dec. 3, 2021), <https://verfassungsblog.de/independent-selection-of-judges-via-competence-evaluation-and-lot/> (discussing how a political initiative in 2021 did not receive the required majority).

⁵⁰See CONSTITUTION OF IRELAND 1937 art. 35(3), <https://www.irishstatutebook.ie/eli/cons/en/html> (“No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument.”).

⁵¹See House of Commons Disqualification Act 1975, 70 Eliz. 2 c. 24, § 1(1), (2) (Eng.).

⁵²See GUIDANCE TO THE JUDICIARY ON ENGAGEMENT WITH THE EXECUTIVE, JUDICIAL EXECUTIVE BOARD, <https://www.judiciary.uk/wp-content/uploads/2016/07/guidance-to-the-judiciary-on-engagement-with-the-executive.pdf> (last visited Aug. 16, 2023) (stating that Canada’s regulations include the following: “Judges are prohibited from engaging in partisan political activities while in office. They do not hold memberships in political parties, attend political gatherings, contribute to campaigns, participate in political discussions in public, or sign petitions.”); ETHICAL PRINCIPLES FOR JUDGES, CANADIAN JUDICIAL COUNSEL, https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf (last visited July 24, 2023); Ian Binnie, *Judicial Independence in Canada* 25–26, https://www.venice.coe.int/WCC/Rio/Papers/CAN_Binnie_E.pdf (last visited July 24, 2023).

⁵³See ROBBERS, *supra* note 12, at 36 (explaining the Frankfurt Parliament in 1848 was the first freely elected parliament in Germany, and the *Paulskirchenverfassung* still remains a crystallization point for positive constitutional developments in Germany).

⁵⁴See Matthias Burghardt, *Richter und parteipolitisches Engagement – Versuch einer Betrachtung aus ethischer Sicht* [Judges and Partisan Political Engagement: An Attempt at an Ethical Perspective], 88 DEUTSCHE RICHTERZEITUNG 351, 252 (2010). See also Werner Büttner, *Richter und Politik – Ziele und Grenzen des politischen Engagements der Richter* [Judges and Politics – Goals and Limits of Judges’ Political Engagement], 2 ZEITSCHRIFT FÜR RECHTSPOLITIK 53 (1969).

⁵⁵See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], BVerfGE, Case No. 2BvL 13/73 (May 22, 1975), 1975 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 334, 346 [hereinafter 1975 NJW 334 (346) for NEUE JURISTISCHE WOCHENSCHRIFT]; SCHMIDT-RÄNTSCH, *supra* note 21, § 39, Rn. 17; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 1BvB 1/51, paras. 12, 35, (Oct. 23, 1952), https://www.uni-mannheim.de/media/Einrichtungen/Dezernat_V/Dokumente/Einstellungsunterlagen/A4_Belehrung_Vftreue_en.pdf (explaining that the term is fundamental in German constitutional law and describes a core structure of the GG, and was first mentioned in the jurisprudence of the BVerfG); Kommers, *supra* note 32, at 680 ([T]he free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of

free, democratic, federal, and social basic order, is designed to reinforce the concept of a “militant democracy.”⁵⁶ This principle aims to prevent enemies of the constitution from endangering, impairing, or destroying the constitutional order by invoking the freedoms granted by the GG and protected under it.⁵⁷ The BVerfG therefore considers it essential that the free, democratic, federal, and social basic order under the rule of law does not allow its destroyers to take control. There is still an understanding today that it must be ensured that enemies of the constitution do not infiltrate the civil service apparatus.⁵⁸ However, this approach was not consistently applied after 1945 because personal continuity within the judiciary was strong.⁵⁹ In the GDR the judiciary was purged and—like in other socialist and communist countries—new judges were quickly educated to replace former judges. After the reunification, however, almost all Eastern German judges were replaced by judges educated in Western Germany.⁶⁰ While this enabled a full purge of the judiciary after the transition, which was not possible partly due to a lack of educated judges, it led to a judiciary dominated by Western judges in Eastern Germany.⁶¹

III. Political Engagement of Judges in Germany: Significance of the Regulations Today

This section presents an analysis of the current legal situation in Germany regarding judges who are, or have been, politically active. It includes historical observations. Sections 5 and 6 of the AbgG outline the procedure by which judges and other public servants who were originally part of another branch of the state may be elected as MPs.⁶² Nonetheless, this concept also presents a challenge. This is because a former MP who has been politically active may return to their judicial office, which requires independence and political moderation—as outlined in section 39 DRiG. This poses a crucial question: How can a former political MP transform once more into an independent judge? The issue may become more pressing when a former MP wishes to return to their former position as a judge after making authoritarian right-wing political statements that deny equal rights for all. The concept enshrined in Sections 5 and 6 of the AbgG, which was not designed with authoritarian right-wing cases in mind, is vague, and does not provide sufficient

the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties.)

⁵⁶See Burghardt, *supra* note 54, at 353. See also SCHMIDT-RÄNTSCH, *supra* note 21, § 39, Rn. 18; Erhard Blankenburg, *Changes in Political Regimes and Continuity of the Rule of Law in Germany*, in *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 249, 313 (Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzer, Doris Marie Provine & Joseph Sanders eds., 1996) (“Contrasting itself to the political abuse of courts by the Nazis, as well as by the communist regime, the official self-image of the judiciary in the Federal Republic emphasizes the principle of autonomy of law as a concomitant of democracy.”).

⁵⁷See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] BVerfG, Case No. 2BvB 1/13 (Jan. 17, 2017), 2017 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 611, 614, para. 418 [hereinafter 2017 NJW 611 (614) for NEUE JURISTISCHE WOCHENSCHRIFT]; See also Voßkuhle, *supra* note 8, at 1842.

⁵⁸See 1975 NJW 334 (346, paras. 1641, 1642–44, 1648) for NEUE JURISTISCHE WOCHENSCHRIFT.

⁵⁹See, e.g., INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH 202–30* (1991) (describing how during the drafting process of the GG some members – despite knowing about the high involvement of judges during the Nazi regime – opposed further actions for denazification: I would like to urge you not to prescribe a review of judges in the British zone in the Basic Law or any implementing regulations. The denazification procedures have been carried out and have caused so much unrest that I know what excitement will ensue if this is taken up again. We want to bring denazification to a definitive conclusion. For the judges, who have already been through so many trials, to prescribe the matter once again, I would consider politically highly questionable.). See also Büttner & Wettengel, *supra* note 45, at 1419.

⁶⁰See, e.g., Annelie Kaufmann, “Im Westen geschaut, wie das Justizsystem dort funktioniert” [“Looked to the West to understand how the judicial system operates there”], LTO (Nov. 11, 2019), <https://www.lto.de/recht/hintergruende/h/interviu-w-mariion-walsmann-ddr-justiz-thueringen-wende-mauerfall>.

⁶¹See generally Katarina Šipulová & David Kosař, *Purging the Judiciary After a Transition: Between a Rock and a Hard Place*, 17 HAGUE J. RULE L. 61 (2024) (discussing the Czech Republic as an example).

⁶²See Abgeordnetengesetz [AbgG] [Members of the Bundestag Act], Oct. 28, 2025, BGBL at § 5, 6, no. 258 (Ger.).

guidance.⁶³ Maintaining an independent judiciary and public confidence in it involves striking a delicate balance. Articulating right-wing authoritarian positions can make this task challenging. Nonetheless, there is also a risk of punishing members of opposition parties and judges for their political views. In general, the right to express political opinions is a fundamental aspect of a free and democratic society. The fight against enemies of the constitutional order can sometimes lead to suppression of the opposition.⁶⁴ This tension is inherent within the concept of a “militant democracy.”⁶⁵

Having outlined some general remarks on the political engagement of judges in Germany, the question remains: How are these concepts, tensions, and the delicate balancing act dealt with in practice?

C. Three Case Studies from Germany

To demonstrate the relevance of the debate in Germany and the legal uncertainties surrounding the application of regulations in the context of disciplinary measures against judges, this Article will highlight two cases from 2022. They have garnered significant media attention,⁶⁶ and opened a broader discussion on how to handle right-wing civil servants and judges. Although two of the examples represent authoritarian right-wing cases, they illustrate the tension between constitutional principles.⁶⁷ Additionally, this Article will present a third case from 2024 to provide a less straightforward example for discussion.

⁶³See Klaus Gärditz, *Extremistische Rückkehrer in den Richterdienst II* [Extremist Returnees in the Judiciary II], VERFASSUNGSBLOG (Feb. 7, 2022), <https://verfassungsblog.de/extremistische-ruckkehrer-in-den-richterdienst-ii/>.

⁶⁴See, e.g., *infra* Section C.I (discussing the example of the Anti-Radical Decree in 1970s Germany).

⁶⁵See Voßkuhle, *supra* note 8, at 1842.

⁶⁶See Andreas Fischer-Lescano, *Warum der Rechtsextremist Jens Maier nicht wieder Richter werden darf* [Why Right-Wing Extremist Jens Maier Should Not be Allowed to Become a Judge Again], VERFASSUNGSBLOG (Jan. 10, 2022), <https://verfassungsblog.de/warum-der-rechtsextremist-jens-maier-nicht-wieder-richter-werden-darf/>; Klaus Gärditz, *Zum Rückkehrrecht extremistischer Abgeordneter in den öffentlichen Dienst* [On the Right of Extremist Members of Parliament to Return to the Civil Service], VERFASSUNGSBLOG (Feb. 4, 2022), <https://verfassungsblog.de/zum-ruckkehrrecht-extremistischer-abgeordneter-in-den-offentlichen-dienst/>. See also Christoph Möllers, *Tatbestandliche Voraussetzungen des grundgesetzlichen Verfahrens der Richteranklage im Freistaat Sachsen – in Anwendung auf den „Fall Maier“* [The Statutory Prerequisites for the Constitutional Procedure of Judicial Impeachment in the Free State of Saxony—as Applied to the “Maier Case”], BÜNDNIS GRÜNE (Mar. 21, 2022), https://www.gruene-fraktion-sachsen.de/wp-content/uploads/2022/03/Rechtsgutachten_Richteranklage.pdf; Torsten von Roetteken, *Kann die Erfüllung des Anspruchs auf Rückführung in ein Richterverhältnis unter Berufung auf eine mangelnde Eignung zur Erfüllung der Kernpflicht des Richterverhältnisses verweigert werden?*, SPD: FRAKTION IM SÄCHSISCHEN LANDTAG (Mar. 15, 2022), <https://www.spd-fraktion-sachsen.de/der-fall-maier/>; Christoph Möllers, *Richteranklage unter dem GG* [Judicial Echoes under the Basic Law], 100 DEUTSCHE RICHTERZEITUNG [DRiZ] 216 (2022); Hendrik Cramer, *Rassistische und rechtsextreme Positionierungen im Dienste des Staates? [Racist and Right-Wing Extremist Stances in the Service of the State?]*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE (2022), https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_Rassistische_und_rechtsextreme_Positionierungen_im_Dienste_des_Staates.pdf; Voßkuhle, *supra* note 8; Rainald Gerster, »J'accuse . . . !« – Oder besser doch nicht? [“J'accuse . . . !” – Or perhaps better not?], 5 ZEITSCHRIFT FÜR DAS GESAMTE SICHERHEITSRECHT [GSZ] 177 (2022); Bernd Wittkowski, *Maßnahmen zur Verhinderung der Dienstrückkehr von Richtern* [Measures to Prevent the Return of Judges to Service], 55 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 87 (2022); Andreas Nitschke, *Reichsbürger im Staatsdienst* [Reichsbürger in the Civil Service], 76 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 8 (2023); Annabelle Maier, *Die Richteranklage* [The Impeachment of the Judge], 78 JURISTENZEITUNG [JZ] 31 (2023); Josef-Franz Lindner, *Müssen Beamte ihre Verfassungstreue beweisen* [Must Civil Servants Prove their Loyalty to the Constitution?], 59 RECHT UND POLITIK [RuP] 65 (2023); John Philipp Thurn, *Über “Rechte Richter”, Regelanfragen und “Republikschutz”* [On “Right-Wing Judges,” Rule Requests and “Protection of the Republic”], 56 KRITISCHE JUSTIZ 213 (2023). See, e.g., RECHT GEGEN RECHTS: REPORT 2023 (Nele Austermann, Andreas Fischer-Lescano, Heike Kleffner, Kati Lang, Maximilian Pichl, Ronen Steinke & Tore Vetter eds., 2023).

⁶⁷See Matthias Meisner & Heike Kleffner, *Justiz [Justice]*, in EXTREME SICHERHEIT, RECHTSRADIKALE IN POLIZEI, VERFASSUNGSSCHUTZ, BUNDESWEHR UND JUSTIZ 210–236 (2019). See also JOACHIM WAGNER, RECHTE RICHTER [RIGHT-WING JUDGES] (2021).

1. Explicit Manifestations of Racist and Antisemitic Ideologies – Undermining Equality

The first example concerns a former MP and judge in Saxony. Jens Maier was previously the chairman of the far-right faction of the AfD, known as the “Flügel,” which has since been officially dissolved by the party.⁶⁸ Despite its official dissolution, the faction remains relevant in practice. In January 2024, a secret meeting of far-right groups and neo-Nazis, including AfD MPs, sparked discussions of a potential ban on the AfD,⁶⁹ which is still ongoing but the ban does not yet have the backing of a political majority in the Bundestag.⁷⁰ The State of Saxony’s Office for the Protection of the Constitution (*Verfassungsschutz Sachsen*) classifies Maier specifically as an authoritarian right-winger. Maier himself has publicly and repeatedly expressed racist, antisemitic, and other unconstitutional views, both inside and outside of parliament.⁷¹ Prior to his time as an MP, while he was a judge, several disciplinary proceedings were initiated against him.⁷²

Following his application for reinstatement, Saxony’s State Minister of Justice requested a preliminary decision from the Judges’ Disciplinary Court, which are courts solely concerned with disciplinary measures and regulations on judges’ duties. After the controversial legal debates surrounding formal competence and the inclusion of statements expressed both inside and outside the Bundestag and its committees,⁷³ coupled with public criticism of the minister’s reluctance to act,⁷⁴ the minister submitted a legal request to prohibit Maier from performing official judicial duties.⁷⁵ This is in accordance with Section 46 of the Judiciary Act of Saxony, in conjunction with Sections 35, 30, 31, and 39 of the DRiG. In March 2022, the Judges’ Disciplinary Court of Saxony granted the application in a preliminary decision.⁷⁶ The court ruled that Maier’s extra-parliamentary statements during his tenure as an MP could be considered when deciding whether his actions upon returning to office could potentially erode public confidence in his impartiality as a judge.⁷⁷ At the same time, the minister filed an application for Maier’s early retirement based on

⁶⁸See *German Court Rules Far-Right AfD Party a Suspected Threat to Democracy*, THE GUARDIAN (Mar. 8, 2022), <https://www.theguardian.com/world/2022/mar/08/german-court-rules-far-right-afd-party-a-suspected-threat-to-democracy> (stating that Alternative für Deutschland, a right-wing populist political party in Germany, can be classified as a suspected threat to democracy according to Germany’s Federal Office for the Protection of the Constitution); Verwaltungsgericht [VG] [Administrative Court] VG Köln, Case No. 13K 326/21 (Mar. 8, 2022) BECK-RECHTSPRECHUNG [BeckRS] 3817 [hereinafter VG Köln, Case No. 13K 326/21 at 3817].

⁶⁹See Mariam Lau, Andreas Busch, Cas Mudde, Fatma Aydemir, Matthias Quent & Holger Hestermeyer, *How Should Germany Deal with its Far-right Problem—and Could it Ban the AfD?*, THE GUARDIAN (Feb. 8, 2024), <https://www.theguardian.com/commentisfree/2024/feb/08/germany-ban-far-right-afd-panel>.

⁷⁰See *Everyone Talks About It – We Want To Know! Expert Opinion on the Potential Unconstitutionality of the AfD*, GESELLSCHAFT FÜR FREIHEITSRECHTE <https://freiheitsrechte.org/en/themen/demokratie/afd-gutachten> (last visited May, 13, 2026) (discussing how several initiatives have declared that they will commission a group of legal experts to assess the success of a ban).

⁷¹See *Verfassungsschutz stuft Jens Maier als rechtsextrem ein* [Domestic Intelligence Agency Classifies Jens Maier as Right-Wing Extremist], SPIEGEL POLITIK, (Oct. 5, 2020), <https://www.spiegel.de/politik/deutschland/afd-verfassungsschutz-stuft-jens-maier-als-rechtsextrem-ein-a-adac96c3-c497-459c-b47e-19703cf65b92>. See also Meisner & Kleffner, *supra* note 71, at 211; RECHT GEGEN RECHTS: REPORT 2023, *supra* note 66, at 33.

⁷²See Valentin Lippmann, *Causa Maier – Richteranklage wagen* [The Maier Case – Dare to Indict a Judge], DEUTSCHE RICHTERZEITUNG [DRiZ], 2022, at 154.

⁷³See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Mar. 22, 2025, BGBl. at § 46(1), no. 94 (Ger.) (“At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or a remark made by him in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.”).

⁷⁴See also Thurn, *supra* note 66, at 216; Fischer-Lescano, *supra* note 66.

⁷⁵Markus Sehl & Amelie Kaufmann, *Jens Maier soll in den Ruhestand versetzt werden* [Jens Maier is to be retired from office] (Feb. 22, 2022), <https://www.ito.de/recht/nachrichten/n/jens-maier-sachsen-justiz-versetzung-in-den-ruhestand-richtergesetz-justizministerin-meier>.

⁷⁶See Sächsisches Dienstgericht für Richter [Judges’ Disciplinary Court of Saxony], Case No. 66DG 1/22 (Mar. 24, 2022).

⁷⁷See Judges’ Disciplinary Court of Saxony, Case No. 66DG 1/22.

Section 31(3) DRiG.⁷⁸ It has been ruled by courts that due to the independence of judges guaranteed in Article 97(1) GG, judges should be dismissed only in exceptional cases. When interpreting Article 97(1) GG, strict standards must be applied. The court can only declare a measure permissible if it has been objectively established that the facts of the case show a serious impairment of the judiciary. This is the case if the public's trust in a judge or their conduct of office has been damaged to such an extent that their jurisdiction no longer appears credible, and remaining in the judiciary would diminish or destroy the public's confidence in an independent and unprejudiced judiciary. The judge's intent is immaterial, as Section 31(3) DRiG protects the reputation of the judiciary. This cannot, therefore, be categorized as a disciplinary sanction for conduct violating judicial duties.⁷⁹ In 2022, the court of first instance granted the application for early retirement.⁸⁰ The judge's comments during his time as a MP had damaged the public's trust to such an extent that his jurisprudence no longer appeared credible. If he were to remain in judicial office, the public's trust in an independent and unbiased judiciary would be destroyed or diminished. The court ruled that a judge's duty of loyalty to the constitution—Section 9(2) DRiG—still applies even during their time in the Bundestag, despite their active status being suspended.⁸¹ The judge's integrity must be maintained continuously while they are a member of a legislative body, although specific duties—Section 39 DRiG—are suspended during their time as a MP.⁸² Consequently, Section 31 DRiG remains applicable, as the basic status is not terminated.⁸³ The judge violated his duties with racist, antisemitic, and antidemocratic comments, making it unacceptable for him to continue in a judicial position.⁸⁴ Therefore, the transfer to early retirement was necessary and proportionate.⁸⁵ The Federal Court of Justice (BGH) upheld the decision in October 2023.⁸⁶

Meanwhile, the decision based on Section 31 DRiG has no bearing on Maier's eligibility for pension benefits. This situation has been the subject of criticism on the grounds that, in his capacity as a suspended judge, he has demonstrated his opposition to the democratic state. This results in a situation in which the state is responsible for remunerating a judge who has contravened fundamental principles.⁸⁷ To reduce or prevent this consequence, another disciplinary proceeding is needed, which was initiated but rejected by the Judges' Disciplinary Court of Saxony in November 2024. The court argued that there was insufficient evidence that the judge's comments had intentionally violated the duty to be loyal to the constitution or the duty to behave in a respectful and trustworthy manner, or had intentionally jeopardized public trust in the independence of the judiciary.⁸⁸

⁷⁸See Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl at § 31(3), no. 320 (Ger.) (stating that this statute regulates that judges who have been appointed for life until retirement at age 67 can be dismissed from office if facts unconnected with their judicial office make a measure from section 31 DRiG imperative in order to avoid grave prejudice to the judiciary).

⁷⁹See Sächsisches Dienstgericht für Richter [Judges' Disciplinary Court of Saxony], Case No. 66 DG 2/11 (Dec. 1, 2022), 2023 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT [NVWZ-RR] 543, 544, paras. 34, 35 [hereinafter 2023 NVW-RR 543 (544) for NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT]. See 2023 NVW-RR 543 (545 para. 42a) for NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT (stating that the judgement is final as the decision was upheld by the BGH in December 2023).

⁸⁰Sächsisches Dienstgericht für Richter [Judges' Disciplinary Court of Saxony], Case No. 66DG 1/22 (Mar. 24, 2022).

⁸¹See Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl at § 9(2), no. 320 (Ger.).

⁸²See Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl at § 39, no. 320 (Ger.).

⁸³See Judges' Disciplinary Court of Saxony, Case No. 66DG 2/11 at 545 para. 41–42.

⁸⁴See *id.* at para. 58.

⁸⁵See *id.* at para. 65.

⁸⁶See Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 5, 2023, 2023 BECK-RECHTSPRECHUNG [BeckRS] 30276.

⁸⁷See Andreas Fischer-Lescano, *Sachsen: Rechtsextremer Richter im Unruhestand* [Saxony: Far-Right Judge in Restless Retirement], BLÄTTER (Mar. 2022), <https://www.blaetter.de/ausgabe/2022/maerz/sachsen-rechtsextremer-richter-im-unruhestand>.

⁸⁸See Sächsisches Dienstgericht für Richter [Judges' Disciplinary Court of Saxony], Case No. 66DG 2/23, (Nov. 28, 2024), 2024 BECK-RECHTSPRECHUNG [BeckRS] 40063, para. 73.

II. Participation in Planning a Far-Right Government Coup

The second case involves a former MP for the AfD. Birgit Malsack-Winkemann was able to return to the Berlin judiciary as a judge in 2021, despite an attempt by the Berlin's State Minister of Justice to apply for her early retirement in Spring 2022. During the 2017 election campaign, Malsack-Winkemann advocated for closed borders and emphasized the need to “fight for [our] country.”⁸⁹ As an MP, she displayed a strong tendency towards conspiracy myths and was associated with the far-right wing of the AfD.⁹⁰ Unlike the case of Jens Maier, the Judges' Disciplinary Court of Berlin ruled in October 2022 that there was no serious threat to the judiciary.⁹¹ The court's decision to apply Article 46 GG in the context of Section 31 DRiG has been criticized for its high threshold, which disregarded the authoritarian activities and racist and antisemitic statements of Malsack-Winkemann.⁹² However, in December 2022, Malsack-Winkemann and other suspects were arrested for planning a far-right coup to overthrow the government.⁹³ The suspects belong to the “Citizens of the Reich” (*Reichsbürger*), a group that rejects the legitimate existence of the German state. They believe that the German Reich still exists and that the Federal Republic of Germany is merely a firm.⁹⁴ After new allegations concerning Malsack-Winkemann's involvement in planning the coup, Berlin's Ministry of Justice triggered Sections 74 and 75 of the Judiciary Act of Berlin (RiGBln).⁹⁵ These Sections allow for preliminary decisions regarding the early retirement and removal of a judge from office without entitlement to a retirement pension. The Judges' Disciplinary Court of Berlin upheld the application for early retirement and removal, in contrast to its previous decision. According to Section 38 and Section 9(2) DRiG, a judge who participates in a secret alliance with the aim of carrying out a violent coup d'état has seriously breached their duties and must be removed from office.⁹⁶ In April and May of 2024, criminal proceedings were initiated against 27 suspects accused of involvement in

⁸⁹See Robert Kiesel & Alexander Fröhlich, *Berliner RichterIn, Sportschützin, Esoterik-Fan: Wer ist Birgit Malsack-Winkemann, die militante Umstürzlerin von der AfD?* [Berlin Judge, Competitive Shooter, Esotericism Enthusiast: Who Is Birgit Malsack-Winkemann—the Militant Subversive from the AfD?], TAGESSPIEGEL (Dec. 7, 2022), <https://www.tagesspiegel.de/berlin/berliner-richterIn-sportschutzin-esoterik-fan-wer-ist-birgit-malsack-winkemann-die-militante-umsturzlerin-von-der-afd-8988766.html>.

⁹⁰See *id.*

⁹¹See Richterdienstgericht Berlin [Judges' Disciplinary Court of Berlin], Case No. DG 1/22, (Oct. 13, 2022) JURIS, paras. 30–32.

⁹²See Andreas Fischer-Lescano, *Kein Ruhestand für AfD-RichterIn: Berliner Dienstgericht erschwert Vorgehen gegen Rechtsextreme* [No Retirement for AfD Judge: Berlin Service Court Complicates Action Against Right-Wing Extremists], VERFASSUNGSBLOG (Nov. 22, 2022), <https://verfassungsblog.de/kein-ruhestand-fur-afd-richterIn/>. 2023 NVw-RR 543, 544, para. 39 for NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT; Hermann Butzer, *Kommentierung von Art. 46 GG* [Commentary on Articles 18, 38, 46 of the Basic Law], in BECKOK GRUNDGESETZ-KOMMENTAR, Rn. 4 (Volker Epping & Christian Hillgruber eds., 55th ed. 2023) (discussing how, contrarily, activities and statements made outside the parliaments can be used).

⁹³See Kate Brady, *German Judiciary and the Far-Right*, DEUTSCHE ZWELLE (Dec. 14, 2022), <https://www.dw.com/en/german-judiciary-and-the-far-right/a-64095122>; Auch RichterIn und Ex-AfD-Abgordnete festgenommen [Judge and Former AfD MP Also Arrested], LTO (Dec. 7, 2022), <https://www.lto.de/recht/nachrichten/n/reichsbuerger-razzia-ermittlungen-richterIn-festnahme-afd-abgeordnete-malsack-winkemann/>; Markus Sehl & Leonie Ott, *Jura-Karteikarten und Zielfernrohr für den Staatsstreich* [Law Flashcards and a Rifle Scope for the Coup d'État], LTO (July 31, 2023), <https://www.lto.de/recht/nachrichten/n/bgh-ak4623-untersuchungshaft-reichsbuerger-umsturz-prinz-richterIn-tag-x-razzia/> (discussing how her custodial sentence has been increased); Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. AK 46/23, (July 11, 2023), <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=134166&pos=0&anz=1>.

⁹⁴*Reichsbürger* [Reich Citizen], LANDESZENTRALE FÜR POLITISCHE BILDUNG BADEN-WÜRTTEMBERG [STATE AGENCY FOR CIVIC EDUCATION BADEN-WÜRTTEMBERG], <https://www.lpb-bw.de/reichsbuerger> (last visited May 13, 2026).

⁹⁵See Annelie Kaufmann, *So soll Malsack-Winkemann aus dem Dienst entfernt werden* [How Malsack-Winkemann is to be Removed from Service], LTO (Dec. 8, 2022), <https://www.lto.de/recht/justiz/j/berliner-richterIn-malsack-winkemann-reichsbuerger-umsturz-disziplinarverfahren-eingeleitet-justizsenatorIn/>.

⁹⁶See Richterdienstgericht Berlin [Judges' Disciplinary Court of Berlin], Case No. DG 1/23, (Mar. 15, 2023), <https://www.be.rln.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2023/pressemitteilung.1304795.php>.

the far-right coup.⁹⁷ These proceedings are being heard before three distinct higher regional courts⁹⁸ and are still ongoing.⁹⁹

III. Attendance at AfD Election Parties, Political Expression in Exclusive Online Forums, and Statistical Deviations

To conclude this section, the Article considers the case of a judge at the Administrative Court in Gera, who has made a significantly higher number of unfavorable asylum decisions than the national average.¹⁰⁰ He was also spotted at election parties of the AfD in Thuringia in 2018¹⁰¹ and, more recently, a number of newspapers have published allegations against him, asserting that he had made racist and anti-gay comments in various online forums. While Bengt Fuchs has denied authorship of the posts in question, the leaked forum histories revealed a reference to the author's role as vice-president of an administrative court, and showed that the profile in question was linked to the judge's work email address at the time.¹⁰² Taking a closer look at these events, several aspects must be taken into consideration. Unlike the other two cases, Bengt Fuchs was not a MP, meaning that the obligation contained in Section 39 DRiG applied to him continuously. However, participating in electoral parties, engaging in moderate political activity, and expressing political opinions are not prohibited in general. Freedom of expression constitutes one of the essential foundations of a democratic society, extending to judges and civil servants.¹⁰³ In the absence of a direct reference to a specific legal dispute, the judge is at liberty to engage in discourse or writing on any subject, including legal policy issues, in a manner that is objective and moderate. Such discourse may be presented in a variety of formats, including academic journals, presentations, and conferences.

⁹⁷See Christian Rath, *Kein Schauprozess in der Turnhalle* [No Show Trial in the Gymnasium], LTO (Apr. 19, 2024), <https://www.lto.de/recht/hintergruende/h/olg-stuttgart-stammheim-reichsbuerger-prozess-prinz-reuss-militaerischer-arm/>.

⁹⁸See *id.*

⁹⁹See OLG Frankfurt Terminvorschau des Oberlandesgerichts Frankfurt am Main [OLG Frankfurt: Schedule Preview of the Higher Regional Court of Frankfurt am Main], ORDENTLICHE GERICHTSBARKEIT HESSEN, <https://ordentliche-gerichtsbarkeit.hessen.de/oberlandesgericht-frankfurt-am-main/terminvorschau> (May, 13, 2026) (providing an overview of the trial dates in 2025).

¹⁰⁰See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 20/5709, <https://dserv.bundestag.de/btd/20/057/2005709.pdf> (Ger.); *Gefahr von rechten Richtern für Geflüchtete* [The Danger of Right-Wing Judges for Refugees], PRO ASYL (July 12, 2024), <https://www.proasyl.de/news/gefahr-von-rechten-richtern-fuer-gefluechtete/>.

¹⁰¹See MDR INVESTIGATIV, David Straub, *Schlechte Chancen für Flüchtlinge: Richter in Gera entscheidet besonders streng* [Slim Chances for Refugees: Judge in Gera Adopts an Especially Strict Approach in his Rulings] (YouTube, Feb. 2, 2024), <https://www.youtube.com/watch?v=BrCwdkftlaE>.

¹⁰²See David Straub, *Geraer Richter nutzte offenbar Dienst-Mailadresse für rassistische Kommentare* [Judge in Gera Apparently Used Official Email Address for Racist Comments], MDR (July 22, 2024), <https://www.mdr.de/nachrichten/thueringen/ost-thueringen/gera/richter-rassismus-vorwurf-disziplinarverfahren-email-100.html>. See also Andreas Speit, *Zweifel an Unabhängigkeit wachsen* [Doubts about Independence are Growing], TAZ (July 22, 2024), <https://taz.de/Rassismusvorwurf-gegen-Richter/16024806/>; Christian Rath, *„Derlei vulgäre Äußerungen habe ich nicht getan“* [“I did not make vulgar remarks.”], LTO (June 28, 2024), <https://www.lto.de/recht/hintergruende/h/bengt-vorwuefe-antifa-fallschirm>; James Rothwell, *Asylum Judge Accused of Racist and Homophobic Comments*, THE TELEGRAPH (July 28, 2024), <https://www.telegraph.co.uk/world-news/2024/07/23/german-asylum-judge-accused-racist-homophobic-comments/>; Ann-Katrin Müller, Maik Baumgärtner & Roman Höfner, *Wie eine E-Mail-Adresse einen AfD-nahen Richter in Erklärungsnot bringt* [How an Email Address Puts an AfD-Affiliated Judge on the Spot], SPIEGEL POLITIK (July 22, 2024), <https://www.spiegel.de/politik/deutschland/extreme-rechte-wie-eine-e-mail-adresse-einen-afd-nahen-richter-in-erklaerungsnot-bringt-a-094a1160-001f-4faf-bd9e-b3b31a1627e8>; AUTONOME ANTIFA FREIBURG, *Der Tradition keine Zukunft* [No Future for Tradition] (June 28, 2024), <https://autonome-antifa.org/IMG/pdf/24-06-tramizu.pdf> (outlining that Antifa is a political movement in Germany composed of multiple left, autonomous groups and individuals who describe themselves as anti-fascist).

¹⁰³See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 1BvR 233/81, 1BvR 341/81, 344–45, (May 14, 1985), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1985/05/rs19850514_1bvr023381en.html; Sachs Grundgesetz [GG], § 5, Rn. 22, 41, https://beck-online.beck.de/vp/ath=bibdata%2Fkomm%2FSachsKoGG_8%2FGG%2Fcont%2FSachsKoGG.GG.a5.htm (Ger.); CONSULT. COUNCIL EUR. JUDGES, *On Freedom of Expression of Judges*, 23rd Sess., Opinion No. 25 (2022).

Moreover, the judge may also make a reference to their role as a judge.¹⁰⁴ Nonetheless, judges are subject to a legal duty of restraint according to Section 39 DRiG that aims to preserve judicial independence, impartiality, and public confidence.¹⁰⁵ This applies to behavior within the judicial office as well as outside it,¹⁰⁶ although stricter standards are applied in the case of disciplinary measures directed against a judge's behavior during the judicial decision-making process.¹⁰⁷ In the context of social media, the distinction between the private and public spheres is becoming increasingly blurred. The decision of whether or not to make their office public on social media is at the discretion of the judge. Nevertheless, should judges choose to make their office public, they are bound by the specific duties of moderation outlined in Section 39 DRiG for their entire online presence.¹⁰⁸

The alleged activities of Fuchs fall into several different spheres. A documentary journalist was able to identify an unusual fact concerning Fuchs's judicial office from a response to a parliamentary question asked by DIE LINKE, the left-wing opposition party. The government response indicated that, statistically, asylum seekers have a significantly lower chance of winning their case at this particular administrative court when compared to the national average.¹⁰⁹ It is possible that judges' sentencing practices may diverge from the national average, given that this is an integral aspect of the principle of judicial independence.¹¹⁰ According to court documents, specific judges have been identified as being responsible for the significantly lower success rates at this court.¹¹¹ However, a mere statistical deviation alone does not provide a sufficient basis for the imposition of severe restrictions on judicial independence. When considering the individual's activities outside of the courtroom, the case acquires an additional dimension. While the judge's attendance at an AfD election party may be a cause for concern,¹¹² particularly in Thuringia,¹¹³ it too is insufficient to justify disciplinary measures on its own. It is essential that society strikes a balance between ensuring judges are democratically engaged, while also maintaining their independence in order to prevent unequal treatment. The activities ascribed to Fuchs on multiple online platforms may indicate that the boundaries of restraint set out in Section 39 DRiG have been crossed. In July 2024, the president of the court initiated disciplinary proceedings on the basis of a potential violation of Section 29 DRiG, after the court presidium had already assigned him to

¹⁰⁴See Sächsisches Dienstgericht für Richter [Judges' Disciplinary Court of Saxony], Case No. 66 DG 1/19, para. 53, (Oct. 20, 2020).

¹⁰⁵See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Aug. 30, 1983, 1983 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 47, p. 2691; SCHMIDT-RÄNTSCH, *supra* note 21, § 39, Rn. 6–12, Rn. 27–35; CONSULT. COUNCIL EUR. JUDGES, *Freedom of Expression of Judges and the Judicial Duty of Independence*, 23rd plen. mtg., Opinion No. 25 (2022) (showing the compilation of responses of the CCJE members to the questionnaire for the preparation of Opinion No. 25).

¹⁰⁶See JOHANN-FRIEDRICH STAATS, DEUTSCHES RICHTERGESETZ [GERMAN JUDICIARY ACT] § 39 Rn. 6–7 (1st ed. 2012).

¹⁰⁷See Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 27, 2020, 2020 BECKRS 32629, paras. 25–26.

¹⁰⁸See Andreas Mosbacher, *Facebook-"Sheriff" und Online-Kolumnist: Moderne Richter* [Facebook "Sheriff" and Online Columnist: Modern Judges], LTO (July 25, 2016), <https://www.lto.de/recht/hintergruende/h/richter-moderne-medien-wuerde-amt-zurueckhaltung-und-maessigungsgebot>.

¹⁰⁹See MDR INVESTIGATIV, *supra* note 101.

¹¹⁰See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 20/5709, <https://dserv.bundestag.de/btd/20/057/2005709.pdf> (Ger.).

¹¹¹See MDR INVESTIGATIV, *supra* note 101.

¹¹²See WAGNER, *supra* note 67, at 62–70.

¹¹³See Landgericht Halle [LG] [District Court], Press Release 005/2024 (Feb. 9, 2024), https://lg-hal.sachsen-anhalt.de/fileadmin/tsa_rssinclude/landgericht-halle_09_02_2024_pressemitteilung_lg-hal-hauptverfahren-gegen-bjoern-u-hoecke-vor-dem-landgericht-halle.pdf; Verwaltungsgericht [VG] [Administrative Court] Meiningen, Case No. 2 E 1194/19, (Sep. 26, 2019), <https://openjur.de/u/2180513.html>; James Angelos, *Germany's Far-right "Firewall" Cracks*, POLITICO (Oct. 4, 2023), <https://www.politico.eu/article/germany-firewall-afd-elections-thuringia/>; Germany: AfD a Growing Threat to Democracy, Says Minister, DEUTSCHE WELLE (Dec. 28, 2023), <https://www.dw.com/en/germany-afd-a-growing-threat-to-democracy-says-minister/a-67839373>; Marcus Bensmann, Justus von Daniels, Anette Dowideit, Jean Peters & Gabriela Keller, *Secret Plan Against Germany*, CORRECTIV (Jan. 15, 2024), <https://correctiv.org/en/top-stories/2024/01/15/secret-plan-against-germany/> (describing how parts of the AfD in Thuringia are classified as right-wing extremist; its leader Björn Höcke has criticized Holocaust remembrance, warned of "population replacement," and, following a secret neo-Nazi meeting in November 2023, AfD politicians in Thuringia publicly called for "re-immigration" and the deportation of "foreigners" and "non-assimilated" German citizens).

another chamber, where he would no longer be responsible for asylum cases.¹¹⁴ In December 2024 it was confirmed that Fuchs was no longer working at the administrative court but had been seconded to the Thuringian Ministry of Justice.¹¹⁵

The combination of these three elements—statistical deviation, involvement with the AfD in Thuringia, and the alleged statements on social media—could, collectively, provide the evidence required for disciplinary proceedings. This case represents a more complex scenario than the other two and may prove instructive for future challenges in which statements and potential infringements of judicial impartiality may be less overt, extreme, or verifiable. The three cases presented illustrate the need for a procedure characterized by complexity and accuracy in order to ensure the independence of the judicial system.

D. How to Deal with Radicalized Judges

I. Legal Status Quo

The three cases we have presented show the range of ways in which judges can be involved with right-wing parties. We shall start this discussion with a focus on the first two cases, before turning to the last case. When Maier and Malsack-Winkemann returned to their judicial positions, it immediately sparked a public debate that focused on identifying effective legal ways to deal with the return of such known authoritarian right-wing judges. Four approaches dominated the public debate: (1) reinstatement and a parallel application for transfer/retirement in the interests of the administration of justice, Section 31 DRiG; (2) disciplinary measures, Section 71 DRiG in conjunction with the Civil Service Status Act (*BeamStG*); (3) an impeachment procedure, Article 98(2) GG; or (4) expansion and/or reinstatement of the “routine inquiry” (*Regelanfrage*) to the Offices for the Protection of the Constitution.

- (1) Both the Berlin and Sachsen state ministries have chosen to adopt the approach outlined in Section 31 no. 2 and no. 3 DRiG. Although this approach has rarely been challenged in court, there have been at least two published cases that have resulted in decisions by higher courts.¹¹⁶ While Section 31 DRiG can lead to early retirement, the entitlement to a retirement pension still remains.¹¹⁷

¹¹⁴See Christian Rath, *Disziplinarverfahren gegen Richter Bengt Fuchs* [Disciplinary Proceedings Against Judge Bengt Fuchs], LTO (July 10, 2024), <https://www.lto.de/recht/hintergruende/h/bengt-fuchs-disziplinarverfahren-verwaltungsgericht-gera/>; *Richter Bengt Fuchs darf keine Asylverfahren mehr betreuen* [Judge Bengt Fuchs is No Longer Permitted to Handle Asylum Cases], LTO (July 8, 2024), <https://www.lto.de/recht/nachrichten/n/bengt-fuchs-richter-rassismus-vorwurf-ersetzung/>; Rath, *supra* note 102.

¹¹⁵See David Straub, *Nach Rassismuvorwürfen: Umstrittener Asylrichter wird Referatschef im Ministerium* [Following Racism Allegations: Controversial Asylum Judge Becomes Head of Division at Ministry], MDR (Dec. 19, 2024), <https://www.mdr.de/nachrichten/thueringen/ost-thueringen/gera/asylrichter-rassismuvorwurf-neuer-job-referat-ministerium-100.html>; Andreas Speit, *Vom Geschassten zum Boss* [From the Ousted to the Boss], TAZ (Jan. 7, 2025), <https://taz.de/Rechter-Richter-Bengt-Fuchs/16060744/>; *Kein Strafprozess gegen Richter Bengt Fuchs* [No Criminal Proceedings Against Judge Bengt Fuchs], LTO (July 25, 2025), <https://www.lto.de/recht/nachrichten/n/3kds122js2502324-lg-gera-bengt-fuchs-volksverhetzung-hauptverfahren-eroeffnung-abgelehnt> (providing that the case will proceed to court; the Gera Regional Court does not consider the judge’s Facebook comment to be a punishable offence, and the Gera public prosecutor’s office has already lodged an appeal with the Higher Regional Court).

¹¹⁶See Bundesgerichtshof [BGH] [Federal Court of Justice], May 19, 1995, 1995 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2495 (concerning a judge who was in close contact and friendship with people being prosecuted for engagement in human trafficking and the “red light district”); Dienstgerichtshof Hessen [Judges’ Higher Disciplinary Court Hesse], Case No. DGH 3/08, (Mar. 30, 2009), <https://openjur.de/u/302014.html> (concerning a judge who was convicted for obtaining and possessing images that depict child pornography); Klaus Gärditz, *Ist das die Lösung für den Fall Maier?* [Is this the Solution to the Maier Case?], LTO (Feb. 13, 2023), <https://www.lto.de/recht/hintergruende/h/jens-maier-rechtsextremismus-grditz-richtergesetz-versetzen-ruhestand-grditz/>.

¹¹⁷See generally JONATHAN SCHRAMM, ANSEHEN UND ABSETZEN: DIE VERSETZUNG EINER RICHTER:IN IN DEN RUHESTAND NACH § 31 DRiG [REPUTATION AND REMOVAL: THE PLACEMENT OF A JUDGE INTO RETIREMENT UNDER SECTION 31 OF THE GERMAN JUDICIARY ACT] (2026).

- (2) The second alternative involves disciplinary measures. The problem, however, is that the actual office of judge and the specific duties that go with it are suspended during the individual's time as a MP. The legal community is still debating whether the duty of loyalty to the constitution—Article 33(5) GG, Section 9 no. 2 DRiG—should be treated as one of the explicitly mentioned exempted duties in Article 5 AbgG.¹¹⁸ If it were to be treated as one of the exempted duties in Article 5 of the AbgG, the duty of loyalty would undoubtedly continue to apply during their time as an MP period of office. As a consequence, disciplinary measures relating to a failure to comply with the duty of loyalty could also be taken, even if the individual was not actively working as a judge at the time.
- (3) An impeachment procedure according to Article 98(2) GG, as a third possibility, has not yet been attempted.¹¹⁹ The procedure was initially included in the GG after 1945, and is intended to combine the political responsibility of judges to support democracy with the idea of judicial independence.¹²⁰ The prerequisite for carrying out an impeachment is the violation of constitutional principles or of the constitutional order of a state (*Bundesland*), as prescribed by Article 98(2) GG. Within German academia, it is recognized that this entails the free democratic basic order within the meaning of Article 21(2) GG.¹²¹ There is no requirement for a disciplinary offense to have been committed.¹²² The threshold for impeachment is, nevertheless, extremely high. A federal judge may be impeached by a motion of the Bundestag before the BVerfG on an allegation that she or he has violated the federal constitution or the constitution of a federal state. The BVerfG may then decide, with decisions requiring a two-thirds majority.¹²³ In practice, the impeachment procedure has been discussed publicly only three times: once in 1995¹²⁴ and again in 2021/22, with regard to Jens Maier and Andreas Höfer, a judge at a German administrative court.¹²⁵ In all three cases, however, the procedure was not applied.
- (4) The ongoing debate includes calls for tougher action against right-wing judges. It also includes discussions on the reintroduction of the *Regelanfrage* to the Offices for the Protection of the Constitution—a background check carried out on applicants to public service posts to check their loyalty to the constitution.¹²⁶ In recent years, some states have implemented this background check.¹²⁷ It is a controversial tool because in the 1970s, civil servants with left-wing or progressive views faced challenges due to a similar provision included in the Anti-Radical Decree (*Radikalerlass*). This decree, issued during a time of heightened fear of communism, allowed for a systematic review of applicants' political

¹¹⁸See Fischer-Lescano, *supra* note 66; Gärditz, *supra* note 66. See, e.g., LEPPEK, *supra* note 20, at § 5 Rn. 16 (exemplifying cautious approval). *Contra* Wittkowski, *supra* note 66.

¹¹⁹See Gerster, *supra* note 66, at 181.

¹²⁰See Maier, *supra* note 66, at 37; Voßkuhle, *supra* note 8, at 1844–45. See also Horst Dreier, Helmuth Schulze-Fielitz, in GRUNDGESETZ-KOMMENTAR art. 98, Rn. 5 (3rd. ed., 2018).

¹²¹See GRUNDGESETZ-KOMMENTAR art. 98, Rn. 7 (Peter Huber & Andreas Voßkuhle eds., 8th ed. 2024).

¹²²See Gärditz, *supra* note 66.

¹²³See Martina Künnecke, *The Accountability and Independence of Judges: German Perspectives*, in INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY 217, 228 (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2006).

¹²⁴See Rudolf Wassermann, *Richteranklage im Fall Orlet? [Impeachment of a Judge in the Orlet Case?]*, 48 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 303 (1995).

¹²⁵See *Beschlussempfehlung [Recommendation for a Resolution]*, Hessischer Landtag: Drucksachen[LT] 20/8103, <https://starweb.hessen.de/cache/DRS/20/3/08103.pdf> (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. BvR 890/20, (Jul. 1, 2021), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/07/rk20210701_2bvr089020en.html.

¹²⁶Markus Kenntner, *Verfassungsfeinde im öffentlichen Dienst? [Enemies of the Constitution in the Civil Service?]* NEUE JURISTISCHE WOCHENSCHRIFT [NVwZ] 9 (2025).

¹²⁷See Christine Dieterle & Tobias Kühn, *Wiedereinführung der Regelanfrage für angehende Richter in Bayern [Reintroduction of the Standard Inquiry for Prospective Judges in Bavaria]*, 7 ZEITSCHRIFT FÜR DATENSCHUTZ [ZD] 69 (2017).

views by the Office for the Protection of the Constitution.¹²⁸ The use of the *Regelanfrage* as an executive tool with a broad, baseless, general approach must be viewed critically in light of the principle of proportionality.¹²⁹ Additionally, this approach focuses solely on initial recruitment and disregards the radicalization processes that can occur after recruitment.¹³⁰ Furthermore, it is hard for parliament or the judiciary to control Offices for the Protection of the Constitution and, in view of the independence of the judiciary and the separation of powers, having a secret service as part of the executive branch to monitor the hiring practices of the judiciary is a highly questionable practice. Several incidents raise concerns that these offices tend to overlook right-wing structures, despite high numbers of right-wing motivated criminal and violent offences.¹³¹ This is accompanied by a German debate culture that often operates within the framework of the “horseshoe theory,” which claims that there is no clear distinction between the far left and the far right, as they share similarities and also assumes that the “middle ground” does not contain any authoritarian, nationalistic, or right-wing ideas.¹³²

II. Judicial Independence and Public Trust

Despite these very concrete and practical legal questions, the cases sparked a more general discussion on the central principle of judicial independence. Here, the two-fold characteristic of judicial independence became apparent: the independence of the individual judge who might be confronted with disciplinary measures and the appearance of independence of the German judiciary, for which each judge is also individually accountable.¹³³ The former can be violated if internal or external measures are taken against a judge. The latter can be violated if, for example, authoritarian right-wing judges who actively support inhuman, racist, and anti-democratic views remain in active office.

This balance can be seen in the context of the cases and the standards applied: Section 31 of the DRiG provides that a transfer or retirement may only be made if such a measure is imperative in order to avoid serious prejudice to the administration of justice.¹³⁴ According to previous case law, this is to be assumed, *inter alia*, if public confidence in the judge or in their conduct in office has been damaged. In this case, the damage must be so severe that their jurisdiction no longer appears credible and remaining on the bench would diminish or destroy public confidence in an independent and impartial judiciary.¹³⁵ The retirement or transfer measures provided for in Section 31 DRiG are an exception to the principle of judicial independence.¹³⁶ If such a measure is

¹²⁸See generally Kenntner, *supra* note 126.

¹²⁹See Dieterle & Kühn, *supra* note 127, at 70, 74. See also Dirk Adams, *Regelanfrage beim Verfassungsschutz* [Routine Inquiry with the Office for the Protection of the Constitution], 98 DEUTSCHE RICHTERZEITUNG [DRiZ] 429 (2020).

¹³⁰See Thurn, *supra* note 66, at 216.

¹³¹See generally Voßkuhle, *supra* note 8; IMKE SCHMINCKE & JASMIN SIRI, NSU-TERROR ERMITTLUNGEN AM RECHTEN ABGRUND. EREIGNIS, KONTEXTE, DISKURSE [NSU TERROR: INVESTIGATIONS AT THE BRINK OF THE RIGHT-WING ABYSS—EVENTS, CONTEXTS, DISCOURSES] (2013); DEN NSU-KOMPLEX ANALYSIEREN (Juliane Karakayali, Çagri Kahveci, Doris Liebscher, Carl Melchers eds., 2017); MEISNER & KLEFFNER, *supra* note 67.

¹³²See Thurn, *supra* note 66, at 219–20; MAXIMILIAN FUHRMANN, ANTIEXTREMISMUS UND WEHRHAFTES DEMOKRATIE [ANTI-EXTREMISM AND A RESILIENT DEMOCRACY] 250–55 (2018).

¹³³See, e.g., Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT] 03/516, <https://dserver.bundestag.de/btd/03/005/0300516.pdf> (Ger.).

¹³⁴See Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl. at § 31, no. 320 (Ger.).

¹³⁵See 2023 NVw-RR 543 (544 paras. 34, 44) for NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT (“Since retirement . . . is not a sanction for statements or conduct for the parliamentary past, but to protect the personal independence of the judge in the present and in the future as well as to protect confidence in the independence of the judiciary.”); Bundesgerichtshof [BGH] [Federal Court of Justice] 1995 Neue Juristische Wochenschrift [NJW] 1495 (Ger.).

¹³⁶See STAATS, *supra* note 106, § 31 Rn. 1; Bundesgerichtshof [BGH] [Federal Court of Justice] 1995 Neue Juristische Wochenschrift [NJW] 1495 (Ger.).

taken, the individual independence of the judges enshrined in Article 97(2) GG could be violated. Nevertheless, previous court decisions have declared that Section 31 DRiG does not violate the legislative discretion provided for in Article 97(2) GG, does not affect Article 97(2) GG, and is constitutional if applied proportionately.¹³⁷

These complex structures demonstrate, above all, the balance which must be struck when deciding cases touching upon the independence of judges. The provisions and their regulatory structure reinforce a cautious approach in cases where the independence of the judiciary is restricted. At the same time, they call for increased attention to the independence of the German judiciary as a whole, a critical view of the existing and supposedly well-functioning system, its underlying self-image, and a balanced rather than a generally tougher approach to authoritarian right-wing judges.¹³⁸

Looking at the independence of the judiciary in its broader, structural context, case law has highlighted a close link between independence and public confidence or acceptance. The BVerfG has stated: “the persuasiveness of judicial decisions is not only based on the legal quality of their reasons. It is also based to a large extent on the trust placed in judges by the public. This trust is mainly based on the external and internal independence of the judge, the judges’ neutrality and distance, which must remain perceptible in current political disputes. If expressions of opinion by judges on political issues are likely to shake this trust, they contradict the role of the judge as enshrined in the GG.”¹³⁹

During the debate on the first two cases referred to above, several authors stressed the aspect of public confidence, which could be undermined if swift action was not taken.¹⁴⁰ The independence and impartiality of judges—according to Rainald Gerster—are indispensable prerequisites for their integrity and for public acceptance of their decisions.¹⁴¹ Trust and acceptance thus appear as relevant concepts. Despite, or perhaps because of, the abundance of academic literature,¹⁴² these are broad and vague concepts that appear in case law without prior explanation and without having been defined in legal standards.¹⁴³ In essence, they leave us with open questions: What do they mean in concrete terms and in a specific legal context? Is judicial independence, as the case law and others suggest, a condition for acceptance and trust?¹⁴⁴ What other factors and conditions

¹³⁷See 2023 NVw-RR 543 (551 paras. 71–72) for NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT; DREIER, *supra* note 120, art. 97 Rn. 58.

¹³⁸See Thurn, *supra* note 66, at 219–20 (proposing more balanced approaches). See, e.g., Voßkuhle, *supra* note 8, at 1846.

¹³⁹See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 6, 1988, 1989 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 93, at 93.

¹⁴⁰See Fischer-Lescano, *supra* note 87, at 18; Thurn, *supra* note 66, at 218; Möllers, *supra* note 66, at 218; RECHT GEGEN RECHTS: REPORT 2023, *supra* note 66, at 39.

¹⁴¹See Gerster, *supra* note 66, at 182.

¹⁴²See generally KATRIN ROTH, DIE AKZEPTANZ DES STROMNETZAUSBAUS [THE ACCEPTANCE OF POWER GRID EXPANSION] 30–37 (2020).

¹⁴³See André Kieserling, *Werke und Werkgruppen* [Work and Work Groups], in LUHMANN HANDBUCH 129, 145–46 (Oliver Jahrhaus, Armin Nassehu, Mario Grizelj, Irmhild Saake, Christian Krichmeier & Julian Müller eds., 2012); Marion Müller, *Keine Legitimation durch Familiengerichtsverfahren? Akzeptanzprobleme gerichtlicher Entscheidungen und Konstruktion geschlechtsdifferenter Elternschaft* [No Legitimation Through Family Court Proceedings? Problems of Acceptance Regarding Judicial Decisions and the Construction of Gender-Differentiated Parenthood], 22 SOZIALE SYSTEME 21, 26 (2017) (arguing for a formalized concept of acceptance, according to which a person—irrespective of motive—would have to take over the decision as a premise for his or her own behavior and restructure his or her expectations accordingly); NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN [LEGITIMATION THROUGH PROCEDURE] 33 (1969).

¹⁴⁴See generally U.N. DEPT. OF ECON. & SOC. AFFS., PERI BLIND, BUILDING TRUST IN GOVERNMENT IN THE TWENTY-FIRST CENTURY: REVIEW OF LITERATURE AND EMERGING ISSUES, 19, 7TH GLOBAL FORUM ON REINVENTING GOVERNMENT (2007); Axel Strohbusch, *Akzeptanz durch Verfahren* [Acceptance through Procedure], 64 DEUTSCHE VERWALTUNGS-PRAXIS [DVP] 271, 273 (2013) (discussing the relevance of neutrality). See also EUR. NETWORK OF COUNCILS FOR THE JUD., ENCJ REPORT ON INDEPENDENCE, ACCOUNTABILITY AND QUALITY OF THE JUDICIARY 2022–2023 (June 9, 2023), <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%20Ljubljana/ENCJ%20Report%20Indicators%20IAQ%202022-2023%20May%202023%20with%20links.pdf> (Independence and accountability go together: accountability is a

of trust and acceptance can be identified and how do they relate to judicial independence? Public trust and judicial independence play an important role in political science as well.¹⁴⁵ This raises the question of how should the interdisciplinary aspect of the two concepts be understood and integrated? How can trust and acceptability be measured in qualitative and possibly quantitative terms in order to address conflicts in the balanced approach mentioned above?

Since 2010, the Allensbach Institute for Public Opinion Research has conducted the ROLAND Rechtsreport, an annual survey that seeks to measure, amongst other things, trust in public institutions, including the judiciary.¹⁴⁶ The survey shows a consistently high level of trust in the law and the courts: 70% of respondents have a fair amount of trust in the law and 69% trust the courts.¹⁴⁷ A similarly high level of trust was found in a survey conducted by the Friedrich Ebert Foundation on behalf of the BVerfG.¹⁴⁸ Although the surveys provide a broad and general overview, they do not reveal in detail what the survey and its authors themselves or the respondents actually mean by the term. In order to better understand the concepts of trust and acceptance and to refine the relationship between public trust and acceptance and the principle of judicial independence, further research could be beneficial.¹⁴⁹

E. What to Do?

The two 2022 case studies resulted in a wider, public debate on how to deal with authoritarian right-wing MPs who seek to return to their former position as judges. The third case presented was the subject of a public debate, although it has not yet resulted in the same legal consequences. The immediate legal debate and administrative actions for the two former AfD MPs focused mainly on how the existing provisions could be applied and which legal questions remained unanswered. Following the initial reactions, the debate proceeded to encompass more academic and practical discussions on the development of a “culture of independence”—whereby “the term aims at describing the informal rules on acceptable behaviour and respect of other powers of state towards the judiciary”¹⁵⁰—and critical reflexivity within the judiciary.¹⁵¹ The importance of informal structures and values have already been discussed in relation to the democratization and recent movements of de-democratization of middle European countries such as Slovakia and

prerequisite for independence. A judiciary that does not want to be accountable to society and has no eye for societal needs will not gain the trust of society and will endanger its independence in the short or long run. Accountability without independence reduces the judiciary to a government agency.)

¹⁴⁵See Katarina Šipulová, *The Light and the Dark Side of Judicial Resistance*, 47 L. & POL’Y 1, 16 (2024) (discussing the importance of public trust especially in judiciaries in transition); Šipulová & Kosař, *supra* note 61, at 61.

¹⁴⁶See ROLAND RECHTSSCHUTZ, ÜBERLASTETE GERICHE UND SCHWACHER GESELLSCHAFTLICHER ZUSAMMENHALT [OVERBURDENED COURTS AND WEAK SOCIAL COHESION] (2023), <https://www.roland-rechtsschutz.de/unternehmen/prese/roland-rechtsreport-2023.html>.

¹⁴⁷See *id.* (“For each item on this list, could you please tell me how much trust you have in each: whether a great deal of trust, quite a lot, a little or no trust at all?”).

¹⁴⁸See Frank Decker, Sandra Fischer & Anne Küppers, *Demokratievertrauen in Krisenzeiten: wie blicken die Menschen in Deutschland auf Politik, Institutionen und Gesellschaft?* [Trust in Democracy in Times of Crisis: How Do People in Germany View Politics, Institutions, and Society?], BONN: FRIEDRICH-EBERT STIFTUNG (2023), <https://library.fes.de/pdf-files/pbud/20287-20230505.pdf>; see also EUROPEAN COMMISSION, EUROBAROMETER, PERCEIVED INDEPENDENCE OF THE NATIONAL JUSTICE SYSTEMS IN THE EU AMONG THE GENERAL PUBLIC (June 2023), <https://europa.eu/eurobarometer/surveys/detail/2667>.

¹⁴⁹See generally Joshua Kleinfeld & Hadar Dancing-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 815 (2022).

¹⁵⁰See Eirik Holmøyvik & Anne Sanders, *A Stress Test for Europe’s Judiciaries*, in EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 290, 306 (Ernst Hirsch Ballin Gerhard van der Schyff & Maarten Stremler eds., 2020). See also Eirik Holmøyvik & Anne Sanders, *A Stress Test for Europe’s Judiciaries*, VERFASSUNGSBLOG (Aug. 23, 2017), <https://verfassuingsblog.de/a-stress-test-for-europes-judiciaries/>.

¹⁵¹See Thurn, *supra* note 66, at 219–20; Voßkuhle, *supra* note 8, at 1846.

Poland. Informal structures may strengthen but also weaken the rule of law.¹⁵² In this context, it was argued, that judicial resistance has no normative value—acts of judicial defiance are also possible of authoritarian judges against democratic institutions.¹⁵³ A shift towards a more comprehensive understanding of potential authoritarian right-wing judges is needed, encompassing structural elements instead of targeting merely so-called isolated cases. This entails a critical examination of instruments and approaches, contextualized within historical events. Disciplinary procedures against judges are permissible only under stringent safeguards, which have been even increased by international courts during the rule of law crisis of the last decade.¹⁵⁴ Moreover, it is appropriate to consider that instruments implemented now may be employed in reverse. This is particularly relevant in the context of evolving political landscapes and authoritarian expansion.¹⁵⁵ Thus, each newly introduced regulation should be subjected to a “stress-test.”¹⁵⁶ Such a test could consist of three stages. At stage one the “current playbook for subverting judicial independence” should be examined, taking recent experiences in which forms and ways judicial independence has been attacked in different countries.¹⁵⁷ Stage two and three should include scenarios that analyze the “techniques and approaches employed for subverting judicial independence.”¹⁵⁸ An example of needed critical historical contextualization of instruments and approaches within the German context refers to the fourth approach, displayed above under Section D.I., calling for tougher actions against right-wing judges through the inclusion of the “routine inquiry”. The basis of this “routine inquiry” was the *Radikalenerlass* which targeted specific groups and had historical consequences.¹⁵⁹ Continuing the historical reflection on the *Radikalenerlass*, the basic duty of loyalty to the constitution and the duty to stand up for the free democratic basic order as elements of “militant democracy” should be examined more closely and in greater detail.¹⁶⁰ A first legal definition was discussed and implemented in the 1950s during the introduction of the Act on the Federal Constitutional Court (BVerfGG) and the reforms of the Penal Code (StGB) and its “political criminal law” (*politisches Strafrecht*).¹⁶¹ The BVerfG subsequently adopted this rationale in its decision to ban the Socialist Reich Party (SRP), a

¹⁵²See generally Katarína Šipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24 GERMAN L.J. 1577 (2023); Katarína Šipulová & Samuel Spáč, *(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia*, 24 GERMAN L.J. 1412 (2023).

¹⁵³See Šipulová, *supra* note 145, at 18.

¹⁵⁴See Katarína Šipulová & David Kosař, *Court Un-Packing: A Preliminary Inquiry*, in TRANSITION 2.0 RE-ESTABLISHING CONSTITUTIONAL DEMOCRACY IN EU MEMBERS STATES 323, 359 (Adam Bodnar, Michal Bobek, Armin von Bogdandy & Pál Sonnevend eds., 2023).

¹⁵⁵See Sarah Schulz, *Verfassungstreue in der thüringischen Kommunalpolitik: Zur Einordnung des Falles Sesselmann* [Constitutional Loyalty in Thuringian Local Politics: Contextualizing the Sesselmann Case], VERFASSUNGSBLOG (July 14, 2023), <https://verfassungsblog.de/verfassungstreue-in-der-thueringischen-kommunalpolitik> (discussing how an AfD MP debated the definition of “enemies of the constitution” during a meeting of the committee on internal affairs: “Maybe Björn Höcke [leader of Alternative for Germany in Thuringia and a right-wing politician] will be the Minister of the Interior in Thuringia next year and thus the employer of the Office for the Protection of the Constitution. Then we’ll see.”); Wortprotokoll [Berbatim Record], Deutscher Bundestag: Drucksachen[BT] 20/6703, <https://www.bundestag.de/resource/blob/958094/13ec2210dd33d5a3a6647b95a5f01a8d/Protokoll-12-06-2023-14-00-Uhr-data.pdf> (Ger.).

¹⁵⁶See, e.g., Holmøyvik & Sanders *supra* note 150, at 290 (exemplifying a stress test for the judiciary).

¹⁵⁷*Id.* at 174.

¹⁵⁸See, e.g., *id.* (providing an example of such tests, which can be seen in the projects of the Verfassungsblog).

¹⁵⁹See generally Dominik Rigoll, *The Anti-Radical Decree at 50*, ROSA LUXEMBURG STIFTUNG (Jan. 27, 2022), <https://www.rosalux.de/en/news/id/45822/the-anti-radical-decree-at-50>; MANFRED GÖRTEMAKER & CHRISTOPH SAFFERLING, ROSENBERG FILES – THE FEDERAL MINISTRY OF JUSTICE AND THE NAZI ERA (2016), https://www.bmjv.de/SharedDocs/Publikationen/DE/Broschueren/Akte_Rosenburg_EN_Geschichtsband_1.pdf?__blob=publicationFile&v=7 (summarizing that right-wing members of the Nazi Party often continued to work for state institutions in West Germany).

¹⁶⁰See generally Sarah Schulz, *Nazis raus – aus dem öffentlichen Dienst: Mit geheimdienstlichen Regelabfragen gegen Rechte in Behörden?* [Nazis Out—of the Civil Service: Using Routine Intelligence Agency Checks Against Right-Wingers in Government Agencies?], CILIP (Jan. 12, 2021), https://www.cilip.de/2021/01/12/nazis-raus-aus-dem-oeffentlichen-dienst-mit-geheimdienstlichen-regelabfragen-gegen-rechte-in-behoerden/#_ftnref2.

¹⁶¹See SCHULZ, *supra* note 43, at 156–95.

West German political party with an openly neo-Nazi orientation.¹⁶² This was a period characterized by the East-West conflict, clear opposition to the left and communism, and the repression of National Socialism and its institutional remnants.¹⁶³ Notwithstanding these structural vestiges, the BVerfG's 2017 ruling represented a further evolution of the principle of the free democratic basic order. The ruling underscored that the free democratic basic order is primarily anchored in the dignity of the human being, Article 1(1) GG.¹⁶⁴ The guarantee of human dignity encompasses, in particular, the safeguarding of personal individuality, identity, integrity, and elementary equality before the law. This clarification established that human dignity is egalitarian and that the prohibition of discrimination in Article 3(3) GG can be understood as a specific aspect of human dignity. The court elaborated as follows: "Anti-Semitic concepts or concepts aimed at racist discrimination are therefore incompatible with human dignity and violate the free democratic basic order."¹⁶⁵ This explicit shift could be a fruitful point of reference¹⁶⁶ when discussing the adequacy of measures to protect the independence of the judiciary. Rather than focusing on the historically ambiguous and ultimately indeterminate and broad concept of the free, democratic, federal, and social constitutional order, the application of instruments should, inter alia, be centered on Article 3 GG.¹⁶⁷

One of the key findings is that no simple, straightforward solution should be proposed too quickly. Simple approaches can have unintended consequences. Historical perspectives of instruments should not be ignored. And sensitivity with a critical eye for structural elements are essential, especially in the context of judicial independence. Therefore, a multifaceted approach on several levels, including different perspectives, is needed to grasp the complexity of the issue. This can include action within the current framework as well as actions to reform the existing system. We would like to propose some possible actions, which should not be considered as complete.

I. Actions within the Current Framework and Reforms

1. Focus on Procedural Law and Court Administration

The judiciary itself, as a form of self-control,¹⁶⁸ must acquire the competence to identify members of staff who do not identify with the principles of human dignity and equality, Article 1(1), Article 3 GG,¹⁶⁹ as well as the competence to identify authoritarian, and especially right-wing arguments and codes of litigants.¹⁷⁰

To promote more reflection on cases and their facts, it may be helpful to re-strengthen procedural instruments that have been weakened in recent years in the interests of cost efficiency. It would be beneficial to have more cases decided by a full panel of judges, rather than transferring

¹⁶²See BVerfG, No. 1 BvB 1/51, at 12–14. *But see* SCHULZ, *supra* note 43, at 197–211, 234 (comparing between the reforms of the Penal Code and the BVerfG decision).

¹⁶³See Schulz, *supra* note 155, at 122.

¹⁶⁴See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Dec. 27, 2024, BGBl I § 1(1), no. 439 (Ger.).

¹⁶⁵See 2017 NJW 611 (paras. 538–41) for NEUE JURISTISCHE WOCHENSCHRIFT.

¹⁶⁶See BVerfG, Case No. 1 BvB 1/51, at 65 (demonstrating the court's cautious approach towards banning the SRP: "Despite all caution, however, the anti-Semitic tendency of the SRP cannot be concealed"); SCHULZ, *supra* note 43, at 198.

¹⁶⁷See Jonas Deyda, *Der falsche Weg: Warum eine Reformidee der Landesjustizministerkonferenz zum Ausschluss rechter Referendar:innen die freie Advokatur bedroht* [The Wrong Path: Why a Reform Proposal by the Conference of State Ministers of Justice to Exclude Right-Wing Legal Trainees Threatens the Independent Legal Profession], VERFASSUNGSBLOG (June 12, 2023) <https://verfassungsblog.de/der-falsche-weg/>. See also Jakob Hohnerlein, *Wer ist eigentlich Verfassungsfeind?: Zeit für eine neue Legaldefinition* [Who, Exactly, is an Enemy of the Constitution? Time for a New Legal Definition], VERFASSUNGSBLOG (Aug. 11, 2025), <https://verfassungsblog.de/wer-ist-eigentlich-verfassungsfeind/> (discussing changes to the current definitions).

¹⁶⁸See Thurn, *supra* note 66, at 219.

¹⁶⁹See *id.*

¹⁷⁰See RECHT GEGEN RECHTS: REPORT 2023, *supra* note 66, at 65, 68.

the majority of cases to a single judge's decision.¹⁷¹ In a collective decision-making process, several judges have to agree on a decision and judgment. Consequently, multiple perspectives are exchanged, and views need to be justified in front of colleagues and are discussed in greater depth.¹⁷² In asylum cases, like those decided by Bengt Fuchs, colleagues would be able to challenge views which currently form the basis of a decision made by one judge alone.¹⁷³ The exchange and discussion of cases can also take place through more informal channels, such as weekly meetings of the respective chambers. Nevertheless, these may not completely replace the formal chamber principle, as it is possible to disengage from informal discussions. Additionally, it is recommended that the system of appellate remedies be appreciated and reinforced as the most significant safeguard within the existing system. After all, the appeals process represents the foundation of judicial accountability.¹⁷⁴ Consequently, the obstacles to filing an appeal should not be too stringent. Moreover, the reasoning of the written judgments must be sufficiently detailed to allow for an effective review by the court of appeal.

2. Focus on Legal Traineeships, and the Recruitment, Appointment and Promotion of Judges

It is similarly important to consider the legal education and professional career system in the context of resilience-building efforts.

Legal education practitioners, academics, and legal professionals, would be well advised to examine more closely the historical and structural elements, including structural discrimination. It is of great importance that the aforementioned Section 5a(2) DRiG be included in the historical analysis, in order to facilitate a more comprehensive understanding of the law: "... the teaching of the compulsory subjects also includes a critical analysis of the injustices of the National Socialist regime and of the Communist dictatorship in Germany ...". Consequently, universities should prioritize the education of future legal practitioners who are able to engage in critical and reflective thinking. This should be achieved through the introduction of compulsory and additional courses.¹⁷⁵ In light of the aforementioned considerations, educators should consider reducing the teaching of content relating to substantive law in order to accommodate the additional courses.

Upon completion of a law degree at university and successful completion of the initial state examination, students who aspire to become judges, public prosecutors, or attorneys have to complete a two-year legal traineeship (*Referendariat*).¹⁷⁶ This professional training involves receiving practical instruction at a civil court, a criminal court or prosecutor's office, an administrative agency, and a law firm. Furthermore, the trainees must pass a second state examination. Upon successful completion of the traineeship and exam, individuals are deemed

¹⁷¹See Johanna Schmidt-Räntsch, *Collective Judging in Germany*, in COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE: COUNTING VOTES AND WEIGHING OPINIONS 141, 146–47 (Birke Häcker & Wolfgang Ernst eds., 2020) (summarizing the composition of judicial bodies in German Courts); F. Van Dijk, J. Sonnemans & E. Bauw, *Judicial Error by Groups and Individuals*, 108 J. ECON. BEHAV. & ORG. 224, 225 (2014) (discussing how the structure of the court systems foresees more judges the higher the instance and the more complex and important a case, with the authors arguing that "in legal tradition the belief that group decisions are better than individual decisions is deeply ingrained and formalized."). See also Brian M. Barry, *Judging Better Together: Understanding the Psychology of Group Decision-Making on Panel Courts and Tribunals*, 14 INT'L J. CT. ADMIN. 1, 2 (2013); Ipsos MORI, *The Strengths and Skills of the Judiciary in the Magistrates' Courts*, MINISTRY OF JUSTICE RESEARCH SERIES 9/11 (Nov. 2011), <https://assets.publishing.service.gov.uk/media/5a7c3ae2ed915d7d70d1d74d/strengths-skills-judiciary.pdf>.

¹⁷²See Wolfgang Ernst, *The Fine-Mechanics of Judicial Majoritarianism*, in COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE: COUNTING VOTES AND WEIGHING OPINIONS 3, 4 (Birke Häcker & Wolfgang Ernst eds., 2020).

¹⁷³See Barry, *supra* note 171, at, 6–14 (discussing the positive phenomena of group decision-making).

¹⁷⁴See CONSULT. COUNCIL EUR. JUDGES, *On the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16th plen. mtg., Opinion No. 18 paras. 23, 26 (2015).

¹⁷⁵See, e.g., A Reader on "Injustice within the Law," UNRECHT IM RECHT, <https://www.readerunrechtmitlecht.de/>.

¹⁷⁶Deutsches Richtergesetz [DRiG] [German Judiciary Act], Oct. 22, 2024, BGBl. at § 5b(2).

qualified to work in any legal profession.¹⁷⁷ Training placements during the *Referendariat* should include a more diverse program than the current focus on learning substantive and mere procedural law. The program could include more insights into the historical development of legal practice in Germany. Additionally, it could provide an opportunity for an exchange of views with judges and lawyers who have experienced authoritarian regimes. Finally, it is important to emphasize the social and psychological skills that are required for those wishing to pursue a career in legal practice. Here, further training should be included at professional judicial academies (*Richterakademien*), which offer courses for sitting judges.

It would be preferable if authoritarian right-wing candidates, who oppose the principle of equality, could be excluded from the legal traineeship. Identifying them is not an easy task if such candidates do not share their views openly during the *Referendariat* or on social media. Nevertheless, it would be highly problematic to demand a comprehensive background check and investigation of political views. Such background checks conducted by secret services have been the subject of criticism by bodies of the Council of Europe, especially when these checks are applied to sitting judges.¹⁷⁸ Furthermore, these issues are particularly problematic when viewed in the context of German history and the *Radikalerlass*.¹⁷⁹ Rather than relying on information gathered by secret services that cannot be reviewed by the individual concerned, the focus should be on the legal education of future judges and on fostering a climate of reflection and critical thinking among judicial staff.

The issue of recruitment, appointment, and promotion of judges, and the staffing of the Judges' Disciplinary Courts are relevant as well. While there is currently a shortage of qualified candidates in many areas, promotion to the highest positions can be subject to political considerations.¹⁸⁰ This issue was addressed by the German Jurists' Conference (*Deutscher Juristentag*, DJT) in 2022 with regard to the highest courts in Germany.¹⁸¹ On the whole, the members of the DJT considered the current system to be sufficient.¹⁸² Proposals to make the selection and especially the promotion procedures more independent and transparent throughout Germany and to establish independent, diverse selection bodies in order to include different perspectives on the qualities of future judges were not supported by a majority of members.¹⁸³ This decision should be re-evaluated, especially in the light of developments in 2022, 2024, and 2025.¹⁸⁴ If an authoritarian

¹⁷⁷See Rainer Westermann, *The Structure, Purpose and Methods in German Legal Education*, in LEGAL EDUCATION IN THE GLOBAL CONTEXT: OPPORTUNITIES AND CHALLENGES 233, 235–36 (Christopher Gane & Robin Hui Huang eds., 2016).

¹⁷⁸See, e.g., BUREAU CONSULT. COUNCIL EUR. JUDGES (CCJE-BU), *Comment on certain provision of the Constitutional Act of 4 June 2014 amending and supplementing the Constitution of Slovak Republic* (2014), <https://rm.coe.int/comment-on-certain-provisions-of-the-constitutional-act-of-4-june-2014/1680764b7b>.

¹⁷⁹See *id.*; Marie Müller-Elmau & Friedrich Zillesen, *Favour of Civilian Constitutional Protection: We Cannot Outsource the Protection of Democracy to the Judiciary and Politicians*, VERFASSUNGSBLOG (Feb. 9, 2024), <https://verfassungsblog.de/in-favour-of-civilian-constitutional-protection/>. See, e.g., Jonas Waack, Klima-Aktivistin darf nicht Lehrerin werden, TAZ (Jan. 27, 2025), <https://taz.de/Repressionen-in-Bayern/!6062052/> (providing a current example, although concerning the *Referendariat* for teachers, of a climate activist who was not admitted to the *Referendariat* due to her allegedly too radical political (left) engagement). See Ronen Steinke, *Die Rückkehr der Berufsverbote [The Return of Professional Bans]*, SÜDDEUTSCHE ZEITUNG (Jan. 26, 2025), <https://www.sueddeutsche.de/politik/lehrer-berufsverbot-bayern-aktivismus-li.3186273?reduced=true>.

¹⁸⁰See Ulf Domgörgen, *Vom parteipolitischen Zugriff auf hohe Richterämter, die "causa BFH-Vize", amtsgemäße Anforderungsprofile und der Grundsatz der Bestenauswahl [On Partisan Influence over High Judicial Offices, the "BFH Vice-President Affair," Role-Specific Qualification Profiles, and the Principle of Selection Based on Merit]*, 41 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1073 (2022).

¹⁸¹See generally Anne Sanders & Luc von Danwitz, *Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, 19 GERMAN L.J. 769 (2018).

¹⁸²See generally *id.*; Reinhard Gaier & Anne Sanders, *Germany*, in COURTS IN EVOLVING SOCIETIES 34, 36–41 (Ragna Aarli & Anne Sanders eds., 2021).

¹⁸³See *Beschlüsse des 73. Deutscher Juristentag Bonn [Resolutions of the 73rd German Jurists' Conference, Bonn]*, DEUTSCHER JURISTENTAG E.V. (2022) <https://djt.de/wp-content/uploads/2022/09/Beschluesse.pdf>.

¹⁸⁴See Klaus Gärditz, *Ein sicherer Hafen für Rechtsextremisten? [A Safe Haven for Right-Wing Extremists?]*, LTO (June 7, 2023), <https://www.lto.de/recht/justiz/j/sachsen-verfassungsgerichtshof-rechtsextremer-referendar-justiz-verwaltungsgericht->

right-wing party were to win the post of Minister of Justice in a German state, it would give them considerable opportunities to boost the careers of like-minded jurists, gradually pushing the judiciary of that state in a more authoritarian direction. In this context, it is worth taking note of the empirical socio-legal studies of Vogel. He noted that judges and prosecutors today see themselves as empathetic, competent, and open-minded members of a pluralistic society, frowning upon the ideas of their uncompromising and authoritarian predecessors. He also noted the fear of a risk of a backlash and a return to authoritarian ideals if the progress of the past few decades was not carefully secured.¹⁸⁵ Reforms should include striving for more independence, transparency, and plurality in the selection and promotion of judges. They could also include a more complex understanding of the professional qualities of judges,¹⁸⁶ not focusing only on purely legal qualities, which are supposedly reflected in an outstanding state examination grade. When discussing such proposals, it should be kept in mind that a Minister of Justice might have considerable influence over how such soft factors are interpreted, whereas the German state exam—with all its considerable flaws—still offers the promise of an objective criterion. A Minister of Justice from an authoritarian right-wing party may, for example, consider membership of certain like-minded youth organizations a much better indicator of the right mindset than good grades.

II. Further Research

Finally, further research is needed for a more comprehensive understanding of the concepts of judicial independence, trust and acceptance, right-wing judges, and attitudes and their legal reality. Neither qualitative nor quantitative empirical studies on the judiciary in Germany are very common, at least from the perspective of legal academia. Nevertheless, the sociology of law allows for a nuanced and multifaceted description of legal and social processes. Openness to and curiosity about new empirical perspectives can expand the classical method of legal scholarship and jurisprudence.¹⁸⁷ The current state of empirical studies on the German judiciary indicates a necessity for further in-depth research.¹⁸⁸

[zulassung/](#) (discussing how, in light of a current decision of the Constitutional Court of Saxony to admit a right-wing extremist applicant to the legal traineeship/ preparatory service (*Rechtsreferendariat*), this appears even more urgent).

¹⁸⁵See Berthold Vogel, *Leisten Justizjuristinnen und -juristen einen Beitrag zum Zusammenhalt? Befunde einer justizsoziologischen Studie* [Do Legal Professionals in the Justice System Contribute to Social Cohesion? Findings from a Socio-Legal Study of the Judiciary], ZUSAMMENHALT DURCH RECHT (2024), <https://fgz-risc.de/publikationen-mediathek/publikationsdatenbank/details/leisten-justizjuristinnen-und-juristen-einen-beitrag-zum-zusammenhalt-befunde-einer-justizsoziologischen-studie>; Berthold Vogel, *Die Hüter von Recht und Ordnung* [The Guardians of Law and Order], 5 MITTELWEG 36, 101–18 (2022).

¹⁸⁶See Anne Sanders, *Besetzung von Richterpositionen und Unabhängigkeit der Justiz* [Appointment of Judges and Independence of the Judiciary], 100 DEUTSCHE RICHTERZEITUNG [DRiZ] 364 (2022); *Thesen der Gutachterinnen und Gutachter sowie der Referentinnen und Referenten* [Theses of the Reviewers and Speakers], DEUTSCHER JURISTENTAG E.V. 58–59 (2022), https://djt.de/wp-content/uploads/2022/08/220805_djt_73_thesen.pdf.

¹⁸⁷See REZA BANAKAR, MERGING LAW AND SOCIOLOGY: BEYOND THE DICHOTOMIS IN SOCIO-LEGAL RESEARCH 73, 97 (2003).

¹⁸⁸One study concerns racism in public institutions, which also includes the judiciary: RASSISMUS IN DEUTSCHEN INSTITUTIONEN UND INSTITUTIONELLER RASSISMUS IN DEUTSCHLAND [RACISM IN GERMAN INSTITUTIONS AND INSTITUTIONAL RACISM IN GERMANY], ABSCHLUSSBERICHT DER INRA-STUDIE „INSTITUTIONEN & RASSISMUS“ [FINAL REPORT OF THE INRA STUDY “INSTITUTIONS & RACISM”] (Gert Pickel, Consortium Project Lead & Anne-Linda Amira Augustin, Scientific Coordination, Leipzig University, 2024). See Nicole Bögelein, *Justiz und Institutioneller Rassismus – Phänomen, Erscheinungsformen, Intervention (JuRa)* [The Justice System and Institutional Racism – Phenomenon, Manifestations, Intervention (JuRa)], UNIVERSITÄT ZU KÖLN (Dec. 18, 2025), <https://kriminologie.uni-koeln.de/forschung/laufende-projekte/justiz-und-institutioneller-rassismus-jura>; Berthold Vogel, *Die Hüter von Recht und Ordnung? Generationenwandel und institutionelle Kultur in der Rechtsprechung* [The Guardians of Law and Order? Generational Change and Institutional Culture in the Judiciary], SOFI (Oct. 1, 2016) <https://sofi.uni-goettingen.de/en/projects-1/projects-detail/die-hueter-von-recht-und-ordnung-generationenwandel-und-institutionelle-kultur-in-der-rechtsprechung>; Sarah Schulz, *Forschungsprojekt: Soziale Herkunft und Entscheidungsfindung in der Sozialgerichtsbarkeit* [Research Project: Social Background and Decision-Making in

F. Closing Remarks

The foregoing considerations illustrate the need to identify potential threats to the rule of law and democracy in the context of the rising influence of right-wing parties all over Europe, including in Germany. They also demonstrate the importance of taking legal action—although not only this¹⁸⁹—at different levels. Initiatives such as the *Verfassungsblog* projects, which subject states to a “stress-test” to identify threats to the rule of law, are important. It is evident that Germany has long upheld a high standard of the rule of law, which is also enshrined in the GG. Furthermore, Germany’s strong courts and decentralized, federal structures are not susceptible to immediate alteration by the outcome of one national election. Nevertheless, it must be acknowledged that the system’s overall efficacy is contingent upon a multitude of informal practices and a political culture that prioritizes the rule of law. Consequently, the reason certain actions have not been carried out is not because they are strictly unlawful but because of a culture that favors judicial independence and the rule of law. In the context of heightened polarization, it is unrealistic to assume that these conditions will persist indefinitely. While no legal system can preserve the rule of law without the support of the public, legal and systemic rules can and should be used to strengthen the system—by judges from within and by legislators and society from the outside. Reevaluating the system, including its rules on disciplinary procedures, is a necessary next step. In this context, comparative experiences from different European systems facing the challenge of populist and right-wing shifts should be brought together to help protect the rule of law.

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Social Courts], UNIKASSEL VERSITÄT <https://www.uni-kassel.de/fb01/institute/institut-fuer-sozialwesen/fachgebiete/sozial-und-gesundheitsrecht-recht-der-rehabilitation-und-behinderung/mitarbeitende/dr-sarah-schulz> (last visited May, 13, 2026) (conducting research on the social background of judges). See also Voßkuhle, *supra* note 8, at 1845–46.

¹⁸⁹But see Müller-Elmau & Zillesen, *supra* note 171.