

# Judges, Political Mandates and Judicial Independence in Germany

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In Germany, 2022 has been a turbulent year regarding former (extreme) right-wing Members of Parliament (MP) returning to their original office as civil servants and judges. Even though this topic does not seem to be completely new,<sup>1)</sup> two cases created special great media attention:<sup>2)</sup> Two judges, Jens Maier and Birgit Malsack-Winkemann, demanded (and partly succeeded) to return to serve as judges again. They had failed to re-win their seats as MP for their political party Alternative for Germany (AfD) during the federal election 2021. In an area of worldwide political polarisation, the topic of radicalised judges is not limited to Germany. However, the German cases bring the (often problematic) relationship between judges and politics into sharper focus. Therefore, we would like to provide access to the German debate on to an English reading audience as food for possible comparative insights.

## The Right to be Elected as MP and the Right to Return to Former Positions

In other countries, judges may not be members of political parties and are not supposed to be politically active. Thus, the German approach may be surprising. While judges are required to act impartially ([Art. 97 para 1 German Basic Law \(GG\)](#)), German law does not expect them to stay out of politics completely. Rather, judges who are active in the democratic process are in principle seen as more desirable than judges rejecting democracy, such as judges in the Weimar Republic or under the Nazi-Regime. Judges shall identify with the free, democratic, federal and social basic order (so called *freiheitlich demokratische Grundordnung*) governed by the rule of law and not with a current government policy ([BVerfGE 39, 334 \(346\)](#)). Therefore, German law seeks to reconcile an impartial judiciary with judges who support democracy and are active in democratic institutions. Judges may be party members but must – even during political activity – refrain from any action that could endanger public confidence in their independence. Judges can in principle be elected as MP to the German Federal Parliament (Bundestag) or any Parliament of one of the 16 States, Art. 137 para 1 of GG. However, [section 4 para 1 of the German Judiciary Act \(DRiG\)](#) states that judges may not simultaneously perform duties of adjudication and legislative or executive duties. Therefore, specific duties and rights arising from salaried membership of the permanent civil service – including the position as judge – shall be suspended, according to section 5 para 1, section 8 para 1 of the Member of Bundestag Act (AbgG). At the same time [section 6 para 1, section 8 para 1 of the AbgG](#) establishes the right to reinstatement after the expiry of a mandate. Of course as MPs, such judges cannot be expected to be neutral but must engage in political debate. However, the question arises, if some behaviour just cannot

be forgotten when they return to their positions as judges. Drawing lines here is extremely difficult. On the one hand, public confidence in an independent and neutral judiciary must be protected. On the other hand, there is a danger that both members of opposition parties and judges could be punished for unpopular political views which are an important part of a free democratic society.

## Controversial Legal Debate on the Reinstatement Procedure

In case of far-right-wing civil servants applying to return to their office after their term as MP, the interpretation of section 6 para 1 AbgG is at the heart of the current debate. The [Minister of Justice in Saxony has argued](#) that the section does not leave any margin of appreciation and thus, if an application is filed, the applicant must be reinstated. According to this interpretation, it does not matter if the applicant has openly discredited and distanced him- or herself from the free democratic basic order within the meaning of the GG during the time as MP. This is justified by the fact that during the time as MPs, political moderation is not required as it is for civil servants and the fact that MP enjoy the independence of their mandate.

Others have argued instead that reinstatement could be prevented by an interpretation of section 6 para 1 AbgG that is sensitive to the constitution. Protecting the constitutional order against its enemies and preventing a second failure of democracy in Germany was a central goal in the drafting of the GG. Consequently, in cases where a former judge had made unconstitutional statements, it was doubtful if and how such a judge could be accepted back on the bench. Loyalty to the constitution (as enshrined in [Art. 33 para 5 GG](#)), it is argued, is a fundamental requirement for any civil service, including judges. According to this line of argument, the requirement of loyalty to the constitution is not only connected to the specific duties and position as a judge, which are suspended with the judge's active service status as MP. But the underlying – even though suspended – status as judge is not terminated but only dormant, ready for later reinstatement. This underlying status, it is argued, still demands basic loyalties. Thus, this very basic duty, also enshrined in [section 9 no. 2 DRiG](#), must be taken into account when reinstating a judge. While this approach is possible, deciding when a basic loyalty is violated is not easy. Being a member of a political party that has not been declared unconstitutional but which is classified by the Office for the Protection of the Constitution (Verfassungsschutz), the German domestic intelligence agency designated to gather intelligence on efforts against the liberal democratic basic order as right-wing extremist – [confirmed by a first-instance decision in the case of the AfD](#) – is still not enough for such an assumption. It may be an indicator but the assessment must depend on the personal conduct of the concrete judge (see further and for contextualisation in German [here](#) and [here](#)). Still, the competent superiors – in each case the Minister of Justice – involved in the reinstatement of the two currently debated judges chose a different approach. They reinstated the two former MP as judges but initiated (disciplinary) measures simultaneously. Thus, the courts concerned with the cases did not take a decision on the concrete interpretation of section 6 para 1 AbgG,

but through procedures of disciplinary measures and regulations on judges' duties (Richterdienstrecht).

## Measures Protecting the Independence of Judges and Disciplinary Measures

Apart from a refusal of reinstatement, other possible measures are at hand. Even though a judicial impeachment procedure is provided by the GG, its legal requirements are highly debated and it has never been successfully applied. Initiating this procedure was discussed in the recent cases, but not ultimately pursued. Instead, these cases have been responded to with disciplinary measures, which can be initiated against civil servants, including judges. Measures against judges, however, can only be taken by a special court (Richterdienstgericht).

### *The Case of Jens Maier*

Jens Maier was chairman of the far-right wing section of the AfD, called the "Flügel", which has been, however, dissolved by the party itself. Despite its official dissolution, it is still relevant in practice. The Office of Saxony for the Protection of the Constitution (Verfassungsschutz) rates Maier as [extreme right-wing](#). He has publicly and repeatedly revealed his racist and unconstitutional views, in Parliament as well as outside.

After his application of reinstatement, the Minister of Justice of Saxony applied to the Judges Disciplinary Court for a preliminary decision. The court is solely concerned with disciplinary measures and regulations on judges' duties. The Minister submitted that according to section 46 of the Judiciary Act of Saxony in conjunction with [section 35, 30, 31, 39 of the DRiG](#) Maier should be prohibited to perform his official functions as judge. The Judges Disciplinary Court of Saxony, LG Leipzig (66 DG 1/22) complied with the application with a decision in March 2022. The Court held that the extra-parliamentary statements of Maier during his time as parliamentarian could be used for a prognosis in respect to whether the judge's actions – when back in office – could endanger public confidence in his independence as a judge.

At the same time, the Minister of Justice filed an application for early retirement based on [section 31 No. 3 DRiG](#). The statute regulates that judges (who have been appointed for life) can be dismissed from office, where facts unconnected with their judicial occupation make a measure of this kind imperative in order to avoid grave prejudice to the judiciary. The oral hearing took place on 1<sup>st</sup> December 2022 and the court held that the application for early retirement was admissible. The court was convinced that the public's trust in the judge had been damaged by his comments during his time as MP to such an extent that his jurisprudence no longer appeared credible. If he remained in the judicial office, public trust in an independent and unbiased judiciary would be eliminated or diminished. The court held that even during a judge's time in Parliament, while the judge's active status was suspended, the underlying basic status and thus its basic duties of loyalty to the constitution still remained intact. His comments made outside the parliament could be used. With his

racist and antidemocratic comments, the judge had violated these duties and could not be accepted in a judicial position any longer. Accordingly, the transfer to early retirement was imperative and proportionate (Press release in German, [here](#)).

However, without further procedures, Maier can still claim a full pension. In order to reduce or prevent this consequence, another disciplinary proceeding is needed. This was, thus, commenced in March 2022 and is still ongoing at the LG Dresden (in German [here](#))

### *The Case of Birgit Malsack-Winkemann*

The second case concerns Birgit Malsack-Winkemann, a former MP, who has been able to return as civil judge to the Berlin judiciary in 2021. She was recently arrested together with other suspects for planning to overthrow the government in a far-right coup (summary in English [here](#), in German [here](#)). The suspects belong to the so called “Reich Citizens’ Movement“ which is an unconstitutional group rejecting the legitimate existence of the German state. Before these events, the Minister of Justice of Berlin had tried to apply for the admissibility for early retirement after her application for reinstatement. However, different from the case concerning Jens Maier, the Judges Disciplinary Court of Berlin held that a serious impairment of the judiciary was not to be feared (Judges Disciplinary Court of Berlin, Decision of 13 October 2022, DG 1/22). The decision has been criticised for erecting hurdles that are too high to deal with extremist judges. The court interpreted [Art. 46 para 1 GG](#) in a way that nothing that has been said outside parliamentary discussions could be used for the prognosis decision within the scope of Art. 31 DRiG (in German, see [here](#)).

[Following the new allegations](#) of her participation in the planning of a coup, the Ministry is now commencing section 74, 75 of the Judiciary Act Berlin (RiGBIn) which allows preliminary decisions concerning the early retirement and removal of a judge from office without the entitlement to a retirement pension.

## **A Well-Fortified Democracy and Judicial Independence**

These recent events caused a controversial political debate, demanding a tougher approach against extreme right-wing civil servants and judges. The Federal Ministry of the Interior published a [legislative proposal](#) in December 2022 for civil servants (discussion in German [here](#)) and the Ministry in Saxony even made [proposals](#) for concerning the reinstatement and removal of (extreme) right-wing judges.

The question of (extreme) right-wing civil servants and judges, even though having been troublesome for decades, going back to a high presence of former National Socialists in German ministries and courts in the 1950s and 1960s, has now reached a broader public and legal debate. The two cases concerning the judiciary show the need to prevent judges who actively support inhuman, racists and antidemocratic views, from (re)entering the judiciary. This is consistent with the idea of a well-fortified democracy (wehrhafte Demokratie). This is especially important in Germany,

where judges have supported the failure of democracy in the Weimar Republic and the Nazi-Regime afterwards. However, the rule of law requires judicial independence as well. In less unambiguous and clear cases, finding the right balance between measures against extremist judges and upholding judicial independence is no easy task. Experiences all over the world show that disciplinary measures can be misused to suppress undesired opposition and independent judges. The German history also offers a lesson in this respect. In the 1970s, when there was great fear of communism, left wing, often progressive civil servants faced difficulties based on the so called Radikalenerlass. Today, we must be aware both of the danger of curtailing political freedoms and judicial independence as well as the need to protect our institutions against enemies of democracy, basic human rights and the rule of law.

## References

- See for example the removal of a former public attorney and MP, which was approved by the competent court: Judges Disciplinary Court OLG Stuttgart, Decision of 18 March 2021, DGH 2/19.
- See for an extract of the discussion in German: Fischer-Lescano, Andreas, Kein Ruhestand für AfD-Richterin: Berliner Dienstgericht erschwert Vorgehen gegen Rechtsextreme, *VerfBlog*, 2022/11/22, <https://verfassungsblog.de/kein-ruhestand-fur-afd-richterin/>; Fischer-Lescano, Andreas, Warum der Rechtsextremist Jens Maier nicht wieder Richter werden darf, *VerfBlog*, 2022/1/10, <https://verfassungsblog.de/warum-der-rechtsextremist-jens-maier-nicht-wieder-richter-werden-darf/>; Gärditz, Klaus Ferdinand, Zum Rückkehrrecht extremistischer Abgeordneter in den öffentlichen Dienst, *VerfBlog*, 2022/2/04, <https://verfassungsblog.de/zum-ruckkehrrecht-extremistischer-abgeordneter-in-den-offentlichen-dienst/>; Cremer, Hendrik, Rassistische und rechtsextreme Positionierungen im Dienste des Staates? Warum ein Eintreten für die AfD mit der verfassungsrechtlichen Treuepflicht nicht vereinbar ist, *Deutsches Institut für Menschenrechte (Hrsg.), Analyse*, Berlin, 2022; Voßkuhle, Andreas, Extremismus im Öffentlichen Dienst – Was tun?, in: *NVwZ* 2022, 1841; Möllers, Christoph, Tatbestandliche Voraussetzungen des grundgesetzlichen Verfahrens der Richteranklage im Freistaat Sachsen – in Anwendung auf den „Fall Maier“, *Rechtsgutachten im Auftrag der BÜNDNISGRÜNEN-Fraktion im Sächsischen Landtag*, 21.03.2022; [https://www.gruene-fraktion-sachsen.de/wp-content/uploads/2022/03/Rechtsgutachten\\_Richteranklage.pdf](https://www.gruene-fraktion-sachsen.de/wp-content/uploads/2022/03/Rechtsgutachten_Richteranklage.pdf); all last viewed 12.01.2023.

