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### Public servants and the rise of anti-constitutional sentiment in Germany: Reclaiming the rule of law Presentation at the Leipzig Rule of Law Conference, 28.09.2023

„We will not allow right-wing extremists to undermine our democratic constitutional order from within.“ These are the words of German Minister of the Interior, Nancy Faeser. They were spoken last year, when she presented the second security report on right-wing extremists.<sup>1</sup> But what exactly defines a person who opposes the constitutional order in public service?

German law requires civil servants to commit themselves to the constitutional order by virtue of their entire conduct. They must vouch to support the constitutional order,<sup>2</sup> stand up for its preservation, and act accordingly at all times.<sup>3</sup> This legal obligation requires a thorough commitment to what we call *Freiheitliche Demokratische Grundordnung*, the 'fundamental liberal and democratic order'. Its basic principles include: human dignity, free and fair elections, and the rule of law.<sup>4</sup> „Enemies of the constitution“ are defined as persons who act contrary to these principles or violate them. We have to be wary of such enemies of the constitution.

Recent reports indicate that cases of right-wing extremism in Germany's federal and state security agencies have more than doubled in the last two years, rising to more than 800. Now, this does not necessarily indicate an actual growth of anti-constitutional tendencies in public service, what with many cases having remained unexplored by previous investigations. However, the problem must be tackled, to ensure public trust in the rule of law.

I would briefly like to outline three of these cases for you:

#### First example

Not too long ago, headlines were dominated by a judge from Saxony. Between 2017 and 2021, he was a member of the German Bundestag for a far-right political party. His association with the so-called „Flügel“, a particularly nationalist faction within the party, led to him being classified as a right-wing extremist by the Saxon Office for the Protection of the Constitution. Moreover, this judge attracted

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<sup>1</sup> Bundesamt für Verfassungsschutz: Lagebericht Rechtsextremisten, „Reichsbürger“ und „Selbstverwalter“ in Sicherheitsbehörden, May 2022,

<https://www.verfassungsschutz.de/SharedDocs/publikationen/DE/rechtsextremismus/2022-05-lagebericht-rechtsextremisten-reichsbuerger-und-selbstverwalter-in-sicherheitsbehoerden.html>

<sup>2</sup> § 9 II DRiG.

<sup>3</sup> § 60 I 3 BBG, § 33 I 3 BeamtStG.

<sup>4</sup> Decision of 17.01.2017, Az. 2 BvB 1/13, NJW 2017, 611.

media attention when he made derogatory public remarks about asylum seekers. He also expressed sympathy for the terrorist Anders Breivik. Once the judge's re-election bid had failed in 2021, he applied for a return to the judiciary. He briefly returned to his office as a judge at a county court, but a judicial service-court („Richterdienstgericht“) prohibited him from performing his official duties. In December 2022, a motion was filed for the judge to be retired early – a ruling has yet to come into force.<sup>5</sup> It is worth adding that, from a legal view-point, we are sailing in uncharted waters here, which makes the case rather ground-breaking.

### **Second example** [Birgit Malsack-Winkemann]

Another case concerned a judge in Berlin, who had also served as an MP for a right-wing party and subsequently resumed her office at the Berlin Regional Court. When doubts arose about her loyalty to the constitution, Berlin's Senator of Justice filed a motion for her retirement. However, Berlin's Disciplinary Court for Judges rejected this application, arguing that statements made by the judge when she was a Member of Parliament could not be taken into account. Interestingly, the story does not end there, and its bizarre coda underlines how even members of the judiciary can become entangled in extremist world-views. Last December, the very same judge was arrested in a nationwide investigation against suspected members of the „Patriotische Union“, a far-right grouping of the so-called Reich Citizens' Movement. Reich Citizens believe in the continuing existence of the German Reich in the borders of 1937 and do not recognize the Federal Republic of Germany as a State. According to the Federal Prosecutor General, the group is suspected of domestic terrorism and of preparing to forcefully enter the German Bundestag with a small armed group, effectively staging a coup. According to media reports, the group planned to appoint this very judge as Federal Minister of Justice in the aftermath of the coup.

### **Third (and final) example** [Matthias B.]

My final example concerns a young man who had applied for legal traineeship in Saxony. In Germany, this form of traineeship is one of the prerequisites to become an attorney, judge or prosecutor. However, this young man was a leading figure of a neo-Nazi party – reason enough for the State of Saxony to reject his application. But in October 2021, the Constitutional Court of Saxony declared this non-admission unconstitutional. They argued that subsequent admission to the bar could only be denied if the candidate fought the liberal democratic fundamental order in a criminally punishable manner. Unless this is the case, the state of Saxony cannot deny him professional training to become a lawyer.

### ***What can we gather from these examples?***

Clearly, all of these cases highlight a fundamental tension: a tension between the need to defend our democracy on the one hand, and the need to respect fundamental constitutional freedoms on the other. This is why these cases receive so much media attention, and why they have triggered considerable public debates in Germany. The focus is on several issues here, including the need to take a stand against enemies of the constitution in public service. And I cannot stress this enough: this is a particularly crucial issue when we are dealing with judges who abuse their positions.

An independent judiciary is an integral part of the constitutional state and of the rule-of-law, and if we want to protect public faith in these institutions, we simply cannot allow for cases like these to go unsanctioned. On the other hand, all sanctions and measures must be in line with the constitution, the

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<sup>5</sup> According to the press release of the BGH of July 12, 2023, the appeal is to be heard on October 5, 2023 (Ref. RiZ 1/23).

values of which include the free mandate of MPs,<sup>6</sup> the freedom of speech, the independence of the judiciary (and the separation of powers),<sup>7</sup> as well as the individual freedom to choose an occupation.<sup>8</sup>

In the cases that I have outlined here, the judges in question obviously violated the liberal democratic fundamental order. Other activities, by contrast, may not be judged as severely: for example, a person may be a member of a political party that has been classified as „suspicious“ by the Office for the Protection of the Constitution. But mere membership alone is not considered sufficient grounds to take action against a judge or civil servant. Treading the thin line between those two issues is not easy, and it requires a case-by-case assessment.

In the context of this conference, with its international perspective, I would like to highlight another point: Within the European Union, Germany is not the only country to look for the right balance between these constitutional principles. A few months ago, the Belgian government proposed to subject all magistrates and employees in the judiciary to regular security checks, both upon commencement of employment and afterwards every five years during active service.<sup>9</sup> The aim behind the proposal was to prevent corruption and infiltration of criminal organizations. However, it was met with criticism by the Belgian High Council for Justice, among others. It also drew criticism from judges, who compared the proposed law to (quote-unquote) „what is happening in Hungary and Poland“ and who articulated fears that individual judges might be dismissed for being „too left-wing“ or „too right-wing“.<sup>10</sup>

### ***Conclusion: Steps we are taking in Saxony***

So we are left with quite a conundrum, and a series of questions: How can we strengthen the resilience of public service? How can we protect our democracy against enemies of the constitution in our own ranks? And how can we deal with the singularity of the problem, without losing track of historical precedents?

After all, this is not the first time that anti-constitutional movements in public service have warranted political action in postwar Germany. The so-called „Radikalenerlass“ (*Radicals decree*) of 1972 led to background checks on more than a million individuals working in or applying for a job in public service. Back then, this decree caused an uproar – people felt it paved the way for excessive snooping into people's private lives and political convictions. Current legislative efforts on federal as well as state level concerning alleged „enemies of the constitution“ must be viewed against this background. The aim is not to ban controversial opinions, but to revise and improve the existing possibilities of intervention by the executive branch.

Only a few months ago, back in February, we as the Saxon State Ministry of Justice, Democracy, European Affairs and Gender Equality presented a set of measures for a resolute approach against extremists in public service. We want to bring the issue on the federal government's political agenda, and inspire a broader debate. The list includes the following proposals: **One: to amend the Federal Disciplinary Act**, to extend the time periods within which disciplinary offences can be pursued. **Two: to amend the German Judges Act**, in order to clarify its relationship to disciplinary law, and to make it possible for a judge's salary to be provisionally reduced if necessary. **Three: to amend the Federal Constitutional Court Act**, so that we can extend deadlines for the impeachment of judges. **Four: to**

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<sup>6</sup> Art. 38 Abs. 1 GG.

<sup>7</sup> Art. 97 Abs. 1 GG.

<sup>8</sup> Art. 12 GG.

<sup>9</sup> 2023 Rule of Law Report – Country Chapter on the rule of law situation in Belgium, p. 4 f.

<sup>10</sup> The Brussels Time, 05<sup>th</sup> April 2023, Lukas Taylor: Belgian judges may undergo anti-corruption checks.

**amend the Saxon Judiciary Act**, to strengthen the role of the Ministry of Justice as a supervising body. **And Five: to amend the Law on Members of Parliament**, so that we can ensure their continued duty of loyalty to the constitution.

This last proposal is small-scaled, not by accident but by choice, because it concerns the balance between the three branches of government in a special way. When a judge becomes a member of parliament, he or she may vote for any policy, free from orders – the principle of the free mandate guarantees it. Once their mandate is over, the judge has the right to return to their former position. Under current legislation, this right is an unconditional one, no matter how questionable the judge's previous political agenda might have been. It simply never occurred to the legislator that there could ever be a right-wing extremist judge or public prosecutor trying to re-enter the public service after a foray into politics.<sup>11</sup>

Needless to say, the executive branch respects the judiciary's independence – but at the same time, there are checks and balances to ensure that misconduct will be sanctioned. All of this presents us with a series of challenges – but we are willing to take them on: for the sake of our constitution, and to honour the trust that people put in the judiciary.

Thank you very much for your attention.

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<sup>11</sup> Wagner: NJW 2023, 501 (502).