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# Duty of university professors to teach digitally and the freedom of teaching in Germany

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*Nel semestre estivo del 2020, l'insegnamento nelle Università tedesche si è svolto in modalità digitale a distanza. Nel trimestre invernale 2020/21, la formazione digitale a distanza proseguirà in numerose Università, almeno in parte, soprattutto per i corsi con un numero elevato di studenti. È necessario domandarsi in quale misura l'obbligo dell'insegnamento digitale a distanza interferirà con la libertà di insegnamento e se i professori possano essere obbligati, da parte degli organi accademici, a svolgere questa forma di insegnamento in conformità con i diritti fondamentali, sia nella situazione eccezionale causata dalla pandemia, sia oltre la crisi.*

*In the summer term of 2020, teaching at German universities was shifted to the digital space. In the winter term 2020/21, distance learning will continue at many universities, at least in part, especially for courses with a high number of participants. It is questionable to what extent compulsory digital teaching will interfere with the freedom of teaching and whether digital teaching can be demanded by the faculty management in accordance with fundamental rights in the exceptional situation caused by the pandemic and beyond the crisis.*

## **1. Reaction of universities in the field of teaching**

German universities had time to prepare for digital teaching, since the outbreak of the Covid-19-pandemic and the imposed “lockdown” took place during the lecture-free period.<sup>[1]</sup> Nevertheless, technical and didactic deficiencies on the part of the teaching staff became apparent in some cases at the beginning of the 2020 summer term.<sup>[2]</sup> E-learning technologies were used with varying degrees of

intensity. Professors sometimes limit themselves to asynchronous teaching; which means that students are provided with written teaching materials, videos or podcasts of specially or previously recorded courses, as well as other materials, such as self-tests. On the contrary, in synchronous teaching, courses are transmitted live via online platforms. Both asynchronous and synchronous online teaching have advantages and disadvantages (which can be subject-specific); in asynchronous held courses, the pace can be determined independently by the learners, but there is no direct exchange. A combination of the two approaches seems an appropriate way to compensate the specific disadvantages.

Overall, despite high performance in general, it was certainly not possible to offer a teaching quality comparable to that of a live classroom.<sup>[3]</sup> Nevertheless, the professors and students gained valuable technical and digital-didactic experience and created an appropriate infrastructure. It seems like refusals by university professors to hold their courses digitally or instructions by the faculty management to do so have not become public. Nevertheless, the Bavarian Minister of Science has pointed out the duty of service for the academic education of students in a letter addressed to all employees with teaching duties at Bavarian universities.<sup>[4]</sup>

The development in the winter term of 2020/21 is not foreseeable (so called “2nd wave”). Four forms of teaching are possible which can be combined: Live teaching in compliance with hygiene regulations, a “dual” model with parallel classroom and digital teaching,<sup>[5]</sup> a hybrid model in which the courses are partly held on-site and partly digitally, for example by professors belonging to a risk group. Finally, distance learning alone is a possible option as well. German universities currently tend to «*as much presence as possible*»,<sup>[6]</sup> but this can change on a daily basis due to the development of infection rates. In the United States of America, universities have already stopped teaching on campus the first week after reopening.<sup>[7]</sup> In the long term, the pandemic has shown that universities can switch to distance learning which has triggered euphoria about future developments, at least among some university staff. Furthermore, economies of scale can be exploited in digital teaching; in general, digital teaching formats hold a considerable budget saving potential.<sup>[8]</sup> In terms of university didactics, however, it is controversial whether distance learning can adequately replace

(scientific) classroom teaching.<sup>[9]</sup> The future will show whether the corona pandemic is really a catalyst for the digitalization of teaching. There are signs pointing towards a digitalization push in university teaching<sup>[10]</sup> which has to be differentiated from the feared move away from face-to-face teaching.

## 2. Digital teaching and freedom of teaching

The higher education laws of the German federal states do not specifically stipulate an obligation for university professors to teach digitally; the regulation of digital courses in general has remained a desideratum to date.<sup>[11]</sup> Although most of the German states have now empowered their ministries to react to the pandemic-related effects on universities by amending their higher education laws, the majority of states have not yet implemented the necessary measures.<sup>[12]</sup> Nevertheless, most of the regulations do not allow rectorates to issue teaching-specific regulations regarding digital teaching.<sup>[13]</sup> Although the ordinances on compulsory teaching issued by the respective state ministries of science («*Lehrverpflichtungsverordnungen*») concretize the scope of compulsory teaching in quantitative terms, they do not contain specific statements on any digital teaching obligations.<sup>[14]</sup>

Thus, a corresponding instruction for university professors can be given by the university body that decides on teaching obligations. The faculty management can issue instructions to specify official teaching duties<sup>[15]</sup> to guarantee the educational mandate of universities. This is regularly the allocation of certain courses at the discretion of the faculty. However, the digital delivery of the course can also be subject to such instructions. At the beginning of the 2020 summer term, teaching in classrooms was not legally permitted.<sup>[16]</sup> Therefore, there was initially no discretion. As far as the SARS-CoV2 containment regulations of the federal states allow for face-to-face teaching for the winter semester 2020/21, the faculty management has a discretionary power. Interference with the freedom of teaching must be taken into account by the faculty management. Given the sensitivity of such allocations from the perspective of the freedom of teaching,<sup>[17]</sup> a specific legal basis would have been desirable in view of the constitutional requirement of certainty. However, the provisions of state law are broad enough to include instructions from the faculty management on digital teaching.

In the case of a corresponding instruction, a distinction has to be made. First of all, it is questionable to what extent online courses can be characterized as scientific teaching at all, since an instruction for non-scientific teaching cannot be given<sup>[18]</sup> and university professors would not fulfil their teaching duties if they were to teach in a non-scientific way (2.1.). Furthermore, it must be considered whether and to what extent an instruction to digital teaching encroaches on the freedom of teaching (2.2.).

## 2.1. No duty to teach in a non-scientific way

University professors can only be obliged to teach as «*scientifically sound transmission of the knowledge gained through research*»<sup>[19]</sup> due to the unity of teaching and research as stipulated in Article 5 (3) of the German Basic Law. University professors cannot be obliged to carry out non-scientific tasks, especially non-scientific teaching.<sup>[20]</sup> Teaching is not bound to a specific form; online-based courses can be scientifically sound.<sup>[21]</sup> Thus, scientific content based on research results must be taught.<sup>[22]</sup> This requires a critical reflection of the taught content and not merely a transfer of knowledge or application-related training. The content is determined by examination and study regulations as well as curricula, module manuals<sup>[23]</sup> and state law. The scientific nature of the content is not affected by the shift of teaching to the digital world. Furthermore, transfer of knowledge must be based on a critical and methodical reflection of acquired scientific knowledge. Due to the lack of interaction between students and professors, asynchronous formats in particular do not initiate cognitive dissonance that promotes reflective-critical thinking.<sup>[24]</sup> However, asynchronous formats also offer sufficient opportunities for interaction, for example by providing and, if necessary, moderating discussion forums, online consultation hours or tests. Also synchronous formats may lack the scientifically sound transmission of knowledge, if the course consists of purely frontal teaching without the opportunity for students to participate.

Consequently, there could still be digital courses at universities that are without interaction and not inherently scientific due to a lack of a scientific-critical discussion of the substance taught. The extent to which academic quality is maintained is not subject to general criteria and therefore must be determined on

a case-by-case basis. A differentiation also has to be made between the types of the course. A lecture with many participants is generally less interaction-based than a seminar with only a few participants. In the exceptional pandemic situation, against the background of a lack of adequate alternatives, a broad understanding of science is to be taken as a basis, so that teaching also includes digital teaching formats that ostensibly convey knowledge.<sup>[25]</sup>

## **2.2. Encroachment in the freedom of teaching and justification**

The material area protected by the freedom of teaching<sup>[26]</sup> encompasses the “how”, i.e. the free design in terms of content and methodology by which the generally prescribed subject matter is taught.<sup>[27]</sup> Before the pandemic, teaching obligations were predominantly fulfilled by teaching in presence. That is why the question whether the freedom of teaching also allows for distance learning did not become virulent.<sup>[28]</sup> In principle<sup>[29]</sup>, however, a choice existed for the university teacher to convey the subject matter in presence or online, in the light of the freedom to teach if the chosen type of teaching achieves the academic education objective.<sup>[30]</sup>

The obligatory specification of a digital form of teaching and presentation makes the choice of method impossible and thus shortens the scope of protection.<sup>[31]</sup> An exception to this is made for university professors who have knowingly taken up a position<sup>[32]</sup> that leads one to expect digital teaching. In doing so, they have implicitly given their consent to the restriction of the freedom of teaching. This includes professors employed at distance, “digital” or “virtual” universities. The same applies to those whose job description of the position, for example the job advertisement or the job description in the appointment agreement<sup>[33]</sup>, indicates that digital teaching is one of the teaching tasks. Furthermore, this holds true for those who have negotiated a duty to digital teaching after taking office.<sup>[34]</sup>

The freedom of teaching is guaranteed without reservation,<sup>[35]</sup> but is subject to restrictions inherent in the German Basic Law, so that a justification of the intervention has to be considered.<sup>[36]</sup> Conflicting Basic Law concerns the life and health protection of university members and third parties (Article 2 para. 2 sentence 1 Basic Law), public health<sup>[37]</sup>, the right of students guaranteed in

Article 12 para. 1 sentence 1 Basic Law<sup>[38]</sup> and the fundamental right enshrined in Article 5 para. 3 sentence 1 of the Basic Law, by which universities are protected in their institutional functionality.<sup>[39]</sup> In the following, different aspects that influence the extent of a reduction of the freedom of teaching guaranteed by the Basic Law are discussed.

### **2.2.1. Lack of interaction**

With regard to the intensity of the encroachment caused by a duty to teach digitally, it should be noted that teaching methods of classroom teaching can generally be used online. However, the fact that teaching modalities would be further restricted due to characteristic features of digital teaching, would have an intensifying effect. An integral methodological component of science-based teaching in face-to-face form is, at least in teaching formats with a smaller number of participants, the interaction between professors and students and between students themselves.<sup>[40]</sup> In the humanities in particular, the learning outcome is not just to answer questions but to learn how to ask the right questions in the first place.<sup>[41]</sup> Also, online-based courses do not teach comparable socio-emotional skills like face-to-face teaching does.<sup>[42]</sup>

From the outset, the dialogical structure and the scientific dispute fall away in asynchronous courses, in which the focus is merely on knowledge transfer. Discourse is also minimal in synchronous digital teaching. This is due to the fact that students and professors can still communicate verbally, but there is little or no non-verbal communication. This includes facial expressions, gestures, eye contact or facial expressions. Non-verbal signals are difficult for professors to perceive in the context of video conferencing, since cameras and microphones (if they are available at all) are sometimes not switched on and the faces and bodies of students cannot be captured simultaneously by the professors. Furthermore, echoes, background noise or generally poor sound quality (partly due to connection problems) also limit paraverbal communication, i.e. the way in which people speak, such as articulation or intonation. Thus, essential aspects of interpersonal communication are impaired which leads to shorter attention spans<sup>[43]</sup> and makes interaction significantly more difficult even in smaller groups. Good digital-didactic skills certainly contribute to a higher level of interaction,

but are not able to eliminate the primarily technical problems.

These considerations also make the empirically collected findings plausible according to which in the summer semester 2020 the quality of digital lectures in Germany was assessed by 55% of the students and 60% of the lecturers as equally good or better than face-to-face lectures. In contrast, only 42% of the teachers and 39% of the students considered the digital design of seminars to be of equal or a better quality than face-to-face seminars, and only 35% of the teachers and 37% of the students considered tutorials and exercises to be of equal or better quality.<sup>[44]</sup> Therefore, the smaller and more interaction-based the course, the greater the intensity of intervention of a digital teaching instruction.

### **2.2.2. Restriction of the content**

The change in structure towards academically conducted teaching in digital form also has an effect on the content – regardless of the number of participants. The reason for this is the (justified) fear of recording, storing and further distribution of the synchronously held course or parts of it. Certainly, recording is also possible in classroom teaching, especially in large courses. However, in these cases teachers regularly acquire knowledge of this. In the digital sphere, however, recordings can be made without the professors' knowledge. This is possible with the help of specially designed third-party software that can be used to bypass any recording locks in the video conferencing software or with a second device (e.g. the Smartphone) that records the screen of the device on which the course is displayed. Depending on the videoconferencing software used, it may not always be clear to teachers who is attending the course.

Even by saving the recording,<sup>[45]</sup> instructors lose control over which providers do this, so data may be transferred to cloud service providers in third countries and stored for a long time. In addition, the recordings can potentially be published on various online platforms, serving students as study material. This would make it possible, especially in social sciences, to publish and decontextualize controversial or provocative statements that were possibly just intended to stimulate discussion. This is certainly the exception, but teachers will at least lose their copyrights, and in view of the recording possibilities by which teachers are exposed, special care will certainly be taken to formulate them very carefully. This



cautious behaviour also has a negative effect on interaction. Furthermore, teachers could switch to asynchronous teaching from the outset. The recording, storing and publishing may violate criminal, data and copyright regulations<sup>[46]</sup> and might be challenged by public authorities or in civil courts. However, this always bears a cost risk, and deleting content from the internet is not always successful.

### **2.2.3. Professors as civil servants with a special bond of loyalty**

The majority of German university professors at state universities are civil servants<sup>[47]</sup>, so that civil service regulations<sup>[48]</sup>, in particular the civil service obligation of loyalty<sup>[49]</sup>, apply accordingly.<sup>[50]</sup> It should be noted that academic freedom is primarily an individual basic right,<sup>[51]</sup> in whose area of guarantee individual-subjective freedoms are exercised.<sup>[52]</sup> Contrary to this, actions of civil servants must always pursue a purpose that is in the public interest<sup>[53]</sup>, § 60 of the Federal Civil Service Act («*Bundesbeamtengesetz*») also places the welfare of the general public in the foreground as the guiding goal of official activity.<sup>[54]</sup> Even though research and teaching of university professors usually indirectly serves the public good, the specific subjective foundation must nevertheless be taken into account in the proportionality test. However, the reference to the freedom of teaching does not suspend the duty of loyalty under civil service law.

This bond of loyalty to the public employer requires a special effort by the civil servant, especially in times of crisis. In principle, it includes a duty to maintain teaching operations and thus to fulfil the teaching and training mandate of universities<sup>[55]</sup>, as is also stipulated by law in § 62 Federal Civil Service Act («*Bundesbeamtengesetz*») and § 35 Civil Servant Status Act («*Beamtenstatusgesetz*»). An encroachment on a civil servant's freedom to teach can be more readily justified.<sup>[56]</sup> The duty of loyalty is synallagmatic to the duty of care of the employer.<sup>[57]</sup> This may require compensation after the pandemic due to the shift to the detriment of research<sup>[58]</sup> and in favour of teaching.<sup>[59]</sup>

### 2.2.4. Preliminary result

The faculty management's instruction on digital teaching can interfere with the freedom of teaching, provided that no implicit consent has been given to take on corresponding teaching tasks. The extent to which this intervention can be justified depends on the individual case. An essential aspect of the appropriateness test is the lower level of interaction in virtual classroom courses with synchronous teaching, where discussion-intensive, dialogue-oriented teaching is essential, especially with small numbers of participants. In addition, teachers limit themselves in the way they teach the subject matter due to the fear that contents of the courses will be made public and the consequences this would have. Nevertheless, most professors are civil servants who are obliged to remain loyal, especially in times of crisis.

## 3. Conclusion

The above-mentioned considerations must be taken into account for a constitutionally compliant directive on digital teaching. A differentiation is necessary between the summer term 2020, the winter term 2020/21 and the more distant future, in which the pandemic emergency will be overcome.

Instructions on digital teaching in the 2020 summer term are likely to have been in conformity with fundamental rights and thus legally enforceable with regard to the exceptional situation caused by the pandemic. Since face-to-face teaching was impossible<sup>[60]</sup>, at least initially, the alternative to digital teaching would have meant no teaching at all or self-studying, so that the educational mandate of universities would not have been fulfilled. However, even at this point, individual instructions may have been contrary to fundamental rights. This refers in particular to courses in engineering and natural science disciplines that require a laboratory.<sup>[61]</sup>

In the winter term 2020/21, teaching in presence is at least partially possible<sup>[62]</sup> and therefore requires readjustment. Where presence teaching is legally and factually possible, a directive on digital teaching does not seem appropriate in principle; rather, the professor can decide in such constellations. The synthesis of digital and face-to-face teaching, whereby the course can be attended on site, but

at the same time is also recorded or transmitted live in the digital space, seems to be popular. A milder, equally effective means of achieving this is teaching that is only digital or only in classroom form, with the result that no instruction on hybrid operation is required. However, teaching in classroom form increases the risk to life and health in the exceptional pandemic situation<sup>[63]</sup>, while interaction suffers from pure distance learning.<sup>[64]</sup> Therefore, a corresponding instruction would be necessary. With regard to the appropriateness, it should be noted that the level of interaction could be increased by partial presence, although the active involvement of digital participants might even be worsened, since interaction has to take place simultaneously with the physically and digitally present participants. Courses may also be recorded by third parties.

After the pandemic, digital teaching can only be demanded from the faculty management if this is part of the teaching duties. Nevertheless, the current massive use of digital media will continue to promote the use of digital media in the future. It has to be discussed whether and how the lack of interaction in digitally held courses can be compensated.

1. Although the semester times were not postponed, courses could begin later, Conference of the German Ministers of Education and Cultural Affairs of the federal states, press release dated 3.4.2020, <https://www.kmk.org/aktuelles/artikelansicht/kmk-sommersemester-2020-findet-statt.html> (accessed on 30.10.2020).
2. Cf. A. Franzke, S. Tomšić, C. Baum, *Willkommen im Neuland*, in *Zeit Campus*, 5.5.2020, <https://www.zeit.de/campus/2020-04/digitales-semester-coronavirus-studium-goethe-universitaet-frankfurt> (accessed on 30.10.2020).
3. See for example *Forschung und Lehre*, 13.7.2020, <https://www.forschung-und-lehre.de/lehre/hochschullehrer-beklagen-verslechterung-der-lehre-2939/> (accessed on 30.10.2020) with reference to a survey of the German Philosophical Faculty Day among its members.
4. A. Günther, *Die Unsicherheit an den Unis*, in *Süddeutsche Zeitung*, 6.7.2020, <https://www.sueddeutsche.de/bayern/bayern-universitaeten-corona-perspektive-1.4957283> (accessed on 30.10.2020).
5. This enables a "rolling system" in which different "cohorts" take turns in physically attending the event, see also *Tagesspiegel*, 26.08.2020, <https://www.tagesspiegel.de/wissen/universitaet-in-zeiten-von-corona-praesenz-bleibt-die-ausnahme/26128532.html> (accessed on 30.10.2020).

6. Hochschulrektorenkonferenz, Press Release dated 2.7.2020, [hrk.de/presse/pressemitteilungen/pressemitteilung/meldung/hrk-senat-prioritaet-fuer-gesundheitsschutz-so-viel-praesenzlehre-wie-moeglich-4742/](https://hrk.de/presse/pressemitteilungen/pressemitteilung/meldung/hrk-senat-prioritaet-fuer-gesundheitsschutz-so-viel-praesenzlehre-wie-moeglich-4742/) (accessed on 30.10.2020).
7. Forschung und Lehre, 19.8.2020, <https://www.forschung-und-lehre.de/lehre/einige-us-unis-beenden-praesenzlehre-wieder-3026/> (accessed on 30.10.2020).
8. M. Fehling, *Reine Online-Hochschullehre: Möglichkeiten und Grenzen im Lichte von Ausbildungsauftrag, Lehrfreiheit und Datenschutz*, in *Ordnung der Wissenschaft* 3 (2020), 137 (138).
9. Many professors demand a return to presence teaching, see <https://www.praesenzlehre.com> (accessed on 30.10.2020).
10. M. Fehling, *op. cit.*, 153.
11. This is criticized by G. Sandberger, *Rechtsfragen des digitalen Unterrichts, digitaler Prüfungen und virtueller Gremiensitzungen an Hochschulen*, in *Ordnung der Wissenschaft* 3 (2020), 155 (156 et seq., 167).
12. For example, the Hessian Ministry has issued an ordinance on the basis of § 96 Hessian Higher Education Act («*Hessisches Hochschulgesetz*») that extends the standard periods of study and the maximum duration of fixed-term employment relationships.
13. However, this is regulated by law in North Rhine-Westphalia (§ 8 of the Corona Epidemic University Ordinance («*Corona-Epidemie-Hochschulverordnung*»), based on § 82a of the Higher Education Act of North Rine-Westfalia («*Hochschulgesetz Nordrhein-Westfalen*»)).
14. The creation of e-learning resources and multimedia offerings as well as the supervision can be credited to the teaching load according to most teaching regulations. However, these are primarily resources for a combination of classroom teaching and e-learning (so-called "blended learning"). Cfr. U. Lungershausen, G. Emunds, I. Buß, *Anrechnung virtueller Lehre auf das Lehrdeputat*, in *Die Neue Hochschule* 4 (2016), 102 et seq.
15. M. Hartmer, Y. Dorf, *Ist elektronische Lehre Dienstpflicht?*, in *Forschung und Lehre* 5/20, 394 (396); M. Fehling, *op. cit.*, 141 with reference to the ultima-ratio character of this and the milder means of informal collegial coordination. See also S. Pernice-Wanke, § 35, in C. von Coelln, F. Schemmer, *BeckOK Hochschulrecht NRW*, Munich 2020, par. 23 et seq. A legal basis for the direction can be found e.g. in art. 28 of the Higher Education Act of Bavaria («*Bayerisches Hochschulgesetz*»), § 18 of the Higher Education Act of North Rine-Westfalia or § 79 of the Higher Education Act of Hamburg («*Hamburgisches Hochschulgesetz*»).
16. See, for example, § 10 of the Berlin SARS-CoV-2-EindmaßnV Berlin of March 17, 2020 (GVBl 76. Volume No. 11) or § 20 of the Hamburg SARS-CoV-2-EindämmungsVO of April 2, 2020 (HmbGVBl. p. 181).
17. For details see 2.2.
18. Such an instruction would not be suitable for fulfilling the training mandate of the universities.

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19. German Federal Constitutional Court, BVerfGE 35, 79 (113).
20. M. Fehling, *op. cit.*, 141 et seq. and generally K. Gärditz, *Art. 5 Abs. 3*, par. 157, in T. Maunz, G. Dürig, *Grundgesetz*, Munich, 90. EL Februar 2020.
21. K. Gärditz, *op. cit.*, par. 116.
22. K. Gärditz, *op. cit.*, par. 115.
23. Cf. G. Sandberger, *op. cit.*, 157.
24. Cf. M. Fehling, *op. cit.*, 142.
25. M. Fehling, *op. cit.*, 142.
26. Although this paper focuses on the duty of digital teaching of university professors, the scope of protection covers all lecturers at the university who are responsible for their own research (BVerfGE 35, 79 (125)).
27. Cf. German Federal Constitutional Court, BVerfGE 35, 79 (113); 55, 37 (68) and § 4 Higher Education Framework Act («*Hochschulrahmengesetz*»).
28. Neither the teaching obligation ordinances nor the higher education acts of the federal states address this issue; there are also no judgements.
29. Exceptions exist for the subsequently mentioned consent to the restriction of the freedom
30. Cfr. German Federal Constitutional Court BVerwGE 144, 195 (201 ff.).
31. M. Hartmer, Y. Dorf, *op. cit.*, 394; M. Faller, *Rechtsfragen zu digitalen Lehrformaten, Arbeitspapier Nr. 7 des Hochschulforums Digitalisierung*, Berlin, 2017, 6.
32. Cfr. for example § 43 Higher Education Framework Act, § 99 Abs. 1 Higher Education Act of Berlin («*Berliner Hochschulgesetz*»), § 42 Higher Education Act of Brandenburg («*Brandenburgisches Hochschulgesetz*»).
33. Cfr. on this and on the concept of denomination H. Detmer, *Das Recht der (Universitäts-)Professoren*, in M. Hartmer, H. Detmer, *Hochschulrecht*, Heidelberg, 2017, 195.
34. See in detail M. Hartmer, Y. Dorf, *op. cit.*, 395 et seq.; Faller, *op. cit.*, 6 et seq.
35. B. Kempen, *Grundfragen des institutionellen Hochschulrechts*, in M. Hartmer, H. Detmer, *op. cit.*, 38.
36. An instruction that would impose more concrete guidelines on the methodological design of digital courses, e.g., obligatory synchronous teaching via a certain platform or the recording of videos, would not be justified, since milder means exist for fulfilling the teaching obligation. Cf. M. Hartmer, Y. Dorf, *op. cit.*, 395 et seq.
37. Generally on conflicting fundamental rights due to restrictions on university operations: G. Sandberger, *op. cit.*, 156.
38. Cf. German Federal Constitutional Court, BVerfGE 35, 79 (121 et seq.); 47, 327 (370); 55, 37 (68); 141, 143 (169)
39. Cf. German Federal Administrative Court, BVerwGE 144, 195 (201 et seq.); M. Hartmer, Y. Dorf, *op. cit.*, 394 et seq.
40. Cf. G. Sandberger, *op. cit.*, 157; M. Fehling, *op. cit.*, 140, 153; K. Bremer, C. König, *Wie die "neue Normalität" an Universitäten aussehen kann*, in *Forschung und Lehre*, 3.7.2020, <https://www.forschung-und-lehre.de/zeitfragen/wie-die-neue-normalitaet-an-universitaet-en-aussehen-kann-2919> (accessed on 30.10.2020).

41. L. Lütteken, *Präsenzlehre auch in Krisen nicht ersetzbar*, in *Forschung und Lehre*, 30.6.2020, <https://www.forschung-und-lehre.de/management/praesenzlehre-auch-in-krisen-nicht-ersetzbar-2906/> (accessed on 30.10.2020)
42. R. Bassett, *Sustaining the Values of Tertiary Education during the COVID-19 Crisis*, in *International Higher Education* 102 (2020), 5 (7).
43. Cfr. S. Kühl, *Wenn jeder für sich allein lacht*, in *Forschung und Lehre*, 20.5.2020, <https://www.forschung-und-lehre.de/wenn-jeder-fuer-sich-allein-lacht-2778/> (accessed on 30.10.2020), which also indicates the focus on the factual dimension.
44. Stifterverband für die Deutsche Wissenschaft, *Hochschulen, Corona und Jetzt?*, <https://www.stifterverband.org/medien/hochschulen-corona-und-jetzt> (accessed on 30.10.2020), 8 et seq.
45. Professors may also be forced to use a provider of video conferencing software that is questionable in terms of data protection if the university does not provide other software.
46. Cfr. C. Buchmüller, E. Hohl, *Die Vorlesung? Hab ich auf'm Smartphone! – Vorlesungsmitschnitte und ihre rechtliche Zulässigkeit*, in *Ad Legendum* 2014, 83 et seq.
47. However, it is also possible to be employed under private law in accordance with the state university law, see for example § 43 Higher Education Act of Brandenburg («*Brandenburgisches Hochschulgesetz*»). According to K. Gärditz, *Dienstrecht der Hochschulen*, in K. Gärditz, L. Pahlow, *Hochschulerfinderrecht*, Berlin, 2011, 36, an employment under private law with university professors is only concluded if the requirements under service law for a civil service relationship are not fulfilled.
48. This means, that disciplinary law may apply. If a professor denies to teach digitally, disciplinary proceedings can be initiated. A refusal to fulfil the teaching obligation has recently been punished by a reduction in remuneration, see VG Göttingen, Az. 4 A 102/18 and 4 A 174/19.
49. The legal provisions are § 3 Abs. 1 of the Federal Civil Service Act («*Bundesbeamtengesetz*»), § 4 of the Civil Servant Status Act («*Beamtenstatusgesetz*») and the state civil service laws.
50. Cfr. G. Sandberger, *Das wissenschaftliche Hochschulpersonal – Personalstruktur und Personalrecht*, in V. Haug, *Das Hochschulrecht in Baden-Württemberg*, Heidelberg 2009, 491.
51. Cfr. German Federal Constitutional Court, BVerfGE 15, 256 (263 et seq.).
52. K. Gärditz, *Hochschulorganisation und verwaltungsrechtliche Systembildung*, Tübingen, 2009, 444 et seq.
53. Cfr. German Federal Constitutional Court, BVerfGE 38, 175 (180).
54. BT-Drs. 19/4117, 12.
55. M. Fehling, *op. cit.*, 141.
56. Cfr. Schröder, *Der Schutzbereich der Grundrechte*, in *Juristische Ausbildung* 2016, 641 (644).
57. § 78 Federal Civil Service Act, see also K. Grigoleit, § 78 *BBG*, in U. Battis,

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*Bundesbeamten-gesetz*, Munich, 2017, paragraph 2 et seq.

58. Creating e-learning content for the first time and familiarizing yourself with the technical framework is significantly more time-consuming, cfr. J. Henke, N. Richter, S. Schneider, S. Seidel, *Disruption oder Evolution? Systemische Rahmenbedingungen der Digitalisierung in der Hochschulbildung*, Halle-Wittenberg, 2019, 48.
59. M. Fehling, *op. cit.*, 141.
60. As recently as March 2020, executive order laws were enacted nationwide on the basis of Section 32 of the German Infection Protection Act by the state governments or by bodies authorized by them. The executive order laws prohibited larger events, see for example for Berlin: § 1 SARS-CoV-2-EindV of 14.3.2020, GVBl. 2020, 210 et seq.
61. M. Hartmer, Y. Dorf, *op. cit.*, 395 et seq.
62. See under 1.
63. Cfr. G. Sandberger, *op. cit.*, 156. In addition, for example, students who fall into risk groups and are unable to attend lectures are prevented from enjoying the freedom of study derived from Article 12 of the German constitution.
64. 2.2.1.