International Commission of Jurists

**Deutsche Sektion der Internationalen Juristen-Kommission e.V.**

Contribution of the German Branch of the International Commission of Jurists
to the EU Consultation on

# The Rule of Law in Germany in 2021

The German Branch of the International Commission of Jurists (Deutsche Sektion der Internationalen Juristen-Kommission e.V.) is an independent and distinct branch of the International Commission of Jurists. Like its mother organization, the German branch is composed of lawyers of all stripes and all branches of government, in particular the judicial branch, as well as NGOs, law professors, inhouse lawyers and law firms all over Germany. Its mission consists in the maintenance of the rule of law, fundamental and human rights, and democracy, both in Germany and abroad. The German branch of the ICJ is financed by contributions from the federal government, based on a parliamentary decision, but also membership fees. This is a contribution to the consultation of the European Commission for the EU Rule of Law Report 2021.

## I. General/Introductory remarks

In general, the rule of law in Germany is in good shape. According to its Art. 1 para. 3, the German Basic Law upholds human rights and fundamental freedoms vis-à-vis all branches of government, both within Germany and – as confirmed in May 2020 by the Federal Constitutional Court – whenever German authorities are intervening in constitutional rights abroad.[1] Article 19 para. 4 GG contains a guarantee of the judicial protection of individual rights, whether of constitutional or of legislative provenance. Democracy is enshrined in Art. 20 paras. 1, Art. 28 and Art. 38 GG, in particular. Article 92 entrusts the judicial power to the judges of the Federal Constitutional Court as well as the courts of the federal and constituent states (hereinafter by their German name: "Länder"). Art. 97 para. 1 GG guarantees the independence of the judiciary, emphasizing that they are only subject to legislation ("Gesetz"); Art. 93 guarantees constitutional review; according to its para. 1 Nr. 4a, this includes fundamental rights. The tasks of the ordinary Courts of the five different judicial branches – common (civil and criminal), administrative, finance, labour and social courts – as well as the constitutional Courts in adjudication are thereby comprehensively guaranteed. A question by a single judge of the Administrative Court of Wiesbaden regarding its own independence[2] due to the influence of the State minister of justice in the election of judges and in the administration of Courts thus received

[1] BVerfG, Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17 - 1st headnote, para. 88 f. – Federal Intelligence Service – foreign surveillance.

[2] Judgment of the Court (Third Chamber) of 9 July 2020, C-272/19, VQ v Land Hessen, EU:C:2020:535, para. 38, 44.

Herrenstraße 23
76133 Karlsruhe
Telefon +49 721 388699
Telefax +49 721 358263

E-Mail: office@juristenkommission.de
URL: www.juristenkommission.de

Baden-Württembergische Bank Karlsruhe
Konto-Nr. 8073761, BLZ 600 501 01
IBAN DE05 6005 0101 0008 0737 61
BIC/S.W.I.F.T.-Code SOLA DE ST

a decidedly positive answer by the European Court of Justice as to the conformity of the German justice system with the rule of law.[3] The rule of law report of 2020 did neither have much criticism in this respect.[4]

The following contribution to the EU consultation on the Rule of Law Report 2021 represents the views of the board of the Deutsche Sektion der Internationalen Juristen-Kommission e.V. The following chapter covers the effects of the Covid-19 crisis on the German legal system; we then proceed to the analysis of several additional concerns relevant for the rule of law.

## II. Rule of law and the Covid-19 crisis

In the current Covid-19 crisis, Germany did not introduce a state of exception or derogate from the European Convention on Human Rights; human rights and fundamental freedoms remained fully in place. The federal legislator considerably amended the Law on the Prevention and Combatting of Infectious Diseases[5] several times, but under the authority of that law, the main measures were taken by the Länder, and some have remained controversial as the law itself. Critics argue that the new § 28a on special measures of protection for the prevention of the spread of Covid-19 is not determinate enough - even if it undoubtedly constitutes an improvement over the application of the pre-existing authorizations as contained in §§ 16 et seq. and 28 et seq. of the law. Another area of contention are the broad powers of the executive branches of the federation and the Länder as against the respective parliaments. The federal parliament has introduced for itself, however, the power of declaring an epidemic situation of national importance under § 5a of that law and limited the purview of the declaration to (a renewable) three months. Still, the broad powers conferred as consequence of such declaration on the federal health ministry have remained controversial. In addition, the determination of the sequence of vaccination for the protection of, among others, the especially vulnerable elderly and health workers by mere order of the health minister has been heavily criticized. Whether such broad delegations are constitutional remains to be seen.

[3] Ibid., paras. 50 et seq.

[4] European Commission, 2020 Rule of Law Report of 30 September 2020, {SWD(2020) 300-326}.

[5] Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG) of 20 July 2000, BGBl. I p. 1045, last amended 18 Nov. 2020, BGBl. I, p. 2397.

Similar to other crises, the health crisis has proved to be "the hour of the executive". The respective governments of the federation and the Länder meet regularly to agree on measures to battle the pandemic - even if some Länder later diverge from the decisions of this venerable, but non-constitutional body.

However, with the progress of the pandemic, the Courts have played a more and more active role. While the Federal Constitutional Court has, in 2020, only accepted three urgent Covid-related cases - two regarding the freedom of assembly, one on the freedom of the exercise of religion[6] - the administrative courts have more often intervened to require a proper balance to be struck between the duty of the state to protect health and life, on the one hand, and fundamental freedoms such as the freedoms of assembly, religion, or the free exercise of profession, on the other.

In general, the Covid-crisis has required courts to update their working methods and administrations to upgrade their respective IT infrastructure to facilitate working from home. Many courts have started using online proceedings (§ 128a ZPO) that lay largely dormant before; the introduction of electronic filing has continued. However, the technical equipment and online resources do not yet meet all needs, and the budgetary constraints will probably not ease after Covid-19. In other words, the judicial branch remains considerably underfunded, not only with regard to online resources.

## III. Rule of law and the judicial system

The requirements of the rule of law are well established and do not require further elaboration in this context. Nevertheless, a few recent developments stand out and require explanation. Alas, the reality of the rule of law in Germany does not always completely live up to these constitutional requirements; and Court proceedings can be long and arduous. While the number of cases in the ordinary courts may slightly dwindle – which may lead to problematic developments by itself because some areas of the law are only subject to secret arbitration - cases get ever more complex. The existence of three and at times four

[6] BVerfG, Beschluss der 1. Kammer des Ersten Senats vom 15. April 2020, http://www.bverfg.de/e/rk20200415_1bvr082820.html, DE:BVerfG:2020:rk20200415.1bvr082820; Beschluss der 1. Kammer des Ersten Senats vom 17. April 2020, DE:BVerfG:2020:qk20200417.1bvq003720, http://www.bverfg.de/e/qk20200417_1bvq003720.html (both freedom of assembly); Beschluss der 2. Kammer des Ersten Senats vom 29. April 2020, DE:BVerfG:2020:qk20200429. 1bvq004420, http://www.bverfg.de/e/qk20200429_1bvq004420.html (freedom of worship). See also Report of the Federal Constitutional Court 2020, pp. 59-60, available at http://www.bundesverfassungsgericht.de (last 3 March 2021).

avenues of judicial protection for human rights and fundamental freedoms – the global quasi-judicial means not included –, namely the State and the federal levels, the European Court of Justice and the European Court of Human Rights – makes it difficult, if not impossible for the common person to access the courts without a specialized lawyer who knows how to steer a case to the right court. Nevertheless, when individuals have found the correct instance, their rights will be effectively protected.

Judicial independence has both a substantive and a personal component, the former regarding the independence of decision-making and the exclusive bindingness of the law alone, the latter the personal basis of the exercise of independent judgment. Art. 97 para. 2 GG protects the personal independence by protecting judges from dismissal and promotion against their will, with narrow exceptions for an age limit and changes of legal constituencies. Only the federal constitutional court could theoretically remove a judge by a majority of two thirds in case of violations of the core principles of the constitution (Article 98 § 2 and 5), but this has so far never happened.[7] The respective provision of the Organic Law on the Federal Constitutional Court regarding constitutional justices has neither been applied so far.

However, recent judgments deal with novel threats to judicial independence, in particular regarding the election of judges and their remuneration and thus their material independence, but also their time of service and working conditions, as well as regarding legal education in general. Another question is whether the independence of judges is also applicable to prosecutors.

## 1. Election of judges

The most sensitive point regarding judicial independence is probably the election and selection of judges. While Germany has a unitary legal system for both federal and state law, the federal constitution only regulates the election of constitutional justices and the election of judges in the respective federal jurisdictions.

Legislation, but not the constitution requires a majority of two thirds of the federal parliament, the Bundestag, and the Federal Council, respectively, for the election of constitutional justices (§§ 6 (1) s. 2, 7 BVerfGG). The other federal judges are selected by

[7] Federal Constitutional Court, Annual Statistics 2019, pp. 8, 9, available at http://www.bundesverfassungsgericht.de (last 3 March 2021).

the federal minister of justice together with a committee equally composed of members of the Bundestag and state ministers of justice (Art. 95 para. 2 GG). In 2016, the Second Senate of the Federal Constitutional Court has further clarified this procedure:[8] The minister is bound by the principle of selection of the best qualified candidate according to Article 33 para. 2 GG. The committee is free in its decision, but needs to observe that very principle. The minister must give reasons when selecting another candidate, or when agreeing to the election of a candidate who was considered unqualified by the regular assessments or by the presidential council of the respective court. Thus, the judges do not decide themselves who is appointed, but the requirement to give reasons exercises a considerable degree of control regarding the necessary qualifications. In addition, the decision can be challenged in court. However, courts will only check whether the formal procedure was observed and whether the result is incomprehensible. Accordingly, as to the appointment of federal judges the principle to select the best qualified candidate is subject only to a basic control of reasonableness. Their further promotion, however, if challenged by other candidates, can be checked by the administrative courts,[9] as every appointment of judges (even the presidents of the courts[10]) or public officials ("Beamte") on the federal level or in the Länder, whether the appointment or promotion corresponds with Article 33 para 2 GG and is thus based on qualification.

The Länder have adopted very different rules on the election of judges. Some have committees of different composition, others leave the selection entirely to the executive branch. But even in the latter case these Länder have to include committees composed by representatives of judges in the decision making. Similar rules apply for promotions.

Recently, particularly in 2020 and 2021, this system has come under a certain stress. With regard to the election of constitutional justices, the federal council in one case missed several deadlines and debated openly between three candidates with the previous justice remaining in office for longer than his original term, as provided by the Law on the Federal Constitutional Court. In the end, a fourth candidate was elected. But of course, careful deliberation as such is not a crisis. What causes concern is that part of the discussion

[8] BVerfGE 143, 22 (2016), DE:BVerfG:2016:rs20160920.2bvr245315.

[9] BVerfG, Judgement of 25 November 2015, DRiZ 2016, 348, DE:BVerfG:2015:rk20151125.2bvr146115; Verwaltungsgerichtshof Baden-Württemberg, Judgement of 12 August 2015 - 4 S 1405/15 -, DE:VGHBW:2015:0812.4S1405.15.0A.

[10] BVerfG, Judgement of 4 July 2018, DRiZ 2018, 310, DE:BVerfG:2018:rk20180704.2bvr120718.

centred on regional representation rather than legal qualifications, even if the result of this process is not in doubt.

More problematic appears to be the current selection process of a president and a vice-president of the Federal Court of Finance (*Bundesfinanzhof*), in which the Minister of Justice dropped, without consultation with the federal Courts, the requirement of a five year activity as judge of the Federal Court of Finance in order to qualify for the position of president or vice-president of the Court. The requirement is particularly important for the function of the vice-president, because she hardly performs any administrative tasks within the court, but is primarily required to head a specialized senate at a supreme federal court. The German Judges' Association also criticizes this approach and points out that the ability of the supreme fiscal court to function is at risk, as the minister's actions will be subject to judicial review.[11] It would be very regrettable if the current system that functions without much friction and has produced an appellate jurisdiction of undoubtedly high quality would thus be put into question. It needs to be emphasized, however, that the candidates in question have considerable experience as presidents of lower courts.

Related developments can be observed in the Länder. In North Rhine-Westphalia, the justice ministry is planning to control the regular assessment of higher judges.[12] Recently, the Minister of Justice of Berlin appointed three judges to become heads of a chamber of the *Kammergericht*, Berlin's highest Court, without awaiting the decision on a legal challenge put forward by another, arguably better qualified candidate[13]. The conduct of the Minister does hardly meet the requirements of the Federal Administrative Court.[14]

As to gender equality, the Federal Constitutional Court has now, for the first time in its history, a female majority. The number of women justices has gone up from three to

[11] See, e.g., interview with the President of the Federal Administrative Court, Prof. Dr. Klaus Rennert, Frankfurter Allgemeine Zeitung of 3 March 2021, available at www.faz.net (visited 4 March 2021), who considers the independence of judges as secure, but the election of the president and particularly the vice-president of the Federal Court of Finance as a "step in the wrong direction"; DRB warnt vor Hängepartie bei Neubesetzung der Spitze des BFH, https://www.drb.de/newsroom/presse-mediencenter/nachrichten-auf-einen-blick/nachricht/news/drb-warnt-vor-haengepartie-bei-neubesetzung-der-spitze-des-bfh (visited 4 March 2021).

[12] Burger, Einfallstor für Einflussnahme?`, Frankfurter Allgemeine Zeitung of 5 March 2021.

[13] See Fröhlich, "Missachtung der Gerichte führt anderswo zum Rücktritt", Tagesspiegel of 26. Jan. 2021, available at https://www.tagesspiegel.de/berlin/richterposten-streit-wird-problem-fuer-berlins-justizsenator-missachtung-der-gerichte-fuehrt-woanders-zum-ruecktritt/26847514.html.

[14] BVerwG, Judgement of 22 November 2012, BVerwGE 145, 112.

nine in the past ten years. Nominations to the Supreme Court and the other federal courts, however, do not quite live up to this example. It remains to be seen whether the current female majority in the Federal Constitutional Court will translate soon into more equality on the federal bench in general.

### 2. Remuneration of judges

A sufficient remuneration of judges considerably reduces the risk of undermining their independence through corruption. To assess the fairness of the remuneration of judges, the Federal Constitutional Court applies the principles established for public officials (Beamte) in general.[15] The Court uses five parameters, namely the comparison with other public servants, the index on nominal wages, the prize index, the comparison with other public employers, but also the limits on public debt contained in the constitution. In some Länder, the Court came to the conclusion that the balance struck was inappropriate.[16]

In the most recent decision of the Court on the matter, two considerations stand out. Firstly, the quest for talent between courts and law firms that offer high wages to young associates. Secondly, the remuneration of young judges must allow raising a family.[17] These considerations are narrowing the great discretion enjoyed by the legislature in financial matters.

In the current crisis, it appears increasingly difficult for courts to fill positions opened by judges retiring with highly qualified young lawyers. Some Länder – who appoint judges at entry level – had to lower their requirements in order to fill the open positions. By way of a "Pact for the rule of law" (Pakt für den Rechtsstaat),[18] the federal level provides financial resources to the Länder to fill gaps in appointment of new judges and prosecutors, among them 2.000 new positions for judges in the Länder. It needs to be thoroughly checked, however, whether this will really lead to the creation of new positions and not merely create windfall effects in the Länder budgets.

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[15] BVerfGE 139, 64 (2015), DE:BVerfG:2015:ls20150505.2bvl001709; 149, 382 (2018), DE:BVerfG:2018:ls20181016.2bvl000217; BVerfG, Order of the Second Senate of 4 May 2020 - 2 BvL 4/18, DE:BVerfG:2020:ls20200504.2bvl000418.

[16] BVerfGE 139, 64 (65, 3rd and 4th headnote).

[17] BVerfG, Order of the Second Senate of 4 May 2020 - 2 BvL 4/18 - Rn. 47 with further references, DE:BVerfG:2020:ls20200504.2bvl000418.

[18] Pakt für den Rechtsstaat (Covenant for the rule of law), Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder of 31 January 2019, available at www.bundesregierung.de (last on 3 March 2021).

3. Judges for a limited period?

To fill gaps in the ranks of administrative judges, particular in asylum cases, the legislator introduced positions of non-permanent judges and allowed officials from the civil service to apply for a term-limited judgeship. The Federal Constitutional Court has decided that this was permissible.[19] One of the judges of the Court appended a dissenting opinion by pointing out that the envisaged return to the former position in the executive branch was endangering the independence of such non-permanent judges as well as the separation of powers between the legislative and the judicial branches. Accordingly, the dissenting judge considered the mere appearance of mixing of the executive and judicial branches worrisome,[20] since, in the famous words of the European Court of Human Rights, "Justice must not only be done, it must also be seen to be done."[21]

As far as the Federal Constitutional Court is concerned, however, the highest (and "extraordinary") jurisdiction in Germany, the exclusion of reëlection of constitutional justices after a single period of 12 years strengthens their independence from politics or from seeking political favours.

4. Supervision, working conditions and workload of judges

In spite of their independence, judges in the ordinary courts are not completely free of supervision, though. Rather, they are subject to a supervisory authority, as far as this does not put into question their independence as a judge (§ 26 (1) Deutsches Richtergesetz (DRiG)). When judges claim that a directive of the supervisory authority interferes with their independence, they can file a complaint to a special court, the Richterdienstgericht (judge service tribunal, § 26 Abs. 3 DRiG). In particular, the limits of judicial independence can be challenged with regard to the workload and working conditions of judges.

For example, a judge of an higher regional court („Oberlandesgericht") whose workload had been way below the court's average for numerous years is currently fighting a decision to bear a fair share of the court's workload. The Federal Court of Justice rejected

[19] BVerfGE 148, 69 (2018), DE:BVerfG:2018:rs20180322.2bvr078016.

[20] Id., at 143 para. 25 (diss. op. Hermanns).

[21] See, e.g., ECtHR, *De Cubber v. Belgium*, 26 October 1984, Case. No. 9187/80, § 26, Series A no. 86; For its origin, see UK House of Lords, *Rex v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.

his complaint that is now pending before the Federal Constitutional Court.[22] According to the Federal Court of Justice,

> „the independence of a judge is only impaired if the workload in question could generally not be managed appropriately, that is, also by other judges."[23] (Our transl.)

It should be noted that there is a fundamental difference between political interference and the determination of a fair share of the workload among the judges themselves.

### 5. Independence of the prosecution

Due to a decision of the European Court of Justice,[24] one point has received particular attention in 2020, namely the independence of the public prosecution. Art. 97 para. 1 GG simply states that "Judges shall be independent and subject only to the law." But this wording does not include the Prosecutor's Office.

While the prosecution as such acts in practice as independently from the executive branch as Courts do, they are also, in principle, subject to an hierarchy with regard to the supervisory authority of the democratically legitimated government, in particular the minister of justice (§§ 146 f. GVG - Law on the constitution of Courts). While the last Rule of Law report – different from the Parliamentary Assembly of the Council of Europe[25] - has not criticized this longstanding practice rooted in the democratic responsibility of the executive branch to the people and thus itself of a constitutional character,[26] it has been under discussion for a long time. In practice, however, the "Weisungsrecht", the right of the minister to issue a formal instruction to a public prosecutor is hardly ever exercised, as far as a specific case is concerned. In order to avoid any appearance of improper interference the Bundestag is discussing a reform,[27] quite independently of the decision of

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[22] BGH Dienstgericht des Bundes (Service Court of the Federation), Judgment of 12 May 2020, RiZ 3/19, DE:BGH:2020:120520URIZ.R.3.19.0.

[23] Id., para. 29.

[24] European Court of Justice, Judgment of 27 May 2019, C-508/18, C-82/19 – OG (Parquet de Lübeck), EU:C:2019:456.

[25] PACE, Resolution 1685 (2009), available at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1685.htm (last 3 March 2021).

[26] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany of 30 September 2020, SWD(2020) 304 final, p. 3.

[27] Respective proposals by opposition parties were however rejected, cf. Draft Law for the Strengthening of the Independence of the Prosecution, BT Drs. 19/11095 of 25 June 2019 (FDP); Reform the Position of the Prosecution in accordance with the Rule of Law, BT Dr. 19/13516 of 24 September 2019 (BÜNDNIS 90/DIE

the Grand Chamber of the European Court of Justice that the German Prosecutor's offices are no "Justizbehörde" in the sense of Art. 6 § 1 of the Framework Decision.[28] In practice, judges are now required to issue a European Arrest Warrant.

However, as long as the Prosecutor's Office is not explicitly included in Art. 97 para. 1 GG and its independence thus enshrined in the constitution, it is doubtful whether a simple change of the law would suffice. The hierarchy ensures the democratic legitimation of its decisions. As long as the prosecution does not render decisions binding on individuals, this practice is in accordance with the rule of law.

### 6. Legal Education

At the same time, a debate is raging on whether legal education should concentrate on the formal qualifications for judges or also include more academic issues mostly taught in the more specialized part of university education. The Federal Council has recently adopted a restrictive view on the value of the latter, arguing in favour of a separate grade for the general part of the education excluding the specializations,[29] whereas the minister of justice has argued for a mandatory treatment of the aberrations of the Nazi dictatorship.[30]

While the German branch of the ICJ does not have an "official" view on legal education, after the experience of the abhorrent Nazi regime, the branch's mission to uphold the rule of law clearly militates in favour of young lawyers learning not only the mechanics of the law, but teaching them the dangers of abuse inherent in the legal profession. Lawyers becoming automatons exercising the will of the powerful without regard for the human consequences is a nightmarish vision of the future of the legal profession. Thus, deeper insights and historical knowledge must remain, or become, a permanent feature of legal education, and they should be included not only in the curriculum, but also in exams and grades that determine the entry into the legal profession including judgeships.

GRÜNEN). For the state of discussion, see Pinar, Gül: Frei, aber nicht unabhängig: Zur Stellung der Staatsanwaltschaft im System der Gewaltenteilung, VerfBlog, 2020/12/14, https://verfassungsblog.de/frei-aber-nicht-unabhangig/, DOI: 10.17176/20201214-180218-0.

[28] Judgment of the Court (Grand Chamber) of 27 May 2019, para. 88, EU:C:2019:456.

[29] BR-Drs. 20/21, Entwurf eines Gesetzes zur Modernisierung des notariellen Berufsrechts und zur Änderung weiterer Vorschriften (Draft law for the modernization of the profession of notary and other provisions), p. 18.

[30] C. Lambrecht, Neu über Recht und Unrecht nachdenken, available at ww.bmjv.de/SharedDocs/Interviews/DE/2021/Namensartikel/0128_FAZ_NET.html (last 3 March 2021).

## IV. Conclusion

It is not a matter of course that political interference in judicial decisions is rare, almost non-existent in Germany. However, it should be noted that there are cases where judgments are not properly executed[31]. Each instance of non-compliance with judicial decisions is dangerous.

This is all the more true for judgments of the European courts in Luxemburg and Strasburg. However, a clear distinction should be made between certain courts in Europe denying the implementation of Court orders against them or threatening judges who exercise their duties of referral to the European Court of Justice under Art. 267 TFEU,[32] and the German Federal Constitutional Court calling upon the European Court of Justice to exercise more judicial control of the powers of the European Central Bank[33]. Whatever one may think of the latter decision – and the opinions within the German Section do diverge - the first decisions are inimical to the rule of law and endanger judicial independence, the latter judgment is rather a plea for their exercise.

Thus, the merits of this or that Court decision will always be debatable in a democratic State as well in a democratic Union of States – the principle of the rule of law in a liberal democracy is not. While the described problems in Germany are certainly solvable, they demonstrate that the rule of law does not come by itself or from legal texts alone, rather, it must be fought for and needs to be defended at all times and under all circumstances. It must be part of our common legal culture.

[31] Non-Execution of judgements was reprimanded by BVerfG, Judgment of 24 March 2018, EuGRZ 2018, 232; Oberverwaltungsgericht Nordrhein-Westfalen, Judgment of 15. August 2018, NVwZ 2018, 1493. Bayerischer Verwaltungsgerichtshof, Judgment of 9 November 2018 - 22 C 18.1718 -.

[32] Judgment of the Court (Grand Chamber) of 2 March 2021, A.B., Case C-824/18, paras. 93 et seq., EU:C:2021:152.

[33] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 – PSPP, paras. 154-163, DE:BVerfG:2020:rs20200505.2bvr085915.