Andrea Orsi Battaglini/Fabio Roversi Monaco (eds.)

The University within the research System – An international comparison

Science and society. Constitutional problems.
The national experiences

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Government and Self-Government of Science – Constitutional safeguards of scientific research and teaching –

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1. Freedom and autonomy of science, organized in the corporative body of the university, necessarily means freedom of research and teaching in the framework of self-government, regulated and protected by the law. Anyhow, the core of the self-government of science is and remains the individual liberty of the scientist, for whose initiative, thinking, work and teaching the academic self-government provides the organizational and material conditions.[1] In this capacity and function, academic self-government is a supportive strengthening of the individual liberty of research and teaching, even a supportive bulwark of individual liberty against the administrative powers of the state. But, being not only a collectivized form of the individual rights and liberties of the academic members, academic self-government by its administrative and regulatory powers can become an antagonist for the individual liberty of the

1 A. Köttgen, Deutsches Universitätsrecht, 1933, p. 50 sqq.

singular scientist. That means that academic self-government has an ambivalent role, as well as a support as a virtual counterpart of individual liberty of science.

The organizational support of liberty by forms of self-government is an old pattern in the development of public law. University as an academic corporation for research and teaching in a free community of scholars is a striking paradigma of this institutional phenomenon. But it should be considered that meaning and purport of liberty and self-government have undergone substantial changes, especially in the course of constitutional and political revolution from the age of liberalism to our times of the democratic Welfare-State. The liberal confrontation of liberty versus the State has been superimposed and in part displaced by the new dependences of group society. State, by virtue of this contemporary situation and circumstances of individual liberty has in essential regards assumed again the position of protector and promotor of individual well-being and freedom. This is valid, of course, for the university, too. Social policy and group interests do not stop in front of the gates of university. So, the safeguards of the freedom of science must secure defences against inroads from group power, may it operate from society in general or by means of academic self-government itself. The modern position of the State as protector and promotor of academic liberty, again is ambivalent. The Welfare-State with its all-embracing penetration of social relations is, even under an effective constitution and a strong rule of law, a powerful interventor everywhere, and not least in matters of science and education. Finally, the democratic State is not a neutral prince aloft and outside of the group process.

2. University comprises all sciences and the interdependence of all scientific research and teaching. In former times, a university in the full sense had been constituted by the classical canon of faculties: theology, law, medicine, philosophy and artes liberales. Nowadays, a long line of further faculties and departments has completed the circle of academic sciences: natural sciences, economics, social and political sciences, educational sciences, architecture and engineering, and so on. The traditional faculties of philosophy have disintegrated and produced another set of faculties for humanities.
These changements have not a technical character alone. They reflect different cultural and educational advancements and in general a very diverse progress of knowledge. Anyhow, all these organizational and substantial developments unfold in the precinct of the unique form and house of the university, keeping the idea and – at least in part – the living reality of the unity of sciences. The specialized division of scientific research shall not lead to an institutional segregation of the scientific culture and learning. University is

the main embodiment of this fundamental principle. Consequently, academic self-government is a way of cooperation of sciences under the guidance of common criteria for valid scientific knowledge and education.

3. Unviersity rests on the principle of a unity of research and teaching. From the beginning, the European university united learning and teaching on the common ground of free and unerring thinking and inquiry. The scientist, by this incorporation in the academic community, is part of an erudite and educational process, not an isolated and narcissic self-sufficient brain. By the way, this process constitutes a continuity of generations, combining the freshness and openness of a new look with the experience and practice of self-gained knowledge.
Scientific work, of course, is not confined to the academic institutions of university. There are countless institutions and facilities, established by the State, which are entrusted with scientific assignments of temporary or lasting importance, without an educational responsibility. Under these noneducational organizations of science the academies have a national and historic prominence. Moreover, scientific research is an expensive subject of larger enterprises, to secure the position in the market and the progress of production. Measured in the figures of persons and costs, industrial research might well outnumber the university-based science. Conclusions on the importance in the long run, of the academic science on the one side and the non-educational and industrial science on the other hand, might be precipitate. The diversity and peculiarity of those provinces of science, each of its own right, depends of proper safeguards. In the case of the univesity it must be a legal protection, which takes into account the combined efforts of research and teaching.

4. University is not an island of self-sufficient scientific life, shielded from the outer world of political power and social interests. University is a part - and, according to its innermost mandate, an actif element – of society and of the political process. Freedom of science and academic self-government are designed to permit and secure this own, autonomous and independent force of science, of research and teaching in the fabric of society and State.
The impact of politics and interests on the university has changed its face and quality under the conditions of industrialization, democracy and the Welfare-State. Science has become a decisive factor in the development of industrial civilization and in entrepreneurial activity and success. Economical growth as well as ecological protection are dependend on the achievements of science. Education and professional instruction are a basic requirement of personal self-realization in a society, where the distribution of status and income is mainly

determined by the output of labour. In either regard, science and education or instruction, university has a pivotal position. Under these circumstances, the danger is imminent that the capacities of the university and of the scientists and teachers in the university are molded to be instruments for interests and social policies, for purposes which are set by extra-scientifical instances.[2] The frontierlines of the struggle of politics and interests prolongate into the academic institutions, not only by the way of regulations or administrative directives but, even more dangerous, from the ranks of academic community and self-government themselves. So, the vexing question is, how to unfold the old-type guarantees of the freedom of science to be effective legal tools in the corporative university as a part of the democratic Welfare-State.

II. *Politics, Science and Unviersity*

1. a) The colourful avenue of European scientific culture from the Greeks through the Middle Ages, the Renaissance and the Enlightenment to our times, has added manyfold pieces of tradition which are entrusted in the hands of the scientist of today. This is the treasure-house which opens for us the opportunity to learn, to know and to teach. We must be able to use it and to preserve it, but we must augment its stocks, too. The organization of science must secure that these fundamental activities can be exercised freely and effectively and, of course, for the common benefit.

Modern science, in the beginning, was a servant of theology and developed under the surveillance of dogma, the school and Aristotelism. Its final emancipation succeeded under the guidance of natural philosophy and natural science, with the mentorship of Bacon, Galilei, Descartes and Newton,[3] to select the most prominent and symbolic pioneers. Francis Bacon aspired to a revolution of sciences, but also to a scientific »revolution«, to put the progress of knowledge in the service of common welfare.[4] Consequently he designed

2 Th. Oppermann, Deutsche Universität und Wissenschaft im ausgehenden 20. Jahrhundert, Deutsches Verwaltungsblatt 1983, 858.

3 Francis Bacon (1561-1626): Instauratio magna (1605 sqq.); Galileo Galilei (1564-1642): Dialogo spora i due massimi sistemi del mondo (1632); René Descartes (1596-1650): Discours de la méthode pour bien conduire sa raison, et chercher la verité dans les sciences (1637); Isaac Newton (1642-1727): Philosophiae naturalis principia mathematica (1687). – J. Mittelstraß, Neuzeit und Aufklärung. Studien zur Entstehung der neuzeitlichen Wissenschaft und Philosophie, 1970.

4 B. Farrington, Francis Bacon. Philosopher of Industrial Science, 1949; P. Rossi, Francesco Bacone. Dalla magia alle scienza, 1957; W. Krohn, Francis Bacon, 1987 (»philosophy of inquiry«).

his ›Nova Atlantis‹ as a Welfare-State under the benevolent governance of scientists. The continuation of the following centuries deposed natural science from its standard-setting position, giving history and then sociology and political economy the avantgarde responsibility. The new magistri were Giambattista Vico, Adam Smith and August Comte,[5] to call again upon the outstanding and symbolic names. Man was discovered as a historic being, embedded in a living culture of nations and occupying the world by action and labour.

b) In the European tradition of culture and education the University of Bologna – docta Bononia – has a unique position.[6] Paris acknowledged the precedence of theology,[7] Bologna emphasised the study of law, becoming, in the late Middle Ages the outstanding place for the teaching of ius civile and of canon law. Since 1088, when the Commune of Bologna founded a school of artes liberales for the instruction of syndics, notaries and advocates, and since the work of Irnerius, Orlando Bandinelli (later Pope Alexander III., 1159-1191) and Gratian we can speak of the coming into existence of a legal science. »In many respects the work of the School of Bologna represents the most brilliant achievement of the intellect of medieval Europe«.[8] Friedrich Carl von Savigny writes on the universities in the Middle Ages: »The intellectual impetus which Europe has received by them, has been more lasting than their own initial blossom, and we lawyers, especially, should never ungratefully forget, that the learned science of law of newer times rests on the foundation of the School of Bologna«.[9]

Another reason to mention the School of Bologna is its organizational feature as an unviersitas scoliarium, a corporation with a distinct legal position with a kind of protected autonomy. The Authentica habita, drafted by the quattuor doctores of Bologna, which Friedrich I., Emperor and ruler of Lombardia, at the Diet of Roncaglia (1158) bestowed to the university of Bologna, became a model for the liberties of medieval university in general. It was a privilege, granted

5 Giambattista Vico (1668-1744): Principii di una scienza nuova intorno alla natura delle nazioni, per la quale si ritruovano i principii di altro sistema del diritto naturale delle genti (1725); Adam Smith (1723-1790): An Enquiry into the Nature and Causes of the Wealth of Nations (1776); Auguste Comte (1798-1857): Course de philosophie positive (1830-42).

6 H. Fitting, Die Anfänge der Rechtsschule zu Bologna, 1888; H. Rashdall, The Universities of Europe in the Middle Ages, 1895, vol. I, pp. 89 sqq; P. Vinogradoff, Roman Law in Medieval Europe, 1909, 3rd ed. 1961, pp. 55 sqq; F. Wieacker, Privatrechtsgeschichte der Neuzeit, 2nd ed., 1967, pp. 45 sqq; F. C. Copleston, A History of Medieval Philosophy, 1972.

7 Bonaventura: Omnes cognitiones famulantur theologiae.

8 Rashdall op. cit., p. 254.

9 F. C. von Savigny, Geschichte des Römischen Rechts im Mittelalter, 3rd vol., 2nd ed., 1834, p. 156.

»omnibus qui causa studiorum peregrinantur scolaribus et maxime divinarum atque sacrarum legum professoribus«. So, Bologna was – as university is today – at the same time a corporative community and a public institution of learning and teaching, of scientific education and instruction.

c) Only one further contribution to the tradition of university should be mentioned. Inspired by the philosophy of Idealism, the renewal of Prussia's educational system produced the foundation of the universities in Berlin (1809), Breslau (1811) and Bonn (1818).[10] Pestalozzi, Schleiermacher, Fichte[11] and especially Wilhelm von Humboldt promoted the reconstruction of the university, following the principles of the unity of research and teaching and the freedom of research and teaching. This purposely lead to a new spirit and effectiveness of science and, at the same time, to a renewal of the Prussian State after the design of a civil society and a national culture. Humboldt's university combined the corporative and the institutional element: the »inner« matters of research, learning and teaching were assigned to the corporative and autonomous self-government, the »extern« matters of organization, personnel policy and finance concerned the university as an institution (»Anstalt«) and were under the administration or surveillance of the State. Whereas this basic pattern of the German university has survived until now, the kind and operation of academic self-government has been substantially alterated by the establishment of »group-university« after 1970.

2. a) The nucleus of the individual liberty of science and of academic self-government, insofar as it serves the free research and teaching, is the freedom of thought, Spinoza's libertas uniuscuisque, sentire quae velit, et dicere, quae sentiat.[12] This really original freedom of man might be considered as a natural attribute of everybody, needing only legal protection against despotic or intolerant arbitrariness and unfair restrains. With freedom of science it is not the same. It, also, needs the mentioned guarantees, but additionally it can, foremost as an element of the academic organization, exist and can be exercised only by virtue of rules which regard and balance this freedom with the exigencies of public interest and with the rights and interests of the other affected persons. The rules of academic self-government are one set of those legal provisions which are necessary to give individual liberty of science legal effect.

10 E. R. Huber, Deutsche Verfassungsgeschichte seit 1789, vol. I, 2nd ed., 1967, pp. 260 sqq.
11 Johann Gottlieb Fichte (1762-1814): Reden an die deutsche Nation (1807/08).
12 Spinoza, Tractatus Theologico-Politicus, 1670, chap. XX.

The principle of constitutional safeguards for individual liberty and for autonomous forms of self-government, stemming from the natural law philosophy and policy of the Enlightenment, defends the protected persons and institutions not only against administrative or political intrusions of the executive branch of government, but also against the law-giving sovereign, be it the prince, be it the people represented in Parliament. The binding force of an article on freedom of science in the constitutions, operating against the legislating power, works in the main respect as a directive and guideline to make such laws as are necessary to enable, protect and foster free science in the corporative and institutional organization of the university.

Freedom of thought, freedom of opinion and, obviously, freedom of science are, if safeguarded by a constitutional liberty, a personal right, but not an isolated good or privilege. The raison d'ètre of these liberties is also the social usefulness of the protected freedom. Free science is a precondition of fruitful scientific work and of the progress of knowledge. As Rudolf Smend in a very influential lecture[13] has shown, freedom of opinion is »at first a piece of morally necessary ›Lebensluft‹ for the individual«. But from the times of Enlightenment the freedom and publicity of opinions has been viewed as the«automatically effective organization of valid opinion and political morality«, or at least as a very important means to inspire the cultural spirit and an undispensable condition and form of political life. This side of free speech and opinion has a social or institutional meaning. Consequently, freedom of science, especially as academic liberty, is the safeguard of a part of cultural life, which is acknowledged and privileged as social important because of the intended value (not utility) of the output. This interpretation rests on the assumption, taken as self-evident and matter-of-course, that »science« is a clearly recognizable concept, following the Weltbild of the German Idealism.[14] This, of course, today is far from evident, to say nothing of self-evident. »Science« now, used in the context of a constitutional guarantee, can only be defined by formal criteria of scientific activity.

Under the modern circumstances of politics and bureaucracy, a constitutional guarantee for freedom of science and for academic self-government is essential. On the other hand, the possible effectiveness of such a safeguard should not be overestimated. The organization and formation by the law is necessary and the latitude of legislative decision is broad. After all, the legal (and constitutional)

13 R. Smend, Das Recht auf freie Meinungsäußerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 4, 1928, p. 44. – G. Anschütz, Die Verfassung des Deutschen Reichs, 14th ed., 1933, Art. 142, n. 2.

14 A. Köttgen, Die Freiheit der Wissenschaft und die Selbstverwaltung der Universität, in: Die Grundrechte, vol. II, 1954, p. 291/293.

point of view only leads to normative conditions and instruments for a free science in an autonomous realm of self-government. It cannot secure the success and quality of scientific activities. This is due to the scientists themselves, to their capacity and ethics, and in part, to the responsible selection of the members of the academic community. Finally, the general situation of society and culture, the spiritual élan vital of the time influences the way of science, and interdependendly is influenced by the living and movement of science[15].

b) The Basic Law of the Federal Republic of Germany comprises the following liberty: »Art and science, research and teaching are free. The freedom of teaching does not dispense from the loyalty to the constitution« (Art. 5 sect. 3 GG). With the exception of the new second sentence, the phrasing of the guarantee follows the traditional words.[16] The Constitution of Weimar had added: »The State ensures them (sc. the art, the science and the teaching of it) protection and takes part in their cultivation«. This program and guide-line stresses the institutional, objective aspect of the constitutional guarantee, which anyway is hinted at by the wording. Especially the explicitly named freedom of teaching (»Lehrfreiheit«) is an individual liberty and has the specific attribute to be an institutional guarantee, because academic teaching is a matter of the university and the professional academic teachers, the professors, are civil servants[17]). The core of the guarantee is the acknowledgment of the autonomy of the scientific life, which in virtue of its own laws defies legal regulation and review. Freedom of teaching means the liberty, not to be subjected any orders or directives concerning the content of scientific truth and the form of its presentation and imparting, notwithstanding the duty of the teacher to represent his subject appropriately[18]).
The objective, institutional side of the liberty of science seems to suggest the conclusion that Art. 5 sect. 3 GG is an individual liberty and in the same way a self-reliant guarantee of the autonomous self-government of science in the university. This conclusion is not valid. The dominant interpretation, supported by the Constitutional Court, understands the guarantee as an individual liberty which is supplementarily enforced by the protection of those institutional and procedural provisions which are a necessary extension of free science, free research and free teaching.[19] The basic constitutional decision for free

15 Th. Oppermann op. cit., p. 858.
16 Constitution of the Paulskirche in Frankfurt, 1849 (§ 152); Constitution of Prussia, 1850 (Art. 20); Constitution of Weimar, 1919 (Art. 142).
17 G. Anschütz op. cit., Art. 142, n. 4; A. Köttgen, Freiheit der Wissenschaft, op. cit., p. 302; R. Scholz, in: Maunz/Dürig, Grundgesetz, Art. 5 Abs. III (1977), n. 131.
18 R. Smend op. cit., pp. 61, 68. – BVerfGE 47, 327/367.
19 R. Scholz op. cit., n. 133.

science lays the ground for the personal liberty of the scientist, but does not include a guaranteeing decision for a special organizational form of academic self-government; this is a matter of the legislator and so the law may change and expand or shorten the academic self-government to the point, where this alteration would cut into the individual liberty of scientific research and teaching. The organizational and material conditions and prerequisites of science are only insofar – indirectly protected by the freedom of science as they could be an instrument for an infringement of the independent and autonomous way of finding, producing and transmitting scientific knowledge.

Art. 5 sect 3 GG protects in the university only the organizational and procedural elements which in the course of historic development in the singular states (Länder) had been formed as indispensable for a free activity of the universities in science, research and teaching. The guarantee does not protect the maximum of that what could be seen desirable, looked from the viewpoint of an ideal university.[20] The freedom of science is not the »basic right of the university«. This guarantee has not the traditional organization of the German university as its fundament, nor does it on the whole prescribe a certain organizational form for the process of science in the university. It belongs into the realm of legislation and to the discretion of the legislator, respecting the limitations set by the basic constitutional norm of Art. 5 sect. 3 GG and respecting the individual freedom of science, to regulate the organization of the universities and to adapt it to the social and sociological exigencies of the time.[21]

The university as a corporative entity is legally able to defend its autonomous position in the court and to assail an administrative decision and even a law or other regulation, on the ground that its constitutional right be violated. But this would – as we have seen – not be the case only because the State had intervened in a matter of science or had interfered with academic self-government. Otherwise, the university combines the corporative academic life with its public function as an institution of education and instruction and as an agency for administering matters of the State, for instance in personal and financial matters. Therefore a legal confrontation of university and State could only concern the genuine academic part of university activities. Much more in the line, according to the underlying principle of combined responsibility, is the cooperation of State and university.[22] This cooperation, from the part of State, includes the respect for academic liberty and self-government. It determines the day-to-day picture of university life.

20 BVerfGE 15, 256/264.
21 BVerfGE 35, 79/116.
22 R. Scholz op. cit., n. 137 sqq.

c) An essential constitutional feature of university affairs in Germany is the federal structure of the State. The Federal Republic of Germany is a Bundesstaat and the foundation, organization and administration of universities is in the competence of the Länder. Originally even the legislation, planning and financing of universities was reserved to the Länder. This in part has been changed by two amendments to the Basic Law. The 22nd amendment from May 12, 1969 (BGBl. I p. 363) gave the federation the competence to enact sceleton laws on the general principles of university matters (Art. 75 No. 1 a GG). The Finanzreformgesetz from May 12, 1969 amended the Basic Law in designating the enlargement and new construction of universities and colleges including academic clinics as a common task of federation and Land (»Gemeinschaftsaufgabe«), so that planning and financing in this respect are a matter of both (Art. 91 a GG).

The federal constitution, by stating the basic right of free science, research and teaching (Art. 5 sect. 3 GG), establishes – in addition to the binding force of this guarantee for the federal powers, esp. the federal legislation – a federal safeguard against the powers of the Länder. Combined with the jurisdiction of the federal courts, including the judicial review by the Bundesverfassungsgericht, the constitutional liberty secures a means of surveillance over the legislation and administration of the Länder, concerning the universities.

The Länder, endowed with original constituent powers, have enclosed in their constitutions own guarantees for the freedom of science and, most of them, additionally for academic self-government. These institutional guarantees are somebit different in their content.[23] Using a bit of simplification, their common pattern is that universities are erected and supervised by the State and have a right of academic self-government with an appropriate participation of students and within the limits of the law. These constitutional provisions state an explicit and original right of the universities, obligating the powers of the Land, especially the lawmaking power. In this regard, there is a difference to the Art. 5 sect. 3 of the Federal Constitution. Anyhow, this difference is one of form and of legal construction, not a difference of substance. Only the clauses which postulate the participation of students in academic self-government, prescribe a certain formation, whereas in every other respect the legislator has a broad discretion. The law cannot abolish academic self-government, it must take into regard the traditional elements of academic autonomy and self-government and must respect the freedom of science, research and teaching, including the

23 Art. 20 Const. Baden-Württemberg; Art. 138, 140 Const. Bayern; Art. 34 Const. Bremen; Art. 60 Const. Hessen; Art. 16, 18 Const. Nordrhein-Westfalen; Art. 39 Const. Rheinland-Pfalz, Art. 33 Const. Saarland.

necessary conditions and prerequisites of this complex freedom in organization and procedure of the university. But, as in the above elucidated case of Art. 5 sect. 3 GG, there is again no fixed and untangible right of the university to have a certain form and extent of its self-government.

3. Using its legislative competence in Art. 75 No. 1 a GG the federation has issued a sceleton statute for university matters: Hochschulrahmengesetz (HRG) from January 26, 1976 (BGBl. I p. 185). This statute has been amended and is now in force in the text of the promulgation from April 9, 1987 (BGBl. I p. 1170). The Hochschulrahmengesetz embraces the basic regulations on the duties and functions of the universities, on the access to the university and on the regulation of study and curriculum, on the members of the university and on its organization and administration. The Länder have filled out the framework of this law by issuing statutes on their universities (Hochschulgesetze) and the professors and other academic personal (Hochschullehrergesetze). According to the different traditions and formation of universities all over Germany and, too, influenced by the divergent political intentions of the respective majorities the landscape of university organization is quite multicolour, now.
The Hochschulrahmengesetz prescribes that Länder and universities have to secure that the members of the university can make use of the basic rights which Art. 5 sect. 3 GG guarantees, and gives then a detailed legal fixation of the main content of those constitutional rights (§ 3 HRG). In this, it follows the principles, partly the wording, of the leading decision of the Bundesverfassungsgericht from May 29, 1973 (BVerfGE 35, 79).
In a short chapter the Hochschulrahmengesetz deals with »self-government and State administration« (§§ 58 – 60 HRG). On the status of the university, the law says: (1) The universities are corporations of public law and at the same time establishments of the State.They have the right of self-government in the limits of the laws. (2) The universities enact fundamental by-laws, which need the approval of the Land. The conditions for a deniance of the approval must be determined by the law. (3) The university fulfills their tasks, their own and those of the State, by a uniform administration (§ 58 HRG). The provision on surveillance reads as follows: (1) The Land exercises a supervision, to keep the university in line with the law (Rechtsaufsicht). The means of the supervision are determined by the law. (2) Insofar as the universities administer matters of the State, especially in the personnel administration, the economic administration, the budgetary and financial administration and in the providing for hospitalized sicks, the Land must establish a supervision with a broader scope. The same has to be done, insofar as the universities fulfill tasks in the ascertaining of instructional capacity and in the determination of admittance

figures (§ 59 HRG). In the last provision of this chapter the Länder are obligated to set up rules for the cooperation of Land and universities, inter alia concerning the curricula and the academic examinations, the establishing and altering of faculties and scientific institutions and facilities (§ 60 HRG).
Finally, to be clear and to avoid misunderstandings, it should be said that the German word »Hochschule« is not equivalent with »Universität«. It connotes additionally special colleges (»Fachhochschulen«) and other installations of public education and instruction which the Land assigns the status of »Hochschule«.

III. *Self-government of science and public intervention*

1. Self-government in public law rests, as a rule, on a corporative organization of those persons who by the institutional means of elective or representative bodies participate in the administering of their own matters. The chief question of every kind of self-government is, who takes part in the corporative substratum, as member or at least with a similar standing.
In a university which would be based alone on the freedom of science, research and teaching, the corporation could – and should – have as members only the persons who are entitled with the full rights and entrusted with the full responsibilities of the constitutional guarantee. Additionally the students, following the traditional concept of academic freedom, take part by an elective form of representation, especially in matters of their studies. The newer German university law does not comply anymore with this principle. As »member« (§§ 36 HRG) of the university we find all persons, who belong to the public service and have a professional tenure in the university, and the students. That means that the corporative organization of the university comprises the professors and the students and other »groups«, mainly the scientific personnel without the allowance for independent research and teaching and the non-scientific personnel. The constitutional limits of this »group university« and the proper delimitation of the different »groups« and of their differentiated corporative rights have brought up a thicket of legal questions and a host of litigations.[24]

24 S. v. BVerfGE 35, 79; 54, 363; 55, 37; 61, 210; 61, 260; 66, 270; 66, 291.

To say the least, this formation of university has dismembered the corporative basis of self-government which now has no homogenous academic character and is – or could be – criss-crossed by divergent interests and political forces. The practice of group-university is different from university to university and from faculty to faculty. In the greater part of universities and at least in the last years, the preconditions for a free and effective life of learning and teaching have been sufficient. One feature of group-university to which lesser attention has been paid, is the mode of representation in the faculty which excludes a certain number of professors from the organ of the faculty with the powers of decision. The strength of this construction is the existence of a little and – in theory, not always in practice – effective gremium. The weakness lies in the fact that the unity of the faculty and the personal responsibility in the framework of collegial deliberation and decision is lost.

2. The main subject of academic self-government is the cooperative organization of research, learning and teaching and the collegial selection and fostering of the scientific personnel, especially of the proper members of the faculty and of the rising generation.[25] The responsibility in this field is not exclusive in the hands of academic self-government, and so there is no unrefringed competence and right of decision.

The institutional organization of the university, the establishment of its organs, the plan and structure of faculties, scientific installations and facilities for the studies and the determination of the tasks of research and teaching by the formation of the chairs or the other tenures and offices, is effectuated by the law and by the administrative and regulatory powers of the State. In the course of the execution of the law, the affected organs of academic self-government are entitled to make proposals and at least have the right to be heard in a due process of law.

The position of academic self-government is stronger in the field of teaching and curriculum, but here, too, external requirement have to be observed. It cannot be deduced from the constitutional guarantee in Art. 5 sect. 3 GG, that a faculty or department had an autonomous right, to decide exclusively on extent and content of the teaching program and how to do the teaching. The constitutional provision also does not guarantee the given assignment of certain matters of teaching or instruction. It is in the realm of the law, to assign certain subjects of teaching and instruction to different faculties or departments, to alter the studies in their organizational formation and to decide on the delimitation

25 O. Kimminich, Wissenschaft, in: I. von Münch (ed.), Besonderes Verwaltungsrecht, 8th ed., 1988, pp. 835/852 sqq.

of the teaching programs of the respective faculties or departments. All this does not touch upon the free activity in science, research and teaching.[26] It is only the own and self-determined plan and procedure of scientific work which is beyond the reach of legal and administrative intervention.[27]
In the selection of the scientific and teaching personnel the organs of self-government must submit to the preconditions and regulations of the law on the civil service. In these limits, the assessment of professional ability and fitness is a matter of the academic organs. Only in the case of the call and nomination of a professor, the decision of the university is merely a proposal and the State might go into the merits of the ability and fitness of the proposed person.
If, in all these matters of organizational and personnel policy, we speak of academic self-government, it should be taken into account that there is a quite substantial difference between the professional and collegial plane of the faculty or department and the administrative and political plane of the central organs of the academic self-government (president or rector, senate) which are – at least in the larger universities – far from the place of science, learning and teaching and have a highly representative, i.e. remote character. All regulations and by-laws of legal force are a matter of the central level, and equally all essential resolvings for proposals to the State administration.

3. Budgetary and financial matters do not belong to the sphere of academic self-government. The German university traditionally has no financial autonomy, but depends on the grants by the State budget, though it is entitled to make proposals for the budget of the ministry.[28] The administering of the funds by the organs of the university follows the general rules of budget law and is under the special accountance and inspection of the State Audit Office.
This point will be seen in a more lenient view, if it is considered that the appropriation of the budgetary grants, with the exception of the plan and endowing of the permanent personnel, gives a substantial financial discretion for the university. Thus, the organs of academic self-government, mainly on the central level, can distribute the granted financial assets according to the respective exigencies of the faculties, departments and other academic facilities. Further, the appropriation of the funds, to a certain extent, is loose in that way that in the limits of a larger frame the funds – for instance, for administrative purposes and for the acquisition of books – are interchangeable. Finally, the State and the administrative organs of the university as a rule do not interfere

26 BVerfGE 67, 202/207 sq.
27 A. Köttgen, Universitätsrecht op. cit., pp. 23 sq.
28 O. Kimminich op. cit., pp. 852 sq.; W. Zeh, Finanzverfassung und Autonomie der Hochschule, 1973.

with the spending purposes of the competent academic organ or professor in respect of science, research and teaching.
So, the financial policy of the State and the appropriation of funds, of course, has an essential influence on the university and the course of science, research and teaching. By the means of the budget, the State and foremost the parliamentary representation can express and realize its responsibility for the development and flourishing of science and education and at the same time for a reasonable, effective and economic spending of the public funds. This way of financing the universities does not lead as such to an improper infringement of the freedom of science, research and teaching. To use it as an instrument of directing or discriminating contents or methods of science, research and teaching with the aim of suppression or manipulation would be an abuse and an infringement of the constitutional guarantee. But such a verdict would not hit the possibility of a financial policy of fostering, and that means differentiating and selective allocation of funds for science, education and universities.
A special question is the research of a professor or a department in a university, which is financed by non-budgetary funds, given by privat organizations or enterprises to effectuate a certain project (»Drittmittelforschung«). This is a legitime way of financing research, and it is under the protection of the constitutional guarantee of free science and research. But this kind of research touches upon the public interest insofar as the personnel and material capacities of the university are required for this extern purpose and as the State has to secure the independence of scientific work against possible subserviance. Therefore, a regulation and supervision of this kind of extern financed and influenced research is constitutionally admissible and necessary (§ 25 HRG). Similar prinicples must be valid for agreements, which universities or faculties conclude with non-universitary institutions or organizations, for instance with trade unions or other interest groups.

4. The Constitutional Court sees the contemporary university »primarily geared to the instructing of a largest possible number of specialists for a growing ›science-orientated‹ (»verwissenschaftlichte«) practice. Insofar university is not only the place for the separate processes of research and education, developing according to their own scientific rules, but subject and means of a publicly controlled policy of education and research«.[29] This passage stresses – may be a bit to forcefully – the requirements of education and instruction for the specific occupations and the service-function of the university for the occupational and professional life. The main direction of this argument is valid. The democratic

29 BVerfGE 35, 79/121 sq.

emancipation and the social policy of the democratic Welfare-State give the political and legal intervention into the university life and self-government a new quality. The Basic Law contains a guarantee of free choice of occupation and of instruction (»Ausbildungsstätte«) and this constitutional provisions mean inter alia a directive and mandate for a legislation that offers the appropriate opportunity of occupational and professional instruction (Art. 12 sect. 1 GG). Consequently, the State may regulate the university studies and may set guidelines and limits for academic self-government.[30]

Concerning the responsibility of university for education and teaching, the political argument has produced ideas and claims on the organization of studies which go beyond the mark. Some politicians argue, to effect a shortening of the student time of studying, the professors should be set under a constraint through regulations of the examinations, so indirectly tightening the teaching program and the selection of topics.[31] The contradiction should be noted that on the one hand we hear of a growing science-orientation of occupational practice and of life-long learning, and on the other side we hear, education and instruction should be cleared from complicational theory. But again, the main line of this is sound, especially the call for shorter studying and for a renewal and adaptation of the curriculum. This is a genuine task of the academic self-government and no field for short-living political sparks. The kind and duration of studies cannot be defined by the university with the yardstick of abstract desirability and the State may set up rules for the appropriate formation and duration of the studies. But the State and the politicians should not decide only with the criterion, if certain matters of learning and teaching are necessary for the actual situation of an occupation or a profession. University never can go astray from the basic aim of providing – and improving – a scientific and virtually universal education and teaching. In a recent conference of the association of university teachers (Hochschulverband) in Cologne, the overall theme was phrased: »Studies without science?« The invited Minister stated the deep-rooted problem in an effective shorthand: »A shortening of the duration of occupational life may not be accompanied by an elongation of the formative years, if our social net shall remain functioning.«

The planning and framing of ordinances and by-laws on examinations, including the formal requirements for the access to examination terms and regulating the bestowal of degrees and qualification certificates to enter an occupational career, have a dominating impact on teaching and study. In some

30 BVerfGE 33, 303 (numerus clausus).

31 Die deutschen Studenten sollen nicht so lange studieren – 23 Empfehlungen der Kultusminister, Straffung und Entlastung des Lehrstoffs, Frankfurter Allgemeine Zeitung, June 25, 1988.

professions, the examinations are organized by the State, though with the participation of university teachers. Here the regulations are issued by the State and the position of the faculty – even if heard beforehand – is weak. If the examination is a matter of the academic self-government, the regulations are issued by the university, but need the approval of the State. This is true even in the case of the most prominent academic degree, the doctorate. The faculty confers it without a concomitant decision of the State, but the by-law on the procedure is enacted by the central organs of the university and is dependend on the approval of the Ministry. The protection for academic self-government in these matters is afforded mainly by the necessity that the decision on the disapproval of such academic by-laws must be rested on a disregarding of requirements which have been stated by the law.

5. Generally speaking, the most conspicuous impediment of a free and working academic self-government lies in the tangled mass, complexity and density of regulations and in the resulting reglementation and red tape of bureaucracy. Even were self-government has some latitude and free play, the complications and uncertainties of the legal and bureaucratic framework are paralizing and crippling. This, of course, is an observation of a broader range and moment.
Among the reasons for this phenomenon, there are two traits with a juridical origin. The first and foremost cause is the exigency of equal treatment which is a dominant feature of all mass administration and social policy. The large and inhomogenous shape of academic self-government adds to this principle cause; the reliance on rules and legality is a substitute for the fading reliance on the quality and capacity of persons and cooperating groups. A second reason is the doctrine, some time favoured by the Bundesverfassungsgericht, that every essential question in regard of the guaranteeing of the basic rights must be regulated by law or at least by an authorization of sufficient detail in the law. This doctrine supports the powers of parliament and strengthens the guaranteeing function of law for individual liberty and for self-government. But in some respect it has been exaggerated and has become a bracket for parliament and an undue incentive for overregulation.

6. The question of a social (or moral) responsibility of science and research and further, of the limits of science and research, in front of public morals and welfare, concerns in our times the most urgent and essential field of political and legal intervention. There can be no doubt that such a responsibility and such limits exist and, consequently that the individual scientist and researcher has to respect social and moral obligations and duties. The political and constitutional

problem is, if State and law can or must relinquish the delimitation and obeyance of these obligations and duties to the scientist and researcher alone or to the self-governing community of university science alone. This is – in my opinion – an untolerable conclusion. Freedom of science and research is the protection of the finding and transmitting of scientific knowledge and the right of the scientist to defend these activities against the intrusion of the State. This freedom includes the assessment of moral and social effects of science and research, with the legal consequence that neither the State nor the academic self-government is entitled to censure this individual assessment or to act against the scientist because of a dissenting evaluation.[32]

This self-responsible liberty is the principle, but there must be exceptions, based on the clear and compelling exigencies of public interest and of the protection of other rights. Those exigencies can be a limitation of free science and research only, if they are laid down and defined by the law, especially the criminal code. The law may set limitations for the exercise of the freedom of science and research, to secure public interests or rights of a third party, which are protected or acknowledged by the constitution, as for instance life, liberty, dignity of man, health, property. An administrative agency is not in the position to interfere with free science, research and teaching, without a sufficient authorization by the law. A statute which effects or allows a restriction or limitation of free science, research or teaching must be determined in the subject matter, must regulate in sufficient detail and must be proportionate in kind and extent of the effected or allowed interference. It must guarantee an appropriate balance of the secured public interest or right and the affected freedom. In respect to the subject of regulation it can be doubtful, how important and palpable the danger must be, to justify the limitation or restriction, how momentous and palpable the risk of damage must be, which the law wants to defy by the interference with the liberty. Kind and extent of the limitation or restriction must be in a reasonable proportion to the averted danger or the expected risk.

7. The scientist who crosses over the halls of academic world to become a temporary or longtime consultant of politicians or political institutions does not loose the protecting shield of constitutional freedom of science. In the more important cases he will not be consulted only because of his professional knowledge and experience, but because of his independent judgement. From this it should be inferred that regulations or stipulations, which aim at a partial binding of the expert opinion of the university scientist are void. Furthermore, it should be assumed that the constitutional guarantee of free

32 BVerfGE 47, 327.

science forbids to use scientists in a consultative body of the State as tools for a pseudo-scientific strengthening of political decisions which belong into the field of democratic elective responsibility. There should be a discernible borderline between political action and scientific judgement.
Probably the most important consultative institution for economic policy in Germany is the Expert Council for the Evaluation of Economic Development (Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung), constituted by the statute of August 14, 1963 (BGBl. I p. 685), as amended by statutes from November 8, 1966 (BGBl. I p. 633) and from June 8, 1967 (BGBl. I p. 582).[33] The independence of the members is explicitly stated and carefully safeguarded, including the right of a dissenting opinion.

8. The freedom of science and research comprehends, too, the applied, purpose- or interest-orientated research. It is not restricted to the research in the university and in the studio of the single scientist. The guarantee protects the economic enterprises in their scientific work, the industrial and the commissioned research. As a rule, it can be assumed, that the appliance-orientation of research and the practical appliance of the results justifies legal regulation to a deeper degree than in the case of basic research, self-sufficient in its aim. This conclusion is due to the social effect and social responsibility of applied research.
The constitutional guarantee protects only against interferences and reglementation with special reference and effect to the way and content of the research, i.e. interventions concerning the choice of scientific questions and projects, the method and means of research and the investments assigned for research. The effects of State intervention on enterpreneurial activity and competitive or market behaviour, for instance by the subventioning of a competitor, could touch upon the economic liberty (Art. 2 sect. 1 GG), the freedom of enterpreneurial activity (Art. 12 sect. 1 GG) or, under certain circumstances, the guarantee of property (Art. 14 GG). A priority in the promotion of publicly instituted science and research, especially of the universities, does not violate the right of equal treatment (Art. 3 sect. 1 GG).
Public promotion of scientific research is ambivalent, as well from the viewpoint of the freedom of science as under the aspect of free enterprise and equality of competition. The responsibility of the State for social progress and economic growth demands the public furthering of science. On the other side, the State by this activity controls and disposes over the selection of

33 S. v. the opinion for the period 1987/88, published November 19, 1987 (Bundestag Drucksache 11/1317).

supported branches and projects of research and of the favoured installations, enterprises and persons. Beyond that, the grants necessarily are connected with appropriations, influencing or gearing the aim and ways of research. The principle of equal treatment and – in the case of unappropriate regulations or decisions – the freedom of science or the freedom of enterprise might prevent a misuse of the power of the purse.

This leads back to the beginning and to the contemporary situation of our scientific-technical civilization, steered by a democratic political process. In principle, the possibility and power of the State to influence and even direct the scientific development is only the consequence of the constitutional operation of democracy, which lays political decisions and the budgetary disposition over public funds in the hand of the parliamentary representation of the people.

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