

Headnotes

to the order of the First Senate of 26 October 2004

– 1 BvR 911/00 –

– 1 BvR 927/00 –

– 1 BvR 928/00 –

- 1. The conferment by statute of decision-making powers on monocratic management bodies of universities is compatible with Article 5.3 sentence 1 of the Basic Law (Grundgesetz – GG), provided that those powers are substantively limited and at the same time it is sufficiently ensured organisationally that their exercise does not result in any structural threat to academic freedom.**
- 2. Article 5.3 sentence 1 of the Basic Law contains no prohibition on attaching consequences to the evaluation of academic quality in the allocation of resources. The legislature’s decision to allocate resources in the university sector partly on a performance-oriented basis is constitutionally unobjectionable if it is sufficiently ensured that performance is evaluated in a manner which is appropriate from an academic point of view.**
- 3. Decision regarding the constitutionality of the participatory and supervisory powers of university councils.**

FEDERAL CONSTITUTIONAL COURT

– 1 BVR 911/00 –

– 1 BVR 927/00 –

– 1 BVR 928/00 –



IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaints

I. 1. of the Law Faculty of the University of Potsdam,
represented by its dean,
Professor Dr. Detlev W. Belling,
August-Bebel-Straße 89, 14482 Potsdam,

2. of Professor Dr. K.,

- authorised agent of the first complainant: Professor Dr. Eckart Klein,
Heideweg 45, 14482 Potsdam –

– 1 BVR 911/00 –,

II. of the Philosophy Faculty I of the University of Potsdam,
represented by its dean, Professor Dr. Norbert Franz,
August-Bebel-Straße 89, 14482 Potsdam,

- authorised agent: Professor Dr. Eckart Klein,
Heideweg 45, 14482 Potsdam –

– 1 BVR 927/00 –,

III. 1. of the Law Faculty of the European University
Viadrina Frankfurt (Oder),
represented by its dean,
Professor Dr. Dr. Uwe Scheffler,
Große Scharrnstraße 59, 15230 Frankfurt (Oder),

2. of Professor Dr. P.,

3. of Professor Dr. Dr. S.,

4. of Professor Dr. W.,

5. of Professor Dr. J.,

– 1 BVR 928/00 –

against § 1.3, § 2.7, § 53.1 sentences 2 and 3, § 55.3 sentence 2, § 63.1 sentence 2, 63.2, 63.3 sentence 1, § 65.1 sentences 3 and 4 nos. 2 to 5, 65.2 and 65.4, § 67.3 sentence 1 no. 1, § 71.3, § 73.1 sentence 1, 73.2 sentences 2 and 3, 73.3 sentence 1 of the Act on the Higher Education Institutions of the Land Brandenburg (Brandenburg Higher Education Act (Gesetz über die Hochschulen des Landes Brandenburg – Brandenburgisches Hochschulgesetz – BbgHG) of 20 May 1999 (Law and Ordinance Gazette (Gesetz- und Verordnungsblatt – GVBl) I p. 130), now in the version promulgated on 6 July 2004 (Law and Ordinance Gazette I p. 394),

the First Senate of the Federal Constitutional Court, with the participation of

Justices Papier (President)
Jaeger,
Haas,
Hömig,
Steiner,
Hohmann-Dennhardt
Hoffmann-Riem, and
Bryde,

on 26 October 2004 held as follows:

The constitutional complaints are rejected as unfounded.

G r o u n d s :

A.

The complainants – faculties and professors of two Brandenburg universities – directly object to provisions of the Brandenburg Higher Education Act which altered the organisational structures of the universities of the *Land* (state) Brandenburg. 1

I.

Brandenburg higher education law was reformed by the Amending Statute (*Novelle*) of 20 May 1999 (Act on the Higher Education Institutions of the *Land* Brandenburg <Brandenburg Higher Education Act – BbgHG>, Law and Ordinance Gazette I p. 130). It is intended to strengthen the autonomy of the universities, whose management and decision-making structures are reformed and evaluation and performance-related allocation of resources introduced (see the *Land* Government bill, *Landtag* printed paper (LTDruicks) 2/5977, p. 1 et seq. and explanatory memorandum, p. 1 et seq.). With the Amending Statute, the Act follows a guiding principle which has been applied with similar objectives in numerous amending statutes reforming the higher 2

education acts of the *Länder* (states). This is a reform of the organisational structures, which is above all characterised by a strengthening of the management bodies. The collegial bodies retain policy and supervisory powers. Further key points of that guiding principle are the integration of personnel from outside the universities by university councils, new public control systems (overall budgets, agreements on targets), evaluation and performance-oriented allocation of resources.

The relevant provisions were amended (albeit not significantly for decision-making) by the First Act amending the Brandenburg Higher Education Act (*Erstes Gesetz zur Änderung des Brandenburgischen Hochschulgesetzes*) of 22 March 2004 (Law and Ordinance Gazette I p. 51). Since the promulgation of the amended version on 6 July 2004 (Law and Ordinance Gazette I p. 394), they have had the following wording:

§ 1 4

Scope; designations 5

(1) and (2) ... 6

(3) The *Land* Government may, by agreement with the relevant committee of the *Landtag*, establish, amalgamate or close, by ordinance, universities and sites of universities in order to ensure a balanced structural development of universities. 7

(4) ... 8

§ 2 9

Legal status; supervision; state financing 10

(1) ... 11

(2) The universities shall fulfil the tasks, including where these are state matters, by means of a single administration. State matters are the personnel, budget and finance administration of the universities and the levying of fees. 12

(3) to (6) ... 13

(7) The state financing of universities shall be geared to the levels of performance achieved in teaching and research and in the training of the new generation of academics. Here, progress with regard to fulfilling the gender equality mandate is to be taken into account as well. 14

§ 4 15

Freedom of teaching, research and study in science and the arts 16

(1) Freedom of teaching shall cover, in the context of the teaching tasks to be fulfilled, the organisation of classes, seminars and lectures as regards their content and methodology and the right to express expert scientific and artistic opinions. Decisions of university bodies concerning teaching are permissible in so far as they relate to the organisation of teaching activity and to the drawing up and observance of 17

study and examination regulations; they must not impair freedom within the meaning of sentence 1.

(2) Freedom of research shall cover, in particular, the formulation of questions, the principles of methodology and the evaluation of the result of the research and its dissemination. Decisions of university bodies concerning research are permissible in so far as they relate to the organisation of research activity, the promotion and coordination of research projects and to the building up of research focuses. They must not impair freedom within the meaning of sentence 1. Sentences 1 to 3 shall apply to artistic development projects and to practice of the arts. 18

(3) Freedom of study shall cover, without prejudice to the study and examination regulations, in particular, the free choice of classes, seminars and lectures, the right, within a course of study, to decide on areas of study according to one's own choice, and the formation and expression of scientific and artistic opinions. Decisions of university bodies concerning study are permissible in so far as they relate to the organisation and lawful and proper conduct of teaching and study activity and to ensuring a lawful and proper course of study. 19

(4) Exercise of the rights mentioned in paragraphs 1 to 3 shall not release the holder of rights from the obligation to comply with the rules governing the organisation of communal life at the university. 20

§ 7 21

Evaluation of teaching 22

(1) The evaluation of teaching shall promote quality development and quality assurance in the field of teaching. It shall enable competition with other universities and their centres and departments and be taken into account in the performance-oriented allocation of resources. The students shall participate in the evaluation of teaching. The universities shall determine the evaluation procedure by statute. 23

(2) The dean, in collaboration with the faculty council, shall evaluate the centres and departments of the faculty and shall draw up a teaching report at two-year intervals which shall be submitted to the president. 24

(3) The president, in collaboration with the senate, shall evaluate the faculties and central units and departments taking into account the teaching reports and at shall draw up a combined teaching report two-year intervals which shall be submitted to the member of the *Land* Government responsible for the universities. 25

(4) The teaching reports and combined teaching reports shall contain in particular: 26

1. the presentation of the data relevant to the assessment of the situation and development of teaching and study and their evaluation 27

2. the measures taken and envisaged in order to improve the quality of teaching and study. 28

The teaching reports and combined teaching reports shall aid in the evaluation to be carried out regularly by outside experts.	29
(5) The universities may set up a joint evaluation agency which shall support the universities in the evaluation.	30
§ 53	31
Private lecturers (<i>Privatdozent(inn)en</i>)	32
(1) Any person who is able to produce the teaching qualification in accordance with § 19.1 sentence 2 may be given authority to conduct classes, seminars and lectures independently at the university (authority to teach). The president shall decide, upon application by the habilitated person, on the content and scope of the authority to teach. It may be conferred where the applicant's teaching activity can be expected to represent a sensible addition to the teaching provision offered by the university, and where no reasons exist which statutorily preclude an appointment as professor.	33
(2) and (3) ...	34
§ 55	35
Contract lecturers (<i>Lehrbeauftragte</i>)	36
(1) and (2) ...	37
(3) The teaching contract creates a public-law legal relationship <i>sui generis</i> with the university; it does not create an employment relationship. It shall be awarded by the dean for a maximum period of two semesters. ...	38
(4) ...	39
§ 63	40
<i>Land</i> university council	41
(1) A <i>Land</i> university council shall be formed for the state universities. It shall support the universities in the discharge of their tasks and in their cooperation with the relevant member of the <i>Land</i> Government. In order to advise him or her and the universities, it shall set up a university council for the respective university. Further details shall be laid down by the rules of procedure of the <i>Land</i> university council.	42
(2) The <i>Land</i> university council shall	43
1. advise the presidents and senates on policy matters,	44
2. participate in the decision-making on the development plans of the universities in order to ensure a balanced structural development of the universities,	45
3. give recommendations on budget planning to the relevant member of the <i>Land</i> Government and	46
4. propose, in consultation with the senate, candidates for the election of presidents.	47

(3) To enable it to discharge its tasks, the *Land* university council shall have a comprehensive right to obtain information from the presidents and the senates. It shall not be entitled to inspect personnel files. 48

(4) ... 49

(5) Upon the proposal of the member of the *Land* Government with responsibility for the universities, after hearing the views of the universities and in consultation with the relevant committee of the *Landtag*, the Minister-President shall appoint the members of the *Land* university council. This shall comprise 10 persons, at least one third of whom shall be female. Their term of office shall be four years. 50

(6) ... 51

§ 65 52

President 53

(1) The president shall manage the university on his or her own authority and responsibility and shall represent it externally. He or she shall render account to the senate, annually and upon the latter's reasoned request, for the performance of his or her tasks. The president shall be responsible for all the tasks of the university in so far as this Act does not specify otherwise. He or she shall be responsible, in particular, for: 54

1. the preparation of concepts for the development of the university, 55

2. the establishment and dissolution of faculties, central departments and operating units and of courses of study after hearing the views of the senate, 56

3. the coordination of the activities of the faculties and central departments, in particular in regard to teaching and research, 57

4. the evaluation of research in the faculties and central departments, on the basis of the research reports 58

5. the preparation and management of the budget and the performance-related allocation of resources and posts, for limited periods, to the faculties and central facilities according to the results of the evaluation and 59

6. the preservation of order and the exercise of proprietary powers. 60

... 61

(2) The president shall be elected for a temporary period by the senate on the basis of the election proposal of the *Land* university council and appointed by the member of the *Land* Government with responsibility for the universities. Should no candidate be elected in either the first or the second ballot, a third ballot shall be held between the candidates who have received the most votes in the second ballot, in which whoever receives the most votes shall be elected. 62

(3) Any person who holds a degree and can be expected, on the basis of responsible professional activity over several years, in particular in science, business, administration or the administration of justice, to be equal to the duties of the office may be appointed president. The president shall exercise his or her office as their principal occupation. His or her term of office shall be six years. He or she may be re-elected. 63

(4) The president may be voted out of office by the senate by a majority of two thirds of its members; the vote to remove him or her from office may not take place until six months have elapsed after the president's taking up of office. Before initiating a procedure for voting the president out of office, the senate shall communicate in writing to the *Land* university council the reasons for desiring a vote to remove him or her from office and shall give the president the opportunity to express his or her views on the reasons for desiring a vote to remove him or her from office. He or she may be voted out of office only by the senate's electing, on the proposal of one or more of its members, a successor and requesting the member of the *Land* Government with responsibility for the universities to dismiss the president. Provided that the procedure for voting to remove the president from office is lawfully conducted, the member of the *Land* Government with responsibility for the universities must comply with the request and, in accordance with subsection 3, appoint the elected person. The pension of the president voted out of office, who has the status of a civil servant for a fixed term, shall be governed by § 66.6 of the Civil Service Benefits Act (*Beamtenversorgungsgesetz*). If the president voted out of office was a professor at the same university before taking up office, he or she shall, upon his or her application, be taken on as a professor at that university. If the president voted out of office was not a professor at the same university before taking up office, he or she may, upon his or her application, be taken on in a legal position in the *Land* service which is comparable to that which or she occupied at the time of his or her appointment. The application shall be made within three months from being voted out office. Upon being taken on, the status of civil servant for a fixed term shall be terminated by dismissal; this shall not apply where the president was re-elected and would have retired had he or she not been re-elected. 64

(5) and (6) ... 65

§ 67 66

Senate 67

(1) The senate shall be responsible for: 68

1. the adoption of the university's constitutional system and other statutes, in so far as they are not to be adopted by the faculties, and the opinion on the statutes of the faculties, 69

2. the decision on fundamental questions concerning teaching, research, study and examinations and concerning the training of the new generation of academics in sci- 70

ence and the arts,	
3. the decision on the development plan of the university,	71
4. the election and voting out of office of the president and	72
5. the decision on the proposals of the faculties for the appointment of university lecturers.	73
(2) The senate shall supervise the president in regard to the fulfilment of his or her tasks. In particular,	74
1. it shall discuss the president's report and statement of account and shall decide whether he or she should be granted discharge,	75
2. it shall adopt an opinion on the draft budget.	76
...	77
(3) The following shall be members of the senate:	78
1. six representatives of the university lecturers' group,	79
2. two students,	80
3. two representatives of the academic staff group	81
4. one other staff member.	82
(4) ...	83
§ 71	84
Faculty	85
(1) and (2) ...	86
(3) The establishment and dissolution of faculties shall be notified to the relevant member of the <i>Land</i> Government with responsibility for the universities.	87
§ 73	88
Election and tasks of the dean	89
(1) The dean and vice-dean shall be elected on the proposal of the president of the faculty council. In addition to the majority of the members of the faculty council, the election of the dean shall also require the majority of the university lecturers on the faculty council. If on this basis no dean is elected in either the first or a second ballot, the majority of the university lecturers shall suffice for the decision in a third ballot. For a vote to remove from office, sentence 2 shall apply <i>mutatis mutandis</i> , with the proviso that the majority of the members must be two thirds.	90
(2) The dean shall manage the faculty and represent it within the university. He or she shall be responsible for all the functions of the faculty, in so far as this Act does	91

not provide otherwise. He or she shall, in particular, be responsible for the organisation of studies and examinations and the coordination of research and teaching. ...

(3) The dean shall allocate resources and posts to the departments and centres out of the resources available to the faculty, taking into account the result of the evaluation of teaching and research. At the same time as the teaching report under § 7.2, he or she shall submit the research report to the president. 92

§ 74 93

Functions of the faculty council 94

(1) The faculty council shall be responsible for: 95

1. the adoption of the faculty's statutes, 96

2. the decision on the structural and development planning of the faculty, 97

3. the decision on appointment proposals, 98

4. the decision on habilitations, 99

5. cooperation in the evaluation and coordination of teaching and research in the faculty and 100

6. the election and voting out of office of the dean and his or her deputy. 101

(2) The faculty council shall supervise the dean in regard to the performance of his or her tasks. In particular, ... it shall discuss the dean's report and statement of account and decide whether he or she should be granted discharge. In order to carry out its supervision, the faculty council shall have a comprehensive right to obtain information from the dean. 102

II.

By their identically worded constitutional complaints, the complainants claim that the contested provisions violate their fundamental right under Article 5.3 sentence 1 of the Basic Law. [They argue as follows:] 103

1. The constitutional complaints are admissible with or without prior legal redress from the non-constitutional courts. 104

As a result of the academically inappropriate reform of the organisational structures at the universities, the Act alters the legal position of the complainants to their detriment, irrespective of any implementing measures. These are structural impairments of academic freedom which do not first find concrete expression in individual measures. The new organisational structures result directly from the Act. 105

2. The president's exclusive right of proposal for the election of the faculty managements in conjunction with their extended, academically relevant powers interferes with the independence of the faculties in violation of academic freedom. 106

It is also unconstitutional that the complainants are excluded from the conferment of authority to teach. 107

The powers conferred solely on the president for the coordination of the faculties' activities, for evaluation and allocation of resources to the faculties and for the dissolution of faculties also violate the complainants' academic freedom. The broadly formulated coordinating power could be used to control research. It is not appropriate from an academic point of view to exclusively confer that power on the president. The same also applies to the academically relevant power of evaluation. Since there are no clear criteria, the president, who is only partially technically competent, is assigned unfettered discretion which is not open to judicial review. The senate's rights to exercise supervision, obtain information and undertake verification do not constitute an adequate involvement of the research fields concerned. In addition, there is the lack of involvement of the faculties or the senate in the performance-related allocation of resources. The performance orientation is constitutionally problematic, since no assessment criteria which are appropriate from an academic point of view have yet been developed. Finally, the power to dissolve faculties constitutes a disproportionate means of bringing pressure to bear and, together with the other powers of the president, although the continued existence of the faculties is not protected by fundamental rights, represents a violation of or at least an interference-like threat to academic freedom. 108

The complainants also view the decisive participation of the *Land* university council in the development plans of the universities and in appointing the universities' management as a violation of their academic freedom. The complainants argue that the *Land* university council is a non-academic body lacking adequate democratic legitimacy and insufficiently subject to parliamentary control. They further argue that the *Land* legislature violates the autonomy of the universities when it grants an external body substantial involvement in the appointment of universities' management. It is true that the senate is allowed to elect the president; however, since the *Land* university council is not obliged to propose several candidates, that right to decide is *de facto* worthless. The senate's ability to vote the president out of office does not make up for those defects. The unclear involvement of the *Land* university council in the decision on the universities' development plans is designed as a right of codetermination. However, the members of the *Land* university council do not have sufficient legitimacy for that academically relevant task. 109

The complainants take the view that a further violation of the complainants' rights under Article 5.3 sentence 1 of the Basic Law arises from the fact that the representation of each individual faculty on the senate is not guaranteed. However, that is necessary because the senate is the only central collegial body of the university with an academically pluralistic composition and thus represents the only opportunity for the various faculties to be involved in academically relevant decisions and supervisory powers at the central level. 110

With regard to the restructuring of the faculties, the complainants argue that the subsidiary comprehensive competences of the dean and his powers to coordinate research and teaching, allocate resources and posts and award teaching contracts go far beyond technical and executive matters and should therefore be conferred on the faculty council as the place of the collegial, cooperative exercise of fundamental rights. Because of the limited assignments of competences to the faculty council, the dean has, through his subsidiary comprehensive competence, the ability to exert influence on numerous matters relevant to research. In the sphere of awarding resources and posts, which is vital to research, the collegial principle must not be displaced by a hierarchical and monocratic power of allocation. The shaping of the academic profile of a faculty by teaching contracts also forms part of the core of academically relevant matters. 111

The closure of universities by ordinance, provided for in § 1.3 BbgHG, contravenes the Basic Law. Although it is true that the complainants are not entitled to rely on that contravention, the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) is nevertheless not precluded from extending the examination to include it. 112

III.

The Government of the *Land* Brandenburg, the German Rectors' Conference (*Hochschulrektorenkonferenz*), the German Association of University Professors and Lecturers (*Deutscher Hochschulverband*), the Association of Higher Education Institution Lecturers (*Hochschullehrerbund*) and the Education and Science Trade Union (*Gewerkschaft Erziehung und Wissenschaft*) have made statements on the constitutional complaints. 113

1. The *Land* Government contends that the constitutional complaints are largely inadmissible. In particular, the complainants' fundamental rights are not by the possibility of the closure of universities and faculties, and the complainant university lecturers' fundamental rights are not affected by the conferment of authority to teach and the award of teaching contracts. 114

The *Land* Government takes the view that the constitutional complaints are, for the remainder, unfounded. The contested provisions satisfy the criteria to be derived from academic freedom for organisational provisions relating to universities. No guarantee of the university as an institution or of any academic right of self-government is to be inferred from the fundamental right. As long as the core sphere of academic activity is not affected, the legislature is entitled to regulate the organisation of universities as it sees fit. 115

As regards the expanded powers of the president, sufficient account has already been taken of conceivable constitutional requirements concerning participation in the conferment of authority to teach through the decisive influence of the faculties on the teaching qualification decision. The president's fall-back competence is a consequence of the "science management" model and constitutionally unobjectionable. In 116

view of the systematic and constitutional limits of its concrete expression and exercise which have to be taken into account, the power to evaluate and to allocate resources on the basis of the evaluation results does not create too wide a margin of discretion for the president. The faculties are sufficiently involved. The president's right of proposal for the election of the dean and vice-dean is unobjectionable, because the group of candidates is restricted to the university lecturers belonging to the faculty and the final right of approval remains with the faculty.

On the basis of the principle of cooperation alone, a state-established, participatory body such as the *Land* university council is constitutionally unobjectionable. 117

As regards the composition of the senate, having regard to the principle of representation, academic freedom is also guaranteed where not every faculty is represented by a university lecturer. 118

As to the expanded powers of the dean, the *Land* Government submits that the power to award teaching contracts is now regulated in a more relevant way. The academic activity of the university lecturers belonging to the faculty is not affected. As regards the dean's fall-back competence, it must and can be interpreted in conformity with academic requirements, as in the case of that of the president. Academic freedom does not require collegial decision-making competence beyond the matters assigned to the faculty council. The dean's coordinating powers to be exercised in cooperation with the faculty must also be interpreted as meaning that they do not allow substantive encroachments upon the core sphere of academic activity. The dean's power to allocate resources and posts is circumscribed by the required orientation towards the evaluation results and a consequence of the "science management" model. The faculty council is sufficiently able to exert influence on the evaluation itself. A further-reaching co-decision power is not imperative. Regardless of that, the individual holder of a professorship is able to secure his basic provision of funds required by academic freedom through the courts. The state's influence on the allocation of resources is adequately compensated for by the procedure provided for. 119

2. The German Rectors' Conference that the universities need their management structures modernising in order to be able successfully to use their autonomy responsibly and also internationally. An administration by management lay persons, shaped solely by the collegial principle, does not fulfil that need. The present constitutional complaints, by contrast, seek to tie the state down to a traditional university model. That is precluded by the legislature's freedom as to choice of model; the legislature is even under a duty to shape academic life in keeping with the times. 120

The involvement of the *Land* university council in the universities' development plans is regarded by the Conference of Higher Education Institution Rectors as merely a supporting one. It is also restricted to only the one aspect, that of a balanced structural development, which extends beyond the individual university. Even construed as a power of co-decision, it is nevertheless legitimate, since Article 5.3 of the Basic Law certainly allows non-academic shares of control, so long as academic 121

posts are not seized. The right of proposal for the election of the president does not create a command structure, but implements a principle of cooperation.

The strengthening of the management functions is necessary. The previous model of university organisation led to relevant decision-making powers being retained by the state and to repeated state intervention. The resultant deficit of autonomy should be reduced by the strengthening of the management level, in order to increase capacity for the successful acquisition of a more clearly differentiated image in relation to competitors. 122

In the election of the faculty management, a cooperation mechanism is being established which takes into account the fact that the faculties are part of an overall corporation and in that respect the deans also have an obligation to the overall well-being of the university. The faculty management is subject to the supervision of the faculty council and can be voted out of office at any time. 123

The evaluation of research as the basis for the allocation of resources is no more irrational and academically alien than the previous system. For the evaluation of teaching, § 7 BbgHG contains procedural rules which are already standard to a large extent. 124

3. The German Association of University Professors and Lecturers considers the constitutional complaints to be admissible and well founded. With regard, in particular, to the allocation of resources, a threat to the fundamental right already exists by reason of the organisational structure itself. 125

Article 5.3 of the Basic Law protects an area of freedom for the universities, which, in conjunction with the state's rights of influence, results in a joint power of control. The Brandenburg Higher Education Act strengthens only superficially the autonomy of the universities; in reality, it imposes its will on the universities. The Act ignores the special features which distinguish universities from commercial enterprises. In the areas directly affecting research and teaching, such as, for example, the conferment of teaching authority or the allocation of resources, the management must be committed to scholarship and not to managership. 126

The substantial release of the president from the traditional involvement of the senate is said to be unconstitutional. The senate retains no adequate decision-making powers. The power of the president to evaluate research and teaching is especially problematical, in particular because there are no statutory criteria for this. The power to confer teaching authority is also open to objection, particularly as it is not restricted to persons habilitated by the faculty concerned and leaves the technical definition of authority to teach to the president. 127

With only six professor representatives, no adequate representation of all faculties on the senate exists. The position of the deans is also said to be framed unconstitutionally; the reform removes the collegial structure of the faculty. 128

4. The Association of Higher Education Institution Lecturers has made it known that it agrees in substance with the constitutional complaints. 129

5. In the opinion of the Education and Science Trade Union, it is not objectionable that certain qualification requirements for the members of the *Land* university council are not regulated. The members have adequate democratic legitimacy through the appointment procedure. A power to remove them also exists without express statutory provision. 130

The appointment of the president as such is not an academically relevant matter. Through the intervention of the *Land* university council, direct state influence is rather being retracted. Constitutionally, the senate's comprehensive powers of verification are said to be decisive. An alteration of the structures of collegial and monocratic management in the direction of university management is permissible. No requirement for exclusive designation of management bodies by the university itself can be inferred from Article 5.3 of the Basic Law. 131

The university management's right of proposal for the election of the faculty management is said to be constitutionally tenable. The arrangement improves the cooperation between the university and the faculties. The academic relevance of its management and coordinating powers is taken into account in the fact that the faculty management has to be elected from the group of professors on the faculty council. The coordinating power of the university management is a typical cross-faculty management function; the previous collegial competence has not proved successful. 132

The power of evaluation of the university management must be interpreted in conformity with the constitution. It cannot be a substantive evaluation of scientific results, but an evaluation of productivity and of acceptance in the scientific community. 133

No entitlement to a presence for all the faculties on the senate can be inferred from the Basic Law. What is called for is not primarily specialist and technical, but academic policy expertise. 134

The relationship between faculty management and faculty council has been developed within the framework of Article 5.3 sentence 1 of the Basic Law. The fall-back competence of the faculty management does not give cause to fear consequences for the core sphere of academic activity. The responsibility of the faculty management for the coordination of teaching is permissible; there should be no interference with the freedom of teaching as a result of it. There are possibilities of legal redress against encroachments in individual cases, and conflicting constitutional positions must be taken into account. In research, coordination is primarily the responsibility of the scientists concerned in each case. Limited scope therefore remains for the coordinating competence of the faculty management. The involvement of the faculty council is guaranteed. The allocation of resources is decisively controlled by the right to basic provision of funds and the faculty development plan and is subject to adequate supervision. Monocratic competence makes it possible to take priority-setting 135

decisions, which experience shows are not taken by collegial bodies.

IV.

The Federal Constitutional Court requested the Government of the *Land* Brandenburg to provide information on which criteria form the basis of research evaluation at the universities, where those criteria originate, whether there are procedures for establishing them within each university or across universities and who is involved in them and, where relevant, how. It was also asked what percentage of resources and posts in the universities and the faculties are allocated subject to evaluation and whether there are plans or tendencies to alter that percentage in the future. 136

The Brandenburg Ministry for Science, Research and Culture has informed the Court that the discussion on the criteria has not yet concluded. At present, the principal factors taken into account at the universities are the attraction of external funding, the number of doctorates and habilitations and the nature and number of publications. At the art colleges and universities of applied sciences (*Fachhochschulen*), criteria such as interdisciplinary orientation, collaborative partnerships, patents and awards and honours also play a part. Procedures for establishing criteria do not yet exist everywhere. As a rule, the presidency establishes the criteria on the basis of consultations with an internal body (senate, plenary meeting of university lecturers or research commission). In future, recommendations by inter-university/college academic institutions and tried and tested procedures will be followed. 137

As far as the allocation of funds to the universities in Brandenburg is concerned, a model has been developed with the participation of the universities, which envisages 78% of the available budget total for a task-related provision of finance and basic appropriation covering exceptional situations, 2% for structural development by agreements on targets and 20% for performance-related appropriations. The external funding criterion is used as a directly research-related indicator in that connection. At present, within the universities, only a small proportion of the resources are allocated on a performance-related basis, the rest being allocated on a needs-oriented basis and to fulfil commitments to provide equipment; however, in future the performance-related proportion will follow the inter-university/college model. 138

B.

The constitutional complaints of the complainant professors are admissible only in regard to § 63.2 no. 4, § 65.1 sentence 4 nos. 3 to 5, 2 and 4, § 73.1 sentence 1, 73.2 sentence 2 and 73.3 sentence 1 BbgHG. The constitutional complaints of the complainant faculties are, in addition, admissible in regard to § 53.1 sentences 2 and 3 and § 55.3 sentence 2 BbgHG. For the remainder, the constitutional complaints are inadmissible. 139

I.

In part, the submissions of the complainants do not satisfy the requirements which 140

§ 92 in conjunction with § 23.1 sentence 2 phrase 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) lays down with respect to the grounds of a constitutional complaint.

With regard to the provisions on the subsidiary comprehensive competence of the university management (§ 65.1 sentence 3 BbgHG) and on the obligation to notify in the case of establishment and dissolution of faculties (§ 71.3 BbgHG), in relation to the support function of the *Land* university council and to its power to issue recommendations on budget planning to the Ministry and its right to obtain information (§ 63.1 sentence 2, 63.2 no. 3, 63.3 sentence 1 BbgHG), the complainants do not make out an adequate case for a violation of fundamental rights. Likewise, no threat to the academic freedom of the complainants as a consequence of the advisory power of the *Land* university council (§ 63.2 no. 1 BbgHG) has been demonstrated. 141

Nor do the complainants state why the parameters laid down in § 2.7 BbgHG for the state financing of universities infringe Article 5.3 sentence 1 of the Basic Law regardless of the configuration of the university's internal evaluation and resource allocation procedure. 142

II.

In part, the constitutional complaints are inadmissible for lack of any possibility of a violation of the complainants' fundamental rights (§ 90.1 BVerfGG). 143

1. This applies to the constitutional complaints of the professors with regard to the provision of § 67.3 sentence 1 no. 1 BbgHG concerning the composition of the senate. It is true that effective protection of academic freedom requires adequate precautions under organisational law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 35, 79 <121>). However, the fundamental right of academic freedom does not prescribe any specific form of organisation for academic activity (see BVerfGE 35, 79 <116>). The only criterion for a form of university organisation which is compatible with the constitution can be whether free academic activity is possible and can be safely pursued under it (see BVerfGE 35, 79 <117>). No threat to free academic activity lies in the possible non-representation of individual faculties on the senate. Article 5.3 sentence 1 of the Basic Law does not guarantee any entitlement to the representation of a faculty on the senate. 144

2. Article 5.3 sentence 1 of the Basic Law does not protect the complainant university lecturers against the university management's deciding on the conferment of teaching authority (§ 53.1 sentence 2 and 3 BbgHG) and the faculty management's deciding on the award of teaching contracts (§ 55.3 sentence 2 BbgHG). The complainants' academic freedom is not impaired by the conferment of teaching authority on and award of teaching contracts to other persons. Their own research and teaching are not affected by that, either directly or indirectly via the composition of relevant bodies. 145

III.

The constitutional complaints are also, in part, inadmissible from the point of view of subsidiarity (§ 90.2 sentence 1 BVerfGG). Under that provision, a constitutional complaint is not admissible where the holder of fundamental rights can reasonably obtain legal redress by bringing the matter before the non-constitutional courts (see BVerfGE 97, 157 <165> with further references). That is the case here in a number of respects. 146

1. In so far as the complainants complain that § 1.3 BbgHG enables the closure of a university by ordinance, it must be determined, if necessary by proceedings before the non-constitutional courts, such as by way of the judicial review of the constitutionality of laws under § 4 of the Brandenburg Administrative Court Act (*Brandenburgisches Verwaltungsgerichtsgesetz*), whether rights of the complainants are thereby violated. The same applies in so far as the power of the university management to dissolve faculties under § 65.1 sentence 4 no. 2 BbgHG is contested. 147

2. Legal redress through the non-constitutional courts is also available in so far as the complainants contest the participation of the *Land* university council in development planning. What influence the participatory power of the *Land* university council may have on the academic freedom of the complainants depends on whether it is a power of co-decision or only a right of participation. § 63.2 no. 2 BbgHG is open to and in need of interpretation in that regard. The determination as to which interpretation should be preferred under ordinary law is primarily a matter for the non-constitutional courts (see BVerfGE 79, 1 <24>; 86, 382 <386-387>; 93, 85 <94>; 97, 157 <165>). The complainants can also reasonably be expected to wait and see whether the provision is implemented in a manner which restricts the scope of the senate's decision-making power, and if necessary institute legal proceedings before the non-constitutional courts. 148

IV.

In regard to the remaining contested provisions, the complainants are personally, presently and directly affected (see BVerfGE 1, 97 <100 et seq.>). Faculties also are entitled to invoke academic freedom (see BVerfGE 68, 193 <207>; 75, 192 <196>; 93, 85 <93>). 149

The protection of fundamental rights under Article 5.3 of the Basic Law may also be invoked in relation to organisational provisions (see BVerfGE 35, 79 <108>). The decisive factor determining whether the complainants are directly affected by an organisational provision is the threat to fundamental rights caused by an organisational structure which is academically inappropriate. 150

Such a possibility exists in relation to the reform of the management body elections at university and faculty level, because it is there that academically relevant decisions must be taken, and also in regard to the transfer of powers of coordination and resource allocation and the transfer of subsidiary comprehensive competence from the 151

collegial bodies to the management bodies; academically relevant decision-making powers are thereby transferred. The responsibility of the university's management for the newly introduced evaluation of research and teaching, in conjunction with its responsibility for the evaluation-oriented allocation of resources, is also academically relevant.

C.

In so far as they are admissible, the constitutional complaints are unfounded. The contested provisions are compatible with the academic freedom guaranteed by Article 5.3 sentence 1 of the Basic Law. 152

I.

1. In addition to an individual freedom, Article 5.3 sentence 1 of the Basic Law contains an objective fundamental provision that determines values (*wertentscheidende Grundsatznorm*) which regulates the relationship of science, research and teaching to the state (see BVerfGE 35, 79 <112>; established case-law). That value decision includes the taking of responsibility by the state, which considers itself to be a civilised nation, for the idea of free academic activity and the state's involvement in its realisation (see BVerfGE 35, 79 <114>). The state must accordingly make provision for efficient institutions of free academic life and ensure, by appropriate organisational measures, that the individual fundamental right of free academic activity remains inviolate so far as is possible taking into account the other legitimate functions of the academic institutions and the fundamental rights of the various parties concerned (see BVerfGE 35, 79 <115>; 85, 360 <384>; 93, 85 <95>). 153

2. For the individual holder of the fundamental right under Article 5.3 sentence 1 of the Basic Law, there arises from that value decision a right to such state measures, including those of an organisational nature, which are indispensable for the protection of his or her freedom secured as a fundamental right, because it is those measures that enable him or her to pursue free academic activity at all in the first place (see BVerfGE 35, 79 <116>). That freedom is not only guaranteed in the interests of his or her development as an academic, but also in the interests of an academia serving the well-being of the individual and society (see BVerfGE 47, 327 <370>). Academic freedom therefore does not protect against restrictions which are unavoidable for the individual holder of fundamental rights by reason of his or her collaboration with other holders of fundamental rights in academic life (see BVerfGE 35, 79 <122, 128>; 47, 327 <369-370>; 51, 369 <379>; 55, 37 <68-69>). 154

Academia is a sphere of autonomous responsibility in principle free from outside control (see also BVerfGE 35, 79 <113>; 47, 327 <367>; 90, 1 <12>). That freedom is also based on the notion that an academia free from ideas of social utility and political expediency serves the state and society best in the end (see BVerfGE 47, 327 <370>). The processes, practices and decisions in the search for knowledge, in its interpretation and transmission, which are based on academic autonomy, constitute 155

the core sphere of academic activity (see BVerfGE 35, 79 <112>; 47, 327 <367>; 90, 1 <11-12>). In order to safeguard that sphere, Article 5.3 sentence 1 of the Basic Law not only guarantees freedom from state commands and prohibitions, but obliges the state to protect and promote and grants to those engaged in academic activity a share in public resources and in the organisation of academic life (see BVerfGE 35, 79 <115>).

Article 5.3 sentence 1 of the Basic Law requires university organisation and thus also the formation of intention in relation to university organisation to be regulated in such a way that free academic activity is possible and can be safely pursued in the university (see BVerfGE 35, 79 <116-117>; 54, 363 <389 et seqq.>). The share of the holder of the fundamental right in the organisation of academic life is therefore not an end in itself. On the contrary, it serves to protect that holder from academically inappropriate decisions and is accordingly guaranteed as a fundamental right only to the extent necessary for that purpose. The guarantee is restricted, for every academic, to such decisions concerning the organisation of universities as may jeopardise his or her own freedom to research and to teach (see BVerfGE 35, 79 <116-117, 127-128>).

156

The universities and their subdivisions are protected, in exactly the same way as the university lecturers, against decisions concerning the organisation of universities only in so far as such decisions may jeopardise the fulfilment of their task of making free academic activity possible.

157

3. The constitutional review of the compatibility of organisational provisions with Article 5.3 sentence 1 of the Basic Law must focus on whether free academic activity and task fulfilment are structurally jeopardised by those provisions. Decisions which violate academic freedom in individual cases can never be completely precluded by organisational provisions (see BVerfGE 35, 79 <124>). On the other hand, however, the respective holder of the fundamental right is protected by the possibility of legal counter-measures. In order to determine whether a provision creates structures which may have jeopardising effects, the overall organisational framework of the university with its varying possibilities of influence and control must be considered. In that connection, account must also be taken of the degree of importance of the decision to be taken in each case for free academic activity and task fulfilment. Since most decisions relating to university organisation of may, even if they do not directly affect the core sphere of academic activity, have an indirect effect on academic activity on account of the reliance of those engaged in academic activity on publicly provided and organised academic life (see BVerfGE 61, 260 <279-280>, clarifying BVerfGE 35, 79 <123> in that respect), a merely hypothetical threat is not sufficient.

158

4. So long as the legislature ensures such degree of organisational self-determination for the holders of the fundamental right as is sufficient for that purpose, it is free to regulate academic life as it sees fit, in order to bring into a reasonable balance the varying tasks of the academic institutions and the interests of all parties in-

159

volved in them, in discharge of its responsibility for society as a whole (see BVerfGE 35, 79 <116, 120>; 47, 327 <404>; 93, 85 <95>). The parliamentary legislature is better suited to that task than the holders of academic freedom, who are oriented towards special interests. In that regard, it is not tied either to traditional organisational structures of higher education or to their individual elements. The legislature is not only free to develop and try out new models and control systems (see BVerfGE 47, 327 <404>: "science management"); on the contrary, it is even obliged to observe existing forms of organisation critically and reform them in keeping with the times (see BVerfGE 35, 79 <117>). In that connection, specifically in regard to the suitability of new forms of organisation, it has a prerogative of assessment and a margin of prognosis (see BVerfGE 50, 290 <332-333>; 88, 203 <262>).

In particular, the legislature is free to shape the nature and manner of the participation of the holders of the fundamental right, so long as the structures sufficiently ensure free teaching and research. It can, for example, provide for direct or representative participation in decisions, direct or indirect exertion of influence, rights to decide, veto, be involved or be heard, rights of supervision, to obtain information or of verification, depending on what organisational structures appear to the legislature to be suitable for an efficient administration of academia. The participation of those engaged in academic activity, required in order to safeguard the academic of organisational decisions concerning universities, does not have to take place along the lines of traditional self-government in every case. Institutions outside of the universities may also help, on the one hand, to limit state control in a manner which safeguards academic freedom and, on the other, to counter the risk of reinforcement of status quo interests in the case of pure self-government.

160

II.

The admissibly contested provisions satisfy those constitutional criteria.

161

1. The strengthening of the powers of the monocratic management bodies of the universities and faculties does not lead to a structural threat to academic freedom. No precedence for collegial bodies over monocratic management bodies follows from Article 5.3 sentence 1 of the Basic Law for the constitution of the self-government of universities. Matters which are subject to the self-government of the holders of the fundamental right must not, in any case, be assigned for decision to either collegial or monocratic management bodies (see BVerfGE 57, 70 <95>). A decision-making power for monocratic management bodies is also permissible in academically relevant matters, provided that their activity is limited in terms of content and subject to organisational safeguards in such a way that any structural threat to academic freedom is precluded. That is the case here.

162

a) The coordinating competence of the management bodies (§ 65.1 sentence 4 no. 3, § 73.2 sentence 3 BbgHG) is constitutionally unobjectionable. It is not primarily directed towards the unilateral taking of decisions, but is conducive to the necessary coordination between the various subdivisions of the university and within the facul-

163

ty.

In so far as the management bodies, in exercise of their coordinating power, take decisions because a consensus among those concerned by the decision cannot be established or cannot be established in time, they must observe the parameters in § 4.1 and 4.2 BbgHG. It is thereby ensured that the coordinating power may not be used to impair freedom of teaching or research (see also § 4.4 BbgHG). No rights to issue instructions in academically relevant matters, which go beyond the extent determined by the necessity of collaboration with other holders of the fundamental right (see BVerfGE 35, 79 <122, 128>; 51, 369 <379>; 57, 70 <94>), are associated with the coordinating competence. The observance of those limits is open to review by the non-constitutional courts in individual cases. 164

Moreover, the collegial bodies have rights of supervision and to obtain information vis-à-vis the management bodies at university and faculty level (§ 67.2, § 74.2 BbgHG), as well as the right to vote them out of office (§ 65.4, § 73.1 sentence 4 BbgHG). In addition, at faculty level, an express power for the faculty council to participate in matters concerning the coordination of teaching and research is provided (§ 74.1 no. 5 BbgHG). 165

b) Nor does any structural risk to academic freedom follow from the subsidiary fallback competence of the faculty managements (§ 73.2 sentence 2 BbgHG). The exercise of that competence is limited not only by explicit other competences, in particular the competences of the faculties, listed in § 74.1 BbgHG, but also by § 4.1 and 4.2 BbgHG. Those competences may not be used to impair freedom of teaching and research. Safeguards also result from the supervisory and verification rights of the faculty councils under § 74.2 BbgHG and the ability to vote the management out of office under § 73.1 sentence 4 and § 74.1 no. 6 BbgHG. 166

c) The conferment of teaching authority by the university management and the award of teaching contracts by the faculty management are also compatible with academic freedom (§ 53.1 sentence 2, § 55.3 sentence 2 BbgHG). By virtue of their powers to obtain information, exercise supervision and vote out of office, the collegial bodies have sufficient possible ways in which to prevent decisions which are inadequate from an academic point of view. 167

2. The competence of the management bodies to evaluate teaching and research and to take results into account in the allocation of resources under § 65.1 sentence 4 no. 4 and 5 and under § 73.3 sentence 1 BbgHG is compatible with Article 5.3 sentence 1 of the Basic Law on an interpretation in conformity with the constitution. 168

a) However, for science as a sphere of autonomous responsibility, which must not be characterised by mere notions of social utility and political expediency (see BVerfGE 47, 327 <370>), that competence holds more than merely insignificant risks. The pressure which may be caused by its exercise to follow externally set evaluation criteria could lead to developments in the wrong direction. The criteria used for the evalu- 169

ation must leave sufficient room for specifically academic orientations. That requirement applies irrespective of whether such criteria are set externally or within the university; where they are set externally, however, there exists an increased risk of disregard for concerns which are appropriate from an academic point of view, such as by use of the evaluation to achieve non-academic purposes. Evaluation criteria assume increased importance where the allocation of public funds is linked to the evaluation results, because the members of the university are reliant on public academic activity and its resources.

However, no prohibition on the evaluation of academic quality or on attaching to that evaluation consequences in the allocation of resources can be inferred from Article 5.3 sentence 1 of the Basic Law. Research carried out and research projects have always been evaluated, not only in tests and qualification procedures, but also in appointment procedures and in the award of external funding. Evaluation in the context of resource allocation within the university is equally permissible. Any resource allocation, including allocation by self-governing bodies which is not linked to an evaluation, can be exposed to non-academic influences. The legislature's intention to control allocation decisions as rationally as possible and also, in the interests of making more effective use of resources, on a performance-oriented basis is constitutionally unobjectionable where there is evaluation of work carried out and expected to be carried out in research which is appropriate from an academic point of view.

170

b) In order to avoid any potential for control which is academically inappropriate, appropriate participation by representatives of the academic world in the procedure for establishing the evaluation criteria is indispensable for the purpose of ensuring that criteria are appropriate from an academic point of view. In that connection, regard must also be had to the fact that those criteria can and, where necessary, must be different in the various disciplines. In addition, cross-disciplinary differences must be taken into account, such as in regard to an abstract and theoretical piece of basic research with an (uncertain) long-term return as against an application- and demand-oriented academic activity with a short-term focus. An evaluation based solely or very substantially on a single criterion, such as external funding attracted, would not meet that requirement. In so far as the attraction of external funding serves as a criterion, this must not be external funding acceptance of which creates incentives for contract- and result-oriented research.

171

c) The evaluation criteria are not specified in detail in the Brandenburg Higher Education Act. As regards the evaluation of teaching, § 7.1 sentences 1 and 2 BbgHG does at least mention the objectives pursued by evaluation. Apart from the general prohibition on impairments of freedom of research under § 4.2 sentence 3 BbgHG, which must also be observed in this connection, the criteria for the evaluation of research are not predetermined in the Act.

172

In any event, at the present stage of discussion, trial and only gradual development of proven practices of academic evaluation at local, national and international level,

173

the legislature is constitutionally not yet obliged to establish such criteria. Instead, within its margin of assessment and prognosis, it can establish a model in which the evolution of such criteria continues to be left to an intra-university process. That process is framed by provisions of the Brandenburg Higher Education Act, and in the final analysis there is no structural risk to the possibility of engaging freely in academic activity. However, in that regard the legislature is under a duty to monitor and, if necessary, remedy defects as soon as risks to academic freedom arise, for example, through the use of criteria which are academically inappropriate (see BVerfGE 95, 267 <314> with further references).

aa) The evaluation of teaching takes place by a procedure satisfying the constitutional requirements of Article 5.3 sentence 1 of the Basic Law. Thus, in § 7.2 BbgHG, the departments and centres of the faculty are evaluated by the faculty management in collaboration with the faculty council, and the faculty management regularly draws up a teaching report. The involvement of the faculty council in the evaluation in the faculty is established in § 74.1 no. 5 BbgHG. The students must also continue be involved in teaching evaluation (§ 7.1 sentence 3 BbgHG). The university management in turn evaluates, in collaboration with the senate and taking into account the teaching reports, the faculties and regularly draws up a combined teaching report (§ 7.3 BbgHG). The teaching and combined teaching reports contribute towards the regular evaluation by external experts; evaluation agencies, set up on a cross-university basis, can support the universities in the evaluation (§ 7.4 sentence 2, and § 7.5 BbgHG).

bb) The evaluation of research by the university management (§ 65.1 sentence 4 no. 4 BbgHG) and at faculty level (§ 74.1 no. 5 BbgHG) is regulated in less detail in the Act. At faculty level, the research evaluation takes place in collaboration with the faculty council (§ 74.1 no. 5 BbgHG). The basis of the evaluation of research at university level is formed, in accordance with § 65.1 sentence 4 no. 4 BbgHG, by the research reports which are drawn up at faculty level by the faculty management (§ 73.3 sentence 2 BbgHG). It follows from § 74.1 no. 5 BbgHG that the faculty council also has a participatory right in relation to the research reports. The faculties are thus necessarily also involved in regard to research evaluation at the level of the university.

Account must, in addition, be taken of the general powers of the senate and the faculty council to exercise supervision and obtain information, powers which are also effective in the context of the evaluation by the management bodies, and of their ability to vote the university and faculty managements out of office. Moreover, it is not the university management but the senate which is responsible under § 67.1 no. 2 BbgHG for establishing the evaluation criteria. On an interpretation in conformity with the constitution, because of the considerable importance of those criteria for academic freedom, their establishment is a fundamental question within the meaning of that provision.

The necessary incorporation of academic expertise is ensured through the partici-

pation of the senate. There is therefore no structural risk of academically inappropriate decisions by reason of the competence arrangements for the evaluation of research. The legislature is at present not obliged, by virtue of its margin of assessment and prognosis, to formalise that involvement any further. It is however required to monitor and, if necessary, remedy defects in the arrangements for the organisation of evaluation which are chosen within that margin.

d) The allocation of competences with regard to the evaluation-oriented allocation of resources likewise does not meet with any far-reaching constitutional objections. 178

aa) The exercise of the competences by the management bodies is limited by the structural and development planning of the faculties, which has to be adopted by the faculty council (§ 74.1 no. 2 BbgHG), by the university development plan to be adopted by the senate (§ 67.1 no. 3 BbgHG) and by the evaluation results, taking into account the teaching and research reports. The senate is also involved through its right to express its views on the draft budget (§ 67.2 sentence 2 no. 2 BbgHG). In addition to the above, there are also the powers of the collegial bodies to obtain information and exercise supervision and verification in this connection. 179

bb) A further limitation results from the guarantee of freedom of research in § 4.2 BbgHG. In particular, in the case of basic research which is not directly “marketable” and which it is hardly reasonable to evaluate in the short term, areas protected by a basic provision of funds must remain. When the available funds are allocated, the human and physical resources which make it possible for scientific research and teaching to be conducted at all in the first place must in any case be assigned (see BVerfGE 43, 242 <285>; 54, 363 <390>; Federal Constitutional Court, First Chamber of the First Senate, order of 15 September 1997 – 1 BvR 406/96 and 1 BvR 1214/97 –, NVwZ-RR (*Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report*) 1998, p. 175). 180

It is true that, in contrast to other *Land* acts (see, for example, § 28.2 sentence 2 phrase 2 of the Act on the Universities in the *Land* Baden-Württemberg (*Gesetz über die Universitäten im Lande Baden-Württemberg*), in the version promulgated on 1 February 2000 <Law Gazette (GBl) p. 208>), the Brandenburg Higher Education Act contains no express provisions on the guarantee of a reasonable share in the available physical and human resources. However, Article 5.3. sentence 1 of the Basic Law and also the ordinary-law guarantee of freedom of research in § 4.2 BbgHG require that the possibility of academic work for any holder of the fundamental right continues to exist even where resources are allocated on the basis of evaluation results. 181

3. The provisions on appointment to the university management office are likewise compatible with Article 5.3 sentence 1 of the Basic Law. 182

Since the university management has to fulfil not only self-government functions but also, to an increasing extent, state functions (see § 2.2 BbgHG), its appointment is 183

the joint responsibility of the state and the university. The responsibility of the state is safeguarded, in particular, by the appointment by the minister of the candidate chosen by the senate (see § 65.2 sentence 1 BbgHG). By virtue of the decisions to be taken by the university management, the appointment is in any event indirectly academically relevant, and therefore a sufficient influence must be preserved for the holders of academic freedom. However, the state is not obliged by Article 5.3 sentence 1 of the Basic Law to restrict the influence exerted from outside the university on the act of appointment of a person selected by the university.

a) The right of proposal of the *Land* University council for the election of the university management (§ 63.2 no. 4 BbgHG) does not infringe Article 5.3 sentence 1 of the Basic Law. 184

The organisation of a sphere of freedom protected by fundamental rights by means of the involvement of independent bodies, in order to keep the organisation of the sphere of freedom free from state control, certainly, but under public control, is constitutionally unobjectionable. Specifically in the sphere of academic freedom, the curtailment of the traditionally hierarchically oriented instruments of control may be conducive to the fundamental right. Within its wide margin when shaping an organisation of university activity which safeguards decisions that are academically appropriate, the legislature, which enjoys democratic legitimacy, can therefore, in the course of framing the university, pursuant to Article 5.3 of the Basic Law, also choose forms of organisation which are free from ministerial control and more strongly protective of the independence of academia from the state. The provisions of the Brandenburg Higher Education Act on the *Land* university council keep within that framework. 185

The legislature has adequately regulated the composition, appointment and tasks of the *Land* university council. The latter is appointed by the Minister-President on the proposal of the relevant minister after hearing the views of the universities and in consultation with the relevant committee of the *Landtag* (§ 63.5 sentence 1 BbgHG). Its tasks (§ 63.2 BbgHG) are mainly of an advisory and recommendatory nature. 186

The right of proposal for the election of the university management does admittedly go beyond that. However, that right is constitutionally and substantively integrated into the appointment to the university management office in which the state and the university act in collaboration. The *Land* university council exercises the right of proposal in consultation with the senate (§ 63.2 no. 4 BbgHG). In substance, it is bound in its proposal by Article 33.2 of the Basic Law and by § 65.3 sentence 1 BbgHG. Moreover, § 63.2 no. 4 and § 65.2 BbgHG are premised on a proposal which includes more than one candidate. 187

Furthermore, the universities retain a significant influence in the election and the responsible minister retains the final decision-making power. The senate, as a collegial body, on which the majority of places are filled by university lecturers, elects the university management in accordance with § 65.2 and § 67.1 no. 4 BbgHG and has available to it, under 65.4 BbgHG, the power to vote it out of office again. If the senate 188

does not consider a person proposed by the *Land* university council to be suitable to manage the university in such a way that free academic activity is safely possible there, it is free not to elect him or her. If it elects a proposed person, he or she is also, in its assessment, suitable for the office. Should something change in that regard in the view of the senate, a vote to remove him or her from office is possible. Removal from office by a two-thirds majority vote is envisaged by the legislature as a last resort for the resolution of conflicts between the senate and the university management (see the *Land* Government bill, *Landtag* printed paper (LTDrucks) 2/5977, explanatory memorandum, p. 23). An escalation which can no longer be overcome by less drastic conflict resolution mechanisms can generally be discounted. The requirement of a two-thirds majority takes reasonable account of the exceptional character of the situation and is therefore not over-restrictive in its formulation.

b) Nor does any structural threat to academic freedom result from the fact that a blockade situation between the *Land* university council and the senate could arise in the event of a conflict with regard to the appointment of the management body. It is true that academic freedom requires that the efficiency of the university's operation be safeguarded (see BVerfGE 35, 79 <124>). However, a possibility of blockade which is conceivable only in the abstract does not threaten the efficiency of the university's operation. The margin of assessment and prognosis enjoyed by the legislature in the organisation of universities allows it to choose an organisational structure designed for reciprocal cooperation. The pressure for consensus which therefore exists among the parties involved is constitutionally unobjectionable in the absence of indications that a threat of structural blockades could arise.

189

4. Finally, the right of proposal of the university management for the election of the faculty managements (§ 73.1 sentence 1 BbgHG) is also compatible with academic freedom. No right for the faculties to appoint the faculty management exclusively themselves results from academic freedom. The faculties are not only basic units of teaching and research, but also part of the university, to which the faculty managements are likewise responsible.

190

In view of the role of the faculty council as a collegial body, no structural threat to academic freedom exists by reason of the right of proposal of the university management. The faculty management is elected by the faculty council as a collegial body on which the majority of places are filled by university lecturers, in which process, in addition to the majority of the members of the faculty council, a majority of the university lecturers are required for a successful election (§ 73.1 sentences 1 and 2 BbgHG). Moreover, the faculty council has available to it a right of supervision and a comprehensive right to information (§ 74.2 BbgHG) as well as the ability to vote the faculty management out of office (§ 73.1 sentence 4, § 74.1 no. 6 BbgHG). Furthermore, the right of proposal for election is limited to those university lecturers who are members of the faculty (§ 73.1 sentence 1 BbgHG).

Papier	Judge Jaeger has left office and is therefore unable to sign. Papier	Haas
Hömig	Steiner	Hohmann- Dennhardt
Hoffmann-Riem		Bryde

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 26. Oktober 2004 -
1 BvR 911/00**

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 26. Oktober 2004 -
1 BvR 911/00 - Rn. (1 - 191), [http://www.bverfg.de/e/
rs20041026_1bvr091100en.html](http://www.bverfg.de/e/rs20041026_1bvr091100en.html)

ECLI ECLI:DE:BVerfG:2004:rs20041026.1bvr091100