Headnotes

to the order of the First Senate of 24 June 2014

– 1 BvR 3217/07 –

1. **The participation by academics in the overall structure of an institution of higher education's academic organisation as guaranteed by Article 5 sec. 3 sentence 1 of the Basic Law covers all decisions of academic relevance. This includes decisions about the organisational structure, the budget, and patient care, which is, in university medicine, inseparably intertwined with the academic work of research and teaching.**

2. **The more fundamentally, and the more substantially academically relevant decision-making powers that affect staffing and substantive matters are taken away from the representative body of academic self-administration and assigned to a management body, the more the representative body must be involved in the appointment and removal of the management body as well as in its decisions.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 3217/07 -

IN THE NAME OF THE PEOPLE

In the proceedings
concerning
the constitutional complaint

of Prof. H[…],

- authorised representatives: Schindhelm Rechtsanwaltsgesellschaft mbH, Aegidientorplatz 2 B, 30159 Hannover -

against a) Art. 1 no. 63, § 63c sec. 1 sentences 1 and 2, secs. 2 to 6 and § 63e sec. 2 nos. 2, 3, 5, 10, 11, sec. 3 and sec. 4 sentence 1 nos. 1, 2, 4 of the Act Amending the Lower Saxony Higher Education Act (*Gesetz zur Änderung des Niedersächsischen Hochschulgesetzes*) and other acts of 21 November 2006 (Lower Saxony Law and Official Gazette - Nds-GVBl p. 538),

b) Art. 1 no. 11 (§ 63c secs. 3 to 6 of the Lower Saxony Higher Education Act [*Niedersächsisches Hochschulgesetz* – NHG]) of the Act on the Improvement of Equality of Opportunity by Abolishing and Compensating Tuition Fees (*Gesetz zur Verbesserung der Chancengleichheit durch Abschaffung und Kompensation der Studienbeiträge*) of 11 December 2013 (NdsGVBl p. 287)

The Federal Constitutional Court – First Senate –

sitting with the Justices

Vice President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 24 June 2014 as follows:

Judgment:

1. **§ 63c section 2 sentence 1, section 3 sentence 2, section 4 sentence 2, section 5 sentences 1 and 2, section 6 sentence 1 and § 63e section 2 number 2, number 3, number 5, number 10, number 11, section 3, section 4 sentence 1 number 1, number 2, number 4 and section 4 sentence 2 of the Lower Saxony Higher Education Act of 26 February 2007 (Lower Saxony Law and Official Gazette page 69; as last amended by the Act on the Improvement of Equality of Opportunity by Abolishing and Compensating Tuition Fees of 11 December 2013, Lower Saxony Law and Official Gazette page 287) are in their overall structure incompatible with Article 5 section 3 sentence 1 of the Basic Law (*Grundgesetz* – GG).**

2. **The remainder of the constitutional complaint is rejected.**

3. **The provisions mentioned in no. 1 will continue to be applicable until revised by the legislature in accordance with the reasons of this decision. The legislature has until 31 December 2015 to revise its legislation.**

4. **The *Land* of Lower Saxony (*Niedersachsen*) shall reimburse the complainant for his necessary costs.**

5. **The value of the matter in terms of lawyers' fees for the constitutional complaint is established at € 100,000 (in words: one hundred thousand Euros).**

Reasons:

A.

The constitutional complaint challenges provisions concerning the organisation of the Hanover Medical School (*Medizinische Hochschule Hannover* – MHH) that have been inserted into the Lower Saxony Higher Education Act taking effect as of 1 January 2007, and that have been – in part – amended in December 2013. 1

I.

1. The challenged provisions structure the responsibility for management of the medical university MHH. In Lower Saxony, this management responsibility in university medicine has, since 1998, been shifted, step by step, from the representative body of the members of the university […] to an executive board or a presidency as its 2

management body. The constitutional complaint challenges the arrangements now in force for appointing, re-appointing and dismissing the executive board under § 63c secs. 1 to 6 NHG and against certain powers of the executive board under § 63e NHG (each in the version of 26 February 2007).

2. […] 3-5

3. On the basis of an experimentation clause in the Lower Saxony Higher Education Act (§ 125a NHG in the version of 24 March 1998; subsequently § 46 NHG), the Lower Saxony legislature allowed to gradually restructure the decision-making powers within institutions of higher education in the area of human medicine by means of regulations, in order to test new management structures. […] In 2006, the Lower Saxony legislature implemented the new management structures, which had been experimentally tested, to become a permanent part of the Lower Saxony Higher Education Act. 6

4. The organisation of university medicine must fulfil two tasks that are *inter alia* enshrined in the Constitution: academic work and patient care. Medical schools are therefore at the interface between the academy and the health care system, being a combination of research and teaching on the one hand and patient care on the other. Thus, in addition to academic work, the medical schools in Lower Saxony provide services within the public health care system, highly specialised patient care, and training of members of non-medical health-care professions. 7

Combining the two areas – academic work and patient care – is organised differently in the German *Laender* […]: In the co-operation model the functional areas (medical faculty and university clinic) work separately, but are intertwined at the levels of staff, organisation and resources, and are obliged to co-operate; in the integration model the decision-making powers for research and teaching and for patient care are concentrated in one body. By enacting the Human Medicine Regulation (*Humanmedizinverordnung*) of 1998, Lower Saxony chose the integration model. This decision is particularly clear in the case of the MHH, which is to date Germany's only purely medical university, because the university medical department together with the hospital forms its own institution of higher education, which is independent of the university at large […]. 8

The diversity of the tasks of university medicine has financial implications. The interplay of academic work and patient care means that resources for investments and operating costs on the one hand and resources for research and teaching on the other need to be kept apart. This reason has led to separate budgeting requirements for university medicine by some *Laender*. […] There is no such stipulation in Lower Saxony. 9

5. MHH, as a state institution of higher education, is under the responsibility of the State (§ 1 sec. 1 sentence 1 NHG). The responsible government ministry, in co-operation with MHH, sets objectives on the basis of the *Land* 's higher education 10

planning and the university's development planning. These agreements cover all the main issues in research and teaching, usually for several years ahead (§ 1 sec. 3 sentences 1 and 4 NHG). In matters of self-administration, MHH is subject to review of legality and in state matters to the supervisory control of the responsible government ministry. State affairs (§ 47 NHG) include personnel management and management of the *Land* resources allocated to institutions of higher education, as well as patient care and other tasks in the public health care system. […]

6. a) The decision-making powers within MHH were largely transferred from the Academic Senate to a three-person executive board under the Human Medicine Regulation of 1998 and subsequently under the legal provisions challenged by the constitutional complaint. 11

[…] 12

b) Due to the university's status as an independent institution of higher education, the executive board of MHH is at the same time its presidency. The executive board consists of one member responsible for research and teaching (§ 63b sentence 4 no. 1 NHG), who is at the same time the President, one member responsible for patient care (§ 63b sentence 4 no. 2 NHG) and one member responsible for financial management and administration (§ 63b sentence 4 no. 3 NHG). The executive board members are employed full-time and are appointed for a term of up to six years by the responsible government ministry. 13

Apart from the executive board and the Academic Senate, a university council (§ 52 NHG) participates in the management of the university. The majority of its members - five out of seven - are external, which is common practice in Lower Saxony. They are appointed by the responsible state ministry in consultation with the Academic Senate. The Academic Senate and the responsible ministry are also represented on the university council (§ 52 sec. 2 NHG). […] 14

[…] 15-17

There are various degrees of the Academic Senate's participation in the removal or dismissal of the executive board by the state. Under § 63c sec. 5 NHG, the board member for research and teaching should be removed if good cause exists and the Academic Senate, with a three-quarters majority, decides to propose the removal. Previously, it was the university council that had the right to make this proposal. The university council now must confirm the proposal, but the decision lies with the Academic Senate if confirmation is refused and the parties are unable to agree. Under § 63c sec. 6 NHG, the Academic Senate now also has the opportunity to give its opinion on the removal of other board members. […] 18

c) The executive board has comprehensive decision-making powers under § 63e NHG. […] 19

d) The executive board adopts its resolutions unanimously (§ 63f sec. 1 sentence 1 20

NHG). If a resolution is not adopted, a simple majority is sufficient in a second vote (§ 63f sec. 1 sentence 2 NHG). According to § 63f sec. 1 sentence 3 NHG, as amended by the Act of 11 December 2013, the board member for research and teaching holds a veto power in all resolutions "that particularly affect the areas of research and teaching". According to the new sentence 4, inserted into § 63f sec. 1 NHG by the Act of 11 December 2013, the board member for financial management and administration holds such a veto right in matters "that particularly affect the area of financial management". […]

II.

The complainant is a university professor and member of the Academic Senate of MHH. He is challenging the arrangements for the appointment and removal of the executive board (§ 63c NHG) and the arrangements concerning the tasks and powers allocated to the executive board (§ 63e NHG). He claims a violation of his academic freedom under Art. 5 sec. 3 sentence 1 GG and a violation of Art. 19 sec. 1 sentence 1 GG. 21

1. […] 22-23

2. a) The complainant considers the constitutional complaint directly against the Act to be admissible. He claims that he is himself presently and immediately affected in his academic freedom by the challenged provisions. […] 24

b) The complainant claims that the constitutional complaint is well-founded because due to a lack of adequate delimitation in terms of content and organisational safeguards, the decision-making competence of the executive board of MHH poses structural threats to academic freedom. 25

[…] 32

3. […]

III.

The State Chancellery of Lower Saxony (*Niedersächsische Staatskanzlei*), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Academic Senate of MHH, the German Higher Education Association (*Deutscher Hochschulverband*), the Higher Education and Science Association (*Verband Hochschule und Wissenschaft*), the General Students' Committee of MHH (*Allgemeiner Studierendenausschuss der Medizinischen Hochschule Hannover*) and the free association of student bodies (freier zusammenschluss von studentInnenschaften (fzs) e.V.) have submitted *amicus* briefs on the constitutional complaint. 33

[…] 34-39

B.

The constitutional complaint is mostly admissible. 40

I.

[…] 41-42

II.

43 The complainant is mostly entitled to lodge the complaint.

44 1. The protection of fundamental rights under Art. 5 sec. 3 sentence 1 GG may be directly asserted against rules of academic organisations if these rules result in an organisation not adequately suited for the needs of science and research that puts the complainant's fundamental rights at risk (cf. *Entscheidungen des Bundesverfassungsgerichts*, Decisions of the Federal Constitutional Court (BVerfGE) 35, 79 <108>; 111, 333 <352>; 127, 87 <113>).

45 a) Accordingly, the complainant is entitled to lodge his complaint to the extent that it is directed against the restriction of the Academic Senate's involvement in identifying candidates for appointment to the executive board as provided for under § 63c sec. 2 sentence 1 NHG. Identifying candidates is a crucial part of pre-selecting the executive board. The decisions of the candidate identification committee are not binding but merely prepare a decision on who should be appointed. In line with the legislative aim of establishing a candidate identification committee, however, only a person who has been "identified" by the committee will be appointed to the executive board, while a person who has been rejected by it will not be appointed. This means that even the candidate identification process has considerable significance for academic decisions within the University.

46 b) The complainant is likewise entitled to lodge the complaint to the extent that he challenges the arrangements for appointing, re-appointing and removing the executive board as well as transferring powers to it. His depiction of the situation makes it seem likely that the overall organisational structure created by the challenged provisions poses structural threats to academic freedom. The complainant challenges rules on the allocation of powers that do not concern specific future decisions against which legal protection by the regular courts could and should then be sought first. Instead, he challenges organisational arrangements that do not adequately take needs of science and research into account, i.e. the structural threat posed by decisions made by non-academics that endanger his academic freedom. A constitutional complaint against an organisation not adequately suited for the needs of science and research that is an action in its own right [*aliud*], and not a preparatory stage to rejecting a future decision; in such a case, the focus is on the structural endangerment of academic freedom by the overall organisational structure of the institution of higher education, and the complaint is not merely being used to challenge a specific decision that is the actual subject of criticism. Protection of fundamental rights under Art. 5 sec. 3 sentence 1 GG requires that decisions taken by the state to structure academic organisations ensure academic freedom. As such, academic freedom is a right that the legislature refrain from creating a system which, by means of arrangements regarding

the constitution of management bodies, typically enables decisions that endanger the freedom of research and teaching.

2. On the other hand, the constitutional complaint at hand is inadmissible with regard to the provision, in the second half of sentence 1 of § 63c sec. 2 NHG, that the MHH´s constitution sets forth details for electing members of the candidate selection committee. It has not been demonstrated that this provision involves the possibility of an infringement of the complainant's fundamental rights. […] 47

3. The complainant is not entitled to lodge a complaint regarding the provisions […] that exclude certain persons – the executive board members concerned and candidates – from involvement in appointing, re-appointing and removing [*board members*] and with regard to those rules concerning the duty of confidentiality […] and the way voting is conducted in the candidate identification committee […] . No threat to academic freedom can emanate from these provisions. 48

4. The constitutional complaint is inadmissible for lack of entitlement to lodge the complaint insofar as it is directed against provisions concerning the University of Göttingen and against participation rights of the clinic conference in § 63e NHG. […] 49

III.

The constitutional complaint satisfies the requirements under the principle of subsidiarity expressed in § 90 sec. 2 sentence 1 of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht* – BVerfGG). 50

It cannot reasonably be expected of the complainant that he should first seek recourse before the regular courts against specific personnel decisions before lodging a constitutional complaint against the arrangements for making those decisions (§ 63c sec. 1, secs. 3 to 6 NHG) in which he sees a structural threat to academic freedom. 51

Before the regular courts, there is no legal recourse against the planning powers […] that are challenged by the constitutional complaint. […] 52

[…] For the complainant, no recourse exists before the regular courts to claim that the organisational structure presents a structural threat to academic freedom, which is protected as a fundamental right under Art. 5 sec. 3 sentence 1 GG. 53

C.

To the extent that it is admissible, the constitutional complaint is largely well-founded. The provisions regarding appointment and dismissal and regarding the powers of the executive board in § 63c sec. 1 sentences 1 and 2, secs. 2 to 6 and § 63e sec. 2 nos. 2, 3, 5, 10 and 11, sec. 3, and sec. 4 sentence 1, nos. 1, 2, and 4 NHG are in their overall structure incompatible with the requirements of Art. 5 sec. 3 sentence 1 GG for protecting academic freedom against structural threats. 54

I.

55 1. Apart from a liberty right for the individual, Art. 5 sec. 3 sentence 1 GG contains an objective value-defining foundational principle that governs the relationship between academic work, research and teaching on the one hand and the state on the other. Accordingly, the state must provide for functioning institutions to undertake free academic work in universities and guarantee, by means of appropriate organisational measures, that the individual fundamental right to free academic work is least interfered with while taking into consideration the other legitimate tasks of academic institutions as well as the fundamental rights of the various persons involved (cf. BVerfGE 127, 87 <114>; established case-law). In an academic institution for university medicine, with both tasks of research and of teaching as well as patient care, the legislature must take into consideration not only the protection of academic freedom under Art. 5 sec. 3 sentence 1 GG and the fundamental right under Art. 12 sec. 1 GG, which is important for tasks in the area of professional training (cf. BVerfGE 35, 79 <121>), but also the protection of health under Art. 2 sec. 2 sentence 1 in conjunction with Art. 20 sec. 1 GG (cf. in this regard BVerfGE 57, 70 <98 et seq.>), which are closely interconnected with each other.

56 2. Academic work is an area of autonomous responsibility that is, as a matter of principle, free from outside determination. Also, this liberty is based on the idea that academic work that is freed from aims to be socially useful or politically appropriate is best able to perform the tasks assigned to it (cf. BVerfGE 47, 327 <370>; 111, 333 <354>; 127, 87 <115>). Art. 5 sec. 3 sentence 1 GG therefore obliges the state to protect and promote academic work, while it also guarantees those involved the possibility to participate in university affairs (cf. BVerfGE 35, 79 <115 et seq.>); this involvement is not an end in itself but serves to protect against decisions that are not adequately suited for the needs of science and research (cf. BVerfGE 127, 87 <115>; 130, 263 <299 et seq.>).

57 3. The legislature possesses wide discretion for structuring university affairs while taking into account the various tasks of academic institutions and the interests of all those concerned while at the same time exercising its responsibility for society as a whole. It is not bound by traditional models of organisation for institutions of higher education (cf. BVerfGE 35, 79 <116>; 127, 87 <116 et seq.> with further references; established case-law) and, in order to put into practice its ideas for higher education, may assign different weight to demands of efficient organisation, good budgeting and clear allocation of responsibilities (cf. BVerfGE 35, 79 <120>). Guaranteeing academic freedom by means of organisational arrangements requires, however, that by means of being represented in their institutions' decision-making bodies, academics are able to avert threats to academic freedom and to contribute their specialist competence to organisational decisions in order to realise this freedom. The legislature must create an overall structure for the organisation of academic freedom in which arrangements for decision-making powers and rights of participation, exertion of influence, information and oversight are provided for in such a way that threats to the free-

dom of teaching and research are avoided (cf. BVerfGE 127, 87 <116 et seq.>). Organisational provisions are incompatible with Art. 5 sec. 3 sentence 1 GG if they create an overall structure that presents a structural threat to free academic activity and free fulfilment of academic tasks (cf. BVerfGE 127, 87 <115 et seq.>).

58

4. The adequate level of participation by academics in the overall structure of an institution of higher education's academic organisation as guaranteed under Art. 5 sec. 3 sentence 1 GG covers all decisions of academic relevance. These are not merely decisions that concern specific research projects or course programmes, but also those which concern planning the continuing development of an institution as well as the arrangements governing the running of the organisation (cf. BVerfGE 35, 79 <123>). Academically relevant decisions also include such decisions that regard the organisational structure and the budget (cf. BVerfGE 35, 79 <123>; 61, 260 <279>; 127, 87 <124 et seq., 126>), as the fundamental right of academic freedom would be rendered moot if the organisational framework and resources were not available that are the conditions for actually making use of this freedom (cf. BVerfGE 35, 79 <114 et seq.>). Insofar as the academic work of research and teaching is inseparably intertwined with other tasks such as that of patient care (cf. BVerfGE 57, 70 <98 et seq.>; see also BVerfGE 111, 333 <359>; 127, 87 <125>), decisions concerning these other tasks are also academically relevant.

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5. As long as academic staff can participate sufficiently in making academically-relevant decisions (cf. BVerfGE 127, 87 <116 et seq.>), the legislature has a free hand in shaping *inter alia* the manner in which such involvement is put into practice within the academic organisation's overall structure. Matters that are subject to the self-determination of the fundamental right holders, however, may anyway not be allocated either to representative bodies or to management bodies for decision (cf. BVerfGE 127, 87 <118>). The legislature may assign other matters of academic relevance to appropriately instituted bodies for decision. This means that representative bodies are also able to secure constitutionally guaranteed self-determination in the organisation of academic work and protect it from decisions that might threaten academic freedom; if they are pluralistically constituted and thus enable the differences that exist even within the academic world to be brought into the organisation in an expert way (see with regard to functional pluralism BVerfGE 35, 79 <126 et seq.>). Small management bodies, on the other hand, are geared towards streamlined decision-making and, due to their distance to the individual academics, are able to operate in a more dynamic way.

60

6. From the significance of pluralistically-constituted representative bodies for the self-organisation of academics it does not follow that such bodies take fundamental precedence over the management bodies. Decision-making powers may, however, only be assigned to management bodies if they are limited in terms of content and organisationally secured in such a way that there is no structural danger to academic freedom (cf. BVerfGE 111, 333 <357 et seq.>; 127, 87 <118>). To protect academic freedom it may therefore be necessary to give the fundamental right holders the op-

portunity to actually make their views concerning such decisions prevail and not simply to allow them the opportunity of merely giving their opinion (cf. concerning the group of higher education teachers BVerfGE 35, 79 <145>). Even though academic freedom does not mean that academics themselves have the exclusive right to determine which people manage an academic institution (cf. BVerfGE 111, 333 <365>), the right to a pluralistically-constituted representative body for appointing and also for removing members of management is a central and effective instrument for academics working in an institution to have influence and oversight in the way it is organised. The greater the extent and importance of the powers allocated to members of management, the more there must exist the possibility to remove them in a self-determined way (cf. BVerfGE 127, 87 <130 et seq.>). The more fundamentally, and the more substantially those academically relevant decision-making powers that affect staffing and substantive matters are taken away from collegial bodies of self-administration and assigned to management, the more the self-governing body must be involved in the appointment and dismissal of the management as well as in its decisions. The legislature must take this into consideration throughout the whole organisation.

61

7. The organisational guarantee of Art. 5 sec. 3 sentence 1 GG offers protection against structural threats from decisions that do not adequately take into account the needs of science and research and that are made within the organisation itself and limits state oversight. The legislature must guarantee that academic staff are able to adequately participate in academically-relevant decisions made by management bodies within the organisation. State oversight of academic institutions may be based on considerations of appropriateness or usefulness in matters of general administration; in matters of academic relevance, however, it is limited (cf. BVerfGE 35, 79 <122 et seq.>). At the same time, the state has a responsibility for patient care, which is, in university medicine, closely intertwined with research and teaching. This responsibility is exercised by wide-ranging supervision rights. Constitutionally, it follows from the aforesaid that the fundamental right of teaching staff at a medical university to academic freedom under Art. 5 sec. 3 sentence 1 GG may not be completely excluded in the context of their work of treating and caring for patients. The legislature must, on the one hand, respect this fundamental right, and must on the other hand guarantee the best possible patient care; in this respect, too, acknowledged legal interests of high importance enjoy constitutional protection under Art. 2 sec. 2 sentence 1 in conjunction with Art. 20 sec. 1 GG (cf. BVerfGE 57, 70 <98 et seq.>). Decision-making powers in patient care must therefore be organised in such a way that the academic staff retain as far as possible their self-determined exercise of their fundamental right as well as their rights of participation that correspond to an organisation that adequately takes into account the needs of science and research.

II.

62

The provisions of the Lower Saxony Higher Education Act regarding the management structure of the MHH as an independent medical school, which have been chal-

lenged in an admissible manner, do not satisfy in their totality the constitutional requirements deriving from Art. 5 sec. 3 sentence 1 GG. Within the overall organisational structure of the University, its members whose academic freedom is protected are – by comparison to the executive board – not adequately involved via the Academic Senate in making academically relevant decisions. The organisational requirements arising from Art. 5 sec. 3 sentence 1 GG also apply to medical faculties and universities (1.). The overall organisational structure of constitutive rights and decision-making powers stipulated for MHH by the challenged provisions holds unconstitutional structural threats for the freedom of teaching and research because crucial decisions concerning the University's development, organisation and resources are essentially assigned to the executive board and taken away from the Academic Senate (2.). In the case of definitive decisions of academic relevance, veto rights of the board member responsible for research and teaching (3.) and constitutive rights of the Academic Senate (4.) do not compensate for this change.

63

1. Art. 5 sec. 3 sentence 1 GG protects academic freedom, even in an independent university clinic. A university medical establishment that, as in the case of MHH, is structured according to an integration model and in which "in addition" (§ 3 sec. 5 sentence 1 NHG, § 1 sec. 2 GO MHH) to academic work highly-specialised tasks of patient care are undertaken to a considerable degree, is therefore subject to constitutional requirements of adequate participation by the fundamental right holders in making academically relevant decisions. Structural threats to university medical research cannot in the overall organisational structure be justified by referring to the duty of providing medical care, because the two are independent of one another.

64

2. There are well-founded constitutional concerns regarding the fact that in the overall organisational structure on review here, crucial decisions regarding development, organisation and resources for research and teaching have been essentially allocated to the executive board and taken away from the Academic Senate.

65

a) Basically, however, there is no constitutional objection to the decision of the legislature to place the management of an academic institution of higher education in the hands of a three-person executive board. The Basic Law contains no provisions relating to higher education policy that stipulate any particular model of governance. Therefore, there is no constitutional concern if in a medical school even decisions of academic relevance are not taken by the Academic Senate alone or exclusively by the board member responsible for research and teaching, who, by virtue of the provisions concerning appointment and removal is tied closely to the Academic Senate (see C. II. 4 below), but if the board members responsible for the budget and even for patient care are included as well. To the extent that there is a right under the Constitution to participate in decisions regarding the budget and regarding patient care (see C. I. 4 above) in order to protect academic freedom, the Constitution also permits, vice versa, when designing decision-making powers, to take into account other tasks of an academic institution with the aim of achieving a balance (cf. BVerfGE 57, 70 <99>) in the spirit of practical concordance of all interests protected by fundamental

rights […].

b) The Lower Saxony Higher Education Act also recognises in its arrangements for academic organisation that freedom of medical research must not least be protected against the considerable potential threat resulting from the requirements for health care; these requirements result from health policy and economic considerations, and are thus not subject to the autonomy of research and teaching but rather in conflict with it. […] Accordingly, rights of participation benefiting the Academic Senate were included in the Act Amending the Lower Saxony Higher Education Act of 11 December 2013; under § 63f sec. 1 sentence 3 NHG, the executive board member responsible for research and teaching has been given the right to veto board decisions in order to protect research and teaching against being too easily made subordinate to the task and requirements of patient care. 66

c) Nor are there any constitutional concerns about making the executive board responsible for decisions regarding the development plan in accordance with § 63e sec. 2 no. 2 NHG. For in § 41 sec. 2 sentence 1 in conjunction with § 63e sec. 2 no. 1 NHG the power to decide on the fundamental elements of the development plan is allocated to the Academic Senate; the legislature is thus leaving the determination of the future development of the organisation as a whole in the hands of the academic representative body. As the *Land* government has confirmed, the decision of the executive board is bound by the Academic Senate's decision (cf. BVerfGE 127, 87 <127>). In a medical school, there is, moreover, no constitutional concern about the executive board – including the members for budget and for patient care – having to agree under § 63e sec. 2 no. 1 NHG to the Academic Senate's decision on the fundamental elements of the development plan in order to balance all legal interests that need to be considered in university medicine. Moreover, under § 63f sec. 1 sentence 3 NHG the board member responsible for research and teaching has a right to veto decisions regarding the development plan under § 63e sec. 2 no. 2 NHG if interests specific to research and teaching are affected. 67

In the present case, there are, however, constitutional concerns arising from the fact that MHH has not, in fact, undertaken any development planning since 2005. Instead, basic questions are decided only within the scope of the agreement on objectives concluded with the ministry responsible for institutions of higher education (cf. § 1 sec. 3 NHG). Under § 63e sec. 2 no. 4 NHG, the power to enter into an agreement on objectives is assigned to the executive board; according to § 63e sec. 2 no. 4 in conjunction with sec. 3 sentence 2 NHG, the Academic Senate merely has the right to give its opinion. This means that there is in fact no adequate participation by the Academic Senate in fundamental decisions of academic relevance. Whether this is, in principle, consistent with the requirements of Art. 5 sec. 3 sentence 1 GG (cf. Gross, German Administrative Journal (DVBl) 2005, p. 721 <726 et seq.>; Trute, Journal of Academic Law (WissR) 2000, p. 134 <144; 154>; more cautiously Fehling, *Die Verwaltung* [The Administration] 2002, p. 399 <409>), is not a matter to be decided in the present proceedings, as the complainant has not challenged § 63e sec. 2 no. 4 NHG. 68

The provisions as a whole are deficient, however, to the extent that they clearly permit the Academic Senate's rights concerning development planning to be undermined. Arranging for the Academic Senate's rights to participate in agreements on objectives between the institution of higher education and the state falls within the legislature's discretion. The legislature may require consensual agreements or otherwise make it mandatory for the academically-relevant part of the agreements on objectives to be tied to development planning that is decided upon by the Academic Senate (cf. § 1 sec. 3 sentences 1 and 2 NHG). In any case, it must be guaranteed, however, that the Academic Senate is able to actually use its power to decide on, or its effective participation in, development planning; if necessary, this includes being able to force in court any necessary preparatory actions by the executive board. The lack of constitutionally-required participation of academics could insofar not be compensated for by their influence on appointing and dismissing the management body (C. II. 4. below).

69 d) The arrangements for decision-making powers in the overall structure provided for here are highly problematic, because § 63e sec. 2 no. 3 NHG assigns decisions regarding the organisation of MHH to the executive board, on which the members for research and teaching and for budget have veto rights, but does not provide for any effective participation in decision-making by the Academic Senate, with its wide range of understanding of academic matters. The executive board is merely required to consult the Academic Senate. Thus, even taking into consideration the appointment and removal of the executive board, the Lower Saxony Higher Education Act expressly limits in the overall structure the participation of the Academic Senate in making decisions regarding the organisation, which also involve setting out the future path for the academic side of the organisation (cf. BVerfGE 35, 79 <123>), in a way that is incompatible with Art. 5 sec. 3 sentence 1 GG. An interpretation of the provision whereby consultation could be understood as consensual agreement is not in line with the legislature's intention.

70 e) The Academic Senate's inadequate powers to participate in the executive board's decisions on the finance plan (§ 63e sec. 2 no. 5 NHG), on distributing material, investment and staffing budgets to the organisational units (§ 63e sec. 2 no. 10 NHG) as well as on providing resources for the central funds for teaching and for research (§ 63e sec. 2 no. 11 NHG) may result in a structural threat to academic freedom, since the resulting deficit in the Academic Senate's ability to exert influence is not compensated for elsewhere.

71 aa) Fundamental economic decisions such as those concerning the finance plan of an institution of higher education are not unrelated to academic matters; instead, in view of the fact that research and teaching depend on resources, they are academically relevant. Budgetary decisions must adequately respect the constitutionally-guaranteed requirements under Art. 5 sec. 3 sentence 1 GG for protecting academic freedom. Nonetheless, for decisions on the finance plan, the legislature has not awarded the executive board member for research and teaching a veto right corre-

sponding to the veto right of the board member for financial management and administration.

Within its margin of appreciation, the legislature is not obliged to guarantee academic freedom solely by providing for rights of participation. It may also make use of statutory requirements for the use of resources (cf. BVerfGE 127, 87 <119 et seq.>). In Lower Saxony, there are however no budgetary arrangements in place that could contribute to protecting academic freedom, for instance by attempts to counter the risk of patient care being internally cross-subsidised with resources designated for research and teaching by means of binding separate accounting [i.e. for economic and non-economic activities] […]. The executive board's duty of accountability under § 41 sec. 2 sentences 3 and 4 NHG, and § 5 sec. 5 GO MHH is not in itself sufficient to compensate for the lack of participation rights intended *inter alia* to secure involvement in shaping the institution. 72

To the extent that the power under § 63e sec. 2 no. 10 NHG to distribute the budget covers the operative implementation of the finance plan's requirements, there is no constitutional concern regarding this power being allocated to the executive board; the special interests of academics are guaranteed by means of the veto right for the board member for research and teaching, which was inserted in 2013. If, however, distributing the budget involves fundamental decisions of academic relevance, these should not be made without the Academic Senate's participation with its wide-ranging understanding of academic matters, the lack of which cannot be compensated for by a veto on the executive board. The legislature has the discretionary power to establish the overall structure for guaranteeing academic freedom. 73

bb) The legislature conceives of the academically-relevant power to provide resources for central funds for teaching and for research as a decision that concerns distributing the budget of the institution of higher education as a whole. The legislature has allocated this power to the executive board, with the executive board members for research and teaching and for financial management and administration respectively holding veto rights. With regard, however, to the organisation's overall structure, the fact that the challenged provisions do not at all involve the Academic Senate in making this decision meets with constitutional concerns. In an overall organisational structure in which academic freedom is adequately protected it may well satisfy constitutional requirements if, for example, the scope of the resources is limited; moreover, a structural threat to academic freedom may be avoided if this decision is linked to a finance plan drawn up with the Academic Senate's participation and any deviation from this linkage is monitored and can be corrected. None of this is the case, however, in the matter under consideration. 74

3. There are well-founded constitutional objections regarding the arrangements being challenged by the constitutional complaint concerning the decision-making powers of the board member responsible for research and teaching. Appointing a board member for research and teaching to the executive board of a university clinic that 75

comprises several members may contribute to protecting academic freedom as long as the Academic Senate has a significant influence on appointing and removing this board member. It moreover corresponds to the importance of academic freedom as guaranteed under Art. 5 sec. 3 sentence 1 GG if in a medical university this board member also holds the elevated position of university president. Allocating academically-relevant decision-making powers to a member of management who is more closely connected to the academic staff of the university cannot, however, completely replace the participation of a representative body of academic self-administration in making such decisions.

a) Allocating to the responsible board member decision-making powers regarding organising and continually developing research and teaching under § 63e sec. 4 sentence 1 no. 1 NHG does not stand up to constitutional scrutiny in the overall structure as it appears here. These powers do not merely involve co-ordination duties but are conceived of by the legislature as genuine powers to shape the institution. § 63e sec. 4 sentence 2 NHG, under which decisions may be made that concern establishing main areas of focus, makes this especially clear; the Academic Senate is involved in making these essentially academically-relevant decisions only if they are of fundamental importance, and then only by way of being consulted. This means that the legislature has not adequately complied with the constitutional requirements by which an executive board, even if it can be appointed and removed according to the provisions applicable here, may only be allocated the power to make such decisions that do not have to be made by way of self-determination (cf. BVerfGE 35, 79 <126 et seq.>; 127, 87 <118>). Moreover, in order to give organisational protection to academic freedom, the legislature should normally be obliged to require consensual agreement with the representative body of academic self-administration, especially in matters that directly affect defining future paths for research and teaching. 76

b) Similarly, at least in the overall structure on review here, there are concerns about the decision-making powers regarding the distribution of resources for research and teaching under § 63e sec. 4 sentence 1 nos. 2 and 4 NHG. Here, too, the executive board member decides merely in consultation with the Academic Senate and, as far as can be seen, is not subject to any other normative requirements […]. The Dean of Research, who is appointed with the agreement of the Academic Senate, and the research committee, the members of which are elected biannually by the Academic Senate, assess internal funding applications; but § 10 GO MHH does not guarantee that this means that decisions on the distribution of resources are made with the participation of academic staff. 77

4. In the overall structure in question here, the existing structural threats to academic freedom are not compensated for by the arrangements made to identify candidates for the board, and for appointing, re-appointing and removing the executive board. In particular, the Academic Senate does not have any possibility to remove by way of self-determination a management body it no longer accepts. This carries great weight at least in such cases in which, as in the present case, the Academic Senate is not 78

entitled to any rights of oversight and information – in particular other powers in the form of veto rights – meaning that the lack of power to vote out the executive board *de facto* makes effective oversight of the executive board by the Academic Senate impossible (cf. BVerfGE 127, 87 <131>; C. I. 6. above).

79 a) The provision in § 63c sec. 3 NHG, which is challenged by the constitutional complaint and which relates to the appointment of board members, meets at least in part with deep constitutional concerns in an overall structure in which the legislature on the one hand furnishes this management body with wide-ranging powers, but on the other hand does not give the Academic Senate, as an academic representative body, the right to participate in all decisions.

80 aa) The protection resulting from Art. 5 sec. 3 sentence 1 GG against organisational structures that do not adequately take into account the needs of science and research is now, however, given due regard by the amendment of § 63c sec. 3 sentence 1 NHG, which renders decisive the participation of the representative body, which reflects the points of view of the university's academics; this body now has the exclusive right to propose candidates for appointment as the board member responsible for research and teaching.

81 bb) There are no constitutional concerns regarding the provisions that concern the appointment of the board member responsible for patient care. It is true that in university medicine research and teaching are inextricably interlinked with patient care (C. I. 1. above), and that the board member for patient care has considerable powers to participate in decisions regarding matters of academic relevance, since decisions on matters like the finance plan, development planning, the funds for teaching and research, structuring the organisation, agreeing on objectives, as well as on distributing the budget are made jointly on the executive board (§ 63e sec. 2 nos. 2, 3, 4, 5, 10 and 11, § 63f sec. 1 sentence 1 NHG); however, it is within the discretionary power of the legislature to tie this board member's appointment to an external body's right of proposal, such as the University council, the majority of whose members in Lower Saxony are external (§ 52 NHG). The legislature has at least since 2013 in a reasonable way given due regard to the needs of science and research by granting the Academic Senate the right to give its opinion on this appointment.

82 cc) The arrangements for constituting the university's management body meet with constitutional concerns as regards the way the powers of the executive board are presently structured; the board member responsible for financial management and administration is appointed without adequate participation by the Academic Senate, namely upon the proposal of the external University council with the agreement of the board member responsible for research and teaching. Under the three-person executive board model chosen by the Lower Saxony legislature, in which each member has their own area of responsibility, this board member has obligations towards patient care as well as towards academic matters. Even under the revised provision of 2013, the Academic Senate is merely permitted to comment on this appointment. Unlike pa-

tient care, however, budgetary matters are not a task that in its defining areas is subject to quite different autonomous considerations that are completely unconnected to academic matters. Rather, as a rule, budgetary decisions are in fact also decisions on the actual possibility to conduct medical research and teaching (C. I. 4. above). The Lower Saxony legislature has also allocated considerable powers to the board member responsible for the budget to participate in making decisions of academic relevance, which go beyond the powers assigned to the member responsible for patient care, because he or she is accorded the right to veto decisions that concern the organisational structure, the finance plan and the fund for teaching and research (§ 63f sec. 1 sentence 4 NHG). Only in cases that concern providing funds for a teaching and a research fund are these powers balanced by a counter-veto held by the board member responsible for research and teaching (§ 63e sec. 2 no. 11 NHG).

83 b) The participation of a representative body in constituting a university management as strong as in this case – as is necessary to protect academic freedom – may not be put into question by the possibility for the state ,under § 63c sec. 1 sentences 1 and 2 NHG, to freely refuse the appointment according to the yardsticks of its own personnel policy. It is true that institutions of higher education do not merely perform tasks of self-administration, but also state tasks. This means that appointing the members of the management body may be arranged for as a matter within the joint authority of the state and the institution (cf. BVerfGE 111, 333 <362 et seq.>), but may also be allocated to the university's representative body alone as being a matter of self-administration (cf. § 39 sec. 2 Hessen Higher Education Act, § 63 sec. 2 sentence 1 Brandenburg Higher Education Act, § 80 sec. 1 sentence 1 Hamburg Higher Education Act). At any rate, the rights of the academic staff to themselves participate may not be degraded either by state powers or by powers of a University council with a majority of external members. Accordingly, the right of appointment provided for in § 63c sec. 1 sentences 1 and 2 NHG must also be understood to mean that in this case the state is not entitled to free political discretion. It may only refuse to appoint the board member for research and teaching if there are solid legal reasons to do so that are supported by a correspondingly important public interest that respects academic work as an area of autonomous responsibility (C. I. 2. above).

84 c) There are well-founded constitutional objections regarding the fact that the appointment of a University management board with such wide powers as in the case of MHH is preceded by a candidate identification process in which – unlike in the case referred to by § 38 sec. 2 sentence 2 NHG, which applies to other institutions of higher education – the participation of academics is not adequately guaranteed. The candidate identification procedure – which is mandatory under § 63c sec. 2 sentence 1 NHG, since, unlike in § 38 sec. 2 sentence 4 NHG, the law does not provide for a mere recommendation – is given decisive importance in the legislature's conception for appointing members of the executive board. While the proposal submitted by the candidate identification committee is not binding, the candidate identification committee is able to decisively filter who will be considered as a member of the executive

board at all. To this extent, the participation requirements that apply to the appointment of executive board members in order to protect academic freedom (C. I. 6. above; C. II. 4. a), also apply to the candidate identification process. The participation of the representative body in identifying candidates for appointment as executive board members must therefore in the overall structure on review here be extensive in order to rule out any threats to academic freedom; the executive board is allocated extensive and substantial powers to make academically relevant decisions and is only to a limited extent subject to other oversight mechanisms, be they statutory obligations or rights of influence.

85 aa) In the overall structure, the arrangements provided for in § 63c sec. 2 sentence 1 NHG prove to be deficient insofar as the Academic Senate, as the representative body of academic self-administration, lacks effective influence in identifying candidates for the position as board member for research and teaching. The legislature must ensure that it is not possible for any person who does not enjoy the confidence of the academic staff to be proposed precisely for the executive board's area of responsibility that deals with academic matters.

86 bb) The arrangements for identifying candidates for appointment as the board member for patient care are not subject to the same participation requirements as the arrangements for identifying candidates for appointment as the board member for research and teaching. However, these two areas are interlinked (C. I. 1. above) and, in the executive board model, joined to each other by decision-making powers (C. II. 2. a above), for which reason a candidate identification process undertaken without participation by the Academic Senate as the representative body of the fundamental right holders represents a structural threat to academic freedom.

87 cc) Any procedure for identifying candidates for appointment as board member responsible for the university's budget must also guarantee that the interests of academic work are appropriately taken into account. Accordingly, the legislature is required to make arrangements for participation of the representative body in candidate identification. Therefore, in view of the important powers of the executive board, the provision of the Lower Saxony Higher Education Act under which, in the case of this board member, two of the eleven voting members of the candidate identification committee are chosen by the Academic Senate does not seem adequate.

88 d) The arrangements for re-appointing a management board of an institution of higher education are basically subject to the same requirements concerning participation of the representative body, and thus legitimation by the fundamental right holders, that apply to its appointment as well as to the identification of candidates. The legislature may in this case, however, take into account whether the representative body of academic self-administration was involved in making the initial appointment.

89 aa) The provision in § 63c sec. 4 sentence 1 NHG awards the Academic Senate the right to propose the re-appointment of the board member for research and teaching. It then provides for the University council to give its opinion, and finally for the responsi-

ble ministry to make the appointment. This arrangement meets with no constitutional concerns if the Academic Senate has participated in identifying candidates for the position and in appointing the incumbent.

bb) Nor are there any constitutional concerns regarding the arrangements for re-appointing the board member for patient care, who can be re-appointed at the proposal of the executive board in agreement with the School council and with the Academic Senate having provided its opinion (§ 63c sec. 4 sentence 2 NHG). The Academic Senate's low level of participation is justified by this board member's different kind of responsibilities (C. II. 4. a bb above). 90

cc) A structural threat to academic freedom is not, however, ruled out if the legislature limits the representative body's participation in re-appointing the board member responsible for the budget to the residual possibility of commenting (§ 63c sec. 4 sentence 2 NHG). 91

e) In the overall structure of higher education organisations, the more powers are assigned to the management body and taken away from the representative body (cf. BVerfGE 127, 87 <130 et seq.>), the more significance is accorded to the possibility for a representative body to remove a management body. 92

aa) It is constitutionally unobjectionable if the legislature also allows bodies that comprise external members, in this case the University council, to contribute their point of view (§ 63c sec. 5 sentences 2 and 3 NHG), as long as this body cannot deprive the representative body of academic self-administration of its right of participation (§ 63c sec. 5 sentence 4 NHG). 93

bb) Nor are there any constitutional objections to the state having to confirm a decision as significant as the removal of a member of the executive board or presidency. If, however, this concerns a board member who has academically relevant powers, such a state right of oversight may not run counter to the self-determination of the fundamental right holders (C. I. 6. above). For this reason, there are no concerns when § 63c sec. 5 sentence 1 NHG stipulates that the responsible ministry "should" remove the board member for research and teaching at the proposal of the Academic Senate. Conversely, in the case of removal of the other board members, the legislature provides the responsible ministry with the discretion to decide on the proposal put forward by the executive board in agreement with the University council (§ 63c sec. 6 second half of sentence 2 NHG) and with the Academic Senate having the opportunity to comment; the responsible ministry "can" follow the proposal put forward under § 63c sec. 6 sentence 1 NHG. To the extent that this applies to the board member for patient care, this meets with no constitutional concerns, since the special interests of patient care may be given due regard in this way. There are constitutional concerns regarding this design of participation rights, however, in the case of the board member for financial management and administration, since this member has decision-making powers of academic relevance. 94

cc) The arrangements provided for in § 63c sec. 5 sentences 1 and 2 NHG meet with deep constitutional concerns insofar as they overly favour the interests of the management body in question in staying in office over the interests of academics in decisively participating in the constitution of management bodies. When establishing procedures for removing a member, the legislature must take into consideration not just the interests of the holders of the fundamental right under Art. 5 sec. 3 sentence 1 GG in participating decisively in appointing and removing the management bodies responsible for academic interests. Beyond the rights of oversight assigned to the state, the legislature can instead seek to protect the interests of the person concerned. A procedure to remove a member, as provided for in § 63c sec. 5 sentences 1 and 2 NHG, whereby the representative body may propose removal but is bound by the requirement of a three-quarters majority and the existence of good cause, disregards academic interests, however, to a degree which endangers academic work. While it is constitutionally admissible to make decisions by representative bodies subject to a qualified majority, it meets with considerable concerns if this majority cannot be achieved by the academic staff on their own (cf. BVerfGE 127, 87 <130 et seq.> and even BVerfGE 35, 79 <132 et seq.>) and removal is moreover subject to narrowly-defined material conditions. It is constitutionally admissible and even required for the protection of the persons concerned that a decision regarding removal or dismissal should be subject to material criteria. To safeguard academic freedom, however, making removal subject to the existence of good cause must, in view of the very high voting majority set here, be understood as meaning that such grounds exist if the necessary majority of the representative body vote for the dismissal; this is then in principle an indication that a management body has lost the confidence of the academic staff (cf. also BVerwGE 135, 286 <301>). 95

5. The overall organisational structure of the University as arranged under the challenged provisions in §§ 63c and 63e NHG in accordance with the integration model for organising university medicine and in accordance with the executive board model for organising the management of the School, violates Art. 5 sec. 3 sentence 1 GG. This is so even in view of the legislature's wide range of discretion in structuring the institution of higher education's management as well as in view of the duty to sufficiently take into consideration the task of patient care in organising university medicine. Neither the participation rights of the representative body of academic self-administration itself nor the representative body's participation in constituting the management body adequately secure the decision-making powers allocated to the executive board as a whole and those allocated to the board member for research and against the structural threat posed by decisions that do not adequately take into account the needs of science and research. Having a veto right on the executive board cannot compensate for the representative body's lack of participation rights. 96

III.

[…] 97

IV.

98 As the constitutional complaint is predominantly admissible and well-founded, the complainant shall under § 34a sec. 2 BVerfGG be fully reimbursed for his necessary expenses (cf. BVerfGE 86, 90 <122>).

99 The value of the matter in terms of lawyers' fees for the constitutional complaint was established on the basis of § 37 sec. 2 sentence 2 in conjunction with § 14 sec. 1 sentence 1 of the Law Concerning Lawyers' Fees (RVG).

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 24. Juni 2014 - 1 BvR 3217/07

Zitiervorschlag	BVerfG, Beschluss des Ersten Senats vom 24. Juni 2014 - 1 BvR 3217/07 - Rn. (1 - 99), http://www.bverfg.de/e/rs20140624_1bvr321707en.html
ECLI	ECLI:DE:BVerfG:2014:rs20140624.1bvr321707