Headnotes

to the Order of the First Senate of 17 February 2016

– 1 BvL 8/10 –

In principle, the fundamental freedom of research and teaching in Article 5(3) first sentence of the Basic Law (*Grundgesetz* – GG) does not conflict with requirements set up to ensure the quality of academic studies. However, the legislature may not leave essential decisions on the accreditation of study programmes to other actors; the legislature itself must make such essential decisions, taking into consideration the intrinsic rationale of academic research and teaching.

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 8/10 –

IN THE NAME OF THE PEOPLE

In the proceedings for

constitutional review

of whether § 72(2) sixth sentence of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia (*Gesetz über die Hochschulen des Landes Nordrhein-Westfalen* – HG NRW) is compatible with Article 5(3) and Article 20(3) of the Basic Law (*Grundgesetz* – GG)

of whether § 72(2) sixth sentence of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia (*Gesetz über die Hochschulen des Landes Nordrhein-Westfalen* – HG NRW) is compatible with Article 5(3) and Article 20(3) of the Basic Law (*Grundgesetz* – GG)

– Order of Suspension and Referral from the Arnsberg Administrative Court (*Verwaltungsgericht*)
of 16 April 2010 (12 K 2689/08) –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 17 February 2016:

1. **§ 72(2) sixth sentence and § 7(1) first and second sentences of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia in the version of the Higher Education Autonomy Act (*Hochschulfreiheitsgesetz)* of 31 October 2006 (Law and Ordinance Gazette of the *Land* North Rhine-Westphalia, *Gesetzes- und Verordnungsblatt des Landes Nordrhein-Westfalen* 2006, page 474) and § 73(4) first and second sentences of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia of 16 September 2014 (Law and Regulations Gazette of the *Land* North Rhine-Westphalia 2014, page 547) are not compatible with Article 5(3) first sentence in conjunction with Article 20(3) GG.**
2. **§ 7(1) first and second sentences and § 72(2) sixth sentence of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia in the version of the Higher Education Autonomy Act of 31 October 2006 and § 7(1) first and second sentences and § 73(4) of the Act on the Higher Education Institutions of the *Land* North Rhine-Westphalia of 16 September 2014 shall continue to apply until new legislation enters into force, but until 31 December 2017 at the latest.**

R e a s o n s :

A.

These judicial review proceedings concern provisions of *Land* law which govern the accreditation of study programmes. An accreditation agency – the defendant in the initial proceedings – refused to accredit two study programmes offered by a private university of applied sciences (*Fachhochschule*). The referring Administrative Court considers the *Land* law upon which this refusal was based to be unconstitutional. 1

I.

[*Excerpt from Press Release no. 15/2016 of 17 February 2016*] 2

Accreditation in the field of higher education is a procedure applied across the Laender and higher education institutions to evaluate Bachelors' and Masters' programmes of state or state-recognised higher education institutions. The request for judicial review concerns the accreditation of study programmes offered by higher education institutions that are not under the responsibility of the Land, i.e. the so-called "programme accreditation". The process starts with the selection of an agency by the higher education institution, its application for accreditation, and an agreement on the procedure and costs; after that, the higher education institution submits a comprehensive self-documentation. The agency organises a group for the evaluation, which prepares an expert opinion after an on-site visit. Based on this, the agency's decision-making body adopts a decision.

Generally, the programme accreditation is subject to various requirements. In 1998,

the German Rectors' Conference (Hochschulrektorenkonferenz – HRK) advocated the accreditation of study programmes across the Laender. Shortly afterwards, the Standing Conference for the Ministers of Education and Cultural Affairs of the Laender (Kultusministerkonferenz – KMK) decided to introduce such procedures on a trial basis for Bachelors' and Masters' programmes that were to be newly established and to set up an accreditation council for this purpose. In 2004, the KMK agreed to transform the accreditation council into a public law foundation with legal capacity under the law of the Land North Rhine-Westphalia. By Act of 15 February 2005, the Land North Rhine-Westphalia then established the "Foundation for the Accreditation of Study Programmes in Germany". As the central organ of the foundation, the accreditation council issues the essential rules for the accreditation of study programmes. The Act does not specify details in that respect. The council also accredits or re-accredits the accreditation agencies, which in turn develop their own accreditation requirements.

At the time of the initial court proceedings, the Act on the Higher Education Institutions of the Land of North Rhine-Westphalia (Gesetz über die Hochschulen des Landes Nordrhein-Westfalen – HG NRW) in the version of the Higher Education Autonomy Act (*Hochschulfreiheitsgesetz*) of 31 October 2006 (HG NRW former version – f.v.) was in force. Higher education institutions that were not under the responsibility of the Land required state recognition (§ 72 HG NRW f.v.) in order to be put on an equal footing with state higher education institutions in terms of graduation, the right to hold examinations and the right to award an academic degree (§ 73(1) and (2) HG NRW f.v.). Without state recognition, these institutions were not allowed to operate under the designation higher education institution (§ 75(1) HG NRW f.v.) Pursuant to § 72(1) no. 3 HG NRW (f.v.) a prerequisite for state recognition was "a majority of … successfully accredited study programmes". According to § 72(2) sixth sentence HG NRW (f.v.) accreditations were carried out "in accordance with applicable regulations".

On 1 October 2014, a new Act on Higher Education Institutions in the Land of North Rhine-Westphalia entered into force. According to the new Act, accreditation of study programmes is now required uniformly for all higher education institutions pursuant to § 7(1) HG NRW (current version – c.v.), which § 73(4) HG NRW (c.v.) specifically refers to regarding the accreditation of non-state higher education institutions. Pursuant to § 7(1) HG NRW (c.v.) accreditation must, as in the past, be carried out "in accordance with applicable regulations".

[*End of excerpt*]

[…]

[…] 3-17

II.

In the initial proceedings, the parties are in dispute as to whether it was lawful for the defendant, an accreditation agency, to refuse the accreditation of two study programmes offered by the claimant, a private university of applied sciences. 18

1. The claimant in the initial proceedings is a private university of applied sciences, S… gGmbH. It was founded and recognised as a higher education institution by the state in 2005. In September 2005, this university of applied sciences took up operations with the study programme "Logistics" leading to a Bachelor's degree, offered by way of both on-site and distance learning courses. 19

The defendant agency in the initial proceedings is A… e. V. It is financed and controlled by higher education institutions, business associations, expert and professional associations, as well as social-partnership organisations; the agency itself was first accredited in December 2002 and re-accredited in June 2006. 20

2. The [*Land* government] prohibited the university of applied sciences […] from registering student applicants for [certain] courses "with immediate effect". It stated that this "prohibition would be lifted" if the study programmes were later successfully accredited after all. […] 21

3. Prior to this, the university of applied sciences had commissioned the accreditation agency […] to re-accredit the study programmes. […] The accreditation agency sent the university of applied sciences its general terms and conditions, and its "Information for Higher Education Institutions: Requirements and Procedural Principles for the Accreditation and Re-Accreditation of Bachelors' and Masters' Programmes in Engineering, Architecture, Computer Sciences, Natural Sciences, and Mathematics". The expert group appointed by the accreditation agency and tasked with carrying out the evaluation recommended to the agency's accreditation commission not to accredit the study programmes […]; the technical committee endorsed this recommendation, as did the accreditation commission […]. The managing director of the accreditation agency notified the university of applied sciences [...] of this decision. 22

The university of applied sciences [unsuccessfully] lodged a complaint with the accreditation agency's complaint and appeals board. […] 23

4. The Administrative Court refused […] to grant a preliminary injunction. […] 24

[…] 25

[…] 26

7. [T]he Administrative Court […] suspended the [principal] proceedings and referred the question whether § 72(2) sixth sentence of HG NRW (f.v.) is compatible with Art. 5(3) and Art. 20(3) of the Basic Law (*Grundgesetz* – GG) to the Federal Constitutional Court. […] 27

[…] 28-29

III.

[…] 30-32

B.

The referral is admissible. 33

I.

In proceedings pursuant to Art. 100(1) first sentence GG, the [referring] court must indicate, as per § 80(2) first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), in which respect its decision depends on the validity of the legal provision in question and which higher-ranking legal provision that provision is incompatible with. The referring court must comprehensibly and verifiably substantiate that the validity of the legal provision is material to the outcome of its pending decision, and set out the arguments why the court believes the legal provision to be incompatible with the Constitution (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 105, 61 <67>; 127, 335 <355 and 336>; 132, 360 <366 and 367>; established case-law). […] 34

II.

These requirements are satisfied in the case at hand. 35

1. The Administrative Court has provided comprehensible reasons as to why it considers § 72(2) sixth sentence HG NRW (f.v.) to be unconstitutional. […] 36

2. The Administrative Court has comprehensibly set out that it would reach a different result if § 72(2) sixth sentence of the HG NRW (f.v.) were valid, than if the provision were void, and provided reasons as to why this was the case. 37

a) If § 72(2) sixth sentence HG NRW (f.v.) were held to be unconstitutional, the Administrative Court would have to dismiss the claim. Without an adequate legal basis it would not be possible to presume an obligation on the part of the defendant accreditation agency to take the administrative decision [on re-accreditation] or to render a new decision. Conversely, if the legal basis were held to be constitutional, the claim in the initial proceedings would be successful to the extent that – despite the principal motion being dismissed – the court would have to conclude that the decision of the agency of 14 April 2008 was unlawful. […] 38

b) Moreover, the referring court reasonably considered admissible the application in the [now moot] initial proceedings for a continuation of proceedings seeking a declaratory finding of unlawfulness (*Fortsetzungsfeststellungsklage*). 39

[…] 40-42

III.

The fact that the challenged statute is no longer in effect does not affect the admissi- 43

bility of the referred question. The referred provisions continue to have legal effects which are material to the decision in the proceedings pending before the regular court (cf. BVerfGE 39, 148 <152>; 47, 46 <64>; 55, 32 <36>; 68, 155 <169 and 170>; 106, 275 <296 and 297>; 130, 1 <42>). […]

C.

44 The referral is well-founded. The provisions governing the accreditation of study programmes at higher education institutions in § 72(2) sixth sentence in conjunction with § 72(1) no. 3 HG NRW (f.v.) are incompatible with the requirements of the Basic Law.

I.

45 There are no objections to the formal constitutionality of the referred provisions. […]

II.

46 However, the referred provisions fail to satisfy the substantive requirements of Art. 5(3) first sentence GG. The accreditation of study programmes involves serious interferences with the freedom of research and teaching. In this respect, the referred provisions do not meet the [constitutional] requirement that interferences with fundamental rights be based on a statutory provision (*Gesetzesvorbehalt*); rather, the legislature leaves the decision on applicable standards for the accreditation of study programmes at higher education institutions largely up to other actors, without setting out the necessary statutory requirements.

47 1. The requirement that study programmes at higher education institutions be accredited bears on the scope of protection of Art. 5(3) first sentence GG. This scope of protection covers the university of applied sciences as a private higher education institution and is affected by procedures involving the evaluation of academic teaching.

48 a) Art. 5(3) first sentence GG protects academic teaching staff, faculties and departments, and higher education institutions (cf. BVerfGE 15, 256 <262>; 61, 82 <102>; 75, 192 <196>; 93, 85 <93>; 111, 333 <352>), thus protecting both universities and universities of applied sciences (cf. BVerfGE 126, 1 <20 et seq.>), as well as research and teaching organised under private law (in this respect cf., for example, Bethge in Sachs, GG, 7th ed. 2014, Art. 5 para. 213; Fehling in BK Art. 5(3) para. 132, edited in March 2004). This means that private higher education institutions, such as the university of applied sciences, its sub-divisions and members, may invoke Art. 5(3) first sentence GG.

49 b) Research-based teaching, as a process of imparting academic knowledge, falls under the protection of Art. 5(3) first sentence GG (cf. BVerfGE 35, 79 <82 et seq.>; 126, 1 <23 and 24>). This fundamental right guarantees a sphere of freedom to academics protecting them from any exertion of influence by the state on the processes of gaining and imparting academic knowledge (cf. BVerfGE 35, 79 <112 and 113>; 47,

327 <367>; 111, 333 <354>). In particular, this includes the independent determination of the content, organisation and methodical approach of teaching (cf. BVerfGE 127, 87 <120>; also BVerfGE 55, 37 <68> with further references), as well as the right to express academic opinions (cf. BVerfGE 35, 79 <113 and 114>) and the right to actively participate in academic discourse within the framework of one's higher education (cf. BVerfGE 55, 37 <67 and 68>). However, Art. 5(3) first sentence GG does not provide an entitlement to a specific range of courses taught. Just as it does not guarantee the existence of a particular research or teaching institution as such (cf. BVerfGE 85, 360 <382, 384 and 385>; Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the First Senate of 12 May 2015 – 1 BvR 1501/13 –, para. 63 with further references), the fundamental right also does not guarantee any particular study programme.

50 2. The indirect obligation to have study programmes accredited, implicit in the referred provisions, constitutes a serious interference with the freedom of research and teaching.

51 a) It is true that the legislature, in the referred provisions, did not set out any direct obligation of compliance relating to the specific design of study programmes. The relevant provisions of *Land* law on higher education institutions that are applicable in the initial proceedings do not expressly require private higher education institutions to subject their study programmes to accreditation, nor does the law unequivocally prohibit them from offering non-accredited study programmes, in contrast to the case of state higher education institutions to which § 7(1) HG NRW (f.v.) was applicable. In practice, however, the requirement of state recognition […] essentially compels private higher education institutions to have their study programmes accredited, if they want to be recognised by the state. […] Private higher education institutions require state recognition in order to be put on an equal footing with state higher education institutions with regard to the legal framework governing academic degrees, examinations, and postgraduate matters [...]. The same applies if such institutions want to operate as a "higher education institution". Moreover, […] the eligibility for potential state subsidies hinges upon state recognition. In addition, accreditation is indispensable if university education offered by private higher educations is to be recognised in the labour market. Thus, the legislature has made accreditation a prerequisite for state recognition. This in itself interferes with the freedom of science, research and teaching. This interference cannot be ruled out merely on the basis that, according to the explanatory memorandum to the draft law, the process of accreditation should be sufficiently "independent of state influence" ("*staatsfern*") (state parliament document, *Landtagsdrucksache* – LTDrucks 13/6182, pp. 12 and 13). The decisive factor is that, in practice, the legislature essentially made accreditation mandatory. [...]

52 b) The requirement to obtain accreditation for study programmes restricts a higher education institution's freedom to decide on the content, organisation, and methodical approach of the study programme and courses taught (cf. BVerfGE 127, 87 <120>). The prerequisite that accreditation be obtained also interferes with the rights of teach-

ing staff, and of faculties or departments. Although the decision on recognition, like the decision of the accreditation agencies, is directed at the higher education institution as such, it nevertheless also involves an external evaluation of study programmes with regard to their content and educational and instructional approach. The evaluation also relates to the competence of teaching staff, who are thus held accountable by an external institution that is not part of their higher education institution. In practice, this meant that [staff and other members of the higher education institution] were essentially obligated to participate in the process of accreditation. This obligation, which at the time had already been imposed on members of state higher education institutions in § 7(4) HG NRW (f.v.), is now expressly set out for members of both state and private higher education institutions in § 7(4) HG NRW (c.v.). The evaluation covers the concept and organisation of the study programme [...], the composition in percentage of the curricula, the designation of areas of specialisation and course modules, and regulations of academic and exam regulations. This touches upon the faculties' and departments' areas of responsibility; they are no longer free to decide, within the accreditation system, on the contents, scope or design of study courses and exams in their respective field of study.

c) This interference with the freedom of research and teaching, resulting from the requirement of accreditation, is a serious one. 53

The accreditation requirement constitutes complete preventive monitoring, which must be renewed regularly, due to the generally applicable time limits [...] which are determined by the accreditation council alone. This monitoring is of considerable importance, because under [the *Land* law], compliance is a prerequisite for state recognition; [...] for the right to operate as a "higher education institution"; and [...] for the allocation of state funding (cf. BVerfGE 111, 333 <358>). Moreover, the accreditation of a study programme involves significant costs for the higher education institution, since it must carry both the cost of the agencies' fees as well as the burden of organisation, time, and staff resources required to prepare the self-documentation. The *Land* courts of audit estimate that the regular burden of payments from higher education institutions to the agencies amounts to a sum of between EUR 10,000 to EUR 15,000 per study programme [...]; the additional internal costs borne by these higher education institutions are estimated to range from EUR 30,000 to EUR 38,000 per study programme [...]. 54

By way of accreditation, the legislature does not merely define the formal structures for the organisation of academic teaching. As is discernible from the explanatory memorandum to the draft law, the legislature aims to "enforce" the state's responsibility "for the nationwide mobility of students and graduates, and for the quality assurance of study programmes and degrees" (LTDrucks 14/2063, p. 141). Based on standards set by the accreditation council, a review is carried out to assess whether the "implementation of the study programme (...) is ensured with regard to personnel, material, and room capacities, in terms of both quality and quantity, (...), and with regard to relevant structural links with other study programmes". The review also exam- 55

ines whether the “intensity and organisation of examinations is adequate and appropriate to the workload” in these study courses [...]. This directly affects the general and the teaching-related organisational autonomy of higher education institutions, also with regard to their budgets. Moreover, the review examines whether study programmes impart “subject-specific knowledge”; whether they are “expedient for achieving defined qualification objectives”; whether they are coherently structured; and whether they follow “a well-founded educational and instructional approach” [...]. The agencies further set requirements concerning the proportional composition of curricula, as well as study and examination regulations, and make recommendations with regard to areas of specialisation and course modules [...]. While no specific results nor interpretations of academic findings are prescribed, the review is by no means limited to merely assessing the coherence of the teaching objectives with the qualification objectives, or the manner in which the imparting of academic knowledge is organised, either. The accreditation instead directly affects the structure and content of academic teaching.

56 3. This interference with the freedom of research and teaching is not justifiable under constitutional law. A simple reference to the Europeanisation of the higher education area is, from the outset, unsuitable for providing a basis for justification (see below a). While it may be permissible to restrict the freedom of research and teaching in order to ensure the quality of teaching (see below b), the legislature itself must determine those issues relating to quality assurance that are considered essential under constitutional law (see below c); this standard was not met in the case at hand (see below d).

57 a) The Europeanisation of the higher education area, initiated by the “Bologna Process”, cannot in and of itself justify interferences with the freedom of research and teaching. It is true that the accreditation system under German law also implements European agreements. However, the European Union does not have the competence to harmonise teaching at higher education institutions (cf. Art. 165(4) of the Treaty on the Functioning of the European Union – TFEU). The Bologna Declaration on the European Higher Education Area is a mere measure of cooperation to pursue European objectives in the education sector. Pursuant to Art. 165(1) TFEU, such cooperation remains subject to full respect of the responsibility of the Member States for the content of teaching and the organisation of education systems.

58 b) Interferences with the freedom of research and teaching, which is guaranteed without reservation, may be justified in order to serve an aim of constitutional rank (cf. BVerfGE 47, 327 <368 et seq.>; 122, 89 <107>; 126, 1 <24>; established case-law). Ensuring the quality of academic teaching is one such aim. Research and teaching is, in principle, an area of autonomous responsibility free from external control; this is because the academic sphere can best fulfil its role if it is free from considerations of its social usefulness or its political expediency (cf. BVerfGE 47, 327 <370>; 111, 333 <354>; 127, 87 <115>; 136, 338 <362 para. 55>). However, higher education is also closely connected to the right to freedom of occupation as set out in Art. 12(1) GG,

since education is usually a preparatory step towards entering a profession (cf. BVerfGE 33, 303 <329 and 330>, with reference to BVerfGE 7, 377 <401, 406>; 85, 36 <53 and 54>; 134, 1 <13 and 14, paras. 36 and 37>). Accordingly, academic teaching must take into account the purpose of professional training and the related fundamental rights of students (cf. BVerfGE 35, 79 <121 and 122>; 136, 338 <362 para. 55>; established case-law). Thus, the fundamental right to freedom of research and teaching does not stand in the way of requirements to ensure proper academic teaching (cf. BVerfGE 127, 87 <119 and 120>) and a transparent examination system (cf. BVerfGE 93, 85 <94 et seq.). Measures to ensure the quality of teaching that satisfy academic standards also serve to ensure that higher education institutions fulfil their functions. Thus, these also benefit the freedom of research and teaching guaranteed in Art. 5(3) first sentence GG (cf. BVerfGE 96, 205 <214>).

59 c) Pursuant to Art. 5(3) first sentence in conjunction with Art. 20(3) GG, quality assurance measures that interfere with the freedom of research and teaching require an adequate statutory basis (cf. BVerfGE 49, 89 <126>; 122, 89 <107>; 126, 1 <24>). The rule of law and the principle of democracy require the legislature itself to enact provisions that are essential for the realisation of fundamental rights in this regard (cf. BVerfGE 134, 141 <184 para. 126>; BVerfG, Order of the First Senate of 12 May 2015 – 1 BvR 1501/13 –, para. 51 with further references). The determination of what is essential derives from the key principles of the Basic Law, and most notably from the fundamental rights enshrined therein. The extent to which the legislature must itself set down the essential legal rules for a particular area of human activity that is protected by the Constitution, depends on the subject matter and its specific characteristics (cf. BVerfGE 83, 130 <142, 152>; 98, 218 <251>; 108, 282 <311 et seq.>).

60 aa) The legislature itself may not determine details of the content of academic teaching, in an effort to ensure the quality of academic teaching, as this would disregard the intrinsic rationale of research and teaching, which is protected by fundamental rights. Rather, any criteria for evaluating the quality of research and teaching to which the legislature attaches consequences must leave room for research and teaching to determine its own focus and orientation autonomously (cf. BVerfGE 111, 333 <358>). Thus, within systems of quality assurance, the legislature must at least establish procedural and organisational safeguards to protect the freedom of research and teaching: in addition to the defensive right against interferences in specific cases and concerning individual persons, a guarantee of adequate participation by academics applies in this respect as well (cf. BVerfGE 35, 79 <115 and 116>; established case-law). This guarantee protects against academically inadequate decisions that are taken by actors from within higher education institutions, as well as by third parties that have been granted decision-making powers within the academic system (cf. BVerfGE 127, 87 <115>; 130, 263 <299 and 300>; 136, 338 <363 para. 57>). Thus, with regard to assessment decisions concerning fundamental rights, the legislature must determine by whom these decisions are to be taken and what the relevant procedure will be (cf. BVerfGE 61, 210 <252> with further references). With respect

to quality assurance in higher education, the legislature must also establish a comprehensive structure in which decision-making powers and participation rights, influence, information and monitoring, are designed in a manner that avoids jeopardising free academic teaching (cf. BVerfGE 111, 333 <355>; 127, 87 <116>; 136, 338 <363 para. 57>). In order to avoid potential external control that would be academically inadequate, sufficient participation by academics is indispensable, especially in the process of determining evaluation criteria. This applies all the more where evaluation criteria are set by actors outside the higher education institutions, as this increases the risk that academic concerns are disregarded, and where the members of higher education institutions are dependent on the external evaluation. It is necessary to ensure that consideration is given to the fact that criteria may, and in some cases must, vary in respect of different disciplines (cf. BVerfGE 111, 333 <358 and 359>). Likewise, it must be ensured that the criteria chosen are sufficiently open – e.g., by way of flexibility or experimentation clauses –, to allow for a variety of course programmes within a field of study and diverse instructional methodologies and organisational profiles.

61 bb) The legislature may not leave it to other actors to take the essential decisions regarding the accreditation of study programmes without more specific guidelines, on the grounds that, for example, the process is still in an early pilot stage. In 2004, this justification was accepted with regard to the definition of evaluation criteria also applicable to academic teaching; it was held that the establishment of such criteria could “still” be left to the internal process of evaluation carried out by the higher education institution, but the legislature was already under an obligation to monitor it, and, if need be, to remedy deficits (cf. BVerfGE 111, 333 <361>). At the time, it was found that the legislature could, within its margin of appreciation and prognosis, establish a model under which the evaluation criteria were not determined by the legislature itself nor by external actors, but were rather left to an internal process within higher education institutions subject to the requirement that academia itself be sufficiently involved (cf. BVerfGE 111, 333 <359 and 360> with references to BVerfGE 95, 267 <314>). However, and for many years now, the accreditation of study programmes has become a nationally and internationally established practice, and yet it is, on the basis of § 72(2) sixth sentence and § 7(1) HG NRW (f.v.) as well as § 7(1) HG NRW (c.v.), largely left to a system that operates outside higher education institutions, while the increased risk of interference with the freedom of research and teaching that this implies is not countered, by the legislature, by designing the process in a manner adequate to academic rationale.

62 d) The provisions referred for review fail to satisfy these requirements.

63 aa) Nevertheless, the requirement to obtain external accreditation of study programmes at higher education institutions does not, in and of itself, raise constitutional objections.

64 (1) In principle, the legislature is free to require quality assurance with respect to

teaching at higher education institutions to be carried about externally, i.e. not by the higher education institutions or the faculties or departments themselves as part of their internal operations. Art. 5(3) first sentence GG does not confer a constitutionally protected autonomous right to higher education institutions, faculties, or departments to decide only by themselves on the scope and content of their study programmes (cf. BVerfGE 111, 333 <365>; 127, 87 <129>).

(2) Quality assurance of academic teaching need not be limited to scientific or technical criteria, but may also assess the organisation of study courses, academic requirements and academic success. A higher education degree can only enable access to professions if the degree programme confers specific qualifications, if potential employers recognise its quality, and if the degree can be compared with other degrees on the labour market. It is thus not objectionable that the system of quality assurance of degree programmes at higher education institutions is designed taking into account research findings, and also taking into account the potential usefulness of acquired knowledge and skills for the labour market, in order to promote the constitutionally protected freedom of occupation in Art. 12(1) GG. This justifies the decision to base accreditation primarily on an evaluation carried out by experts of the respective academic field, in a peer review process; it is the ability of academia to largely ensure quality on its own that warrants its involvement in the process. In addition, it is, however also legitimate to involve practitioners in the process of accrediting study programmes. Furthermore, a general requirement to evaluate study programmes in terms of measures taken to promote equal opportunities for men and women as well as in terms of other structural disadvantages and measures to compensate disadvantages of students with disabilities, serves to fulfil the guarantees of Art. 3(2) and (3) GG, and to achieve equality of opportunity in higher education (cf. BVerfGE 134, 1 <16 para. 43>). In view of the present-day internationalisation of labour markets and of research and teaching, the legislature may also require the accreditation process to evaluate the international comparability of study programmes, provided that other criteria do not supersede the relevant discipline-specific academic criteria. 65

(3) Furthermore, it is also within the scope of the legislature's leeway to design a requirement to obtain the accreditation of study programmes, in addition to the regular legal supervision pursuant to § 76 HG NRW (f.v.), and to require such accreditation on a recurring basis and without specific cause. This does not exceed the margin of appreciation and prognosis granted to the legislature in determining necessity (cf. BVerfGE 102, 197 <218>; 115, 276 <309>; 126, 112 <145>). Admittedly, less-restrictive means would be available, in form of a review limited to formal compliance with relevant standards or as a review limited to plausibility and evident errors in the self-documentation submitted by higher education institutions. As the German Rectors' Conference argued, these less-restrictive means would respect the intrinsic rationale underlying Art. 5(3) first sentence GG. However, the Constitution does not prohibit external measures of quality assurance of academic teaching in addition to regular legal supervision. Likewise, neither an obligation to cooperate imposed upon 66

members of higher education institutions, [...] nor a requirement to be re-accredited regularly raises constitutional concerns [...].

bb) However, [in the *Land* law], there is a lack of adequate legislative decisions regarding evaluation criteria, the procedure and the organisation of the accreditation (1). This lack is not compensated [by other provisions elsewhere] [...] (2). In particular, there is a lack of sufficient participation by academics in the accreditation process itself (3). 67

(1) The legislature has addressed the matter of the assignment of quality assurance of higher education to agencies organised under private law, which in turn are accredited by a foundation of the *Land*, to a minimal degree [...]. This does not satisfy the requirements of the essential-matters doctrine (*Wesentlichkeitsvorbehalt*) for justifying a restriction of the freedom of research and teaching. 68

It is not compatible with constitutional requirements that [the relevant provisions] merely refer to “applicable provisions” with regard to accreditation. This generic and unspecific reference does not allow those subject to the law to deduce from the legal provisions the intensity of the interference with their fundamental rights. Nor does the statement that accreditation be carried out by agencies which are themselves accredited suffice to legitimise a process of recognising private higher education institutions imposed by the state and carried out within a largely external and far-reaching system of quality assurance. 69

There is not even a rough determination of objectives by way of reference to minimum standards regarding subjects and contents of study courses, or to the degrees’ relevance in terms of professional qualification [as is the case in another *Land*] [...]. 70

At the time of the initial proceedings, there was also no provision determining the legal status of the agencies. [...] The legislature had not formally transferred the power to exercise public functions (*Beleihung*) to the agencies; this was not expressly provided for until the new version of Act on the Higher Education Institutions was enacted in 2014 [...]. Uncertainty with regard to the legal status of the agencies, however, not only affects their procedures but also impairs legal protection against their decisions. 71

There are also no statutory provisions regarding the initiation of the procedure [as is the case in another *Land*], the accreditation procedure; the legal nature of the decision taken by the agencies and the accreditation council of the Accreditation Foundation, the consequences of non-compliance with conditions imposed by the agencies; or regarding the time periods between re-accreditations. 72

(2) This lack of adequate statutory control in the referred provisions is not compensated for by other statutory provisions elsewhere. 73

(a) In the law on higher education institutions of the *Land*, there are no sufficient provisions that would justify the accreditation process’s interference with the freedom of 74

research and teaching [...]. While [...] [the law] does set out requirements applicable to state higher education institutions relating to study objectives, the structure of study programmes, [and] standard periods of study [...], the legislature did not make these requirements applicable to the accreditation of programmes at non-state higher education institutions [...]. [T]he state's decision on recognition is separate from the [agencies'] decision on accreditation. The legal requirements for state recognition also do not constitute a sufficiently comprehensive basis for decisions on accreditation. In fact, in the current system, the agencies base their practices on standards set by the Accreditation Foundation, or developed by the agencies themselves, and on decisions by the Standing Conference for the Ministers of Education and Cultural Affairs of the *Laender.* These decisions are executive agreements that first need to be implemented in the individual *Laender*, and such implementation has not taken place in this case […].

75 (b) A statutory reference to the Act on the Accreditation Foundation (Akkreditierungsstiftungsgesetz – AkkStiftG), another statute enacted by the *Land* North-Rhine Westphalia, is also not sufficient to satisfy the requirements under the essential-matters doctrine which apply to the restrictions to the freedom of research and teaching that arise from the accreditation requirement in the provisions referred for review. Admittedly, the legislature is not required by the Constitution to address all matters that are essential in a single piece of legislation. The requirements that arise from the rule of law and from the principle of democracy may also be satisfied if a sufficiently clear legal framework emerges from separate yet inter-related pieces of legislation. The legislature may also regulate a matter by way of reference to other legal provisions, including provisions from a different legislative authority (cf. BVerfGE 78, 32 <35 and 36>). However, it must be sufficiently clear which specific provisions the legislature intends to refer to. This applies to so-called fixed references to legal provisions in a specified version of another statute. In contrast, dynamic references [that refer to both the current version and future versions of a statute] are only permissible within the limits set by the principles of the rule of law, democracy, and federalism (cf. BVerfGE 47, 285 <312 et seq.>). In any case, the Act on the Higher Education Institutions does not contain any mention of the Act on the Accreditation Foundation to begin with.

76 In addition, the Act on the Accreditation Foundation itself fails to satisfy the constitutional requirements in this respect. To a large extent, the Act leaves the process, the legal nature and the legal effects of accreditation decisions unspecified. There are no procedural mechanisms in place to safeguard the freedom of research and teaching; furthermore, it is not clear what legal protection is available against decisions of the accreditation council or the agencies. Regarding the relevant procedure, § 3(2) no. 5 AkkStiftG merely indicates, by way of mentioning "the evaluation experts involved", that groups are asked to carry out the evaluation; however, it remains entirely unclear what professional requirements must be fulfilled in this regard. This does not ensure that evaluation by peer review will take place in a manner adequate to academic ra-

tionale. Otherwise, there is merely the general provision that, in preparation for a decision on accreditation, a group of persons shall be appointed in order to ensure that the evaluation covers all relevant areas and that all relevant stakeholders, students and professional practitioners be represented in the composition of the group (see Clause I(4) accreditation council document AR 85/2007). In contrast, there is no provision on whether, or to what extent, agency committees and the accreditation council are bound by the views of the evaluation experts [...]. [Besides,] these are [...] only “minimum requirements” for accreditation.

77 Even if the Act on the Accreditation Foundation were to contain sufficient provisions concerning accreditation in accordance with the requirements of the essential-matters doctrine, it would not meet the relevant constitutional standards if other *Laender* were to refer to this Act by means of mere executive measures.

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79 (d) Furthermore, in 2014 [...] the legislature created a statutory basis specifying the legal status of the agencies [...]. This, by itself, also does not satisfy the requirements of Art. 5(3) first sentence GG. [...] There remains a lack of sufficient and academically adequate provisions regarding the accreditation, the composition of the expert group, the evaluation criteria, and the determination of margins of appreciation.

80 (3) Thus, by enacting the referred provisions, the legislature effectively gave up control over the accreditation requirements related to contents, procedure, and organisation; it did not take the essential decisions pertaining to significant interferences with the guarantee of Art. 5(3) first sentence GG itself. Instead, many such essential decisions have been left to the accreditation council, which in turn gives very extensive leeway to the agencies. [...]

81 In particular, there are no requirements that safeguard the adequate participation of research and teaching staff in the accreditation process. Pursuant to § 7(2) AkkStiftG, the accreditation council consists of four members representing higher education institutions, as well as two students, to be nominated by the German Rectors’ Conference. The students may participate to the extent that they can invoke the fundamental right to freedom of professional and occupational training (Art. 12(1) GG) and the fundamental right in Art. 5(3) GG (cf. BVerfGE 55, 37 <67 and 68>). However, there is no guarantee that research and teaching staff will indeed be represented in the accreditation council and in the agencies, rather than, for example, the management of higher education institutions. Nor is it certain that representatives of research and teaching will have the decisive vote on the accreditation council, given that the members of the council are appointed by agreement between the German Rectors' Conference and the Standing Conference for the Ministers of Education and Cultural Affairs of the *Laender* pursuant to § 7(2) second sentence AkkStiftG, meaning that the government has an unconditional veto power. The rest of the accreditation council consists of representatives from the *Laender*, professional practice, the *Land* ministries responsible for labour and collective bargaining law, and the agencies (§ 7(2)

first sentence no. 2, 3, 6 AkkStiftG). As a result, only interests from outside the academic community are represented in the council. Thus, the Act on the Accreditation Foundation fails to set up a comprehensive structure that sufficiently takes the freedom of research and teaching into account.

82 Due to the requirement to respect freedom of research and teaching, the legislature is precluded from regulating specifics. However, the legislature is not precluded from determining the objectives of accreditation and the requirements of the accreditation procedure, or from regulating the academically adequate composition of the parties involved, or from setting procedures for establishing and revising evaluation criteria. This would ensure rather than rule out that sufficient leeway is left for peer review and technical expertise within the responsible bodies.

III.

83 As the referred provisions already fail to satisfy the requirements of Art. 5(3) first sentence GG in conjunction with the principle of democracy and the rule of law, there is no need to review whether any other fundamental rights of the University of Applied Sciences have been violated.

D.

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II.

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III.

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IV.

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V.

88 The legislature must enact revised legislation that complies with the constitutional requirements. Since this calls for a process of coordination across the *Laender*, a sufficient period of time is necessary to achieve this. Yet, it is not discernible that the accreditation of study programmes, to support the freedom of professional and occupational training under Art. 12(1) GG, would indeed result in intolerable restrictions of the freedom of academic teaching protected in Art. 5(3) first sentence GG and thus require the relevant provisions to be declared invalid with immediate effect. In consequence, with regard to the provisions of § 7(1) first and second sentences, and § 72(2) sixth sentence HG NRW (f.v.), as well as § 7(1) first and second sentences and

§ 73(4) HG NRW (c.v.), which are incompatible with the Basic Law, it shall be ordered that the relevant provisions remain in effect until revised legislation is enacted or, at the latest, until 31 December 2017.

Kirchhof	Eichberger	Schluckebier
Masing	Paulus	Baer
	Britz	

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