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Observatory for Fundamental University Values and Rights

Case Studies

Academic Freedom and University Institutional Responsibility in Mecklenburg-Vorpommern

Bononia University Press

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Foreword

Prof. Fabio Roversi-Monaco
President of the Collegium

On 5 July 2002, in the State of Mecklenburg-Vorpommern (North-Eastern part of Germany), a new law on higher education entered into force. It acknowledged the academic freedom and institutional autonomy guaranteed by the Federal Constitution but qualified those rights by linking their application to the responsibilities of academics towards man, nature and society (article V, subsections 2 to 4 of the *Landes Hochschulgesetz*).

This has induced four teachers of the University of Greifswald, representing themselves directly, to contest the law in the Constitutional Court of the Land, outlining the various reasons for its unconstitutionality. Their arguments were of sufficient strength for the Parliament to envisage amending the new law – even before the Court's final decision.

The Observatory of the *Magna Charta Universitatum* was presented an English version of the case, edited by the former Rector of the University of Greifswald, Prof. Juergen Kohler. Members of the Collegium considered that the arguments developed were of such a general interest that they deserved wider publicity; thus, it was decided to publish the appeal of the four professors with a note of the President of the Observatory, Prof. Fabio Roversi-Monaco, himself a lawyer, and the remarks formulated by another member of the Collegium, Prof. Michael Daxner, a political scientist and the former Rector of the University of Oldenburg.

With this publication, the Observatory would like to start a series of **case studies** in institutional autonomy and university responsibilities that could become reference documents for those leaders, academic and political, interested in the definition of the role and requirements of universities in the development of today's society, in Europe and beyond.

Bologna, 3 September 2003

Application to the State Constitutional Court of Mecklenburg-Vorpommern (Germany) for Annulment of Sect. 5 Subsect. 5 LHG-MV

Edited by Prof. Jürgen Kohler
Former Rector, University of Greifswald

Petition of the applicants:

1) The Law on Higher Education of the State Mecklenburg-Vorpommern (LHG-MV) of 05.07.2002 is incompatible with Art. 7 subsect. 1 and 2 of the Mecklenburg-Vorpommern State Constitution (LV-MV)[1] and via Art. 5 subsect. 3 LV-MV[2] with Art. 5 subsect. 3 of the Federal Constitution (GG)[3] in as far as sect. 5 subsect. 5 LHG-MV[4] in conjunction with sect. 5 subsect. 2 and 3 LHG-MV "binds the use of the rights" of the applicants concerning free research and teaching "to responsibility for the human being, society, and nature, and to the public character of their activitis", and hence in so far as sect. 5 subsect. 5 LHG-MV limits Art. 7 subsect. 1 LV-MV in excess of the limits of the latter as defined in Art. 7 subsect. 2 LV-MV (i.e.: violation of, or at least a risk of violation of human dignity or of the natural fundamentals of life).

[1] Art. 7 subsect. 1 and 2 LV-MV read:
(1) Arts and science („Wissenschaft"), research and teaching are free. Freedom of teaching is restricted by the duty to adhere to the constitution.
(2) Research is subject to limits imposed by law if violation of human dig-nity or permanent threat to the natural fundamentals of life is imminent.

2) In as far as sect. 5 subsect. 5 LHG-MV is incompatible with Art. 7 subsect. 1 and 2 LV-MV and also with Art. 5 subsect. 3 GG as described in item 1) above of this petition,[5] sect. 5 subsect. 5 LHG-MV shall be declared null and void.

[2] Art. 5 subsect. 3 LV-MV reads:
The basic rights and citizens' rights stipulated in the (federal) basic law are an integral part of this constitution...

[3] Art. 5 subsect. 3 GG reads:
Arts and academic activity ("Wissenschaft"), research and teaching are free. Freedom of teaching does not cover the right not to adhere to the constitution.

[4] The new sect. 5 subsect. 5 LHG-MV states:
"(5) The use of the rights specified in [sect. 5] subsect. 2 to 4 [LHG-MV] is bound to responsibility for the human being, society, and nature, and to the public character of their activities and does not exonerate from the respect for the rights of others or from the respect for the rules governing cooperation in higher education."

[5] As a result, the applicants object to the following part of sect. 5
sub-sect. 5 LHG-MV:
"(5) The use of the rights specified in [sect. 5] subsect. 2 to 4 [LHG-MV] is bound to responsibility for the human being, society, and nature aand to the the public character of their activities."

A. Facts of the case

The applicants are professors at Greifswald University and employees in the service of the State of Mecklenburg-Vorpommern. They are subject to sect. 5 subsect. 5 LHG-MV.

B. Legal reasoning

Sect. 5 subsect. 5 LHG-MV is unconstitutional and infringes on the rights of the applicants at present and directly; this is even the case when interpreting sect. 5 subsect. 5 LHG-MV with a view towards maximizing its compliance with the constitution.

I. Admissibility of the case

1. Effect on the applicants

The applicants are affected themselves in persona, at present and immediately. With respect to the admissibility of the action it is sufficient to establish that an infringement of the basic rights of the applicants cannot be ruled out patently.

a) Involvement in persona

The requirement that applicants in a case heard before the constitutional court must themselves suffer an infringement of one of their basic rights is merely designed to rule out any populist action at law. In the given case applicants, being engaged in research and teaching, are personally and directly affected by the legal obligation to connect the process of acquiring and disseminating knowledge with the duty to bear in mind all consequences of their activities and to give due consideration to

these consequences.

b) Effect at present

As for the present effect of the measure to the detriment of the applicants, this legal requirement is met if any such effect of the law is not merely potential and future. The applicants are currently obliged by sect. 5 subsect. 5 LHG-MV since the entry into force of the LHG-MV which means that they are obliged to obey the legal restrictions to academic freedom at the present time.

c) Immediate effect

Immediate effect of the law to the detriment of the applicant means that the applicants are affected directly by the contested measure as such. This is the case. The legal rule laid down by sect. 5 subsect. 5 LHG-MV imposes a self-executing limitation on the applicants' planning and implementation of scientific projects and therefore limits their decisions on academic activities directly, i.e. without the need of any additional specific executive order. The law as such does not merely represent the basis of, or the preparation for, concrete sanctions in case of violation of the norm; on the contrary, it directly transforms itself, via the applicants' obligation to adhere to the rule of law, into direct conditioning of the applicants' conduct.

2. Jurisdiction of the state constitutional court

The jurisdiction of the state constitutional court ensues from sect. 51 subsect. 1 of the law on the state constitutional court (LVerfGG) in conjunction with the applicants' complaint of a violation of their basic right by law of the land Mecklenburg-

Vorpommern.

II. Substantive reasons for rendering sect. 5 subsect. 5 LHG-MV unconstitutional

The complaint concerning violation of the constitution is justified. Sect. 5 subsect. 5 LHG-MV, in as much as it is contested here, violates the applicants' fundamental right guaranteed by Art. 7 subsect. 1 LV-MV and Art. 5 subsect. 3 LV-MV in conjunction with Art. 5 subsect. 3 GG.

1. Infringement

Sect. 5 subsect. 5 LHG-MV unlawfully infringes the applicants' fundamental constitutional right - as stipulated in Art. 7 subsect. 1 LV-MV and Art. 5 subsect. 3 LV-MV in conjunction with Art. 5 subsect. 3 GG - to conduct their academic activities freely.

a) Academic freedom: scope of protection

"Academic activity" in the sense of the constitution pertains to all activities which are "by content and design to be regarded as a serious methodological attempt to ascertain truth" (BVerfGE 35, 79, 113). The term "academic activity" ("Wissenschaft") in the sense of the constitution is not limited to a particular perception of academic activity, and it may neither be restricted quantitatively nor qualitatively, in order not to render the fundamental right of academic freedom as such subject to wilful disposition.

The constitutional right to free academic activity provides an individual right of liberty to the benefit of the individual, thus

– via protecting the individual person – protecting the very process of widening the scope of knowledge by means of research and teaching, by dissemination, publication and perception of insight gained through academic activities from any external determination by state authority.

Particularly in a state-operated and state-financed system of higher education, Art. 7 subsect. 1 LV-MV as well as Art. 5 subsect. 3 GG are indispensible to protect the core institutional task of academic research and teaching to defend the quest for knowledge and truth as elements and conditions of freedom, peace and prosperity against "political correctness" and majority opinion on "truths".

b) Content of sect. 5 subsect. 5 LHG-MV

Sect. 5 subsect. 5 LHG-MV infringes considerably upon the constitutionally protected scope of protection of academic freedom thus defined.

The right to academic freedom means that in principle, academics have the right to perform all their academic activities, i.e. research and teaching, free from state intervention. This right, however, is infringed upon due to the prerequisite stated in sect. 5 subsect. 5 LV-MV that academics' rights to free research and teaching are bound "to responsibility towards the human being, society and nature, and the public character of their activities".

The applicants are restricted to a predetermined understanding of academic activities, contrary to the constitutional understanding of freedom of research and teaching. Following the wording of sect. 5 subsect. 5 LHG-MV, the norm is to be

understood as stating that the applicants' rights pertaining to freedom of research and teaching are used in a regular, legitimate manner (according to the wording of the law, these rights are "bound") only if and when they are conducted with "responsibility towards the human being, society, nature, and the public character of academic activities".

c) Object and intensity of restrictions to academic activity as imposed by sect. 5 subsect. 5 LHG-MV

The intervention imposed by sect. 5 subsect. 5 LHG-MV is extreme since it concerns all academic disciplines; it covers each phase of academic activity; it envisages high intensity in binding academic activity; furthermore, academic activity and public character of academic activity are not only linked in inadmissibly unclear and confused wording and sentence structure but also, above all, their limits are determined by means of unclear terminilogy which is unsuitable to serve as criteria. This is explained as follows:

aa) All academic disciplines affected

Sect. 5 subsect. 5 LHG-MV indiscriminately applies to all academic fields. It is academics from all disciplines who are obliged by law to examine and consider the consequences of their academic activities for the human being, society, nature as well as the effect of their activities on the general public, and they are indiscriminately bound to conduct their research and teaching activities with regard to these considerations, irrespective of whether the academic disciplines and activities in question deal with examining such consequences by virtue of the very nature of their academic approach.

bb) All stages of academic activities affected

Sect. 5 subsect. 5 affects the entire spectrum of academic activities, from choice of topic, conceptionalising, planning, organising and carrying out of research and teaching to publication and use of results. Hence legal limitations are not only imposed upon phases of academic activity which are particularly and directly inclined to be risky or detrimental.

This is a very considerable extension of restrictions to research and teaching into areas in which any immediate, direct violation of a legally protected right is not to be found; this is contrary to the prerequisite for legal limitation of academic freedom as stated in Art. 7 subsect. 2 LV-MV.

cc) Intensity of intervention

The restriction of academic freedom resulting from the term “binding” in the wording of sect. 5 subsect. 5 LHG-MV intervenes in academic freedom in an unusually intensive manner.

In “binding” academic activity to “responsibility for the human being, society, nature and the public character of academic activity”, the law affects academic freedom in terms of activity way beyond the restriction which is brought about, for instance, by wording such as “additional consideration of social consequences of academic activities”. In connecting the term “binding” to the term “responsibility”, the legal obligation extends beyond taking consequences into consideration since academics are expected to abstain from their academic activities when an assessment of consequences renders those “irresponsible” when applying “responsibility towards the human being, society, nature and the public character of their activities” as

the relevant yardstick.

d) Summary concerning infringement on the constitutional right of academic freedom

The fact that sect. 5 subsect. 5 LHG-MV does not expressly formulate sanctions itself does not preclude the fact that there is serious legal intervention directly by sect. 5 subsect. 5 LHG-MV. Irrespective of the fact that sect. 5 subsect. 5 LHG-MV authorises state authorities to apply their general right to intervene in order to enforce legality, an explicit regulation of sanctions is not actually required in order to qualify this regulation as such to be immediately interventionist. For the legal responsibilities imposed upon academics directly influence choice of academic activities in a particular, i.e. socially accepted manner, in particular with a view towards aforementioned consequences in the light of the term "responsibility", which is inappropriate to serve as a sufficiently clear criterion. This is contrary to the core purpose of Art. 7 subsect. 1 LV-MV and Art. 5 subsect. 3 GG to offer protection from such interventions.

2. Absence of constitutional justification of the infringement of the constitutional right of academic freedom

a) Violation of the constitutional principle of clarity of normative regulation

It is obvious that the wording of sect. 5 subsect. 5 LHG-MV is linguistically distorted, unclear, and useless as a decision-making criterion. Hence the wording violates the principle of normative clarity, which is an essential element of the rule of law stipulated in Art. 20 subsect. 1 GG as a key element of the federal constitution. This is set out in more detail as follows:

aa) The term "responsibility"

"Responsibility" is a fashionable political buzzword with legally unclear meaning. The development of ethical standards related to the term responsibility has, at least for the time being, not led to any finite, definite understanding. The development of such understanding is at present subject to a highly differentiating academic self-discovery process which is not yet conclusive nor decided. The status of the debate does therefore not present such a degree of maturity which would allow normative usage in the sense of formulating substantive legal criteria by appealing to "responsibility", at least when this term is linked to a restriction of academic freedom which is as intensive as is described above, extending beyond the appeal to researchers and teachers to "consider" their responsibility.

bb) The term "human being"

With regard to stipulating responsibility for the human being it is evident that this term indicates the right of a human being to be free from bodily harm and to have his/her human dignity protected. Protection of these rights is a matter of priority, as is stated in Art. 7 subsect. 2 LV-MV; however, this is only the case if an academic activity has reached such a degree that it poses at least an immediate threat to these legally protected rights. The present law suit does therefore not dispute sect. 5 subsect. 5 LHG-MV with regard to these protected rights in principle. However, it does contend this clause in so far as the extent of its scope subordinates all academic activity to the restriction.

cc) The term "nature"

As far as responsibility for "nature" is concerned, the term may

be interpreted as referring to the natural fundamentals of life, as mentioned in Art. 20 a of the federal constitution (GG). In this respect also Art. 7 subsect. 2 LV-MV subordinates academic freedom; however, this is only the case under the premise that interference of an academic activity has at least reached the intensity of posing an immediate threat to the natural fundamentals of life. As far as this constitutionally protected sphere is concerned, the complaint regarding violation of a constitutional right of the applicants is therefore restricted to the excess in scope of the infringement upon academic freedom imposed by sect. 5 subsect. 5 LHG-MV, since this statute extends restrictions of academic freedom to areas of research activities before any threat to natural foundations of life is imminent.

dd) The term "society"

Linking academic freedom towards responsibility to "society" is constitutionally inadmissible. The term "society" as a collective, in contrast to the dignity of the individual, is unknown to the constitution; prudently so, since it invites infringement upon the freedom of the individual academic by simply considering his/her activities to be irresponsible in the light of so-called collective values which are mere superimposed constructions.

The legislator of the LHG-MV expressly justifies the regulation stipulated in sect. 5 subsect. 5 LHG-MV by stating "that universities, being part of society, require social acceptance, which may only be attainable by academic activities which are oriented towards the public good". This perception is, as a basis and therefore as a scale for academic regulation, fundamentally inappropriate from a constitutional point of view because social acceptance which is seen and used as legislative

motivation and therefore is the basis of interpretation of sect. 5 subsect. 5 LHG-MV represents the exact opposite of academic freedom, the protection of which is the objective of Art. 5 subsect. 3 GG and of Art. 7 subsect. 1 LV-MV.

When interpreting both the system of the federal constitution and of the constitution of Mecklenburg-Vorpommern comprehensively in the light of power-sharing, it is the essential purpose of academia in the constitutional system to introduce and defend the quest for truth and to question majority opinion, thus providing an essential component to public debate to the benefit of society and state. This societal function of academia is of vital importance also in a democracy since democratic societies are not necessarily oriented towards fostering truth and long term perspectives but are often rather interested in populism which is of little value for lasting problem solving based on proper analysis.

ee) The term "public character of academic activities"

It is also constitutionally inadmissible to bind the freedom of research and teaching to the "public character of academic activities".

The semantics of this phrase, or in more precise terms, the syntax of this element of the sentence is unclear, and any interpretation, if possible at all, is very vague.
Linking academic activities to the public character of academic activities again results in expecting academics to give precedence of an examination regarding the consequences of his/her publication over his/her right to publish, with responsibility to "the human being, society, and nature" being the yardstick. This represents an intervention both in the freedom of publi-

cation as far as academic research is concerned, and also a general ban on teaching in this area.

ff) In particular: impossibility to interpret sect. 5 subsect. 5 LHG-MV with a view towards maximising conformity of the statute with the constitution

There is no way to interpret the aforementioned terms used in sect. 5 subsect. 5 LHG-MV to make them conform with legal requirements of the constitution.

In order to ensure conformity with the constitution, the parliament of Mecklenburg-Vorpommern was merely required to restate Art. 7 subsect. 2 LV-MV. However, sect. 5 subsect. 5 LHG-MV cannot be restricted to meaning the same as is stipulated in Art. 7 subsect. 2 LV-MV. The legislative body clearly wished to exceed Art. 7 subsect. 2 LV-MV and not to merely put the content of Art. 7 subsect. 2 of the LV-MV into more concrete terms.

b) Absence of express constitutional limitations and absence of implicit constitutional limitations of the right of academic freedom: basics

The infringement imposed to the aforementioned extent by sect. 5 subsect. 5 LHG-MV on the fundamental right of academic freedom cannot be justified in a constitutional way; hence the regulation is unconstitutional and void.

aa) Absence of express constitutional limits

Any restriction of academic freedom by means of a restricting statute is in principle excluded by the federal constitution since

it does not expressly authorize any statutory limitations to the freedom of research, and to teaching only in as much as teaching must adhere to the constitution. Art. 5 subsect. 3 GG and thus also Art. 7 subsect. 1 LV-MV are, in this respect, *leges speciales* to Art. 5 subsect. 2 GG, so that in fact Art. 5 subsect. 2 GG cannot provide any justification for statutory limitations of the right to academic freedom.

bb) Absence of implicit constitutional limitations

Any limits to the protection of the fundamental right of academic freedom must, if at all, be derived from the constitution itself: Justification of restrictions to academic freedom can therefore merely arise from a collision between the usage of the fundamental right of academic freedom and other constitutionally guaranteed rights. In case any such collision occurs, it is mandatory to strike optimal balance between the conflicting basic rights of individuals or constitutional objectives of the state by establishing practical concordance between them.

However, restricting the right to academic freedom in the manner set out in sect. 5 subsect. 5 LHG-MV is not constitutionally admissible from the viewpoint of establishing "practical concordance" between conflicting rights or interests protected by the constitution. This is to be shown as follows:

c) No restriction to the right of academic freedom by means of implicit constitutional limitations, in particular in the light of Art. 7 subsect. 2 LV-MV

Any justification of limitations of the right to academic freedom is dependent on the existence of a collision of academic freedom with an individual's right to enjoy human dignity and

to be free from bodily harm, and with the interest to safeguard the natural fundamentals of life. This, and no more than only this, is also stated in Art. 7 subsect. 2 LV-MV. Any excess of these limits to the right of academic freedom renders sect. 5 subsect. 5 LHG-MV unconstitutional.

However, even with regard to conflicts with human dignity, bodily harm, and natural fundamentals of life sect. 5 subsect. 5 LHG-MV exceeds the limits imposed upon academic freedom defined by the constitution in Art. 7 subsect. 2 LV-MV. Also as far as these constitutionally protected rights and interests cited in Art. 7 subsect. 2 LV-MV are concerned, sect. 5 subsect. 5 LHG-MV is in this respect unconstitutional due to its failure to define the threshold for limiting the constitutional right of academic freedom; this threshold is defined by Art. 7 subsect. 2 LV-MV, stating that there must at least be an immediate threat to the right to human dignity, absence of bodily harm, and respect tor the natural fundamentals of life.

aa) Violation of Art. 7 subsect. 2 LV-MV by unconstitutional coverage of aspects as being relevant for assuring "practical concordance" of constitutional rights and interests (excess of constitutional rights to be protected)

Sect 5 subsect 5 LHG-MV exceeds the constitutional limitations of academic freedom defined by Art. 7 subsect. 2 LV-MV in that sect. 5 subsect. 5 LHG-MV imposes restrictions to academic freedom by binding it to "responsibility with regard to society and to the public character of academic activities". It is only with regard to rights concerning human dignity, which includes freedom from bodily harm, and with regard to the natural fundamentals of life that the constitution of Mecklenburg-Vorpommern grants legislature any right to limit

the right of academic freedom. Sect. 5 subsect. 5 LHG-MV disregards this "limitation of the right to limitation" set out by Art. 7 subsect. 2 LV-MV.

bb) Violation of Art. 7 subsect. 2 LV-MV by exceedng the "risk threshold" defined in Art. 7 subsect. 2 LV-MV

Art. 7 subsect. 2 LV-MV establishes a second "limitation of the right to limit" academic freedom by stipulating that the constitutionally protected right of human dignity and protection of the natural fundamentals of life prevail over the right of academic freedom only and when academic activities pose a sustainable threat to these rights and interests.

Such a substantial threat, however, is beyond the point at which sect. 5 subsect. 5 LHG-MV undertakes to make the use of the right to academic freedom conditional by binding this right to a vague notion of "responsibility"; this is particularly true since the law brings the beginning of such responsibilities forward to a point at which a threat to human dignity or to the natural fundamentals of life can neither be perceived nor be considered to be immediate.

cc) Violation of Art. 7 subsect. 2 LV-MV by imposing restrictions on the freedom of teaching and studying

Finally Art. 7 subsect. 2 LV-MV indicates that only research can be restricted by law while teaching and learning may not be infringed upon beyond the limits set out in Art. 5 subsect. 3 sent. 2 GG. Contrary to this stipulation, however, sect 5 subsect. 5 LHG-MV also restricts the right to teach and study freely.

d) "Society" and "public character of academic activity" as criteria for restricting academic freedom: absence of constitutional justification

As has been pointed out, in the light of the function of Art. 7 subsect. 2 LV-MV to serve as a "limitation to limitations" there is no constitutional justification to limit academic freedom with regard to binding it to any such objective as "responsibility towards society" and "the public character of academic activities".

aa) "Society" as an object unsuitable for constitutional protection

With regard to the need to assure practical concordance of conflicting constitutional interests, only grave societal consequences such as human dignity, life and health, as well as the natural fundamentals of life are relevant. This understanding, however, cannot be used to interpret the term "society" in sect. 5 subsect. 5 LHG-MV, for all such legally protected societal rights are already included in the terms "responsibility for the human being" and "nature"; hence the term "society" is intended to signify some additional position (supposedly) protected by the constitution.

This understanding of sect. 5 subsect. 5 LHG-MV is supported by the official motivation of sect. 5 subsect. 5 LHG-MV presented by the state parliament because legislative material of the bill states expressly that "social acceptance" in the sense of subordinating research and teaching under political approval of majority opinion is the motif of this legislation.

Furthermore, the vagueness of the term "society" prevents any attempt to legitimise this term as a constitutional means to

steer limitations to academic freedom. Finally, the requirements of sect. 5 subsect. 5 LHG-MV to consider "responsibility to society" exceeds the means of the individual academic.

bb) "Public character of academic activity" as an object unsuitable for constitutional protection

It is inconceivable that the right of academic freedom can, for any reason, be limited with regard to the public character of academic activities or, on the contrary, to abstention from publicity of academic activities. This is clearly indicated by the fact that sect. 7 subsect. 2 LV-MV considers limiting freedom of research in some serious cases but does not in any way mention any restrictions to the area of teaching and publication.

The specific reference of sect. 5 subsect. 5 LHG-MV to responsibility due to the public character of an academic's activity is a gateway to political censorship since it is a limiting criterion specifically added to the aforementioned substantive criteria cited in sect. 5 subsect. 5 LHG-MV. This, however, is neither compatible with Art. 5 subsect. 3 GG nor with Art. 7 subsect. 1 LV-MV, nor is such a provision in accordance with the function of academia in a free democratic state.

e) Violation of the legal principle of guaranteeing proper balance between purpose of legal limitation and opting for (a specific mode of) limitation

Binding the right to free research and teaching to the responsibility for the human being, society and nature, and the public character of academic activity is also excessive and thus unconstitutional since it violates the legal principle to properly balance the purpose of limiting a constitutional right of an indivi-

dual and the means as well as the process of limiting such a right. In this respect, unconstitutionality of sect. 5 subsect. 5 LHG-MV arises from its legal consequences, i.e. its sanctions in case of violation of sect. 5 subsect. 5 LHG-MV, both with regard to substantive (aa)) and to procedural (bb)) aspects.

aa) Imbalance with regard to substantive aspects: "binding" of academic freedom

If an academic does not act "responsibly" in the sense prescribed by sect. 5 subsect. 5 LHG-MV, as a consequence any such academic activity is no longer covered by the fundamental right of academic freedom; on the contrary, it is inadmissible since it is considered to be a violation of a legal limitation ("to bind") of the freedom of research and teaching and may therefore be prohibited by means of legal supervision imposed and enforced by state authorities.

This mode and extent of intervention is not covered by the legal principle of proper balance as described above. By contrast, applying the legal principle of proper balance between cause of intervention and mode/process of intervention correctly means that any restriction to academic freedom is only possible to the effect that the academic concerned has to "take into consideration" the consequences his/her academic activity may have to the detriment of particular constitutionally protected rights.

However, sect. 5 subsect. 5 LHG-MV exceeds this consequence by far. This statutory regulative intends not only to expect academics to consider consequences of specific academic activities and to weigh their advantages and disadvantages, but instead it establishes as an enforceable standard that academic activity must be abandoned when "binding" the legality of cer-

tain academic activities to "responsibility" for the areas mentioned in sect. 5 subsect. 5 LHG-MV.

bb) Imbalance with regard to procedural aspects: absence of statutory provisions for an appropriate internal (autonomous) academic process to decide on limitations of academic freedom

The legal principle of proper balance between cause of intervention and means of intervention is violated in a procedural sense due to the fact that the law fails to establish or to respect an internal academic and academically appropriate process of providing self-governance of higher education institutions to ensure autonomous academic control of academic activities, and one to the fact that the law fails to define the relationship between such an autonomous academic process and the general legal provisions on state authority supervision of academic activities.

When considering the constitutional right of academic freedom with a view towards ensuring that any limits imposed upon the right of academic freedom must be reduced to that very minimum which is just required to protect paramount conflicting constitutional rights and legal positions effectively, it is unconstitutional for any limiting legislation simply to make do without providing any autonomous proceedings within higher education institutions and to allow state authority intervention instead, without defining the relation of the latter with regard to an academic system to regulate the conflict of rights at stake autonomously.

In the interest of "guaranteeing correctness by means of ensuring due process", it is the least interventionist and, at the same time, most effective method for safeguarding respect both for

academic freedom and for conflicting constitutional rights to provide academically suitable, autonomous proceedings of higher education institutions designed to intervene effectively in case of ethically inadmissible academic conduct. Such academically autonomous proceedings must be given legal precedence over academically inadequate, external decision-making powers of state authority supervision on higher education institutions and on academic staff.

Sect. 5 subsect. 5 LHG-MV, therefore, does not only falsely suggest the existence of workable criteria pertaining to restriction of academic freedom. In addition, sect. 5 subsect. 5 LHG-MV also ignores the decisive question of how to organize the discourse on decisions concerning limitations to the right of academic freedom, and erroneously ignores the question which institution – state or higher education institution – is to take responsibility for such decisions.

f) Violation of the constitutional principle to regulate essentials by statute, and in particular of the principle of comprehensiveness of statutory regulations

The failure to make statutory provisions for an internal autonomous process of higher education institutions to ensure proper use of the right of academic freedom also violates the constitutional principle to regulate essentials by statute. Hence sect. 5 subsect. 5 LHG-MV is also unconstitutional due to the incompleteness of the regulation.

According to the constitutional principle to regulate essentials by statute, parliament itself is obliged to make all fundamental decisions directly by statute in case fundamental questions, namely those extending to limitations of basic rights guaran-

teed by the constitution, are at stake. The need to provide procedural regulations by statute is included here since they are essential to safeguard the right to academic freedom from any undue external state influence.

The assessment of criteria of, and the judgement on, the existence of conditions which may justify such a serious intervention into the right of academic freedom may not be left to considerations outside the very statute which makes provisions for limiting the right of academic freedom. This however, is the case since enforcing the provisions made by sect. 5 subsect. 5 LHG-MV is left to the general right of state authorities to supervise the legality of university operations and to the state authority's right to discipline academics. Instead, the scope of any such state intervention should and must be regulated specifically by the very statute that provides for the substantive limitations of the right of academic freedom.

3. Conclusion

To sum up, the regulation provided in sect. 5 subsect. 5 LHG-MV is unconstitutional due to a number of reasons to the extent claimed by the plaintiffs. This holds true not only with reference to Art. 5 subsect. 3 GG, but also to Art. 7 subsect. 1 LV-MV and specifically Art. 7 subsect. 2 LV-MV. Hence sect. 5 subsect. 5 LHG-MV must be declared null and void.

Remarks on the Application for the Annulment of an Article in the Law on Higher Education in the German State of Mecklenburg Vorpommern.

Michael Daxner
Former Rectors Oldenburg University

The considerations presented here follow on the discussions held in the Collegium of the Magna Charta Observatory in January 2003. As requested by participants in the Geneva meeting, they will neither refer to the discussions among the members nor to the original text submitted to a German State Court, as the Collegium wished to see the case "de-germanised" and "de-legalised". The author wishes to state expressly that his opinions and conclusions are thus restricted to a minimum, as his intentions is to prepare a working basis for possible consideration by the Collegium, should the Observatory use the case to make a direly needed clarification about "Academic Freedom" and its links to "University Autonomy".

1. The last meeting of the Collegium of the Observatory discussed the issue at length and agreed to consider the question as relevant to its task insofar as the concrete case can be brought to a more general level, irrespective of the peculiarities of German legislation.

2. At the core of the argument, the article that the four applicants ask to be annulled complements existing law by introducing additional duties for academic faculty, i.e., **'responsibilities towards mankind, society, and nature'.** It also points to the **'public status'** of university work. The applicants hold that such additional duties endanger their academic freedom and that, with regard to the public status of

their activities (because of unclear in language), there is no solid basis laid for them to meet their responsibilities.

Nota bene 1: the applicants read the German notion *"Die Oeffentlichkeit ihres Wirkens"* as a compulsory duty to **"publish"**. This is one possible interpretation: The text can also be read as pointing to the need for **"public responsibility"** (versus "private interest").

Nota bene 2: I fully concur with the applicants that the language of the clause is so open to misunderstanding that this might be a formal reason to urge a review by the legislators.

3. Further arguments, which can be generalised, are focused on the request to annul the aforementioned article **preventively**, i.e., before a possible curtailing of the rights of an individual professor or a group of academics may be affected by the negative consequences resulting from the new norms.

Why should the Observatory deal with the issue?

4. **Academic Freedom** is a highly valued basic right. In different constitutional contexts, it can be interpreted either as an extension of the right to the free expression of opinions, or as a separate, more specific right which is focused exclusively on scholarship and science. In some cases, "Academic Freedom" is mentioned explicitly in the Constitution of a nation, in other cases it is derived from more general statements on the freedom of expression. A short definition would link **freedom of expression** to a **quality criteria.**

5. The Observatory has taken the responsibility to interpret in

a continuous way Academic Freedom in the spirit of the *Magna Charta* and to monitor closely the **objective circumstances** under which Academic Freedom is being enacted, pursued or put at risk.

6. Let alone the German specifications (and there are quite a few in this specific case), we can distinguish in this issue several layers of understanding:

a) **The right of legislators and/or governments** to specify what is "Academic Freedom" through basic legislation, and
b) thus, their right to **set academic freedom in the frame of institutional autonomy,** i.e., to consider it as a positive right given to universities with a specific purpose; or should this right apply **to all persons** who are occupied with science and scholarship, and if so, **with or without institutional affiliation(s)?**
c) Notwithstanding the 'right' of the state to set up norms of intervention and interpretation, are "society", "humankind" and "nature" categories that allow for legal and administrative enforcement in case of violation? If so, **who should decide** about the objective facts and the possible sanctions ? Should it not be the university itself through its **self-government** - under the rules of granted autonomy?
d) Public responsibility and the interpretation of **"public good"** or of "work with a public dimension" need the support of very complex arguments, all the more so as such notions become increasingly more important not only for all kinds of research and development, but also for teaching and learning, especially under the emerging rules of GATS.

A checklist of Arguments

In order to reduce complexity, the following arguments are not

dealing exhaustively with all issues raised but they concentrate on what the Observatory may take as first steps in order to deal with the set of issues on a more general level.

a) Thus, the Collegium should clarify the fundamental **difference between Academic Freedom and Institutional Autonomy** in the context of the *Magna Charta.* While Academic Freedom is among the basic rights of a well-defined social group, i.e. the academic community, Autonomy is a necessary attribute of institutions in a civil society where prevails state rule over university governance and operations. (Academic Freedom has not only an **individual** side, but also an **institutional** aspect requiring the university, as a unique pillar of civil society, to be responsible - and liable as a whole entity – thus implying for the institution the possibility to curtail the unlimited freedom of its members. Autonomy is a concept that stems from a **well-conceived division of labour between state and society:** it simply means that the university must keep distance from dominion by state or private interests in order to to fulfill its public mission. Autonomy, anyway, is also a precondition for competitive, entrepreneurial agendas, but it should not hinder the mission of scholarship and science 'beyond the market').

b) Stating such preliminary definitions makes it clear that the **utilitarian** aspect of academic activities, including their benefit to society, mankind and nature, is not excluded from the mission of the university; thus, it is open to clarifications by legislation *and/or* by normative acts stemming out from within the academic corporation. The question is more about the *how?* than the *if.* The "how" should refer in particular to the basic concept of **Truth** –although the "quest for truth" is ***not*** mentioned in the *Magna Charta.* Indeed, in the work of the Observatory today or in times

prior to its establishment, the tension between the **utilitarian and ethical commitments** of the universities has always been a major focus in any discussion about the essence of Academic Freedom and how it is to be implemented into the reality of the academic institution.

c) The Observatory cannot but make a statement about the **rights** and the **limitations** of the **state (government) when it interprets Academic Freedom** beyond its evident needs for law enforcement. In a **publicly financed** system, the government may always argue that the mere fact it is supporting a sprawling institution with taxpayers' money allows the State to determine, *inter alia*, the purpose, orientation and the limitations of such a basic right.

d) In the case under consideration, the aims are subsumed under three categories: *society, mankind* and *nature.* However, as the interpretation of such notions is volatile or unclear, it is worth the effort to have a closer look at their possible substance.

e) **"Mankind"** may be read as an extended analogy to such commitments as those included in the Hippocratic oath. (The advocates of a "truth approach" may say that any truth is to the benefit of mankind, but the majority of constitutional experts worldwide would concede that **not everything must be done that is legally or even morally allowed).** The very crucial question that occurs with very divergent views in much legislation is whether or not the law should allow Academic Freedom to be the **only** rationale in questions of genetic engineering or nuclear research. As a consequence, **academia could agree to state definitions** of what is considered to be detrimental to "mankind", on a case to case basis; then, the Observatory's role would be to define how such an external intervention can be practically included into the rights and duties of university governan-

ce. It is clear that this cannot rely on the individual researcher's discretion. The question is of **sanctions and procedures** rather than of contents if the focus is also on the university's responsibilities as far as its members' elbow room is concerned.

f) **"Society"** is, of course, a much more controversial concept. The approach of the *Magna Charta* is clearly in favour of civil society, and, in the end, against interventions from both the private and public sectors - apart from the requests of accountability that any public system of higher education can reasonably require. This makes the university an agent of civil society rather than a conduit of private and/or governmental interests. "Society" can thus be read as a priority given to the "common good", when it is clearly linked to the public sphere (see below). Or it can be read as the pendant of the state, i.e., the market forces, culture and life evolution experienced by citizens; then, the *functionality* of autonomy becomes the focus. Both readings seem to be legitimate, and should be intertwined. Then, the prerogatives of the State – as a major and legally obliged source of primary funding - must be given some margins for interpretation. To my mind, the problem can be resolved on a relatively low key level. It should be considered that the **state may give effect to its norms and purposes** by supporting certain research programmes and curriculum elements when they lead to civil service needs and to public employment - which is the case in all state-funded systems anyway. It should also allow the state to **shield universities from undue domination** by private or merely market-oriented interests. But it should not allow to restrict Academic freedom unduly in the search by the university and its members for priorities or fields of research, as long as legal boundaries are not being transgressed and the prin-

ciples discussed under "mankind" are not violated. This topic should not be discussed as an aspect of sanctions, but much more as an *incitation to close cooperation* between the university's patron and funding entity and the institution's own autonomous government. Both have to cater for Academic Freedom.

g) **"Nature"**, paradoxically, is the most difficult notion, as far as I am concerned. Although distinct "rights of nature" do exist, it is doubtful whether these can be included into positive law without defining its much broader context. This context may combine the utilitarian aspect (preservation of natural resources) with an ethical point of view (provisions for the quality of life of future generations), and even include aesthetic considerations (keeping nature as a space necessary for the well being of civilized persons). In all such cases, therefore, the notion of "Nature" must be interpreted in reference to "Mankind" and "Society"; as a result, "Nature" should be mentioned explicitly when dealing with these two other categories

7. The **public status** of academic work is not easy to determine. A market-oriented philosophy would have it that there are basically **contractual frameworks, supply and demand, and a limited access to both methods and results,** which operate the process of research, development and of task-oriented teaching. A fundamentalist approach to the quest for truth would hold that **truth is the indivisible property of everyone** and that it cannot be sacrificed to any narrow interests. Both extremes are not to be applied as such; as we know, universities have always sought to strike a balance between the two positions. This did not lead to a complete surrender to the market forces, and it did not create ivory towers either; however, both temptations exist

and must be permanently monitored in order to protect simultaneously Academic Freedom and University Autonomy.

8. The public sphere is tightly bound to the **republican** notion that universities are organizing forms, in which and through which science and scholarship can meet their beneficiary, i.e. "the public". At the same time, universities are the place where a society is thinking of itself, bringing into close links "science" and "the public". In other words, **science is always part of the public domain, even when private or limiting property rights are involved.** The Observatory may establish guidelines as to what extent the private rights of potential patrons of commissioned research - or the rules from GATS - should limit the rights of public ownership in science. Only then, the question may be decided whether the rules for publication and intellectual property should be formulated more rigidly, and what rights may remain with the individual researcher, and which of them must be entrusted to the university. It could be argued that the State has no right to interpret the prerogatives of the "public domain", but then this would require new forms of control and oversight. The other approach would lean towards a 'republican' interpretation of the 'public' as inclusive, i.e., it would require universities to deploy much more transparency and more proactive information strategies towards the public at large, recognizing science ownership as a right of mutual 'citizenship'.

8. **Conclusion:** It might be rewarding for the Observatory to undergo an exercise in drafting guidelines and rules taking further the arguments developed above. There are indeed other options and alternatives available than those offered that could certainly be taken into account.

Reflections on the Mecklenburg-Vorpommern case in the light of the Magna Charta Universitatum

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President of the Collegium

The case referred by four faculty members of the University of Greifswald to the State Constitutional Court of Mecklenburg-Vorpommern against a law on higher education enacted on 5 July 2002 takes on particular significance with reference to the provisions of the Magna Charta Universitatum, since it relates to issues of fundamental significance.

The new law makes provision for a limitation on the freedom of research and teaching protected both by the German Federal Constitution *(Grundgesetz)*[1] and the Constitution of the State *(Land)* of Mecklenburg-Vorpommern[2]. In addition to existing limitations, relating to respect for the Federal Constitution and fundamental aspects of human rights, both with reference to personal dignity and the natural fundamentals of life, further limits are introduced, expressed in an indeterminate and incomplete manner and therefore susceptible to variable political interpretations.

"The use of the rights specified in (section 5) subsection 2 to 4 (LHG-MV) is bound to responsibility for humanity, society, and nature, and to the public character of their activities and does not exonerate from the respect for the rights of others or

[1] Article 5 subsection. 3 GG reads:
Arts and academic activity (Wissenschaft), research and teaching are free. Freedom of teaching does not cover the right not to adhere to the Constitution

[2] Article 7 subsection.1 and 2 LV-MV read:
-Arts and science (Wissenschaft) research and teaching are free. Freedom of teaching is restricted by duty to adhere to the Constitution.
-Research is subject to limits imposed by law if violation of human dignity or permanent threat to the natural fundamentals of life is imminent

from the respect for the rules governing cooperation in higher education" [3]. This is the legislative provision against which the case was brought.

It is evident that this takes on a particular significance in relation to a system of higher education that is funded by the State, as is usually the case in Continental Europe, increasing the danger of interference and a strengthening of State control.

In relation to the function assigned to higher education institutions by the German Federal Constitution (Grundgesetz) consisting of the recognition and search for truth [4], protecting individual faculty members and students but also representing an advantage for the State, the new law, that substantially assigns powers of assessment to the State on what is "right" in the light of the requirements of society, humanity and nature, applying a public policy perspective to University activities, might lead to improper intervention, harmful to the fundamental rights of higher education institutions and of individual faculty members and students.

Regardless of the judicial outcome of the case, that may include political elements even without the intervention of the Constitutional Court, the issue that has arisen is extremely significant in that it highlights the usefulness of the written definition of the fundamental principles that must characterise the University and the community of faculty members and students constituting it as an institution considered as a whole.

At the same time the case is further proof that University autonomy is always subject to risks and external pressures and therefore the role of the Observatory in providing information, criticism and moral suasion is extremely useful.

[3] This is the wording of the law passed by the State of Mecklenburg-Vorpommern against which the four professors took legal action.

[4] "Academic activity" in the sense of the Constitution pertains to all activities which are "by content and design to be regarded as a serious methodological attempt to ascertain truth" (BverfGE 35,79,113)

1. It is above all necessary to recognise and protect a fundamental and authentically original aspect as a duty towards higher education, relating to its history — from the foundation of the University until its development across Europe and the world — and in today's world, for the efforts made, principally by the European Universities, to search for and find in their noble origins the sense of their future mission.
   The fundamental principles of the essence of true Universities (the expression 'true' is particularly significant and is included in the Magna Charta) derive from a consistent historical development dating back almost 1000 years. Although in the context of historical developments that have given rise to many difficulties, periods of decline and conflict, this has a series of unifying elements that make it possible to argue that the history of Europe coincides to a considerable extent with the history of its Universities.
   Europe already exists, and its people have shared one common institution for centuries: the University. Indeed, Europeans can rally around their Universities as agents of their intellectual past and future, considering that these institutions have common aims and methodologies when exploring and disseminating knowledge — be it theoretical or practical. This was the message given in 1988 at the 900th anniversary of the University of Bologna, considered to be the oldest academic institution in Europe.
   These principles, by virtue of their history and enduring validity, sanctioned also by national and international norms, are those to which individual States need to refer. In this sense there is an effective right, albeit a rather abstract one, on the part of the University as a global institution to see these principles defended.
   The various national systems could even eliminate the University as an institution, which has actually been the case in recent times, and in this event we could no longer

speak of Universities even if such a term were to be used: this could harm the essence of the discipline of the University and in such an event it should be the system of Universities — united in a joint document that they have freely signed — that makes clear that such entities are not true Universities.

Clearly the community of Universities does not have the power to implement sanctions, just as the Magna Charta Observatory has no such no power.

But the fact is that if we wish to consider Universities in the world today, we need to refer to the principles embodied in the Magna Charta Universitatum. These principles and the results of this historical development are recognised in the draft European Constitution and in the legal provisions of the European institutions. At the state level, the Constitutions of the States, whether unitary or federal, generally contain principles analogous or partly analogous to those set out in the Magna Charta, such as the freedom of teaching and research, and the recognition of the autonomy of higher education institutions.

In the federal States the Constitutions or statutes of the individual federal States contain an analogous recognition. This is the case also for the State of Mecklenburg-Vorpommern. However, a strong argument can be made that one point remains clear: an ordinary law of a unitary State or of a federal State that is in contrast with the principles laid down at a constitutional level stemming from the history of the University would be unconstitutional. This is exactly the argument put forward by the faculty members in the case under consideration.

2. However, it is also true that a freedom is only genuine if it respects the freedom of others recognised at a constitutional level; therefore the autonomy of university institutions cannot be absolute, but is affected by other forms of autonomy

and by the presence of the State that, at least in the case of public-sector Universities, is a necessary interlocutor with its own prerogatives and powers.
It is clear then that the power of States and federal States to legislate is not negated by the recognition of the freedom of faculty members and students and university autonomy, since the need to safeguard other interests may well give rise to carefully considered and reasonable measures that may be adopted only in connection with the other values recognised by the juridical and constitutional system.
The University operates for society and in society, and therefore the autonomy of the institution and that of faculty members and students must be conciliated with the freedoms of others and with the autonomy of other institutions. I believe this cannot be questioned.
The fact is that in placing limits on the freedom of research and teaching, the State of Mecklenburg-Vorpommern failed to make reference to other well defined or specified constitutional or supranational values, but made reference to concepts that were so indeterminate as to be able to inspire the action of a public or State body (humanity, society, nature), introducing a kind of inappropriate link depending on the fact that the University is an entity dealing with the public. The situation that emerges is certainly lacking in clarity and gives rise to a range of potential dangers.
If it is intended to place limits on academic freedom, this can be done, but not by laying down generic rules relating to humanity, society and nature, without identifying specific values to safeguard, precise objectives to pursue or detrimental aspects to eliminate.
If such a provision had been adopted in the days of Galileo Galilei, it could have been used as a justification for the despicable treatment to which he was subjected: society, humanity and nature in the conceptions current at that

time were harmed by Galileo's endeavours to reconsider in a radical manner the framework of our knowledge of the cosmos.

Galileo was searching for the truth, but this was politically incorrect and worked against the conception of truth that the vast majority considered it necessary to embrace.

There are Universities that in adopting this position refused to allow Galileo to teach, and regrettably one of them was Bologna. But there were others that supported him and one of them was the University of Padua.

The Magna Charta implicitly deals with this matter, outlining in a clear manner the necessity to respect the great harmonies of the natural environment and life itself, while at the same time promoting an understanding of the production and critical transmission of culture by means of research and teaching in order to perform the fundamental task of the University as an institution, that is to say innovation in order to deal with society's developing needs and requirements.

3. The term "humanity" can never be used to place prior and abstract limits on research and teaching. Rather, the individual systems need to identify the means by which the well-being of humanity is pursued and by which every attack on humanity can be prevented.

   Also in this case an emblematic case can be mentioned: that of nuclear energy, the subject and result of scientific research at the highest levels, that can be used for practical applications with devastating consequences for humanity, nature and consequently also for society. However, can a limitation on research and teaching be considered an appropriate instrument for eliminating or simply reducing the risk of nuclear catastrophe?

   Other articles of the Constitution, or rather of the Constitutions, may be utilised to limit the detrimental

effects that may result from research activities. The Magna Charta contains firm principles also from this point of view. The concept of society, that is further taken into consideration, is used in an improper manner, since the University is a typical product of the development of a particular society in a certain historical period. The University transcends the concept of the State; it prefigures this concept and moves beyond it even when, as in many countries, it has been funded by the State for many years.

Civil society created the University, and it is not the task of the public authorities to limit in an a priori manner the mission of the University by making reference to society, as if to take on the role of society itself. The question arises as to whether laws have been enacted for analogous sectors with similar limitations making reference to the same general principles in relation to large companies, small and medium-sized enterprises, commerce or the development of tourism, or, in the public sector, local authorities, hospitals or firms managing essential public services. This is indeed not the case.

The fact is that the University, further to the recognition of its autonomy sanctioned by the various provisions of State constitutions, is periodically seen by politicians as a potential risk.

Since politicians engage in discussions with all sections of society in order to attract votes and exert strong influence over wide sections of society, at times even over the majority, the Universities risk being subject to pressures that undermine their autonomy and this is unacceptable, as it would pave the way for pressure by the political powers of the day that in principle it was intended to prevent, by means of a solemn statement of freedom and autonomy at a constitutional level.

An exemplification linked to the situation that has arisen in

recent decades may be useful in order to gain a clearer understanding of this issue. The Universities have carried out in-depth research and teaching programmes on fundamental issues such as the utilisation of nuclear power, genetics, and in particular genetically modified organisms, the climate, the management of primary resources such as water, animal experimentation, pollution, and so on.

The fact that they are engaged in research in these fields has given rise to criticisms that are often unfounded, in order to gain a political advantage in the public domain. In all these cases, noble but indeterminate concepts have been cited, often applying mediocre processes of reasoning, but generating slogans capable of arousing strong feelings among the general public, at times leading to decisive steps in the direction of ignorance (suffice it to mention the destruction of research in the nuclear sector in Italy).

4. It is difficult to understand why an institution created by society, for society, with specific reference to the progress of humanity and knowledge can be required by law to bear responsibility towards everything — humanity, society and nature — that has been and is at the basis of the institution itself.

   "The future of mankind depends largely on cultural, scientific and technical development ... built up in centres of culture, knowledge and research as represented by true universities" as stated in the Preamble of the Magna Charta Universitatum, in a vision that focuses on the continuity of humanity and future generations. These aims and principles underlie the foundation of the University which, as a creation of the spirit of society, is called upon to implement them, not due to a legislative imperative but as a result of the proper functioning of its autonomy. The University is born free, private and autonomous and the freedom of faculty members and institutional autonomy that guaran-

tees its functioning must be the leitmotiv of its history.
The pursuit of these aims and the firmly rooted nature of these values are the fruit of autonomous operation, as part of the historical development and the future of Universities, and are fundamental to their recognition as bodies guaranteed at a constitutional level.
Consequently, Universities cannot be subject to orders on the part of the legislator. The fact that the law of the State of Mecklenburg-Vorpommern links the reference to the responsibility of the University to the public nature of its activity, and the need to respect the rights of others with the need to cooperate with the government in higher education is the result of a dangerous confusion of ideas.
First of all it is necessary to ask why provisions of this kind should be directed at the public university system and not also at private universities.
In effect the law enacted by the State of Mecklenburg-Vorpommern emphasises the public nature of higher education (and consequently the four faculty members take account of this in their case and highlight the particular risk for University autonomy deriving from the fact that the law relates to publicly funded universities), but regardless of whether or not private universities exist in the State of Mecklenburg-Vorpommern, there is no doubt that issues of this kind must be dealt with by taking account of the higher education system as a whole, in which universities organised and funded by public bodies, in compliance with the State laws governing this sector, are increasingly finding space to operate.
Moreover, the confusion of ideas mentioned above is all the more dangerous in that the autonomy of the institution, the close connection between research and teaching for the production and critical transmission of culture, and the task of implementing the innovations necessary to keep up with

the development of society, could give rise at any time to contrasts with other sections of society that have interests, also of an economic nature, that are completely different and that do not enjoy institutional autonomy for higher purposes, and may from time to time exert strong pressure, interpreting in a detrimental manner the responsibility towards humanity, society and nature.

The Magna Charta states: “The undersigned Rectors, on behalf of their Universities, undertake to do everything in their power to encourage each State, as well as the supranational organisations concerned, to mould their policy sedulously on the Magna Charta, which expresses the universities’ unanimous desire freely determined and declared.”

In the case of Mecklenburg-Vorpommern, this did not happen. Rather, an attempt was made to influence and undermine by means of ordinary legislation the recognition of the freedom of research and teaching sanctioned by the Constitution of the Federal Republic of Germany and the Constitution of the State of Mecklenburg-Vorpommern.

It is however a positive development that the four faculty members have raised the question by claiming to be directly harmed by the legal provisions enacted. It is to be presumed that they are supported by their University, which probably does not have powers to take legal action directly in the Constitutional Court.

Universities, faculty members and students must therefore continue to be vigilant and to defend themselves directly, and in taking account of the solemn declaration made by the principal Universities of the world in signing the Magna Charta Universitatum, they can count on the fact that their arguments are supported by the University community as a whole, and on the moral suasion that the Universities can exert also by means of the Magna Charta Observatory.

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