

## Recent Development in Higher Education Accreditation in Germany

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### ABSTRACT

The paper explains the current legal situation and recent developments on the field of higher education accreditation in Germany. It informs about the significant verdict of the German Federal Constitutional Court from the year 2016, where the unconstitutionality of the current program accreditation system in Germany was stated. Thus, the legislator in Germany was requested to create a new legal basis for the higher education accreditation which was done with effect from this year. The author discusses what can be learned from the argumentation of the German Constitutional Court for the future use of quality assurance measures in higher education. The aim is to avoid mistakes while developing quality assurance for the university sector at the example of the program accreditation discussion in Germany.

**Keywords:** Study program accreditation, legal situation in Germany, Academic Freedom, Constitutional Court's decision, and future of higher education accreditation.

### INTRODUCTION

Each year, German universities spend enormous sums of money for higher education accreditation although the benefit is questionable and legal compliance was discussed controversial over a long time<sup>1</sup>. In the year 2016, the German Federal Constitutional Court (*Bundesverfassungsgericht*) found that the current system of program accreditation currently applied in the German Federal State (*Bundesland*) of North Rhine-Westphalia was unconstitutional<sup>2</sup>. Six years the court's decision was pending while the verdict of the judges was highly anticipated in the academic world.

Important to know, that Germany has no homogenous accreditation environment and the

respective regulations differ significantly. That's because every *Bundesland* has its own Higher Education Law. But, nevertheless, the higher education regulations must be in compliance with the constitution of the respective *Bundesland* and the German Constitutional Law.

One of the constitutional rights, which is guaranteed in all constitutions of the federal states (*Bundesländer*) and in the German Constitution, is the freedom of science which secures free teaching and research as well as universities free decisions in their own science related matters (Academic Freedom). It is therefore the most important constitutional right of the Academic Community which is guaranteed without any limitation. Only other constitutional rights can restrict the Academic Freedom.

Regarding higher education accreditation often the question occurred whether the extensive examination while the accreditation process and obligations or recommendations as results of the procedure are in conformity with the German Constitutional Law.

### PREVIOUS GERMAN HIGHER ACCREDITATION SYSTEM

#### Origin and Implementation in Germany

Accreditation has its origin in the United States of America (USA) where these quality assurance methods for universities and their

<sup>1</sup> See exemplarily Lege, *Die Akkreditierung von Studiengängen*, Juristenzeitung (JZ) 2005, pp. 699-700. Wilhelm, *Verfassungs- und verwaltungsrechtliche Fragen der Akkreditierung von Studiengängen*, p. 275, 2009. Quapp, *Akkreditierung – Ein Angriff auf die Freiheit der Lehre?*, Wissenschaftsrecht (WissR) 2010, pp. 346-363.

<sup>2</sup> Decision of the *Bundesverfassungsgericht* of Feb 17<sup>th</sup> 2016 – 1 BvL 8/10 –, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/02/1s20160217\\_1bv1000810.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/02/1s20160217_1bv1000810.html). Accessed Jan 5<sup>th</sup> 2018.

programs were developed. This was necessary because in the USA private education institutions are dominating and neither university degrees nor universities are state regulated or protected. Requirements regarding equipment and lecturers are set by the higher education institutions themselves. In that point the US-American university system diverges essentially from the European Higher Education Area. In USA, universities' education quality may be confirmed by private non-profit accreditation agencies. But, US-American universities are not obliged to undergo an accreditation process<sup>3</sup>.

Within the reorganization of the European Higher Education Area while the so called Bologna Process in the 1990s, the accreditation idea came to Europe<sup>4</sup>. The equivalence of the new developed university programs and degrees should be secured by quality assurance methods such as evaluation and accreditation.

Until beginning of 2018, the accreditation system in Germany was characterized by decentralized agencies, which conduct the accreditation of study programs and internal quality assurance systems of higher education institutions, and a central accreditation institution (Accreditation Council), which accredits and reaccredits the agencies and also ensures, by defining the basic requirements of the accreditation procedures, that the accreditation is carried out according to reliable, transparent and internationally recognized standards<sup>5</sup>.

### Legal Basis

Contrary to the USA, in German there is a strong, maybe even excessive regulation of the university sector by the *Bundesländer*. Rigorous appointment procedures for new professorships, report obligations of the universities and technical or legal supervision by the federal state ministries characterize everyday life at German higher education institutions. Due to the fact that Germany has a federalism system in which higher education is a matter of the *Bundesländer*, legal basis of higher education are, beside the

German Higher Education Framework Act as well as numerous statutory orders and administrative regulations, particularly the higher education acts of the *Bundesländer*.

The Federal Republic of Germany consists of 16 *Bundesländer* with 16 different higher education acts. Not all of them contain an obligation of higher education accreditation. Thus, for example in the Saxon Higher Education Law the word "accreditation" is not explicitly mentioned<sup>6</sup>. Other higher education acts contain regulations regarding higher education accreditation but with heterogenic content and various levels of detail. But, in none of them specific information regarding criteria and procedure of accreditation can be found. Furthermore, there is no definition what the "recognized bodies" are which often are mentioned in the higher education acts. The German Higher Education Framework Act at federal level contains regulations regarding the tasks of German universities but does not regulate the higher education accreditation<sup>7</sup>.

The Joint Declaration of the European Ministers of Education (Bologna Declaration) from 1999 also cannot be a legal basis for the higher education accreditation. Its aim was to introduce a system of easy comparable academic degrees, to promote academic mobility, to ensure quality in education and to take into account the European dimension of higher education<sup>8</sup>. This declaration is not more than a memorandum of understanding without any legally binding effect. That applies to the resolutions of the German Rectors' Conference (HRK)<sup>9</sup> and the Standing Conference of the Ministers of Education and Cultural

<sup>3</sup> Mager, *Ist die Akkreditierung von Studiengängen an Hochschulen des Landes Baden-Württemberg verfassungsgemäß?*, Verwaltungsblätter für Baden-Württemberg (VBIBW) 2009, p. 9.

<sup>4</sup> More detailed to the Bologna Process: Quapp, *Akkreditierung – Ein Abgesang auf die Wissenschaftsfreiheit?*, Die öffentliche Verwaltung (DÖV) 2/2011, pp. 68-74.

<sup>5</sup> See [www.akkreditierungsrat.de](http://www.akkreditierungsrat.de). Accessed Jan 25th 2018.

<sup>6</sup> See the Saxon University Freedom Act in the version of Jan 15<sup>th</sup> 2013, published in the Saxon Law Gazette 2013, p. 3, last amended by the act of Oct 15<sup>th</sup> 2017, Saxon Law Gazette, p. 546: <https://revosax.sachsen.de/vorschrift/10562-Saechsisches-Hochschulfreiheitsgesetz>. Accessed Jan 25<sup>th</sup> 2018.

<sup>7</sup> See the act in the version of Jan 19<sup>th</sup> 1999, published in the Federal Law Gazette I 1999, p. 18, last amended by Article 6 (2) of May 23<sup>th</sup> 2017, Federal Law Gazette I 2017, p. 1228: <https://www.gesetze-im-internet.de/hrg/>. Accessed Jan 25<sup>th</sup> 2018.

<sup>8</sup> Joint Declaration of the European Ministers of Education (Bologna Declaration), [https://www.eurashe.eu/library/bologna\\_1999\\_bologna-declaration-pdf/](https://www.eurashe.eu/library/bologna_1999_bologna-declaration-pdf/). Accessed Jan 9<sup>th</sup> 2018.

<sup>9</sup> Entschließung des 185. Plenums from July 6<sup>th</sup> 1998: <https://www.hrk.de/positionen/beschluss/detail/akkreditierungsverfahren/>. Accessed Jan 5<sup>th</sup> 2018.

Affairs (KMK)<sup>10</sup> too, which are only executive agreements. Nevertheless, up to this year, accreditation processes in Germany were organized and realized on the basis of these resolutions. An Accreditation Council was implemented which was responsible for the supervision of privately organized accreditation agencies. These agencies conducted accreditation procedures on the basis of contracts with the universities.

After criticism because of a missing legal basis for accreditation procedures, in 2005 a foundation for the accreditation of study programs was established by an act of the *Bundesland* North Rhine-Westphalia<sup>11</sup> to which the tasks of the Accreditation Council had been delegated by an agreement of the KMK. But the concerns in the judicial literature could not be dispelled<sup>12</sup>. In its decision of 2016 the *Bundesverfassungsgericht* (see under III.) confirmed the criticism of the law experts.

A legal basis for accreditation procedures is essential because this quality assurance method does not respect the constitutionally guaranteed Academic Freedom. If the state will infringe the Basic Rights of people or institutions it needs a parliamentary act as a legal basis for the infringement. The North Rhine-Westphalian Accreditation Foundation Act is only law of one *Bundesland* and can't regulate the accreditation procedures in the whole Federal Republic of Germany. Finally it must be stated that until beginning of this year, there was no legal basis for higher education accreditation in Germany.

<sup>10</sup> Einführung eines Akkreditierungsverfahrens für Bachelor-/Bakkalaureus- und Master-/Magisterstudiengänge from Dec 3<sup>rd</sup> 1998; Statut für ein länder- und hochschulübergreifendes Akkreditierungsverfahren from May 24<sup>th</sup> 2002, amended from Oct 15<sup>th</sup> 2004; Ländergemeinsamen Strukturvorgaben für die Akkreditierung von Bachelor- und Masterstudiengängen from Oct 10<sup>th</sup> 2003, amended from Feb 4<sup>th</sup> 2010. See under: <https://www.kmk.org>. Accessed Jan 5<sup>th</sup> 2018.

<sup>11</sup> Act to establish a foundation „Foundation for Accreditation of Study Programs in Germany” (Accreditation Foundation Act) of Jan 27<sup>th</sup> 2005, published in Law Gazette NRW 2005, p. 45, amended by Art. 4 of the Act of Mar 13<sup>th</sup> 2008, Law Gazette NRW 2008, p. 195.

<sup>12</sup> Lege, *Die Akkreditierung von Studiengängen*, Juristenzeitung (JZ) 2005, pp. 703-704. Wilhelm, *Verfassungs- und verwaltungsrechtliche Fragen der Akkreditierung von Studiengängen*, p. 275, 2009. Pautsch, *Rechtsfragen der Akkreditierung*, Wissenschaftsrecht (WissR) 2005, pp. 206-207.

### Types of Accreditation

Program and system accreditation are two instruments of quality management available to universities. To test new approaches of quality assurance and improvement in teaching and learning the Accreditation Council resolved in September 2014 a special procedure (trial clause). But, the Accreditation Council decided to forego the formulation of detailed guidelines in order to strengthen the experimental character of the process and to promote the development of innovative systems and processes<sup>13</sup>. Because, the trial rather rarely was used by German universities the paper will concentrate only on program and system accreditation.

### Accreditation of study programs

The object of program accreditation is one of the universities' offered study programs. In the former system a successful accreditation confirmed that the individual program meets certain requirements that apply to a certain seal. Thus, the quality of study programs as a result of a successfully operating qualification process, the interaction between its elements and finally the achievement of its objective, which is attaining the intended learning outcomes for the students were evaluated. The content-related specification of the quality of a study program was defined within the objectives formulated by the higher education institution itself. In addition, there are external requirements made by the political, legal and socio-economical environment, within which the degree program was designed and realized<sup>14</sup>. Furthermore, the quality of a study program was demonstrated by the level of graduates' employability.

Study programs which carry the seal of the Accreditation Council are published in the database of accredited study programs on the Accreditation Council's website<sup>15</sup>.

This offers information on accreditation deadlines, the conditions associated with accreditation where applicable, the experts involved, and the evaluation carried out by the experts.

<sup>13</sup> See Activity Report of the Accreditation Council 2014, p. 7: [http://www.akkreditierungsrat.de/fileadmin/Seiteninhalte/AR/Veroeffentlichungen/Taetigkeitsberichte/en/AR\\_Taetigkeitsbericht\\_2014\\_en.pdf](http://www.akkreditierungsrat.de/fileadmin/Seiteninhalte/AR/Veroeffentlichungen/Taetigkeitsberichte/en/AR_Taetigkeitsbericht_2014_en.pdf). Accessed Jan 15<sup>th</sup> 2018.

<sup>14</sup> See [www.asiin.de/en](http://www.asiin.de/en). Accessed Jan 25<sup>th</sup> 2018.

<sup>15</sup> See <http://www.hs-kompass2.de/kompass/xml/akkr/maske.html>. Accessed Jan 15<sup>th</sup> 2018.

### System accreditation

System or institutional accreditation was completed after auditing and evaluating educational institutions and their quality management systems. In contrast to the program accreditation, the content-related quality for teaching and learning is determined by the higher education institution itself. By defining the learning outcomes of its study programs and the design of its quality management, the higher education institution expressed its strategic orientation, its profile and its integration into the social context while including external requirements of the political, judicial and socio-economic environment<sup>16</sup>.

Whilst the accredited study programs of a system-accredited higher education institution are listed in the database of accredited study programs, the website offers an additional overview of all system-accredited universities.

### Procedure

To award an accreditation seal, universities or programs had to expose itself a pre-defined external reviewing procedure. An accreditation procedure up to now started with an application for accreditation to an accreditation agency the higher education institution had chosen. After receiving the application, the relevant agency deployed an evaluation group of experienced auditors.

For both accreditation types universities had to prepare and submit a self-evaluation report and documents which were examined by the auditors. Dependent on the type of accreditation one or more site-visits (including random checks in the case of a system accreditation) were planned with various groups from the applying institution. After the visits in the institutions auditors formulated a report and submitted it to the higher education institution for fact checking and a statement. Then, final recommendations by the auditors for the agency's accreditation commission were formulated. At the end, the decision of the agency - full accreditation, accreditation under conditions or rejection of the accreditation - was communicated to the applying institution and the German Accreditation Council while delivering the final accreditation report to the applying university as well as to the Accreditation Council. The results were published online in the database on the Accreditation Council's website. Due to the fact

<sup>16</sup> See [www.asiin.de/en](http://www.asiin.de/en). Accessed Jan 25<sup>th</sup> 2018.

that accreditations were granted for a limited period of time, re-accreditation after a fixed duration was required.

### DECISION OF THE BUNDESVERFASSUNGSGERICHT OF 2016<sup>17</sup>

#### Case

In 2008 a private university in the German *Bundesland* North Rhine-Westphalia appealed against the rejection of its study program re-accreditation against the responsible accreditation agency. Due to the rejection of the re-accreditation and on the basis of the current higher education law of North Rhine-Westphalia, the responsible ministry prohibited the enrolment of students in the not reaccredited programs. For the private university a lot of money and its reputation were at stake.

#### Judicial Procedure

The administrative court of the first instance deemed the accreditation regulations in the North Rhine-Westphalian University Law, which was material to its decision, to be unconstitutional. It suspended the proceedings and transferred the matter to the *Bundesverfassungsgericht* for decision. This type of proceedings is therefore also called referral from a court, regulated in Art. 100 (1) of the Basic Law and in Art. 80 et seq. of the Act on the Federal Constitutional Court<sup>18</sup>. Only the *Bundesverfassungsgericht* is competent to decide on the constitutionality of laws.

The *Bundesverfassungsgericht's* duty is to ensure that the Constitution of the Federal Republic of Germany (*Grundgesetz* – Basic Law) is obeyed<sup>19</sup>. As the 'guardian of the Basic Law', it has to secure the enforcement of fundamental rights such as the Academic Freedom which is written down in Art. 5 (3) sentence 1 of the Basic Law.

<sup>17</sup> See footnote No. 2.

<sup>18</sup> See act in the version from Aug 11<sup>th</sup> 1993, published in the Federal Law Gazette I 1993, p. 1473, last amended by Article 1 of July 18<sup>th</sup> 2017, Federal Law Gazette I 2017, p. 2730: <http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.html#download=1>. Accessed Jan 15<sup>th</sup> 2018.

<sup>19</sup> [http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Aufgaben/aufgaben\\_node.html;jsessionid=C06F5666CD348A1F065F28CFFFE93673.1\\_cid394](http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Aufgaben/aufgaben_node.html;jsessionid=C06F5666CD348A1F065F28CFFFE93673.1_cid394). Accessed Jan 15<sup>th</sup> 2018.



### Court's Argumentation

The Court stated that, in principle, external accreditation of courses of study is in compliance with the German Basic Law. But the previous program accreditation in North Rhine-Westphalia was unconstitutional<sup>20</sup>.

Key points of judges' criticism were that the current program accreditation system intervenes in the Academic Freedom. Furthermore, the accreditation process is expensive and causes a heavy workload for universities. In developing the accreditation criteria and while the accreditation process, the Academic Community has not the dominant role it must have.

### Intervention in the Academic Freedom

The court stated in a clear and unmistakable manner that the obligation in the North Rhine-Westphalian University Law to bring study programs to accreditation is a massive intervention in the Academic Freedom guaranteed for professors, departments and universities<sup>21</sup>. That most important right of the Academic Community protects against any state intervention on the process of gaining and dissemination of knowledge. That means in detail the fundamental granting of the free choice of subject, form (e.g. lecture, tutorial seminar), method (content, structure, with or without discussion), time and place of a course. If the university would refuse an accreditation of its programs it will risk the state recognition as a higher education institution. In this way, the state enforces the accreditation which is an intervention in Art. 5 (3) sentence 1 of the Basic Law in itself. Furthermore, the study program accreditation is precondition for a possible financial support by the federal state and advantageous in the competition between private and state universities.

The court argued that audits, interviews, requirements to provide documents, recommendations and obligations during the process of accreditation violates the Academic Freedom of universities, departments and lecturers. The obligation of university staff to cooperate in the accreditation process in the University Law of North Rhine-Westphalia as well as the comprehensive content-related evaluation of university programs regarding concept, program organization and curricula violates the freedom to decide about content, procedure and methodical approach of the

courses of study<sup>22</sup>. The applying university must report to an external institution regarding technical, pedagogical and didactical concept of its programs and the competence of the lecturers. Thus, under the accreditation system, departments and its staff are no longer able to decide independently which contents in which extent and form within their subject will be taught and examined.

In the eyes of the judges, the obligation to accredit university programs is a total control which is preventive and periodically to renew. Therefore, and because the accreditation does not only evaluates operational processes and the matching between teaching and qualification aims of the program, it violates the rights guaranteed in Art. 5 (3) sentence 1 of the Basic Law.

But, an intervention in a basic right can be justified by a legitimate aim on constitutional level. The court decided for the quality of teaching to be such an aim because it is connected with the basic right of Occupational Freedom in Art. 12 (1) of the Basic Law<sup>23</sup>. Higher education normally will be a preliminary phase to occupation and that's why the task of universities to make the students fit for the job must be respected in the academic teaching. However, even when the Occupational Freedom of the students and the quality of teaching is able to justify an intervention in the Academic Freedom there has to be a parliament's act as its legal basis.

After discussing various regulations to be possible justifications for interventions in the Academic Freedom, the court decided that the current accreditation system is not in compliance with the German Constitution. The reason is that the legal basis for program accreditation in Germany is not in compliance with the constitutional state rule of law principle and the democracy principles in Art. 20 (3) of the German Basic Law. The principle of rule of law and of democracy obliges the parliament as the German legislator to decide by itself in all essential matters on the field of exercising fundamental rights. It is not allowed to delegate these decisions to the executive power<sup>24</sup>. The more the holders of basic rights are influenced in their guaranteed position by a rule, the more

<sup>20</sup> See footnote No. 2, paragraph 46.

<sup>21</sup> See footnote No. 2, paragraph 50.

<sup>22</sup> See footnote No. 2, paragraph 52.

<sup>23</sup> See footnote No. 2, paragraph 58.

<sup>24</sup> Decision of the Bundesverfassungsgericht of Oct 20<sup>th</sup> 1982 – 1 BvR 1470/80 – in BVerfGE 61, p. 275.

detailed it must be<sup>25</sup>. What an essential matter is and the level of detail must be decided in the special case under consideration of the German Basic Law and the fundamental rights guaranteed by it<sup>26</sup>. Also, the content and specific character of the respective fundamental right must be respected.

The judges stated that there was no parliament's act as a basis for the previous German program accreditation system. All regulations mentioned above (see under Legal Basis) are either not legally binding or do not fulfill the requirements for a justification act because they do not regulate all necessary matters regarding the accreditation. All decisions regarding the accreditation did not have been taken by the legislator but were delegated to external actors.

### High costs and workload

The court also criticized the high costs and workload of accreditation procedures<sup>27</sup>. Higher education institutions in Germany are responsible for the accreditation financing. Furthermore, the preparation of the self-evaluation report and other required documents causes an enormous workload and organizational burden which are to carry by the universities and their staff<sup>28</sup>. The judges identified accreditation cost of 40.000 to 53.000 Euros per program accreditation including fees for the agencies and hidden internal cost occurring at the universities<sup>29</sup>.

### Lack of academic participation

Furthermore, a point of criticism was the lack of involvement of scientists in program accreditation<sup>30</sup>. It is important that the Academic Community has the major influence on the development of evaluation criteria. Only by this way it is possible to prevent that academic interests will be ignored and science inadequate governance will dominate.

The legislator cannot establish detailed guidelines for teaching contents to assure the teaching quality. That would ignore the constitutionally

guaranteed intrinsic rationality of the science. But, legislation should regulate procedure and organization of quality assurance. With the non-existing or less detailed legal requirements the parliament as the legislator has given away its responsibility for the regulation of the higher education accreditation<sup>31</sup>. That conferred externals like accreditation agencies as well as the Accreditation Council too extensive power. A significant influence of the Academic Community was not ensured.

## NEW LEGAL SITUATION

### Interstate Accreditation Treaty

Although Higher Education Law is law of the *Bundesländer* and the verdict is only referring to regulations of the one *Bundesland* North Rhine-Westphalia, it had a considerable signal effect for all other German *Bundesländer*. As the *Bundesverfassungsgericht* did not declare external quality assurance in higher education for unconstitutional in principle, but criticized its legal basis and the procedure, all *Bundesländer* had to check and to revise the regulations for higher education accreditation.

Normally, all *Bundesländer* would revise their regulations independently. But, in case of subjects which should have common rules on the level of the whole federal republic (e.g. emission control or broadcasting), the *Bundesländer* can close a state agreement (Interstate Treaty) which must be adopted by the parliaments of all *Bundesländer*.

Regarding the higher education accreditation, all *Bundesländer* agreed for the Interstate Treaty about the organization of a common accreditation system for quality assurance in teaching and learning at German Universities (Interstate Accreditation Treaty)<sup>32</sup>.

### Specimen Statutory Order

For the implementation of the interstate treaty, a specimen statutory order was developed by the Standing Conference of the Ministers of Education and Cultural Affairs (KMK)<sup>33</sup>. This specimen statutory order contains in its 37

<sup>25</sup> Decision of the Bundesverfassungsgericht of May 9<sup>th</sup> 1972 – 1 BvR 518/62, 1 BvR 308/64 – in BVerfGE 33, p. 157.

<sup>26</sup> Decision of the Bundesverfassungsgericht of Sep 24<sup>th</sup> 2003 – 2 BvR 1436/02 – in BVerfGE 108, 282, p. 311.

<sup>27</sup> See footnote No. 2, paragraph 54.

<sup>28</sup> See footnote No. 2, paragraph 54.

<sup>29</sup> See footnote No. 2, paragraph 54 with link to other references.

<sup>30</sup> See footnote No. 2, paragraphs 60-61, 81.

<sup>31</sup> See footnote No. 2, paragraph 80.

<sup>32</sup> <http://www.akkreditierungsrat.de/fileadmin/Seiteninhalte/AR/Sonstige/Studienakkreditierungsstaatsvertrag.pdf>. Accessed Jan 9<sup>th</sup> 2018.

<sup>33</sup> [https://www.kmk.org/fileadmin/Dateien/pdf/PresseUndAktuelles/2018/BS\\_171207\\_Musterrechtsverordnung.pdf](https://www.kmk.org/fileadmin/Dateien/pdf/PresseUndAktuelles/2018/BS_171207_Musterrechtsverordnung.pdf). Accessed Jan 18<sup>th</sup> 2018.

articles details regarding accreditation criteria and procedure.

As mentioned before, the resolutions of the KMK were only executive agreements without any legally binding effect. While elaborating the specimen statutory order, the KMK has taken the opportunity to bring contents of its resolutions in the document. Although the specimen statutory order also will not have a legally binding effect, the *Bundesländer* agreed in the Interstate Accreditation Treaty that they must elaborate statutory orders which do not diverge from each other to secure the equivalence of study and examination achievements as well as degrees and to enable a change of university<sup>34</sup>. That means only little scope left for the *Bundesländer* to implement the individualities of their higher education systems (such as traditional degrees).

### New Regulations

In its verdict regarding the reorganization of the German program accreditation the *Bundesverfassungsgericht* gave advises what must be fixed in the new accreditation regulations to be a legal basis in accordance with the constitution. First of all, the aim of such quality assurance measures is to define. Furthermore, organizational details and the detailed accreditation procedure must be described e.g. regarding how to open an accreditation procedure, the legal status of the accreditation agencies, the legal nature of the agencies' and Accreditation Council's decisions, the legal consequence if conditions in an accreditation decision will not be fulfilled, qualification requirements for the experts in the group of auditors, the appeal procedure and the time intervals of re-accreditation. Additionally, there must be criteria which are flexible enough to enable heterogeneous program offers of different universities in one field of study and diverse didactic and organizational profiles. While developing these criteria and evaluating the programs the Academic Community must have a significant influence.

The following discussion will show, if the new legal basis for accreditation procedures will meet the demands of the *Bundesverfassungsgericht*.

Primarily, the Interstate Treaty will be discussed because when submitting this paper it was, besides the North Rhine-Westphalian Act about

<sup>34</sup>Art. 4 (6) of the Interstate Accreditation Treaty. See footnote 32.

the Foundation Accreditation Council<sup>35</sup>, the only legally binding document regarding the reorganized German accreditation system. The Specimen Statutory Order is only of advisory nature. Currently, the *Bundesländer* are working at their individual statutory orders for the higher education accreditation.

### New relationship between Accreditation Council and accreditation agencies

In future, the Accreditation Council will be the decision-making institution in the German accreditation system. The Interstate Accreditation Treaty transferred this competence from the accreditation agencies to the Accreditation Council<sup>36</sup>. Since this year, the Accreditation Council will decide whether the university programs will meet the formal and professional criteria and an accreditation seal can be awarded or not.

But, the accreditation agencies will only loose less of their power in the new system. While the procedures they will be responsible for evaluating universities and their programs as well as preparing the report for the Accreditation Council<sup>37</sup>.

For the universities nothing has changed in comparison to the former system, except that the final accreditation decision in future will be taken by the Accreditation Council based on the recommendation of an agency.

On the basis of Art. 3 (2) sentence 2 and Art. 5 (3) No. 5 of the Interstate Accreditation Treaty the Accreditation Council will authorize the accreditation agencies. In the previous system, the council was responsible for the accreditation of the agencies.

Now, the professional competence of an agency will be assumed if it is registered in the European Quality Assurance Register for Higher Education (EQAR), what means that the Accreditation Council will lose its strong influence on the agencies.

<sup>35</sup> Act about the Foundation Accreditation Council of Feb 15<sup>th</sup> 2005, published in Law Gazette NRW 2005, p. 45, last amended by Art. 2 of the Act from Oct 17<sup>th</sup> 2017, Law Gazette NRW 2017, p. 806.

<sup>36</sup> Art. 9 (1) of the Interstate Accreditation Treaty. See footnote 32.

<sup>37</sup> Only if the universities decide for an alternative procedure on the basis of the experimental clause in Art. 3 (1) No. 3 of the Interstate Accreditation Treaty they are not obliged to use accreditation agencies.

### Procedure

Within the Interstate Accreditation Treaty, the *Bundesländer* agreed about a reorganization of the higher education accreditation procedure. However, there were only minor changes while the basic structure of the process was kept.

Further on, universities or study programs must expose itself to a pre-defined external reviewing procedure to award an accreditation seal. But, in future, the higher education institution must not apply to an accreditation agency to start an accreditation process but to the Accreditation Council.

Before the application to the Accreditation Council universities have to use an accreditation agency to be evaluated. As a result, the agencies will generate a report with recommendations regarding the rating and decision as result of the accreditation process. For this purpose agencies will deploy an evaluation group of experienced auditors. The intensively discussed legal status of the contract between universities and accreditation agencies now was clarified as a private contractual legal relationship.

In the new system, universities also have to prepare and to submit a self-evaluation report as well as documents for both accreditation types. But, the Interstate Accreditation Treaty now separates the accreditation in a process to review the formal criteria on the one side and to review the subject- and content-related criteria including vocational relevance on the other side<sup>38</sup>. Only the subject- and content-related criteria will be examined by the auditors while the accreditation agencies will check the compliance with the formal criteria. The site-visits remain as well. The results of the accreditation procedure - full accreditation, accreditation under conditions or rejection of the accreditation - will be published online in the database on the Accreditation Council's website. Accreditations are granted for eight years now before a re-accreditation is required<sup>39</sup>.

The legal nature of the accreditation decision now is defined. It will be an administrative decision under administrative law against which universities have the right of objection and can bring an action to the administrative court.

<sup>38</sup> Art. 3 (5) of the Interstate Accreditation Treaty. See footnote 32.

<sup>39</sup> Art. 26 of the Specimen Statutory Order. See footnote 33.

For the procedures running under the experimental clause (see Experimental Clause for Alternative Procedures) divergent practices can be concluded with the Accreditation Council and the respective *Bundesland*<sup>40</sup>.

It is questionable if the regulations regarding the procedure in Art. 3 of the Interstate Accreditation Treaty will meet the requirements of the rule of law principle and the democracy principles in Art. 20 (3) of the German Basic Law. These principles obliges the parliament as the German legislator to decide by itself in all essential matters on the field of exercising fundamental rights and not to delegate these decisions to the executive power. The further details of the procedure and of the academic participation however will be regulated in the statutory orders for the higher education accreditation of the *Bundesländer*<sup>41</sup>, which are only decisions of the executive power.

### Academic participation

The *Bundesverfassungsgericht* criticized the lack of academic participation in the development of accreditation criteria and while the program accreditation procedure. In reaction to the judges' argumentation the State Accreditation Treaty contains regulations regarding the members of the Accreditation Council as well as the members of the group of auditors<sup>42</sup>. This shall extend the academic influence in the accreditation system to secure an academic majority in subject- and content-related questions.

While the accreditation procedures, the Academic Community must be part of the auditors' group, but which is not a new requirement. The HRK shall be responsible for developing a science adequate process for designation of evaluating professors. What is really new is the requirement of professors' majority in the process of developing and evaluating subject- and content-related criteria for the higher education accreditation in Art. 4 (3) sentence 2 of the Interstate Accreditation Treaty.

With the new regulation regarding the number of professors as members of the Accreditation Council the *Bundesländer* reacted to the

<sup>40</sup> Art. 3 (1) No. 3 of the Interstate Accreditation Treaty. See footnote 32.

<sup>41</sup> Art. 4 (1) of the Interstate Accreditation Treaty. See footnote 32.

<sup>42</sup> Art. 3 (2) and 9 (2) of the Interstate Accreditation Treaty. See footnote 32.



criticism from the *Bundesverfassungsgericht*'s verdict. Now, the German Accreditation Council consist of eight professors (instead of four before) which must not be a member of the university management, one representative of the HRK (instead of no representative before), five representatives from the professional practice, two students, two foreign members with accreditation experiences and one representative of the accreditation agencies in an advisory capacity<sup>43</sup>. The eight professors need to represent at least all four groups of higher education subjects which are humanities, social sciences, natural sciences and engineering sciences. When the Accreditation Council at the end of an accreditation procedure decides about the programs' or institutions' compliance with subject- and content-related criteria, professors will have two votes each. That secures a majority of the academic members in these decisions. But, in all other decisions the professors are in minority.

If this member structure corresponds with the demands of the *Bundesverfassungsgericht* to increase the academic influence in the accreditation system remains to be seen.

### Fees

In future, higher education institutions have to pay two fees if applying for an accreditation or re-accreditation.

Although the *Bundesverfassungsgericht* criticized the high cost of accreditation procedures, the Accreditation Council is authorized by the Interstate Accreditation Treaty to charge fees additionally to the fees universities must pay to the accreditation agencies<sup>44</sup>. By this way, the council shall be financed besides the common funding of the *Bundesländer*.

For the reorganization of the Accreditation Council in 2018 costs of more than 1, 3 million Euros are planned<sup>45</sup>. Further expenditures are unforeseeable. The money will come from the *Bundesländer* and the universities' budgets. Because in Germany higher education institutions

are mostly state financed, finally the additionally fees for the Accreditation Council will be paid by the German taxpayers.

## DEVELOPMENTS IN HIGHER EDUCATION ACCREDITATION AND RECOMMENDATIONS

### From Study Program Accreditation to System Accreditation

In Germany's university system higher education accreditation has established deep roots. The fundamental and continuous critique regarding the evaluation of academic performance was not successful, although until now there are no scientifically proofed results that quality assurance methods in higher education institutions really did improve the higher education quality.

Currently, among German universities a tendency can be observed to switch from program accreditation to system accreditation. This has one of its reasons in requirements from the responsible ministries e.g. in higher education development plans<sup>46</sup> or target agreements.

Furthermore, universities hope to save a lot of money. But, it is controversial, if system or institutional accreditation really will save resources.

True is that system accredited universities do not need to bring all of their programs to a program accreditation which saves accreditation fees. But, programs must undergo a continuous quality assurance process inside of the higher education institution which finally generates more workload for the departments and Academic Community as if the programs would be accredited once in eight years. Additionally, there is the system accreditation procedure every eight years with one or more site-visits including continuous random checks in the applying institution.

Under system accreditation, responsibility for higher education quality is transferred from external quality assurance agencies to internal quality assurance units. For the Academic Community of a university, as the technical developer of educational programs, it will rarely make a difference to whom they are accountable – to the own university quality management or

<sup>43</sup> Art. 7 (2) of the Act about the Foundation Accreditation Council. See footnote 35.

<sup>44</sup> Art. 3 (8) and Art. 6 (4) of the Interstate Accreditation Treaty. See footnote 32.

<sup>45</sup> See the explanation to the draft law regarding the Interstate Accreditation Treaty in North Rhine-Westphalia, p. 2. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-494.pdf>. Accessed Jan 19<sup>th</sup> 2018.

<sup>46</sup> See the Saxon Higher Education Development Plan, p. 28. [http://www.studieren.sachsen.de/download/HEP\\_2025\\_1.pdf](http://www.studieren.sachsen.de/download/HEP_2025_1.pdf). Accessed Jan 22<sup>th</sup> 2018.

external experts. Both will intervene in the Academic Freedom of the scientists.

System accreditation finally does not save cost for universities. Additionally to the fact that two fees are to be paid under the new system, one to the Accreditation Council and one to the agency, higher education institutions must finance an internal quality assurance unit which must be sustainable. That means to transfer human resources in the quality assurance which urgently will be needed for teaching and research. But, only from checking, quality will not increase.

Furthermore, often is claimed that system accreditation is a particularly suitable instrument for establishing higher education institutions' responsibility for their own study programs. But, content-related quality must also meet quality standards: quality criteria for higher education institutions can only be developed in relation to its effects on society, the economy and educational policy<sup>47</sup>.

### Experimental Clause for Alternative Procedures

The Interstate Accreditation Treaty allows an experimental procedure to secure and increase the quality in higher education<sup>48</sup>. These procedures have to be confirmed by the Accreditation Council and the *Bundesland* in which the applying university is located.

Alternative procedures can be managed without participation of an accreditation agency but on the basis of the formal as well as subject- and content-related criteria of Art. 2 (3) of the Interstate Accreditation Treaty.

Additionally, the requirements regarding a significant participation of the Academic Community must be met.

Currently, by smart rules in their statutory accreditation orders, it is the turn of the *Bundesländer* to give their universities the possibility to develop science adequate, cheap and useful alternative quality assurance procedures.

### Treatment of Traditional Degrees (Diplom)

Some of the *Bundesländer* still award the traditional German university degrees such as the *Diplom* degree. Starting with the Bologna Process and the implementation of the new

bachelor and master degrees there was a discussion how to deal with the traditional degrees in the higher education accreditation. Until its reorganization the German Accreditation Council refused the accreditation of the traditional degrees. Some of the universities used the seal of an accreditation agency instead of the Accreditation Council's seal as a quality assurance label for their *Diplom* programs.

While the negotiations about the Interstate Accreditation Treaty, presidents of six German *Bundesländer* required a reliable solution in the Specimen Statutory Order for the acceptance of the *Diplom* degree.

But, the Accreditation Specimen Statutory Order only contains an equivalence regulation. Art. 6 (3) states that in the final degree documents the university can inform about the corresponding of the *Diplom* degree with the new degrees of the bachelor-master-system. It is controversial if in this topic the Accreditation Specimen Statutory Order is consistent with the Interstate Accreditation Treaty because the treaty allows alternative degrees<sup>49</sup>.

The *Bundesländer* now must show by deviating with their statutory orders from the Accreditation Statutory Specimen Order if they stand for their traditional degrees or not.

### Academic Freedom

In the last years the *Bundesverfassungsgericht* had to deal with the Academic Freedom for several times<sup>50</sup>. In contrast to the verdict discussed in this paper the former decisions of the judges were characterized by undermining the basic right of free teaching and research<sup>51</sup>. Even though the judges now found clear words that the previous program accreditation in Germany was an infringement of the basic right from Art. 5 (3) of the German Basic Law<sup>52</sup> it is no clear statement in favor of the Academic Freedom.

<sup>49</sup> See Wiarda, *Brodkorb verliert und triumphiert*, March 17<sup>th</sup> 2017: <https://www.jmwiarda.de/2017/03/17/brodkorb-verliert-und-triumphiert/>. Accessed Jan 22<sup>th</sup> 2018.

<sup>50</sup> See e.g. the decisions of the *Bundesverfassungsgericht* in BVerfGE 128, pp. 1 et seq.; 127, pp. 87 et seq.; 126, pp. 1 et seq.; 122, pp. 89 et seq.; 111, pp. 333 et seq.

<sup>51</sup> Especially in the decisions of the *Bundesverfassungsgericht* in BVerfGE 111, pp. 355 et seq.; 126, pp. 25 et seq.

<sup>52</sup> See footnote No. 2, paragraphs 50-56.

<sup>47</sup> See [www.asiin.de/en](http://www.asiin.de/en). Accessed Jan 25<sup>th</sup> 2018.

<sup>48</sup> Art. 3 (1) No. 3 of the Interstate Accreditation Treaty. See footnote 32.

## Recent Development in Higher Education Accreditation in Germany

Since hundreds of years<sup>53</sup> the Academic Freedom has been protecting scientific activities against intervention of the state and other authorities. But although the Academic Freedom is guaranteed without limitation and only can be restricted by another basic right, it will be more and more difficult to defend it against attacks from persons who intend a reorganization of the university system with methods such as new public management, institution controlling, higher education accreditation and course evaluation by students.

Also, in many European Countries the freedom of sciences for universities, departments and/or academic staff will be guaranteed by the constitution or other law to different extents<sup>54</sup>. If accreditation becomes more and more popular in Europe and all over the world, accreditation stakeholder should be aware about the conflict with the Academic Freedom. If the persons responsible for the German accreditation system would not have been ignorant in such a way regarding the rights of the Academic Community, the higher education accreditation would not have to be reorganized which was expensive and work-intensive.

Maybe in other countries requirements for intervention in the Academic Freedom are not as high as in Germany, but a permanent attack at this important basic right has consequences for the acceptance of quality assurance measures in the whole higher education area.

At all universities accreditation costs a huge amount of money and staff resources. While preparing self-evaluation reports and documents, being present at site visits and auditions the staff of the applying university has no time for teaching and research. Why not to trust the Academic Community to develop a science adequate quality assurance method by itself which is cheaper, less work-intensive and respects the specialties of the higher education sector? Additionally, in countries with a strong state control over universities, only very less additional external quality assurance is necessary.

<sup>53</sup> To the historical development of the Academic Freedom see Hoye, *Wurzeln der Wissenschafts freiheitander mittelalterlichen Universität*, 2009, pp.19-25.

<sup>54</sup> See for more details Steinecke, *Zur internationalen Governance der Wissenschaft*, 2010, pp. 200-203, also with information to the situation regarding the Academic Freedom in non-European Countries.

But, at least, a significant participation of the Academic Community in the development of quality criteria and the accreditation procedures must be guaranteed to respect the Academic Freedom and to prevent the increasing influence of science inadequate interests in higher education.

Furthermore, until now no science based system for measuring of scientific performance has been developed. Quality on the field of higher education to much often depends on external conditions which cannot be influenced by universities or lecturers<sup>55</sup>.

Finally, it must be stated that the *Bundesverfassungsgericht* with its commitment to quality assurance in higher education privileges the students' interest for high quality teaching against the Academic Freedom. But, to make graduates fit for the job cannot be more valuable as the free development of teaching and research. Employability should only be a by-product of prospering sciences. On the question how will benefit the society from higher education it must be answered that generating self-thinking and critical graduates which are able to develop methods and to use them, has a greater value for the society than only to train someone for a job. If university will be interpreted as simple institutions for vocational training, scientist and Academic Freedom are no longer necessary and would not be more than an anachronism.

## CONCLUSIONS

The German *Bundesländer* reacted to the critic of the *Bundesverfassungsgericht* regarding the former accreditation system. Whether the reorganization of higher education accreditation did go far enough so satisfy the highest judges, remains to be seen. Anyway, for the higher education institutions in Germany nothing has significantly changed. The high workload and the high costs will remain or maybe increase although everyone knows that a science needs resources to generate output and success.

Also, in the new accreditation system the Academic Freedom continuously will be under attack. Unfortunately, the *Bundesverfassung sgericht* in its verdict of 2016 was not able to sensitize the accreditation stakeholder for the

<sup>55</sup> Klein/Rosar, *Das Auge hört mit*, Zeitschrift für Soziologie 2006, pp. 305 et seq. Stifter, *Qualitätssicherung und Rechenschaftslegung an Universitäten*, p. 279, 2001.

needs and the rights of the Academic Community.

They still did not recognize that the Academic Freedom is a valuable basic right what is worth to be protected in the interest of the sciences but especially for the good of the society.

The other European states but also higher education systems worldwide would be well advised to use quality assurance methods in their higher education institutions in a very moderate extent to avoid such a verdict like this from the *Bundesverfassungsgericht*.

Thus, an expensive and work-intensive reorganization of the running systems will be prevented and the acceptance of all quality assurance methods in higher education will not be risked.

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