

## The University in a Public Law Foundation - a Sustainable Model?

by Christoph Conrads<sup>1</sup>

In the next few years, universities will be a burden for politicians. They can expect little support and little understanding from the public.  
( H.-L. Schreiber<sup>2</sup>)

Some of the author's most interesting and formative years<sup>3</sup> are owed to the fact that the jubilarian not only made a name for himself as a researcher and teacher but was also dedicated to outstanding offices and functions of science organisation and administration.<sup>4</sup> Furthermore, *Hans-Ludwig Schreiber* continuously published articles on issues of university law and university development. Reason enough, therefore, to dedicate the following article on the current university reform of Lower Saxony based on a practical perspective to the honoured jubilarian.

### I. The Law on the University Reform in Lower Saxony

For the universities of applied sciences of Lower Saxony, a new University Law pertaining to the Universities of Lower Saxony (hereafter NHG) came into force on 1st September 2002, and for all other universities on 1st October 2002, as Article 1 of the Law on the University Reform in Lower Saxony.<sup>5</sup>

<sup>1</sup> The author was employed as Head of Department for University Law with a focus on university reform in the central administration of the Georg-August-Universität Göttingen (University of Göttingen) upon completion of the manuscript; he is now entrusted with the business management of the Georg-August-Universität Stiftung Öffentlichen Rechts (University of Göttingen Public Law Foundation). This article is not to be considered as an official statement.

<sup>2</sup> *Schreiber*, Legal sciences course of study in Osnabrück, law and politics 1981, p. 14 ff, 17.

<sup>3</sup> The following are named as important: under secretary of state in the Ministry for Science and Culture of Lower Saxony (1987 - 1990), (vice) president of the Universität Göttingen ([1981 - 1983] 1992 - 1998), [acting] chair of the Board of Trustees of the Volkswagen Foundation ([1994-1999]) 1989-1994) as well as chair of the Saxon University Structure Commission (Hochschulstrukturkommission) (1990 - 1993). For presidency see also *Conrads/Heuer/Jungeblodt/Rosenau*, Hans-Ludwig Schreiber - Präsident zwischen Barock und Postmoderne, Georgia Augusta 69, November 1998, p. 5 ff as well as *Hoffmann*, Hans-Ludwig Schreiber - der >pragmatische< Präsident, Georgia Augusta 69, November 1998, p. 15 ff.

<sup>4</sup> In particular as a personal assistant to the President of the Universität Göttingen 1994 - 1996.

<sup>5</sup> Nds. GVBl (*Lower Saxony Law and Ordinance Gazette*) No. 19/2002 from 04.07.2002, p. 286 ff. The Advisory Board appointed by the state parliament of Lower Saxony had already presented its recommendations on the introduction of University Councils in March 1997, whereby recommendation No. 8 dealt with a change in the legal form of the university, for example the transfer of responsibility for the university into a Foundation, according to *Ipsen*, Eine neue Hochschulverfassung für Niedersachsen?, NdsVBl. 1997, p. 184 ff. On 22.12.1999, the joint working group of the State University Conference of Lower Saxony (LHK) and the Ministry for Science and Culture of Lower Saxony presented their recommendations on the new draft of the NHG. It recommended optionally providing for alternative legal forms for universities and their maintaining bodies without stipulating these forms in detail. The model of a "sponsored Foundation" for universities was described as "particularly suitable". They found that it is characterised by a duality of academic cooperation on the one hand and the necessary infrastructure of the providing responsible organisation (Foundation) on the other hand. A

Please note that this is a translation of the original version published in: Ameling, Knut/ Beulke, Werner/ Lilie, Hans/ Rosenau, Henning/ Rüping, Hinrich/ Wolfslast, Gabriele (editors), Criminal Law, Biological Law, Legal Philosophy. Publication for Hans-Ludwig Schreiber on his 70th birthday on 10th May 2003, Heidelberg 2003, pp. 1003-1014.

It is continuously emphasised<sup>6</sup> that the "completely new" NHG, which focuses on the privatisation of universities,<sup>7</sup> renounces numerous sentences, approval authorisations and restrictive regulations<sup>8</sup> and is therefore around two thirds shorter than the previous University Law<sup>9</sup>.<sup>10</sup> Nevertheless, a recent investigation by the Association for the Promotion of Science in Germany (*Deutscher Stifterverband*), which compares the German state university laws in terms of "organisational autonomy, legal experimentation and opening clauses" due to "too many statutory regulations" with other university laws, awards this reform law<sup>11</sup> last place.<sup>12</sup>

Be that as it may, it is undeniable that the new NHG offers German universities the option of transferring into the responsibility of a Public Law Foundation for the first time.<sup>13</sup>

---

requirement for the establishment of a "sponsored Foundation" is the provision of an annual, guaranteed government donation to finance the basic requirements; this would give the universities permanent planning security. Point 10. of the innovation pact II, concluded on 17. 05.2000 by the Minister President of Lower Saxony and the chairman of the LHK, following up their joint declaration from 17.09.1997 on an innovation initiative for the period of 2002-2006, plans to make the responsibility for all universities of Lower Saxony, including human medicine institutions, legally independent, whereby the establishment of independent Public Law Foundations should be considered first and foremost. (The LHK later appeared unconvinced by the statement based solely on the public (revenue-based) Foundation (see its statements on the draft bills from November 2000, p. 8 under 4. (1) and p. 12 under 4. (6) a.E. as well as from February and November 2001)). On 22.09.2000, the Ministry for Science and Culture of Lower Saxony (hereafter: Ministry) presented the draft bill to the reporters and on 11.12.2000 presented the consultation draft of the Law on the University Reform in Lower Saxony. The corresponding government draft (hereafter NHG gov. draft) was integrated in the state parliament of Lower Saxony on 13.06.2001 as state parliamentary printed matter 14/2541 and passed on 12.06.2002.

<sup>6</sup> Legislative intent NHG gov. draft, p. 60.

<sup>7</sup> Legislative intent NHG gov. draft, p. 60. *Ipsen*, Hochschulen als Stiftungen des öffentlichen Rechts?, NdsVBl. 2000, p. 240 ff, 242 recognises a slight "additional separation from the government" in the legal independence of the maintaining body of the university. According to *van Lith*, state parliament of North-Rhine Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 42, this would definitely have a "positive" effect. However, according to *Koch*, Verfassungsfragen eines neuen Hochschulrechts für Niedersachsen, Wissenschaftsrecht 34 (2001), p. 57 ff, 74, separation from the government has no recognisable constitutional value and consequently does not automatically associate with the self-administration of the university.

<sup>8</sup> Also *Ipsen*, NdsVBl. 1997, p. 184 ff, 185 under III. and also *Ipsen* in NdsVBl. 2000, p. 240 ff, 241 stated, in reference to the dual function of the university according to Article 58, para. 1, clause 1 of the HRG (University Framework Law) that in the past, the character of the university as an institute emerged stronger than that of its legal independence.

<sup>9</sup> Law pertaining to the Universities of Lower Saxony in the version from 24.03.1998 (Nds. GVBl. p. 300), recently amended by Article 8 of the law from 18.12.2001 (Nds. GVBl. p. 806).

<sup>10</sup> According to *Oppermann*, the minister for Science and Culture of Lower Saxony when introducing the corresponding government draft to the parliament; state parliament of Lower Saxony, Stenographic report, 14th legislative period, 79th meeting, p. 7783 and the academic speaker of the SPD fraction in the state parliament of Lower Saxony *Domröse* when passing the NHG gov. draft; state parliament of Lower Saxony, Stenographic report, 14th legislative period, 109th plenary meeting, p.2.

<sup>11</sup> Still in its version as NHG gov. draft.

<sup>12</sup> Association for the promotion of German science, quality through competition and autonomy - comparison of state university laws, positions in August 2002, p. 11 under 2.3, 27. On the whole, however, in this investigation the new NHG achieves an excellent assessment in the leading group. Even in comparison with the co-nominations in the leading group (Baden-Württemberg, Bremen, Hamburg and Hesse) the Law of Lower Saxony distinguishes itself by an outstanding number of nominations in the "best-law group". What should be even more important than the shortening of the law is the fact that the Foundation model of Lower Saxony is considered to be an embodiment of the "new management model", which clearly separates the areas of responsibility of politics and administration; *von Brünneck*, advisory opinion on the on the consultation draft of a law on the university reform in Lower Saxony, published on behalf of the state of Lower Saxony, represented by the Ministry for Science and Culture of Lower Saxony, p. 60 as well as in detail, *Mehde*, Neues Steuerungsmodell und Demokratieprinzip, Hamburger Rechtsstudien, published by the members of the Legal Science department at the University of Hamburg, issue 92, Berlin, 2000, in particular p. 85 ff. 128 f.

<sup>13</sup> See the legislative intent NHG gov. draft, p. 60 below. With less than ten regulations (Articles 55-63 of the NHG), the fourth chapter of the first part of the NHG on the responsible Foundation emphasises the stressed shortness. This is noteworthy since the Establishment Law (*Errichtungsgesetz*) represents the most important legal basis of the Foundation

## II. The Foundation Model

According to Article 55, para. 1 of the NHG, a university can be transferred upon its own request<sup>14</sup>, to be decided upon by the Senate of the University with a majority of two thirds of its members, to the responsibility of a Public Law Foundation by way of state government regulation.<sup>15</sup>

The charitable<sup>16</sup> Foundation shall maintain and promote the university in its capacity as a Public Law Corporation.<sup>17</sup> The statutory aim of the Foundation is to increase the quality of research, teaching and studies and further education at the university through a self-responsible and efficient use of the funds transferred to the Foundation; Article 55, para. 2 NHG.<sup>18</sup>

The state legislator has stated that the constitutive basic assets<sup>19</sup> for a Foundation should represent the property in state ownership which is required to run the university supported by the Foundation; Articles 56, para. 1, 55, para. 1 clause 4 NHG.

According to Article 59, para. 1 of the NHG, the organs of the Foundation are the Presidential Board of the University in its function as Executive Committee of the Foundation as well as the Foundation Council. The Presidential Board primarily manages the ongoing business of the Foundation and prepares the resolutions of the Foundation Council, which it also implements.<sup>20</sup> In accordance with

---

model given the codifying incompleteness of the Law on Public Foundations; see *Frhr. v. Campenhausen*, in: Seifart (intent)/CAMPENHAUSEN (Publ.), *Handbuch des Stiftungsrechts*, 2. edition, Munich, 1999, Article 17 marginal note 8.

<sup>14</sup> The state government first managed to meet the requirement of legally defining the need for an application of the university with its NHG gov. draft. For this purpose, when introducing the NHG gov. draft into the state parliament, Minister *Oppermann* stated that the Foundation model is "optional" and is not a "mass offer" but an offer to "the best and fittest"; state parliament of Lower Saxony, 14th legislative period, 79th meeting, p. 7785. Also, according to *Domröse*, the majority of the universities in Lower Saxony will remain in governmental control in the long term. The state government will only transfer a small number of the universities in Lower Saxony into the responsibility of a Foundation; state parliament of Lower Saxony, 14th legislative period, 79th meeting, p. 7792. Admittedly, the legislative intent for the NHG gov. draft on p. 61 states that the privatisation of the university will receive a completely new impetus, the more universities could withdraw from government responsibility and change into the responsibility of a Foundation. For North Rhine-Westphalia, *Jubelius* asks the interesting question of why unequal opportunities at the expense of the university would be accepted in a conventional maintaining body if the reform can obviously not be exhaustive; state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 5.

<sup>15</sup> A legally responsible Public Law Foundation is meant here as an element of indirect government administration; see *Andrick/Suerbaum*, *Stiftung und Aufsicht, Dogmatik - Stiftungspraxis - Rechtsformbestrebungen*, Munich 2001, p. 27.

<sup>16</sup> Article 55, para. 6 of the NHG. Charitable Foundations are used for public welfare and for purposes of general interest, they directly promote public purposes, for example in the fields of science. In order to distinguish them from private Foundations, they are called "public" Foundations; *Andrick/Suerbaum*, *Stiftung und Aufsicht*, p. 28 f.

<sup>17</sup> According to *Hagebölling*, Constitution of Lower Saxony, commentary, Wiesbaden, 1996, Article 5 under 3., the institutional guarantee of Article 5, para. 2 of the Constitution of Lower Saxony refers to universities and other academic institutions under state responsibility ("maintains") as well as third parties ("promotes"). *Geis* agrees with this, Advisory opinions of the cabinet draft of the law on the university reform in Lower Saxony (NHG) from 29.05.2001, published on behalf of the German Association of University Professors and Lecturers, Bonn, November 2001, p. 73; *Koch*, *WissR* 2001, p. 57 ff, 63. The law leaves the question as to what extent a Foundation should be able to "maintain" and "promote" the university it supports unanswered. Article 55, para. 2, clause 1 of the NHG is of fundamental significance for the purpose of the Foundation as the Foundation element commanding the Foundation assets and organisation as well as the regulation according to Article 55 para. 1, clause 1 of the NHG; see *Andrick/Suerbaum*, *Stiftung und Aufsicht* p. 16.

<sup>18</sup> According to Article 57, para. 2 NHG, the economic management and accounting of the Foundation are based on commercial principles; the State Budget Regulation of Lower Saxony is declared as inapplicable with the exception of a few paragraphs (Article 57, para. 6 NHG).

<sup>19</sup> *Andrick/Suerbaum*, *Stiftung und Aufsicht*, p. 18 f.

<sup>20</sup> Article 61, para. 1 and 2 of the NHG.

Please note that this is a translation of the original version published in: Amelung, Knut/ Beulke, Werner/ Lilie, Hans/ Rosenau, Henning/ Rüping, Hinrich/ Wolfslast, Gabriele (editors), Criminal Law, Biological Law, Legal Philosophy. Publication for Hans-Ludwig Schreiber on his 70th birthday on 10th May 2003, Heidelberg 2003, pp. 1003-1014.

Article 60, para. 1 of the NHG, in principle<sup>21</sup> the Foundation Council consists of seven members: five honorary persons, who are familiar with the university system and who do not belong to the university, primarily from the fields of economy, science and culture, a representative of the Senate of the University and a representative of the Ministry for Science and Culture of Lower Saxony. The Foundation Council advises the university, resolves matters relating to the Foundation which are of significance and supervises the work of the Presidential Board.<sup>22</sup>

The Foundation has capacity as a principle in terms of Article 2, para. 1 of the Civil Service Code of Lower Saxony; for example, the Foundation can appoint professors (Article 58, para. 1, 2, clause 4 NHG).

The legislator made the (first) regulations on the protection of vested rights for the employees in Articles 55, para. 1, clause 3; 58, para. 4 NHG.

The Foundation deals with the government matters under its own responsibility according to Article 47, clause 2 of the NHG.<sup>23</sup> The law only explicitly mentions professional supervision in Article 62, para. 2 of the NHG as regards the implementation of Federal laws and the exercising of legal supervision of the university by the Foundation (Article 55, para. 4 of the NHG). The Foundation is solely subject to legal supervision by the ministry according to Article 62, para. 1 of the NHG.

### **III. "Releasing" the University through the Foundation model?**

If the legislator is granted more freedom in terms of the organisation of the university (generally considered as a legal public law corporation as well as a government institution ((dependent institute))<sup>24</sup>, which is not restricted by a perpetuate protection of certain arrangements of academic self-administration<sup>25</sup>, the reform model of Lower Saxony may not oppose the superior protected right to academic self-administration as an element of academic freedom according to Article 5, para. 3 of the Constitutional Law (GG), Article 58, para. 1, clause 3 of the HRG (University Framework Law) and Art. 5, para. 3 of the Constitution of Lower Saxony.<sup>26</sup>

---

<sup>21</sup> In the fourth chapter on the Public Law Foundation, the NHG gov. draft provided for statutory regulations for the structure of responsibilities and organs of the Foundation (different in universities without the department of human medicine as well as the with the department of human medicine) with a transfer of the Universität Göttingen into a public law Foundation (Article 57, para. 2 ff NHG gov. draft). These are no longer in the NHG, this should now be regulated by way of an order (Articles 46, para. 2; 55 para. 1 NHG). If the organisation and the definition of essential responsibilities of the Foundation comes under the term Foundation establishment, this will appear legally questionable from the perspective of legal reservations; see *Andrick/Suerbaum*, Stiftung und Aufsicht, p. 80 ff.

<sup>22</sup> Article 60, para. 2 NHG.

<sup>23</sup> Article 55, para. 3 NHG.

<sup>24</sup> Article 58, para. 1, clause 1 and 2 of the University Framework Law (HRG). For the dualistic conception see also *Kimminich*, in: Flämig/Kimminich/Krüger/Meusel/Rupp/Scheven/Schuster/Stenbock-Fermor (Publ.), Handbuch des Wissenschaftsrechts, volume 1, 2. edition, Berlin, 1996, p. 231 ff; *Bethge*, in: Achterberg/Püttner/Würtenberg (Publ.), Besonderes Verwaltungsrecht, volume 1, 2. edition, Heidelberg, 2000, p. 1042 ff, 1072 ff.

<sup>25</sup> *Geis*, Rechtsgutachten, p. 22; *von Brünneck*, Rechtsgutachten, p. 30. f with further evidence.

<sup>26</sup> *Geis*, Rechtsgutachten, p. 18. The maintaining body of the right to self-administration is the individual university plus its subdivisions; *Bethge*, in: Achterberg/Püttner/Würtenberg (Publ.), Besonderes Verwaltungsrecht, p. 1042 ff, 1078; *Geis*, Rechtsgutachten, p. 22. The Foundation as an institute of indirect government administration, the statutory task of which is not direct researching and teaching work itself, is confronting the university and is the addressee of Article 5, para. 3 of the GG; *von Brünneck*, Rechtsgutachten, p. 39; *Geis*, Rechtsgutachten, p. 23 with further evidence. Article 55 paragraphs 3 to 5 of the NHG show that there is relationship of subordination between the university and Foundation with a typical fundamental rights risk potential at the expense of the university.

If, according to this, a university refuses to establish itself as a Foundation<sup>27</sup>, there is no reason why the university cannot be designed as a public law corporation without "the constraints of the government institution".<sup>28</sup> Does the reform law of Lower Saxony "release" the university under the responsibility of a Foundation in this sense? This question cannot be explained on a purely academic level. Given the woeful under-financing of universities, the legislator noticeably aims for the Foundation to receive the assets transferred to it and for these assets to multiply through the acquisition of additional donations, primarily from private persons so that it can increasingly fulfil its purpose using its own means over the long term.<sup>29</sup> However, the less certain the design of the legislative intent is in confirming that the autonomy of the corporation of the university is "expanded and supplemented by that of its maintaining body"<sup>30</sup> through its transfer into a public law Foundation, the sparser the endowments, donations and other additional donations from private persons would be for the Foundation University.

Whether and to what extent the Foundation model actually achieves autonomy of the university and Foundation in terms of the propagated privatisation is to be investigated in the following using an example overview of the assets of the Foundation, the origins of the Presidential Board as well as legitimization requirements for the decisions of the Foundation Council.

#### **IV. The Provision of Assets for the Foundation**

According to Articles 56, para. 1, 55 para. 1, clause 4 NHG, the Foundation assets (with which the Foundation purpose should be met)<sup>31</sup> should consist of the property which is required to run the university supported by the Foundation. In order to be able to finance the annual total budget, for example approx. €634 million<sup>32</sup> for the Universität Göttingen, completely from the revenue of Foundation assets, basic assets amounting to over €12 billion would be required.<sup>33</sup> At approx. €30

<sup>27</sup> According to *Reich*, Higher Education Framework Act, commentary, 7th edition, Bad Honnef, 2000, Article 58 marginal note 2; *Ipsen*, NdsVBl. 2000, p. 240 ff, 242. A. A. *Bethge*, in: Achterberg/Püttner/Würtenberg (Publ.), *Besonderes Verwaltungsrecht*, p. 1042 ff, 1073, accordingly, universities do not necessarily have to have a corporation status and can also be established as public law Foundations. As regards the issue of to what extent a material entitlement to a fundamental right can be accepted for a public law Foundation which carries out governmental competencies as the maintaining body of indirect government administration, see *Andrick/Suerbaum*, *Stiftung und Aufsicht*, p. 75 ff, 93 with more evidence.

<sup>28</sup> *Reich*, Article 58, marginal note 2. On the superfluousness of "institutional characteristics", see also *Bethge*, in: Achterberg/Püttner/Würtenberg (Publ.), *Besonderes Verwaltungsrecht*, p. 1042 ff 1073.

<sup>29</sup> Justification of the NHG gov. draft, p. 61. The Minister *Oppermann* assumes that in Germany private assets to the amount of 180 billion Euro are inherited each year - according to his assessment, a mere 1% of this would suffice to remove the financial misery of German universities; state parliament of Lower Saxony, 14th legislative period, 109th plenary meeting, p. 14. However, also see *Palandt*, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 13 as well as the comparison with the USA in *De Vivanco*, Was können die beiden Systeme voneinander lernen?, in: Breinig/Gebhardt/Ostendorf (Publ.), *Das deutsche und das amerikanische Hochschulsystem, Bildungskonzepte und Wissenschaftspolitik*, Münster, 2001, p. 209 ff, 209.

<sup>30</sup> Legislative intent for NHG gov. draft, p. 62.

<sup>31</sup> Article 55, para. 2, clause 1 NHG.

<sup>32</sup> Total volume of the Universität Göttingen without the department of Human Medicine in 2001: approx. €220 million, total volume of the Human Medicine department in 2001: approx. €414 million.

<sup>33</sup> As a comparison: The TU Braunschweig would need basic assets amounting to approx. €3 billion in order to cover its financial requirement; *Mundlos*, state parliament of Lower Saxony, 14th legislative period, 79th plenary meeting, p. 7786. For the University of Hamburg with a current annual economic plan amounting to approx. €209 million, basic assets of approx. €4 billion would be necessary; Senator for Science and Research of the Free and Hanseatic City of Hamburg (Publ.), *Möglichkeiten und Grenzen der rechtlichen Organisation von Hochschulen*, Hamburg, October 2001, p. 56.

Please note that this is a translation of the original version published in: Amelung, Knut/ Beulke, Werner/ Lilie, Hans/ Rosenau, Henning/ Rüping, Hinrich/ Wolfslast, Gabriele (editors), Criminal Law, Biological Law, Legal Philosophy. Publication for Hans-Ludwig Schreiber on his 70th birthday on 10th May 2003, Heidelberg 2003, pp. 1003-1014.

billion, the total expenses for sufficient basic Foundation assets for all universities of Lower Saxony would exceed the entire state budget by one-and-a-half times.<sup>34</sup> In comparison, all state property allocated to the universities in Lower Saxony only total an overall value of approx. €2.5 billion.<sup>35</sup>

The size of the sums and values mentioned alone highlights that the property in the ownership of the Foundation concerned which is required to run the respective university does not come close to allowing even the operation of a single university in Lower Saxony to be financed by the revenue from the basic assets of a Foundation alone.

In accordance with this, the legislator plans a so-called "revenue-based Foundation" (*Einkommenstiftung*)<sup>36</sup> which, according to Article 56, para. 3, clause 1, No. 1 NHG, obtains the funds (for the time being) necessary to serve the purpose of the Foundation first and foremost from an annual financial subsidy from the state of Lower Saxony.<sup>37</sup> The law mentions this source even before the revenue from the assets.

However, allowing the efficiency of this type of Foundation to depend on a regular financial subsidy is an ideal way to affect the Foundation autonomy vis-a-vis the lenders and to bring this form of Foundation closer to that of an institution.<sup>38</sup> Given the expected provision of assets for the Foundation, in the hearing on the reform law, the Universität Göttingen therefore described the question of whether the privatisation and economic independence of the university presented in the new university law could also be experienced in reality as essential.<sup>39</sup>

## V. The Origins of the Presidential Board

According to the reform law, the members of the Presidential Board are nominated or appointed<sup>40</sup> upon the proposal of the Senate by the Ministry<sup>41</sup> for universities under the responsibility of the government and by the Foundation Council<sup>42</sup> for universities under the responsibility of a foundation.

<sup>34</sup> According to *Mundlos*, in the scope of the workshop "Von der Gruppen- zu der Stiftungsuniversität?" at the TU Clausthal (15-17.02.2001).

<sup>35</sup> See *Palandt*, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 12; *Mundlos*, state parliament of Lower Saxony, 14th legislative period, 79th plenary meeting, p. 7786.

<sup>36</sup> For the term see *Hof*, in: Seifert (intent)/Campenhausen (Publ.), Handbuch des Stiftungsrechts, Article 8, marginal note 30.

<sup>37</sup> According to *van Lith*, this type of financing of the Foundation as an independent legal person is no longer a part of the government budget in the narrowest sense; it is considered more as a subvention which could be subjected to considerably smaller cutbacks than the financing of direct administration: *van Lith* state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for science and Research on 18.01.2001, p. 43.

<sup>38</sup> *Hof*, in: Seifert (intent)/Campenhausen (Publ.), Handbuch des Stiftungsrechts, Article 8, marginal note 30. As regards the connection between funds and autonomy, *Koch* has already stated that for the university, the self-administration of the university is an autonomy which excludes "effective financial decisions" due to the traditional lack of its own sources of income and the resulting dependency on government funds; *Koch*, WissR 2001, p. 57 ff, 65.

<sup>39</sup> *Kern*, state parliament of Lower Saxony, minute of the public part of the 66th meeting of the Committee for Science and Culture on 29.11.2001, p. 22. See also *Palandt*, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 13, who considers the reshaping of the Foundation organisation as a legally independent institution to be "fundamentally outdated" and sees "new opportunities" in the normally ninety percent government financing of the current expenses. For more on the high percentage of the government university financing in Germany, see *De Vivanco*, in: Breinig/Gebhardt/Ostendorf (Publ.), Das deutsche und das amerikanische Hochschulsystem, p. 209 ff, 209.

<sup>40</sup> Articles 38, para 2, clause 1; 39 clause 1 of the NHG.

<sup>41</sup> Article 48. para. 2, clause 2, No.1 of the NHG.

<sup>42</sup> Article 60, para. 2, clause 2, No. 1 of the NHG.

Please note that this is a translation of the original version published in: Amelung, Knut/ Beulke, Werner/ Lilie, Hans/ Rosenau, Henning/ Rüping, Hinrich/ Wolfslast, Gabriele (editors), Criminal Law, Biological Law, Legal Philosophy. Publication for Hans-Ludwig Schreiber on his 70th birthday on 10th May 2003, Heidelberg 2003, pp. 1003-1014.

According to the legislative intent, the Ministry or the Foundation Council hereby decide upon the transfer of office "on its own authority".<sup>43</sup> According to the old law, the appointment of the university management was the responsibility of the Council as an organ of the university - the Ministry only had to determine whether formal statutory application requirements were met for each application.<sup>44</sup>

A decision by the Ministry "on its own authority" upon the proposal by the Senate of the university under government responsibility is in striking contrast to the legislative intent,<sup>45</sup> according to which the state of Lower Saxony wants to renounce sovereign powers with the reform law.<sup>46</sup> A pressure to compromise is also institutionalised for the university under Foundation responsibility, which runs the risk of the Senate ultimately only submitting "enforceable" personnel proposals to the Foundation Council. The Senate's right to final decision can therefore be assessed as not enforceable in a case of doubt.<sup>47</sup>

Although the justification for this given by the legislator (corporate, social and democratic legitimisation of the person(s) concerned)<sup>48</sup> may indeed refer to a correctly identified problem within the framework of the foundation model: securing a legitimisation and responsibility connection over the state government and parliament to the nation as sovereign, it is incorrect for the university as a public law corporation, and in particular for the university under government responsibility. The fact that, according to the legislator, in the foundation model, the Presidential Board is both an organ of the university as well the Foundation in a personal union, cannot constitute a convincing reason for restricting, or even suppressing the effective composition of the university management by the corporation members as a constitutive condition for the presence of university self-administration.

Allowing the Ministry and/or Foundation Council to have its own right to make substantive decisions as regards the composition of the members of the Presidential Board violates the right of the university to academic self-administration,<sup>49</sup> meaning that the Articles 48, para. 1; 60, para. 2, clause 2 No. 1 NHG are to be constitutionally applied against the legislative intent in such a way that the office *will* also be transferred in accordance with the Senate proposal.<sup>50</sup>

---

<sup>43</sup> See legislative intent on the NHG gov. draft p. 81.

<sup>44</sup> Articles 87, para. 1, clause 1; 89 para. 1 of the NHG and Article 87 para. 3, 4 of the NHG.

<sup>45</sup> NHG gov. draft, p. 62.

<sup>46</sup> Koch, WissR 2001, p. 57 ff, 60 f.

<sup>47</sup> Koch, WissR 2001, p. 57 ff, 78.

<sup>48</sup> Legislative intent NHG gov. draft, p. 81.

<sup>49</sup> The Court of Auditors of Lower Saxony, statement on the law on the university reform in Lower Saxony (hearing) from 27.02.2001 (AZ: 3.1-70004), p. 11 under 23, also considers the monitoring of the Presidential Board by the Foundation Council according to Article 60, para. 2, clause 1 NHG as a non-justified intervention in the university's right to self-administration.

<sup>50</sup> Koch, WissR 2001, p. 57 ff 80. The legislator wants to counteract the criticism that the new NHG only insufficiently plans organisational securities of academic self-administration with the expert statements, *Wielands*, Constitutional matters of a draft of a law on the university reform in Lower Saxony, brief reports on behalf of the Ministry for Science and Culture of Lower Saxony, March 2001, *passim*, and *von Brünnecks*. As the university cannot effectively waive its protected right to self-administration by virtue of the transfer application according to Article 55, para. 1 NHG, *Geis*, Rechtsgutachten, p. 75, *von Brünneck*, Rechtsgutachten, p. 29, is not convincing when he states that possible university rights could therefore not be violated because they can only be transferred "in the legal form of a Foundation" upon its application. According to *von Brünneck*, Rechtsgutachten, p. 15, provided the law is not opposed to it, the constitution could assign further powers to the Senate by using the freedom granted legally granted to it. Furthermore, according to *von Brünneck*, Rechtsgutachten, p. 19, only the constitution should, for example, "counteract" possible misuse of powers of the Presidential Board in appointment procedures through constitutional regulations. However, it cannot only depend on whether a university secures its self-administration in a certain way through its constitution so that, as a result, legal formality can be certified for the Foundation model with its typical risk situation at the expense of the university. This cannot be convincing, after-all it is the Foundation Council as an organ of the Foundation based on fundamental rights which is the issuing authority for the constitution (Articles 62, para. 4, clause 1; 41 para. 1, clause 3 NHG). What *Ipsen* exposed for the University Council is also noteworthy

## VI. Legitimation Requirements for Decisions of the Foundation Council

The university under government responsibility still subjects the law in Articles 51, para. 1, clause 1; 47 NHG notwithstanding the legislative intent (according to which the state of Lower Saxony wants to renounce sovereign powers<sup>51</sup> given the "target agreement" as a new management tool) to professional supervision in government matters. If this is unavoidable in the case of conventional, direct government responsibility, the following statement from *Geis* on the foundation model applies: according to his opinion, professional supervision has *not* become obsolete for universities under the responsibility of a Foundation. The transfer of tasks according to Article 55, para. 3 NHG does not also ignore the power to exercise professional supervision as a transfer of tasks does not also contain the corresponding power to intervene.<sup>52</sup> Even those who want to find comfort in the fact that the expression "own tasks" in Article 55, para. 3 of the NHG has the same meaning as that of "own (self-administration) matters", meaning that only the area of application of government legal supervision could be questioned here<sup>53</sup>, will find themselves facing another problem. These regulatory aspects<sup>54</sup> are not congruent with the requirements of the democratic legitimization of the Foundation, i.e. the Foundation Council as an element of direct government administration.<sup>55</sup> According to *Koch*, the Foundation Council can at best be described as a "mixed legitimate committee"<sup>56</sup> given the majority of honorary members who are not associated with orders or instructions<sup>57</sup>. As a result, in terms of its decisions, which of the respective represented positions a decision is to be attributed to must remain unclear, which in turn virtually enforces organised irresponsibility<sup>58</sup> - a situation which should be eliminated with the university reform for the "group university".<sup>59</sup>

It is therefore not surprising that *von Brünneck* judges that "the Foundation University", which (in the scope of Articles 55-63 NHG) exercises government powers in its own responsibility, must remain

---

for the Foundation Council: exercising the right to grant authorisation mentioned requires sufficient legal training and jurisdiction which cannot be expected given the composition of the Foundation Council. Legal supervision activities require a competency which hardly develops through the majority decision-making of a committee; *Ipsen*, NdsVBl. 1997, p. 184 ff, 185. The factual decision-making authority of the Presidential Board, which according to Article 61, para. 1, clause 1 NHG prepares the resolutions of the Foundation Council, can appear problematic here.

<sup>51</sup> NHG gov. draft, p. 62.

<sup>52</sup> *Geis*, Rechtsgutachten, p. 88. Also *von Brünneck*, Rechtsgutachten, p.39, (only) says that in relation to the university, the Foundation carries out "a part of the previous government tasks".

<sup>53</sup> See *Bethge*, in Achterberg/Püttner/Würtenberg (Publ.), Besonderes Verwaltungsrecht, p. 1042 ff, 1081 f. The question is how, for example, matters according to Article 47, clause 2 No. 3 and 5 NHG should be "own tasks" of the Foundation. The Court of Auditors of Lower Saxony, the statement on the law on the university reform in Lower Saxony (hearing) from 27.02.2001 (AZ: 3.1-70004), p. 11 under 24. cannot understand why in accordance with Articles 55, para. 3; 47, clause 2 NHG the professional supervision should actually be omitted.

<sup>54</sup> Legal supervision in terms of a legal person of the public law with the right to self-administration, professional supervision as regards a subordinate authority.

<sup>55</sup> See also *Mehde*, Neues Steuerungsmodell und Demokratieprinzip, p. 253 ff; *Koch*, WissR 2001, p. 57 ff, 67 ff.

<sup>56</sup> In particular according to the statements from the Senate of the Universität Göttingen from 17.01.2001 and from 24.10.2001, information for university affiliates, No. 3, 1st March 2001, p. 2 ff and No. 12, 1st December 2001, p. 4 f, the Foundation Council is not a self-administration organ with sufficient legitimization through internal decision-making amongst the university members, nor is it an organ of democratic legitimated administration. The LHK, statement from November 2000, p. 1 f under 1.2. also considers the recognised divergence from decision-making powers on the one hand and university-specific expert competence and legitimization on the other hand to be extremely problematic for the Foundation Council. The Council of Auditors of Lower Saxony, statement on the law on the university reform in Lower Saxony (hearing) from 27.02.2001 (AZ: 3.1-70004), p. 12 under 24., speaks of "diffuse democratic legitimization".

<sup>57</sup> Article 60, para. 1, clause 3 NHG.

<sup>58</sup> *Koch*, WissR 2001, p. 57 ff, 77.

<sup>59</sup> *Oppermann*, state parliament of Lower Saxony, 14th legislative period, 79th meeting, p. 7784; *Oppermann*, state parliament of Lower Saxony, 14th legislative period, 109th plenary meeting p. 12.

Please note that this is a translation of the original version published in: Amelung, Knut/ Beulke, Werner/ Lilie, Hans/ Rosenau, Henning/ Rüping, Hinrich/ Wolfslast, Gabriele (editors), Criminal Law, Biological Law, Legal Philosophy. Publication for Hans-Ludwig Schreiber on his 70th birthday on 10th May 2003, Heidelberg 2003, pp. 1003-1014.

"bound to decisive government guidelines" in doing so. The self-responsibility and independency of instructions of the members of the Foundation Council<sup>60</sup> can only be exercised in a framework which is "predefined" by the legislator, regulator and budget regulator as well as the Ministry.<sup>61</sup> According to *von Brünneck*, an overall view of Articles 1, para. 3; 55-63 NHG shows that the establishment and organisation of the Foundation is fully dependent on government legal acts. The fundamental actions of the Foundation would be structured through the connection to the state university planning and the target agreements and guidelines. The ongoing management of budget funds is also considerably influenced in this way. As a result, the Foundation can only make all important decisions about its structure, its long-term planning and development as well as on its ongoing work in the scope of structural guidelines which are produced by the legislator, the regulator or by the Ministry. As regards the target agreements and guidelines, the government regulations could also cover the more specific details. The Foundation may only manage its matters "under its own responsibility" in the scope of this guideline. When considering this from a more realistic perspective, the development of a "ministerial-free environment" in the Foundation, the decision-making of which could no longer be affiliated to the government, the parliament and the nation, is excluded.<sup>62</sup>

*Geis* also considered that restricting the independency on instructions to the legal supervision is, in principle, only possible if the law itself provides for a strong connection without its own room for manoeuvre (associated administration). However, if the law does not contain more specifically defined powers to act i.e. discretionary powers<sup>63</sup>, an unrestricted responsibility i.e. independency of instructions is fundamentally essential in order to guarantee the required legitimization of Foundation Council decisions.<sup>64</sup>

An essential question is whether it can be excluded that, in the scope of the foundation model, the Ministry turns the work of the Foundation in relevant areas into a "binding administration"<sup>65</sup> using target agreements and guidelines<sup>66</sup> where possible if the accusation of a lack of material legitimization of Foundation Council decisions cannot be opposed.<sup>67</sup> If this question cannot be affirmed with certainty, this should undermine an important incentive from the university perspective to transfer into the responsibility of a Foundation.<sup>68</sup>

---

<sup>60</sup> Article 60, para. 1, clause 3 NHG.

<sup>61</sup> *von Brünneck*, Rechtsgutachten, p. 60 ff.

<sup>62</sup> *von Brünneck*, Rechtsgutachten, p. 62.

<sup>63</sup> Given the broad assignment of tasks and competencies to the Foundation, *Geis*, Rechtsgutachten, p. 90, attests that the Foundation has an area of responsibility which is almost blank. The corresponding standards for the Foundation Council and the Presidential Board as organs of the Foundation are also not defined as final and binding but open up significant room for manoeuvre.

<sup>64</sup> *Geis*, Rechtsgutachten, p. 89 ff.

<sup>65</sup> Also Article 1, para. 3 NHG would probably not offer any reliable protection against this.

<sup>66</sup> In other words: using government instructions.

<sup>67</sup> In this connection, *von Brünneck*, Rechtsgutachten, p. 62, even expects "an implementation of the government responsibility vis-a-vis the university".

<sup>68</sup> Also according to *Göke*, The management of universities using target agreements, manuscript of a presentation at the University of Osnabrück from 11.06.2002, p. 17, the tool of target agreements could act as a "Trojan Horse" with a "professional government influence" on the Foundation. The legislative intent of the NHG gov. draft, p. 100 is noteworthy here: "Professional supervision... is partially exercised over the Foundation."

## VII. Conclusion

The foundation model of the law on the university reform in Lower Saxony: does it set the university environment in motion<sup>69</sup> or does it not leave the universities in peace<sup>70</sup>? *Battis* has already clearly expressed the latter point: "A public Foundation is completely useless. [...] With all respect, the only winners in this would be the bureaucrats again."<sup>71</sup>

Being able to name the Lower Saxony foundation model a model for success, is, on the one hand, a question of effectively overcoming the discrepancy between the university excess demands and under financing.<sup>72</sup> "Privatisation" without sufficient funding of the Foundation would be, as *Rawert* described it, "fraudulent labelling".<sup>73</sup>

If, on the other hand, a convincing solution for the legal difficulties shown does not develop, this would not simply mean (as bad as it is) being left standing halfway. A foundation model in the form of a government dominated "institutional model", in which the university also has to carry out tasks which are not its own<sup>74</sup> under the responsibility of a Foundation, would not only be entirely unattractive for private funders but also create a serious competitive disadvantage for the university concerned.

---

<sup>69</sup> Koch, WissR 2001, p. 57 ff, 57; Geis, Akademische Selbstverwaltung im Reformzeitalter, Die Verwaltung, Bd. 33, Heft 4, 2000, p. 563 ff, 563.

<sup>70</sup> Ipsen, NdsVBl. 2000, p. 240 ff, 240.

<sup>71</sup> Battis, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 7 below.

<sup>72</sup> See Ipsen, Hochschulen als Unternehmen? Zum Anhörungsentwurf eines "Gesetzes zur Hochschulreform", Forschung & Lehre 2001, p. 72 ff, 74.

<sup>73</sup> Rawert, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 10.

<sup>74</sup> In the Foundation model, the canon of government interests, tasks and obligations on the one hand, and the autonomy of the university as well as the purpose of the Foundation on the other hand must actually be in line with one another; Niederdrenk, state parliament of North Rhine-Westphalia, minute 13/165 on the 7th public meeting of the Committee for Science and Research on 18.01.2001, p. 4; Koch, WissR 2001, p. 57 ff, 77.