

General Framework

1. How is academic freedom defined and protected in the constitution or laws of your country, and what are possible limitations or restrictions?

Please provide the original citation and source, as well as a summary of relevant judicial practice, if any.

Federal law

As part of the German Basic Law, the fundamental right to academic freedom constitutes an independent and genuine right on its own – not a derivative or a subpart of more general right to freedom of expression or speech, but the acknowledgement that there is a particular social value to protecting a free and independent academia. Historically, the legislative protection of academic freedom as set out in Art. 5 III S.1 Basic Law builds on a long-standing legal tradition dating back as far as the 19th century:

Art 5 III Basic Law: "Art and science, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."

Official translation of the Basic Law (BMJ): https://www.gesetze-im-internet.de/englisch_gg/

This provision protects the freedom of universities, researchers, and academics to pursue their research, teaching, and other scholarly activities without interference from the government. It also allows for the free exchange of ideas and opinions, even those that may be unpopular or controversial.

The sphere of protection comprises all processes based on scientific methodologies, particularities and approaches striving for knowledge, its interpretation and distribution (BVerfGE 111, 333/354; 122, 89/105; 128, 1/40).

It is meant to be encompassing and broad: Following the idea of scientific pluralism, every genuine attempt to gain knowledge and scientific insights is protected, with minority opinions as well as mainstream approaches including those which ex-post turn out to be erroneous. What constitutes scientific work is based on scientific criteria as understood by the scientific community and thereby shielded from governmental interference.

As stated above, academic freedom is granted to natural persons (professors, researchers, academic staff) as well as to - in relation to the state - universities and scientific institutions as such. In addition to establishing a negative freedom of a defensive character ("to be free from interference by any state agents") it also establishes a positive right/entitlement by obliging the state to maintain, protect and promote free academia and science by providing human, financial and organizational resources. (Ruling of the Federal Constitutional Court [*Bundesverfassungsgerichtsentscheidung*] BVerfGE 35, 79/114 f; 88, 129/136 f; 94, 268/285)

In order to offer effective protection, also violations of these participatory aspects are justiciable. Besides, the state is obliged to hinder violations of academic freedom by third parties.

Limitations and restrictions

Although Art. 5 III does not set forth any explicit restrictions to academic freedom – in particular no legal proviso – academic freedom is not granted

	<p>as absolute. Instead, it may be limited or rather balanced by other constitutional provisions such as conflicting basic rights of third parties or objective concerns of constitutional status. When weighing these conflicting rights against each other, the threshold is set high: By establishing a practical concordance, the essence of both rights has to be preserved. In this context, the health and physical integrity of others or animal welfare are often cited as examples. In order to thoroughly encompass the ethical considerations that have to be taken into account when restrictions of academic freedom are determined, these processes are often supported by ethic commissions and advisory structures. Other examples are laws which serve to protect other basic rights, such as those related to defamation, hate speech, or national security.</p> <p>Additionally, academic freedom does not provide immunity from criminal prosecution for violations of the law.</p> <p>Länder laws (state laws)</p> <p>The responsibility for higher education issues in Germany as a federal republic lies with the states (Länder). Consequently, in most of the constitutions at Land level, there are corresponding rights to academic freedom, partly independent, partly referring to the basic right set forth in Art. 5 III Basic Law. Although these provisions did not come into play much so far (at least on their own), this establishes an additional level of judicial review, which serves to strengthen once again the protection of academic freedom.</p> <p>Furthermore, the Länder's respective higher education legislation provides a variety of legal identification, further definitions and protection of aspects of academic freedom. Most Länder have higher education laws in place that offer comparable provisions for the protection of the freedom of research as well as the freedom to teach and study. They define freedom of research as to include freedom of methodology, dissemination of research results, and the evaluation of the scientific process by the academic community itself.</p>
<p>2. Are academic staff, teachers, students all entitled to academic freedom?</p> <p>Does this differ by level of education? Please explain.</p>	<p>Please see answer on question 1.</p> <p>Academic staff (scientists, professors, researchers etc.) are entitled to academic freedom as long as they are involved in independent scientific research, teaching or a likewise scientific activity within their own responsibility.</p> <p>Additionally, also students can invoke academic freedom insofar as they are engaged in independent academic work (BVerfGE 55, 37/67). Yet, it is controversially discussed whether their studies and academic learning are protected by their fundamental right to academic freedom or whether these are rather part of their entitlement to education as set out in Art. 12 I Basic Law. Both approaches provide comprehensive protection for students pursuing their studies and academic education.</p> <p>Section 4 of the Higher Education Framework Act (HRG), which still forms a valid frame of reference, though it has lost its direct scope of application as a result of the federalism reform of 2006, further elaborates on what is covered by academic freedom in detail:</p> <p>Academic staff is free particularly in matters of research questions, the principles of methodology as well as the evaluation of research results and their dissemination (cf. Section 4(2) HRG). This applies equally to artistic development projects and to the practice of art.</p> <p>Freedom of teaching includes organizing courses and their content and</p>

	<p>methodological organization as well as the right to express academic and artistic teaching opinions within the framework of the teaching tasks to be fulfilled (cf. Section 4(3) HRG).</p> <p>With regards to students (in higher education), the freedom of studies as laid out in section 4 (4) of the Higher Education Framework Act (HRG) further stipulates the free choice of courses, the right to determine specializations of one's own choice within a degree program, as well as the development and expression of academic and artistic opinions.</p> <p>Most of these aspects of academic freedom are adopted in the Länder's respective higher education laws. As it would go beyond the scope of what can reasonably be represented here, reference will only be made to three examples of Länder legislation: The Länder of Bavaria, Berlin and North-Rhine-Westphalia all have higher education laws in place that include word-equivalent provisions for the protection of the freedom of research, and the freedom to teach and study.</p> <p>Bavarian Higher Education Law, 2022, Art. 3 (word equivalent) Berlin Higher Education Law, 2022, § 5 (word equivalent) Higher Education Law of North Rhine-Westphalia, 2019, § 4 (word equivalent).</p> <p>Notably, the freedom of research also includes freedom of methodology, dissemination of research results, and the evaluation of the scientific process by the academic community itself (see also State of play of academic freedom in the EU Member States, EPRS study 2023, page 82).</p> <p>Teaching at primary and secondary schools is not covered by Article 5 of the Basic Law as they do not have an academic focus. Article 7, paragraph 1 of the Basic Law applies to them instead which stipulates the following:</p> <p>(1) The entire school system shall be under the supervision of the state.</p>
<p>3. What do you consider to be</p> <p>(a) the main challenges to academic freedom, and</p> <p>(b) gaps in the legal framework for protecting academic freedom?</p>	<p>The legal protection of academic freedom in Germany is extraordinarily strong – this is reflected in the country scores achieved in the Academic Freedom Index (AFI). The AFI score for Germany is stable and among the highest scores of all EU Member States. (https://academic-freedom-index.net/) This suggests that not only the <i>de lege</i>, but also the <i>de facto</i> situation is positive. In 2021 e.g., Germany ranked first in the AFI score, indicating that of all countries included, Germany was the country where the state of play of academic freedom was assessed to be the most positive. (see <i>also</i> State of play of academic freedom in the EU Member States, EPRS study 2023, page 83)</p> <p>Yet, there are a number of worries publicly voiced in different media channels with regard to (perceived) threats to academic freedom. These include:</p> <ul style="list-style-type: none"> • The effects of a growing scepticism in politics and society towards science – a recent example can be seen in the societal responses to the involvement of scientists in the German Covid-19 measures • Populist politicians proposing to cut all funding for certain areas of research, e.g. Gender Studies. <p>Considering the importance accorded to academic freedom in the rather detailed legal framework described above, no gaps have been identified.</p>

	Any shortcomings might be attributed to an inconsistent implementation of parts of this framework.
Autonomy of educational institutions	
<p>4. Please explain the autonomy and self-governance enjoyed by educational institutions at the different tiers of education.</p> <p>Please explain what autonomy and self-governance entail.</p> <p>Are there restrictions on police or military personnel entering educational institutions? If so, please share the rules.</p>	<p>Due to the federal structures, the autonomy of schools differs from Land to Land in Germany. In general, however, measures have been taken in order to expand the legal and in parts financial autonomy of schools. As such schools respectively, their headmasters are responsible for implementing programmes, developing teaching, personnel and the organisation, managing staff and in some cases budgeting.</p> <p>While autonomy and self governance are not explicitly addressed at the federal law level, they are granted in much detail at the state level, thus forming a deliberate completion by granting participatory aspects of academic freedom. The autonomy of higher education institutions is regulated in the laws of the Länder and ranges between the guarantees of Article 5 paragraph 3 sentence 1 of the Basic Law and the obligation to state authority under Article 20 paragraph 2 of the Basic Law.</p> <p>Most Länder constitutions grant higher education institutions the right of self-governance within their legislative frameworks. These frameworks differ from Land to Land, due to the federal structure of Germany. Higher education institutions also have the right to act independently in the legal, financial, personnel and organisational fields. The exact scope of this autonomy is the subject of political discussions, not least due to the in part substantial differences between the regulatory provisions at the Land level. Thus it is repeatedly a subject of negotiations between stakeholders and Land representatives.</p> <p>Irrespective of these specifics, the principle of higher educational institutions being legally entitled to define their structures, organization and decision-making processes within the framework of legal requirements is retained. This autonomy is primarily carried out by academic self-governance bodies with the (university/HEI) senate as the highest body, consisting mainly of representatives of professors, students and staff, by various management offices, in particular the university management (rectorate/president) as well as faculty and deanery management. These regulations do not strive to protect the individual existence of a certain institution but the existence of self-governing, autonomous higher education institutions as such.</p> <p>Higher education institutions respectively their presidents have domestic authority as laid down and often further specified in their house rules.</p> <p>Military forces are generally not deployed for domestic affairs unless there is a domestic emergency as stipulated in Art. 87 a, paragraph 4 of the Basic Law.</p>
5. Please provide examples of institutional guidelines/codes of	As one of the most important stakeholders, the German Research Foundation (DFG) has published a corresponding set of recommendations: <i>empfehlungen-de-en-data.pdf (dfg.de)</i>

<p>conduct developed to ensure respect for academic freedom, including from external public or private actors.</p>	
Funding	
<p>6. How is funding, including for research, regulated? Is the process transparent, and are there any guarantees put in place to ensure respect for academic freedom?</p>	<p>Reliable funding is understood to be one of the basic prerequisites to ensure academic freedom. As the providers of higher education, the Länder guarantee basic funding for universities. In total, almost 90 per cent of funding for higher education institutions stems from government sources. The Federal Government is involved in the funding of higher education institutions by financing research projects, through special programmes (e.g. Excellence Strategy, Higher Education Pact, Tenure Track Programme, the Programme for Women Professors (Professorinnenprogramm)), and also through the construction of research facilities (approx. 15 per cent). Around 10 per cent of funding comes from private sources. This is largely a result of commissioned research, but also covers research funding from private donors (patronage) and sponsoring of university activities-.With regard to research, the structure of the German science system has to be taken into account: As a further pillar of the German science system, but not directly involved in the educational area, research institutions are funded by the federal and Länder governments both institutionally and on the basis of individual projects. Especially the institutional funding of research institutions within the framework of the Pact for Research and Innovation contributes significantly to guaranteeing and realizing academic freedom.</p> <p>In principle, (private) universities approved by the state have the same rights as public universities that are stipulated in Art. 5(3) of the Basic Law.</p> <p>Funds provided by public institutions (e.g., European Research Council,), foundations and the industry are made available through a transparent process, which is generally based on peer review. Peer review aims at ensuring meritocratic principles and academic freedom.</p> <p>Target and performance agreements (Ziel- und Leistungsvereinbarungen) between the universities and the relevant state ministry (Landesministerien) grant the universities autonomy and on the other hand allow the Länder governments to withdraw from the detailed management of the higher education system. These agreements do not have a uniform legal character but depend on the substantive provisions. The agreements are generally concluded for a period of several years but are subject to regular review and updating. Target and performance agreements are a steering instrument that makes use of the close interlinking of funding and planning.</p>
<p>7. Which rules and regulations protect academic freedom from interferences by commercial actors and financial</p>	<p>With regard to protective mechanisms, please see answers on questions 1 and 6.</p>

<p>sponsors, at different tiers of education? Please explain how conflicts of interest that may arise are addressed.</p>	
<p>Surveillance</p>	
<p>8. Please explain whether and the extent to which academic staff and students, at all levels of education, are subject to surveillance by public authorities, for example through on-site cameras or online scrutiny. Has this led to undue restrictions to academic freedom and freedom of expression in educational institutions?</p>	
<p>Freedom of expression in training and access to books</p>	
<p>9. Do teachers and professors, at all levels of education, enjoy freedom of expression in their own teaching? Are there any limitations imposed, such as remaining "neutral" or forwarding a particular perspective, e.g. on religious and political matters?</p>	<p><u>General principles:</u></p> <p>a) Teachers and university lecturers (both as employees and as civil servants) can invoke article 5(1) of the Basic Law (<i>Grundgesetz</i>, "GG") (freedom of expression) and article 4 GG (freedom of faith, religion and philosophical creed) (see, by way of example, Dreier GG/Brosius-Gersdorf, 4th ed. 2023, GG article 7 para. 200). Article 5(1) sentence 1 GG gives every person the right freely to express their opinion, for instance on political or religious issues, in speech, writing and pictures and to inform themselves without hindrance from generally accessible sources. According to article 5(2) GG, the right to freedom of expression finds its limits, inter alia, in the provisions of general laws. Civil servants who work as teachers and university lecturers are in a relationship of service and loyalty defined by public law in accordance with article 33(4) GG and are subject to special limits resulting from their special status as civil servants. The right to freedom of expression of civil servants is limited by the guiding principle of a civil service that supports the free democratic basic order (article 33(5) GG). In cases where this leads to conflict, they must be resolved in such a way that the obligations under civil service law that are essential for maintaining a solid, reliable civil service limit the exercise of the fundamental rights of civil servants. Accordingly, any conduct that can be interpreted as the expression of a political or religious opinion is only covered by the</p>

constitutional protection of article 5(1) sentence 1 GG if it is compatible with a civil servant's **duty of loyalty to the constitution** as a traditional principle of the civil service which has the status of constitutional law (article 33(5) GG). The freedom of teaching under article 5(3) sentence 1 GG does **not** release a person from loyalty to the constitution (article 5(3) sentence 3 GG). Accordingly, the provisions defining the duty of loyalty to the constitution in greater detail, as well as the other provisions of the law governing the civil service and disciplinary measures covered by article 33(5) GG, are general laws within the meaning of article 5(2) GG, which limit the right to freedom of expression (Ruling of the Federal Constitutional Court [*Bundesverfassungsgerichtsentscheidung*] BVerfGE 39, 334, 335). Whether the expression of an opinion by a civil servant, and thus also that of a teacher or university lecturer, is compatible with the duty of loyalty to the constitution must be examined in each **individual case**. While, article 33(5) GG **does not** apply to employees in the public sector, ordinary laws (i.e. laws below the level of the constitution) usually also lay down rules on how employees shall behave with regard to the constitution and when exerting influence on pupils (see in particular section 3(1) sentence 2 of the collective agreement for the public service of the *Länder* (*Tarifvertrag für den öffentlichen Dienst der Länder*): "Through their entire conduct, employees must commit themselves to the free and democratic basic order within the meaning of the Basic Law." as well as, by way of example, section 67(3) and (4) of the Berlin School Act [*Berliner Schulgesetz*])

- b) The protection of fundamental rights under article 5(1) sentence 1 GG only applies to cases where the civil servant expresses an opinion as a citizen – and not as a **public official**. This is because official statements are not attributable to civil servants themselves but to their **employer** and therefore **do not** enjoy any protection as a fundamental right. When making (official) statements, civil servants must always follow the instructions of their superiors and general official guidelines (section 35(1) sentence 2 of the Civil Service Status Act [*Beamtenstatusgesetz*, "BeamtStG"]), without article 5(1) sentence 1 GG being affected. **Teachers** at public schools make **official** statements in a **teaching** context (see BVerwG [Federal Administrative Court] NJW 1988, 1747). Even if, based on article 7(1) GG (school system), they have some pedagogical leeway, they are **bound by instructions** and cannot invoke article 5(1) sentence 1 GG or article 5(3) GG (freedom of arts and sciences, research and teaching), which is **only** applicable to **university lecturers** (see Schnellenbach/Bodanowitz, *Beamtenrecht in der Praxis*, 10th edition pp. 207 to 211).
- c) **Private** statements made within and outside their public service, on the other hand, do fall within the **scope of protection** of article 5(1) sentence 1 GG. As citizens, civil servants can express and disseminate their views on **any** topic in speech, writing and pictures. When determining the limits of the fundamental right, the extent to which a private statement – even outside of work – is likely to have an impact on public service operations must be weighed up. Obligations under civil service law, such as the duty of loyalty to the constitution laid down in ordinary laws (section 33(1) sentence 3 BeamtStG), the duty to maintain confidentiality (section 37 BeamtStG) or the duty to

exercise moderation (section 33(2) BeamtStG) and to respectful and trustworthy conduct (section 34 sentence 2 BeamtStG), compliance with which is essential for due and proper civil service operations, **take precedence** over the civil servant's freedom of expression. Civil servants must refrain from making statements that could have a negative impact on public confidence in their loyalty to the constitution or their impartial and fair performance of duties, as well as statements that could have a lasting negative impact on the reputation of the public office, the operation of the public office and the effective fulfilment of duties. When publicly expressing a political opinion and participating in the exchange of public opinions, civil servants must also exercise the **moderation** and **restraint** required by their public position and maintain a clear **separation** between their public position and their participation in the exchange of political opinions. Particularly when making private statements, they must not create the impression that they are expressing an official position or deliberately use their office to highlight their personal opinion in the public debate. **Teachers** who provide political instruction must exercise **neutrality** and **restraint** even if they are (obviously) making a point as a citizen (cf. section 33(2) BeamtStG; Schnellenbach/Bodanowitz loc. cit. p. 209); when making statements, they must **not** disregard the conflicting fundamental rights of the pupils concerned or the parental right guaranteed by article 6(2) GG.

- d) With regard to article 4(1) GG, it must be added that the pupils' **negative freedom of belief**, which is also protected by this provision, requires that a teacher does not seek to verbally influence them in favour of the teacher's beliefs in general, compulsory lessons (see BVerfGE 138, 336, 337 (para. 105)).

Special features of university teaching depending on the public role in question

(cf. on the following remarks as a whole: Klaus Ferdinand Götz, Forschung und Lehre, issue 2/18, on the obligation of political moderation for university lecturers who are civil servants)

- a) The degree of restraint required by the requirement to exercise moderation pursuant to section 33(2) BeamtStG cannot be determined in the abstract, but specifically depends on the respective official functions, the responsibility associated with the public role and the public perception of the role. University lecturers have a **special** public role because they have been entrusted with the task of carrying out free research and teaching, which is protected by fundamental rights under article 5(3) GG. Atypically, the personal use of a freedom is combined with the public role. However, as already set out above, the freedom of teaching pursuant to article 5(3) sentence 1 GG does **not** release a person from loyalty to the constitution (article 5(3) sentence 3 GG).

Scientific activity as such is not subject to the obligation to exercise moderation. Research findings are the result of a scientific process to acquire knowledge that follows criteria of scientific accuracy, but not legal codes. Scientific accuracy or inaccuracy is generally not subject to official determination by the

	<p>state or university. The freedom of arts and sciences protects arts and sciences regardless of their quality.</p> <p>a) Scientific knowledge may also be taught. When combining teaching with loyalty to the constitution (article 5(3) sentence 2 GG), the special significance of the freedom to teach must be taken into account. Objectively, however, teaching must not be abused to fight against the basic constitutional order; criticism of the constitution is, however, permissible (see Jarass/Pieroth/Jarass, 17th edition 2022, GG article 5 para. 150). The limits of a permissible expression of opinion are exceeded, for example, if the right to education and respect, to which all students are entitled, is violated, for example by belittling or marginalising individual persons or groups. For example, the attempt to patronise female students wearing a religious headscarf and driving them out of the lecture theatre violates the official duties of a university lecturer. The immunity of free research and teaching also ends where it is not concerned with serious method-led knowledge processes (“discovering the truth”), but merely with camouflaging political agitation, for example Holocaust denial (see BVerfG, order of 30 November 1988 – 1 BvR 900/88) or conspiracy theories in essay form.</p>
<p>10. Please explain the extent to which teachers and professors at different education levels can choose school manuals and other books/resources for teaching, and the reasons for any restriction in this regard. Have any specific books/materials been banned, including from school libraries, and alternatively is some material mandatory? If so, why?</p>	<p>In the majority of the Länder, textbooks must be authorised by the responsible Ministry of Education. Approval is usually preceded by a formal review process. Authorisation is granted if the books do not contradict constitutional principles and legal regulations, if they are in line with the curriculum and if they are didactically and linguistically suitable. The decision to select and introduce a textbook is usually made by the teachers’ conference or subject conference of the individual schools. Further teaching materials are assessed by the teacher to determine that they are suitable for the learning group. The decision as to which material is used lies with the teachers – in some Länder in consultation with the class conference or school conference – and is based on the age of the children and the needs they have expressed.</p> <p>At institutions of higher education, instructors select teaching material themselves in line with the freedom of teaching that grants them autonomy.</p>