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Speaking Out on Campus: The University as a Platform for Free Speech or Academic Discourse?

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Speaking Out on Campus

*The University as a Platform for Free Speech or Academic
Discourse?*



Campus protests have been testing European universities. The demonstrations at Freie Universität Berlin highlighted the tension between seeing universities as open spaces for free speech and regarding them primarily as institutions dedicated to academic discourse. German courts have leaned toward the latter approach, whereas EU law provides a broader scope for academic freedom while still tying it to academic contexts. Although the upcoming European Research Area Act does not appear to address this issue, guidance from EU law could help universities strike a better balance between protecting the right to protest and safeguarding academic freedom.

Protests at FU Berlin

Pro-Palestinian protests took place in Spring 2024 at Freie Universität Berlin (FU). Shortly after, four people received deportation orders from the Landesamt für Einwanderung (LEA, Berlin Immigration Office). Their only common was participation in the protests at the FU campus, which involved serious property damage.¹ Each deportation order cited Germany's national pledge to defend Israel – its *Staatsräson*² (*raison d'état*) – as justification, framing the behaviour of the activists as indirect support for Hamas and its affiliated organisations. Notably, the orders did not mention that the protests were directed against Israel's warfare in Gaza, nor that both the International Court of Justice and the International Criminal Court had already issued strong criticism of Israel at the time.³

All four protesters filed urgent motions for interim measures, alongside appeals challenging the legality of the orders.⁴ The Verwaltungsgericht Berlin (VG Berlin, Berlin Administrative Court) granted a suspension of the deportation

orders until the conclusion of the main proceedings, reasoning that the LEA should have sought information from the public prosecutor's office on the ongoing cases against the protesters before issuing deportation orders.⁵ By failing to do so, the LEA neglected its duty to investigate. (Later, it was reported that all four protesters ultimately won their cases, though the main proceedings appear to remain pending.⁶)

German courts approached the matter as a question of freedom of movement in an EU law sense, rather than one of free speech or academic freedom. One reason may have been that three of the four protesters were EU citizens, which led the courts to rely on the guidance of the Court of Justice of the EU (ECJ) when assessing whether the protesters' conduct in another EU Member State posed a present and serious threat to an important social interest.⁷ Another reason may have been that none of the protesters were enrolled at FU at the time.⁸ Nevertheless, these cases raise important questions about whether, and to what extent, peaceful campus protests are protected under national and supranational (EU and ECHR) law.

Protecting speech on campus

Broadly speaking, there are two main theoretical approaches to protecting speech on campus. The first holds that academic freedom standards govern teaching and research, while the general right to free speech protects broader public discourse on campus (see, e.g., Whittington⁹, Cole¹⁰). As the seminal Kalven Committee Report of the University of Chicago put it, the university is the home of critics; its obligation is to provide a forum for the most serious and candid discussion of public issues.¹¹ To preserve these conditions, the university should

remain neutral: It cannot take collective action on public issues without endangering its existence and effectiveness. This institutional neutrality complements the fullest freedom for faculty and students as individuals to participate in political action and social protest. Since a broad commitment to free speech is essential to a university's identity, content-based regulations should not apply to campus premises. Applying this approach to the FU protest, a peaceful pro-Palestinian demonstration should have been permitted on campus and protected as free speech.

The other theoretical view argues that uninhibited free speech on campus can undermine academic practices, and that universities should instead prioritise their epistemic mission – the pursuit and dissemination of truth – over serving as venues for all forms of speech (see, e.g., Simpson¹²). According to this view, speech must be utterly free in the classroom, but need not be equally free in other campus spaces (see, e.g., Tribe¹⁵). A campus-wide free speech culture, as Simpson contends, may dilute the intellectual rigour required to prepare students as informed citizens. From this perspective, campus events should be vetted against academic standards, allowing even content-based restrictions. Protests or discussions would not be permitted if they failed to align with the university's intellectual mission. In the context of the FU protest, a peaceful pro-Palestinian protest on campus would only be allowed if it conformed to the university's educational mission by contributing to rational, evidence-based, and pluralistic dialogue on critical social issues.¹⁴ Academic freedom does not extend to wholly unrelated political issues or to disruptions of teaching.

The German understanding

German jurisprudence subscribes to the second theoretical approach. The German Federal Constitutional Court has confirmed that participation of students in academic discourse – such as in a seminar or lecture – is covered by academic freedom under Article 5(3) of the Basic Law (BL), according to which “arts, sciences, research and teaching shall be free”.¹⁵ However, these judgments, along with lower court decisions indicate that students’ academic freedom of expression – protected under Article 5(3) BL rather than the general right to freedom of expression under Article 5(1) BL – does not extend to general political issues.¹⁶ It is limited to the topics of academic discussion or issues of university policy, and it may be further restricted by academic freedom understood as the faculty’s professional freedom (see, e.g. Gärditz¹⁷, Ogorek¹⁸). Political expression by students and faculty is instead protected under Article 5(1) BL. Yet given the courts’ understanding of the university’s mission, the lecturers’ freedom to teach, and the university’s duty to protect it, the latter interest usually prevails when conflicts arise.

German jurisprudence also recognises that freedom of assembly protects the right to choose the location of a protest (see, e.g., Zimmermann¹⁹). Still, it is widely accepted that this right does not extend to places that, under the circumstances of the case and at the time of the assembly, are not publicly accessible and that do not function as public forums (see, e.g., Dirscherl²⁰). Accordingly, courts – supported by literature such as Braun and Kniesel²¹ – have distinguished between different types of university property: Protests are permitted on fore-

courts and lawns, but not in lecture halls or corridors within university buildings. In the courts' view, the former provide a public space for communication, whereas the latter are reserved for university members for academic and teaching purposes.²²

Thus, the German understanding of campus speech suggests that academic freedom is essential for the pursuit of knowledge but does not require uninhibited free speech across the entire campus. But does this understanding comply with EU law?

Platforms for academic discourse

Article 13 of the EU Charter of Fundamental Rights (Charter) codifies, for the first time within the European context, the freedom of scientific research and academic freedom. It stipulates: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected." The ECJ gave effect to Article 13 with its judgment in *Commission v. Hungary* (C-66/18).

What does this mean for campus speech? Article 52(3) of the Charter requires that Charter rights corresponding to those in the European Convention on Human Rights (ECHR) must have the same meaning or, at the very least, the same scope as those given by the Strasbourg Court. Since academic freedom in ECHR jurisprudence is protected under the free expression clause of Article 10,²³ academic freedom in EU law likewise guarantees, among other things, the right of academics to express controversial or unpopular ideas on matters of public concern within their expertise, without fear of repercussion. Opinions not based on sustained or completed research may still be free speech, but not academic freedom. This distinction is relevant when scholars or students protest on campus.

The ECJ has incorporated this understanding of free speech in the academic context into EU law, but it has not stopped there. The ECJ interprets Article 13 more broadly by referring to AG Kokott’s opinion, which emphasises that “the university serves as a platform for academic discourse and a network and infrastructure for teaching staff, students, and donors” (para. 146).²⁴ Thus, even under EU law, campus speech is conditioned by academic freedom. Universities are platforms for academic discourses, but they are not obliged to provide platforms for all types of speech.

A fifth freedom

The European Parliament recently adopted two resolutions addressing concerns about academic freedom. In 2023, the EP called on the EU to respect and promote academic freedom as well as the freedom to conduct scientific research and teach (amendment to Article 3 TEU).²⁵ It also suggested amending the Treaty on the Functioning of the European Union (TFEU) to include these freedoms as objectives of the EU (amendment to Article 179(1) TFEU) and proposed creating a shared competence for education (amendment to Article 4(2)(kc) TFEU).

In 2024, the European Parliament urged the Commission to propose a legally binding act at the EU level.²⁶ The Commission is currently preparing the European Research Area Act. However, the scope of this secondary legislation appears limited: It focuses exclusively on the freedom of scientific research and on establishing a “fifth freedom” – the free movement of research and knowledge. It does not seem to provide guidance on how to interpret and protect academic freedom, nor does it define the role of universities.²⁷

To the extent possible within competence constraints, addressing these issues through EU law would be beneficial, as there are no clear legal precedents in Europe on how universities should respond to protests on their premises. This lack of clarity often leaves universities struggling to make the right decisions.

Future EU actions in the field could draw on the approach implicitly adopted by the German courts and the ECJ: treating the university as a platform for academic discourse. This idea has roots in Europe, unlike the one articulated in the Kalven Report, which views the university as a home of critics and a forum for discussion of all public issues.

Introducing clear legal standards in the shared European academic space would help ensure that students can participate in lawful protests without fear, and that academics can openly express their views on those protests – and on the political events that trigger them – without fear of repercussions,²⁸ whether by exercising their right to academic freedom or their right to free speech.

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