Statement by the Landesastenkonferenz (LAK) on the 17th BerlHG amendment: Against the reintroduction of disciplinary law!

1. Proposed Law as a gateway for the law of public order

The disciplinary law in its previous form was created in the context of the 1968 movement with the aim of being able to specifically prevent student politicisation of universities and protests at them. In this context, disciplinary law is to be interpreted as a fundamentally political instrument intended to ensure the "orderly and disruption-free operation of universities" and to oppose a politicised and democratic university.

This has already been argued in the previously published statements against the reintroduction of disciplinary law by the HU RefRat (https://www.refrat.de/article/PMOrdnungrecht.html), the FU AStA (https://astafu.de/node/600) and the TU AStA (https://asta.tu-berlin.de/artikel/stellungnahme-des-asta-tu-berlin-gegen-die-wiedereinfuehrung-von-ordnungsmassnahmen-wie-exmatrikulation-im-hochschulrecht-fuer-einen-konsequenten-kampf-gegen-jeden-antisemitismus/). In these statements, as well as in the explanatory memorandum to the law on the abolition of § 16 BerlHG in 2021, it is shown that disciplinary law is fundamentally unsuitable for effectively combating discrimination.

The Grand Coalition (SPD-CDU) is presenting a draft bill which, in its eyes, is characterised by its "greater flexibility". In fact, this is reflected in the inappropriately broad definition of offences and in the fact that the legislator largely hands over the powers to shape disciplinary law - in particular the procedure - to the statutory bodies. This opens the door to a political right to regulate and fundamentally fails to recognise the role of universities as public spaces for discourse. This is particularly surprising in the context of the many statements to the contrary made by the Senator for Science.

2. All Regulatory Measures Have A Repressive Effect - students whose funding or residence status depends on enrolment are particularly affected

The explanatory memorandum emphasises that "differentiated regulatory measures" are possible as a result of the amendment. This is wrong, as the mere threat of regulatory measures has a repressive effect. This becomes particularly clear when considering the far-reaching consequences of de-registration in all areas of life. For many students, such a measure means that the financing of their livelihood, e.g. through student grants and scholarships, is cancelled. There is also the threat of losing a place in a hall of residence and thus the only affordable living space in Berlin. For many students without German citizenship, even their residence permit and thus their right to stay depends on their enrolment.

Poor students and students without German citizenship in particular are therefore restricted in their freedom to be politically active. It is more difficult for these people to defend themselves against unlawful disciplinary measures in administrative proceedings.

3. Hasty Laws Are Of Little (Legal) Use - draft law violates constitutional principles and turns universities into a special criminal justice system

The draft deliberately draws parallels with the higher education laws of the states of North Rhine-Westphalia, Brandenburg and Rhineland-Palatinate. This is absurd: in these states, universities are organised fundamentally differently by law. They therefore have completely different self-administration and participation rights, so there can be no question of restoring the autonomy of universities.

On the contrary: As the university president of the FU Günter Ziegler rightly noted in the expert hearing on 4 March 2024, this creates the problem of a special criminal justice system. Exmatriculation in particular, but also all other regulatory measures, represent a serious encroachment on freedom of occupation under Article 12 of the Basic Law. The regulatory committee is given powers that are comparable to those of a criminal court: they have to decide on far-reaching consequences, weigh up fundamental rights and ultimately make comparable repressive measures enforceable. This decision-making power lies with the courts, and not only for reasons of the rule of law and the separation of powers.

A regulatory measure against a criminal offence committed by a person also touches on another core principle of the German constitution: The prohibition of double jeopardy under Article 103 (3) of the constitution. The dual prosecution, reprimand and conviction by the university and the civil jurisdiction courts thus denies a person an essential fundamental right of justice.

4. Serious Technical Deficiencies - lack of procedural rules and an undefined, overbroad definition of violence

Furthermore, the current draft has considerable technical flaws. While the 2021 version still clearly regulated which body can initiate proceedings before the regulatory committee, this is now completely unclear. The authorisation to initiate such proceedings, if at all, should lie with the Academic Senates of the universities.

Section 16 para. 1 no. 1 also uses an overly vague concept of violence that is worthy of criticism. The legal concept of violence is usually understood more broadly than what is generally accepted. This can be seen in the second-line case law of the Federal Court of Justice, which, for example, classifies the anti-nuclear protests in Gorleben as punishable coercion. The legal effect is therefore likely to go far beyond what the SPD and CDU had intended.

5. Political Participation of students and their representatives is under attack

Section 16 (1) No. 3 is also particularly worthy of criticism. Contrary to the promises of the Senator for Science and the SPD parliamentary group, a political disciplinary law that can be used arbitrarily is clearly to be introduced here. In contrast to the other clauses of paragraph 1, the condition of impact on university operations is missing here; furthermore, even the attempt to commit a criminal offence is to be punishable by a disciplinary measure. Whether these accusations, on the basis of which the resulting disciplinary measures are issued, are in the end actually punishable under criminal law is a question of fact. However, a disciplinary committee cannot judge whether these accusations, on the basis of which the resulting disciplinary measures are issued, are actually valid under criminal law in the end. In a state governed by the rule of law, the sole authority for judgements on criminal liability lies with the judiciary.

Section 16 (1) No. 3 will have a lasting negative impact on the political participation of students at Berlin's universities due to the lack of clarity. For example, statements such as that of the RefRat, which last year led to the investigation of a case of sexualised violence by a lecturer, could in future lead to the imposition of disciplinary measures, as these statements could be considered criminal offences under Sections 185 et seq. of the German Criminal Code (StGB). Putting up posters could also be considered damage to property, and even the repeated illegal downloading of an academic article via the university WLAN could ultimately lead to de-registration. Of course, it is also possible that the Senate's declared aim with this amendment is to put a stop to extremist academic article thieves.

6. Drastic Encroachments on informational self-determination are made possible

A clearly foreseeable effect of the proposed bill is drastic interference with fundamental rights in the context of data protection and the general right to privacy (Art. 2 para. 1 of the Constitution). The procedure according to § 16 para. 1 no. 2 and no. 3 is only possible if the regulatory committee has access to criminal convictions of the students concerned, details of the respective offence or potentially even investigation files. The authorisation to do so arises from § 1 No. 48 StudDatVO, which stipulates that universities may collect all personal and other data necessary for the implementation of disciplinary proceedings. This applies not only to the data of students who are subject to disciplinary proceedings, but also to the data of potential other students involved - i.e. those affected in the case of violent offences. Investigation files contain highly personal information, the disclosure of which to an unregulated group of people cannot be in the interests of victim protection.

This far-reaching right to information on the part of universities and the sheer extent of monitoring and control cannot be justified. For good reason, the universities do not even have a comparable claim against their employees.

In the present draft law, it remains completely unclear which body should have access to such information, to what extent, who can apply for this and how a proper procedure is to be guaranteed here.

7. Legislator Shirks Responsibility - student participation in the procedure is insufficient!

The draft also has clear shortcomings with regard to the democratic participation of all university members. In contrast to the disciplinary law in force until 2021, the regulatory committee envisaged here will no longer be composed of a quarter of all members. Instead, the possibility of an almost exclusively professorial committee will be opened up, which in case of doubt will only include a single student member. The legislator does not clearly regulate the responsibility for setting up such a committee. This harbours the risk that the statutory bodies of the universities will fail to recognise the need for appropriate student participation, as they are regularly staffed by a majority of professors. The fact that other status groups that are not affected by this disciplinary law decide on a potential encroachment on students' fundamental rights at this point reinforces power relations at the university.

Furthermore, such restrictions on fundamental rights require a clear legal basis, which is not the case here. A reference to concretisation in the respective university statutes clearly violates the theory of materiality, an outgrowth of the principle of democracy from Art. 20 para. 1 sentence 2 of the German constitution, as very essential parts of disciplinary law are precisely not regulated by the legislator.

This also creates the danger that the regulations of the universities differ greatly from one another and are largely dependent on the political decisions of the statutory bodies of the individual universities.

8. At No Point is the draft suitable for achieving the justified purpose

The justified purpose of ensuring a safe space for students, free from discrimination and violence, cannot be achieved by the present draft. Measures from § 16 para. 1 no. 1, 3-5 can only become legally binding after the court decision as long as the students defend themselves against the accusations before the administrative court. If relevant convictions have not already been handed down in these cases or corresponding further (criminal) charges have been filed, these measures are

likely to be regularly overturned by the administrative courts. This usually means that proceedings take several years, as the administrative courts naturally have to wait for the decision of the competent court in criminal matters. Time during which potential offenders are allowed to continue attending courses and using university facilities.

Students must have the right to be politically active. As mentioned above, regulatory sanction mechanisms restrict this participation. True to the motto: "The main thing is that students who are politically active on campus do not disrupt the proceedings." The law is therefore primarily suitable for penalising civil society resistance to discrimination by the university, but not for protecting those affected from further discrimination.

What would actually protect against discrimination would be a proper anti-discrimination counselling structure at universities, support for members of the university in criminal proceedings against perpetrators and strong commissioner positions. A court-ordered ban on approaching perpetrators effectively protects those affected and actually means that perpetrators are not allowed to move freely on campus. These measures are usually issued within a few weeks if there is sufficient suspicion.

9. Recommendation - reject the draft!

To summarise, it can be said that the Berlin Senate has not only presented a bill that is conceivably invasive of fundamental rights and full of loopholes, but has even managed to reinforce the anti-democratic basic idea of disciplinary law. In its repressive content, the present draft law goes far beyond the old disciplinary law of 2021.

Particularly against the backdrop of a hasty and ill-considered amendment to the law in summary proceedings, it is clear that we, as representatives of the group most affected by this tightening, were only given an absolutely inadequate period of four working days to comment. This gives rise to the suspicion that the Senate's primary motivation is not to protect marginalised students, but rather to present itself to the public as a government that is taking tough action.

The bill should be urgently rejected for all the reasons mentioned.

Signed

- the LAK on behalf of the Berlin student bodies -