

The human right to education in the German school system: What will it take to reduce discrimination

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German Institute
for Human Rights

Analysis

The human right to education in the German school system:

What will it take to reduce discrimination

Mareike Niendorf | Sandra Reitz



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Analysis

The human right to education in the German school system:

What will it take to reduce discrimination (excerpt)

The following is a slightly revised excerpt from the German publication “Das Menschenrecht auf Bildung im deutschen Schulsystem. Was zum Abbau von Diskriminierung notwendig ist“.

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1 Introduction

Education is a human right. It was expressed in the Universal Declaration of Human Rights (UDHR) many years ago, and has since been reaffirmed and further elaborated by subsequent human rights treaties. It is seen as the key for access to other human rights. The absence of education can restrict a person's ability to participate actively in the political, economic, social or cultural life of society, or render participation more difficult. The right to education lays the groundwork for a society in which persons are aware of their rights and are able to exercise them actively.

The Committee on Economic, Social and Cultural Rights has described the right to education as follows: Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹

Thus, education can be seen as a means to an end, specifically, as an investment in the future, and at the same time as a means with which to realize other human rights, particularly by reducing discrimination and marginalisation. The Committee also emphasises (in language verging on the

poetic) the importance of education as an independent right and an end in itself.

The quality of the German education system has been a topic of perennial debate since long before the first PISA study in 2000. Catchwords like “educational justice” and “equal opportunity” are as ubiquitous as are discourses about necessary skills and their (economic) value for the employment market. Moreover, education also means that future generations will acquire the skills to find solutions to global problems like injustice, discrimination, violence, dwindling resources and lack of sustainability.² The ratification of the UN Convention on the Rights of Persons with Disabilities and, with it Germany's commitment to create an inclusive school system, is a fiercely controversial topic in political, educational and legal discourse. Ensuring the right of refugee children and adolescents to education has broadened this discussion and has brought changes for teaching staff and the structure of schools.

The present analysis is intended as to help shift human rights more into the focus of discussions on education and educational justice, particularly with respect to protection against discrimination. Protection against discrimination, as a structural principle of human rights, is integral to all of them. All human beings are equally entitled to human rights on the basis of their humanity, and human rights are not guaranteed unless everyone can exercise them without encountering discrimination. Thus education, as a human right, entails the recognition of equal rights for all.

Although “equal opportunity” and “educational justice”, both concepts that crop up frequently in public debate, constitute normative frames of reference, the understanding and interpretation of

¹ E/C.12/1999/10, para. 1.

² Cf. Krappmann (2016), especially p 153.

these terms varies greatly from one context to another, depending on whether the focus is on equity or on needs with respect to the distribution of educational resources, on ensuring that everyone has an equal chance at the start of their education or on egalitarian, compensatory principles. The human rights perspective on education can introduce greater clarity to the discussion – and ensure that protection against discrimination is not merely an empty phrase, by making everyone aware of the concrete and universally binding consequences it entails. The individual human right to education, to be enjoyed by all children and adolescents in Germany equally, serves as the frame of reference here. The focus of the present analysis is on the public school system for general education, i.e. on the first through thirteenth years of school.

In terms of methodology, the focus in this analysis was on placing pre-existing empirical findings within the human rights context. Data on protection against discrimination in relation to educational objectives, content and methods are hard to come by however, so the analysis also included a

review and analysis of the school acts (*Schulgesetze*) of all Länder (federal states of Germany) as well as of the education plans (*Bildungspläne*) of five of the Länder.³ We used the insights gained through this analysis as a basis for recommendations – some of which echo recommendations of the international system for the protection of human rights (and are identified as doing so) – addressed to ministries, education authorities and education professionals.

The excerpt at hand includes the clarification of key terms (chapter 2), an explanation of how the human right to education is anchored in law on an international (UN treaties), regional (European Convention) and national level (chapter 3), and a description of the content of the human right to education (chapter 4). The analysis of the framework conditions of the German school system and the analysis of the objectives, content and methods of education (chapters 5 and 6 in the German version) are not included in this excerpt. The conclusion and recommendations form the final chapter, both of the German and the English version.

3 We used the method of content analysis as described in Lamnek/Krell (2010), pp 434–498, as a model for our analysis in this respect.

2 Clarification of key terms

In order to examine the education system in Germany from a human rights perspective, one must first establish human rights-based definitions for the terms and concepts used. In the broader educational discourse, terms like “protection against discrimination” (encompassing multiple forms of discrimination), “inclusion” and “intersectionality” are used with varying emphases, and their meanings can also differ somewhat with context and speaker (or author). The use of these terms in the present analysis is based on the following human rights-based definitions and explanations.

2.1 Protection against discrimination afforded by human rights

Protection against discrimination is an integral element of all human rights. All of the key human rights instruments include non-discrimination provisions. These provisions outline either an independent prohibition or an accessory prohibition of discrimination: The provision in the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that prohibits racial discrimination in all fields of life, for instance, is an independent prohibition.⁴ By contrast, the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains an accessory prohibition of discrimination, meaning that the prohibition only applies to with regard to the rights enshrined in the treaty (which include the

right to education). It reads: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to “race”^[5], colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶

The term “other status” indicates that the list is not an exhaustive one. The Committee on Economic, Social and Cultural Rights has explained (in its General Comment No. 20) that a flexible approach that is able to capture other forms of differential treatment is necessary because the nature of discrimination varies with context and changes over time.⁷ The Committee has explicitly stated that the concept of “other status” covers (though not exclusively) the following grounds of discrimination: disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.⁸ In this analysis, we use the term “dimensions” to refer these criteria, categorizations, characteristics or grounds for differentiation.⁹

Whether the person concerned self-identifies as a member of a group characterised by a given dimension is of relevance for determining whether discrimination on the basis of that dimension has occurred in the case of that person.¹⁰ What is more, membership in such a group can exist

⁴ See ICERD.

⁵ Quotation marks added by authors. See Cremer (2010) and Cremer (2008) on the problematic aspects of the German term “Rasse” (English: “race”), which is named as one of the grounds of discrimination in the non-discrimination provisions of international treaties and in the Basic Law and the German General Equal Treatment Act (AGG: Allgemeines Gleichbehandlungsgesetz).

⁶ ICESCR, article 2, para.2; cf. also ECHR, article 14.

⁷ See E/C.12/GC/20, para.27.

⁸ See E/C.12/GC/20, paras. 27–35. Protection under the General Equal Treatment Act encompasses the following grounds: ethnic origin, sex, religion or world view, disability, age and sexual identity (Cf. section 3.3 also).

⁹ Although one frequently encounters these terms, particularly “characteristics” and “grounds of discrimination” in legal contexts, they are rejected by many persons who have experienced discrimination. They can be perceived as a “label” and can lead people to assume erroneously that the attributes associated with such categorisations are in fact applicable.

¹⁰ Cf. E/C.12/GC/20, para.16.

through association with another person. For instance, a member of the family of a person with a disability could be the victim of discrimination even though that person does not have an impairment.¹¹ In addition, persons may face discrimination as a result of the fact that others perceive them as being members of the group characterised by a given dimension, even when they are not members of that group. A person of non-Muslim faith with a Turkish-sounding name, for example, can still be affected by anti-Muslim racism.

Thus from a human rights perspective, discrimination “constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on prohibited grounds and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing,”¹² of human rights. Discrimination is also an instrument of power that is used to create or maintain privileges and hierarchical relationships.¹³

Differential treatment that is based on a prohibited ground is considered discriminatory if there is no “reasonable and objective”¹⁴ justification for it. To determine whether such a justification exists one must examine three questions: whether the aim and effects of the unequal treatment are compatible with human rights, whether promoting the general welfare of a democratic society is the sole purpose being pursued and whether a clear and reasonable relationship of proportionality is maintained.¹⁵

However, the protection against discrimination afforded by human rights extends beyond the establishment of formally equal treatment. Indeed, it seeks to ensure equal opportunities for the actual exercise of human rights. Human rights, therefore, afford protection against indirect and structural forms of discrimination as well. In the case of any of these forms of discrimination, the discriminato-

ry behaviour does not have to be intentional: crucial are the effects of the discrimination.¹⁶

For the sphere of education, the principle of non-discrimination applies both to the framework conditions of education, i.e. the availability and accessibility of education, and to the objectives, content and methods of education, i.e., the adequacy and the adaptability of education. The point is to not to discriminate against any person with respect to their access to education and to design educational content in way that is sensitive to discrimination. To put it differently: content as such must not be discriminatory (in its language or imagery for instance) and the educational objectives should be directed towards making pupils sensitive to discrimination and empowering them to take action against it.

2.2 Forms of discrimination

In the context of the protection against discrimination afforded by human rights, distinctions are drawn among different forms of discrimination:

Immediate/direct discrimination

The term “direct discrimination” is used to describe forms of discrimination linked to one of the prohibited grounds of discrimination (e. g. gender). These forms of discrimination occur when one person receives less favourable treatment than another person in a similar situation as a manifestation of discrimination along one of the dimensions described above.¹⁷ Thus the exclusion of girls from instruction at schools is an example of direct, gender-based discrimination.

11 Cf. E/C.12/GC/20, para.16.

12 E/C.12/GC/20, para.7.

13 Cf. for the dimension of sex: A/RES/48/104, article 6 recital. Cf. Rudolf/Chen (2015), p. 54–55, for further discussion of this.

14 E/C.12/GC/20, para.13.

15 E/C.12/GC/20, para.13.

16 Vandenhole (2005), p. 84.

17 Cf. E/C.12/GC/20, para.10 a.

Indirect discrimination

Indirect discrimination refers to forms of discrimination associated with legislation, policies or practices that, though appearing neutral, have a disproportionate impact on certain persons in connection with the exercise of their rights. For example, imposing a requirement that a child's birth registration certificate to be presented in order to enrol the child in school may constitute indirect discriminations, if, for instance, members of ethnic minorities or non-nationals do not possess or have been denied such certificates.¹⁸

Structural/institutional discrimination

Structural or institutional forms of discrimination occur when social, state or institutional structures and mechanisms, acting as organisations, disadvantage certain population groups through a combination of factors (these forms of discrimination are often also indirect discrimination, see above).¹⁹ This kind of discrimination is deeply entrenched in the behaviours and structures of society and frequently goes unnoticed or unchallenged.²⁰ Institutional discrimination in particular is a topic of discussion in the field of education.

Interactional discrimination

Forms of discrimination on a prohibited ground can also be manifested in the interaction between two or more persons, leading to disparagement or exclusion. Interactional discrimination may be tied to structurally or institutionally discriminatory practices or may develop from them.²¹ For instance, when a teacher praises a pupil who was born and grew up in Germany for speaking such good German despite her family's migrant background, the pupil may perceive the praise as discriminatory if she understands it as a signal that she does not

actually belong. This example also illustrates the fact that it is not the intent, but the potential or actual effect that is key in determining when discrimination has occurred.²²

Denial of reasonable accommodation

The UN Convention on the Rights of Persons with Disabilities (CRPD) expands the concept of discrimination by recognising the "denial of reasonable accommodation"²³ as constituting discrimination on the basis of disability. The CRPD defines the term "reasonable accommodation" as "necessary and appropriate modification and adjustments"²⁴ that ensure that persons with disabilities can enjoy and exercise their human rights on an equal basis with others. The principle of proportionality applies for the implementation of reasonable accommodation measures.²⁵ Reasonable accommodation can mean different things – e.g. the provision of accessible documents, a ramp or sign language interpreting – depending on the needs of the individual concerned.²⁶

2.3 Inclusion

The human rights concept of inclusion has been shaped to a great degree by the CRPD, which was the first human rights instrument in which the term appears. The CRPD calls for inclusion and participation in all aspects of life.²⁷ Unlike integration,²⁸ inclusion is not about admitting persons who had previously been excluded into a pre-existing environment, but about eradicating barriers so that everyone feels a part of and able to play an active part in something right from the start. Thus rather than calling on certain groups of persons who have not yet been able to fully participate in

¹⁸ Cf. E/C.12/GC/20, para.10 b.

¹⁹ Vandenhoe (2005), p. 85.

²⁰ Cf. E/C.12/GC/20, para.12.

²¹ Cf. Jennessen et al. (2013), p 19.

²² Vandenhoe (2005), p. 84.

²³ CRPD, article 2.

²⁴ CRPD, article 2.

²⁵ CRPD, article 2.

²⁶ Cf. Aichele (2012), p 2.

²⁷ Cf. CRPD.

²⁸ We are referring here to an understanding of "integration" in the sense of "assimilation", i.e. a one-sided adaptation. In practice, the line between integration and inclusion can be somewhat blurry; Integrationspädagogik (integration pedagogy), for instance, has pursued approaches that are more inclusive than otherwise for decades.

society to make an effort to integrate, the concept of inclusion calls for structures and mechanisms to be adapted and made available accordingly.²⁹

The human rights perspective on inclusion is closely bound up with the concept of disability described in the CRPD: disabilities only exist through the interaction of impairments with barriers, which hinders participation.³⁰ These barriers may be physical barriers, barriers to communication, or they may be chiefly social in nature. In the German media, the discourse on inclusion is frequently limited to the topic of schools. This narrow focus does not reflect the approach taken in the CRPD; though the CRPD does explicitly enshrine the right to inclusive education.³¹

In the German discourse, the term “inclusion” also tends to be used to refer to the inclusion of persons with disabilities and no one else. Internationally, the concept is often understood in a much broader sense. One finds a far broader understanding of the concept, for instance, in the Salamanca Statement, which emerged from a 1994 UNESCO conference and is seen as a milestone towards establishing inclusive education in the international context: The guiding principle that informs this Framework is that schools should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions. This should include disabled and gifted children, street and working children, children from remote or nomadic populations, children from linguistic, ethnic or cultural minorities and children from other disadvantaged or marginalized areas or groups.³² If we understand inclusion as a general human rights principle closely bound up with non-discrimination as a structural principle of human rights, it becomes clear that there is a complementary relationship between the two, which facilitates a broader understanding of inclusion, with respect to target groups.³³ This

in turn requires a broader view of barriers to participation and mechanisms of exclusion, one that encompasses barriers and exclusions that might hinder the full participation in society of persons with migrant backgrounds, for instance, or single parents, or trans* persons.

2.4 Intersectionality and cumulative discrimination

The concept of intersectionality relates to the fact that power relationships and social inequalities that evolved over the course of history such as racism and those associated with gender, disability or socio-economic origin cannot be viewed in isolation. Intersectionality looks at the interweaving or intersections among these dimensions, rather seeing them as simply one added to the next. An intersectional perspective encompasses multiple dimensions and considers the interaction among them, areas of overlap and mutually reinforcement effects in the lived reality of human beings.³⁴ Another concept that relates to multiple dimensions of discrimination is cumulative discrimination (sequential discrimination). While intersectionality examines coincident manifestations of multiple dimensions of discrimination, the concept of cumulative discrimination also looks at the impact that manifestations of discrimination along multiple dimensions at different points of time in different situation can have on one individual.³⁵

The individual discourses about non-discrimination tend to focus on a single target group, which, ostensibly, can be clearly defined.³⁶ A juxtaposition of the various discourses, however, makes it apparent that these clearly identifiable target groups do not in fact constitute homogenous groups of persons at all. Thus we must assume, for instance, that the school performance of children from an immigrant background is influenced not only by

29 Cf. Niendorf/Reitz (2016).

30 CRPD, article 1.

31 CRPD, article 24.

32 UNESCO, World Conference on Special Needs Education: Access and Quality (1994), sect 3.

33 Cf. Deutsches Institut für Menschenrechte (2012), especially p 41.

34 Cf. Crenshaw (1991), Walgenbach (2014), pp 53–54; and also Wansing/Westphal (2014), p 38.

35 Cf. Baer et al. (2010), particularly pp 16–28.

36 Cf. Wansing/Westphal (2014), p.34.

migration in their past (or their family's past) and their potentially experienced racism within the school system, but by other factors as well: their socio-economic origin, their gender, the parents' level of education or the existence of a physical impairment. Yet there has been very little inter-linking between the discourses on migration and disability, for instance.³⁷

Alongside the use of individual dimensions as categories for analysis, the perspectives of intersectionality and cumulative discrimination combined with a human rights concept of inclusion can sharpen our perception for the work of dismantling barriers to participation and eliminating disadvantages for everyone. For instance, persons with learning difficulties are not the only ones who can benefit from texts written in simple language: persons who do not yet understand the language very well may also do so.³⁸

³⁷ Cf. Gummich (2015); Wansing/Westphal (2014), p 18.

³⁸ Cf. Niendorf/Reitz (2016), p 12.

3 Anchoring the human right to education in law

The right to education is a human right. Human rights derive from the inherent dignity of the human person and claim to have universal validity. They are inalienable: they can be neither taken away by another nor voluntarily renounced. They are also indivisible and interdependent, i. e. each is indispensable for the others.³⁹ This is especially clear in relation to the right to education: the right to education is what makes it possible for a person to enjoy the right to participate in political life and in society, which would otherwise be granted only formally or insufficiently. For this reason, the right to education is sometimes called an “empowerment right”.⁴⁰

With the adoption of the UDHR, if not before, there began a process in which legal status was conferred on human rights. In 30 Articles, the UDHR outlines political, civic, economic, social and cultural rights inherent to all human beings. While the UDHR itself does not formally constitute a legally binding document, it laid the substantive groundwork for subsequent legally binding covenants and conventions of the United Nations and other bodies; over time, some experts have come to view the content of the UDHR itself as legal binding.⁴¹ The human rights treaties lay a duty on the state to respect, protect and fulfil the rights outlined within them.⁴²

The obligation to respect as it relates to the right to education can be defined more specifically as follows: states have a duty to refrain from taking any measures – discriminatory legislation on schools, for instance – that hinder or prevent the enjoyment of the right to education. The obligation

to protect requires states to ensure that no person is prevented from fully exercising the right to education by a third party, e. g. a parent. Finally, the obligation to fulfil requires the state to take positive steps – for instance, to build schools, to make them accessible (barrier-free), and to hire appropriately trained teaching staff – aimed at enabling individuals and communities to enjoy their right to education.⁴³

3.1 Human Rights Treaties of the United Nations

The rights outlined in the UDHR were spelled out more specifically in two human rights treaties, which were adopted in 1966 and entered into force in 1976: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Since their adoption, seven additional UN human rights treaties have entered into force. These international instruments either focus on one particular aspect of human rights, like the Convention against Torture, or, concretise human rights in relation to a certain group of persons who are particularly at risk of human rights violations or abuse, as the Convention on the Rights of the Child does, for instance.

The right to education, or rather, certain aspects of the right to education are laid down in several UN human rights treaties: the ICESCR (economic, social and cultural rights), the CRC (children’s rights), the CRPD (rights of persons with disabilities), the ICERD (racist discrimination) and the

39 A/Conf.157/23, sect 5.

40 Cf. E/C.12/1999/10, para.1; see also Chapman/Russel (2002), p 219; and Coomans (2007), especially p 185.

41 Cf. Buergethal et al. (2009), p 42.

42 Cf. E/C.12/1999/10, paras. 46–48, 50.

43 Cf. E/C.12/1999/10, para.47.

CEDAW (discrimination against women). While the ICESCR contains an article laying down the right to education in general terms, the other treaties concretise the right in relation to persons whose lives are characterised by particular circumstances. The word “concretise” is used here in the sense that the treaty further elaborates states’ obligations with the aim of achieving greater respect for the universal rights and better protection of them in relation to a certain group. Hence, the same right to access to education is laid down for refugees,⁴⁴ for persons who face racist discrimination,⁴⁵ for girls and women,⁴⁶ and for persons with disabilities.⁴⁷ In the case of the latter, the CRPD also lays down the principle of reasonable accommodation, the provision of effective individualised support,⁴⁸ and measures to promote forms of communication like Braille and sign language.⁴⁹ Finally, UNESCO also formulated obligations in the Convention against Discrimination in Education adopted in 1960, the content of which was taken up into the later UN treaties and general comments of their treaty bodies.⁵⁰

The treaty bodies, one of which exists for each UN human rights treaty, concretise the substantive provisions of their respective treaties. Each treaty body is made up of independent experts who serve on a voluntary basis. One part of the treaty bodies’ work is the preparation of “general comments”, in which they interpret the substantive provisions of the treaties and render them more precise. A treaty body’s general comments provide authoritative guidance for the interpretation of the treaty in question and are addressed to all of the treaty’s signatory states.⁵¹

The special rapporteurs are also important figures in the United Nations’ system of human rights protection. Special rapporteurs are independent experts on specific human rights themes or coun-

tries who are appointed by the UN Human Rights Council. In 2007, Vernor Muñoz Villalobos, then Special Rapporteur on the right to education, reported on his visit to Germany.⁵²

3.2 European Convention on Human Rights of the Council of Europe

Apart from the United Nations human rights treaties, the European Convention of Human Rights (ECHR) of the Council of Europe is also of central relevance for Germany. The ECHR is binding for all 47 states that belong to the Council of Europe, and, in its principles and fundamental tenets, is based on the UDHR. The European Court of Human Rights (ECtHR) was set up in 1959 in Strasbourg to ensure the observance, safeguarding and enforcement of the rights outlined in the ECHR; all of the signatory states of the European Convention of Human Rights are subject to the jurisdiction of this court.

The right to education is laid down in Article 2 of the first Protocol to the ECHR, which reads: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.⁵³

The wording of the first sentence clearly points to the non discrimination principle that is integral to all human rights, including the right to education. The articles on the right to education in the UN treaties allow a somewhat broader reading though, which is why they are at the focus of this analysis.

Like many other treaties, the ECHR affords its signatory states the right to make reservations re-

44 Cf. Convention relating to the Status of Refugees, article 22.

45 Cf. ICERD, article. 5.

46 Cf. CEDAW, article 10(a),(b),(d),(e) and (g)–(h).

47 Cf. CRPD, article 24, para. 2(a) and (b).

48 Cf. CRPD, article 24, para. 2(c)–(e).

49 Cf. CRPD, article 24, para.3.

50 Cf. UNESCO Convention against Discrimination in Education.

51 Cf. Hübner et al. (2012), especially pp 67–83.

52 For a more in-depth discussion see Overwien/Pregel (2007).

53 First Protocol to the ECHR, article 2.

garding any of its provisions. The Federal Republic of Germany availed itself of this option with respect to the second sentence in Article 2 of the (first) Protocol (cited above), emphasising that the sentence does not entail any obligation on the part of the State to finance schools or a religious or philosophical nature or to assist in financing such schools.⁵⁴ The ECHR also contains an accessory prohibition of discrimination.⁵⁵

3.3 Binding force of human rights law in Germany

The provisions of the UN human rights treaties and the ECHR that relate to education are applicable law in Germany: Under Article 59, paragraph 2 of the Basic Law of the Federal Republic of Germany (GG: Grundgesetz, Germany's federal constitution), they are a binding element of the German legal order and have the status of "simple" (non-constitutional) federal law.⁵⁶ Under Article 20, paragraph 3 of the Basic Law, all bodies of the federal government are bound to comply with simple federal law, and thus the standards of human rights treaties.⁵⁷ In the event of a conflict of laws, human rights standards, as federal law, take precedence over Länder law (Article 31 of the Basic Law).

The obligations under international law primarily address legislative authorities. Since the education sector falls almost exclusively within the competence of the Länder, it is the Länder Parliaments that are subject to the obligation to take decisions required to implement the treaties. It is the Länder Parliaments which enact the school acts, create the conditions required to allow regulations to be defined with sufficient precision, and allocate the requisite funds in their budget legislation. The international human rights standards can also be applied outside of the legislative domain though,

by other state bodies of executive government or the judiciary. In these contexts, one can distinguish between two forms of application: direct application and interpretation of German law in a way that is "friendly towards international law" (völkerrechtsfreundliche Auslegung).

In the case of the former, direct application, human rights standards constitute the direct basis for the decision of an authority or a court. Whether a human rights standard can be directly applied depends on whether its substantive provisions are sufficiently precise.⁵⁸ With respect to the right to education, this is deemed to be the case regarding the right to free primary education, for example, but the same applies, in particular, to the prohibition of discrimination laid down in article 1, paragraph 2 of the ICESCR. The ICESCR does provide for progressive realisation (subject to the availability of resources) of the rights it recognises – for instance, free higher education is to be introduced progressively, for instance. However, in the view of the Committee on Economic, Social and Cultural Rights, the provision requiring states to guarantee that the right to education can be exercised without discrimination of any kind is one suitable for immediate and full application.⁵⁹ This means, for instance, that children cannot be denied access to certain forms of schooling on the basis of their parents' residence status. It also means that Germany and the other UN CRPD signatory states have had an obligation to ensure reasonable accommodation for persons with disabilities in individual cases since the CRPD entered into force in 2009, and that the failure to do so constitutes discrimination prohibited by human rights law (see section 2.2).

What is more, the treaties also lay down an obligation to move forward with the progressive realisation of the right, including the progressive realisa-

54 Cf. German Bundestag document (Drucksache) 14/3694, p 5.

55 Cf. ECHR, article 14.

56 Cf. BVerfG (Bundesverfassungsgericht: Federal Constitutional Court) 19 Sep. 2006, 2 BvR 2115/01, marginal no. 52.

57 Cf. BVerfG (Bundesverfassungsgericht: Federal Constitutional Court) 19 Sep. 2006, 2 BvR 2115/01, marginal no. 52.

58 This hinges on whether the standard is suitable, in the words of the Federal Constitutional Court, "in its wording, purpose and substance... to result in legal effects" as a domestic statutory provision does: "die Vertragsbestimmung muß nach Wortlaut, Zweck und Inhalt wie eine innerstaatliche Gesetzesvorschrift rechtliche Wirkungen auszulösen geeignet sein". Cf. BVerfG (Bundesverfassungsgericht: Federal Constitutional Court) 09 Dec. 1970, 1BvL 7/66, p. 306 (margin no. 45).

59 Cf. E/C.12/1999/10, paras. 31 and 43.

tion of the other aspects of the right to education as described in the treaties, i. e. the gradual introduction of free access to secondary and tertiary education. This means that the State has a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of the rights.⁶⁰ Regression from a standard once achieved is permissible only in strictly limited exceptional circumstances.

Interpretation friendly towards international law, the second way that international human rights standards can be applied in domestic contexts, refers to the principle in German law which calls for international human rights treaties of the United Nations and the Council of Europe to be taken into account in the interpretation of simple and constitutional law.⁶¹ When applied in this way, the legal standard from the international human rights treaty serves not as the basis for a decision by an authority or court, but instead as an aid to the interpretation of provisions of national law. The standard is consulted in connection with the interpretation of legal terms or the exercise of discretionary powers. German courts have consulted the UN CRPD in particular in cases relating to education in order to interpret German law in a way friendly to international law. A case in point is a ruling by the Higher Social Court of Saxony in which the Court had to review a legal interpretation relating to the funding of a school integration assistant for a blind child attending a regular school.⁶²

At the national level, the right to education is addressed in several different laws. Article 6 of the Basic Law addresses the right and duty of parents to care for and raise their children. Alongside this is Article 7, which puts the entire school system under the supervision of the State and contains provisions on religious instruction and the establishment of private schools. Specific policies and rules are formulated in the constitutions, school

acts and education plans of the individual Länder.⁶³

The General Equal Treatment Act (AGG: Allgemeines Gleichbehandlungsgesetz) is an important point of reference in national law for protection against discrimination. Compared to that in the IC-ESCR, however, the list of dimensions found in the General Equal Treatment Act is less extensive: only ethnic origin, gender, religion or belief, disability, age and sexual identity are named. Specifically, the General Equal Treatment Act does not provide protection against discrimination on the basis of socio-economic origin or “other status”, which is why this analysis concentrates below on the dimensions cited in the ICESCR.

The bodies that monitor the implementation of the human rights treaties are of central relevance for Germany with respect to understanding of the international human rights standards, and thus to their immediate application and the interpretation of domestic law in conformance with human rights. In their specific procedures, these bodies concretise the content of their respective human rights treaties. The international system for human rights protection of the United Nations and the regional system of the Council of Europe exist side by side. Although the two systems relate to different human rights treaties, efforts are made to ensure the harmonious interpretation of the texts.

In the case of the United Nations human rights treaties, every signatory state is obliged to submit a “State-party report” to the treaty bodies at regular intervals. The first report is due two years after the treaty in question comes into force with, in most cases, additional reports falling due in four-to five-year intervals thereafter. In the course of its review of a state’s report, the competent body also consults what are called “parallel reports”, which are submitted by civil society organizations and National Human Rights Institutions. The treaty

60 Cf. E/C.12/1999/10, para.44.; E/1991/23, para.9.

61 Cf. BVerfG (Bundesverfassungsgericht: Federal Constitutional Court) 14 Oct. 2004, 2 BvR 1481/04, margin nos. 30–39; BVerfG, 26. March 1987, 2 BvR 589/79, 740/81 and 284/85, p. 370 (margin no. 39); BVerfG, 23 March. 2011, 2 BvR 882/09 margin no. 52; BVerfG, 04 May 2011, 2 BvR 2365/09, margin no. 86; established practice of the Court.

62 See LSG Sachsen (Landessozialgericht Sachsen: Higher Social Court Saxony), 03 Jun. 2010, I 7 SO 19/09 B ER, p 6.

63 Parts of section 3. 3 are based on: Aichele (2011) and Mahler (2013); for a more detailed handling of the topics in section 3 in general: see Poscher (2012); Suelmann (2013); Dern et al. (2012).

body then compiles the results of its review in a set of “concluding observations”, in which it identifies deficits and formulates recommendations on how the state could improve its implementation. States are obliged to inform the treaty body about their implementation of such recommendations within what is known as a “follow-up procedure”.⁶⁴

Many UN human rights treaties have additional protocols laying down various procedures that are available in the event of human rights violations. One such is the individual complaints procedure, through which individual persons who have exhausted the remedies available under domestic law can bring complaints against their own state to the treaty bodies. This complaint mechanism can only be used if the signatory state in question has ratified the relevant protocol of the relevant human rights treaty in question. The possibility of bringing an individual complaint against Germany to a UN treaty body exists for all of the human rights treaties named in this study with the exception of the ICESCR. Germany has not ratified the Optional Protocol to the ICESCR, a shortcoming which it would do well to remedy soon.⁶⁵

Alternatively, it is possible to invoke the ECHR and bring a complaint on a human rights violation against Germany to the European Court of Human Rights. Unlike the outcomes of complaints procedures at the UN level, the rulings of the European

Court of Human Rights do not have the character of mere recommendations; they are binding. If the Court finds that a violation of human rights has occurred, reparation must be made, in some cases through the payment of compensation for damages. Under certain circumstances the Court will rule that a state must amend a piece of legislation that itself has given rise to a violation. The UN treaty bodies can make recommendations along similar lines, urging the state in question to award compensation or provide effective remedy, but these are of a less binding nature than the judgments of the European Court of Human Rights ECtHR.⁶⁶ The Court has heard a number of individual complaints against Germany relating to education. The issues involved included the refusal on the part of German authorities to release the applicants’ children from the obligation to attend school and permit them to be homeschooled instead,⁶⁷ the refusal on the part of German authorities to exempt the applicants’ children from attendance of certain compulsory school classes/events,⁶⁸ the failure to reimburse expenses for travel to and from school in a private vehicle,⁶⁹ and the failure to render pupil data anonymous in the context of school leaving examinations.⁷⁰ Decisions in which the Court rules against another state are a further source of information relevant for understanding the rights guaranteed in the ECHR and its Protocols (see section 5).

64 Cf. Hüfner et al. (2012), especially pp 67–83.

65 See also: Mahler (2015).

66 Cf. Hüfner et al. (2012), especially pp 97–98, 324–330.

67 Cf. European Court of Human Rights, *K. and Others v. Germany*, application no 35504/03 (ECtHR, 11 Sep. 2006).

68 Cf. European Court of Human Rights, *A.-I. and Others v. Germany*, application no. 45216/07 (ECtHR, 10 Jun. 2009) and *D. and Others v. Germany*, application no. 319/08 (ECtHR, 13. Sep. 2011).

69 Cf. European Court of Human Rights, *H. v. Germany*, application no. 61145/09 (ECtHR, 27 Aug. 2013).

70 Cf. European Court of Human Rights, *Q. S. and Others v. Germany*, application no. 17292/13 (ECtHR, 08 Oct. 2013).

4 Content of the human right to education

As an “empowerment right” (see sections 1 and 3), the right to education serves the purpose of empowering individual persons to exercise and realise their human rights. It is also an independent human right though. Full realisation of the right requires that the context be taken into consideration: in addition to the right to education and the rights through education (as an “empowerment right”), there are rights in education that must be taken into account.⁷¹ Thus, one must consider the rights of teaching staff, of parents and others involved in the education process as well as the rights of pupils. The right to education is embedded in the context of other human rights, including the right to freely express one’s views, to participate and to be protected against violence, and all of these rights must also be protected in the education system.⁷²

That part of the content of the right to education, as laid down in the various human rights instruments, that is of relevance for this analysis can be broken down into categories (4.1) in aid of implementation of the right. A closer look at the non-discrimination principle as it relates to availability and accessibility (4.2) and to acceptability and adaptability (4.3) should be helpful in this context.

4.1 Analytical scheme for the implementation of the human right to education

It has become standard to use the terms “availability”, “accessibility”, “acceptability” and “adaptability” as a framework for the examination of the realisation of the human right to education at the

4-A scheme framework for analysis

Availability	Accessibility	Acceptability	Adaptability
Functional educational institutions and necessary resources have to be available in sufficient quantities (context-dependant)	Non-discrimination, in law and in fact, physical accessibility and economic accessibility: education must be affordable to all (free primary education).	Form and substance of education have to be suited to the needs and living situations of the children/parents (i. e. relevant, culturally appropriate and of good quality). Compliance with the educational objectives required by the UN Conventions is required.	Education has to be flexible: it must adapt to the needs of changing societies and to the needs of students, which are shaped by their diverse social and cultural settings.

⁷¹ Cf. Lohrenscheit (2007), especially pp 39–42.

⁷² Cf. CRC/GC/2001/1, para. 8.

UN level. Specifically, this “4A scheme” or framework is used by the Special Rapporteur for the right to education and the Committee on Economic, Social and Cultural Rights. General Comment No. 13 of the Committee on Economic, Social and Cultural Rights states that the four features it comprises must be exhibited by “education in all its forms and at all levels”⁷³, and goes on to say: “When considering the appropriate application of these ‘interrelated and essential features’ the best interests of the student shall be a primary consideration.”⁷⁴

This framework for analysis depicted above has been used in this study, and has been further concretised through the addition of individual questions (listed below) for an analysis focused on the protection against discrimination. In this context, the categories of availability and accessibility are pulled together under the heading of “framework conditions”, while the categories of acceptability and adaptability are addressed for the most part under “educational objectives, content and methods”.

The UN human rights treaties describe two additional aspects that are of relevance for all four categories. Firstly, states have an obligation to establish a human rights-oriented monitoring system.⁷⁵ While a variety of education reports are prepared in Germany, e.g. those commissioned by the Federal Ministry of Education and Research, none of them are explicitly and consistently oriented towards the human right to education. Secondly, access to courts and complaint bodies is essential for the enforcement of rights. Institutions that receive and handle complaints should be accessible to everyone without discrimination, and complaints should be investigated promptly, impartially and independently. Such institutions should be able to provide effective remedies.⁷⁶ States have also been encouraged to examine their complaints

mechanism to verify that they accept complaints related to educational objectives.⁷⁷

4.2 Analytical questions relating to the availability and accessibility of education (framework conditions)

Education must be realised without discrimination and on a basis of equal opportunity.⁷⁸ Framework conditions play an essential role for this – particularly statutory regulations and administrative policies.

General Comment No. 13 of the Committee on Economic, Social and Cultural Rights explains what the terms “availability” and “accessibility” should be understood to refer to with respect to education as follows:

(a) Availability. Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes⁷⁹, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) Accessibility. Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

⁷³ E/C.12/1999/10, paras. 6 and 7.

⁷⁴ E/C.12/1999/10, para. 7.

⁷⁵ E/C.12/1999/10, para. 49.

⁷⁶ Cf. E/C.12/GC/20, para. 40.

⁷⁷ Cf. CRC/GC/2001/1, para. 25.

⁷⁸ Cf. ICESCR, article 2, para. 2; CRPD, article 24, para. 1; CRC, article 28, para. 1. The wording in article 2 of the first Protocol to the ECHR (1952) is more general: “No person shall be denied the right to education”.

⁷⁹ From today’s perspective, it would have been more comprehensive to write “for all genders” to include trans* and inter* persons.

i) Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31–37 on non-discrimination);

ii) Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);

iii) Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education.⁸⁰

The Committee goes on to say that a fellowship system should be in place to “enhance equality of educational access for individuals from disadvantaged groups”⁸¹ and that “sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.”⁸²

With respect to the availability and accessibility of education, the human rights treaties also recognise the parents’ right to choose schools for their children⁸³ and the freedom to establish and direct educational institutions.⁸⁴ Although this analysis does not focus on these rights, it is of relevance for private education, as it examines what is required of the State in connection with school acts, educational objectives, text books etc. which are

binding for private as well as public schools.⁸⁵ The analysis also addresses the right of parents to choose schools for their children, primarily in the context of the freedom of religion or belief.

The human rights treaties concretise access to education differently according to which level of schooling is at issue: Attendance of primary school, or rather primary school education, should be compulsory and free for all.⁸⁶ This obligation is balanced against educational liberty, particularly with regard to the liberty of parents or other individuals legally responsible for a child to ensure the religious and moral education of their children in conformity with their own convictions. In this respect one could argue that the teaching of subjects like religion or ethics constitutes interference on the part of the State with the rights of parents. The treaty bodies see instruction of this kind as permissible, however, as long as it is carried out in an objective and unbiased way and the freedoms of opinion and expression, and the freedom of conscience, religion or belief are respected. Moreover, instruction in a religion at public schools is also in accordance with the right to education provided that participation is not mandatory and provision is made for non-discriminatory exemptions or alternatives that accommodate the wishes of parents or other persons legally responsible for pupils.⁸⁷ From today’s perspective, and thus taking the UN CRC into account, the best interests of the children in question would have to be a primary consideration and due weight would have to be given to their opinions.⁸⁸

Secondary schools, of both general education and vocational forms, should be made generally available and accessible, in particular through measures such as the introduction of free education and the provision of financial assistance in cases of need.⁸⁹

⁸⁰ E/C.12/1999/10, para. 6.

⁸¹ E/C.12/1999/10, paras. 26, 53.

⁸² E/C.12/1999/10, para. 35.

⁸³ Cf. ICESCR, article 13, para. 3; cf. ECHR, first Protocol, article 2; cf. Basic Law, article 7, para. 2, 3.

⁸⁴ Cf. CRC, article 29, para. 2; ICESCR, article 13, para. 4; E/C.12/1999/10, paras. 29–30; cf. Basic Law, article 7, paras. 4, 5.

⁸⁵ Cf. Basic Law, article 7, para. 1: “Das gesamte Schulwesen steht unter der Aufsicht des Staates.” (The entire school system shall be under the supervision of the state.)

⁸⁶ Cf. ICESCR, article 13, para. 2(a), article 15; CRC, article 28, para. 1(a); E/C.12/1999/10, paras. 8–10, 57.

⁸⁷ Cf. E/C.12/1999/10, paras. 28–30; cf. ICCPR, article 18, para. 4; and in this regard: CCPR/C/21/Rev.1/add.4, para. 6.

⁸⁸ Cf. CRC, articles 3, 12.

⁸⁹ Cf. ICESCR, article 13, para. 2 b; CRC, article 28, para. 1(b); E/C.12/1999/10, paras. 11–14.

Higher education should also be made accessible to all according to their abilities – in particular through the progressive introduction of free education.⁹⁰

Other aspects relate to educational and vocational guidance,⁹¹ measures to encourage school attendance,⁹² the elimination of illiteracy throughout the world,⁹³ and basic education for persons who never attended or never finished primary school.⁹⁴

Some of the wording of the relevant treaty provisions makes it apparent that realising the human right to education is associated with different sets of requirements around the world. Since the present analysis concentrates on the general education system in Germany, the following questions are of primary relevance here:

Are functional educational institutions and programmes available in sufficient numbers?

Is attendance of primary school/primary education compulsory?

Is access to education made available on a basis of equal opportunity and non-discrimination with respect to formal, legal aspects?

In this context, the following should be given particular consideration with respect to pupils with impairments/disabilities:

- whether children with disabilities can attend regular schools if they or the persons legally responsible for them so desire
- whether the recommendation to phase out the special needs schools is being implemented⁹⁵
- whether reasonable accommodation is being provided

Is access to education made available on the basis of equal opportunity and non-discrimination with respect to de facto discrimination?

Has the aspect of physical accessibility been realised with respect to access to educational institutions, particularly for pupils with disabilities?

Has the aspect of economic accessibility been realised with respect to access to educational institutions?

Are freedom of religion or belief accorded in the school context?

4.3 Analytical questions relating to the acceptability and adaptability of education (educational objectives, content and methods)

On the subject of the categories of “acceptability” and “adaptability”, General Comment No. 13 of the Committee for Economic, Social and Cultural Rights reads:

(c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e. g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State ...;

(d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.⁹⁶

90 Cf. ICESCR, article 13, para. 2(c); CRC, article 28, para 1(c); E/C.12/1999/10, paras. 17–20.

91 Cf. CRC, article 28, para. 1(d).

92 Cf. CRC, article 28, para. 1(e).

93 Cf. CRC, article 28, para. 3.

94 Cf. ICESCR, article 13, para. 2(d); E/C.12/1999/10, paras. 21–24.

95 Cf. CRPD/C/DEU/CO/1, para. 46.

96 E/C.12/1999/10, para. 6. Cf. also CRC/GC/2001/1, para. 9.

The human rights treaties repeatedly state that education should be directed to the “full development” of the human personality and sense of its dignity.⁹⁷ The treaties make it clear that this refers to both mental and the physical abilities.⁹⁸ The UN CRPD speaks of both a sense of dignity and self-worth in this context.⁹⁹ In addition, education should, as the UN CRC also emphasises, be child-centred, pursue the best interests of the child, and by nature child-friendly and participatory. In particular, teaching methods should take into account the fact that every child has unique characteristics, interests, abilities, and learning needs.¹⁰⁰ The UN CRC sets out two additional objectives of education that are not mentioned in the other UN treaties: “the development of respect for the natural environment”¹⁰¹ and the development of respect for cultural identity, and the cultural values of one’s own country and those of others.¹⁰²

With respect to dignity, the UN CRC also stipulates that the states must “ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention”.¹⁰³ The Committee for Economic, Social and Cultural Rights has also emphasised that corporal punishment is inconsistent with human dignity, as are disciplinary measures like public humiliation, for example. The Committee advocates the use of positive, nonviolent approaches to school discipline.¹⁰⁴ As the present analysis focuses on protection against discrimination, it addresses this aspect only indirectly, in the context of the related educational objective of promoting an awareness of one’s own dignity and of

the injury to human dignity resulting from discrimination.

In addition to understanding the full development of the personality as one purpose of education, the UN human rights treaties exhibit an understanding of education as enabling or preparing persons “to participate effectively”¹⁰⁵ and lead a “responsible life in a free society”.¹⁰⁶ Accordingly, strengthening “respect for human rights and fundamental freedoms”¹⁰⁷ and “human diversity”¹⁰⁸ are also identified as important objectives of education. Education should also promote peace, tolerance, “friendship among all peoples, ethnic, national and religious groups”.¹⁰⁹ Thus states have an obligation to ensure that “curricula, for all levels of the educational system, are directed to the objectives identified in article 13 (1) [of the ICESCR]”.¹¹⁰

At this point it should be clear that the right to education also encompasses a right to human rights education. The aim of human rights education is to promote respect for human rights. The UN Declaration on Human Rights Education and Training spells out the aim of “[d]eveloping a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others”.¹¹¹ Human rights education therefore involves not only providing knowledge, but also imparting values (“education about human rights”), forms of learning and instruction that respect the rights of both learners and educators (“education through human rights”) and finally, empowering or strengthening the ability of persons to enjoy and exercise their rights and to respect and uphold the rights of others (“educa-

97 ICESCR article 13; cf. CRC article 29, para. 1(a); cf. CRC/GC/2001/1, para. 1; cf. CRPD, article 24, para. 1(a),(b).

98 CRC, article 29, para. 1(a); cf. CRPD, article 24, para. 1(b).

99 Cf. CRPD, article 24, para. 1(a).

100 Cf. CRC, article 3; CRC/GC/2001/1, paras 2, 9. For a more in-depth discussion of the UN CRC in the school system cf. Krappmann/Petry (2016).

101 CRC, article 29, para. 1(e). This aspect was not included in this analysis however.

102 Cf. CRC, article 29, para. 1(c)

103 CRC, article 28, para. 2.

104 E/C.12/1999/10, para. 41.

105 CRPD, article 24, para. 2 d; cf. CRC/GC/2001/1, para. 12.

106 CRC, article 29; cf. ICESCR, article 13.

107 ICESCR, article 13; cf. identical wording in CRC, article 29, para. 1(b); cf. CRPD, article 24, para. 1(a).

108 CRPD, article 24, para. 1 a.

109 CRC, article 29, para. 1 d; cf. CRPD/C/DEU/CO/1, para. 13; cf. ICESCR, article 13.

110 E/C.12/1999/10, para. 49.

111 A/RES/66/137, article 4 (b).

tion for human rights”).¹¹² Human rights education should be seen as a lifelong process and human rights values should be reflected in the daily life and experiences of learners.¹¹³ It should cover international, national and local problems and take the school’s situation into account.¹¹⁴

General Comment No. 20 of the Committee on Economic, Social and Cultural Rights also speaks of an educational approach of this type as a way to strengthen human rights and contribute towards the elimination of discrimination: “Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society”.¹¹⁵

Other educational objectives and content of relevance to protection against discrimination are mentioned in the UN CEDAW and the UN CRPD. The latter specifies that states should carry out effective public awareness campaigns to foster respect for the rights of persons with disabilities and to promote awareness of the capabilities and contributions of persons with disabilities.¹¹⁶ The CEDAW makes it clear how far-reaching the consequences of the objective of ensuring that education is sensitive to discrimination can be in its formulation of the following aim: ... the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.¹¹⁷

These are aims that should be taken into account in an analysis of the implementation of the human right to education. The Committee on Economic, So-

cial and Cultural Rights writes: “These new elements are implicit in, and reflect a contemporary interpretation of article 13 (1).”¹¹⁸

Fulfilling these aims will involve the scrutiny of school acts, the education plans and curricula, teaching and learning materials and the general school environment and life, including any school bodies.¹¹⁹ This gives rise to the following analytical questions:

Is the education aimed at promoting the full development of the human personality and sense of dignity?

Does education prepare pupils to effectively participate and lead a responsible life in a free society?

Have respect for human rights and fundamental liberties and human rights education been established as an educational objective?

Has the elimination of discrimination been established as an educational objective?

In this context, is respect for other cultures fostered in conjunction with the preservation of respect for one’s own cultural identity?

Are contents, methods and implementation based on principles of equality and non-discrimination and are they participative in nature and sensitive to diversity?

Are contents and methods chosen and implemented in a manner which ensures that they contribute to the elimination of any stereotyped concepts, particularly with respect to those belonging to groups named in the conventions? [...]

112 Cf. A/RES/66/137, article 2, (2). For a more in-depth discussion: Reitz/Rudolf (2014).

113 Cf. CRC/GC/2001/1, para. 15.

114 Cf. CRC/GC/2001/1, para. 13.

115 E/C.12/GC/20, para. 38.

116 Cf. CRPD, article 8; for a more in-depth discussion see Feige (2013).

117 CEDAW, article 10 c; cf. also E/C.12/1999/10, para. 55: “States parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups”.

118 E/C.12/1999/10, para. 5, the Committee refers explicitly to “specific references to gender equality and respect for the environment”.

The UN CRPD had not yet entered into force when the 1999 General Comment was released.

119 Cf. CRC/GC/2001/1, paras. 17–19.

5 Conclusions and recommendations

[The following recommendations are based on the analysis of the framework conditions of the German school system and the analysis of the objectives, content and methods of education (chapter 5 and 6 in the German version), which are not included in this excerpt.]

[...] With respect to the framework conditions (availability and accessibility), functional educational institutions and programmes providing a good quality of education should be available throughout the country. The human rights requirement of compulsory primary schooling is realised in Germany as a rule through the obligation to attend school. Formal access to education should be based on equal opportunities and non-discrimination and all children should have equal access to school. The early assignment of children to different types of schools in Germany should be examined critically. Forms of special education should be phased out. All aspects of the education system should be subjected to transparent and effective review to identify formal forms of discrimination as well as de facto discrimination. The latter is visible in particular in connection with the transition to secondary schools, the educational achievements of certain groups of persons, the intersection of different dimensions of discrimination and with regard to the permeability and flexibility of the school system. Physical accessibility should be guaranteed, particular for children and adolescents with disabilities or impairments, and this entails the systematic application of the concept of reasonable accommodation. In addition to the physical accessibility of education, economical accessibility must also be ensured. Actions taken for this purpose must avoid stigmatisation and be easily accessible to their target groups. Finally, freedom of religion or belief must be guaranteed in the school context. This involves ensuring that pupils are free to exercise their individual rights while also protecting them against religious or philosophical indoctrination. With respect to educational objectives, content and methods (ac-

ceptability and adaptability), school acts, education plans and curricula, teaching and learning materials as well as interactions in the daily school context should be non-discriminatory; moreover, they should fulfil the human rights requirements directed towards the free development of a person's personality, respect for human rights and the aim of reducing discrimination. In this context, the learner's role as an autonomous agent should be reinforced and human rights education should be explicitly anchored at all levels. Human rights education should not only provide knowledge about human rights, but also foster skills and attitudes empowering pupils to take action to uphold human rights and combat discrimination. Protection against discrimination should extend beyond tolerance and pursue the aims of equality and effective, active participation in society by all. In this context, general educational objectives should be linked to content and methods and all dimensions of human rights education be taken into account. Methods employed in education should be as inclusive and participatory as possible, thus ensuring the participation of everyone involved in the school. The concrete implementation in everyday school life is by no means trivial and requires a range of supporting measures, such as the establishment of appropriate criteria for the review of teaching and learning materials, the provision of information and counselling services, the adaptation of the initial and continuing education and training of teaching staff and the consideration of the non-discrimination principle in the context of school development, school culture and school programmes. Only then can education make a sustainable contribution to the reduction of discrimination and only then will the right to education be realised without discrimination. Against this backdrop, the German Institute for Human Rights recommends the following with regard to the realisation of the human right to education as laid down in the human rights treaties discussed herein:

1 that all entities that are responsible for the financing of an educational institution (social welfare authorities, school authorities, local authorities or other entities running schools) ensure the fulfilment of demands placed by human rights relating to the availability of resources for multi-professional teams with qualifications in teaching/teaching specific subjects, school social work, school psychology and special education.

2 that the Länder Parliaments broaden the scope of the prohibitions of discrimination in their school acts. All schools acts should clearly state that racist discrimination and discrimination based on socio-economic background, language, gender, religion or belief, political conviction, impairment or disability, age, nationality, civil status or familial relationships, sexual orientation or gender identity, state of health, place of residence or "other status" is prohibited.

- that the education ministries of the Länder review critically the early assignment of children to different educational paths with a view to the non-discrimination principle.

- that the Länder Governments and Parliaments and the Federal Ministry of Education and Research make access to a high quality education system available throughout the country without any discrimination, including by providing the requisite financial resources and appropriately qualified personnel.

- that the Länder Governments and Parliaments phase out the special needs schools and admit children with disabilities into regular schools if they so desire.

- that the Länder Governments and Parliaments ensure that reasonable accommodation is made at all levels of education and that persons affected have access to means to legally enforce this right.

- that the Federal Ministry of Education and Research and the Länder education ministries initiate and fund research projects to evaluate the effects of preparatory or transition classes that refugee or immigrant children and adolescents attend whose German language skills are not yet considered adequate to enter a regular class.

3 that the Federal Ministry of Education and Research and the Länder education ministries monitor the education system in a transparent way so that effective measures can be taken to remedy de facto discrimination, such as the disparities in school performance levels. Education data should be disaggregated by the dimensions of discrimination. Within the framework of this monitoring, it should also be examined whether education is in fact directed towards the educational objectives laid down in the UN human rights treaties. Monitoring and evaluation of progress should take into account the views of all stakeholders in education, including children and adolescents, teachers, parents, school administrations and directors. In particular, measures to reduce discrimination should involve individuals and groups affected by discrimination on the basis of the dimensions mentioned above.

4 that the Federal Ministry of Education and Research and the Länder Governments and Parliaments secure the needs-based funding of participation in education.

- that the Federal Ministry of Labour and Social Affairs, local employment offices, local authorities and other competent authorities and also educational institutions and advice centres disseminate understandable and accessible information on existing programmes that support participation in education in a manner that is suited to the target groups.

5 that the Länder Parliaments amend their school acts in such a way that they clearly state that the educational aim “preparing learners to participate” clarifies both the character of learners as active autonomous agents and the effective nature of the participation. Similarly, the school acts should firmly and permanently anchor the rights of learners to participate in the daily school routine – in all forms of schools and in all areas in which the learners are involved. The criteria of the UN Committee on the Rights of the Child for children’s participation should serve as an orientation framework in this context.

6 that the Länder Parliaments explicitly anchor human rights education as an aim of education in their school acts.

7 [this recommendation has become obsolete with the updated recommendation “Human Rights Education in Schools”¹²⁰] that the Standing Conference of the Ministers of Education and Cultural Affairs update its recommendation on human rights education in schools to reflect the terminological and conceptual changes of the past decades as well as the developments in human rights over the same period. Relevant individuals, organisations and institutions in the area of human rights education should be involved in this process, with the aim of making it an inclusive and participatory endeavour.

8 that the Länder education ministries explicitly anchor human rights education throughout their education plans and curricula. In this context, care should be taken to ensure that the wording makes it clear that it relates to all levels of human rights education (education about, through

and for human rights) and to ensure that human right education is anchored both in core subjects and across subjects for the life at school as a whole.

9 that the Länder Parliaments more firmly anchor educational objectives and learning objectives relating to the provision of knowledge and imparting of attitudes and skills empowering persons to reduce discrimination in the school acts: all school acts should clearly define the active role played by the school and thus also by pupils in reducing discrimination and should define the aims of equality and effective participation. In addition, school acts should refer to the dimensions identified in the UN human rights treaties. Moreover, school acts should be subjected to critical review with respect to any wording relating to love of one’s native country or Christian values, bearing in mind the prohibition of discrimination, and should be revised if necessary.

10 that the Länder education ministries revise their education plans in order to anchor the topic of discrimination much more firmly in them: discrimination should be addressed both as a cross-cutting topic and as a topic in the social science/social studies subjects in all types of schools and all school years. Rather than only general cross-references, the education plans should contain specific information as to how the topic can be addressed in association with different content matter. The relationship between human rights and protection against discrimination should be explained and all dimensions of discrimination be considered. Finally, care should be taken to ensure that in addition to the transfer of knowledge, attitudes are reflected and skills are fostered in order to

120 Standing Conference of the Ministers of Education and Cultural Affairs: „Menschenrechtsbildung in der Schule. (Beschluss der Kultusministerkonferenz vom 04.12.1980 i.d.F. vom 11.10.2018)“. https://www.kmk.org/fileadmin/Dateien/veroeffentlichungen/beschluesse/1980/1980_12_04-Menschenrechtserziehung.pdf (Retrieved: 23.11.2020).

take action against discrimination and to uphold human rights.

11 that the Federal Ministry of Education and Research and other individuals, institutions and organisations in the field of research, review teaching materials and everyday school life to identify ways in which they impede or promote the reduction of discrimination. An intersectional perspective encompassing all dimensions of discrimination should be adopted in this context.

12 that the competent bodies at the level of the Länder education ministries, the Länder education institutes (Landesinstitute für Bildung) and the school councils (Schulkonferenzen) and subject-specific councils (Fachkonferenzen) at individual schools carefully review teaching and learning materials with a view to whether they convey stereotyped, demeaning images, terms etc. with respect to any of the dimensions of discrimination contained in the international human rights texts, and if necessary to take up awareness raising and professional training offerings. - for the competent bodies and authorities to take into account all dimensions of discrimination in review criteria for the approval of teaching materials or guidelines of an advisory nature.

- that the competent bodies and authorities take all dimensions of discrimination into account in the criteria for the approval of instructional materials and in any informational texts providing guidance. Care should be taken to verify the absence of discriminatory depictions and content on the one side and that diversity and discrimination are depicted and addressed from a human rights perspective on the other.

13 that education authorities, school directors, and school councils as well as other school bodies ensure that information and advice on protection against discrimination is available and consider external qualified advice and contact points for complaints relating to discriminatory behaviour. Appropriate entities functioning as reporting and evaluation bodies for the protection against discrimination should be set up, or the mandate of existing bodies be broadened. In this process it is necessary to discuss the makeup of these bodies with respect to inclusion and diversity (analogous to gender balance). Above all, there is a necessity to discuss possibilities for supporting persons with experience of discrimination or adjusting the mechanism to make the body more inclusive and diverse.

14 that the Länder education ministries, education authorities and institutions of higher education which engage in the initial or continuing education and training of education professionals incorporate offerings on human rights-based protection against discrimination in their teacher training programmes. This also entails appropriate awareness raising, the provision of knowledge and pointing out possibilities for action with respect to mechanisms of discrimination including institutional and structural forms of discrimination. Furthermore, the thematic fields of inclusion, participation, German as a second language and the human rights-based approach to diversity should be anchored in all teacher training programmes and continuing training as cross-sectional obligatory content.

- that the Länder education ministries, local authorities, other entities running schools, the education authorities, school directors and school councils take human rights-based protection against discrimination into account in the context of school development, school culture and school programmes. This includes incorporating human rights and children's rights perspectives into existing evaluation instruments.

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TYPESETTING

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TITLE IMAGE

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