

The Right to Inclusive Education in Germany

Mona Niemeyer

Email: mononaniemeyer@gmail.com

Total word count:
8,583 (without references)
7,124 (with references)

Abstract:

The UN Convention on the Rights of Persons with Disabilities in article 24 seeks to combat discrimination of children with disabilities in the field of education by prescribing a model of social inclusion. This paper will critically examine the sociological concept of inclusion, the German experience in implementing article 24 and the limitations of article 24 vis à vis the Right to Education in the International Covenant on Economic, Social and Cultural Rights. Before turning to the situation in Germany it is beneficial to discuss underlying concepts relating to special need education in order to clarify the notion of inclusion. In doing so, contested medical concepts, the perception of education as end rather than means and the voicelessness of the child, all lead to the conclusion that a rights-based approach is advantageous in acquiring social justice. Moreover, looking at the case of Germany and a school system with an exclusion rate of 82% the delay in the public discourse about inclusion is particularly striking. Hence, section 3 will look at empirical data, the UN definition of education and elaborate on the German confusion of inclusion and integration by making reference to domestic law and an exemplary case along with relating the Monitoring Body's guidelines of availability, accessibility, acceptability and adaptability to the action plan of North Rhine-Westphalia. Finally, the application of social inclusion maxims to anti-discrimination law demands significant, positive adjustments but is also restricted by its focus on absolute disadvantage. The convention is arguably limited because of its narrow outlook owed to its civil and political nature and inclusive reform might bring broader equality when applied to the a priori Right to Education from the International Covenant on Economic, Social and Cultural Rights.

Keywords:

Right to education, economic, social and cultural rights, UNCRPD, inclusion, Germany, disability.

Introduction

The UN Convention on the Rights of Persons with Disabilities in article 24 seeks to combat discrimination of children with disabilities in the field of education by prescribing a model of social inclusion. This paper will firstly elaborate on the thus far predominant conception of special needs and education in general to show where and how social inclusion can bring considerable improvements. In doing so, contested medical concepts, the perception of education as end rather than means and the voicelessness of the child, all lead to the conclusion that a rights-based approach is advantageous in acquiring social justice. Further, the German experience in implementing article 24 will be discussed with the example of the Verwaltungsgerichtshof Hessen (Administrative Court) and the North-Rhine Westphalian action plan. Looking at the case of Germany and a school system with an exclusion rate of 82% the delay in the public discourse about inclusion is particularly striking. Hence, section 3 will look at empirical data from Germany, the relevant UN documents on education and elaborate on an exemplary case along with relating the Monitoring Body's guidelines of availability, accessibility, acceptability and adaptability to the action plan of North Rhine-Westphalia. Finally, it will be interesting to critically examine the sociological concept of inclusion and the limitations of article 24 vis à vis the Right to Education in the International Covenant on Economic, Social and Cultural Rights. The application of social inclusion maxims to anti-discrimination law demands significant, positive adjustments but is also restricted by its focus on absolute disadvantage. The convention is arguably limited because of its narrow outlook owed to its civil and political nature and inclusive reform might bring broader equality when applied to the a priori Right to Education from the ICESCR.

Special needs, Rights and Social Inclusion

In the educational context the debate often finds itself around the idea of intelligence which is not perceived as problematic in itself.¹ There are disagreements about its measurement where IQ figures for example support the idea that children with disabilities do not sufficiently benefit from education,² but very little has been said about its existence per se.³ In eugenic thought for instant, intelligence is not something a person creates or develops it is an innate phenomenon and playing by the rules of genetics, the most effective way to a more intelligent society is to separate the 'stupid' from the 'smart'.⁴ Further, this separation process in the field of education then is managed and legitimized by labeling children as, for example, having emotional and behavioural difficulties (EBD).⁵ In this context, EBD is a good example for showing how apparent scientific truths lead to labels which in turn lead to the identification of certain needs children with disabilities supposedly have. The concept of Cartesian dualism defining the interrelatedness of body and mind is the underlying supposition for holding psychological processes accountable for behaviour. So that, the problem is to explain behaviour by ability which in a different context than education would not be seen as appropriate. For example, to drive a car a person needs to move their arms and yet no arm movement course is set out to be the solution to improve driving skills. The assumption

1 Gary Thomas and Andrew Loxley, *Deconstructing Special Education and Constructing Inclusion* (Open University Press, Buckingham 2001) 24.

2 Marcia Rioux and Paula Pinto, 'A Time for the Universal Right to Education: Back to Basics' (2010) 31(5) *British Journal of Sociology of Education* 621-642, 622; Generally the special needs approach is based on the devaluation of education for persons with disabilities, compare Rioux and Pinto 626; Lee Ann Basser, 'Justice for All? The Challenge of Realizing the Right to Education for Children with Disabilities' (2005) 8 *The Journal of Gender, Race and Justice* 531-559, 540 and 545.

3 Thomas and Loxley (n 1) 45.

4 *Ibid* (n 1) 23-32.

5 *Ibid* (n 1) 70; For further reading on the creation and effects of labels, compare Thomas and Loxley (n 1) 44; Rioux and Pinto (n 2) 637; Iris Marion Young, *Together in Difference: Transforming the Logic of Group Political Difference* in *Principled Positions: Postmodernism and the Rediscovery of Value* (Laurence & Wishart, London 1997).

that children who behave differently, for example learn slower, have special needs is simply not a scientific fact and is open to debate.⁶ Importantly, presenting these concepts and ideologies as scientific facts supports the necessity for social exclusion. Further, EBD effectively allocates the problem within the child as opposed to admitting institutional difficulties and evokes the here contested suggestion of specific needs that have to be met. The argument runs that disabled children need to find stability, nurture and security in education and that even more so than other children. But whose need is met when the child's behaviour is primarily unwelcomed by the institution? It is arguably the school which benefits the most from excluding disturbances and not the children themselves.⁷ As an explanation for this, Bourdieu argues that doxa, the things taken for granted and remaining unquestioned because of their apparent self-evidence, supports this need-allocation to individuals because of managerial aspects. Thus, it is much more difficult to accept institutional flaws than individual ones because it is a lot more problematic to find appropriate remedies.⁸ Furthermore, in practice schools are unable to cope with children that do not react to subtle forms of punishment which is why Foucault speaks of a shift from punishment to judgment that has taken place in order to solve this dilemma, from 'naughty-therefore-impose-sanction' to 'disturbed-therefore-meet-needs'.⁹ This brings the opportunity of converting the teacher's role from labeler into helper at the same time as reformulating institutional demands into children's needs with the ultimate result that a child's action is accounted for by defining his/her personality.¹⁰ Additionally, labels effect the labeled in so far as individuals internalize the status imposed upon them and by acting accordingly they reinforce their exclusion.¹¹ Similarly, Foucault stresses the importance of power in these situations and finds that the label of deviance is not ultimately an individual's characteristic but rather defines the relationship between two individuals as it is the comparative element between children that leads to concepts like slow learners.¹² Questioning these concepts of intelligence, EBD, deviance and special needs is crucial in order to understand the status quo and facilitate the change towards social inclusion.

Furthermore, what the concept of inclusion entails cannot be understood without examining fundamental questions about the nature of education and its purpose within society. Hence, John Dewey illustrates that the school is a social institution, a community in which the social individual through the use of language can take part in shaping society.¹³ On that account he states that 'What the best and wisest parent wants for his own child that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy'.¹⁴ In this quote the indication of democracy should be highlighted as it demands for a participatory and inclusive approach to education in order to support the entire community. Dewey further discusses the idea of diversity in a pluralistic society and finds that the oppression of various interests in order to promote the agenda of the powerful will produce a vulnerable society unable to cope with change.¹⁵

6 Thomas and Loxley (n 1) 70.

7 Ibid (n 1) 52.

8 Ibid (n 1) 54; Compare generally Michael Grenfell and David James, *Bourdieu and Education* (Falmer Press, London 1998).

9 Ibid (n 1) 50; Compare generally Michel Foucault, *Discipline and Punish* (Penguin, Harmondsworth 1977).

10 Ibid (n 1) 53.

11 Ibid (n 1) 52-54 and 85; Rioux and Pinto (n 2) 630.

12 Thomas and Loxley (n 1) 78 and 84-85.

13 Nigel Blake and others, *The Blackwell Guide to the Philosophy of Education* (Blackwell Publishing Ltd, Oxford 2003) 27.

14 John J McDermott, *The Philosophy of John Dewey; Two Volumes in One; 1 The Structure of Experience; 2 The Lived Experience* (The University of Chicago Press, Chicago 1981) 455.

15 Blake and others (n 13) 27-28.

It is in this light that the pragmatic approach characterizes education as growth and therefore, allocates the ability to support growth as the primary tool to assess schools.¹⁶ Likewise, Adorno's concept of *Halb-Bildung* establishes the argument that *Bildung* (education) in its normative function supplied students with the capacity to question and change social order whereas now its focus is reduced to the ability to live in the existing system and thus, became *Halb-Bildung*.¹⁷ Correspondingly, other theorists like Giroux, Freire and Bourdieu argue that schools represent and reinforce systems of oppression but essentially have the potential in a democratic manner to advocate critical thinking¹⁸ and in the Deweyan sense, to support the expression of a given society's aims and definitions by the community itself.¹⁹ This potential can only be unleashed when the educational system is inclusive.

Following from this, participation and empowerment are crucial when understanding education as the heart of democracy by bringing about social progress and reform, advocating for growth and limiting the reproduction of the system. In this regard, individuals have to recognize the equality of the other so that each, governed by justice, can take part in shaping the social structure.²⁰ Thus, an essential requirement for any individual to participate in society is to have a voice. Children are perceived as incapable, irrational and vulnerable which accommodates a paternalistic notion of protection. The issue is that this leads to a fundamentally weak voice of the child, even more so when the child is labeled with a learning disability. Effectively, the safeguarding of children results in their exclusion from any real engagement with their society²¹ based on the allegation of a deficiency in moral capacity.²² In this respect, Dewey has long argued that all interests should be taken into account and that non-recognition will leave the individual feeling powerless and alienated.²³ Consequently, social justice demands for the voice of the child to be acknowledged and the education system is the means to show children how to acquire the capacity to participate.²⁴ What's more, exclusion and disempowerment must not take place within the system itself.²⁵ In this matter, the policy implications and the philosophy of the New Right approach²⁶ situated in an era of Neoliberalism are substantial in order to understand that there has been a major shift in the understanding of the purpose of education. This also helps to explain the focus on exclusion rather than inclusion in education. Hayek completely opposes the concept of social justice and establishes the idea of a natural social order in which inequalities are inevitable and provide stability for society. It is the notion of a spontaneous order that cannot be positively influenced by interference.²⁷ Therefore, any effort towards inclusion in the education

16 Ibid (n 13) 28.

17 Ibid (n 13) 40.

18 Thomas and Loxley (n 1)28-50.

19 McDermott (n 14)453.

20 Blake and others (n 13) 83.

21 Thomas and Loxley (n 1) 57-61.

22 Rioux and Pinto (n 2) 626.

23 Blake and other (n 13) 27-28; Compare also Hugh Collins, 'Discrimination, Equality and Social Inclusion' 2003(1) *The Modern Law Review* 16-43, 24.

24 Rioux and Pinto (n 2) 632; Compare also Neville Harris, 'Empowerment and State Education: Rights of Choice and Participation' (2005) 68(6) *Modern Law Review* 925-957, 938; J. Nixon and others, 'Confronting Failure: Towards a Pedagogy of Recognition' (1997) 1 *International Journal of Inclusive Education* 121-142.

25 Blake and others (n 13) 90; Rioux and Pinto (n 2) 630.

26 It should be noted that there are different viewpoints and conceptions within the group of the New Right but this abstract focuses mainly on Hayek's philosophy of a spontaneous order.

27 Norman Barry, *The Tradition of Spontaneous Order; A Selected Essay Reprint* (Literature of Liberty, Arlington 1982) B76.

system will endanger that order. Further, New Right policies in the field of education were designed to advance the economy by tying schools closer to employment and businesses, increase the state's control over the curriculum and emphasize community involvement as to support more community input and simultaneously less government expenditure. Ultimately, education has been transformed into a quasi-market whereby students are made customers and the basic criterion for evaluation is productivity.²⁸ Thus, describing exactly what Adorno referred to as *Halb-Bildung*. This marketization lead to division rather than diversity in the field of education and can be partly explained by the phenomenon of cost externalization, meaning that the schools which refuse to include certain children do not have to pay or account for the consequences of social exclusion.²⁹

Moreover, article 24 of the UN CRPD emphasizes the shift from a needs-based approach towards a rights-based approach in education. For the actual realization of inclusive education a rights-based approach will be an effective instrument. A needs-based approach perpetuates the failure to recognise the right of the child.³⁰ This seen in combination with the lack of student's voices forms the grounds on which power relations are played out and prevent active participation. In this light, a rights-based approach is of benefit because agency is perceived to have objective interests in planning and choosing their goals in life so that the possibility of meaningful contribution by students will limit segregation and ultimately provide for their autonomy.³¹ The individual Right to Education for children with disabilities has the capacity to realize a child-centered approach to the matter which will enable an occupation primarily with the child's interest.³² Additionally, the concept of rights brings the notion of duty which changes the perspective of the disempowered as being the outcome of unfortunate circumstances to being the subject of injustice. Injustice then invokes the idea of remedies that have to be provided by the duty-carrier whereby rights lead to more accountability of schools and governments. In this light a legal framework corrects who has the decision-making power.³³ Moreover, in special needs education a human rights-based approach will set out a more comprehensive approach as it delivers entitlements of access as well as quality so that it steps beyond the mere equality of opportunity proposal in favour of including a definition of conditions within the education system.³⁴ Further, the holistic angle of the legal conception manifests itself in not limiting inclusion to merely affect economic results but also comprehending social and environmental consequences.³⁵ There is a danger though to undermine the substantiality of the right to inclusive education and transforming it into a procedural right when allocating decision-making power to individual institutions.³⁶ Supporting a basic Right to Education deduced from general principles that can deliver equality for all is advantageous³⁷ because it is not as vulnerable to narrow interpretation and does not limit the focus on disability.

28 Ibid; Blake and others (n 13) 126.

29 On the cost of social exclusion, compare Carl Parsons and Frances Castle, 'The Cost of School Exclusion in England' (1998) 2(4) International Journal of Inclusive Education 277-294.

30 Thomas and Loxley (n 1) 114; Harris (n 24) 933.

31 Alicia Ely Yamin, 'Suffering and Powerlessness: the Significance of Promoting Participation in Rights-Based Approaches to Health' (2009) 11(1) Health and Human Rights Journal 5-8.

32 Rioux and Pinto (n 2) 630.

33 Yamin (n 31) 5, 6-8 and 16.

34 Rioux and Pinto (n 2) 622, 626-627.

35 Ibid (n 2) 636.

36 Ibid (n 2) 635.

37 Ibid (n 2) 637.

The German Example

Having examined the conceptual background of an inclusive education system and understanding its importance for the whole entity of society this paper will now turn to the specific situation in Germany looking at significant statistics, presenting the relevant United Nation's conventions, analysing some aspects of domestic law with help of the important judgment of the Verwaltungsgerichtshof Hessen (VGH – Administrative Court of the State of Hesse) and the example of North Rhine-Westphalia (NRW) considering an independent expert's report and the general guidelines for the realization of article 24 from the Monitoring Body of the German Institute for Human Rights.

Exclusion in Numbers

The statistical data from 2010 for the situation in Germany underlines the lack of an inclusive educational model. Looking at day care facilities the national average of the inclusion proportion³⁸ is relatively high with 61.5% even though there are significant variations in the different *Bundesländer* (counties). Children with special educative needs form 6% of all children within the age group subject to fulltime compulsory education. Since 4.6% of these 6% constitute the so-called exclusion rate.³⁹ 82% of the children with special needs are facilitated in special institutions, namely the *Sonderschule* (special needs school). Additionally, the children who are in general schools, around 18% of all children with special needs, although under the same roof as ordinary children, are being taught in separate classes.⁴⁰ Thus, describing the idea of integration rather than inclusion, an important differentiation.⁴¹ The federal average exclusion rate lies by 4.9%. Moreover, looking at the specific enhancement focuses or focuses of advancement efforts it is noticeable that 43.7% are children with learning disabilities who form along with the 11.5% children with behavioural and emotional difficulties (BED) more than half of the group of children with special needs. Another important and striking group within this are the children with the enhancement focus language constituting 10.6% of all children with special needs along with the enhancement focus of mental development (16%). In summary, the four enhancements focuses in learning disabilities, BED, mental development and language embody 81.8% of all children with special needs. Having already discussed the controversy around the concept of BED above, it would be interesting to know how many children of those with an enhancement focus in language are not native German speakers and or come from a migration background. Also, there is no data available to determine generally how many children with special needs have a migration background.⁴² In general, the federal inclusion proportion for primary schools reaches an average of 33.6% while secondary schools only manage to include 14.9% of all children with special needs. Further, this signifies that children who have been inclusively educated in day care and or primary school have to overcome a big barrier in order to get accepted to mainstream secondary schools. In addition, 45.3% of the 14.9% who are visiting ordinary secondary schools are found in the *Hauptschule*, the lowest in the three-tier-system hierarchy and with the necessity for the *Abitur* (normally received at the *Gymnasium*) in order to apply for programmes at university there is very little evidence for social inclusion in this model. In summary, the empirical data points out that the inclusion proportion in the sphere of day care facilities is significantly greater than in the area of schooling. Furthermore, 6% of the children in the age of fulltime compulsory schooling have special needs and primary

38 The inclusion proportion represents the fraction of students with special needs present in inclusive systems from all the students with special needs.

39 The exclusion rate is the fraction of students with special needs in separate institutions from all students.

40 Klaus Klemm, *Gemeinsam lernen. Inklusion leben.* (Bertelsmann Stiftung, Guetersloh 2010) 1-15.

41 Brigitte Schuhmann, 'Inklusion statt Integration - eine Verpflichtung zum Systemwechsel' (2009) 2 Sonderdruck Pädagogik 51-53, 51.

42 Klemm (n 40) 15-21.

schools have an inclusion proportion of 33.6% contrary to only 14.9% in secondary schools. The problem of equality expresses itself most obviously considering that 76.3% of all children with special needs do not manage to achieve the leaving certificate from the *Hauptschule*, the lowest in the secondary school hierarchy which leaves no real job opportunities.⁴³ Generally, the focus in empirical research will have to be on providing more holistic data in order to illuminate the real issues underlying exclusion policies.⁴⁴

Inclusion in International Provisions

As seen above the concept of inclusion is far from being realized in Germany despite the ratification of the relevant international documents, the CRPD and the ICESCR. It is surprising that the controversy around inclusion did not achieve any public attention before the CRPD as article 13 of the ICESCR introduced the Right to Education as early as 1976 and should have been read in conjunction with a non-discrimination clause and is justiciable.

Article 13 of the International Covenant on Economic, Social and Cultural Rights talks about the 'right of everyone to education' in order to facilitate meaningful participation of individuals within their society. The document specifies that primary, secondary and higher education should be free of charge and 'accessible for all' along with the right of the parents or legal guardians to select an institution for their child.⁴⁵ This read along with article 2, paragraph 2 in the same Covenant which provides a non-exhaustive list of criteria upon which rights should not be discriminated on leads to the question as to why children with disabilities are excluded from mainstream schooling. While it is true that *Sonderschulen* (special education schools) are free of charge and compulsory these institutions have deprived children of access to secondary schools and universities as well as of vocational opportunities as indicated by the figures above. Moreover, possible explanations for the failure of the state and civil society to notice this human rights violation earlier are rooted in the impression that education has little to offer to persons with disabilities.⁴⁶ And as mentioned above, the growing influences of New Right policies and the ideology of Neoliberalism colonized the domain of education nurturing competition and exclusion.⁴⁷

Additionally, the need of politicians to provide visible solutions for their constituency should not be dismissed. The establishment of special institutions is therefore more effective in letting politicians appear to actively solve the problem.⁴⁸ It follows that inclusion is an issue intrinsically concerning politics.⁴⁹ In this light, art. 24 of the CRPD can be seen as an extension of the Right to Education in the ICESCR in that the document specifically relates the Right to Education to persons with disabilities and seeks to avoid discrimination against this group. Further, inclusion means no exclusion of any child from the general school system which then more than clearly condemns the *Sonderschule* as illegal under international law. It is crucial to stress the danger of using the terms of *inclusion* and *integration* interchangeably because the need to understand what inclusion means is especially important in the German context where case law and other documents display major misinterpretations.

43 Ibid (n 40) 21-23.

44 Rioux and Pinto (n 2) 621-642, 639.

45 General Assembly, *International Covenant on Economic, Social and Cultural Rights* (adopted 12 December 1966, entered into force 3 January 1976) Res. 2200A (XXI) (ICESCR) art. 13.

46 Rioux and Pinto (n 2) 622, Bassier (n 2) 540 and 545.

47 Roger Slee, 'Inclusive Education? This Must Signify 'New Times' in Educational Research' (1998) 46(4) *British Journal of Educational Studies* 440-454, 447-448; Barry B76.

48 Thomas and Loxley (n 1) 43.

49 Rioux and Pinto (n 2)638.

Hence, Integration is a concept that aims at incorporating excluded children into the existing system and is therefore distinct from the idea of inclusion in that the latter claims to support diversity.⁵⁰ It follows that, integrative measures still allow for children to be separated when being taught on the basis of the child being the inherent problem.⁵¹ The UNESCO in 2006 therefore observes: ‘Looking at education through an inclusive lens implies a shift from seeing the child as the problem to seeing the education system as a problem.’⁵² immediately replacing the need for the child’s conformity by the demand for structural change.⁵³ This confirms and reinforces the already mentioned critique of a needs-based approach to special education. Already in 1994 in the Declaration of Salamanca did the UNESCO expressively abolish the idea of integration to promote inclusion.⁵⁴ In general, the concept of education as understood by the United Nations is not informed by Neoliberalism’s and New Right’s economic worries. It rather reinforces Dewey’s notion of its importance for a democratic society and tries to bring out its potential to promote communicative action⁵⁵ and critical thinking based on Human Rights norms.⁵⁶ Thus, the ICESCR qualifies the overarching aim of education as to ‘be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.’⁵⁷ Moreover, the idea of inclusion in a UN context is not new as the absence of former debate might suggest. The Convention of the Child in 1989, for example, defines the Right to Education and in article 23 refers precisely to active and meaningful participation and in 2007 General Comment No 9 of the UN Committee on the Rights of the Child identifies inclusion as a key element to educate children with disabilities.⁵⁸ Furthermore, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) established in 1993 emphasize the integrity of education provided for disabled children in the general system and clearly articulate the preference of inclusion into mainstream education over special support measures.⁵⁹ Followed by the UNESCO Declaration of Salamanca 1994, previously pointed out, these documents form a substantive basis for an inclusive approach to education. Additionally, they define the way in which the broader principle of equality illustrated in the Universal Declaration on Human Rights (1948) and the ICESCR (1966) can be accomplished⁶⁰ by specifying the meaning of the right to education.⁶¹ The added value the CRPD brought to the debate is the legal dimension.

50 For further explanations on diversity, compare F. Williams, *Somewhere over the Rainbow: Universality and Diversity in Social Policy* in Social Policy Review 4 (Social Policy Association, Canterbury 1992).

51 Schuhmann (n 41) 51-53.

52 Ibid (n 41) cited UNESCO 52.

53 Rioux and Pinto (n 2) 630.

54 Ibid (n 2) 634.

55 Communicative action describes the process through which individuals reach agreement on validity claims by consent. Compare Jürgen Habermas, *Moral Consciousness and Communicative Action* (Polity Press, Cambridge 1990).

56 Rioux and Pinto (n 2) 639.

57 ICESCR art. 13 (n 45) para. 1.

58 United Nations Committee on the Rights of the Child, General Comment No 9, Paras. 66 and 67, U.N. Doc. CRC/C/GC/9 (2007), <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/GC/9>

59 The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993.

60 Rioux and Pinto (n 2) 630-633.

61 Bassler (n 2) 559.

The Case of the VGH Hessen

One of the main court cases concerning the right to inclusive education is the judgement of the *Hessischer Verwaltungsgerichtshof* (VGH Hessen) from the 12 November 2009. It has to be noted that Germany is a monist system of law meaning that there is no need to specifically translate international into domestic legislation⁶² and sufficiently defined normative aspects require no further legal implementation on the national level.⁶³ The significance of the legislation domestically then depends on whether the legislator acknowledged it and gave an order to apply law (*Rechtsanwendungsbefehl*). In the context of CRPD Germany ratified, therefore acknowledged the law and further, included it in the *Bundesgesetzblatt* (federal Gazette). Consequently, it is now considered equal in status with ordinary federal law. Furthermore, international law is to be understood as a guideline for the constitution and hence, national law is to be interpreted in accordance with the convention.⁶⁴ It is important to read the convention as part of the wider Human Rights context and it should be acknowledged that article 24 of the CRPD contains several responsibilities which are distinct in their understanding and degree of legal bindingness. As such there are supportive responsibilities along with duties to respect, protect and ensure rights as well as the obligation to progressively realize some rights while others are immediately justiciable. Overall, Germany signed the convention on 30.3.2007,⁶⁵ requiring the state to abstain from any act contrary to the treaty and with ratification on 24.2.2009⁶⁶ committed to progressive implementation and compliance with already sufficiently defined norms. Further, the CRPD excludes certain rights from the principle of progressivity and clearly stresses their immediate justiciability in article 4 paragraph 2 saying that states have to take measures '(...) without prejudice to those obligations contained in the present Convention that are *immediately applicable* (...)'.⁶⁷(emphasis added). Looking at the court case this notion will be important along with the assurance of the provision of reasonable accommodation made in article 24, paragraph 2c. It defines the responsibility of the relevant institutions to make amendments in order to facilitate mainstream schooling in individual cases implying effects on authoritative procedures concerning diagnostics and reasons for decisions.⁶⁸ The judgment of the VGH Hessen from 12.11.2009⁶⁹ provides an example on how litigation plays an essential role in the implementation process.

In the case the applicant was assigned to go to a special school (*Schule für praktisch Bildbare*) against her will and she appealed to the court invoking the CRPD. The VGH Hessen dismissed the application mainly on three grounds: the CRPD not being part of domestic law, that there has been no agreement from the *Land* Hessen (county Hesse) to the convention and that article 24 does not fulfil the requirements for immediate justiciability based on sufficiently defined norms. The argument accusing the convention of not being domestically justiciable

62 Ibid (n 2) 538.

63 Monitoring Body of the German Institute for Human Rights, 'Stellungnahme der Monitoring-Stelle zur UN-Behindertenrechtskonvention zur Stellung der UN-Behindertenrechtskonvention innerhalb der Deutschen Rechtsordnung und ihre Bedeutung fuer behoerdliche Verfahren und deren gerichtliche Ueberpruefung, insbesondere ihre Anforderungen im Bereich des Rechts auf inklusive Bildung nach Artikel 24 UN-Behindertenrechtskonvention' 1-7 (August 2010) http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/stellungnahme_der_monitoring_stelle_z_un_behindertenrechtskonvention_zur_stellung_der_behindertenrechtskonvention_innerhalb_der_dt_rechtsordnung.pdf accessed 7 November 2011.

64 'Stellungnahme zur Rechtsordnung und behoerdliche Verfahren' (n 63) 8.

65 Compare United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en

66 Ibid.

67 General Assembly, *Convention on the Rights of Persons with Disabilities* (adopted on 13 December 2006, entered into force on 3 March 2008) 2515 UNTS 3 Res. A/RES/61/106(CRPD) art. 4, para. 2.

68 'Stellungnahme zur Rechtsordnung und behoerdliche Verfahren' (n 63) 3-9.

69 Hessischer Verwaltungsgerichtshof (VGH Hessen) 7 B 2763/09 of 12 November 2009.

is based on the *Grundgesetz* (GG) as the court finds that the confederation has no legislative competence along with insufficient legislative jurisdiction under chapter VII of the GG.⁷⁰ Here, the German constitutional law specifies that the legislative competence lies with the *Länder* unless it is assigned to the confederation by the GG and article 73, in particular, lists the areas in which the confederation enjoys exclusive legislation. The school system is not included in the list neither is it mentioned in article 74 which defines the domains of competing or rivalry legislation.⁷¹ In paragraph 6 of the judgment, the court proceeds to claim that international treaty law is only subject to domestic law as far as the confederation has the legal competence over resource matters. But this perception is not acceptable when it comes to international human rights treaties as it would mean that international law has to be transformed into domestic law on county level. One could then raise the question as to why no county has implemented the ICESCR, for example. Eventually, German case law and practice shows an acceptance that the *Länder*, even when exclusively legally competent in the matter, have to follow the guidelines of international law.⁷² Additionally, there is no case that ever denied authority of international law on the basis of the GG and the therein principle of legal competence. Moreover, the court completely misinterprets the link between the GG and the convention when ignoring that article 3, paragraph 3 (second sentence)⁷³ now has to be analysed in the light of an inclusive society. The second main reason appealed on by the VGH Hessen concerning the consent of the *Land* Hessen to the convention is founded on article 32, paragraph 1 and article 59, paragraph 1 of the GG.⁷⁴ But the argument is weak because the *Bundesrat* expressed its consent on the matter on 19 December 2008 and consequently, the indicated requirements are met. Finally, the third point of critique from the court is the observation that immediate justiciability could not be provided because the convention did not include sufficiently defined norms. Generally, this view can be opposed by the fact that the CRPD clearly excludes some rights from progressive realization and it remains questionable if the court fulfilled its duty to at least not act contrary to the convention even if not yet transformed on a local level. Since the convention is obviously justiciable and applicable to domestic law of the counties the findings of the VGH Hessen are deeply flawed. Moreover, this case is crucial to the situation in Germany because of its precedent effect as it was cited for example by the *Niedersächsisches Oberverwaltungsgericht* in 2010.⁷⁵ This evolution consequently shows the importance of the courts to interpret and enforce the convention conformable to human rights principles.⁷⁶

Realization of Article 24 in North Rhine-Westphalia

Besides the court's role concerning implementation there has been an argument that the federal system allocating substantial authority over education within the *Länder* ultimately constraints the realization of article 24 of the convention. As seen above, the empirical evidence indeed suggests quite elementary disparities in the level of inclusion found in the various *Länder*. While the convention does not give detailed guidelines concerning practicalities of its implementation it is not acceptable that the *Länder* who have always been pushing for autonomy now use this as an excuse for not achieving the goals of article 24 and there is no manifestation that any county's

70 Hessischer Verwaltungsgerichtshof (VGH Hessen) (n 69) para. 5 and 7.

71 Grundgesetz (GG) der Bundesrepublik Deutschland (Bundestag, 1948) http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg_07.html accessed 2 December 2011.

72 For example, on police law: SächsVerfGH, Vf. 44-II-94 of 14 May 1996 para. 162.

73 GG (n71): Art. 3, para.3, sentence 2 states that no one shall be disadvantaged because of their disability.

74 These articles declare that although the confederation is responsible for signing international treaties the *Länder* have to be informed and consent to it.

75 Niedersächsisches Oberverwaltungsgericht 2 ME 278/10 on 16 September 2010.

76 'Stellungnahme zur Rechtsordnung und behördliche Verfahren' (n 63) 10-11.

legal system is not appropriate for this purpose. Generally, an international treaty cannot provide such specific information as to accurately relate to a range of states and human rights conventions have to be interpreted in a differentiated manner and are not merely programmatic.⁷⁷ It follows that implementing the UN norms of article 24 foremost depends on political action recognizing the inherent rights in order to make the small but necessary changes in the legislation to reach a setting in which individuals have internalized these rights. Therefore, this paper will now turn its attention to the position of the *Länder* making particular reference to the example of North Rhine-Westphalia combined with the guidelines for the realization of article 24 published by the Monitoring Body of the German Institute for Human Rights, the national human rights institution.

In order to inspect the situation in the *Länder* it will be useful to take a closer look at the example of North Rhine-Westphalia (NRW) to discuss possible measures for progressive realization which can mostly be assigned to other counties as well. Further, in conjunction with the example, the position and suggestions of the Monitoring Body of the German Institute for Human Rights will be introduced. The empirical data describing the situation in NRW for the term 2009/2010 is in many respects similar to the national average which was evaluated earlier. In this regard, the special needs rate (all children that are diagnosed to have special needs) with 6.3% and the exclusion rate with 5.3% lie slightly above national average (6% and 4.6%).⁷⁸ Remarkable is that despite the increase in the inclusion proportion the general special needs rate and the exclusion rate continued to grow⁷⁹ which can be explained by the connection of resource allocation and special needs diagnosis applying to mainstream schools. Moreover, the phenomenon of a biographic disruption with reference to the changeover from primary school to secondary school can also be observed in NRW⁸⁰ along with gender imbalances as just 34.8% of all children diagnosed with special needs are girls and additionally, only 12.3% of the group with special focus on emotional and behavioural difficulties are female. Further, the analysis of the county shows substantial regional discrepancies which points out the need to pay particular attention to those areas characterized by greater shortcomings. Consequently, the approach to the realization of article 24 has to be specific to regional contexts.⁸¹ The suggestions then to develop an inclusive education system in NRW are largely based on the guidelines for the realization of article 24 of the convention set out by the Monitoring Body concentrating on the four main aspects of availability, accessibility, acceptability and adaptability. First, availability as defined in General Comment 13 No. 6 by the UN Committee on ESCR⁸² covers primarily, the implication that national law accommodates for the possibility to flexibly regulate resources in mainstream schools. Also, provisions should be made in order to guarantee continuous resources for the future. Moreover, in the domain of constructions barrier-free buildings have to be further developed and no new special needs institutions should be established. Finally, the Monitoring Body acknowledges the

77 *ibid* (n 63) 6.

78 In this respect, the special needs rate (all children that are diagnosed to have special needs) with 6.3% and the exclusion rate with 5.3% lie slightly above national average (6.0% and 4.6%). Compare Klemm (n 40) 15.

79 The special needs rate augmented from 4.5% in 1991 to 6.3% in 2009 while the exclusion rate expanded from 4.6% to 5.3% during these 10 years. Compare Klaus Klemm and Ulf Preuss-Lausitz, 'Auf dem Weg zur Schulischen Inklusion in Nordrhein-Westfalen. Empfehlungen zur Umsetzung der UN-Behindertenrechtskonvention im Bereich der Allgemeinen Schulen' (June 2011) 58-59 Expert's Report requested from the Ministry for Schools and Further Education North Rhine-Westphalia http://www.schulministerium.nrw.de/BP/Inklusion_Gemeinsames_Lernen/Gutachten_Auf_dem_Weg_zur_Inklusion_NRW_Inklusionskonzept_2011_-_neue_Version_08_07_11.pdf accessed 1 December 2011.

80 The inclusion proportion in primary schools amounts to 29.1% compared to 12.3% in secondary schools. Compare Klemm and Preuss-Lausitz (n 79) 60.

81 Klemm and Preuss-Lausitz (n 79) 58-67.

82 The General Comment links availability with quality ('functioning') and quantity (adequate amount) of institutions.

importance of the impact the convention has to have on the technical didactics.⁸³ In this regard, the experts advise North Rhine-Westphalia to first and foremost formulate an action plan in order to achieve the goal of an inclusion proportion of 85% by 2020.⁸⁴ With respect to availability the county has to ensure the preservation of resources related to special needs education for the future despite the fact of a general decrease in student admissions. Therefore, paragraph 2⁸⁵ of the education act has to be amended as to include the individual right of the convention along with the elimination of the reservations of school supervisory boards in paragraphs 19 and 20.⁸⁶ Furthermore, children enjoying inclusive primary school education shall be instantly entitled to continue their secondary education within an inclusive system. In practice the claim to the right to inclusive education will be progressively realized starting with transferring classes 1 and 5 into the mainstream system in 2012/2013 and then gradually moving upwards. Further, the area of technical didactics will be improved through measures of vocational training on inclusion and the introduction of a new subject of study,⁸⁷ for example. At the same time NRW has to adequately adjust the building regulations for schools.⁸⁸ The second important aspect expressed by the Monitoring Body is accessibility and deals with the abolition of the interrelationship between resource allocation and diagnostics and emphasises the concept of a child centred approach meaning that the parent's right of choice only prevails when in accordance with the inclusion principle. Moreover, the parents have to be informed and educated about their role to safeguard the child's best interest. In addition, a legal definition of the principle of reasonable accommodation will serve to avoid confusion.⁸⁹ Consequently, the regions and cities within NRW have to create Ombuds centres to inform and include parents in the transformation process along with the establishment of a working group in order to coordinate the developments on the different levels of engagement (Regional Authorities, Cities Council, County Association, Association of Towns and Municipalities and Project Team Inclusion).⁹⁰ Thirdly, acceptability is a fundamentally crucial element of article 24 of the CRPD. In order to generate a functioning system of inclusive education in Germany all of society has to understand and support its basic components and the core educative goals of the convention have to be mirrored in the legal system. It follows a demand for the participation of the child as well as a legal entitlement to consultations for parents and pupils. Moreover, under this point the Monitoring Body takes the opportunity to point out that the practice of diagnostics, too, has to be directed towards inclusion.⁹¹ In the concrete case of NRW a feedback group should be developed in addition to the Project Team Inclusion as to insure the cooperation and presence of civil society in the process. Moreover, the countywide progress towards inclusion will be documented for periodic publication (every 2 years) and shall be publicly discussed. Also, in respect to diagnostics the exercise of a declarative diagnosis will be avoided so as to give way to a school internal process of diagnostic. Furthermore, the enhancement focuses in learning difficulties, EBD and language problems will be grouped together as *LES*.⁹² Finally, the fourth feature of adaptability encompasses amongst other notions the priority of academic and

83 Monitoring Body of the German Institute for Human Rights, 'Stellungnahme der Monitoring-Stelle; Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems (Primarstufe und Sekundarstufe I und II)' (March 2011) 12 http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/stellungnahme_der_monitoring_stelle_eckpunkte_z_verwirklichung_eines_inklusiven_bildungssystems_31_03_2011.pdf accessed 10 November 2011.

84 Klemm and Preuss-Lausitz (n 79) 5.

85 This paragraph defines the educational mandate and purpose of the school.

86 Klemm and Preuss-Lausitz (n 79) 75

87 This subject will be titled *LES* referring to the special needs areas of learning, EBD and language.

88 Klemm and Preuss-Lausitz (n 79) 124-128 and 130.

89 'Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems' (n 83) 13-14.

90 Klemm and Preuss-Lausitz (n 79) 127-129.

91 'Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems' (n 83) 15.

92 Klemm and Preuss-Lausitz (n 79) 125 and 127 and 130.

scientific support. Here, the communication of relevant, successful examples from the praxis should be given preference. Further, the education of teachers should reflect the positive results from empirical findings along with the use of uniform human rights based indicators as to facilitate meaningful comparisons of empirical data.⁹³ This finds practical implications in the form of a process-oriented approach to academic and scientific data that will evaluate and report experiences of the feedback group and the Project Team Inclusion for the purpose of acquiring quick and effective solutions.⁹⁴ In conclusion the expert's report on North Rhine-Westphalia deals with all the relevant aspects of the guidelines put forward by the Monitoring Body and succeeds in revealing a detailed, comprehensive document relating to the realization, progressive and immediate, of article 24 of the CRPD. The *Land* North Rhine-Westphalia has to adopt these suggestions as quick as possible and transform them into an action plan for the county as the National Action Plan cannot accomplish the task to provide uniform guidelines for the considerably autonomous *Länder* and their diverse positions.

Limitations of a Civil and Political Right to Education

Having seen the German efforts to implement article 24 of the CRPD and understanding the value added it will be interesting to provide an outlook on some underlying restrictions of article 24 based on its civil and political nature.

Generally, when talking of anti-discrimination laws the notion of equality instantly springs to mind. The problem is an inherent tension between equality of opportunity, a procedural issue and equality of outcome, a more substantial perception.⁹⁵ In European litigation the principle of proportionality has been largely applied to decide whether or not it is possible to deviate from the doctrine of equal treatment depending on the outcome.⁹⁶ But despite its usefulness as a legal instrument it still means that courts have to judge over the persisting tension. The principle of equal treatment must be acknowledged as a crucial element, the substantive aspect of equality must feature within the law, the idea of equal worth or respect should be attached but the tension can never be completely suspended.⁹⁷ Social inclusion sets out a particular framework addressing the themes of relevant social problems, appropriate prioritization of the standard of equal treatment and the procedure of proving illegal discrimination. Hence, as to the social problem intended to be dealt with by anti-discrimination law social inclusion focuses on structural disadvantage. The concept of structural disadvantage is built on the presupposition that there are certain groups that are systematically worse off than others and that these conditions are generated by institutions. It follows that in order to account for the cause of structural disadvantage the theory has to further investigate the constitution of the group, the characteristics of the disadvantages and the features of the institutions constructing the disadvantages.⁹⁸ Considering the aspects that constitute a socially excluded group the concept's definition is inherently linked to a *de facto* asymmetric discrimination of a group compared to the rest of the community. Therefore, the nature of the classifying components, whether genetic or social for example, is irrelevant in determining discrimination.⁹⁹ Furthermore, the account gives a more holistic perspective on the

93 'Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems' (n 83) 16.

94 Klemm and Preuss-Lausitz (n 79) 130.

95 Collins (n 23) 17.

96 *Ibid* (n 23) 18.

97 *Ibid* (n 23) 20.

98 *Ibid* (n 23) 26.

99 *Ibid* (n 23) 27.

disadvantages that should be addressed by anti-discrimination law because of its focus on the well-being of the individual which is not merely subject to economic circumstances. Hence, the concept perceives employment for example as the most efficient reassurance of social inclusion and therefore, attaches great importance to education as the precondition to get a job. Notice here that education and employment are not defined as means to enhance one's economic position but are ends in themselves.¹⁰⁰ The third important aspect of the idea of structural disadvantage is the centrality of institutions in producing inequality and therefore, their character has to be examined. So far, individuals that are subject to indirect discrimination have to resort to stereotypes and classifications which they might object to. Thus, a woman for instance has to live up to formal requirements of the job (working hours) and informal social norms (mother caring for her children). The legislation scrutinizes the effect of institutions but not of social norms.¹⁰¹ This is where social inclusion does not accept individual autonomy if the outcome leads to exclusion and thereby manages to account for problematic social conventions at the same time as negative impacts of institutions.¹⁰² Moreover, social inclusion gives guidelines as to when the principle of equal treatment can be abolished by not relying on a comparative element of proof. In practice anti-discrimination laws often make use of comparisons in order to determine whether or not an individual has been discriminated against. The problem with this reasoning is that it prompts the individual from a disadvantaged group to look for someone who is better off *and* similar to them in order to confirm discrimination. Effectively, this is hard to achieve since the worse-off by the mere nature of their category are usually very different from the privileged. In this respect, social inclusion limits the requirements to the exhibition of the excluding aspect of a rule and the presentation of the *de facto* impact on the individual.¹⁰³ Additionally, contrary to mainstream anti-discrimination law the concept takes into account that exclusion most of the times results from the combination of several factors which cannot be separated. Another main issue is the stand social inclusion takes towards the method of a justification defence of discrimination. Therefore, under the CRPD parents do not have to show the integrative capacity of their child anymore but the burden of proof shifted towards the schools that have to provide for reasonable accommodations.¹⁰⁴ Consequently, the issue at stake is not the equality of treatment but the substantive legitimization of the practice and therefore, social inclusion in a Rawlsian sense acknowledges deviation from equality of treatment if benefiting the least well-off. Remember though that the least well-off are not defined only in economic terms and remedies have to be understood in non-material as well as material terms.¹⁰⁵

Moreover, the social inclusion perspective constitutes a political justification of the legislation for the Third Way because of its ability to find a compromise between egalitarian welfarism and neoliberal individualism. In this sense, the theory is essentially concerned with justice but not with egalitarian distribution as it focuses on the absolutely disadvantaged and does not seek to reach general equality but rather looks towards realizing a minimal cut-off point.¹⁰⁶ The argument here is fundamentally dependent on the lack of a refusal of the status quo as social inclusion gives a broad margin of appreciation to governments in the matter of resource allocation. It acknowledges that resources can never be completely fairly distributed and this leads to the ultimate difficulty

100 Ibid (n 23) 29-30.

101 Ibid (n 23) 30; Compare also N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, Oxford 1998) 22.

102 Collins (n 23) 31.

103 Ibid (n 23) 32.

104 Collins (n 23) 35; Rioux and Pinto (n 2) 629.

105 Collins (n 23) 40 & 23.

106 Collins (n 23) 22-23.

the approach encounters namely the question whether or not inclusive education can reach beyond the category of disability.¹⁰⁷ While article 24 of the CRPD formulates rights for children with disabilities it is limited in its approach because of its inability to address wider inequalities. Although, as empirical research shows, the *Sonderschule* is a school of the poor there are other relatively disadvantaged groups that are excluded from inclusion.¹⁰⁸ This has been very clearly argued by social inclusion proponents in the German context as they specifically state not to confuse the abolition of special education schools with the fundamental debate around the restructuring of the three-tier system of secondary schools.¹⁰⁹ Although the argument is maybe considered more realistic there is no substantial reason against the practicality of a broader approach to social inclusion.¹¹⁰ This point however does partly not arise because of the consideration of the matter under the umbrella of civil and political rights rather than under the Right to Education in article 13 of the ICESCR. This fall back on a civil and political right to implement an inclusive education system despite the danger of benefiting exclusively one group shows the apparently still predominant perception of the injusticiability of economic, social and cultural rights.

107 Collins (n 23) 23.

108 Klemm and Preuss-Lausitz (n 79) 125.

109 Compare for example, 'Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems' (n 83) 6.

110 Klemm, for example, points to the inconsistency of the German school structure with the inclusion model. Compare: Klemm (n 40) 12.

Conclusion

Social theory helps to explain problematic concepts of special needs education such as presenting some differences as scientifically proved medical concepts, labelling children with disability which leads to the internalisation of the labels and the voicelessness of the child. Moreover, it is important to stress the potential education has to strengthen democracy through empowerment. In this regard, a rights-based approach further strengthens the voice of the child. Ultimately, the German experience shows that the exclusion rate of 85% has to be addressed by litigation of the relevant UN documents. Further the experience demonstrates the central role the monitoring body of the German Institute for Human Rights plays in clarifying and advising on human rights obligations so as to avoiding misunderstandings. Further, it is important to distinguish between integration and inclusion as only the latter will accommodate diversity instead of difference. However, the question arises as to why the debate and measures taken to realize an inclusive education system only happen in relation to the CRPD while other earlier UN documents have been ignored in this context. This is partly because of the legally binding character of article 24 and on the other hand, because of the vague definition of the Right to Education in the ICESCR leading to segregating policies in a country with a fundamentally hierarchical education system. The problem is that while social inclusion suggests legitimate changes of anti-discrimination law it does not inevitably provide a comprehensive approach to universal equality because of its focus on absolute disadvantage. There is a danger of applying the right to social inclusion exclusively to persons with disabilities. This narrowness partly stems from the connection of social inclusion with a civil and political right rather than with the a priori Right to Education in article 13 of the ICESCR. The disregard of an interrelationship between the notion of inclusion and article 13 seems to suggest the prevailing idea of the injusticiability and inferior value of economic, social and cultural rights.