

Gewerkschaft Erziehung und Wissenschaft (GEW)¹
The German Education Union

Alternative Report to the Fifth Country Report of the Federal Republic of Germany

to the Committee on Economic, Social and Cultural Rights

Short Version

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1 Introduction

Of the numerous functions attributed to education, one is that of personal development. The purpose of education should be to increase awareness of what it means to be human. In consequence, education should assist individuals to become self-confident and facilitate not only their participation in society but also their input into the shaping of society. Another, related, aspect of education should be to counter existing social inequalities and help to combat poverty. Last but not least, education, playing an economic role, should contribute to a better quality of life by increasing productivity (cf. Achelpöhler et al. 2007 and the bibliography mentioned there as well as the collection BdWi et al. 2009, and Overwein/Prenzel 2007).

The right to education is of paramount importance, both for the individual and society, as exclusion from it massively curtails personal development, participation in society, and individual advancement. The right to education is covered in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and is recognised by signatory states. It states: "The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall 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. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace." (ICESCR 1973). Fritzsche (2007, p.80) summarises the significance of the right to education as a special right, as its exercise is also a condition for the exercise of other rights.

A resolution passed at the 2009 Annual Conference of the German Education Union states that a good education and training for all not only constitutes a human right but is also a necessary condition for the development of a socially just and peaceful society. It is against this background that the enforcement of participation in education and the safeguarding of the rights of those in education, both as students and as teachers must be of central concern in a functioning democracy. Any weaknesses in enforcing the human right to education must be rectified as a matter of urgency; equality of opportunity is a vital factor of any modern state; to put it another way, failure to implement equal opportunities in a democracy is no trivial offence. (Lauterbach 2007, p.44)

2 Non-discrimination and Equality between Men and Women (Articles 2 and 3)

Article 3 of the ICESCR reads as follows: „The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.“ The mainstreaming approach will be further examined below. This section addresses questions of anti-discrimination in general and equal treatment of men and women in particular. It is based, on the one hand, on Article 2.2 ICESCR, anti-discrimination generally, and Article 3 ICESCR, equal economic, social and cultural rights of men and women. Both articles are integral parts of all rights agreed in the ICESCR.

The Committee on Economic, Social and Cultural Rights recently adopted General Comment No. 20, which is of particular importance in relation to the general regulations in the ICESCR covering equal treatment of men and women. GC 20 elaborates the principles of non-discrimination and equality “which are recognised throughout the Covenant, and that the Covenant explicitly recognises the right of ‘everyone’ to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life”.

2.1 Non-discrimination

In its Country Report, the Federal Republic of Germany refers to the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz - AGG) (2008, p.21f) and, though it is positive that important steps towards equal treatment have been taken through the implementation of the EU Equal Treatment Directive, not all clauses of the UN Covenant have been met.

The UN Committee on the Elimination of Discrimination Against Women also noted this omission and in the Concluding Observations of February 2009 (cf. UN 2009a, paragraphs 18, 36, and 40) the Committee, rightly, called on the State Party

- to carefully monitor the implementation of the General Equal Treatment Act;
- to take appropriate measures to ensure that discrimination against women is eliminated effectively;
- to consider the possibility of amending the General Equal Treatment Act in terms of
 - its application to appropriate aspects of the domestic and private sphere,
 - the reversal of the burden of proof,

- full compliance with the Convention, for example, by including the termination of contracts into the scope of the General Equal Treatment Act;
- to provide the Federal Anti-Discrimination Agency with adequate human and financial resources, broaden the scope of the mandate of the Agency to endow it with additional investigative and sanction powers and, in order to enhance the independence and transparency of the Agency, design a different appointment procedure for the Agency's head.

Though the Federal Labour Court – Germany's highest court for employment issues – has made changes in its legal practice by correcting certain deficiencies applying to the protection against dismissal, there is no indication that corresponding measures have been taken on the legislative level.

This is also of concern that the General Equal Treatment Act covers only eight features of discrimination. Other characteristics mentioned in Article 2.2 of the Covenant, namely language, national or social origin, property, or birth, are not included. With reference to "political and other opinions" it is the intention of the Covenant, according to the apposite Committee, that trade union membership be included (cf. UN 2009b, paragraph 23). The Committee further regarded it as essential that "other status" included nationality, marital status, and state of health (cf. *ibid.* paragraphs 30, 31, and 33). All this shows that the General Equal Treatment Act will have to be amended to cover (at least) these characteristics in order to achieve equal treatment.

That only some characteristics of discrimination are covered in the General Equal Treatment Act alone shows that Germany lacks a coherent policy in relation to equal treatment. As stated in the Committee's GC 20, each State Party is obliged to ensure that policies, plans, and strategies are in place (cf. *ibid.* paragraph 38) - all these are insufficient in Germany.

2.2 Equality between Men and Women

The only obstacle in relation to equal treatment of men and women examined in some detail and with reference to Article 3 of the Covenant by the Federal Government in its Fifth Country Report (cf. Bundesrepublik Deutschland 2008, p.28) is the shortage of childcare provision. Other issues of equal treatment of men and women are considered separately in pertinent specific articles. In contrast, every important aspect of equal treatment of men and women as specified in Article 3 of the Covenant is covered in the report.

Part-time Employment (Article 6 – The Right to Work and Training)

The UN-Committee on the Elimination of Discrimination against Women expressed concern as recently as February 2009 that the increase of women in the labour market which had been achieved has not resulted in an increase of women's share in the overall volume of gainful employment but rather an increase in part-time employment. It was noted with concern that women were concentrated in part-time, fixed-term, and low paid jobs. The Committee recommended measures to counter this situation (cf. UN 2009a, paragraph 37f).

In the German education sector, it is primarily women who work part-time: 85.4 per cent of part-time workers in schools are female, thus it can be said to be a preserve of women. Approximately every tenth teacher is employed by the hour, and here, too, women are in the majority with 66.4 per cent (cf. Tondorf et al. 2009, p.50).

Type of school	Part-time employment in schools		
	total	female	in %
Primary Schools	103,441	98,975	95.7
General-education secondary schools (Hauptschulen)	22,149	18,344	82.8
Schools with different courses of education	15,338	11,992	78.2
Junior high schools (Realschulen)	30,103	25,294	84.0
Secondary schools (Gymnasium)	65,788	48,581	73.8
Comprehensive schools (integrierte Gesamtschulen)	13,963	10,853	77.7
Special schools (Förderschulen)	24,392	21,448	87.9
All types of schools	283,703	242,329	85.4
thereof			
- West Germany	221,837	189,810	85.6
- new Länder (incl. Berlin)	61,866	52,519	84.9

Source: Tondorf et al. 2009, p. 53

Table 1: Part-time Teachers by Type of School 2006/2007

Taking type of school into account, the ratio becomes even more significant, as set forth in Table 1. While the proportion of women in part-time jobs is 85.7 per cent in all school types, in primary schools the proportion increases to 95.7 per cent. Men constitute only a tiny minority of part-time workers. In secondary schools the picture is somewhat different: here every fourth part-time teacher is a man (cf. *ibid.* p.52).

Equal Remuneration (Article 7 Right to Just and Favourable Conditions of Work)

It is common knowledge that there are still significant pay differentials for work of equal value. The Federal Government itself acknowledged that women earn approximately 22 per cent less than men (Bundesrepublik Deutschland 2008, p.41) and this in spite of many binding international and European obligations² and the explicit reference the Committee made (cf. UN 2009b, paragraphs 19 and 37). Likewise, the UN-Committee for the Elimination of Discrimination against Women considered this issue as recently as February 2009. It presented a strong case and urged the Federal Republic to take pro-active and concrete measures and to ensure that non-discriminatory job evaluation and job assignment systems be put in place and implemented (cf. UN 2009a, paragraph 40).

There are still pay differentials in the education sector; remuneration in primary schools, where the vast majority of employees are women, is in most of the Länder lower than in secondary schools, where male teachers far outweigh female teachers among full-time employees. And in some areas, part-time teachers – predominantly women – are still not paid pro rata with full-time teachers, contrary to judgements of the European Court³.

According to the Federal Statistical Office (Press Release 331 dated 08.09.2009) in the last quarter of 2008 women in child care and teaching positions earned 15 per cent less than men. The hierarchical German education system is partly responsible for the comparatively high pay differentials in the educational sector as it leads to the unequal division of female and male employees by concentration in different occupations. Thus, childcare positions, with low pay a general feature, are almost exclusively held by women, while comparatively well-paid occupations (e.g. lecturers in higher vocational training institutes and universities) are largely held by men.

Promotion (Article 7 Right to Just and Favourable Conditions of Work)

Just as in the area of equal pay, problems exist in relation to promotion. The Committee expressed concern in its latest Concluding Observations and recommended relevant actions (cf. UN 2009b, paragraphs 19 and 37). These measures also apply to the education sector as can be verified from a detailed study carried out in 2006 which found that the higher the remuneration and salary scale the lower the proportion of women (Scheurig/Burkhardt 2006). The proportion of women among senior management of schools is generally lower than among other grades.

² ILO Convention No.100 (ratified 1956), European Social Charter Art.4.3 (ratified 1965), Art.157 Treaty of the Functioning of the European Union (originally Art.119 EEC Treaty, in effect from 1958).

³ E.g. Judgement of 07.12.2007, ref. C-300/06 (VoB) on Discrimination in Terms of Overtime Remuneration.

Work-Life Balance (Article 7 Right to Just and Favourable Conditions of Work)

The Committee expressed concern about the shortage of childcare provision. The Federal Government accepted that there was a need not only for more, but also in some cases, for better childcare facilities (Bundesrepublik Deutschland 2008, p.28). The German Education Union is of the opinion that there is a considerable need to catch up both in terms of quantity as well as quality.

According to data from the Federal Statistical Office 20 per cent of under threes had places in nurseries in March 2009 (45 per cent in East Germany, 15 per cent in the West); the United Nations Committee also expressed concern about insufficient childcare provision. It seems likely that the target set by the Federal Government, a statutory right from 2013 to a nursery place for all children from the first year, will fail unless realisation of this specified goal is prepared as a matter of urgency. The challenge is for action on the federal, regional (Länder), and local level to ensure that the necessary financial resources are in place to train sufficient qualified staff as well as for the equipment of nurseries.

The Committee on the Elimination of Discrimination against Women expressed concern as recently as February 2009 that domestic and family responsibilities are still primarily borne by women, many of whom interrupt their careers to engage in part-time jobs to meet family responsibilities (cf. UN 2009a, paragraph 29). A further recommendation concerned the issue of work-life balance, namely that the Federal Republic should increase incentives for men to use their right to parental leave in order to achieve equality in domestic tasks (cf. *ibid.* paragraph 38).

To name a few examples:

- There is a need for investment in all-day schools;
- There is a need to expand services for people needing special care. People with special needs must be able to access services easily, so that other family members can combine work and care responsibilities.
- People who work in the personal service sector need to be valued more highly, both in terms of remuneration and status.

3 The Right to Strike for Public Servants (Article 8)

International Agreements which have been ratified by Germany and have thus come into effect, stipulate an unlimited right to strike for public servants. These include, among others, Convention No. 87 (freedom of association) and No. 98 (right to organise and collective bargaining) of the International Labour Organisation (ILO). The ICESCR urged unequivocally “that civil servants who are not engaged in providing essential services, should have the right to strike” – the Federal Republic repudiates this request (Bundesrepublik Deutschland 2008, p.47).

3.1 Debate on the Right to Strike

The last time the German Education Union, with the support of the German Confederation of Trade Unions (DGB), complained to the ILO in Geneva was on 5th December 1994. The complaint dealt with the strike ban for public servants, as asserted by the Federal Government, an assertion not in accord with the cited ILO Agreement. The ILO had on several previous occasions found that the strike ban for public servants, as far as teaching staff is concerned, was contrary to International Agreements.

The ILO Committee for Freedom of Association considered the complaint by the German Education Union at the beginning of 1996 and concluded that the Federal Republic's refusal of negotiating rights clearly constituted a breach of ILO Convention No. 98. The ILO Governing Body urged the Federal Republic in March 1996 to put in place measures ensuring comprehensive collective bargaining rights for public servants.

Far from acting on this request, the Federal Government refused to implement the ILO decision on the grounds of it being contrary to and incompatible with the Constitution. The strike ban for public servants was also repeated in the Fifth Country Report (cf. Bundesrepublik Deutschland 2008, p.47ff). The argument adopted was the same as that put forward when the ILO considered the complaint. The Federal Government distinguished between two groups of public servants: public sector workers covered by collective bargaining had an unequivocal right to strike while public servants whose rights and obligations were regulated by law could not claim the right to strike (cf. *ibid*).

The argument put forward by the Federal Republic was still unconvincing and insufficient to justify a strike ban. The Federal Government and the jurisdiction base their arguments on antiquated and outdated premises which are presented thus:

Article 9.3 of the German Basic Law guarantees the right to association which includes the right to combine for purposes of safeguarding terms and conditions at work and issues relating to remuneration; it includes the right to strike and applies in principle to public servants, albeit only in its core provision. This means in practice that, although public servants have the right to association and can found and join an association and take part in its activities, the right of public servants to take strike action for economic reasons is excluded. This argument is based on the consistent practice of the Constitutional Court which held that both custom and convention applying to public servants and enshrined in Article 33.5 of the Basic Law, and the Duty of Allegiance consequential on Article 33.4 of the Basic Law apply.

3.2 Asserting the Right to Strike

The Federal Republic is party to international conventions. Yet from 1996 onwards, it ignored the conflicting international legislation by continuing to deny public servants employed at the federal and Land level the right to strike. The CESCR stated recently that it does not share the stance of the Federal Government that a strike ban for public servants arises from the Duty of Allegiance (cf. Bundesrepublik Deutschland 2008, p.47).

The German Education Union is committed to asserting the unequivocal right to strike for public servants; but in spite of conflicting European court rulings and ILO declarations as well as the concern expressed by the CESCR, the Federal Government continues in its negative stance. It appears that only a verdict by the European Court for Human Rights can persuade the Federal Republic to change its position.

In relation to the implementation of collective bargaining rights for public servants, the Federal Republic and only a few other countries – Turkey among them – trail behind the rest of Europe. Most states recognise the right of public servants to strike. At the international level an increasing number of international monitoring bodies criticised the absolute strike ban for public servants. The European Court for Human Rights found on 12th November 2008 and 21st April 2009 in the case of Turkey that the right to collective bargaining and the right to strike were protected as a human right by Article 11 of the European Convention on Human Rights. Among other international agreements and covenants, the Federal Republic has also ratified the European Convention on Human Rights. These Treaties are binding under international law. This applies in particular to the European Convention on Human Rights which is breached by the total strike ban. According to specialist legal texts the right to collective bargaining for public servants is conferrable to the Federal Republic. It is incumbent on the supreme courts, in particular the Constitutional

Court, to comply with international law and thus interpret Article 9.3 in conjunction with Article 33.4 and 5 of the Basic Law, such that the unequivocal strike ban for public servants is overturned and the right to strike is put into place on the basis of the respective duties or office held by the (individual) public servant.

3.3 Strike Action by Public Servants

There have been several infringements of the right to strike in the Federal Republic. The German Education Union reported these to the ILO. It needs to be stressed, though, that public servants in Germany rarely go on strike as they are constantly reminded of the allegedly conflicting constitutional position – an argument used to put pressure on public servants.

The latest infringement occurred during a strike of teachers with public servant status in Berlin in 2000, to protest against an increase in mandatory lessons. Even following a decision to the contrary, which the ILO had reached after considering the unilateral increase in working hours imposed by the employer, the public servants had to resort to strike action to defend themselves against the imposed increase.

Public sector workers with collective bargaining rights took strike action in Bremen in 2009. Currently there is a dispute in Schleswig-Holstein. Teachers took part in strike action.

In these cases recourse to disciplinary measures was a regular feature, though not followed through to a conclusion by the authorities, as shown by the present situation in Bremen. Management continues, though, to ban notified strikes by public servants, using the same old arguments they have for decades. The ILO as well as the CESCR have severely criticised this practice, yet Germany continues to put forward the same worn-out arguments in its Fifth Country Report.

Almost 40,000 public servants have taken part in strike actions in the Länder since 2000.

4 Access to Higher Education and Tuition Fees

The German education system is characterised by numerous thresholds, and once a decision on a course of education has been made, it can only be revised with difficulty. Isserstedt et al (2010, p.75ff) identified the transfer from primary to secondary school (at the age of ten in most Länder) as the first threshold, the transfer from lower secondary to upper secondary level as the second threshold; the third threshold is the university entrance exam; the fourth threshold to be passed is entry into the tertiary sector, through making use of the qualification obtained, and the fifth threshold is the completion of a course of study in the tertiary sector, i.e. graduation. The following section will only concern itself with entrance into institutions of the tertiary sector. Below is a consideration of access restrictions and financial obstacles.

4.1 Access Restrictions (Numerus clausus)

As early as 1972, the Federal Constitutional Court came to the conclusion that inflexible access restrictions were questionable in terms of the constitution (BVerfGE 33, 303, cf. also Achelpöhler 2009b). In order to offer places to as many potential students as possible, with the introduction of the capacity regulation (Kapazitätsverordnung) Germany created a regulation which was intended to ensure the highest possible take up in universities and colleges (cf. Himpele/Staak 2009). But contrary to the intention to increase access to Institutes of Higher Education to more or all of those entitled to study, the proportion of courses with access restrictions actually increased. As of now, 54 per cent of the (new) courses leading to a Bachelor degree are access-restricted as are 49.7 per cent of courses leading to a traditional university degree equivalent to a Master degree (cf. HRK 2009, p.19; Banscheraus et al. 2009, p.20ff). The value of a university entrance exam was thus undermined by restricting the entitlement to higher education, and a further obstacle to access to higher education has been created.

4.2 Financial Restrictions (Tuition Fees and Grants)

The Covenant suggests a sort of dual strategy for the realisation of the right to education. On the one hand, there is the insistence for education free of charge, on the other hand there is the obligation to establish a system of grants so that there should be no restrictions to access on the grounds of insufficient financial means.

At the time of ISESCR coming into force no tuition fees were charged in Germany. Step by step tuition fees were introduced, first in the Land Baden-Württemberg where fees were charged once a specified number of semesters had been exceeded. Other Länder followed this example. As the debate on the general introduction of fees heated up, the Government in power at the time

intervened in 2002 with an Act which was meant to disallow the charging of fees for first degree courses. However, the Federal Constitutional Court ruled in 2005 that the Federal Government did not have the power to intervene. The judgement overruling the Federal Act was based on a consideration of competency rather than on substance (cf. BVerfGE 112, 226; also cf. Keller 2005).

The Federal Constitutional Court referred in its judgement (BVerfGE 112, 226) to the Covenant and its applicability to federal law and assumed, with reference to the Covenant and other statutory regulations, that in introducing tuition fees, appropriate consideration be given to the needs of low-paid sections of society.

A further seven Länder introduced tuition fees, following the judgement of the Federal Constitutional Court, namely Baden-Württemberg, Bavaria, Hamburg, Hesse, Lower Saxony, Northrhine-Westfalia, and the Saarland. Hesse abolished tuition fees in 2008. The Länder justified the introduction of tuition fees, among other rationales, on the basis of social acceptability. They also pointed to the availability of loans. Tuition fees, so goes the argument, fall due at a later stage, when both loan and interest have to be repaid. Regulations in the different Länder differ considerably, with some capping the amounts. Apart from these problematical separate regulations, the question arises how the loan repayments, which are even higher with the added interest, can overcome the problem of selection by social position. In relation to the alleged social acceptability, it is also mentioned that exceptions are made in hardship cases, though it has to be noted that the regulations here are hardly uniform; apart from problems in implementation it is often impossible for applicants to predict whether their application will be approved or not as exemptions from tuition fees are often interpreted restrictively.

Two interesting empirical studies have been conducted since the introduction of tuition fees. In one, a group of informants, who had fulfilled university entrance requirements but had not taken up studies, were asked the reasons for foregoing higher education. The other study explicitly examined the repercussions of tuition fees. Of the first group, those who had chosen not to pursue their studies, 69 per cent reported that they could not afford tuition fees, 73 per cent reported – this was a multiple choice questionnaire – that they did not want to get into debt either by raising study loans or applying for Federal Training Assistance (BAföG) (Heine/Quast 2009, p.16). Women and men gave different reasons. Heine and Quast (2009, p.18) found that these differences were associated with raising finance to pay tuition fees. Three quarters of women who did not intend to study but comparatively fewer men, 57 per cent, stated that tuition fees influenced them not to take up a course of study.

Heine et al. 2008 (p.15) conducted a study on the impact of tuition fees; they concluded that up to 18,000 of those entitled to study at tertiary level did not take up the opportunity because of tuition fees. More women (5 per cent) than men (3 per cent) did not go on to study for financial reasons. Children of parents of whom at least one parent had a degree (3 per cent) were less likely to be put off studying than children of highly specialised or skilled workers (6 per cent) (cf. *ibid.* p.16f, also p.39ff). This is empirical proof that tuition fees, despite provision for exceptional cases and for loans are not socially neutral.

4.3 UN-Covenant and Country Report

Article 13c of the ICESCR specifies unequivocally that “higher education shall be made equally accessible to all ... by the progressive introduction of free education”. The CESCR, after rightly criticising the introduction of tuition fees, “recommends that the State Party’s Federal Government introduce a reduction of tuition fees in the national framework legislation regulating higher education, with a view to abolishing them”. The Federal Government has no intention, though, to follow up on these recommendations. The argument put forward is that tuition fees are socially acceptable (cf. Bundesrepublik Deutschland 2008, p.94). This line of reasoning has been disproved; it is no longer valid.

The Federal Government’s ignorance of the social repercussions which are always associated with tuition fees (cf. ABS 2005) is astounding. It would be propitious to examine the feasibility of legal intervention at the federal level to prohibit the charging of tuition fees generally, given the Federalism Reform I which redistributed the areas of competence between the governments at federal and Länder level. Alternatively, the Federal Government should exert influence on the Länder to pass appropriate regulations to fulfil their obligations in relation to the Covenant.

Apart from tuition fees there is the question of cost-of-living expenses, not mentioned in the Country Report. Even before the introduction of tuition fees, Dohmen and Hoi (2004, p.51f) calculated expenditure (mainly essential expenses) to be borne by the student as consisting of 49 per cent of total outgoings. Following the introduction of tuition fees, costs to be borne by the student increased further. The grant system in Germany is not extensive: grants are provided by private foundations, denominational agencies, and political parties with support from the government. It is estimated that only 2 per cent of students receive grants (cf. CDU/CSU/FDP 2009, p.60) – there is no legal entitlement to support. The national student grant programme which is in the planning stages, will make no difference (cf. Deutscher Bundestag 2010a).

In the official view, the Federal Training Assistance Act (BAföG) is an essential instrument in the support of students from underprivileged backgrounds. In addition, it is a statutory entitlement. BAFöG support is based on the income of the student's parents and at the time of writing half of it is in form of a grant, the other half is paid on a loan basis. The BAFöG came into force in 1971 in the form of grant payments; in 1982 it was amended and it was paid in form of a loan. This had a negative effect (cf. BMBF 1986, p.255) as the total sum of up to 70,000 DM (approximately 35,800 euros) had to be repaid. The BAFöG thus lost an important function as the decision to study was now linked to the preparedness of the student to get into debt. After both German states were unified, the system was changed to consist to one half of a grant, and one half of a loan to be repaid. Yet the risk of debt was still an ever-present problem, especially for those from underprivileged backgrounds. In 2001 the Federal Government acted to limit the amount to 10,000 euros. Still, 73 per cent of those not taking up studies gave as a reason for their decision that they were not prepared to get into debt to finance their studies (e.g. student loans, part-loan through BAFöG) (Heine/Quast 2008, p.16). Getting into debt is therefore a problem for those entitled to study who lack the financial means necessary.

Support for students through BAFöG has not only been reduced by the change from grant to loan – initially paid as a full loan, now as a part loan – but also because of insufficient adjustments of the assistance rates. The German Education Union pointed out in a report to the CESCR in 2007 that the adjustment of the BAFöG rates was insufficient and did not even cover inflation (cf. Achelpöhler et al. 2007, p.27). The eighteenth BAFöG Report states clearly that the proportion of those receiving BAFöG in 2008 was down to 24.4 per cent from 25.1 per cent in 2005 (cf. Deutscher Bundestag 2010b). It needs to be noted here, that the official figures refer to the number of BAFöG-assisted students from the group of those who are basically and in principle entitled to support; the actual proportion is approximately 17 per cent – significantly below official figures. The average amount of monthly payments has been increased slightly from 2005 (304 euros), 2006 and 2007 (301 euros) to 321 euros at present. BAFöG support, as can be seen, has been further undermined in recent years.

It is worth mentioning that the proportion of students who have during the past twelve years been in receipt of BAFöG support, has never exceeded 20 per cent (of the total number of students). It is fallacious, therefore, to suggest that a developed grant system is in place. At this point it is important to emphasise that in the first period of BAFöG (1972-1975) more than 40 per cent of all students were in receipt of BAFöG support (cf. Deutscher Bundestag 1976. p.5).

4.4 Right to Access to Higher Education?

Access to higher education in Germany is still linked to social background. Although the linkage between social class and higher education was reduced – though not overcome – during the 1970s, it is reasonable to assume that the cause of the change was the abolition of *Hörergeld* (tuition fees) and the introduction of the BAföG as a full grant. However, the course toward social mobility in higher education was not followed up. Initially, the BAföG was devalued step by step (cf. Keller 2002). In addition, since the decision by the Federal Constitutional Court in 2005 some Länder introduced tuition fees. There are no known empirical studies on the general impact of this change for the worse but the introduction of tuition fees in several of the Länder has stopped up to 18,000 people from studying (cf. Heine et al. 2008). Further, access restrictions are firmly established in German higher education, there is still a shortage of university places. The change to a new system (bachelor and master degrees) increases social exclusion further especially as the transition from bachelor to master courses is not assured.

5 Human Rights Education (Article 13)

With regard to human rights education the CESCR requests that up-to-date information about the extent of human rights education in the German education system be included in the next country report.

The Fifth Country Report devoted more than three pages to human rights education in schools providing general education (cf. Bundesrepublik Deutschland 2008). No reason was given for the largely absent information on other types of school. With reference to higher education, there was just a terse note stating that information on human rights education in higher education institutions was not at hand, and that decisions on subjects and topics were a matter for universities in the context of their autonomy (ibid. p.96). No mention was made of human rights education in childcare institutions, vocational schools or colleges, in adult education, and extracurricular youth work. The ignorance about extracurricular educational activities is incomprehensible.

Altogether it almost seems as if the comparatively extensive space given to human rights education was meant to draw the attention away from the sparse consideration of *the right to material and equal opportunities in education*. The amount of text cannot obscure the fact that the response to the actual question, namely to find out the extent of human rights education, is insufficient, even in relation to schools.

5.1 Human Rights Education in Schools Providing General Education

The section on human rights education in schools providing general education in the Fifth Country Report is based on a questionnaire by the Secretariat of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder (Kultusministerkonferenz – KMK) (KMK 2008). Without identifying the source or even referring to it, the Country Report cites verbatim the preface of this survey.

The Fifth Country Report contains general statements such as that schools are of particular importance and have a special responsibility for human rights education (Federal Republic of Germany 2008, p.96), or to put this another way, that human rights education is anchored in the education act of each Land (ibid. p.94). Examination of the KMK survey shows, though, that, at least in this context, *anchoring* of human rights education in the education acts of the Länder is not what is happening. Only the education acts of Bremen and Lower Saxony refer explicitly to human rights. A study by the German Institute for Human Rights (Deutsches Institut für Menschen-

rechte – DIMR) found in 2003 that human rights education was a relatively new concept in the German education system, both in terms of educational research and educational practice (Lohrenscheit/Rosemann 2003). This still holds true today. There are no indications that the situation has changed substantially since 2003.

5.2 The Teaching of Human rights

The Fifth Country Report describes in detail that, apart from the so-called “MINT-subjects” (mathematics, engineering, natural sciences, and technology), human rights education is integrated into most other subjects. When examining the contents, however, it becomes obvious that the point of reference is the Basic Law rather than the Covenant and that the courses consists largely of citizenship lessons (democratic values underpinning the constitution, responsibility towards society, totalitarian systems). In addition there are references to ethics and morality as well as economic and ecological issues.

In total, the statements made in the Country Report, as far as questions of the substance of human rights are concerned, give the impression of being disordered and unsystematic. The established system (learning *about* human rights, learning *through* human rights, learning *for* human rights) is as absent in the Country Report as it is absent in the curricula and timetables. Looking at it cursorily, a lack of concern is hard to escape. In addition, there is no evidence of their attempting to analyse what is meant by human rights education. This is absolutely necessary, though, as there are so many intersections and cross-linkages between human rights education and similar educational sub-disciplines. It would be rewarding and necessary to analyse the different aspects of the education acts, curricula and syllabi, guidelines, and educational standards of the Länder in order to describe systematically and, if possible, to clarify contents and methods, funding for and the scope of human rights education in the Länder.

The authors of the Country Report were aware that human rights education is far from being systematically anchored in the curricula and syllabi. They are correct in stating that, in spite of the topics taught in individual lessons, in most cases it is left up to the schools or other specialist bodies to decide how human rights issues should be taught. In principle, concepts of human rights *can* (authors' emphasis) be conveyed to all year groups, as long as both level and degree of complexity are appropriate to the age and maturity of the pupils (Bundesrepublik Deutschland 2008, p.94). The lack of binding guidelines is unfortunate, and it is astounding that this state of affairs should be accepted in the Federal Republic of Germany as an immutable fact, as appears to

be the case. At any rate, there are no references in the Country Report which indicate that this area has been addressed seriously.

5.3 Resources for Human Rights Education

As far as resources for human rights education are available to schools, the impression given is one of randomness and arbitrariness. Although all sorts of measures were listed to ensure effective teaching which also apply to the area of human rights education, such as further training for teachers, symposia, information sheets, projects, sponsorships, and school partnerships, under the heading of resources for further training for teachers only the Land Hesse was mentioned in the KMK-Report. Here courses were offered which explicitly come under the heading of human rights education. The other Länder only referred generally to further training or in-service courses on human rights education which had been held.

Out-of-school partners can be an important resource for human rights education. The Country Report mentioned UNESCO, UNICEF, churches, and other social facilities. The activities of a number of NGOs such as Amnesty International, Human Rights Watch, Welthungerhilfe (World Hunger Aid), or World University Service, however, were not appropriately acknowledged. Why, instead, the Country Report referred specifically to partnerships with private industry, although there was no single example mentioned of partnerships with private industry committed to human rights in the KMK-Report, remains to be answered.

5.4 Extent of Human Rights Education

The CESCR requested information on the *extent* of human rights education in the German educational system. So, what did the Fifth Country Report say about the *extent* of human rights education in German schools? To put it bluntly: not much. The few reliable statements are as follows:

- The education acts of the Länder refer to the basic rights as enshrined in the Basic Law, not to human rights enshrined in United Nations Conventions.
- Topics covering “human rights” are part of all curricula and guidelines, though “human rights education” is not an explicit part of curricula and guidelines.
- All Länder offer teaching materials and further training for teachers around the subject of “human rights”.

No quantitative statements could be found on e.g., how many lessons were taught explicitly on human rights, how these were allocated according to types of school, subject, and age of pupils, how many student project days had been held by schools around the subject of human rights, how many schools were part of UNESCO Associated Schools (ASPnet) or other networks around human rights education, how many teachers had taken part in further training on the subject of human rights, or how many diplomas or PhD-theses had been written on human rights topics.

The union's own research shows that only comparatively few schools in Germany take human rights education and human rights issues seriously – at least if the activities of a relevant network are acceptable as a conclusive indicator. To get an idea of the (few) schools which are explicitly involved with and focus on human rights issues, the exemplary UNESCO Associated Schools and the network Schools Without Racism – Schools with Courage should be consulted; both have their own homepage. The number of participating schools is under ten per cent; of approximately 40,000 schools in Germany only 174 participate in the ASPnet (0.4 per cent) and 729 schools (1.8 percent) have been awarded the designation School Without Racism – School with Courage. There is a further indicator of activities on human rights, namely the competition Demokratisch Handeln (Education for Democratic Citizenship) which is funded by the Federal Ministry of Education and Research (Bundesministerium für Bildung und Forschung – BMBF) and managed under the aegis of joint sponsors. In the 19 calls for bids since 1990, 3,739 project applications have been received. This is, however, not the place to provide a quantitative evaluation. As a rule the projects are of limited duration and cover a multitude of topics which are more or less related to human rights education. Even on the assumption that any school only takes part in one competition and that, generously, all projects are attributed to the area of human rights education, the proportion of schools which distinguish themselves by taking part, however sporadically, in human rights activities still lies under 10 per cent.

Overall we can state that human rights education in Germany operates rather unsystematically and haphazardly. There are hardly any reliable evaluations on the extent of human rights education. There is an urgent need for action.

6 Schools Providing General Education (Articles 13 and 14)

The statements on the right to education in the Country Report are open to criticism. The right to education is interpreted in a somewhat wayward manner with restrictions clearly contrary to international conventions. Whereas the Convention on the Rights of the Child states unequivocally "The States Parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential." (Article 29) the Country Report diminished attempts to compensate for disadvantage with its statement that every person, independent of their origin and their social status, had the right to education and training, *appropriate for him/her* (authors' emphasis) (Bundesrepublik Deutschland 2008, p.94). Thus the "fullest potential" became, on the quiet, reduced to an *appropriate* education and training. In the selective German education system, the decision on *appropriateness* is made over the children's heads as early as the age of ten, at which stage they are transferred either to a demanding or less demanding type of school and by this procedure, vital preliminary decisions are made regarding their social status.

6.1 Access to education

Statutory primary education

The Fifth Country Report devoted two pages to schools providing general education. According to Article 13 (2) of the Covenant, the States Parties agree that in relation to "the full realisation" of the right to education, "primary education shall be compulsory and available free to all". The Fifth Country Report stated, curtly but just as wrong, that all children receive primary education (Bundesrepublik Deutschland 2008, p.96). The truth is, and the United Nations Special Rapporteur called attention to this as before him had the German Education Union and several refugee organisations, that this did not apply to the children of so-called "illegals". The report of the Special Rapporteur stated in this connection that, as far as non-nationals were concerned, undocumented or unregistered migrants in particular faced significant problems in the area of education. The Special Rapporteur was informed of the Federal Government's declaration on the occasion of the ratification of the Convention on the Rights of the Child: this stipulates that the classification as asylum seeker had precedence over the fundamental consideration of the child as having rights. According to information also available to the Special Rapporteur it is true that children with a refugee background are not covered by the legislation governing mandatory school education (Deutscher Bundestag 2007, p.20). In reality, this means the children are not subject to compulsory education, they have no right to and neither receive teaching and learning materials

nor free transportation. Often, the parents are not aware that there is a “right to attend school”. In some of the Länder, heads are obliged to report illegal immigrants to the immigration authorities, so that the parents, fearing detection, do not exercise their rights. It is estimated that at present between 400,000 and 600,000 people live undocumented in Germany, of those approximately 30,000 young people are under the age of 16.

General Accessibility of Higher Education

The obstacles to study in higher education do not only apply to the children of so-called “illegals” but also to refugees whose leave to stay was insecure, although here, too, the Covenant (Article 13(2)b) unequivocally states that “Secondary education, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.” As a rule, refugees who have the right to remain are not issued work permits; this means that young people over 16 with that status can only study at schools providing general education or full-time vocational institutions; they cannot choose to train in the dual vocational training system (work linked training) as these courses require work permits. In addition, the position of these young people is further worsened in that they can be deported at any time, as they are no longer protected by the UN Convention for the Right of the Child. The Federal Government signed an opt-out agreement (reservation) to the ratification treaty, giving the German law governing non-nationals precedence over the Convention of the Rights of the Child. According to German law covering non-nationals, the status of child ends at age 16, not 18; thus any non-national can be deported after his/her 16th birthday.

Although the Federal Government resolved to revoke all opt-out agreements to the Convention of the Rights of the Child, restricting legislative provisions will continue until the relevant regulations are amended in all 16 Länder.

6.2 Equal Opportunities

Selective Education System

The Special Rapporteur on the Right to Education drew the attention to numerous problems in the German education system with commendable clarity and referred to the selective and, to some extent discriminatory, characteristics of the system (cf. Muñoz 2007, p.2). However, a (self)critical appraisal of this problematic and fundamental aspect of the right to education was lacking in the

Country Report. Muñoz referred in particular to the institutional discrimination against migrants and socially disadvantaged children which he correlated with the early selection and transfer of pupils to different types of schools. "Indeed, the Special Rapporteur believes that the classification process which takes place at lower secondary level (average age of students is 10, depending on each Land's regulation) does not assess students in an adequate manner and instead of being inclusive, is exclusive; since he could verify during the visit that, for example, poor and migrant children – as well as children with disabilities – are negatively affected by the classification system" (Muñoz, p.2). In the period under review these findings were confirmed by numerous international school assessment studies such as PISA and the primary school study PIRLS.

Beside this principal problem, there is also the problem of segregation caused by socio-spatial factors; these exacerbate the early segregation of children into different lower secondary school types in terms of expectations and which lead to the familiar phenomenon of "double disadvantage" (Schümer 2004, p.73ff). Children already disadvantaged by birth or disability are, contrary to intention (?) penalised again by selection and segregation practices in the German education system. The effect on school performance is that, for example, in the challenging setting of elementary schools (primary and lower secondary level) and special schools, the development of reading skills from year five to the end of statutory school age is inferior to that of schools with pupils from a socially and ethnically more advantaged background. Baumert and others (2001, p.174) showed that so-called "statistical twins" with identical socio-economic status and the same cognitive abilities at transfer into the fifth year, differed by 49 test points in mathematical skills at the end of statutory school age, depending on the type of school they attend. This differential is higher than the difference of 46 points between the average performance of all German and all Finnish pupils and equals approximately the learning development of 1.5 school years.

Transfer between Types of School and Special Schools

It seems hardly comprehensible that the Fifth Country Report did not consider the grave problems mentioned above, considering that they were the subject of many official documents and public debates. Instead, a rescue attempt was made to justify the major problem of the lower secondary system; the Country Report referred to transferability, i.e. the option of switching between types of school (cf. Bundesrepublik Deutschland 2008, p.97). As research has shown many times, transfer between school types does not solve the fracturing; more accurately, transfers between school types are a sign of a systemic problem. They *can* mark the end of a wrong turn but they can also be the start of a wrong turn. It is not a rare event that students are "passed downward" because they may

have experienced frustration and failure which, if not addressed, can lead to apathy and school absence. The option of a compulsory transfer to another school type favours a “waste disposal mentality” (Helmut Fend) in the German education system where, for example, downward mobility is on average three times more common than upward mobility. Roughly five times as many pupils are transferred to special schools as from special schools to general schools (cf. Konsortium Bildungsberichterstattung 2006, p.51ff). The transfer to a school type with a higher status usually includes a time factor with negative effects. Only downward mobility avoids loss of time.

A number of matters for concern are not even mentioned in passing in the Fifth Country Report: that in Germany there are special schools alongside schools providing general education – attended by approximately five per cent of a year group; that the rate of integration of disabled children and young people into the regular school system is rather low in international comparison – it consists of 15 per cent; that the Special Rapporteur on the Right to Education made a special point of the right to equal opportunities for this group in particular during his visit to Germany; and that in the period under consideration the Convention on the Rights of Persons with Disabilities was adopted by the United Nations. The only reference to the approximately 80,000 young people in special education can only be gleaned from a table in the appendix of the Country Report.

Free Education and Teaching and Learning Materials

The few references in the Fifth Country Report on how to implement equal opportunities in education appear inane, belittling, even embarrassing. To paraphrase the comments on free primary education: lessons are free of charge. Not all Länder provide free teaching materials. Some parents are entitled to full or part subsidies. As a rule, schoolbooks are on loan; in some cases parents have to contribute according to their circumstances. (Bundesrepublik Deutschland 2008, p.96). It should be: lessons are not completely free of charge. On the one hand, the situation in relation to free teaching and learning materials has been undermined for years, on the other hand, education cannot be reduced to lessons in the classroom. School trips, outings, and other activities outside the classroom can cost considerable sums. In all-day schools additional costs for lunch need to be added, and often also for after-school activities. Such activities are formally not classified as education but as care, thus enabling the education authority to charge. Contributions vary from municipality to municipality. The effect of this is that in low-income local authorities, in which, as a rule, many families are poor, the expenditure on care is significantly higher than in affluent local authorities. Children and young people from poorer families in poor local authorities therefore

participate less or not at all in school meals or after-school activities. Thus unequal opportunities are amplified, although the measures are meant to reduce inequalities.

Transportation

The Fifth Country Report attempts comparatively extensively to show that equal opportunities can be comprehensively realised by regulations covering the transportation of students. It is, of course, important that parents do not have to pay for transportation to schools which can be quite a distance away and can involve substantial fares, but it is incongruous to assume that equal opportunities can be achieved by this measure alone. Yet this assumption seems to be the basis of the Country Report (cf. Bundesrepublik Deutschland 2008, p.97). There is also no recognition that transportation costs differ; only very few details are regulated in the legal systems of the Länder. Responsibility for implementation is passed on to local authorities, and in some cases there is considerable latitude. Differentials include: free transportation in relation to distance: this varied from 1.5 to 2 km for primary age children; 2.5 to 6 km for lower secondary pupils; whether or not parents were charged – in ten Länder there was no charge, in others the contribution could be up to 55 euros per month; whether or not expenses for private schools or attendance at upper secondary school (past statutory school age) were charged to the students or their carers (50 per cent of the Länder charge for transport either in full or a contribution).

The German Federal System

The Special Rapporteur also highlighted the obstacles to equal opportunities arising from the federal system. In relation to financing education he stated the per head allocation in education, for example, varied considerably between the Länder, and the Federal Government was not in a position to intervene decisively to bring about alignment (Deutscher Bundestag 2007, p.16). And in relation to the 16 different education systems in Germany Muñoz wrote that the lack of uniformity caused considerable problems for pupils of families who moved from one Land to another (ibid.). Again, this dilemma was not mentioned in the Country Report.

Capital Spending Programme „Future Education and Care“

After the results of the PISA study were published, expectations were high that equal opportunities would improve with the introduction of all-day schools (cf. KMK 2001). The Country Report responded with an objective, namely that by the introduction of all-day schools it could be possible

to improve the quality of education by early and individual support and at the same time to break down the connection between social background and educational attainment through a new culture of teaching and learning. (Bundesrepublik Deutschland 2008, p.101). However, there are no binding quality standards for all-day schools, neither in relation to framework conditions nor to educational concepts. There is reason to fear that especially the objective to improve equal opportunities cannot be reliably reached because due to the poor framework conditions, only care can be guaranteed at best but not individual support. In this connection the reference to the capital investment programme Future Education and Care (Zukunft Bildung und Betreuung – IZBB) is comparatively detailed; the red-green Federal Government (1998 to 2005) earmarked four billion euros for the expansion of all-day schools. Of the few sections which include concrete quantitative data for the education system, this is one.

6.3 Integration of Children and Young People with a Migration Background

The Fifth Country Report presents the situation of children and young people of immigrants in a rather simplified, belittling, and imprecise manner by stating that children from immigrant families formally have the same rights and duties as children who are not from a migration background. But because of their special linguistic, socio-economic, and cultural situation, children and young people from a migration background find it often harder to achieve educational success compared to children and young people without migration background (Bundesrepublik Deutschland 2008, p.96). Formal equality, however, applies only to those children and young people who have, or whose parents have secure residence rights in Germany. Undocumented people face a completely different situation (cf. 6.1 of this report).

At the time of transfer to the different vocational school types students, particularly from a Turkish, Iranian, or Afghan background who have poor grades, fail to find a placement in the dual training system while students from the EU, Russia and South-East Asia perform better (cf. Konsortium Bildungsberichterstattung 2006, p.156). Compared to children of the same age without migration background, children and young people without a German passport are less likely to attend pre-school institutions and are more likely to start primary school late. Young people from the Turkish community are three times more likely to attend the *Hauptschule* (primary and lower secondary) or a special school and less likely to attend more demanding types of school which provide upper secondary level education. They are also more likely to be delayed in their school career; in some Länder the proportion of children with a migration background who are delayed in their school career is twice that of children without migration background. More than twice as many young

people with a migration background have no school-leaving certificate (cf. *ibid.* p.139). Even with good grades, migrants find it harder to find an apprenticeship or training position than the indigenous population. Given the same level of achievement, the opportunity to obtain qualifications at a vocational school is for German young people without migration background twice that of young people who are non-nationals; not taking performance into account, it is even five times as much (cf. *ibid.* p.156). Both at the time of transition to vocational training and at the time of transition to lower secondary level, the indications are that this constitutes discrimination (cf. *ibid.* p.165).

Measures to Integrate Children and Young People with a Migration Background

There are a number of findings which point to limitations of equal opportunities in education culminating in discrimination, not only for young migrants but also for socially disadvantaged children and young people of German origin – but these were not examined in the Fifth Country Report. What makes it more irritating is that the Country Report pointed to a wealth of measures for learning German, intending to convey that everything was done to ensure that disadvantaged sections of the population can achieve better in education. What the Report did not say is that in the meantime a broad academic debate about the effectiveness of these measures has been taking place and the evaluation of these measures is still in the early stages. Judging by the “success”, or rather, failure achieved so far, the resources and language programmes urgently need to be reviewed as to their effectiveness. It has been shown that the proportion of the so-called “risk group”, those who reach no more than language proficiency 1 in reading skills, is extremely high both for the first generation, of whom 42 per cent only reach this level, and for the second generation, of whom 44 per cent only reach this level. For comparison: the international average of young migrants who are in the so-called “risk group” is 25 per cent. In Germany 14 per cent of students without migration background are classified as belonging to a risk group (cf. *Konsortium Bildungsberichterstattung 2006*, p.174). Left out of the Country Report is a question crucial for equal opportunities, namely that of equal status of languages spoken by migrants with those of other foreign languages taught. German as a medium of instruction and languages spoken by Sinti and Roma, Danish, and Sorb minorities was given much space.

Concluding Remarks

The Fifth Country Report of the Federal Republic did not mention Special Rapporteur Vernor Muñoz' visit to Germany in the spring of 2006; it also did not refer to the many international comparative studies published in the period under consideration. This is extraordinary, given that these triggered thorough public discussion about the state of Germany's education system. Not mentioning the Muñoz' visit can also be interpreted as an expression of conscious contempt.

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