



Juridification and regulative failures. The complicated implementation of international law into national schools

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ABSTRACT

This paper starts with the increasing discussions on juridification in education. Concerning theorizing on such processes, we examine the poor implementation of the UN Convention on the Rights of Persons with Disabilities Convention on the Rights of Persons with Disabilities, CRPD (2008) in the school sector of Germany. The paper considers the reasons for this failed endeavor by analyzing the complex, multilevel relations between policy and law in different national and historical contexts. With this, aspects of juridification as a process in education policy can be illuminated. In this regard, we suggest crucial aspects regarding juridification in public education: a focus on regulative failures in juridification processes, juridification's contexts, the mandate for putting it into action, the allocation of resources, and finally, its objective and subjective rights dimensions, i.e. how an individual can claim rights within the machinery of public education.

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Introduction

This paper has the ambition to contribute to a relatively new but fertile discussion in the *Journal of Education Policy* that calls for a further understanding of the nature of juridification in education (see, e.g. Murphy, 2022, Murphy 2003; Rosén, Arneback, and Bergh 2021). The core of this discussion is promoting an understanding of the legal dimension of creating a school system concerning who is allowed to learn what and under what conditions. Our contribution to this issue is an elaboration on how international policies, in our case, the UN Convention on the Rights of Persons with Disabilities (CRPD), have been handled in a particular national context, in our case Germany. By doing so, we aim to empirically and conceptually further illuminate more dimensions of the phenomenon in question.

Focusing on children's rights to attend regular schools, regardless of their conditions, provides an interesting empirical case for theorizing education policy with a particular juridical focus. Implementing the CPRD in a national context exemplifies the complex relations between political legitimacy and juridical legality, individual citizens' rights,

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historically shaped welfare states, and international, national, and local spaces of policy practice. In other words, the paper's central ambition is not understanding the nature of inclusion as an education policy, whose implementation is rendered by various international, national, and local conditions and enacted by various stakeholders. Instead, we discuss the CRPD implementation with its apparent ambition to open mainstream schools for all kinds of children as an example to further our understanding of the nature of juridification in education.

With this ambition, the paper at hand is structured in the following way: firstly, we present our consideration about juridification in education building on the corpus of existing conceptual literature. Secondly, we present our methodological vantage point in this study: comparative methodology and the material used for our reasoning. The comparison must not happen by juxtaposing various countries. It is also about investigating the changing nature of education phenomena while traveling between multiple contexts and levels of education systems (Popkewitz, 2003). A prominent comparative interest in education policy is illuminating transnational and national policies. Essential for a comparative methodology is the understanding of context. This is presented in the next part. We present the CRPD and the status of inclusion in Germany. Fourthly, we present the complex implementation of the CRPD into the German system alongside various factors that illustrate the confusing relationship between legitimacy and legality. For Germany, such relations have made the implementation a rather unfortunate case, at least for people with disabilities. The presented travel from international law into national schools can scholarly, at least, contribute to further understanding of failures and fallacies in juridification processes. This will be discussed in the last part of the paper at hand.

Understanding juridification

This paper intends to contribute to the recently growing body of political education research on juridification. In the following, we briefly relate the nature of juridification as a scientific concept and societal process. We will show that there have been various juridification waves in Western societies. The most recent relates to New Public Management trends and an increasing intertwining of international and national policy trends. Moreover, the recent wave shifts its reference point from the nation-state towards the welfare state. We discuss that this shift can result in unfortunate interaction effects. This means that different rationales in various systems in society become obstacles or manipulate the implementation of individual human rights in various contexts. In particular, concerning implementation obstacles and the contextualized nature of juridification, we find a research gap that our research can fill.

The phenomenon as such is not new. Regulations by law have been a significant part of the change from pre-modern aristocratic society to democratic societies building on individual liberty. Rules of law have secured norms of societal coexistence, securing the nation states' citizens a particular body of rights and related security. The nation-state united its citizens, also by factors that define a nation, such as a language or common descent, and provided security and plannability (Oxford Dictionary, 2023). Scholarly, this process of juridification (in German '*Verrechtlichung*') was described early by Max Weber (1914/1980). Consequently, the phenomenon has merely had a positive

connotation. The law must be the guardian of individuals because it is independent and formal, i.e. it states precisely and untouchable what is allowed and what is forbidden, connoted with particular sanctions in case of non-compliance (Teubner, 1998). Whether they are just, moral, or not, laws make individual and societal decisions plannable and transparent. Juridification, from this perspective, relates to nation-state building as a mutual relationship between the state and its citizens (Weber, 1914/1980, Blichner & Molander, 2006).

The more recent development of juridification relates instead to the developments of the welfare state. As a complement construction to the nation-state, the welfare state focuses on securing, through its institutions, its citizens' social security and well-being (Esping-Andersen, 1990). This shift also means legal policy intervention (Teubner, 1998). With the welfare state as a new reference for juridification, the law has complimented in many countries its focus, from individual obligation to individual obligation and rights, or from formal law to formal and material law (Teubner, 1998). This is mainly to cope with social inequality and combat too unfortunate market forces (Windolf, 2009). Simply said, having the Nation-state as of reference for juridification, it is asked what the individual must do to be a member of the collective, which is the nation-state. With the welfare state as a reference, the direction of the question shifts. It is asked what the state can do for its citizens.

However, other factors have accelerated the juridification of many social areas, including our sphere of interest in education. In particular, with New Public Management and decentralization ideologies steering the welfare sectors in the global North, this newer sort of juridification gained momentum. New Public Management means implementing market means into the management of public sectors, such as health care or education. Typical means are competition of providers, rationale choice of clients, transparency in which services are offered to whom by which costs (Norén 2003). The correlation is not surprising since NPM builds, among others, on the responsibility of individuals for their choices and their right to make their voices heard if they do not get the services they are expected to get (Montelius, Wermke & Höstfält 2022; Novak, 2018; Norén 2003). The material aspect of rights and laws gets strengthened. The social sphere of education becomes regulated by contractual relations, stating individual rights and possibilities to appeal if such rights might be harmed (Teubner, 1998). Examples are personal rights to receive education of a certain quality or exceptional education support if needed. While due to NPM, the individual's rights are strengthened. Shifts in governance from centralization to decentralization, and indeed, vice-versa, require legal adjustments. This has been necessary to stabilize the new national-local relation (Loughlin, 1996; Novak, 2018). In other words, legal structures are moved between levels in the education system, from the central state to local education authority levels. These new relations can also be manifested in implementing new state authorities, such as school inspectorates, monitoring the new link (Novak, 2018).

Several scholars, pointing to the classic Habermas (1987) argument of laws colonizing the social world, have started to warn of many unfortunate consequences from such developments: in particular concerning a restricted autonomy of school professionals (Rosén, Arneback, and Bergh 2021; Karseth & Möller, 2018; Murray, 2022) or extended fatigue of educational creativity in schools (Novak, 2018; Solbrekke & Englund, 2011). The described developments have also tremendously increased teachers'

administrational workload (Wermke and Salokangas 2021). However, we would argue here that there is no alternative to juridification in the described way. Internationalization and all transnational relations valid today are an even more significant factor behind recent juridification processes. No state is an island. There are a plethora of treaties regulating even small interrelations. Being a member of the community of states also obliges one to secure several human rights in a certain way.

The historically relatively new phenomenon of the potent roles of transnational governmental organizations such as the European Union or the United Nations, and all the binding conventions related to this, have significantly accelerated the process of juridification. In the paper, we put forward the example of the Convention of the Rights of People with Disabilities (CRPD), which has had the ambition to make all parts of society accessible for all people, independent of their conditions. In other words, people with a disability shall be granted more rights and possibilities to fight for their rights. These changes are positive and revolutionary (Ainscow et al., 2019) but also express extreme challenges for various nations' education organizations and professions (Wermke et al. 2020). This leads us to a blind spot in the most recent research on juridification.

What are the very significant issues connoted with juridification are regulatory problems (Teubner, 1998). Building on functional systems theories, Teubner argues that we can expect many different frictions when political interventions are introduced by legal means into various social areas.

However, the legal and political systems are autonomous self-referential social systems that cannot directly influence each other but can only reciprocally trigger self-regulating processes. This they can only do if they respect the limits of their respective self-regulation. Suppose we adopt this perspective and regard juridification processes as complex relations between [...] self-regulating systems. In that case, we understand why *'regulatory failures' must be the rule rather than the exception.* (Teubner, 1998, p. 408, *our italics*)

Various sectors or subsystems have varying rationales or logic. Political ambitions often follow different rationales than legal mechanisms. For example, morally, the full implementation of the rights of people with disabilities is not discussable and must indeed be a political imperative. However, what is legitimate is not always legal since the law does not ask about morality, only if something follows the rules of law. In addition, political ambitions can penetrate existing practices in a way that irritates the system assumed to implement required changes. Regarding inclusion, a genuine school of all might challenge the idea of assessment as a meritocratic selection instrument. Consequently, it is essential to understand these frictions and failures further and describe the fallacies from legitimacy to legality, i.e. from what is considered morally right to legally binding by the rule of law. Such problems still need to be addressed in education policy research. Here, our work aims to contribute to further understanding.

Finally, from our point of view, there is another issue in existing research – Juridification's' contextualized nature (Teubner, 1998; Blichner & Molander, 2006). In a more recent study, the phenomenon in focus has been regarded, although by looking at very distinguished cases, as universal. However, since juridification's point of reference is the welfare state, and welfare states are shaped by nation-specific particularities (Esping-Andersen, 1990), juridification as a process might also depend on contextual factors.

Therefore, this paper chose a comparative perspective on the phenomenon. This does not mean we must compare various countries with others; instead, it is a methodological perspective with its starting point in the premise that equivalent processes can have varying forms at different levels. Different levels can be international, national, and local arenas (Schriewer 1999).

Methodological considerations

In our study, we employ a comparative approach that will illuminate the relation of various levels in educational systems when political trends travel from international arenas to national and local contexts (Schulte & Wermke, 2019, Popkewitz, 2003). We investigate how a document is adopted and morphs on a fictive trajectory from various policy levels to practice. In the words of Archer (1988), what we empirically observe in entities and relationships is always the present, situated historically.

However, this present time is peculiarly pivotal in the morphogenetic approach. As Markovic expresses it, both "past and future" are living in the present. Whatever human beings do in the present is decisively influenced by the past and by the future. [...] The future is not something that will come later, independently of our will. There are several possible futures and one of them has to be made (Archer 1988, p. xxvi).

What we investigate empirically is always local (in a very particular space) and possible to observe as a practice. Thus, when we investigate trajectories, we string present, local, practical, and analytical units together. Time becomes our analytical device. Each unit conditions the next. It is always the prior development of ideas (from previous interactions) that conditions the current context of the analyses. Finally, we advocate comparative education reform policy analyses. While selecting (national, sectorial), cases become critical; comparisons may uncover the different layers of universality and particularity, i.e. what is broadly universal, what is possible to generalize, and what is unique to the given instance and context. Searching for universalities is only possible by attending to the details of the concrete case at hand Erickson (1986). We might see change or stability only in the particular case, i.e. the specific practices and their development in time.

Comparative reasoning draws on the idea of contingency. A common-sense definition is that something could have happened differently or be otherwise (Luhmann 2002). Contingency means not simply infinite possibilities but a specified infinity in which something is neither necessary nor impossible but is a natural alternative (Makropoulos 2004). Contingency is about understanding available options, facilitating understanding of the complex possibility structures, and the fluid construction of this reasoning (Kauko and Wermke 2018). Contingency thus becomes visible through an awareness of other possibilities that are genuine alternatives. In line with such an understanding, action is not the realization of a chance that excludes all other options by excluding selection and the constitution of definition. Still, the completion of a possibility in relation to other existing options has not been chosen (Kauko and Wermke 2018).

Consequently, the adaption of the CRPD into local contexts is contingent. It depends heavily on local structures and traditions. With this, we will also understand the contextuality of juridification processes. In other words, the comparative methodology provides the premises for our analyses: *the trajectory from international law to potential*

practice in German schools as an example of juridification with a particular focus on regulative failures.

Building on this, looking at the national case of Germany, we aim to be as detailed as possible. Our study draws on the following material:

- (1) In the presentation of the German case, we include descriptive statistical analyses of the status quo of the inclusion of children in need of special support into regular and special schools, nationally and in comparison to other European countries.
- (2) We present different legal layers and related stakeholders in implementing the inclusive school in Germany, i.e. Länder (Federal states). Here, we analyzed all 16 states' political coalitions regarding their perspectives on the inclusive school, parental choice, and the respective school laws. We continue to the level of municipalities, i.e. their rights and duties in providing physical conditions for inclusive schools. Finally, we will look at the issue of objective and subjective rights. While Germany may quickly pass objective laws that bind the state to foster inclusion, policymakers are much more reluctant to establish subjective legal rights – claimable in a court of law – such as the individual child's right to be enrolled in an inclusive school. Our analyses of the 16 German Länder are attached to the paper as supplements, downloadable under: **Anonymised**.
- (3) To make visible frictions in the juridification process, we have analyzed various governmental reports, legal analyses, and even critical juridical decisions on individual appeals concerning the CRPD.

Context: the CRPD and the status of inclusion in Germany

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the General Assembly of the United Nations on 13 December 2006. The CRPD was associated with the expectation that soon people with disabilities would have the same opportunities in life as everyone else. One aspect of this was that children with and without disabilities could attend school together.

Germany saw itself as one of the 'pacemakers' of the CRPD project, a country whose swift signing of the convention was an 'important political signal for the other EU member states' (Federal State of Germany 2008, 46). German policy and decision-makers have made explicit promises on progressive inclusion policy long before the CRPD: treaties and declarations were signed, new laws were proposed, or old ones were amended to improve the situation of people with disabilities. At the same time, implementation of the CRPD lags to this day: In Germany, the number of children with disabilities taught in non-inclusive settings has remained unchanged over the past 25 years. The overall share of children led non-inclusively is high in international comparisons.

We have investigated official data to disclose fundamental trends in inclusion and the effects of the CRPD. [Figure 1](#) shows that the proportion of the total share of students with SEN (special educational needs) at regular schools has increased significantly from 1999 to 2020. While this seems to be a positive development in the inclusion efforts, [Figure 1](#) also indicates that these results should be viewed

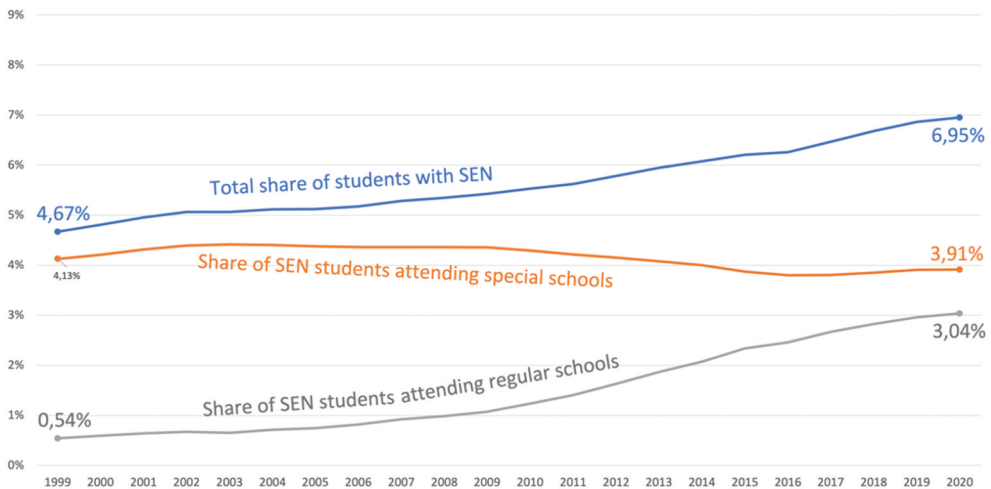


Figure 1. The total share of students with certified SEN and the subcategories of SEN students attending special schools and SEN students attending traditional schools, 1999–2020, across Germany. Data source: Total number of students: Federal Ministry of Education and Research (2021); share of SEN students: KMK [Kultusministerkonferenz, Standing Conference for the Ministers of Education and Cultural Affairs] (2010, 2020, 2022).

cautiously: The proportion of pupils with SEN who are taught non-inclusively has barely fallen in the same period.

The parallel increase in the proportion of special needs students and inclusion students suggests that the increase in the proportion of inclusively taught students results from increased SEN certification at regular schools, while the majority of students who study at special schools remain there instead of being increasingly taught within inclusive settings (Wocken 2018). One factor that could contribute to this development – critics speak of a ‘labeling frenzy’ (Ibid.) at regular schools – is that additional resources in the form of weekly teaching hours are available for students with SEN (Steinmetz et al. 2021, 147). Therefore, schools have an interest in getting their students certified. However, incorporating students with SEN who have traditionally attended special schools is a different kind of challenge. The data discloses that this has not yet been achieved.

We have also analyzed how Germany compares with other European countries. Figure 2 shows the different approaches various countries/regions took in the school year of 2016/2017 with regard to SEN certification and teaching SEN students at special schools at primary and lower-secondary level. There is a large range concerning how many students had a SEN status: in Italy, 3.6 % and Scotland, 25.1 % (Germany: 5.5 %). Divergent approaches are also taken with regard to how many SEN students are taught at special schools. While in Italy 0.9 % of SEN students attended special schools, in the Netherlands this was the case for all SEN students (Germany: 56.6 %). After combining the rates of SEN certification and SEN students attending special schools, Flanders emerges as the country/region with the highest rate of students learning at special schools (6.1 %), while Germany (3.1 %) ranges in a group of countries – including the

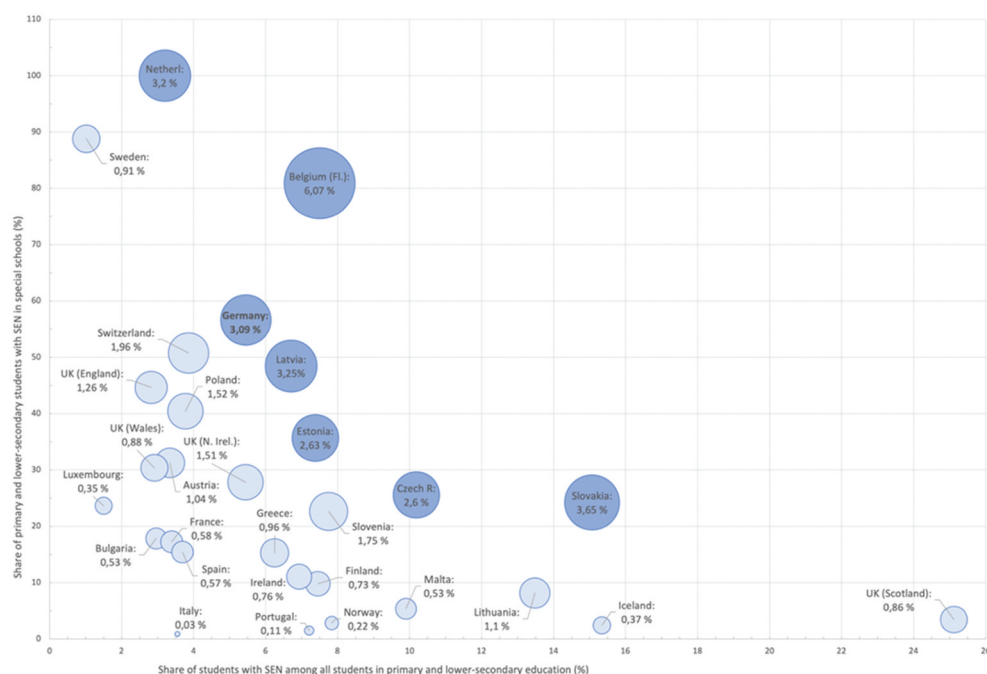


Figure 2. In Flanders (Belgium), 7.5 % of primary and lower-secondary education students in 2016/2017 were identified as having SEN, and 80.89 % of those attended special schools. Combining these numbers ($7.5 \% \times 80.89 \%$), it can be concluded that Flanders had the highest rate of children in special schools (6.07 %). The dark blue circles indicate a rate more significant than 2 %; the size of the circles represents the share of students in special schools in relation to the value from Flanders. Data source: European Agency for Special Needs and Inclusive Education, EASIE (2018) Dataset Cross-Country Report (European Agency for Special Needs and Inclusive Education, p. 61, 98). The diagram is an adaptation/update of Fig. 3.10 in UNESCO 2021 (p. 60).

Netherlands, Latvia, and Slovakia – that also have high rates of students attending special schools.

Germany's continued commitment to special schools conflicts with the country's appropriation of the CRPD. Germany's Permanent Representative at the United Nations signed the CRPD on 30 March 2007, the day it was opened to signatures. No reservations were put forward. When a treaty is signed, the state only expresses its intention to abide by it; for the treaty to become truly binding, it must be ratified in accordance with the state's internal rules. Art. 25 of the *Grundgesetz* (Constitutive Law, hereafter: GG), the German constitution, lays down that the general rules of international law shall be an integral part of federal law and take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. However, international treaties have to follow a different path to be incorporated into the German legislative system: Art. 59 (2) S. 1 GG determines that treaties that regulate the political relations of the federation shall require the 'consent of both bodies responsible for the enactment of federal law,' i.e. the Bundestag (German parliament) and the

Bundesrat (Council of the Länder). This regulation ensures sufficient participation of the Länder when broad commitments are introduced at the federal level.

The complex implementation of the CRPD: mandates, resources, objective and subjective rights

Federalism

The federal system in Germany is laid down in Art. 20 (1) GG. The GG also precisely regulates the distribution of tasks between the federal government or the federation, the Bund, and the federal state government of the 16 German federal states, the Länder in Art. 30, 70–74 and 83 GG. Within this system, education is unambiguously assigned to be the responsibility of the federal state; this includes implementation of legislation but also legislative competence – with few exceptions. For this reason, there is no single education system, school act, or model of inclusive education; instead, pluralism prevails. Here, internationally, this complex system of power relations roughly resembles the one of the USA. When further describing the negotiations, we will refer to the federation or the federal government as *the Bund* and the federal states as the Länder. We aim to illustrate the confusing negotiation between various policy levels in something that might look more coherent from the outside.

It is essential to understand that this meticulously designed federal structure is a direct response to the experiences of National Socialism, which was epitomized by a strategy of Gleichschaltung – enforced conformity through centralization – that put the school administration swiftly under the leadership of the Reich Ministry for Science and Education (Edelstein and Veith 2017). In the Federal Republic of Germany, a deliberately opposing approach was pursued, also supported by the occupying powers who insisted on decentralized state structures (Schäuble 2018).

One may assess the principle of federalism positively, as ‘preservation of cultural diversity’ and ‘protection against too much uniformity’ or negatively, as ‘small-stateism’ and ‘empowerment of self-rule’ (Wocken 2011). Still, it cannot be changed in any case: It is constitutionally protected by an eternity clause under Art. An international treaty or a constitutional amendment cannot undermine 79 (3) GG. Therefore, recommendations such as those made by the United Nations after evaluating Germany’s first State Report on the implementation of the CRPD that the member states should dismantle segregated school systems or ensure increased accessibility in the school environment (Committee of the Rights of People with Disabilities 2015: no. 46 b, d) are somewhat misplaced. From the Länders’ perspectives, pressures to comply with the CRPD can be seen as undermining their constitutional competencies. ‘The UN in faraway New York can determine what the Bavarian school administration may or may not do,’ a leading functionary of a teacher association declared. ‘It is inconceivable to us that an international organization is telling us what to do [. . .]’ (in: Wocken 2011). The truth is: that the federal government can neither dismantle the segregated school system nor introduce mandatory accessibility in schools. It is the 16 Länder that must be addressed and that need to be convinced to act on the obligations of the CRPD.

The extent to which the Federal Republic of Germany (the ‘Bund’) may sign international treaties to regulate areas where the Länder have exclusive legislative competence is

disputed (Wissenschaftliche Dienste Deutscher Bundestag [Scientific services German Parliament] 2009b, 6). The Lindau Agreement of 1957 between the Bund and the Länder states that the consent of the Länder should be obtained insofar as international treaties in areas of exclusive competence of the Länder create an obligation on the part of the Bund or the Länder (Lindauer Abkommen [Lindau Agreement] 1957, no. 3 (2)). However, even if the Bundesrat's approval of the CRPD's law of consent (cf. section 1.2) is regarded as consent within the Lindau Agreement, this does not confer on the Bund any additional legislative competencies detached from Art. 70ff GG (Federal Administrative Court 2010, 5).

The Bund acted on the CRPD where it had legislative competency. For instance, in 2016, art. 1 CRPD's definition of a disability replaced an older definition in the federal *Behindertengleichstellungsgesetz* (Disability Equality Act). The *Bundesteilhabegesetz* (Federal Participation Act), also of 2016, instigated a far-reaching reform of social disability legislation in light of the CRPD. The principle behind this reform was that people with disabilities should no longer be objects of charity. Still, they should instead be put in a position where they can live independently and participate in any activity they choose to participate in. However, the reform was stunted by the agreement that it should not cause additional costs. It would delve too far into the details of the advantages and failures of this highly complex and yet incomplete reform; however, it should be stated that the results also impact inclusive education: Students with disabilities, especially those who attend regular schools, might be dependent on the support of an integration assistant, for whom the parents apply to the municipality within the framework of the social legislation that was amended as a result of the Federal Participation Act.

This example illustrates the situation's complexity: Inclusion is not just a question of access but also of getting the support needed in the right physical surroundings. A child with a mobility impairment has little to gain if the school law grants a legal right to inclusive schooling, but the school of choice is not barrier-free. In contrast, another child might be barred from attending a regular school if they cannot simultaneously claim the support of an integration assistant. One cog must mesh precisely into the next for inclusion to be successful. However, these cogs are run by different state tiers within the German system, making coordination far more complex.

As the Bund was unable to act on behalf of the Länder, a central question, therefore, is whether the consent of the Bundesrat constituted an obligation on the part of the Länder to adapt their legislation in the light of the CRPD. From the Bundestag's perspective, the consent merely created a 'non-binding duty' (Wissenschaftliche Dienste Deutscher Bundestag [Scientific services German Parliament] 2009a, p. 7f). On the one hand, the Bundesrat's reticence during the legislative process suggests that the Länder were not aware of entering into a well-defined obligation; as far as the records are concerned, they worked on the assumption that discrimination had almost been overcome and that German legislation coincided with the requirements of the CRPD. On the other hand, they had plenty of time to become aware of the CRPD's far-reaching intentions and to discuss their concerns; they must also have been aware of Art. 4 (5) CRPD, which states that the provisions of the CRPD extend to all parts of a federal state.

It is easy to see that the Bund had little interest in discussing the precise nature of a 'non-binding duty'; one of its main aims was likely that the CRPD should be ratified without commotion or international embarrassment. At the same time, the Bund must

have been interested in such a discussion as, indeed, they were aware of Art. 27 of the Vienna Convention on the Law of Treaties of 1969, which states that a party may not invoke the provisions of internal law as justification for its failure to adhere to a treaty. The KMK discloses the Länder's strategy quite openly in its SEN guidelines: 'Art. 24 of the Convention constitutes an obligation of the state, which is put under the reservation of gradual implementation. This means it cannot be implemented quickly, and there is competition with other state tasks' (KMK 2010, 2). In other words: The Länder reserved the right to advance at their own pace.

It is important to note that the legal arguments presented above are not just discussed in textbooks but are the fodder for court rulings that, in turn, directly impact the lives of pupils with disabilities. So, for instance, in 2009, the Hessian Administrative Court rejected a pupil's complaint concerning a refusal of interim legal protection against her assignment to a special school. Due to the ratification of the CRPD, the applicant had submitted that her assignment to a special school, according to § 54 (4) s. 1 of the Hessian School Act, was no longer valid. The court, however, argued that Art. 24 CRPD did not take precedence over the provisions of the Hessian School Act because the federal government's implementation of international treaties is limited to the area of its legislative competence assigned by Article 71ff GG. From the court's point of view, there was no apparent compulsion for implementation by the Länder at the time of the decision. The applicant could also not derive the unlawfulness of her allocation directly from Art. 24 CRPD since its provisions do not fulfill the requirements of direct applicability. In summary: A claim to inclusive schooling cannot be derived from the CRPD; only the school acts of the Länder could provide such a claim (see below).

Considering the strategy mentioned above of 'gradual implementation,' it is hardly surprising that the Länder are 'moving at very different speeds' when it comes to implementing inclusion policy. In the supplementary material, we have compiled a synopsis of the school acts' regulations on access to inclusive schooling/legal entitlement, a continuation of special schools, and parental choice. Our research complements and confirms findings by other authors on these laws (see Steinmetz et al. 2021). Our analyses that all Länder's school acts refer to inclusive schooling as a model they aim at in principle. However, the individual wording indicates divergent levels of commitment: The scale reaches from Hamburg, where a subjective claim is established as students with SEN 'have the right' to attend a regular school (§12 (1) HmbSG), to Brandenburg, where students with SEN should 'preferably' be taught in inclusive settings (§3 (4) BbgSchulG) and to Bavaria and Saxony, where inclusion is a project to be concluded at some point in the future, as the inclusive school is the 'goal of school development' (art. 30b (1) BayEUG, § 1 (7) SächsSchulG).¹

Municipalities

Besides the federal tier and the Länder, municipalities must be considered additional players in forming school policies. Legally, municipalities are subordinate to the Länder. However, municipalities also hold constitutional rights to manage all tasks of self-governance (Art. 28 (2) GG). They are responsible for maintaining the school infrastructure, including the construction of school buildings and sports facilities or the equipment of classrooms. In that role, it falls to the roughly 11,000 German

municipalities to make school infrastructure barrier-free. For example, in the federal state of Brandenburg, § 99, in conjunction with § 100 of the Brandenburg School Act, defines the maintenance of schools as an ‘obligatory self-government task.’ With this particular type of task, the municipalities are obliged to carry out their duties, but the legislator does not provide precise guidelines on implementation. As with policy concerning access to inclusive education, the accessibility of school buildings is also not a matter of top-down governance, but municipalities are at liberty to decide that among, for instance, a municipalities’ seven secondary schools, only one is barrier-free, and another is partially barrier-free. In practice, this means that pupils with restricted mobility are required to travel longer distances to school and, consequently, might also find it harder to join afternoon activities with their peers as transport – applied for in another separate process – must be arranged in advance.

For new construction and conversion, the building codes of the Länder regulate which requirements must be observed. The non-binding Model Building Code (MBO) provided by the Länder’s Conference of Building Ministers – the equivalent of the KMK in the area of construction – contains, according to § 50 (2) no. 1 MBO, a barrier-free obligation for structural facilities of the education system, but allows for opting out of accessibility for people with disabilities can only be attained with ‘disproportionate extra expenditure.’ Even if individual Länder do not include this financial constraint in their construction laws, as is the case for Brandenburg, for instance, the fundamental principle of proportionality – ubiquitous in German administrative law – still applies. The smaller the advantage that the protected group of persons gains from barrier-free usability, the lower the threshold of unreasonableness for the building owner (Dirnberger et al. 2021: § 50). Municipalities may thus still choose to make only some schools accessible for children with special needs, depending on their financial means. Economically, it must also be stated that cost increases due to regulation that requires barrier-free accessibility may discourage municipalities from investing in existing schools or building new schools.

One main barrier to inclusive schooling is funding constraints, acknowledged in 12 of the 16 school acts – the exceptions being Bremen, Hamburg, Lower Saxony, and Saarland. In Brandenburg, for instance, the wording is: ‘Special needs education should be fulfilled in regular schools, if adequate personnel, spatial and material resources are available or can be arranged by the available financing possibilities’ (§ 29 (2) BbgSchulG). For example, the Hessian Administrative Court even claimed that funding constraints are acknowledged by the CRPD, as Art. 4 (2) of the convention states that ‘about economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources’ (cf. 2012: no. 17).

Subjective versus objective law

It has been mentioned above that in 2009 the Hessian Administrative Court rejected the notion of a direct claim to inclusive schooling from the CRPD. To understand this argument fully, it is important to grasp the precise legal nature of the CRPD within Germany. The approval of the *Zustimmungsgesetz* (law of consent) by the Bundestag and the Bundesrat in accordance with the already mentioned Art. 59 (2) S. 1 GG gave the Bundespräsident (Federal President = head of state) a power of attorney to sign the

ratification instrument, which was then deposited at the UN in New York. Thirty days later, on 26 March 2009, the CRPD came into force within Germany. From a legal point of view, the CRPD was, even at that stage, simply an international treaty with the rank of federal law. Rights and obligations of citizens vis-à-vis their state did not arise from the ratification (Schmidt 2019, 7); this is because the German legal system distinguishes between *Geltung* (validity) and *Anwendbarkeit* (applicability) (Scientific 2009b, 4).

A valid regulation is only directly applicable if the rule can be applied without there being a need for further regulation and instruction (Ibid.). This will be the case if a significant amount of detail is provided. For instance, in the example of additional teaching hours for students with SEN, the following chain emerges for the Land Brandenburg: § 31 Brandenburg School Act lays down that the ministry responsible for schools has to formulate basic principles of special needs education in a *Rechtsverordnung* (decree-law). Art. 8 of the resulting decree law *Sonderpädagogik-Verordnung* (Special Needs Decree) by the Ministry for Education, Youth, and Sports then refers to the *Verwaltungsvorschriften* (administrative regulations) for the *Unterrichtsorganisation* (organization of lessons) which contains an appendix with the allocated additional teaching hours. If a law is valid but cannot provide this sort of intricate detail – which is the case for an international treaty – it is not directly applicable; those kinds of laws can only be effective if further statutes and administrative regulations are released to provide detail.

For direct applicability, it is also decisive to ascertain to what extent valid regulations establish subjective rights of individuals (Maunz and Dürig 2021). Subjective rights arise when there are not only objective legal obligations stated, but also individual claims directed towards them are granted (Detterbeck 2019). For example, Art. 29 (1) Brandenburg School Act states that pupils with disabilities have a right to be certified as having a SEN status. Here, the individuals entitled by the regulation are clearly defined and precisely stated what kind of claim they have. Objective law, in contrast, contains provisions, often obligations, which must be observed by the addressees (Detterbeck 2019, Rn. 394). For example, Art. 12 (4) of Brandenburg's constitution states that the state and municipalities must ensure equal living conditions for people with and without disabilities. In this formulation, citizens may be advantaged if the state fulfills the described obligation, but they have no right to expect or force it into fulfillment (Detterbeck 2019). The wording of Art. 24 CRPD – 'State Parties shall ensure an inclusive education system' – does not speak of individual rights. Still, the state is put under the obligation to enact appropriate legislation.

The KMK also assumes that the CRPD does not create any subjective rights; these legal claims are only established through legislative acts of implementation (Federal Administrative Court 2010, 2), i.e. through the school acts of the individual Länder. The distinction between subjective and objective law is not always clear-cut: In many cases, whether a regulation also serves to protect individual interests must be determined through interpretation or court decisions (Detterbeck 2019), which underlines the importance of the judicial system.

Parallel systems, interaction effects, and the issue of parental choice and fight

To give an up-to-date view of the importance the Länder governments allocate to 'inclusion' and the policies they intend to introduce, we studied all current coalition agreements of the Länder governments in Germany. Every 2nd page in the Länder synopsis in the supplementary material presents the main results of this analysis. All 16 Länder mention and discuss the issue of inclusion in their coalition agreements. All of them offer some inclusive education at regular schools while maintaining a system of special schools that serve different SEN categories. Most coalition treaties show no indication that the double structures are transitory. For instance, the Hessian coalition treaty of 2019 says: "Depending on the child's situation and the parents' decision, both inclusive education at a general school and education at a special school can be a suitable form of education" (p. 89). The current Bavarian coalition treaty even contains a cast-iron commitment to special schools: 'Our special schools are indispensable special education competence centers and a driving force when it comes to inclusion in Bavaria' (p. 38). As far as the school acts are concerned, only Bremen is taking active steps towards abolishing the special schools: It wants to transform the special schools into centers for supportive education, incorporated into the regular schools; separate special schools are to continue to exist only on a transitional basis (§ 70a (1) BremSchulG Act).

Having parallel systems means somebody must decide which school a child will attend. As this depends on the precise nature of the pupil's special needs, the process usually starts with an SEN certification. In Brandenburg, the parents, the pupil – if they have reached the age of 14 – or the school principal can apply for a certificate, to take place. The school authority then starts the proceedings and appoints a special needs advisory center (a diagnostics team) to carry out standardized testing. The results are summarised in a special needs statement. Next, a special needs committee, headed by a special needs advisory center teacher, is expected to formulate recommendations. Other committee members are the parents, the class teacher and the school's principal (or an appointed teacher), and representatives from the funding bodies (municipalities). Further specialists can be called upon to join the committee. Based on the committee's recommendations, the school authority makes all the final decisions on where the child will learn, according to which curriculum, and whether there will be compensation for disadvantages in assessments (Special Needs Decree 2017: § 3 to 5).

The Court of Audit in Lower Saxony criticized the equivalent process for using too many resources. It calculated that each of the 14,730 SEN certifications in Lower Saxony cost around 2,670 Euros (almost 40 million Euros in total); the involved educators had to employ 43 hours per certification on average. The Court of Audit also questioned whether it was necessary to involve the school authority since it had followed the school's recommendation in 98% of the cases (2018, 23).

Several court rulings have confirmed the high importance of the school authority. In Federal Administrative Court, 2005 overthrew a municipal welfare office's decision not to finance an integration assistant, despite the school authority's decision to assign the pupil to a regular school, where the pupil depended on the support of such an assistant. The welfare office argued that such costs would not occur if the child attended a special school. However, the Federal Administrative Court determined that the welfare office

was not authorized to overrule the school authority's decision but, on the contrary, was bound by it. Inclusion advocates also lauded the Federal Administrative Court's decision of 2007 in a case where the school authority had offered the foster parents of a pupil with a disability the choice of either a regular private school or a special school. Again, the welfare office refused to finance the integration assistant at the regular private school, but the Federal Administrative Court insisted that the option of choice had to be respected by the welfare office; it could not effectively decide on behalf of the parents by refusing to finance one option because the other was cheaper.

As laudable as these two court decisions might be, strengthening the position of both the parents and the school authority, it is essential to be aware of the strain such battles put upon parents. For the latter case – decided in 2007, although the school year in question was 2001/2002 – to reach the highest possible level, the Federal Administrative Court, the foster parents had to present their case, firstly, to the Administrative Court, which supported them, and, secondly, to the Higher Administrative Court, which had supported the welfare office's position. Faced with such trials and tribulations, it may well be that most parents and guardians choose the path of least resistance, particularly if they lack the social or educational background or the boldness or psychological resilience to take on such prolonged legal battles.

Although the school authority generally has the final say, parents also play an essential role since they must be consulted in decision-making. There would have to be watertight arguments within the legal framework to overrule their wishes. In the supplementary material, we highlight the parts of the Länder's school acts that attend to parental choice. Except for Bremen, all the Länder's school acts include regulations about parental choice, so for instance, in the Saarland: 'Whether pupils attend a regular school or a special school, is principally decided by the legal guardians.' (§ 4 (3) SchoG). In North Rhine-Westphalia, parental choice is an integral part of the SEN certification process, as the school authority has to propose at least one inclusive option at a regular school (§ 19 (5) SchulG NRW).

Advocates for inclusion argue that parental choice – not mentioned in the CRPD – ultimately legitimizes the exclusion system in special schools: There can only be a choice if the parents can also choose the special school (Wocken 2011). In that line of thought, parental choice is a barrier to inclusion as it upholds the current system of separating certain children and forces parents of all backgrounds to make potentially life-changing choices for their children. It is important to note that not all parents faced with options automatically choose inclusion. Many parents appreciate the higher-quality care their children receive at special schools. As the current Hessian coalition treaty points out, these have smaller classes and highly trained educators who support their pupils with extensive special needs expertise (2019, p. 91).

The future of the special school is an election issue because some parents, pupils, and educators think they should continue to exist. There is a dilemma between the individual (short-term) and the societal (long-term) perspective: While on the individual level, it may be entirely rational to choose a special school over an ill-prepared and ill-equipped regular school, a long-term inclusive system cannot be built if the majority of children with special needs attend special schools. It is only when children with disabilities must participate in regular schools that these schools must adapt, build the experience, and get the total funding. Considering the shortage of teachers and the high cost of special

schools, the Court of Audit of Lower Saxony advised against maintaining parallel structures, especially at the primary school level (2018, p. 40). While choice is generally considered good, it can also be an unnecessary luxury.

Discussion: the complicating relation between national policy and national law

Our analysis has shown that bridging the gap between international law and school practice is challenging. There is no top-down handling of inclusion in a federal state like Germany. Still, several tiers of the state – the federal government, *Bund*, the federal states, *Länder*, and the municipalities – must work in unison while always respecting constitutional boundaries. By signing the CRPD, the highest level of the state, the *Bund*, has accepted an obligation it cannot fulfill itself but is dependent on the *Länder* and the municipalities to take these duties as their own. Naturally, as there is no clearly defined obligation, the lower tiers adhere to their interpretation of the tasks ahead. Regarding contents or time frames, grey zones emerge when legislation has to be translated/converted by a higher level or received/incorporated by a lower level in the state's structure.

In understanding the institutional impediments that prevent the implementation of the rights of people with disability, one of the main points of this paper is that we wanted to highlight the complexity of issues of juridification. In our empirical material, we could see complex interactions between multiple laws and various levels of the education system that decide whether children with special needs have access to a regular school. The school laws have to include provisions to allow those children to visit those schools, regulate the financial compensation for the schools, and make it viable for those children to be taught under specified curricula and be assessed on specific schemes. The building laws must specify barrier-free accessibility. And social laws must make it possible for those children to receive special support inside and outside the school. Juridification of the rights of people with disabilities in Germany in relation to international treaties appears to be a very confusing endeavor. With this, the case is – unfortunately – a textbook example of Teubner's (1998, p. 408) statement that “regulatory failures” must be the rule rather than the exception.’

However, Germany is not the only CRPD state characterised by protracted progress in the global North. Done and Andrews, 2020 in this journal, describe a very problematic English situation:

A version of this inclusive education model subsequently gained political traction in England where the is-sue of segregated or mainstream provision is now constructed as a matter of parental choice and child voice. Meanwhile, the implications of this latest model of inclusive education for teachers and schools in a rapidly changing wider educational landscape have largely been ignored or reduced to a question of training. (Done and Andrews 2020, 447)

Done's and Andrew's (2020) case of England shows us a configuration in which a public education school system has moved to a more inclusive system and back to a more exclusive one. This occurred in relation to parental choice and teacher workload. In comparison, in Germany, political and legal barriers have led to a genuinely inclusive

system that has never developed and ultimately never will. Still, a parental choice can be either a barrier or a lever for inclusion in both cases. Both Done's and Andrew's England and our Germany have signed the CRPD. The results, 15 years later, concerning an inclusive school, are pretty different. Some reasons for this can be complex nation-specific law-policy-interrelations.

With our and even Done's and Andrew's (2020) example, we want to ask recent research on juridification to look more at such failures and frictions. Detailed analyses of legal interactions between various levels of education systems, trans-nationally, nationally, and locally, and related practical consequences will further illuminate the nature of juridification. We argue as well for the importance of the context of juridification. Building on this request, we present four aspects that further research of juridification should address in particular ways.

(1) *Context*: The need to understand the historical dimension of public education is crucial for further understanding the complex relations of political will and legal realities. The question is: Which laws and new material rights are feasible to implement in which national context? This would require a comparative understanding of juridification. Simply put, the legal and political framing of national public education systems that will follow international law is contingent. It differs depending on various contextual factors. Legal configurations can change over time and vary across locations. As we wrote earlier, contingency becomes visible through an awareness of other possibilities that are genuine alternatives. In line with such an understanding, action is not the realization of a chance that excludes all other options by excluding selection and the constitution of definition. Still, the completion of a possibility in relation to other existing options has yet to be chosen. There are always choices in how laws and rights are understood and implemented.

To elaborate on this: Since juridification today refers to the welfare state, we must consider various welfare traditions in the global North. For example, the categories of Esping-Andersen's *Three Worlds of Welfare Capitalism* (1990) might be still illustrative today. The point is, however, that there are different traditions in how the state regulates the relations between itself and its citizens. To illustrate our point, England would be an example of a liberal system, providing only basic welfare security to its citizens but promoting and rewarding people's aspirations for individual wealth. In other words, the English world promotes traditionally strong markets and a liberal policy requiring individual, personal responsibility by rational choice policies. This tradition would partly explain Done and Andrew's story.

Germany represents the conservative or corporatist statist type that aims to preserve existing societal structures and facilitate traditional family structures. The state is strong but has a significant role in maintaining existing structures. Regarding education, Germany has proven relatively inert to change (Wermke and Salokangas 2021). Even here, we would find some explanation for our findings. Finally, and interestingly, a significant deal of recent research on juridification comes from Norway and Sweden, which have traditionally been seen as figureheads of a universal, or social democratic, type that has provided a high degree of basic security for all. Here, traditions, corporatism, and democratic participation are strong. In addition, social equality has traditionally been a big belief in such contexts. It is probably no coincidence that in particular in these contexts, NPM and related juridification trigger some social chock.

- (1) *Mandate*: When looking at legal and political interaction, it must be discussed who is legally allowed to decide on public education issues, such as the implementation of the inclusive school, at various levels in national contexts. Federal states in Germany are powerful, as in the USA or Switzerland. In England or Sweden, local educational authorities are vital actors. This also relates to the fallacies of methodological nationalism (Chernilo 2006), meaning that the various dimensions of public education remain in the background and empirical; for example, national cases are seen as a natural unity without fragmentation, presented appropriately through policy documents and the voices of policymakers. Focusing on mandates would disentangle ‘fictive actors’ (Pfadenhauer, 2003). Concerning a micro-political approach, organizations (also professions) can be described as a combination of different interests related to each other but still can act autonomously. In other words, we should know more in detail who is ‘the state’ (there might be various departments having different interests); or who are local education authorities. At the local level, we also see many stakeholders, including the people living in the local community. Here, various fields of tension in juridification processes might emerge.
- (2) *Resources*: This dimension relates to the fact that each reform at scale has certain costs. What we can learn from the CPRD, the way from legitimacy to legality is long and packed with fallacies. However, a primary condition to make it work is providing appropriate resources. Given the revolutionary idea of a genuine school for all, the resources must be abundant. Considering a political will, there must be a real commitment to paying for the changes to happen. The one who orders it must pay for it. Legal conditions can be barriers or levers, depending on how we can understand and use these.
- (3) Finally, *subjective/objective rights*: Related to the category of ‘resources,’ we must ask which rights to appeal to or choose different public education stakeholders exist and at which individual costs. This relates to the phenomenon of parental choice. Here, the legal issue is often not litigation in relation to poor quality but rather education access, i.e. the right to choose a school after one’s own will. This relates to the tension between what is a private and what is a public good in public education and how the individual parent can make their voice heard concerning their legal right and individual will.

Note

1. All references to coalition treaties and school laws of the länder, are analysed in the in an appendix: <https://stockholmuniversitet.se/s/0vq6v2vkortzfqvh4m9xu5m4n8ht3a2p>

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