

The Right to Education in Germany and India in the light of the Capability Approach

A Master's Thesis

To obtain the Master's degree for the course „Peace and Security Studies – (M.A.)“
at the University of Hamburg

by

Amely Zacharias
from Berlin, Germany

Hamburg, 12.12.2023

Graders:

Prof. Dr. Andreas Trampota

Dr. Amal Sethi

Table of Contents

1	<i>Introduction</i>	1
2	<i>Access to Justice</i>	2
2.1	Right to Legal Aid	3
2.2	Proceedings	4
2.3	Time	5
2.4	Fairness	6
2.5	Interim Result	7
3	<i>Capabilities and Constitutions</i>	7
3.1	Capability Approach	8
3.2	Constitutional Rights	9
3.3	Capability Approach and Access to Justice	10
4	<i>Comparison of two Constitutions</i>	11
4.1	Methodology	11
4.2	Prima Facie Expectations	12
4.3	German Constitution	13
4.3.1	History	13
4.3.2	Structure, Mode of Operation and Types of Proceedings	14
4.3.3	Right to Education	16
4.3.3.1	Derivation from other Constitutional Rights	16
4.3.3.2	Additional Validity	18
4.3.3.3	Landmark Case: <i>Schulschließungen</i>	19
4.4	Indian Constitution	21
4.4.1	History	21
4.4.2	Structure, Mode of Operation and Types of Proceedings	22
4.4.3	Right to Education	23
4.4.3.1	Derivation from other Constitutional Rights	24
4.4.3.2	Constitutional Amendment	25
4.4.3.3	The Right of Children to Free and Compulsory Education Act	26
4.4.3.4	The Mid-Day Meal Scheme	27
4.5	Comparison of the Constitutional Frameworks	27
5	<i>Implementation of the Right to Education</i>	29

5.1	Methodology: 4-A Scheme	29
5.2	Germany	30
5.2.1	Availability	30
5.2.2	Accessibility	31
5.2.3	Acceptability	32
5.2.4	Adaptability	33
5.2.5	Literacy Rate	34
5.3	India	35
5.3.1	Availability	35
5.3.2	Accessibility	36
5.3.3	Acceptability	38
5.3.4	Adaptability	39
5.3.5	Literacy Rate	40
5.4	Comparison	40
5.5	Reference to Prima Facie Expectations	42
6	<i>Realization of Capabilities</i>	42
6.1	Legal Literacy	42
6.2	Threshold	44
6.3	The Importance of Constitutional Rights	46
6.4	What should the States do?	48
6.4.1	Awareness of Responsibility	48
6.4.2	Minimize Impediments and the Question of Paternalism	49
6.4.3	Legal Reform	50
6.4.4	Central Guidelines	51
7	<i>Conclusion</i>	53
8	<i>Bibliography</i>	54
9	<i>CV Amely Zacharias</i>	64
10	<i>Honor Statement</i>	65

List of Abbreviations

BVerfG	Bundesverfassungsgericht/ German Constitutional Court
BVerfGE	Bundesverfassungsgerichtsentscheidung/ Judgment of the German Constitutional Court
BVerfGG	Bundesverfassungsgerichtsgesetz/ German Constitutional Court Act
BVerwG	Bundesverwaltungsgericht/ German Federal Administrative Court
CA	Capability Approach
CRPD	United Nations Convention on the Rights of Persons with Disabilities
ECHR	European Convention of Human Rights
EU-Charter	Charter of Fundamental Rights of the European Union
GDP	Gross Domestic Product
HDI	Human Development Index
MDMS	Mid-Day Meal Scheme, India
NSO	National Statistics Office, India
PIL	Public Interest Litigation
RTE Act	Right of Children to Free and Compulsory Education Act, India

The Right to Education in Germany and India in the light of the Capability Approach

1 Introduction

For the relation of state and society, court proceedings play a key role¹ as they have the function of balancing the exercised power of the state.² The judicial system has the potential to promote peace and with it, a more just society. The idea that peace should be established through law goes back very far to the earliest legal documents and was specified prominently by Kant³ at the interstate level. In this thesis, it is taken up not on an international but on a national level. Acknowledging that peace extends beyond the absence of war and is a systemic process involving non-violent conflict resolution,⁴ it becomes evident that court proceedings and legalization offer a means of peaceful conflict resolution with the potential to enhance justice. Like the law made by the legislative, the judiciary can shape and influence society through judgments because the very idea of a constitutional state is that judgments are put into practice. However, in order to fulfil the task of providing a usable solution to people's claims through a non-violent mode of conflict resolution, broad access to the justice system is needed. If the majority of the conflicts that arise (whether the opponent is the state, a company or another person) are fought out elsewhere, the courts will not have the envisioned impact. The idea of increasing justice and bringing constitutional rights to life through courts can only be applied to countries where a certain level of functioning democratic institutions is ensured and the rule of law is guaranteed. This means that all of the following considerations contain an underlying assumption of the existence of a democratic system. Of course, there is no ideal democracy, but already fundamental democratic principles are enough for the idea to be reasonably applicable because as mentioned before, the whole path of establishing peace and justice is a multidimensional process in which a fixed endpoint does not exist.

This thesis examines the topic of access to justice, looking at it from a contrastive perspective of how the capability of taking advantage of the judicial system is ensured for people through the lens of the Capability Approach. The question addressed here is whether the constitutional right to education contributes to pass a certain capability threshold and thereby promotes access to justice.

¹ Dieter Conrads, 'Die Rolle des Supreme Court in der Verfassungsentwicklung Indiens' (2001) 32 Internationales Asienforum 225, 225.

² Schmidt-Aßmann, 'Art. 19 Abs. 4' in Dürig, Herzog and Scholz (eds), *Grundgesetz-Kommentar* (99th edn, 2022), para. 1.

³ Immanuel Kant, *Zum ewigen Frieden* (Karl Vorländer ed, 2nd edn, Felix Meiner Verlag 1919).

⁴ Ernst-Otto Czempel, *Friedensstrategien: Eine systematische Darstellung außenpolitischer Theorien von Machiavelli bis Madariaga* (2nd edn, VS Verlag für Sozialwissenschaften 1998) 46.

At first, it is examined which factors are relevant for access to justice. In the second part, the relationship between capabilities and constitutions will be explained. In detail, the capability ‘literacy’ is examined here respectively if adequate education to profit from the right of legal protection against the violation of rights is provided. From a legal perspective, this aspect is secured by the right to education hence a comparative constitutional law study is made concerning the right to education.

Here, the two countries Germany and India are compared. After studying the theoretical framework given by the constitution, a change of perspective will take place towards the implementation of the right to education. Likewise, the two countries under study will be compared to conclude if the capability threshold regarding the necessary literacy is reached. Finally, the results of the comparison are used to sum up findings which can function as guidance for the policy-makers.

The goal of this work is to contribute to the studies that already have combined the Capability Approach with the topic of access to justice and focus in particular on education as one aspect of it. With the in-depth study of two different countries, the aim is to determine findings that can be used for political guidance ‘to rethink and develop educational policies’⁵ on an abstract level.

2 Access to Justice

What the right of access to justice implies can be understood in many different ways and is permanently the subject of reforms around the world.⁶ It is impossible to address all aspects of access to justice to their full extent here. The most basic prerequisite is ‘to understand that you have a legal entitlement to cope with [a] problem, to find and to understand legal information.’⁷ Without this skill, all the following aspects would be ineffective. Hence, the necessary education is the main focus of this work. For the other elements, it is the aim to provide an overview and raise awareness for critical aspects in relation to access to justice. The focus on education

⁵ Ingrid Robeyns, ‘The Capability Approach in Practice’ (2006) 14 *Journal of Political Philosophy* 351, 368.

⁶ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 181; ‘Reaching Equal Justice Report: An Invitation to Envision and Act’ (The Canadian Bar Association, Access to Justice Committee 2013) <https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> accessed 18 April 2023; Australian Law Reform Commission, ‘Access to Justice’ (Australian Law Reform Commission 2018) 133; ‘Issues of Access to Justice: Part III’ (Department of Justice and Constitutional Development, Republic of South Africa) <<https://www.justice.gov.za/legislation/constitution/history/REPORTS/TC5-2703B.PDF>> accessed 19 April 2023; Access to Justice Committee State Bar of Wisconsin, ‘Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs’ (2007).

⁷ Ann-Katrin Habbig and Ingrid Robeyns, ‘Legal Capabilities’ (2022) 23 *Journal of Human Development and Capabilities* 611, 613; Cappelletti and Garth (n 6) 191.

within this thesis is to underline the outstanding importance. Since education is a basic precondition without which an affected person is unlikely to become a plaintiff, it makes sense to look at this point in depth. Nonetheless, various components are necessary to fully enable access to justice and it is not intended to make any judgement about the weighting.

The right of access to justice forms a bridge between institutional and individual spheres. Moreover, it enables protection against and acceptance of state decisions.⁸

It has a long tradition since paragraph 39 of the Magna Carta from 1215 and found its way into many constitutions and international treaties. Thus, the German Constitution for example in its Art. 19 IV states that wherever a person's rights are violated by public authority there has to be an effective remedy.⁹ Similar provisions can be found in Art. 6 and 13 of the European Convention of Human Rights (ECHR), Art. 47 of the Charter of Fundamental Rights of the European Union (EU-Charter) or Art. 8 of the Universal Declaration of Human Rights.

Access to justice needs to be equally available for everyone. To achieve and guarantee this right also for the poor and weak part of the society certain circumstances are needed. Here, access to justice is understood not only as access to the justice system but more broadly referring to legal advice in general.¹⁰

2.1 Right to Legal Aid

For equal access to justice, the possibility of financial legal aid and the provision of legal assistance during proceedings is needed. The following quote from an Indian judgment outlines the scope and the importance:

If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice – advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance.¹¹

The general understanding is that the quality of justice should not depend on the amount of money someone can afford to pay to redeem a violation of rights.

Many countries therefore decided to provide legal aid, with the initial idea to give financial aid to those who cannot afford the costs of a proceeding including appropriate preparation and legal

⁸ Schmidt-Aßmann (n 2) para 1.

⁹ BVerfGE 107, 395 [26]; 117, 244 [67].

¹⁰ Stephen L Pepper, 'Access to What' (1999) 2 Journal of the Institute for the Study of Legal Ethics 269, 270.

¹¹ Bombay High Court in Re: Llewelyn Evans AIR 1926 Bom 551 [15].

support. This is accompanied by the obligation for the authorities to inform about the right to legal aid to ensure the application and a remedy if legal aid is declined.

However, the question arises of how much legal aid is enough and to what extent the society is willing to finance this right with state funds. As a limitation in some countries, like the US, legal aid is limited to criminal matters only.¹² In consequence, legal aid is only available for matters where the freedom of a person is at stake but not for civil matters which can have a similar impact on a person's life. For example, if someone who depends on her car for work has an accident and the person who caused it is not willing to pay, this can end in unemployment.

Furthermore, the quality of the legal aid provided by the state needs to be sufficient which requires that there are enough lawyers and they need to be skilled to fulfill their task.

2.2 Proceedings

The types of available proceedings in front of courts are of non-negligible relevance. The extent to which courts can use their power depends largely on the legal means available to them because a court that cannot adjudicate is powerless.

The question of when a court has jurisdiction to hear a case determines the outcome that a court decision can have. The second particularly important question is, who is given the opportunity to address the court, because this regulation offers considerable leeway as to how accessible the court ultimately is to people.

This can be illustrated by the example of public interest litigation (PIL). The special feature of these procedures is that there is no need to be violated in one's own rights. From this follows that "any member of the public"¹³ is entitled to claim rights against the state, if the person concerned cannot do so themselves. Similarly, it becomes possible for a single person to claim rights for a group of people. The development of PIL results in the possibility for courts to judge on matters within the public sphere and with the loosening of strict standing rules broader access to courts is granted.

¹² Deborah L Rhode, 'Whatever Happened to Access to Justice Symposium: Access to Justice: It's Not for Everyone' (2008) 42 *Loyola of Los Angeles Law Review* 869, 871.

¹³ *People's Union for Democratic Rights vs. Union of India* (1982) 3 SCC 235; *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

PIL exists in many common-law countries like India,¹⁴ Australia,¹⁵ USA and South Africa¹⁶ but cannot be found in Germany. This can be seen in the German landmark case on climate change.¹⁷ For this it was important to find suitable claimants who are directly violated in their own rights to even achieve that the case could be heard by the Constitutional Court as public interests¹⁸ are not part of the jurisdiction.¹⁹

2.3 Time

Another aspect concerning access to justice is time. Remedy against the violation of rights can only be considered effective²⁰ if a final decision is reached within an appropriate period.²¹ Certainly, there is no fixed duration threshold for a proceeding to be considered too long and one also needs to keep in mind that a process within several stages of appeal cannot reasonably be decided within a short period of time. It is not about speed at any price but more about reasonableness. The state is responsible to install a sufficient number of courts and provide the necessary staff and infrastructure.²²

Furthermore, timing refers to something else as well: the deadlines which have to be met to bring an action in front of the court or to provide evidence have to give an appropriate period of time to not undermine the remedy.²³ Again, how long this is in individual cases depends on how difficult it is to provide proof and how complex the case is. The responsible judge needs to weigh the competing interests.

Also, not to be forgotten is the time a claimant needs to spend personally to bring her case into action. Even if it is a lawyer who drafts the complaint, the preparation, the hearings and the time to reach there (especially in rural areas) demands a considerable amount of time, energy and health which not every person can afford.

¹⁴ Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107.

¹⁵ Christine M Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law* 1.

¹⁶ Tumai Murombo, 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?' (2006) 6 *Law Environment and Development Journal* 165.

¹⁷ BVerfGE 157, 30.

¹⁸ BVerfG, 06.10.2016 1 BvR 292/16 [18] stating that it has to be sufficiently demonstrated that the applicant's own fundamental rights or rights equivalent to fundamental rights are directly affected.

¹⁹ Jan-Marcel Drossel, '§ 90 I' in Christian Burkiczak, Franz-Wilhelm Dollinger and Frank Schorkopf (eds), *Bundesverfassungsgerichtsgesetz* (2nd edn, CF Müller 2022), para 2, 81, 104.

²⁰ EGMR NJW 2006, 2389; Sheela Barse vs Union of India, (1986) 3 SCC 632.

²¹ Frank Lansnicker and Thomas Schwirtzek, 'Rechtsverhinderung durch überlange Verfahrensdauer' (2001) 28 *Neue Juristische Wochenschrift* 1969.

²² Helmuth Schulze-Fielitz, 'Art.19 IV' in Horst Dreier (ed), *Grundgesetz Kommentar*, vol 1 (3rd edn, Mohr Siebeck 2013) para 111. f.

²³ Hans Jarass, 'Art. 19' in Hans Jarass and Martin Kment (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (17th edn, CH Beck 2022), para.74.

Lastly, a form of prescription within an adequate time should exist to prevent the courts from dealing with cases which are dating back so long that the evidence finding is very difficult and which would block too many of the system's resources. However, exceptions are important here as well, for example in cases where the rights of minors have been violated, so that they do not lose their right to sue for sexual abuse, before the age of 30 and are fully capable of understanding their possibilities (§ 78 b German Criminal Code).

2.4 Fairness

Finally, it is of overriding importance for access to justice and even further for the rule of law that each and every decision, whether it be the judgment itself, the decision to grant or refuse legal aid, or the length of a given time-limit, is taken in the light of the principles of fairness, equality before the law²⁴ and the prohibition of arbitrariness. Moreover, the independence of the judiciary from external influences like corruption is necessary.

Albeit 'fairness' sounds very familiar to everybody, it becomes apparent that it is quite difficult to identify what it truly means. In consideration of access to justice, one can ask what the goal of fairness within the legal system should be, a substantive fairness or a procedural one²⁵ where the latter might only mean access to law and not to justice.²⁶ If an operational definition of justice is used saying that whatever the legal and administrative system produces is justice²⁷ the two can simultaneously exist. On the other hand, one has to acknowledge that only access to the law does by no means ensure a fair outcome.

However, a study done by Farrow²⁸ shows that if one asks people in the streets what they perceive as important for access to justice, it is primarily the ability to improve people's lives. By this it becomes clear that it is substantive fairness what people are aiming for and the way of getting there is considered subordinate.

²⁴ Jack B Weinstein, 'The Poor's Right to Equal Access to the Courts Address' (1980) 13 Connecticut Law Review 651, 655.

²⁵ Rhode (n 12) 872.

²⁶ Geoffrey C Jr Hazard, 'After Legal Aid Is Abolished' (1999) 2 Journal of the Institute for the Study of Legal Ethics 375, 386.

²⁷ Pepper (n 10) 272.

²⁸ Trevor CW Farrow, 'What Is Access to Justice' (2013) 51 Osgoode Hall Law Journal 957, 972.

2.5 Interim Result

It can be stated that the entrenchment of the rule of law and the protection of democratic values is closely linked to improving access to justice and that it is seen as a key element for the realization of social justice through law.²⁹

Within democratic states there is an existing consensus that a right to equal access to justice exists and may it be implausible, it should always be a societal aspiration.³⁰ The ultimate goal is that legal system leads to justice. The implementation, however, is facing impediments from many different sides.

The creation of law has no other goal than the purpose of serving the people and therefore is a public good.³¹ The comprehensive application, beyond justice for the individual, has the value of promoting the rule of law and thus serves a purpose for the benefit of society as a whole.

Now that we have an understanding of what access to justice encompasses, a turn towards the realization of it is made. For this, an ethical approach is used and linked to constitutional rights. Thereby, it is possible not only to look at the legal system itself, but also to question the extent to which it is truly of use for the people.

3 Capabilities and Constitutions

The Capability Approach (CA) is an approach to social justice which provides a theoretical and normative framework.³² It can be used as a lens while looking at the implementation of constitutional rights. Of course, there exists various other approaches to social justice which could have been chosen here but the advantage of the CA is that a close connection to constitutional rights is inherent already and therefore, the link to constitutional law can be applied without any further hurdles. It is precisely for this reason that the link between capabilities and constitutions has already been made by others, so that existing research can be followed up.

This is not to say that CA is the only, or even the best, theory available. But since it is directed towards it, it promises to generate profitable insights.

²⁹ Marco Segatti, 'A Capabilities Approach to Access to Justice: Unfulfilled Promises, and Promising Strategies in the US and in Europe' [2016] *Teoria politica* 335, 336.

³⁰ Deborah L Rhode, 'Access to Justice' (2001) 69 *Fordham Law Review* 1785, 1816.

³¹ *Ibid* 1795.

³² Ingrid Robeyns, 'The Capability Approach: A Theoretical Survey' (2005) 6 *Journal of Human Development* 93, 94.

3.1 Capability Approach³³

First, the distinct features of the CA³⁴ will be presented. The CA is an ethical approach to social justice that perceives the ability of individuals to choose between different types of actions as central to the realization of human dignity.³⁵ It is focused on choices, freedom and on what people are able to do and be.³⁶ The approach was created by Amartya Sen³⁷ and has been further developed by Martha Nussbaum³⁸ and other scholars.³⁹

The CA differs from the standard utilitarian approach which uses GDP per capita to examine the well-being of the people within one country. This oversees that GDP growth may also be recorded even if the life of the weak part of the society is getting worse as it is ignoring the distribution within the society. It therefore lacks the element of equality.⁴⁰

Second, the CA differentiates between means and ends and it is only the latter that is of intrinsic significance. ‘Means are instrumental to reach the goal of increased well-being, justice and development.’⁴¹ On the opposite side of capabilities are functions. Functions are the ‘active realization of one or more capabilities’⁴² or in the words of Sen: ‘A functioning is an achievement, whereas a capability is the ability to achieve.’⁴³ What the CA highlights is the capability to choose respectively the available option that matters and not the final achievement. To give an example: traveling would be the function whereas having the real ability to travel is the

³³ For additional general information about the CA see the introductory reading list at <https://hd-ca.org>, accessed 18 September 2023.

³⁴ It should be noted that there is not one pure version of the CA. Even among proponents, there is some disagreement about what the approach does and does not include (for example, if there has to be a list of capabilities like Nussbaum suggested it). For this thesis, however, the central ideas of the approach presented here are decisive. The further-reaching theoretical questions are left aside here. It is not of importance to determine which version of the CA is applied. Moreover, the CA is a state-centric approach that ignores other actors. These are accordingly not discussed here which does not mean, however, that they are entirely irrelevant.

³⁵ Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press of Harvard University Press 2011) 1.

³⁶ *Ibid* 18.

³⁷ For example, Amartya Sen, ‘Informational Bases of Alternative Welfare Approaches: Aggregation and Income Distribution’ (1974) 3 *Journal of Public Economics* 387; Amartya Sen, ‘Poor, Relatively Speaking’ (1983) 35 *Oxford Economic Papers* 153; Amartya Sen, *Inequality Reexamined* (Oxford University Press 1995); Amartya Sen, *Development as Freedom* (Oxford University Press 1999); Amartya Sen, ‘Human Rights and Capabilities’ (2005) 6 *Journal of Human Development* 151.

³⁸ For example, Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000); Martha C Nussbaum, ‘Capabilities as Fundamental Entitlement: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33; Martha C Nussbaum, ‘Beyond the Social Contract: Capabilities and Global Justice. an Olaf Palme Lecture, Delivered in Oxford on 19 June 2003’ (2004) 32 *Oxford Development Studies* 3.

³⁹ For example, Sabina Alkire, *Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction* (Oxford University Press 2002); Miriam Teschl and Flavio Comim, ‘Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations’ (2005) 63 *Review of Social Economy* 229.

⁴⁰ Segatti (n 29) 338 f.

⁴¹ Robeyns, ‘The Capability Approach’ (n 32) 95.

⁴² Nussbaum, *Creating Capabilities: The Human Development Approach* (n 35) 24 f.

⁴³ Amartya Sen, ‘The Standard of Living’ (The Tanner Lectures on Human Values, Clare Hall, Cambridge University, 11 March 1985) 48.

capability. What the CA is looking at is the question of whether a person could do something if she wanted to and not if she really does it.⁴⁴

The difficulty within the CA is to define from what point a certain capability is fulfilled. There has to be a defined threshold from which on it can be said that a required capability minimum is reached. Again, the problem of equality arises as one has to consider if the threshold should be the same in every nation. If the answer is no, it would mean that people from countries with low economic power are entitled to less than others. However, if the answer is yes, we demand in total far less from richer states or in other words, the realization then involves the duty of redistribution between nations.⁴⁵ In this thesis we will get back to these considerations later by attempting to answer the question if the capability related to the right to education is fulfilled in the sense that it promotes access to justice.

3.2 Constitutional Rights

The reason that constitutions and the rights embedded in them matter in relation to capabilities is explained in the following.

Already according to Aristotle, the reason for the existence of the state is that it should enable the realization of peace and leisure for its people.⁴⁶ In a democracy, this task is assigned to the legislative and through the creation of law, the state exerts influence on the society. Within the hierarchy of a legal system of a country, it is the constitution that is placed at the top.

‘Constitutional law also seeks to delineate those individual rights which, according to cultural traditions, are the inalienable attributes of a genuinely free society.’⁴⁷ ‘Constitutions not only have function, they also have goals’⁴⁸ and shape the relationship between the state and its citizens.⁴⁹

The focus taken here on law does neither suggest that it is the only, nor the best way of promoting capabilities.⁵⁰ However, it can be acknowledged that ‘constitutions and/ or amendments are a reflection of a nation state’s “national soul” where its value system, political practices, and

⁴⁴ Ingrid Robeyns, *Wellbeing, Freedom and Social Justice: The Capability Approach Re-Examined* (Open Book Publishers 2017) 39.

⁴⁵ Nussbaum, *Creating Capabilities: The Human Development Approach* (n 35) 40 f.

⁴⁶ Friedo Ricken, ‘Krieg und Frieden in der griechischen Antike: Platon und Aristoteles’ in Ines-Jacqueline Werkner and Klaus Ebeling (eds), *Handbuch Friedensethik* (Springer Fachmedien Wiesbaden 2017) 203.

⁴⁷ Alex Carroll, *Constitutional and Administrative Law* (5th edn, Pearson Education Limited 2009) 5.

⁴⁸ Tomkins, *Public Law* (Oxford University Press 2003) 5.

⁴⁹ Katharine Gelber, ‘Capabilities and the Law’ in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021) 646.

⁵⁰ Amartya Sen, ‘Rights, Words, and Laws’ *The New Republic* (23 October 2010); Gelber (n 49) 646.

ideology are rooted'.⁵¹ Consequently the constitution is a manifestation of the basis of society. It is the responsibility of the government as a policy-maker to enable all citizens to achieve a threshold of capabilities through effective measures.⁵² Accordingly, the approved constitutions are the realization of the government's effort to secure the possibility of exercising capabilities. Nevertheless, the applied interpretation of the law is what finally defines its reach.⁵³

3.3 Capability Approach and Access to Justice

This thesis is going to examine how capabilities can be enhanced or detracted by institutional arrangements of law,⁵⁴ namely the role of constitutional law and its implementation by the courts.

With regard to access to justice, the CA becomes useful as the policymakers should consider whether a function or a capability shall be promoted⁵⁵ as it requires different actions. The CA can be a helpful instrument to measure the effectiveness of the rule of law⁵⁶ and therefore is useful when we look at the implementation of rights.

Nussbaum⁵⁷ differentiates between three types of capabilities. Basic capabilities are defined as 'the innate equipment of individuals that is the necessary basis for developing the more advanced capability'. By internal capabilities, she means 'states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions.' Lastly, there are combined capabilities which are a combination of internal capabilities and external conditions for the exercise of the function.

Access to justice itself is a combined capability as it requires various internal capabilities like the ability to read or to understand how the system of legal protection through law works⁵⁸ and at the same time external conditions, like the availability of skilled lawyers or the physical accessibility of courts.⁵⁹

⁵¹ Janette Habashi, Lynee Wright and John D Hathcoat, 'Patterns of Human Development Indicators Across Constitutional Analysis of Children's Rights to Protection, Provision, and Participation' (2012) 105 *Social Indicators Research* 63, 65.

⁵² Sen, *Development as Freedom* (n 37) 10; Martha C Nussbaum, 'Women's Capabilities and Social Justice' (2000) 1 *Journal of Human Development* 219, 238.

⁵³ Amartya Sen, 'Rights, Laws and Language' (2011) 31 *Oxford Journal of Legal Studies* 437, 443.

⁵⁴ Sen, *Development as Freedom* (n 37) 5; Suja Shivakumar, *The Constitution of Development: Crafting Capabilities for Self-Governance* (Palgrave Macmillan 2005) 67.

⁵⁵ Segatti (n 29) 339.

⁵⁶ Maggi Carfield, 'Enhancing Poor People's Capabilities through the Rule of Law: Creating an Access to Justice Index' (2005) 83 *Washington University Law Quarterly* 339, 357.

⁵⁷ Martha C Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273, 289–290.

⁵⁸ Regarding Nussbaum's list of capabilities this could be found in No. 4. senses, imagination and thought as well as in No. 6. practical reason.

⁵⁹ Segatti (n 29) 340.

As announced already, the focus here will lie on the just-given example of the right to education because as explained above, it is one very central aspect of the right to access to justice. The capability ‘literacy’ is an internal capability as such as it is a condition to fully exercise the right of access to justice.

At first, it will be studied how the right to education as a prerequisite for enabling literacy is embedded in the constitution and then a turn towards the implementation is made to finally examine where a certain threshold lies and to what extent it is reached.

4 Comparison of two Constitutions

4.1 Methodology

Before starting with the actual comparative study, there are some methodological aspects that should be considered. Whenever the goal is to do comparative constitutional law studies several challenges appear. A written text can be understood and interpreted in different ways, following that whenever it is done one needs to be very careful with preliminary assumptions and hastily drawn conclusions. There is a risk of overlooking important influencing factors, especially as one is dealing with a foreign legal system which might not be entirely familiar at the start. ‘In comparative law, there is a lot to know, not only about laws and constitutions but also about their historical, cultural, political, and socioeconomic contexts.’⁶⁰ Moreover, constitutions are closely linked to politics and ethics⁶¹ and therefore, it would be too short-sighted to take only a legal perspective.

For the constitutional comparison to be made here, there is a fairly clear question: How does the constitution shape a right to education and is this framework contributing to literacy that enables access to justice? Hence, a functionalistic approach⁶² is applied as a specific problem was selected, with the aim to find a legal solution and the hypothesis that there is one. However, pure functionalism is often and rightly criticized,⁶³ e.g. because law cannot be considered as an isolated system for solving social problems. That is why a contextualized functionalism⁶⁴ is pursued here. It follows that before analyzing the constitutional right to education in more

⁶⁰ Günter Frankenberg, ‘Comparing Constitutions: Ideas, Ideals, and Ideology—toward a Layered Narrative’ (2006) 4 *International Journal of Constitutional Law* 439, 443.

⁶¹ *Ibid* 440.

⁶² *Ibid* 444.

⁶³ Overview in Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *The Yale Law Journal* 1225, 1265 ff.

⁶⁴ Vicki C Jackson, ‘Comparative Constitutional Law: Methodologies’ in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 11; Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), ‘The Southern Turn in Comparative Constitutional Law: An Introduction’, *The Global South and Comparative Constitutional Law* (Oxford University Press 2020) 31.

detail, it is necessary to take a look at the historical development of the constitution and the court that enforces it. Only by doing so, it becomes possible to be sensitive towards any specifics.

The goal of such a comparison is a deeper understanding of the existing law, to enhance the capacity of self-reflection and to develop an understanding of normatively preferable best practices.⁶⁵ In addition, in light of the CA, the aim is to create awareness of how the legal framework supports the accomplishment of capabilities.

This comparison will study Germany and India. India is following the common law tradition which goes back to the British colonial era and Germany is operating in a civil law system. Germany can be categorized as a country from the Global North and India as one from the Global South.⁶⁶ However, it is by far not the goal to highlight structural deficits of India, but rather to do an equal comparison to generate insights on both sides and to take advantage of new ideas, innovations and productions of legal knowledge.⁶⁷ Both countries have a democratic history since the end of World War II, have a federal state organization and perceive themselves as strongly developed welfare states. Furthermore, both have a strong court at the head of their judicial system which has largely exercised its power to influence the society. Accordingly, Germany and India are not too different to be compared. Comparing these two makes it possible to look at the right to education from two different legal systems and legal cultures so that the comparison promises profitable and diverse insights. In addition, purely practical considerations play a role in the selection of countries. In order to understand the legal system of a country it is of the utmost importance to understand the language in which the system is operating. The widespread use of English in India contributes massively to making their legal system accessible for someone studying it from a German background. Finally, I have worked on German and Indian constitutional law through my earlier studies, so background knowledge is available, which in turn is beneficial for the necessary contextualization.

4.2 Prima Facie Expectations

First, it will be elaborated on what the prima facie expectations of the following comparison are. This is not only helpful to become aware of one's own prejudices but also to know about

⁶⁵ Jackson (n 64) 71.

⁶⁶ For a critique of these terms see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 207 ff.

⁶⁷ Described as Comparative Constitutional Law with the Global South in Dann, Riegner and Bönnemann (n 64) 11 f.

existing assumptions that may prove to be wrong and it contributes to checking the underlying expectations with the reality.

For Germany, which is among the ten most developed countries in the world according to the Human Development Index (HDI),⁶⁸ in which education is one of the three basic dimensions of measurement,⁶⁹ the expectation is to have a very well-developed system of education and that also higher education is available for everybody. With this image, one expects that the German state guarantees what is promised in the Constitution and that judgments are implemented to the full extent. Through this, access to justice should be enabled widely.

In India on the other hand, which is a very fast developing country but still only at place 132 of the worldwide ranking of the HDI,⁷⁰ it is expected however that the state is not able to provide the same promised level of education to everybody. Reasons for this could be a difference from rural to urban areas with a disadvantage to the first and simply the large number of people to be reached by the education system. Furthermore, the Indian Supreme Court is widely known for progressive policymaking ensuring a minimum of rights. Nevertheless, the implementation in a country that is so large in terms of territory and with such a diverse society probably often faces various impediments. Therefore, the reached literacy level could be lower in comparison to Germany.

4.3 German Constitution

4.3.1 History

The process of the German state formation has a large history taking place after two World Wars and several former constitutions. At the time of its creation in 1949, the Constitution in force in Germany today did not have a definitive character. There was no will to recognize the existing order of two separated Germanies as permanent, which was created by the Allies after the end of World War II.⁷¹ Accordingly, the name "Basic Law"⁷² was used to avoid the term constitution.⁷³ Apart from this, however, the developed text body has similar characteristics like

⁶⁸ 'Human Development Insights' (*United Nations Development Programme: Human Development Reports*) <<https://hdr.undp.org/data-center/country-insights>> accessed 2 May 2023.

⁶⁹ Milorad Kovacevic, 'Review of HDI Critiques and Potential Improvements. Human Development Research Paper, 2010/33' (2010) 33 Human Development Research Paper 1, 1.

⁷⁰ The HDI is one way in which the CA is put into practice. It is referred to here for the sole reason that it is a widely used ranking tool. Madoka Saito, 'Amartya Sen's Capability Approach to Education: A Critical Exploration' (2003) 37 *Journal of Philosophy of Education* 17, 22.

⁷¹ Christoph Möllers, *Das Grundgesetz: Geschichte und Inhalt* (2nd edn, CH Beck 2009) 20.

⁷² Peter Badura, *Staatsrecht: Systematische Erläuterungen des Grundgesetzes* (7th edn, CH Beck 2018) 32 para 19.

⁷³ Because the Basic Law has now been in existence for over 70 years and is nowadays clearly established as the constitution of Germany, the term constitution will be equally used in the following.

other constitutions. The previously existing Constitution of the Weimar Republic was mostly seen as a negative role model and the mothers and fathers of the Constitution wanted to ensure a well-fortified democracy.⁷⁴ Only after the reunification, when Art. 23 old version was applied which was created solely for the case of reunification, the Basic Law became applicable to all Germans. The former states of the German Democratic Republic were integrated into the Western system and Art. 23 nowadays regulates the relations with the European Union.

4.3.2 Structure, Mode of Operation and Types of Proceedings

Right at the beginning of the German Constitution, Art. 1 is stating: ‘Human dignity is inviolable.’⁷⁵ It can thus be seen that the German system dedicates itself to dignity in the most prominent place, i.e., the aspiration described by the CA can be found here. The Constitution consists of 19 fundamental rights Articles⁷⁶ which have been prominently put in the front of the Constitution as a symbol of antagonism to the preceding period of National Socialism.⁷⁷ This is followed by regulations concerning the federal and state level (Art. 20 - 37). Next, there are provisions for the constitutional organs (Art. 38 - 69), legislation (Art. 70 - 82), administration (Art. 83 - 91 e), jurisprudence (Art. 92 - 104), finance (Art. 104 a - 115), case of defense (Art. 115 a - 115 l) and finally transitional and final provisions (Art. 116 - 146). The most important constitutional principles are set forth in Art. 20 and include, democracy, federalism, the rule of law and the welfare state.

The judiciary is headed by the Constitutional Court, called *Bundesverfassungsgericht* (BVerfG), which exclusively hears constitutional matters and thus is not a general court of appeal. Its specific purpose is the enforcement of the Constitution.⁷⁸ Germany has no common law system. Nevertheless, in regard to constitutional matters the precedent cases are of particular importance, as they have the force of law according to § 32 *Bundesverfassungsgerichtsgesetz* (BVerfGG). Ultimately, this means the Constitution applies to the extent

⁷⁴ Paulien de Morree (ed), ‘The German “Wehrhafte Demokratie”’, *Rights and Wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016).

⁷⁵ In German: ‘Die Würde des Menschen ist unantastbar’ (own translation).

⁷⁶ It is contested if human dignity is a fundamental right in the German Constitution, for an overview of the arguments see Wolfram Höfling, ‘Art. 1’ in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, CH Beck 2021) para 5 ff.; Heike Baranzke, ‘Menschenwürde zwischen Pflicht und Recht: Zum ethischen Gehalt eines umstrittenen Begriffs’ in Tessa Debus and others (eds), *Philosophie der Menschenwürde* (Wochenschau Verlag 2010) 10 ff.

⁷⁷ BVerfGE 7, 198 [31].

⁷⁸ Peter E Quint, “‘The Most Extraordinarily Powerful Court of Law the World Has Ever Known’? Judicial Review in the United States and Germany’ (2006) 65 *Maryland Law Review* 152, 155.

which the Constitutional Court gives it by interpretation, how it concretizes it and to which point it is broadened⁷⁹ beyond the literal meaning of the words.⁸⁰

The Constitutional Court consists of two senates, each containing eight judges, one dealing with fundamental rights and the other with the law of the state organization. Per year, more than 6.000 constitutional complaints⁸¹ are filed in front of the Constitutional Court. To deal with this workload the judges sit in benches of three to decide about cases that are not of fundamental constitutional significance. In total, these are about 99 % of the cases.⁸² With more than 95 % of the cases the constitutional complaints are by far the most numerous.⁸³ This is particularly remarkable because direct access to the Constitutional Court is extremely limited. Before a proceeding will be heard, the person must have done everything possible to have the infringement corrected by other means which in practice usually means that one first has to obtain a last-instance judgment before the ordinary courts. A strict principle of subsidiarity applies.⁸⁴ In addition to fundamental rights proceedings, the court also has jurisdiction over disputes concerning state organization law.⁸⁵

It is also worth noting that although the German Constitutional Court has clearly proclaimed that it has the authority to strike down constitutional amendments if they are inconsistent with the certain fundamental characteristics of the Basic Law, the Court has never exercised this authority.⁸⁶

Nevertheless, the court is sometimes accused pursuing a 'juridification of politics' through its at times quite far-reaching judgments⁸⁷ and of acting as a substitute legislator.⁸⁸ This tension of how far the power of the judiciary should go vis-à-vis the democratically elected legislature is

⁷⁹ Wilfried Fiedler, 'Fortbildung der Verfassung durch das Bundesverfassungsgericht?' (1979) 34 *Juristenzeitung* 417.

⁸⁰ Hans Vorländer, *Die Verfassung: Idee und Geschichte* (3rd edn, CH Beck 2009) 91.

⁸¹ In German: Verfassungsbeschwerden, which is the only procedure in front of the BVerfG that is available for individual persons.

⁸² 'Gericht und Verfassungsorgan' (*Bundesverfassungsgericht*) <https://www.bundesverfassungsgericht.de/DE/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html> accessed 9 May 2023.

⁸³ 'Jahresstatistik 2018' (*Bundesverfassungsgericht*) 1 <https://www.bundesverfassungsgericht.de/Shared-Docs/Downloads/DE/Statistik/statistik_2018.pdf?__blob=publicationFile&v=2> accessed 9 May 2023; Bettina Schöndorf-Haubold, 'Rechtsbehelfe des Einzelnen bei den höchsten gerichtlichen Instanzen: eine Perspektive der Rechtsvergleichung, Deutschland' (EPRS, Wissenschaftlicher Dienst des Europäischen Parlaments 2017) 4.

⁸⁴ § 90 II BVerfGG.

⁸⁵ Constitutional review of laws and acts taken by constitutional bodies.

⁸⁶ Quint (n 78) 165.

⁸⁷ If the Constitutional Court decides that a law is not in accordance with the Basic Law, the decision is often combined with an order to the legislature to introduce a new law within a certain period of time, taking the mentioned aspects into account. See for example, BVerfGE 86, 369 [379], BVerfGE 92, 158 [186].

⁸⁸ Tzu-hui Yang, *Die Appellentscheidungen des Bundesverfassungsgerichts* (Nomos 2002); Basil Bornemann, 'Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht?' (2007) 28 *Zeitschrift für Rechtssoziologie* 75.

appearing in every democracy⁸⁹ but the approval ratings of the BVerfG are much higher than of any other constitutional institutions in Germany.⁹⁰ This allows the conclusion that, at least from the society's perspective, the BVerfG is functioning well.

4.3.3 Right to Education

Let us now turn to the right to education within the German Constitution. After going through all 19 articles of fundamental rights, a search for the fundamental right to education is in vain. Contrary to all initial assumptions, there is no explicit mention of such a right in the Constitution. This might be surprising because Germany has a strong devotion to fundamental rights ever since the formation of the Constitution, but there is no sentence that manifests a right to education. This is followed by the fact that even in the majority of commentaries on the Basic Law, little or mostly nothing can be found on this right.⁹¹ Accordingly, the right to education within the German Constitution can be traced back to a few pioneers in constitutional law theory.⁹²

4.3.3.1 Derivation from other Constitutional Rights

If a right is not explicitly named in the Basic Law, it is possible to derive it from other fundamental rights by interpretation. This is by no means unusual in the German system of fundamental rights since this is how, for example, the general right of personality⁹³ or the right to informational self-determination⁹⁴ came into being. These derived rights are then in principle of equal rank with other fundamental rights, but of course, in the absence of explicit mention in the text, they are not quite as strongly anchored because interpretations can be changed more easily than the text itself.

⁸⁹ Helmuth Schulze-Fielitz, 'Schattenseiten des Grundgesetzes' in Dreier Horst (ed), *Macht und Ohnmacht des Grundgesetzes* (Duncker & Humblot 2009) 11–15; Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 126 ff.; Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 *Annual Review of Political Science* 167; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 90 ff.

⁹⁰ Christian Rath, 'Die öffentliche Wahrnehmung des Bundesverfassungsgerichts' (*bpb.de*, 10 September 2021) <<https://www.bpb.de/shop/zeitschriften/apuz/herrschaft-des-rechts-2021/340007/die-oeffentliche-wahrnehmung-des-bundesverfassungsgerichts/>> accessed 10 May 2023.

⁹¹ This is relevant because there is a large number of detailed and highly recognized commentaries on the German Basic Law, which are of great importance for scholars, but are also regularly used in judgments as support for finding the law.

⁹² Michael Wrase, 'Ein Beschluss mit weitreichenden Folgen: Das Recht auf schulische Bildung nach der Schließungs-Entscheidung des Bundesverfassungsgerichts' (*Verfassungsblog*, 5 December 2021) <<https://verfassungsblog.de/ein-beschluss-mit-weitreichenden-folgen/>> accessed 12 April 2023.

⁹³ Through a derivation from Art. 2 I in connection with Art. 1 I.

⁹⁴ BVerfGE 152, 152 (Recht auf Vergessen I); BVerfGE 65, 1 (Volkszählungsurteil).

Three fundamental rights, in particular, are used to derive the right to education: Art. 7 I (school system), Art. 2 I (right of personality) and Art. 12 I (freedom of occupation). In addition, the general principle of equality as in Art. 3 I is applied to establish a right to equal access to education.

Art. 7 I gives the state the competence to design the school system. This includes the management, organization and supervision of it.⁹⁵ Compulsory education was declared constitutional.⁹⁶ Though, it should be noted that there is a difference between obligation and right in terms of enforceability from the perspective of the citizens.

It is the responsibility of the states to determine the duration of compulsory education,⁹⁷ which varies from nine to twelve years in the different states, starting at the age of five or six. Since this creates a state monopoly over the educational system there has to be a right to participation in the existing educational institutions in return. Meanwhile, there is an obligation for the state to ensure an adequate educational system that meets the different needs of the people. In which way this is realized, however, is at the discretion of the legislator. There is no subjective right and therefore no possibility to raise a claim in regard to the establishment of a particular school system.⁹⁸

Because education and upbringing are part of the needs of children, enabling them to freely develop their personality⁹⁹ the state has to ensure that an adequate environment is created if he takes the establishment of the school system in his responsibility as this prohibits the fulfillment through the parents or even in other conceivable ways.¹⁰⁰ This responsibility also has to be seen in light of the social state principle as education is existential for life within the society.¹⁰¹

For the realization of the right to choose a certain profession which is established in Art. 12 I it is also necessary that the state provides a sufficient level of higher education in the areas where he has the monopoly of education and the sole right to determine exams like in the training of doctors.¹⁰² Conversely, a right to participation exists although this in no way implies that there may be no barriers to entry.

⁹⁵ Hansgünter Lang, *Das Bildungsangebot für Behinderte* (Duncker & Humblot 2017) 94.

⁹⁶ BVerfG NJW 1987, 180; BVerfG NVwZ 1992, 370; BVerfGE 34, 165 [29].

⁹⁷ Helmut Thiel, 'Art. 7' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, CH Beck 2021) para 12; Jost-Benjamin Schrooten, 'Art. 7' in Hans Hofmann and Hans-Günter Henneke (eds), *Schmidt-Bleibtreu Kommentar zum Grundgesetz* (15th edn, Carl Heymanns Verlag 2021) para 4.

⁹⁸ BVerwG, 02.07.1979 - 7 B 139.79.

⁹⁹ BVerfGE 45, 400 [66].

¹⁰⁰ Gerhard Robbers, 'Art.7' in Christian Starck (ed), *Kommentar zum Grundgesetz v. Mandoldt, Klein, Starck*, vol 1 (7th edn, Franz Vahlen GmbH 2010) para 31.

¹⁰¹ Lang (n 95) 95.

¹⁰² BVerfGE 33, 303 [67].

It becomes apparent, that the structure of the right to education is different from other fundamental rights. Most commonly, fundamental rights have the function to ensure freedom and prohibit interference by the public authority in the scope of protection of the fundamental right.¹⁰³ The case of the right to education is different, as the state has to provide something to which the people are consequently entitled.¹⁰⁴ Thus, a state service can be demanded. It is evident, however, that providing something as complex as a whole educational system is much more complicated than mere non-interference. Questions arise as to when exactly the state meets this obligation and when it falls below a certain minimum level. This question, however, is not and cannot reasonably be regulated within the Constitution as this would require too many details for a law that should fulfill an overriding function. The configuration has to be determined in ordinary law. The constitutions and the fundamental rights within it function as objective norms that establish a value system as such¹⁰⁵ which is the starting point for the more concrete design.

4.3.3.2 Additional Validity

In addition to this constitutional derivation, the right to education also applies in Germany as international treaties that contain such a right have been adopted. For example, Art. 2 of Protocol No.1 ECHR and Art. 14 EU-Charta state: ‘No person shall be denied the right to education.’ While this has no immediate effect on the Constitution itself, it nevertheless obligates the national legal system to protect this right and must be taken into account in the interpretation of the laws as the treaties are legally binding.¹⁰⁶

Furthermore, another aspect becomes relevant, which again makes clear how important it is to consider the broader context. As mentioned before, Germany is a federal state. Accordingly, each state also has its own state constitution. In contrast to the Basic Law, almost all of them contain an explicit right to education.¹⁰⁷ In accordance with Art. 70 I the legislative competence lies within the states as long as it is not explicitly assigned to the federal government. As for education, also after several federalism reforms, there is no such assignment in the Art. 71 ff.

¹⁰³ In German: Abwehrrechte, like the freedom of assembly.

¹⁰⁴ In German: Leistungsgrundrechte.

¹⁰⁵ BVerfGE 33, 303 [66].

¹⁰⁶ Johannes Rux, *Schulrecht* (6th edn, CH Beck 2018) para 188 f.

¹⁰⁷ Although different in wording: Art. 11 I BW-V; Art. 128 I BayV; Art. 20 I 1 VvB; Art. 29 I BbgV; Art. 27 I BremV; Art. 59 II HessV; Art. 8 MV-V; Art. 4 I NdsV; Art. 8 I 1 NRW-V; Art. 31 S.1 RP-V; Art. 27 SaarV; Art. 29 II SächsV; Art. 25 I LSA-V; Art. 12 II SH-V; Art. 20 ThürV; Hamburg is the only state where it is not mentioned already in the state constitution but instead in § 1 School Act Hamburg.

Therefore, the states have the authority and the responsibility to legally shape the field of education.

Insofar, the right to education is not as badly anchored in German constitutional law as it first seemed. On the other hand, it must not be forgotten that it is the Basic Law which is the supreme law of Germany and therefore allows the most far-reaching level of protection. By downgrading the right to education to a mere state right the protection becomes weaker. Although state constitutional courts exist to ensure the implementation of the state constitutions, there is no remedy for these claims in front of the BVerfG and therefore it creates an impediment to a uniform level of protection. Moreover, the fundamental rights of the state constitutions are subject to considerable restrictions and are therefore of minor importance in practice.¹⁰⁸ With reference to the CA the claim therefore is that the Constitution itself does not strongly promote a right to education.

4.3.3.3 Landmark Case: *Schulschließungen*¹⁰⁹

On a federal level, it took until the covid-19 pandemic that the right to education was explicitly acknowledged as a constitutional right by the BVerfG. Before, there were already judgments of the Federal Administrative Court which derived the right to education mainly from Art. 2 I.¹¹⁰ The Constitutional Court, however, has taken a more conservative approach and let the existence of such a right open in the past.¹¹¹ This has changed fundamentally with the landmark case *Schulschließungen* in which the BVerfG had to rule if the school closures during the pandemic were constitutional measures or not.¹¹² The reached decision concerning the covid-measures is secondary here, rather the detailed remarks on the right to education deserve special attention. They go beyond what would have been necessary for the decision of the case,¹¹³ issued by the way of an obiter dictum.¹¹⁴ This approach allows the court to make generalizable

¹⁰⁸ Erik Tjarks, *Zur Bedeutung der Landesgrundrechte: Materielle und prozessuale Probleme der Grundrechte in den deutschen Landesverfassungen* (Nomos 1999) 99–101.

¹⁰⁹ BVerfGE 159, 355.

¹¹⁰ BVerwG NJW 1975, 1182 [1183]; BVerwG, 02.07.1979 - 7 B 139.79 [6] hesitantly at first, but later BVerwG NVwZ 1998, 638 [639].

¹¹¹ BVerfGE 45, 400 [66]; BVerfGE 53, 185 [203]; BVerfGE 58, 257 [272]; BVerfGE 96, 288 [304]; BVerfGE 98, 219 [257].

¹¹² Annette Guckelberger, 'Die Entscheidung des BVerfG zur Bundesnotbremse II und ihre Folgen' (2022) 70 *Recht der Jugend und des Bildungswesens* 382, 383.

¹¹³ Martin Nettesheim, 'Schule als Markt staatlicher Bildungsangebote: Anmerkungen zum Beschluss des BVerfG vom 19. November 2021 („Bundesnotbremse II – Schulschließungen“)' (*Verfassungsblog*, 30 November 2021) <<https://verfassungsblog.de/schule-als-markt-staatlicher-bildungsangebote/>> accessed 17 May 2023.

¹¹⁴ This gives the remarks a somewhat 'bitter taste', because in view of the separation of powers, courts only have to decide the case in question. On the other hand, this procedure is widespread and the binding force has never been fundamentally challenged in the German constitutional law. For further considerations see Lorenz Schulz, 'Funktionen des obiter dictum' (2018) 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 403.

statements even outside the specific case, although public interests cannot be an object of the decision.

In the same way, as scholars have done before the BVerfG derives the right to education as follows:

The right of children and adolescents protected by Art. 2 I is [...] the subjective-legal 'counterpart' to the objective-legal duty of the state under Art. 7 I to open up educational opportunities at school that serve their personal development.¹¹⁵

This is a milestone for education constitutional law in Germany and it is the attempt of the BVerfG to avoid falling behind the standards of human rights at European and international level.¹¹⁶ The BVerfG underlines that there is 'no original entitlement to a certain design of state schools.'¹¹⁷ The obligation of provisioning by the state only reaches until 'indispensable minimum standards of school education'¹¹⁸ and is placed under 'a reservation of the possible'¹¹⁹ in addition.¹²⁰ 'The scope of protection of this right encompasses, insofar as it does not concern occupational education as protected by Art. 12 I, [...] school education as a whole.'¹²¹ It is about all personality-building factors and not just about purely academic content.¹²² Moreover, access to school education must not be 'designed or applied in an arbitrary or discriminatory manner'.¹²³

Overall, the judgment is not developing anything new, but more securing the before-existing considerations on a constitutional, unappealable level that has not existed before, concomitant with the legal and symbolic significance that judgments of the BVerfG have. Certainly, in particular the level of minimum standards will raise further questions in the future. As this will go in hand with very detailed aspects of the school design it seems likely that the BVerfG will leave these questions to the legislator and will only function as a protector against discrimination.¹²⁴

Even if the judgment does not comment on this, in the light of the general fundamental rights dogma of the German Constitution, it is clear that the right to education is not guaranteed

¹¹⁵ BVerfGE 159, 355 [48] (own translation).

¹¹⁶ Wrase (n 92).

¹¹⁷ BVerfGE 159, 355 [51] (own translation).

¹¹⁸ BVerfGE 159, 355 [54, 169] (own translation).

¹¹⁹ BVerfGE 159, 355 [56] (own translation).

¹²⁰ Guckelberger (n 112) 390; Wrase (n 92).

¹²¹ BVerfGE 159, 355 [49] (own translation).

¹²² Sebastian Piecha, 'Schulische Bildung: BVerfG kreiert neues Grundrecht' (*Legal Tribune Online*, 1 December 2021) <<https://www.lto.de/recht/hintergruende/h/bundesnotbremse-schulschliessungen-wechselunterricht-recht-auf-bildung-schule-bverfg/>> accessed 18 May 2023.

¹²³ BVerfGE 159, 355 [60] (own translation).

¹²⁴ Nettesheim (n 113).

without limits. The restrictions provided in the Constitution for the three articles¹²⁵ and especially the principle of proportionality will apply.¹²⁶

In conclusion, even though the German Constitution does not contain a right to education according to the wording, it still exists through the derivation from other fundamental rights. Only recently in 2021, the Constitutional Court acknowledged the existence and defined a broad scope with different dimensions, namely indispensable minimum standards for the school system, a right to participation and lastly the component of equality.

The fact that the constitutional recognition of this right happened through a judgment, not the change of the wording of the Constitution, highlights again the importance of the jurisdiction concerning the Constitution.

4.4 Indian Constitution

The Indian Supreme Court interprets and enforces the world's longest and most complex constitution.¹²⁷ The country is characterized by an overwhelming religious, linguistic, economic and social heterogeneity and is becoming the most populous country in the world.

4.4.1 History

The Indian Constitution came into force in 1950 and with it, the Supreme Court was created. The Government of India Act of 1935 served as the framework and textual template for the Indian Constitution, which already contained many provisions, particularly regulations on federal organization, that can be found in the Constitution of independent India.¹²⁸ In addition to this legislative document, the development of the Constitution was significantly influenced by personalities such as Nehru and Ambedkar, who played a decisive role in the drafting and shaped the country in the early years of democracy.¹²⁹

¹²⁵ All three fundamental rights can be interfered with either by law or by constitutional barriers.

¹²⁶ Piecha (n 123); Josef Christ, 'Schulschließungen in der Pandemie und das Recht auf schulische Bildung' [2023] *Neue Zeitschrift für Verwaltungsrecht* 1, 5.

¹²⁷ Burt Neuborne, 'The Supreme Court of India: Constitutional Court Profile' (2003) 1 *International Journal of Constitutional Law* 467, 476.

¹²⁸ Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing 2017) 20; Rohit De, 'Constitutional Antecedents' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 26 ff.

¹²⁹ Uday S Mehta, 'Indian Constitutionalism: Crisis, Unity, and History' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 39.

Despite a tough test for the Supreme Court, crowned by the attempt to remove it from power by Indira Gandhi during the Emergency Era,¹³⁰ the validity of the Constitution itself and the formal judicial powers were never questioned.¹³¹ The decades-long dispute between Parliament and Supreme Court culminated in what is probably the most important Supreme Court decision in Indian history: *Kesavananda Bharati v. State of Kerala*.¹³² With the introduction of the Basic Structure Doctrine, the omnipotence of Parliament as a constitution-amending legislature was not recognized and this means, that lastly, the Constitution itself prevails. From this follows that the Supreme Court has the superpower to decide what is considered unconstitutional and what is not.

4.4.2 Structure, Mode of Operation and Types of Proceedings

The Constitution consists of 22 parts and more than 400 articles. The fundamental rights are located in Part III, Part IV contains the Directive Principles, followed by prohibitions of the state organization. After, Part XII consists of the financial aspects; Part XV elections and Part XVIII emergency provisions to just highlight some of them.

Originally, the Supreme Court consisted of a chief justice and seven other justices,¹³³ though the number has been expanded over the years to 34 judges today.¹³⁴ Due to the larger size of the court and the increased workload, sessions are held in chambers.¹³⁵ Only when the court decides on a case ‘involving a substantial question of law as to the interpretation of this Constitution’ a bench of at least five judges is required.¹³⁶ Furthermore, larger benches convene in the event of disagreement or controversy. The purpose of this is to avoid divergent judgments in the highest court of appeal to ensure the unity of the legal system.

The number of cases before the Supreme Court has increased massively since the court was established: from 1.215 cases in 1950 to a peak of approximately 89.000 cases in 2014. The number of unprocessed cases of over 60.000 in the meantime is significant.¹³⁷ The chronic overloading of the court, is attributed primarily to poor case management, delays in appointing

¹³⁰ Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016) 23.

¹³¹ Conrads (n 1) 227.

¹³² AIR 1973 SC 1461.

¹³³ Nick Robinson, ‘Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts’ (2013) 61 *American Journal of Comparative Law* 173, 179.

¹³⁴ ‘List of Supreme Court Judges’ (*Department of Justice, India*, 1 April 2023) <<https://doj.gov.in/list-of-supreme-court-judges/>> accessed 19 April 2023.

¹³⁵ Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* (15th edn, Oxford University Press 2019) 26.

¹³⁶ Art. 145 III.

¹³⁷ ‘Annual Report 2021-2022’ (*Supreme Court of India*) 82–84 <<https://main.sci.gov.in/publication>> accessed 19 April 2023.

new judges, and procedural inefficiency,¹³⁸ so the ‘time’ aspect becomes relevant here. With its large number of chambers, dealing with a huge number of cases every day, the Supreme Court acts like a second government and issues regulations that affect almost all aspects of daily life in India. Through intensive coverage in the Indian press (even more frequent mention than the Prime Minister), the Supreme Court is very present in the everyday life of the population.¹³⁹ The Supreme Court has original jurisdiction for all cases concerning fundamental rights.¹⁴⁰ Because of its significance, Ambedkar described it as ‘the very soul of the Constitution and the very heart of it’.¹⁴¹ It should be emphasized, especially from a comparative constitutional perspective, that in India, in contrast to Germany, there is the well-established procedure of PIL.¹⁴² In addition, there is original jurisdiction for disputes concerning the state organization¹⁴³ and at once, the Supreme Court is the highest court of appeal. According to Art. 132 - 136, the appellate jurisdiction can be divided into four areas: constitutional, civil, criminal and special leaves. Overall, there are accordingly many different types of procedures available in front of the Supreme Court which increases its power because various decisions about all types of law are possible.

4.4.3 Right to Education

Within the Indian Constitution Art. 21 A states:

The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

A right to education is therefore explicitly mentioned in the Constitution. But already the letter ‘A’ after the Article number shows that it was added later on. Accordingly, it is particularly important to understand the background to the way in which the law came into being to comprehend the scope it has today. The right to education was put right after Art. 21 which protects life and personal liberty.

¹³⁸ ‘One Hundred Twenty Fifth Report on the Supreme Court – A Fresh Look’ (Law Commission of India 1988) 7 <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080855-2.pdf>> accessed 19 April 2023; Nick Robinson, ‘Expanding Judiciaries: India and the Rise of the Good Governance Court’ (2009) 8 Washington University Global Studies Law Review 1, 20.

¹³⁹ Robinson (n 139) 21 ff.; Baxi (n 14) 129.

¹⁴⁰ Art. 32.

¹⁴¹ ‘Constituent Assembly Debates on 9 December, 1948’ <<https://indiankanoon.org/doc/145944/>> accessed 1 June 2023.

¹⁴² Satyaranjan P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd edn, Oxford University Press 2003) 195; Hajime Sato, ‘The Universality, Peculiarity, and Sustainability of Indian Public Interest Litigation Reconsidered’ (2017) 100 World Development 59.

¹⁴³ Art. 131 for legal disputes between the federal government and the member states or between several member states; Art. 71 for disputes in connection with the election of the (vice-) president and a Transfer Petition according to Art. 139a.

Even though the right to education was not part of the original version of the Constitution, it was not forgotten by the framers. Rather, it was decided not to establish it as a fundamental right but as a Directive Principle.¹⁴⁴ According to the founder's ideas, the Directive Principles are not directly enforceable but should rather be guidelines for the state's actions.¹⁴⁵ In this case, the object was to abolish illiteracy.¹⁴⁶

4.4.3.1 Derivation from other Constitutional Rights

Even before the Constitution was amended and Art. 21 A came into being the right to education was derived from other fundamental rights by courts through PIL cases in addition to the existing Directive Principles.

In *Mohini Jain v State of Karnataka*¹⁴⁷ the Supreme Court held for the first time that there is a right to education:

The right to education flows directly from the right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.

Citizens need to be educated and conscious of individualistic dignity to enjoy their fundamental rights which is only possible through education.¹⁴⁸ The right to education is therefore a prerequisite to enjoy other fundamental rights.

The "right to education" (...) is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels.¹⁴⁹

Charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution.¹⁵⁰

*Unni Krishnan v State of A.P.*¹⁵¹ partly overruled *Mohini Jain*:

[The right to education] is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words, every child/citizen of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State.¹⁵²

¹⁴⁴ Art. 41 and 45.

¹⁴⁵ See Art. 37.

¹⁴⁶ Jai Narain Pandey, *Constitutional Law of India* (48th edn, Central Law Agency 2011) 311.

¹⁴⁷ AIR 1992 SC 1858.

¹⁴⁸ Ashok Jain, *Constitutional Law of India (Part-II)* (2nd edn, Ascent Publications 2008) 40.

¹⁴⁹ AIR 1992 SC 1858 (emphasis added).

¹⁵⁰ Ibid.

¹⁵¹ AIR 1993 SC 2178.

¹⁵² (Emphasis added).

It is interesting to note that the focus of the two judgments lies on primary education even though the cases dealt with issues of the capitation fees of higher education.¹⁵³ However, a clear age restriction was placed on the right that had previously been guaranteed almost without restriction. Nevertheless, the importance of a right to education with a particular focus on literacy was profoundly articulated by the Supreme Court as it is the ‘primary duty of the State for the stability of the democracy, social integration and to eliminate social tensions.’¹⁵⁴

4.4.3.2 Constitutional Amendment

With the 86th constitutional amendment in 2002, Art. 21 A was inserted. Thus, what was initially established merely by case law also became written constitutional law.¹⁵⁵ In this respect, the right is secured twice.

It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

The constitutional amendment was celebrated as a great success because every child who was denied education could approach the court through a writ petition to initiate appropriate measures by the authorities. However, the age restriction starting at six years is seen as a clear violation of the *Unni Krishnan* case which stated that every child below 14 had a fundamental right.¹⁵⁶ Aside from that, it is noteworthy that Art. 21 A is the only fundamental right that is not granted unconditionally as it is dependent on age and further on the determination of the states.¹⁵⁷

In *Ashoka Kumar Thakur v Union of India*¹⁵⁸ the Supreme Court highlighted again the importance of Art. 21 A. ‘Education stands above other rights, as one’s ability to enforce one’s fundamental rights flows from one’s education’ and this case is also giving detailed recommendations for the implementation.¹⁵⁹ With this the court is continuing its activist role in advancing the right to education and denounces at the same time the underfunding of the system.

¹⁵³ Vijayashri Sripati and Arun Thiruvengadam, ‘India: Constitutional Amendment Making the Right to Education a Fundamental Right’ (2004) 2 International Journal of Constitutional Law 148, 152.

¹⁵⁴ *Bandhua Mukti Morcha vs. Union of India* (1997) 10 SCC 549.

¹⁵⁵ At the same time, Art. 51 K in the section of the Directive Principles was added.

¹⁵⁶ Sripati and Thiruvengadam (n 154) 155.

¹⁵⁷ Anil Sadgopal, ‘Right to Education vs. Right to Education Act’ (2010) 38 Social Scientist 17, 28.

¹⁵⁸ (2008) 6 SCC 1.

¹⁵⁹ Jain (n 149) 160.

4.4.3.3 The Right of Children to Free and Compulsory Education Act

In 2009, the Right of Children to Free and Compulsory Education (RTE) Act followed with the purpose to ensure the implementation of Art. 21 A. There was a need for this because even after the *Unni Krishnan* case and the constitutional amendment there was not enough improvement.¹⁶⁰ Even though the RTE Act is not constitutional law itself, which is actually the focus of this work, it will be elaborated here because it represents the most outstanding concretization of the constitutional right and is therefore of great relevance. Although education in India is primarily within the competence of the states, the central government has the authority to regulate certain key aspects.¹⁶¹ The constitutional validity of the RTE Act was upheld by the Supreme Court in 2014 as it does not alter the basic structure of the Constitution.¹⁶²

According to the RTE Act, there must be no fees that prevent children from participating in primary education and neighborhood education is obligatory.¹⁶³ Moreover, private institutions are obliged to provide free education to at least 25 % of children belonging to disadvantaged groups and weaker sections.¹⁶⁴ The constitutionality of this regulation was also approved by the Supreme Court.¹⁶⁵

The RTE Act includes in its appendix a schedule of norms and standards that schools must meet in order to be allowed to function.¹⁶⁶ The standards concern a. o. the number of teachers, the condition of the building and the instructional hours in an academic year. This means that there are quite detailed regulations on how school education should be shaped.

Nevertheless, different aspects have been criticized related to the RTE Act.¹⁶⁷ The criticism mainly concerns the fact that the Act does not apply to children between zero and six years even though this age is crucial for the development of children and higher education is not mentioned at all.¹⁶⁸

Even after these far-reaching legal changes over time, the Supreme Court continued to address the right to education and held the following in *State of Tamil Nadu & Ors vs K Shyam Sunder*:

¹⁶⁰ Pandey (n 147) 312.

¹⁶¹ This only applies since 1976, when Art. 42 was amended and education was added to the list of concurrent legislative. Sripathi and Thiruvengadam (n 154) 150; Iftikhar Ahmad Tarar and Abdul Majid Khan Rana, 'Right to Education: Comparative Study of Constitutional Contours, Legislative Initiatives and Institutional Arrangements in India and Pakistan' (2020) 19 *Ilkogretim Online - Elementary Education Online* 3365, 3367.

¹⁶² *Pramathi Educational and Cultural Trust & Ors. v. UOI & Ors. Writ Petition (C) No. 416 of 2012.*

¹⁶³ Right to Education Act, Sec. 3 (1) and 3 (2), Act of Parliament (2009), India.

¹⁶⁴ Right to Education Act, Sec. 12 (1) (c) Act of Parliament (2009), India.

¹⁶⁵ *Society for Un-Aided Private School of Rajasthan v. Union of India & Anr Writ Petition (C) NO. 95 OF 2010.*

¹⁶⁶ Right to Education Act, Sec. 18 (1) and 19 (2) Act of Parliament (2009), India.

¹⁶⁷ Niranjana Radhaya VP, 'People's Constitutional Right to Education versus the Right of Children to Free and Compulsory Education Act 2009' [2010] *Exchanges*.

¹⁶⁸ Athira Prasad, 'Right to Education: A Critical Analysis of the Indian Approach' (The National University of Advanced Legal Studies 2021) 39.

The right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background.¹⁶⁹

This shows that although the legal situation is quite clear, the court still sees the need to clarify this.

4.4.3.4 The Mid-Day Meal Scheme

Finally, it should not go unmentioned that India has attempted to secure the right to education through an approach that comes from a completely different direction.

The idea of the Mid-Day Meal Scheme (MDMS) is to provide a cooked, nutritious meal for children in school.¹⁷⁰ It was first launched already in 1995 and has the purpose to counteract the malnutrition of children and therefore improves health and education at the same time. Again, the Supreme Court played a decisive role by urging comprehensive implementation and setting specific calorie counts for the meals.¹⁷¹ The scheme also creates an incentive for parents to make school attendance possible and takes away the argument that children need to work to ensure their survival.¹⁷² This shows that India takes more than one approach to address the persisting problems.

To summarize, it can be stated that the right to education in India has not been a fundamental right ever since but has been uplifted and was made enforceable first through the Supreme Court and later also through an amendment of the Constitution. Thus, there was an interplay between the judiciary and the legislature. Consequently, the right is now firmly anchored in India's constitutional law. However, a closer look reveals that the scope has its limits and depends on pre-conditions.

4.5 Comparison of the Constitutional Frameworks

At the time of the formation, neither the Indian nor the German Constitution contained a right to education. Over the past 70 years of constitutional development, different stages of change have taken place.

¹⁶⁹ (2011) 8 SCC 737.

¹⁷⁰ Chandra Shekhar Sahai, 'Mid-Day Meal Scheme: Achievements and Challenges' (2014) 3 International Journal of Humanities and Social Science Invention 6.

¹⁷¹ 28.11. 2001 W.P. (C) No. 196 of 2001.

¹⁷² Satish Y Deodhar and others, 'An Evaluation of the Mid Day Meal Scheme' (2010) 22 Journal of Indian School of Political Economy 33, 37.

Nowadays, the Indian Constitution has an explicit right to education since 2002, whereas in Germany the fundamental right has only recently been recognized by the BVerfG. The start of the establishment in both countries happened through the judiciary. The Indian Supreme Court has been central to the development ever since and with it the debate concerning such a right has started way earlier than in Germany. A reason for this might be that the problem of illiteracy was far more pertinent in India at that time. In Germany, mainly academics and the administrative courts played an important role because the BVerfG has been quite reserved to acknowledge the new fundamental right. The aim is probably also to protect the state from excessive demand.

A process of derivation from other fundamental rights happened in both countries and it can be noticed, that the anchor within the constitutional framework is seen differently. In India, the clear connection to the right to life has not only influenced the position of Art. 21 A but also underlines its outstanding relevance confirming that a life without education is not worth living. Moreover, the right is not only a fundamental right but also part of the Directive Principles. On the other hand, the derivation within the Basic Law follows from the right to personality,¹⁷³ the rights of schools and the freedom of employment. The importance of a right to education is acknowledged as well but not to the same extent as in India where it is constantly repeated by the Supreme Court. The right to education allows children to demand a certain provisioning from the state in order to ensure the realization of the fundamental right so the conceptual design goes in a similar direction.¹⁷⁴

Education in Germany is mainly left to the states and there is no law with overarching relevance for the whole country but in India, the RTE Act and also the MDMS are attempts to ensure the implementation in the whole country. What also stands out is that in the Indian judgments, the fees for education play a central role or put differently, the need for free education is an ongoing debate. In Germany, a debate concerning the aspect of free education cannot be found.

Lastly, it can be stated that with reference to the CA, the language used in the Indian judgments is clearly going in the same direction as the CA because the right to education is described as a prerequisite for the ability to enforce other fundamental rights. The purpose of the fundamental right, therefore, is to create capabilities. Such a clear connection to capabilities cannot be found

¹⁷³ The right to life within the German Constitution can be found in Art. 2 II, thus a certain proximity of the text itself is there too.

¹⁷⁴ Can be characterized as a 'positive right', see Mary Ann Glendon, 'Rights in Twentieth-Century Constitutions' (1992) 59 *The University of Chicago Law Review* 519, 525–526.

in Germany. Nevertheless, since the right to personality has a close connection to human dignity,¹⁷⁵ an interlinkage can be made by interpretation too.

5 Implementation of the Right to Education

Now, that the constitutional basis of the right to education has been studied, the aim is to look at the reality of how this right is put into practice. This is particularly relevant, as law in the books alone is neither sufficient nor of use for anyone if there is no or only poor implementation. What matters for individuals is if and how the fundamental right actually reaches them. So argues Nussbaum: ‘If it makes human lives no better, it will be deservedly ignored’.¹⁷⁶

Regarding the implementation of the right to education, countless studies with different focuses have been made. Meanwhile, an extent has been reached that a comprehensive presentation of the existing results is not possible within this work. This is already due to the fact that both in India and in Germany the education system is federally structured to allow for regional differences. Therefore, a highly pluralistic systems exist already within both of the countries.

Nevertheless, this change of perspective away from the primary abstract, constitutional level shall be made here because these pragmatic considerations are indispensable to allow for profound consideration. Checking the constitutional theory with the reality promises further insights.

5.1 Methodology: 4-A Scheme

To assess the implementation of the right to education the 4-A scheme, developed by the United Nations,¹⁷⁷ will be used here. An alternative approach that was taken by other scholars¹⁷⁸ is to study the social spending by the government over time but this is not used here as a more abstract and flexible model of assessment is wanted.

Based on the parameters: availability, accessibility, acceptability and adaptability the fulfilment of the governmental obligations corresponding to the right to education is measured.

¹⁷⁵ The two articles are usually cited together like this: Art. 2 I in conjunction with Art. 1 I.

¹⁷⁶ Martha C Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press 2009) 59.

¹⁷⁷ Katarina Tomasevski, ‘Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25’ (UN Commission on Human Rights 2000).

¹⁷⁸ Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press 2020) 184.

Availability means ‘functioning educational institutions and programs have to be available in sufficient quantity.’¹⁷⁹ In detail, however, this depends on various factors whereby, for example, buildings, drinking water, sanitary facilities, teaching materials and well-trained teachers with adequate salaries are prerequisites everywhere.

Accessibility encompasses equal access for everyone without any discrimination. This includes physical accessibility, as well as affordability for all.¹⁸⁰

Acceptability requires a healthy and safe school environment with quality teaching that is pluralistic and does not confirm any specific ideologies.¹⁸¹

Finally, *adaptability* means that the provided education needs to be dynamic according to changing demands within the society and local contexts.¹⁸²

While these four criteria do not allow for a clear-cut classification of the various influencing factors and overlaps occur, the 4-A scheme helps to examine the implementation of the right to education with a certain structure and is therefore used as a guide here. Precisely because the framework is not particularly rigid, it leaves room to address the specific circumstances of each case.

Hereinafter, selected aspects for the implementation will be examined. For the selection, the 4-A framework provided guidance but it was also the aim to study data which allows a comparison between the two countries on an abstract and federal level. It makes visible where the focus of existing debates lies in the two countries.

5.2 Germany

5.2.1 Availability

Since school attendance is mandatory in Germany, the state has the obligation to ensure the provision of sufficient places for students in schools. This has worked well in the past. However, because of the decreasing number of students within the last years due to the demographic change with an aging population, schools have been closed.¹⁸³ At the same time, areas that are

¹⁷⁹ ‘General Comment No. 13: The Right to Education (Article 13), Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-First Session, E/C.12/1999/10, 8 December 1999’ (United Nations Human Rights, Office of the High Commissioner 1999) <<https://www.ohchr.org/en/resources/educators/human-rights-education-training/d-general-comment-no-13-right-education-article-13-1999>> accessed 21 June 2023.

¹⁸⁰ Ibid.

¹⁸¹ Ravindra Kumar and Preeti Misra, ‘Right to Education: A Critical Evaluation of the Right of Children to Free and Compulsory Education Act, 2009 in the Light of 4A’S Framework’ (2016) April-June Bharati Law Review 180, 189.

¹⁸² Prasad (n 169) 36.

¹⁸³ ‘Statistische Veröffentlichungen der Kultusministerkonferenz: Vorausberechnung der Schüler- und Absolventenzahlen 2012 bis 2025’ (Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 2013) 200.

experiencing strong regional growth, or which are strongly affected by immigration, are struggling at times to provide a sufficient number of places for students in schools.¹⁸⁴ Respectively in rural areas, the school closures resulted primarily in longer school commutes.¹⁸⁵ Official data on the number of school-aged children who are not able to go to school due to a shortage of places has not been published by the states. However, according to other reports, existing capacity gaps¹⁸⁶ appear primarily at the beginning of a new school year. Afterwards, efforts are made to ensure the supply as quickly as possible, so that these are especially temporary problems.¹⁸⁷

Overall, schools in Germany have school buildings with sanitary facilities, areas for physical education, available drinking water and the teachers get sufficiently paid by the states. Even though there is a great need for renovation of the school buildings,¹⁸⁸ the availability can be categorized as appropriate. Certainly, there is always room for improvement but in principle, one cannot attest to Germany a severe failure in this regard.

5.2.2 Accessibility

The state-provided education should be accessible without any discrimination for every child. Especially for children with disabilities, this is a challenging task. According to Art. 24 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of which Germany is a contracting state, the state is obliged to provide an inclusive education system at all levels.

However, the reality in Germany is rather different. Not even half of the pupils with special needs receive inclusive education.¹⁸⁹ This number has been slowly growing since 2008 when the CRPD came into force. But the capacity of the school system has not reached the status of allowing all children to participate in inclusive education to form part of the society and to not be excluded. This is not to say that children with special needs who are not part of the inclusive

¹⁸⁴ Anna-Lena Schlitt, 'Schule: Rund 4.000 geflüchtete Kinder warten in Deutschland auf Schulplatz' *Die Zeit* (Hamburg, 26 May 2023) <<https://www.zeit.de/gesellschaft/schule/2023-05/schule-gefluechtete-kinder-fehlende-plaetze-ukraine>> accessed 5 July 2023; Rux (n 106) para 798 ff.

¹⁸⁵ Caroline Kann, *Schulschließungen und Umbau von Schulstandorten: Steuerungsansätze bei sinkenden Schülerzahlen und die Rolle der Privatschulen* (Springer Fachmedien 2017) 23.

¹⁸⁶ Schlitt (n 185).

¹⁸⁷ Anna Klöpfer, '20.000 Schulplätze fehlen: Stuhl an Stuhl' *taz* (1 September 2022) <<https://taz.de/!5875261/>> accessed 5 July 2023.

¹⁸⁸ Johannes Salzgeber and Stephan Brand, 'Kosten steigen schneller als die Investitionen: Bedarfe für Schulen weiter hoch' (KfW Research Fokus Volkswirtschaft 2022) 401; Claudia van Laak and Axel Schröder, 'Sanierungsstau an Schulen - Wenn der Putz von den Wänden bröckelt' (*Deutschlandfunk*, 25 December 2017) <<https://www.deutschlandfunk.de/sanierungsstau-an-schulen-wenn-der-putz-von-den-waenden-100.html>> accessed 4 July 2023.

¹⁸⁹ Klaus Klemm, 'Inklusion in Deutschlands Schulen: Eine bildungsstatistische Momentaufnahme 2020/21' (Bertelsmann Stiftung 2022) 16.

education system do not receive any education at all but they are schooled in special schools which exists aside from the ordinary ones. The reason for this is a. o. the lack of additional teaching staff¹⁹⁰ which would be required to cope with more demanding situations in daily school life when dealing with a diverse range of children with different needs. Of course, it is even worse for children with special needs to be taught in an environment that is not prepared to deal with the challenges that come along with it. Nonetheless, Germany is not near the point where non-discriminative access to the same schools is ensured.¹⁹¹ One could argue that the overall quota of pupils with special needs is only 7,7 percent in total¹⁹² and that therefore only a neglectable number of students are affected. However, with regard to the CA, it is not enough to look at the majority of pupils because each and every individual matters and it is not sufficient to see the society as a whole.

A second aspect concerning the accessibility is the dependence of learning success on socioeconomic background in Germany.¹⁹³ The most privileged 25 % of students perform significantly better than the most socioeconomically disadvantaged 25 %.¹⁹⁴ The existing social imbalance is thus reflected in the system of education. Accordingly, it shows that the equality of opportunity that is actually intended does not exist.

5.2.3 Acceptability

Concerning the acceptability, the shortage of teachers in Germany will be discussed as an example. A shortage of teachers necessarily has negative effects on the quality of education as the prerequisites which are needed like a sufficient number of taught lessons cannot be ensured anymore.

The model calculations of the *Kultusministerkonferenz*¹⁹⁵ show that the current teacher shortage will worsen in the coming years.¹⁹⁶ Germany faces the problem that the number of graduates is not sufficient. Consequently, there are not enough teachers available to meet the existing demand.¹⁹⁷

¹⁹⁰ Lang (n 95) 99.

¹⁹¹ Marcel Helbig and others, 'Mangelhafte Umsetzung des Rechts auf inklusive Bildung: Bundesländer verstoßen gegen Artikel 24 der UN-Behindertenrechtskonvention' (2021) 44 WZBrief Bildung.

¹⁹² Klemm (n 190) 16.

¹⁹³ Christ (n 127) 7.

¹⁹⁴ Tarek Mostafa and Markus Schwabe, 'Deutschland - Ländernotiz - Ergebnisse PISA 2018' (OECD 2019) 1, 5.

¹⁹⁵ A coordinating body of state ministers in the field of education at the federal level.

¹⁹⁶ 'Lehrkräfteeinstellungsbedarf und -angebot in der Bundesrepublik Deutschland 2021 – 2035: Zusammengefasste Modellrechnungen der Länder' (Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 2022) 233 19.

¹⁹⁷ Wido Geis-Thöne, 'Lehrkräftebedarf und -angebot: bis 2035 steigende Engpässe zu erwarten: Szenariorechnungen zum INSM-Bildungsmonitor' (Institut der deutschen Wirtschaft 2022) 28.

One pursued method of resolution is that graduates who have not studied education are allowed to teach. The only requirement then is a university degree,¹⁹⁸ hence pedagogical knowledge is not necessary anymore. These so-called ‘career changers’ are therefore familiar with the field they are teaching but generally have no competences in working with children. In everyday school life, staff shortages even lead to teachers lecturing in subjects they have not studied.¹⁹⁹ The problem is further compounded by the fact that untrained teachers are particularly likely to teach in schools characterized by a disadvantaged student body.²⁰⁰ Overall, a trend can be observed that filling existing capacity gaps with untrained teachers is becoming the norm.²⁰¹ The quality of teaching is thus in question to a significant extent.

5.2.4 Adaptability

Let us recall what adaptability refers to: the school system has to meet the changing demands of its time. In the 21. century, this encompasses surely imparting knowledge regarding the progressing digitalization. However, the appropriate conditions must be created for this. One obstacle to progress in this area has always been the lack of financial resources available for the states to allow for comprehensive modernization. Due to specific regulations within the finance part of the Constitution,²⁰² the federal level is not allowed to support the states to enable a fast digitalization of the schools. As mentioned before, education forms part of the competence of the states and therefore they are also responsible to cover the costs.²⁰³ To make an exception possible, the Constitution was amended in 2019 through the *DigitalPakt Schule*²⁰⁴ so that the federal government can participate in the financing. Within five years (until 2024), five billion Euro are supposed to enable the digitalization of the schools. Part of this is not only the development of a digital infrastructure but also digital learning methods and teaching digital literacy to students. The attempt to meet the modern times is thus made, albeit with a 10 to 15 year delay.²⁰⁵ The given background of constitutional theory explains indeed the complexity of the

¹⁹⁸ see for example ‘Quereinstieg in den Lehrerberuf’ (*Senatsverwaltung für Bildung, Jugend und Familie Berlin*, 1 June 2023) <<https://www.berlin.de/sen/bildung/fachkraefte/einstellungen/lehrkraefte/quereinstieg/>> accessed 30 June 2023.

¹⁹⁹ Interview with Sebastian Bühring, ‘Aktuelle Probleme des deutschen Schulsystems’ (20 August 2023).

²⁰⁰ Dirk Richter, Alexandra Marx and Dirk Zorn, ‘Lehrkräfte im Quereinstieg: sozial ungleich verteilt? Eine Analyse zum Lehrermangel an Berliner Grundschulen’ (Bertelsmann Stiftung 2018) 8.

²⁰¹ Ibid 20.

²⁰² In particular the older version of Art. 104 c.

²⁰³ Art. 104 a.

²⁰⁴ ‘Rechtliche Grundlagen des DigitalPakts Schule’ (*Bundesministerium für Bildung und Forschung - BMBF DigitalPakt Schule*) <<https://www.digitalpaktschule.de/de/rechtliche-grundlagen-des-digitalpakts-schule-1782.html>> accessed 30 June 2023.

²⁰⁵ Olivia Wohlfart and Ingo Wagner, “‘DigitalPakt Schule 2019 bis 2024’ – Analyse der strukturellen Digitalisierung des Bildungssystems in Deutschland” (2022) 4 *Zeitschrift für Schul- und Professionsentwicklung* 202, 203.

topic but plays little role for the schools themselves. What matters to them is the extent to which the funds can be used effectively. Until the end of 2022 3,9 billion euros of the funds have been approved²⁰⁶ so the money is released despite the often-criticized difficult application processes.²⁰⁷ It was mainly used to finance the purchase of new hardware. The first-level support, administration and development of online learning infrastructure has still not reached a satisfactory level.²⁰⁸ The result is that there are a lot of laptops and tablets in schools, but they cannot be used properly. In addition, problems like complex data protection regulations create impediments to a comprehensive usage.²⁰⁹ Although improvements are starting to show, especially since the covid-19 pandemic required an even faster development, the education system is still not able to teach within a digitalized surrounding because the implementation of the *DigitalPakt Schule* is insufficient and not holistic enough.²¹⁰

5.2.5 Literacy Rate

Finally, in order to have a particularly well-comparable figure, reference is made here to the literacy rate. The literacy rate can be seen as the result of the four parameters and is an indicator to which extent education is ensured.²¹¹ For Germany, some statistics indicate a literacy rate of 99 %.²¹² However, it usually remains unclear what the literacy requirements are there. Contradictory to these results, the study ‘LEO 2018’ commissioned by the Federal Ministry of Education and carried out at the University of Hamburg has shown that 6.2 million people over the year of 18 in Germany have low literacy skills (which equals 12.1 % of the adults).²¹³ Out of the low literalized adults 58% are male and 42% are female.²¹⁴ Therein ‘low literacy means

²⁰⁶ ‘Die Finanzen im DigitalPakt Schule’ (*Bundesministerium für Bildung und Forschung - BMBF DigitalPakt Schule*) <<https://www.digitalpaktschule.de/de/die-finanzen-im-digitalpakt-schule-1763.html>> accessed 3 July 2023.

²⁰⁷ Lukas Petry and others, ‘Technologieauswahl im DigitalPakt: Wie werden Entscheidungen im Bildungssektor getroffen?’ (2022) 59 HMD Praxis der Wirtschaftsinformatik 912, 922.

²⁰⁸ Daniel Rhode and Michael Wrase, ‘Die Umsetzung des Digitalpakts Schule: Perspektiven der schulischen Praxis auf zentrale Steuerungsfragen und -herausforderungen’ 45 <https://www.uni-hildesheim.de/media/fb1/sozial-paedagogik/Forschung/Umsetzung_des_Digitalpakts_Schule/Projektbericht_DigitalPakt_final.pdf> accessed 3 July 2023.

²⁰⁹ Nina Jude and others, ‘Digitalisierung an Schulen – eine Bestandsaufnahme’ [2020] DIPF, Leibniz-Institut für Bildungsforschung und Bildungsinformation 37.

²¹⁰ Petry and others (n 208) 923.

²¹¹ So-called ‘outcome indicator’ by Chilton and Versteeg (n 179) 185.

²¹² ‘Literacy Rate by Country 2023’ (*World Population Review*) <<https://worldpopulationreview.com/country-rankings/literacy-rate-by-country>> accessed 5 July 2023; ‘List of Countries By Literacy Rate’ (*WorldAtlas*, 12 August 2020) <<https://www.worldatlas.com/articles/the-highest-literacy-rates-in-the-world.html>> accessed 5 July 2023.

²¹³ Anke Grotlüschen and others, ‘Hauptergebnisse und Einordnung zur LEO Studie 2018 – Leben mit geringer Literalität’ in Klaus Buddeberg and Anke Grotlüschen (eds), *LEO 2018: Leben mit geringer Literalität* (wbv Publikation 2020) 20.

²¹⁴ *Ibid* 22.

that a person can read and write at most up to the level of simple sentences.²¹⁵ Persons who can read and write individual sentences but fail at the level of coherent texts are therefore also included in this number. Accordingly, a quite precise distinction between different levels of literacy is considered and studied there which makes the numbers seem considerably more credible.

5.3 India

A various number of studies have been conducted concerning the implementation of the right to education.²¹⁶ As India is such a vast and diverse country, the researches mostly focus on one state or a comparison of a small number of states. Still, studies frequently claim that findings can be transferred to other states. Here, there will be no focus on a single state as the aim is to provide a broader picture. Of course, this inevitably leads to generalizations to some extent. However, it is the means to gain the envisioned overview and to ensure comparability with Germany which was solely studied at the federal level as well.

While looking at the implementation of the right to education in India, the enactment of the RTE Act from 2009 is essential as it standardizes the requirements set by the legislator. The expectation of the federal government was that the states comply with the norms by 2015.²¹⁷ Originally, the constitution set a time limit of 10 years for the implementation.²¹⁸ The time horizon that is being talked about today is 2030.²¹⁹

5.3.1 Availability

Regarding the availability of education, one of the major concerns is that parents prefer private school education²²⁰ over government schools for several reasons.²²¹ This has led to the closure

²¹⁵ Anke Grotlüschen and others, 'Hauptergebnisse und Einordnung zur LEO Studie 2018 – Leben mit geringer Literalität' in Klaus Buddeberg and Anke Grotlüschen (eds), *LEO 2018: Leben mit geringer Literalität* (wbv Publikation 2020) 15 (own translation).

²¹⁶ See for an overview Niranjana VP, 'Implementation of the Right of Children to Free and Compulsory Education Act 2009 in the State of Karnataka: An Empirical Study' (Center for Child and the Law, National Law School of India, Bengaluru 2017) 14–22.

²¹⁷ Isabella Burch, 'Realizing the Right to Education: An Evaluation of Education Policy in Six States of India' (CMC Senior Theses, Claremont McKenna College 2016) 4.

²¹⁸ At that time still within the Directive Principles.

²¹⁹ Interview with Niranjana VP, 'Implementation of the Right to Education in India' (15 August 2023).

²²⁰ Geeta Gandhi Kingdon, 'The Private Schooling Phenomenon in India: A Review' (2020) 56 *The Journal of Development Studies* 1795.

²²¹ For example, because the quality of education is perceived as better and they tend to teach more in English which is considered as the language of power. VP (n 217) 57; Jyotsna Jha and others, 'Implementing the Right to Education Act 2009: The Real Challenges' (Centre for Budget and Policy Studies, Bangalore, India 2013) 19; Kiran Bhaty and others, 'Regulation of Non-State Actors in School Education in India' (UNESCO 2022) 39.

of many government schools.²²² A trend of privatization of education can thus be observed.²²³ 68 % of the schools are still state-run, however only 49 % of the pupils are enrolled there.²²⁴ In part, the result of not following RTE norms is that schools are closed.²²⁵ That is consistent, but leads to problems if no adequate replacement is secured.

It goes without saying that the RTE Act applies to private schools too. However, as a result of the school closures, it is even more difficult for children not being admitted in a private school through the 25% ratio to get access to schooling.²²⁶ Simultaneously, they face longer distances, which is an impediment for attendance especially in rural areas. For example, in Karnataka, only half of the interviewed Block Education Officers have made arrangements to ensure school attendance for children living in remote areas.²²⁷

‘Unfortunately, most Government schools, and a large proportion of private schools do not fulfil the norms prescribed by the RTE Act’.²²⁸ In 8.1 % of the schools there are still no hand wash facilities and electricity is only available in 86.9 % of the schools.²²⁹ Hence, basic infrastructure requirements are not comprehensively met. Within the National Policy on Education 2016, the committee points out that it should be the state-run schools leading in quality and infrastructure. Only in this case, there is solid foundation for taking punitive action against private schools for not doing so.²³⁰

5.3.2 Accessibility

In India, 32.2 million children (6 - 17 years) are out of school²³¹ and probably this number is even higher as birth rates are not properly monitored and there is inconsistency within the states about what is considered as a school drop-out.²³² In addition, it must be remembered that there is a difference between enrolment and attendance and it is the latter which is of real significance. Despite the improvements, since independence, children's continuous school attendance is not

²²² Kingdon (n 221) 1801.

²²³ Bhatta and others (n 222) 30.

²²⁴ Bhatta and others (n 222) 32.

²²⁵ Burch (n 218) 81 f.

²²⁶ Jha and others (n 222) 19.

²²⁷ VP (n 217) 46, 65.

²²⁸ ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (Government of India, Ministry of Human Resource Development 2016) 64.

²²⁹ ‘Unified District Information System for Education Plus (UDISE+) 2020-21’ (Government of India, Ministry of Education, Department of School Education and Literacy) 18.

²³⁰ ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (n 229) 81.

²³¹ ‘National Education Policy 2020’ (Government of India, Ministry of Human Resource Development 2020) 10.

²³² Kiran Bhatta, Radhika Saraf and Vrinda Gupta, ‘Out-of-School Children: Some Insights on What We Know and What We Do Not’ (2017) 52 *Economic and Political Weekly* 69, 70.

ensured.²³³ Not even a single state has universal elementary attendance rates.²³⁴ Hence, even in the southern states, whose performance is usually highly praised, there is a need for improvement.

Concerning an equal access to education, it is alerting that the enrolment of girls is considerably lower than of boys²³⁵ and girls drop-out before completing eight years of school is more frequently.²³⁶ Reasons for this are multifaceted.²³⁷ However, especially a ‘female friendly’ educational infrastructure (e.g. separate girls toilets and female teachers) is relevant for reducing the gap.²³⁸ Fortunately, the MDMS has enabled girls to go to school and drop out rates were reduced.²³⁹ The efforts made to improve the situation are therefore proving partly effective.

One of the main impediments for the accessibility of education for all children are school fees. This includes tuition fees as well as fees for textbooks, uniforms or extra activities. With the RTE Act, fees have been banned for government schools and regulated for private ones, however, it is widely reported that this is not prevailing in reality.²⁴⁰ At the same time, prohibited screenings for admission persist being conducted, asking about the family income or owned vehicles.²⁴¹

Overall, ‘there are huge differences in access to education across location, economic category, social group and gender which cannot be simplified into public versus private’.²⁴²

Another problem results from the fact that not all children are able to proof their age. According to Sec. 14 (2) of the RTE Act no child should be denied of admission because of the lack of proof of age (as the RTE Act applies only from 6 - 14 years). Nevertheless, children are denied enrolment because of this.²⁴³ Moreover, there are no solutions in the Act on how to deal with children that dropped out at one point and need to reenter at a later age.²⁴⁴ So there are multiple difficulties adding up.

²³³ Pratham, ‘Annual Status of Education Report (Rural) 2022’ (Pratham) 51.

²³⁴ Burch (n 218) 4.

²³⁵ ‘Unified District Information System for Education Plus (UDISE+) 2020-21’ (n 230) 13.

²³⁶ Ibid 20.

²³⁷ According to Tanushree Chandra, ‘Literacy in India: The Gender and Age Dimension’ (2019) 322 Observer Research Foundation 5 the major challenge is the mindset of the parents concerning the education of daughters; Shobhit Goel and Zakir Husain, ‘Gender, Caste, and Education in India: A Cohort-Wise Study of Drop-out from Schools’ (2018) 58 Research in Social Stratification and Mobility 54.

²³⁸ Zakir Husain, ‘Gender Disparities in Completing School Education in India: Explaining Geographical Variations’ (2011) 28 Journal of Population Research 325, 341.

²³⁹ Daniel M Brinks and Varun Gauri, ‘The Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights’ (2014) 12 Perspectives on Politics 375, 385.

²⁴⁰ VP (n 217) 36; Jha and others (n 222) 10; Mona Kaushal, ‘Implementation of Right to Education in India: Issues and Concerns’ (2012) 4 Journal of Management 44; Bhatti and others (n 222) 58.

²⁴¹ Kaushal (n 241) 44.

²⁴² Ibid 45.

²⁴³ VP (n 217) 38.

²⁴⁴ Burch (n 218) 5.

5.3.3 Acceptability

Regarding the acceptability of education there are several factors of concern.

According to Sec. 17 of the RTE Act, the use of corporal punishment is strictly prohibited in schools. This is one of the key aspects to create a child friendly and safe environment. Unfortunately, the use of physical punishment is a common and widespread phenomenon in Indian schools.²⁴⁵ To break away from this, a change in the mindset of parents and teachers towards successful nonviolent education is needed.

Another area that requires attention is the quality of education. Thus states the National Policy: ‘issues relating to quality of education, both at the school and higher levels have not been addressed adequately either in policy or in practice.’²⁴⁶

One of the impediments is that the distribution of textbooks in primary schools amounts to just 90 % and therefore a considerable number of children remains without proper teaching materials.²⁴⁷ In addition, there is a teacher shortage in India,²⁴⁸ which is partly compensated with insufficiently trained so-called para-teachers.²⁴⁹ Many of the primary schools have teacher-pupil-ratios above the envisioned 1:30 or 1:35.²⁵⁰ At the same time, there is the problem of a huge proportion of schools having very few students,²⁵¹ with only one teacher for all subjects and age groups.

The rate of teacher absenteeism was at about 25 % every day, highly affecting the learning outcome.²⁵² However, this could be improved within the last few years by proper monitoring through the official authorities.²⁵³

Overall, there is a strong need for improvement of the quality of education.²⁵⁴

²⁴⁵ Virginia Morrow and Renu Singh, ‘Corporal Punishment in Schools in Andhra Pradesh, India’ (2014) 123 *Young Lives: An International Study of Childhood Poverty*; VP (n 217) 13, 58.

²⁴⁶ ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (n 229) 32.

²⁴⁷ Pratham (n 234) 51.

²⁴⁸ ‘National Education Policy 2020’ (n 232) 20; ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (n 229) 66.

²⁴⁹ Geeta Gandhi Kingdon and Vandana Sipahimalani-Rao, ‘Para-Teachers in India: Status and Impact’ (2010) 45 *Economic and Political Weekly* 59.

²⁵⁰ Jha and others (n 222) 12; VP (n 217) 40.

²⁵¹ ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (n 229) 64; Bhatti and others (n 222) 31.

²⁵² Michael Kremer and others, ‘Teacher Absence in India: A Snapshot’ [2005] *Journal of the European Economic Association*; ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (n 229) 27.

²⁵³ Interview with VP (n 220).

²⁵⁴ Abusaleh Shariff and others, *Human Development in India: Challenges for a Society in Transition* (Oxford University Press 2010) 105.

5.3.4 Adaptability

The caste system in India has been a dominant feature of the Indian society in history but is officially abolished since the enforcement of the constitution. It prohibits any disadvantages²⁵⁵ and grants special minority rights for scheduled castes and tribes.²⁵⁶ Nevertheless, disadvantages persist.²⁵⁷ The percentage of out of school children amongst Dalits, Adivasis and Muslims is higher compared to their population percentages.²⁵⁸ The continuation rates into secondary education are lower²⁵⁹ and they have the lowest literacy rates.²⁶⁰ The system has until today not been able to adapt to the modern society providing quality education regardless of the social background.

Secondly, India is and has always been a multi-lingual country.²⁶¹ As children can learn best in the language, they are most familiar with²⁶² the education should be provided in different languages, at least at the level of primary education.²⁶³ This entails difficulties, especially in connection with the teaching materials, and an adequate provision is not ensured.²⁶⁴

As education has not always been a fundamental right, the legal changes demanded a mind shift and with it the development of an understanding that education is something the state has to provide for its citizens. Thus, awareness of the right to education needs to be created both on the end of the parents and the teachers so they can fulfill their role and responsibilities accordingly. The necessary awareness, however, is not comprehensively achieved²⁶⁵ and therefore hindering faster process.

²⁵⁵ Art. 17.

²⁵⁶ Art. 46 related to education and for example Art. 243 D, 330, 332.

²⁵⁷ Kiran Bhatta, 'Review of Elementary Education Policy in India: Has It Upheld the Constitutional Objective of Equality?' (2014) 49 *Economic and Political Weekly* 100.

²⁵⁸ Jha and others (n 222) 8.

²⁵⁹ Abusaleh Shariff and others (n 255) 78.

²⁶⁰ Ibid 77.

²⁶¹ Cynthia Groff, 'Language and Language-in-Education Planning in Multilingual India: A Minoritized Language Perspective' (2017) 16 *Language Policy* 135.

²⁶² 'If You Don't Understand, How Can You Learn?' (United Nations 2016) Global Education Monitoring Report: Policy Paper 24 <<https://unesdoc.unesco.org/ark:/48223/pf0000243713>> accessed 17 August 2023.

²⁶³ 'National Education Policy 2020' (n 232) 13.

²⁶⁴ 'The Right to Mother Tongue-Based Education in Tribal India: A Comparative Perspective' (Oxfam India 2023) 11.

²⁶⁵ Tony George, 'Parental Awareness of Right to Education Act 2009' (Christ University 2014); Monica Dungalwar and Meenal Tripathi, 'Awareness Assessment of Government and Non- Government School Teachers Regarding RTE Act' (2019) 5 *International Journal of Home Science* 494; Krishan Lal, 'Awareness of Right to Education Act Among Teachers' (2014) 5 *American International Journal of Research in Humanities, Arts and Social Sciences* 107; Ramachandran Reshmi and others, 'Awareness about Right of Children to Free and Compulsory (RTE) Act 2009 among Elementary Teachers in Coimbatore District' (2015) 9 *i-manager's Journal on Educational Psychology* 27.

5.3.5 Literacy Rate

Data from the National Statistics Office (NSO) of India²⁶⁶ indicate an overall average literacy rate in 2021 of 77.7 % of people over the age of seven, defining literacy as the ability to write, read and understand simple messages. Hence, one fourth is not able to read and write.²⁶⁷ What is particularly striking is the literacy performance of older adults. It is especially poor and therefore degrading the overall literacy score despite the fact that the literacy rate of children is the highest among all age groups.²⁶⁸ Looking back in history, at the time of independence, the rate was at 12 %, in 2001 at 64.8 % and in 2011 at 74 %. There has been considerable improvement concomitant with the strong population growth. The poor rates from the past are still lingering on.

The male-female gap in literacy amounts to 14.4 % with male literacy at 84.7 % and female literacy at 70.3 %. Furthermore, there are massive regional differences confirming again the more advanced development of the southern states. In Kerala (which is leading in almost all aspects of development) the gap is only 2.2 % whereas it is 23.3 % in Rajasthan.

In addition to the differences between the states, a rural-urban gap is conspicuous. In urban areas the literacy rate is 87.7 % but it remains 73.5 % in rural areas. The female literacy rate in rural areas is 65 % only.

5.4 Comparison

A comparison of the two literacy rates reveals a major difference between Germany (87.9 %) and India (77.7 %). Although it should be noted that in India the NSO report measures the literacy of people from the age of seven²⁶⁹ whereas in Germany LEO 2018 starts at the age of 18 it still cannot help to overcome the fact that in India a huge number of people is not literate. This does not mean that the situation in Germany is acceptable but it certainly shows that the dimension of the problem lies at a very different level.

Even though the situation in both countries is very different, there are problems both have in common. In India as well as in Germany school closures, a shortage of teachers and the influence of children's backgrounds on their educational performance are prevailing issues of concern.

²⁶⁶ 'Literacy Rate in India 2023' (*Find Easy*, 17 October 2021) <<https://www.findeasy.in/indian-states-by-literacy-rate/>> accessed 18 September 2023; this website was used because an official publication of the NSO report cannot be found.

²⁶⁷ Dipanjolly Nath, 'Literacy Rate in India 2022' (2023) 5 *International Journal for Multidisciplinary Research* 1, 2.

²⁶⁸ Chandra (n 238) 4.

²⁶⁹ This has a high statistical impact because of the particularly young Indian population.

Until today, India is struggling to ensure that all children are going to school. Therefore, a focus such as set in Germany on the implementation of inclusive education cannot be found in India. Education of disabled students is not entirely disregarded in India.²⁷⁰ Yet, this aspect does not dominate the debate like in Germany.

In India, the education system is shaped by the existence of government and private schools accompanied with the belief that the private schools provide better education. In Germany, there are private schools too.²⁷¹ However, neither are they in the foreground fulfilling constitutional obligations nor is there this strong image of only them providing quality education.

Further, it is interesting to look at what is studied in connection to the literacy rate, already pinpointing at the major challenges within the country. In LEO 2018, differences of urban and rural areas are not even mentioned. Rather the social background is monitored. Hence, it can be assumed that rural literacy is not of major importance because no significant differences arise. Whereas in India higher proportions of females are illiterate, in Germany it is the opposite.

Compulsory education, which exists in both countries, is enforced differently. In Germany even coercive measures against the parents are taken²⁷² while in India there is no unitary system of enforcement through a designated authority.²⁷³

This comparison, in conjunction with the previous legal consideration, reveals that India has a strong right to education under the law and through the judiciary. Even so, it does not ensure basic requirements in practice. However, in Germany, the legal side is comparatively weak, but the implementation is more advanced. Nevertheless, a discrepancy between the guaranteed rights and the implementation becomes visible in both countries.

The active engagement of India's Supreme Court and the extensive scope of constitutional law address emerging challenges within the country. The recognition of the right to education by the BVerfG in Germany during a time when school education was severely threatened by the pandemic suggests that the constitution and jurisprudence always function as a mirror of social problems and needs. They are living representations of the politics which made them and which consume them.²⁷⁴

²⁷⁰ India has ratified the CRDP too; RTE Amendment Act (2012); 'National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy' (n 229) 90; 'National Education Policy 2020' (n 232) 27.

²⁷¹ Their existence is even constitutionally granted by Art. 7 IV GG.

²⁷² Ultimately, even coercive orders can and will be taken against parents who do not ensure the child's school attendance, VG München Beschluss v. 4.5.2023 – M 3 X 23.1147.

²⁷³ Interview with Sidarth Santosh, 'Implementation of the Right to Education in India' (23 August 2023).

²⁷⁴ Tomkins (n 48) 5.

5.5 Reference to Prima Facie Expectations

Upon reflection, it becomes evident that the expectations have predominantly proven to be accurate. In terms of the implementation of the right to education, Germany is far ahead of India. On the other hand, India has a much more progressive judiciary and the constitutional incorporation is much stronger.

Nevertheless, Germany, despite the fact that it is one of the most developed countries in the world, is far from achieving complete literacy. Therefore, access to justice through the factor of literacy cannot be as widely enabled as envisioned.

6 Realization of Capabilities

In this last part of the thesis, I will consider if the capability of literacy leads to access to justice. It was shown above what the constitution encompasses and how the implementation of the right to education is shaped. Beyond these insights, however, it should be asked if this is sufficient to truly fulfill this capability.

Therefore, it is necessary to define more precisely what exactly has to be understood of the capability 'literacy' to profoundly enable access to justice and where a threshold lies from which, we can say that access to justice is secured. This ultimately leads to the question of whether the constitutional right to education has an impact and does contribute to progress at all.

Accordingly, in the following chapter, we do no longer stay on the purely practical level. We deal with the overriding questions and move back towards the topic of access to justice. Or in the categories of Nussbaum: from the internal capability of literacy to the combined capability of access to justice.

6.1 Legal Literacy

If one asks which kind of literacy is needed to be able to participate in the justice system, it becomes apparent that the basic capability to read and write is not sufficient. Anyone who wants to buy a house, take out an insurance policy, or a mechanic whose bills are not paid comes into contact with legal matters in everyday life. Even those who want to receive social benefits must be able to fill out multi-page application forms.

Even though it is not necessary being able to draft a legal text with the usage of specific legal terms, the 'understanding of the importance of a legal problem and [the] ability [of a person] to

find legal support in order to empower herself regarding legal matters'²⁷⁵ is essential to pursue one's interests. Since the vast majority of information exchange within and outside of a court procedure is written-based, it is required to be able to write, read and understand complex and longer texts. Specific advice from lawyers should of course support the understanding to a certain extent, but can by no means replace it. It follows that a particularly high level of literacy is required to participate in the legal system which can be called 'legal literacy'.²⁷⁶ It includes the reading and writing skills on the one hand, but equally the ability to comprehend legal information. Literacy as such can thus not be equated with legal literacy but is only a part of it.

In this sense, LEO 2018 differentiates carefully different levels of literacy²⁷⁷ and looks at relations between literacy and finance-related or political practices. Even if legal literacy is not examined separately there, it shows that certain areas of life require different levels of skills.

On the other hand, the results after studying the two constitutions above show that the constitution's main focus is to ensure basic education for all citizens. This is already evident from the age limits on which the right to education applies. The capability of legal literacy can only be developed with an advanced maturity and a comprehensive understanding of concepts like the rule of law or democracy which is formed after primary education. In both countries, however, compulsory education ends at the point from which on such an understanding would become possible.

For the development of legal literacy, further education would be indispensable and the limitation of education for children is fairly problematic. Certainly, different capabilities are valued more at certain stages of life.²⁷⁸ However, the foundation for the exercise of functioning is laid during childhood.

Just like other languages or skills, legal literacy needs a period of learning but also a lot of practice.²⁷⁹ This is not related to personal intelligence, but rather whether people are given a space to develop this skill.

²⁷⁵ Habbig and Robeyns (n 7) 615.

²⁷⁶ Legal literacy, like basic literacy, still has to be categorized as an internal capability as is concerning skills and knowledge.

²⁷⁷ Grotlüschen and others (n 214) 15.

²⁷⁸ Melanie Walker, 'On Education and Capabilities Expansion' in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021) 515.

²⁷⁹ James Boyd White, 'The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education' (1983) 54 *University of Colorado Law Review* 143, 143.

Nevertheless, a further reaching right to education is not secured in the two studied constitutions. Rather an approach is pursued that only aims at securing a minimum core²⁸⁰ of the right to education. Germany and India are even struggling to fully implement this minimum.

6.2 Threshold

To answer the question whether constitutional rights contribute to achieving a capability threshold of literacy it has to be considered which level of education the state should provide to pass the threshold. The considerations in this regard are thoroughly normatively loaded.

Nussbaum states:

No proponent of the CA holds that everyone must have the same education. But if education is to have the role of enabling young people to develop their human potential, then the minimum offered must be ample enough, and at least that minimum amount must be delivered in a way that respects the equal entitlement of all people within the jurisdiction of the states.²⁸¹

Accordingly, Nussbaum's argumentation goes in the direction of the minimum core approach.²⁸² Furthermore, for her, the aspect of equal access is of major importance and a matter of justice: 'If justice requires it, we must bend all our efforts to make sure that it is done, even if it proves costly.'²⁸³

With this vague definition of the minimum, Nussbaum has been quite reluctant to specify where exactly this threshold is located. The aim of the CA is not to commit to any particular value system and to allow as much diversity as possible to be extensively inclusive towards different societies. On the other hand, this makes any measurement more difficult because it is not clear what exactly must be present. The CA urges each individual case to be considered, but even in Germany which is far from having as many inhabitants as India, it is hardly possible to demand that the system covers 100% of the population. Otherwise, reaching the threshold would be utterly utopian. Yet, it can also not be sufficient to cover the majority (thus more than 50%) as

²⁸⁰ 'General Comment No. 3: The Nature of States Parties' Obligations, Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23)' (United Nations Human Rights, Office of the High Commissioner 1990) para 10 <<https://www.refworld.org/pdfid/4538838e10.pdf>> accessed 9 July 2023; Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 128.

²⁸¹ Martha C Nussbaum, 'Constitutions and Capabilities: "Perception" Against Lofty Formalism' (2007) 121 *Harvard Law Review* 1, 69.

²⁸² Nussbaum, *Creating Capabilities: The Human Development Approach* (n 35) 40, where she argues that the CA aims for an ample social minimum and not make any commitment concerning inequalities above the minimum.

²⁸³ Martha C Nussbaum, 'Frontiers of Justice: Disability, Nationality, Species Membership', *Frontiers of Justice* (Harvard University Press 2007) 203.

it is a basic skill that every person should have. Nonetheless, it would not be of use to simply determine a fixed percentage of literacy that has to be reached and to mark every country that has a literacy rate below this as ‘failed’.

The CA is looking at the freedom of choice but as this is something that cannot be expressed in a simple number the measurement is a complex topic.²⁸⁴ For the measurement of the CA in practice, different kinds of weighting as a quantitative approach have been applied. For example, one could weigh literacy (two-thirds) and school enrolment numbers (one-third).²⁸⁵ Another approach is to derive the weighting by the variance of the indicators in a statistical way.²⁸⁶ Third, a weighting system that uses a social choice procedure has been suggested in which a group of people determines the weights.²⁸⁷ In contrast, Alkire has followed a qualitative approach using a participatory method for the selection of functionings and for the assessment of well-being changes.²⁸⁸

All these different methods present advantages and disadvantages but are only able to indicate changes compared to an earlier status quo. In the end, they do not help to answer the question, of where the threshold lies. Thus, the threshold remains more of an abstract point to work towards, but one that cannot be pinpointed. Nussbaum therefore concludes:

[It is] the task for the constitution-maker (or, more often, for courts interpreting an abstract constitution and for legislators proposing statutes) [...] to select a level that is aspirational but not utopian, challenging the nation to be ingenious and to do better.²⁸⁹

After all, the determination is therefore very dependent on the individual case and it is not the aim of the CA to provide an absolute answer for it. Rather, it is a matter of providing an abstract and theoretical basis for these practical considerations without having to answer concretely the question of whether or not the threshold has been reached. Ultimately, therefore, one cannot get beyond a certain relativity with the CA, since absolute quantifiability does not exist for these abstract terms. So, any measurement can only be an approximation. At this point, the limitation of the CA is reached. What is clear, however, is that it is the state whose responsibility it is to

²⁸⁴ Prasanta K Pattanaik and Yongsheng Xu, ‘On Capability and Its Measurement’ in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021).

²⁸⁵ This was former used for the HDI Index calculation of education, but today the mean of years of schooling for adults aged 25 years and more and expected years of schooling for children of school entering age are taken into account.

²⁸⁶ Wiebke Kuklys, *Amartya Sen’s Capability Approach: Theoretical Insights and Empirical Applications* (Springer-Verlag 2005) 35–38.

²⁸⁷ Achin Chakraborty, ‘On the Possibility of a Weighting System for Functionings’ (1996) 31 *Indian Economic Review* 241.

²⁸⁸ Alkire (n 39) 225–227; Robeyns, ‘The Capability Approach in Practice’ (n 5) 360.

²⁸⁹ Nussbaum, *Creating Capabilities: The Human Development Approach* (n 35) 42.

provide the conditions for its citizens. Consequently, there is a strong demand on the state. There is this persistent normative ideal that the state must live up to but at the same time, it is precisely this ideal that gives it its *raison d'être*. In practice, the provision of education is limited by the resources available for the state. In this context, a uniform assessment standard cannot be equivalently applied to Germany and India.

Here, there is an additional complicating factor. Certainly, the threshold for basic literacy is different than for the above elaborated legal literacy which is necessary to enable access to justice. It may seem contradictory that, on the one hand, Nussbaum calls only for the realization of the minimum core of education, but a capability like access to justice requires more.

Though one should keep in mind that

Nussbaum argues that the ten capabilities on her list, being incommensurable, cannot be traded off against one another (and, hence, have no relative weights), and also that the state should provide each citizen with a minimum threshold of each capability.²⁹⁰

From this can be deduced, that if there is consensus that access to justice is a combined capability and legal literacy is one of the internal prerequisites, a minimum threshold should also be reached in this regard.

With compulsory education respectively the right to attend school for at least nine years in Germany and eight years in India, the constitution aims to ensure that the minimum of education is provided. In both countries, efforts are made to implement this right. However, the section concerning the implementation has shown that even if these policies exist, the implementation faces various impediments. Regarding the outcome factor, Germany is certainly far more advanced than India. However, it should not be forgotten that as explained at the beginning, for access to justice many other factors next to literacy also play a role. In particular, because of the looser standing rules in India, court proceedings are easier to start and PIL can have effects that would not even be conceivable through judgments in Germany.

6.3 The Importance of Constitutional Rights

Already from the beginning of this thesis, the starting point of all considerations were the fundamental rights embedded in the constitution as the assumption was that the constitutional

²⁹⁰ Ingrid Robeyns and Morten Fibieger Byskov, 'The Capability Approach' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Summer 2023, Metaphysics Research Lab, Stanford University 2023) (emphasis added).

rights help to back up the efforts made for the implementation. But what has not been considered yet is, whether they really make a difference.

Constitutionalization of a social right legally requires the government to take steps to realize constitutional rights. Chilton and Versteeg²⁹¹ intended to prove the impact of the constitutional amendment by studying whether the states spending in the educational sector as a percentage of the GDP has risen after the amendment. However, their study finds that the constitutional right to education is statistically not associated with higher spending²⁹² so the amendment does not show any impact. Neither was it possible to prove that the quality of education has improved after a right to education was added to the constitution.²⁹³ Also, the analysis made here based on the 4-A scheme does not allow the conclusion that the law is fully implemented.

The constitutional amendment in India and later the RTE Act have shown some improvements implying that policy changes are of relevance.²⁹⁴ Nonetheless, for a more impactful outcome, the policies would need to encompass broader measures, which are hindered by the absence of sufficient political determination.

These insufficient outcomes create the impression that it is irrelevant whether the right is enshrined in the constitution or not. Even if constitutional rights are not and will never be a panacea,²⁹⁵ arguments shall be found as to why they still are of importance.

First, Woods argues that

when it comes to rights, we are asking the wrong questions and looking in the wrong places for answers.²⁹⁶

Rights are more than just to which the state can be held. [...] Rights can also be a language for articulating grievances, a tool for building a social movement, a specific aspirational goal for the country.²⁹⁷

Second, it has to be acknowledged that the studied time horizon might be too short. Chilton and Versteeg only look at the time period of five years before and five years after constitutional

²⁹¹ Adam Chilton and Mila Versteeg, 'Rights without Resources: The Impact of Constitutional Social Rights on Social Spending' (2017) 60 *The Journal of Law & Economics* 713, 717.

²⁹² *Ibid* 734.

²⁹³ Sebastian Edwards and Alvaro Garcia Marin, 'Constitutional Rights and Education: An International Comparative Study' (National Bureau of Economic Research, September 2014) 15.

²⁹⁴ Akshay Mangla, 'Elite Strategies and Incremental Policy Change: The Expansion of Primary Education in India' (2018) 31 *Governance* 381, 395.

²⁹⁵ Chilton and Versteeg (n 179) 11.

²⁹⁶ Andrew Keane Woods, 'Discounting Rights' (2018) 50 *International Law and Politics* 509, 511.

²⁹⁷ *Ibid* 516.

amendment. But this is likely not being enough to show significant changes in the behavior of the state.²⁹⁸

Third, it can come with high political costs to violate constitutional rights. Governments may be more reluctant to do so in order to prevent negative effects of how they are seen by their citizens.²⁹⁹ Fundamental rights cannot secure the implementation but rather protect from more severe violations. Already this is creating a value in itself.

Lastly, even if constitutional rights do not have a measurable impact on the implementation, they can have an important symbolic purpose. They express the national identities³⁰⁰ and manifest what the society is striving for.³⁰¹ Constitutions are ‘shaped by values, by certain visions of what is in the public good [...] by political ideas’.³⁰² Introducing a new fundamental right in the constitution shows the overarching importance and the strong commitment as usually the amendment of a constitution needs far-reaching majorities.

Overall, constitutional rights, therefore, have value in themselves and are of importance for a democratic society even though the impact might not be directly measurable.

6.4 What should the States do?

In the last section of this thesis, I intend to provide guidelines for what the states should do to improve and get closer to the threshold of reaching first the capability of literacy and therewith one aspect of access to justice.

6.4.1 Awareness of Responsibility

At first, the relevant institutions should be aware of the responsibility they have to enable the fulfillment of fundamental rights. All three branches within a democratic state have the obligation to ensure that children receive the promised education. Previously, the judiciary was notably the most active branch when it came to safeguarding the right to education. Through their judgments, the courts diligently worked towards achieving the threshold. The others should make an equal effort in this regard.

Given that the right to education is inherently a positive right in nature, its fulfillment necessitates proactive enactment rather than mere refrainment from something, as would be the case

²⁹⁸ Andrew Keane Woods, ‘Discounting Rights’ (2018) 50 *International Law and Politics* 509, 524.

²⁹⁹ Chilton and Versteeg (n 179) 8.

³⁰⁰ Geoffrey Brennan and Alan Hamlin, ‘Constitutions as Expressive Documents’ in Donald A Wittman and Barry R Weingast (eds), *The Oxford Handbook of Political Economy* (Oxford University Press 2008) 337 f.

³⁰¹ Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) 155.

³⁰² Tomkins (n 48) 5.

with a negative right.³⁰³ There are three obligations the state has to meet: the obligation to respect, protect and fulfill.³⁰⁴ In both here studied countries, the evolvement of the fundamental right to education started with the judiciary. However, the judiciary is ill-equipped to enforce these rights as it is the legislator, who determines the resources that are allocated in this area.³⁰⁵ Ultimately, the cooperation of all three branches is needed to finally enable the enactment of a right to education.

The state can either provide education itself or hand this over to the private sector. The advantage of a parallel system of state and private schools is that the competition between the two can lead to an improvement of the quality. However, it should not be ignored that the right to education contains a demand from the citizens against the state. Hence, this obligation also should in return be fulfilled by the state and not through private institutions making a business out of education. It is important to ensure that the state retains its legitimacy as a provider of public goods. Moreover, all considerations have been made here from a perspective of social justice and it is obvious that widespread private school systems can heavily increase social injustice. It is not only important that the capabilities are developed, but also that the way to achieve this is socially just and it is the responsibility of the state to work towards this.

6.4.2 Minimize Impediments and the Question of Paternalism

Next, one should try to understand why people sometimes prefer to not develop certain capabilities or even if the capability is there in theory to not make use of the functionings. For example, parents may decide not to send their children to school because they want them to work to contribute to the family income.³⁰⁶ Furthermore, it is easy to overlook the relevance of education if one has not received it oneself. At this point it would be necessary to closely examine the reasons that hinder people from making use of the existing rights and to put effort into minimizing these factors.

On the other hand, people might choose as an outcome of their freedom to not have literacy as a capability. This should not be confused with the decision not to read even though one can; rather, one could make a conscious decision not to learn it.

Undoubtedly, compulsory education has a paternalist element. By making school attendance compulsory, the state forces its citizens into the development of the capability to read and write

³⁰³ Ran Hirschl, ““Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order’ (2000) 22 *Human Rights Quarterly* 1060, 1071.

³⁰⁴ Chilton and Versteeg (n 179) 175.

³⁰⁵ Richard Goldstone, ‘Foreword’ in Varun Gauri and Daniel M Brinks (eds), *Courting social justice: judicial enforcement of social and economic rights in the developing world* (Cambridge University Press 2008) vii.

³⁰⁶ Interview with Santosh (n 274).

and with it, takes away the freedom to choose. This minimizes the scope of a value pluralism and excludes other conceptions of a good life. However, compulsory education concerns children who have due to their age only limited autonomous agency. Even then, it could be argued that this lack of agency is to be replaced by the parents, not the state. But as adults frequently make bad choices or take irrational decisions³⁰⁷ and considered the overarching value that education brings into the life of a person it seems justified to obligate education. It appeals to acknowledge that the procedural ground for the state interventions lies in the wrong conditions³⁰⁸ under which the choice of parents to not send their children to school was made. These considerations may justify compulsory primary education, but at the same time, it shows that limits exist which should be taken into account and acknowledged by the state.

6.4.3 Legal Reform

Even if one can question the level of effectiveness, it became clear that the legal framework has a value and therefore should be the subject of reform too. Moreover, it is also the declared goal of the CA to work towards precisely this.³⁰⁹

In Germany, it would be favorable if the Constitution would be amended to benefit from the symbolic power and to commit stronger to the right to demand the provision of education from the state. Through the public attention of an amendment process the awareness of the right would rise. Moreover, the BVerfG cannot then weaken or abolish the right by a simple change of jurisdiction, meaning that the level of protection would be increased. Further, legal reforms could be introduced in the secondary law to address the issues described in the implementation process. One very important aspect is of course sufficient funding but at the same time, only a lot of money cannot solve the problems either (as the *DigitalPakt Schule* shows). Quality assurance measures and proper monitoring are therefore equally important for the projects to be successful. This can be legally secured just as compliance with existing obligations under international treaties regarding educational standards should be backed up in secondary law.

In India, as there already is the fundamental right in the Constitution the scope of it could be broadened to include all children under 18 regardless of their age. Further, legal documents like the RTE Act or the National Policy on Education Report should be combined with funding regulations as this is not the case until today. The peculiarity in India is that the regulations are

³⁰⁷ Ingrid Robeyns, 'Capabilitarianism' (2016) 17 *Journal of Human Development and Capabilities* 397, 401.

³⁰⁸ Rutger Claassen, 'Selecting a List: The Capability Approach's Achilles Heel' in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2020) 199.

³⁰⁹ Carfield (n 56) 356.

good in their approaches even though not sufficient in the final result, but it mainly is the implementation that is falling behind. It is therefore necessary to legally prescribe effective implementation mechanisms. These may vary locally but ultimately it must be a higher authority that ensures compliance with the prescribed standards. Even though the focus nowadays in India lies on the improvement of the quality of education, the out-of-school children should not be forgotten in the policies. The aim has to be to counteract the mere maximization of the overall benefit as this would be utilitarian to which the CA explicitly provides an alternative.

6.4.4 Central Guidelines

In conclusion, the following objectives emerge as particularly central in both countries. The findings obtained should be taken into account by the legislators.

1. *Schools need to be attractive*

It is important to create a learning-friendly environment for all children regardless of their special needs or different backgrounds.

2. *Ensure governmental schools*

For an education system that not only enables literacy but also follows the requirements of social justice, the existence of state schools is central to the state fulfilling its educational duty.

3. *Prioritize quality*

Not only the availability of the education infrastructure needs to be taken care of but also the quality of the provided education system must be in focus to truly advance literacy.

4. *Legal literacy*

To ensure the best possible achievement of legal literacy it is crucial to ensure school attendance as long as possible. Therefore, mechanisms need to be found to keep children in school after primary education. To develop a legal understanding, it is not necessary to establish a special subject as the skills can be trained through usual reading and writing exercises just with a shifted focus. What matters is to make the children ‘more certain about the moments at which one is entitled to insist upon clarification, or upon being heard’.³¹⁰

5. *Ensure compliance with existing laws*

³¹⁰ White (n 280) 156.

Lastly, the states need to ensure the comprehensive implementation of all existing constitutional obligations and each and every standard set by secondary law to finally allow for the realization of rights.

For the applicability of these guidelines, it is important to note that the above-mentioned points cannot be applied in the same way. Although it would of course be desirable for implementation to take place without delay, it must be recognized that the time dimensions of the aspects within this guideline are different. Solely for *point 2*, an immediate application is possible as the school closure of governmental schools can be stopped. Further, the criteria for the closure decision can be raised. The creation of new state schools requires more time, as the necessary infrastructure such as buildings etc. must first be secured.

In order to achieve an improvement with regard to the other points, previous processes are needed to determine the necessary steps. This evaluation process must be done particularly with regard to local conditions and cannot be generalized on the here-taken level of abstraction. For example, it must first be examined how exactly schools can be made more attractive (*point 1*). For this purpose, existing knowledge, such as the need for a female-friendly environment, must of course be used, but this will not be sufficient to achieve a far-reaching increase. Improving quality (*point 3*) also requires an analysis of the weaknesses of the existing education system. Key aspects like the training of teachers should be considered but one should not stop there and take a look at the education system in general.

To increase legal literacy (*point 4*) the curricula set by the state must be adapted and the topic must be included in the school materials. This could be done within a shorter period of time. However, the more extensively one wants to integrate the topics, the more thoughtfulness is needed, whereby a holistic cross-curricular concept is most profitable. These changes are dependent on the existing curricula and it is once again important to pay specific attention to the local context.

Looking at *point 5*, the prerequisite is that there are state authorities that are equipped to comprehensively enforce the law, in terms of both workforce and enforcement competence. Thus, the executive power must be strengthened but at the same time there must be effective remedy for the individual in case of violation of rights. Setting up and empowering the authorities is also a time-consuming task before a change can be achieved.

Lastly it has to be said, that all of these points require sufficient funding through the government. Without the monetary means it will not be possible to improve the system. From this

results that both the path to specific findings on what exactly needs to be changed and the actual implementation must be financially secured.

7 Conclusion

Only if broad access to justice is ensured, law and the judiciary can unfold the potential they hold to contribute to a more just society and therewith promote peace on a national level. According to the CA, access to justice is a combined capability that consists of different components. One of them is the capability to read and write which is legally backed up through the right to education.

Both in India and Germany, the constitutional development of this right was initiated by the country's highest court. Today, India has a constitutional right to education for children between 6 - 14 years. Germany, on the other hand, only introduced the fundamental right in 2021 through a judgment. Thus, the constitutional protection is legally weaker but state law and the constitutional jurisprudence are establishing compulsory education for at least nine years.

When it comes to the implementation it gets clear that even though the law in India is more progressive, the reality regarding the provided education system is at times far from how the Constitution envisions it to be. The literacy rate cannot be characterized as satisfying. Germany has also failed to achieve full literacy and is facing difficulties in a number of areas. With a view to the CA, it has to be stated that both countries do not pass the threshold set by their own law.

Achieving the capability of literacy is one major aspect of legal literacy to ultimately promote access to justice. Neither educational law nor judgments alone are able to guarantee education. Nonetheless, they contribute to moving implementation in the right direction so that in the end people get at least closer to having access to justice. The here provided policy guidelines are intended to draw attention to the main factors which should receive increased attention in the future.

Through this thesis, it has been shown that law is just one of many instruments and does not have the power to evoke huge changes alone. Ultimately, this demonstrates that constitutions are a mirror of the society that created them. But if applied progressively by all three branches of the state, they can promote a more just society.

8 Bibliography

- Abusaleh Shariff and others, *Human Development in India: Challenges for a Society in Transition* (Oxford University Press 2010)
- Access to Justice Committee State Bar of Wisconsin, 'Bridging the Justice Gap: Wisconsin's Unmet Legal Needs' (2007)
- Alkire S, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford University Press 2002)
- 'Annual Report 2021-2022' (*Supreme Court of India*) <<https://main.sci.gov.in/publication>> accessed 19 April 2023
- Australian Law Reform Commission, 'Access to Justice' (Australian Law Reform Commission 2018) 133
- Badura P, *Staatsrecht: Systematische Erläuterungen des Grundgesetzes* (7th edn, CH Beck 2018)
- Baranzke H, 'Menschenwürde zwischen Pflicht und Recht: Zum ethischen Gehalt eines umstrittenen Begriffs' in Tessa Debus and others (eds), *Philosophie der Menschenwürde* (Wochenschau Verlag 2010)
- Baxi U, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107
- Bhatty K, 'Review of Elementary Education Policy in India: Has It Upheld the Constitutional Objective of Equality?' (2014) 49 *Economic and Political Weekly* 100
- , 'Regulation of Non-State Actors in School Education in India' (UNESCO 2022)
- Bhatty K, Saraf R and Gupta V, 'Out-of-School Children: Some Insights on What We Know and What We Do Not' (2017) 52 *Economic and Political Weekly* 69
- Bhuwania A, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016)
- Bornemann B, 'Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht?' (2007) 28 *Zeitschrift für Rechtssoziologie* 75
- Brennan G and Hamlin A, 'Constitutions as Expressive Documents' in Donald A Wittman and Barry R Weingast (eds), *The Oxford Handbook of Political Economy* (Oxford University Press 2008)
- Brinks DM and Gauri V, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics* 375
- Burch I, 'Realizing the Right to Education: An Evaluation of Education Policy in Six States of India' (CMC Senior Theses, Claremont McKenna College 2016)
- Cappelletti M and Garth B, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181
- Carfield M, 'Enhancing Poor People's Capabilities through the Rule of Law: Creating an Access to Justice Index' (2005) 83 *Washington University Law Quarterly* 339
- Carroll A, *Constitutional and Administrative Law* (5th edn, Pearson Education Limited 2009)
- Chakraborty A, 'On the Possibility of a Weighting System for Functionings' (1996) 31 *Indian Economic Review* 241

- Chandra T, 'Literacy in India: The Gender and Age Dimension' (2019) 322 *Observer Research Foundation*
- Chilton A and Versteeg M, 'Rights without Resources: The Impact of Constitutional Social Rights on Social Spending' (2017) 60 *The Journal of Law & Economics* 713
- , *How Constitutional Rights Matter* (Oxford University Press 2020)
- Christ J, 'Schulschließungen in der Pandemie und das Recht auf schulische Bildung' [2023] *Neue Zeitschrift für Verwaltungsrecht* 1
- Claassen R, 'Selecting a List: The Capability Approach's Achilles Heel' in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2020)
- Conrads D, 'Die Rolle des Supreme Court in der Verfassungsentwicklung Indiens' (2001) 32 *Internationales Asienforum* 225
- 'Constituent Assembly Debates on 9 December, 1948'
<<https://indiankanoon.org/doc/145944/>> accessed 1 June 2023
- Czempiel E-O, *Friedensstrategien: Eine systematische Darstellung außenpolitischer Theorien von Machiavelli bis Madariaga* (2nd edn, VS Verlag für Sozialwissenschaften 1998)
- Dann P, Riegner M and Bönnemann M (eds), 'The Southern Turn in Comparative Constitutional Law: An Introduction', *The Global South and Comparative Constitutional Law* (Oxford University Press 2020)
- de Morree P (ed), 'The German "Wehrhafte Demokratie"', *Rights and Wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016)
- De R, 'Constitutional Antecedents' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)
- Deodhar SY and others, 'An Evaluation of the Mid Day Meal Scheme' (2010) 22 *Journal of Indian School of Political Economy* 33
- 'Die Finanzen im DigitalPakt Schule' (*Bundesministerium für Bildung und Forschung - BMBF DigitalPakt Schule*) <<https://www.digitalpaktschule.de/de/die-finanzen-im-digitalpaktschule-1763.html>> accessed 3 July 2023
- Drossel J-M, '§ 90 I' in Christian Burkiczak, Franz-Wilhelm Dollinger and Frank Schorkopf (eds), *Bundesverfassungsgerichtsgesetz* (2nd edn, CF Müller 2022)
- Dungarwal M and Tripathi M, 'Awareness Assessment of Government and Non- Government School Teachers Regarding RTE Act' (2019) 5 *International Journal of Home Science* 494
- Edwards S and Garcia Marin A, 'Constitutional Rights and Education: An International Comparative Study' (National Bureau of Economic Research, September 2014)
- Farrow TCW, 'What Is Access to Justice' (2013) 51 *Osgoode Hall Law Journal* 957
- Fiedler W, 'Fortbildung der Verfassung durch das Bundesverfassungsgericht?' (1979) 34 *Juristenzeitung* 417
- Forster CM and Jivan V, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law* 1

- Frankenberg G, 'Comparing Constitutions: Ideas, Ideals, and Ideology—toward a Layered Narrative' (2006) 4 *International Journal of Constitutional Law* 439
- Geis-Thöne W, 'Lehrkräftebedarf und -angebot: bis 2035 steigende Engpässe zu erwarten: Szenariorechnungen zum INSM-Bildungsmonitor' (Institut der deutschen Wirtschaft 2022)
- Gelber K, 'Capabilities and the Law' in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021)
- 'General Comment No. 3: The Nature of States Parties' Obligations, Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23)' (United Nations Human Rights, Office of the High Commissioner 1990) <<https://www.refworld.org/pdfid/4538838e10.pdf>> accessed 9 July 2023
- 'General Comment No. 13: The Right to Education (Article 13), Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-First Session, E/C.12/1999/10, 8 December 1999' (United Nations Human Rights, Office of the High Commissioner 1999) <<https://www.ohchr.org/en/resources/educators/human-rights-education-training/d-general-comment-no-13-right-education-article-13-1999>> accessed 21 June 2023
- George T, 'Parental Awareness of Right to Education Act 2009' (Christ University 2014)
- 'Gericht und Verfassungsorgan' (*Bundesverfassungsgericht*) <https://www.bundesverfassungsgericht.de/DE/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html> accessed 9 May 2023
- Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003)
- Glendon MA, 'Rights in Twentieth-Century Constitutions' (1992) 59 *The University of Chicago Law Review* 519
- Goel S and Husain Z, 'Gender, Caste, and Education in India: A Cohort-Wise Study of Drop-out from Schools' (2018) 58 *Research in Social Stratification and Mobility* 54
- Goldstone R, 'Foreword' in Varun Gauri and Daniel M Brinks (eds), *Courting social justice: judicial enforcement of social and economic rights in the developing world* (Cambridge University Press 2008)
- Groff C, 'Language and Language-in-Education Planning in Multilingual India: A Minoritized Language Perspective' (2017) 16 *Language Policy* 135
- Grotlüschen A and others, 'Hauptergebnisse und Einordnung zur LEO Studie 2018 – Leben mit geringer Literalität' in Klaus Buddeberg and Anke Grotlüschen (eds), *LEO 2018: Leben mit geringer Literalität* (wbv Publikation 2020)
- Guckelberger A, 'Die Entscheidung des BVerfG zur Bundesnotbremse II und ihre Folgen' (2022) 70 *Recht der Jugend und des Bildungswesens* 382
- Habashi J, Wright L and Hathcoat JD, 'Patterns of Human Development Indicators Across Constitutional Analysis of Children's Rights to Protection, Provision, and Participation' (2012) 105 *Social Indicators Research* 63
- Habbig A-K and Robeyns I, 'Legal Capabilities' (2022) 23 *Journal of Human Development and Capabilities* 611

- Hazard GCJr, 'After Legal Aid Is Abolished' (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 375
- Helbig M and others, 'Mangelhafte Umsetzung des Rechts auf inklusive Bildung: Bundesländer verstoßen gegen Artikel 24 der UN-Behindertenrechtskonvention' (2021) 44 *WZBrief Bildung*
- Hirschl R, "'Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' (2000) 22 *Human Rights Quarterly* 1060
- , *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014)
- Höfling W, 'Art. 1' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, CH Beck 2021)
- 'Human Development Insights' (*United Nations Development Programme: Human Development Reports*) <<https://hdr.undp.org/data-center/country-insights>> accessed 2 May 2023
- Husain Z, 'Gender Disparities in Completing School Education in India: Explaining Geographical Variations' (2011) 28 *Journal of Population Research* 325
- 'If You Don't Understand, How Can You Learn?' (United Nations 2016) *Global Education Monitoring Report: Policy Paper 24* <<https://unesdoc.unesco.org/ark:/48223/pf0000243713>> accessed 17 August 2023
- Interview with Sebastian Bühring, 'Aktuelle Probleme des deutschen Schulsystems' (20 August 2023)
- Interview with Sidarth Santosh, 'Implementation of the Right to Education in India' (23 August 2023)
- Interview with Niranjanaradhya VP, 'Implementation of the Right to Education in India' (15 August 2023)
- 'Issues of Access to Justice: Part III' (Department of Justice and Constitutional Development, Republic of South Africa) <<https://www.justice.gov.za/legislation/constitution/history/REPORTS/TC5-2703B.PDF>> accessed 19 April 2023
- Jackson VC, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010)
- , 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)
- 'Jahresstatistik 2018' (*Bundesverfassungsgericht*) <https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/Statistik/statistik_2018.pdf?__blob=publicationFile&v=2> accessed 9 May 2023
- Jain A, *Constitutional Law of India (Part-II)* (2nd edn, Ascent Publications 2008)
- Jarass H, 'Art. 19' in Hans Jarass and Martin Kment (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (17th edn, CH Beck 2022)
- Jha J and others, 'Implementing the Right to Education Act 2009: The Real Challenges' (Centre for Budget and Policy Studies, Bangalore, India 2013)

- Jude N and others, 'Digitalisierung an Schulen – eine Bestandsaufnahme' [2020] DIPF, Leibniz-Institut für Bildungsforschung und Bildungsinformation
- Kann C, *Schulschließungen und Umbau von Schulstandorten: Steuerungsansätze bei sinkenden Schülerzahlen und die Rolle der Privatschulen* (Springer Fachmedien 2017)
- Kant I, *Zum ewigen Frieden* (Karl Vorländer ed, 2nd edn, Felix Meiner Verlag 1919)
- Kaushal M, 'Implementation of Right to Education in India: Issues and Concerns' (2012) 4 Journal of Management
- Khosla M, *The Indian Constitution: Oxford India Short Introductions* (15th edn, Oxford University Press 2019)
- Kingdon GG, 'The Private Schooling Phenomenon in India: A Review' (2020) 56 The Journal of Development Studies 1795
- Kingdon GG and Sipahimalani-Rao V, 'Para-Teachers in India: Status and Impact' (2010) 45 Economic and Political Weekly 59
- Klemm K, 'Inklusion in Deutschlands Schulen: Eine bildungsstatistische Momentaufnahme 2020/21' (Bertelsmann Stiftung 2022)
- Klöpffer A, '20.000 Schulplätze fehlen: Stuhl an Stuhl' *taz* (1 September 2022) <<https://taz.de/!5875261/>> accessed 5 July 2023
- Kovacevic M, 'Review of HDI Critiques and Potential Improvements. Human Development Research Paper, 2010/33' (2010) 33 Human Development Research Paper 1
- Kremer M and others, 'Teacher Absence in India: A Snapshot' [2005] Journal of the European Economic Association
- Kuklys W, *Amartya Sen's Capability Approach: Theoretical Insights and Empirical Applications* (Springer-Verlag 2005)
- Kumar R and Misra P, 'Right to Education: A Critical Evaluation of the Right of Children to Free and Compulsory Education Act, 2009 in the Light of 4A'S Framwork' (2016) April-June Bharati Law Review 180
- Lal K, 'Awareness of Right to Education Act Among Teachers' (2014) 5 American International Journal of Research in Humanities, Arts and Social Sciences 107
- Lang H, *Das Bildungsangebot für Behinderte* (Duncker & Humblot 2017)
- Lansnicker F and Schwirtzek T, 'Rechtsverhinderung durch überlange Verfahrensdauer' (2001) 28 Neue Juristische Wochenschrift 1969
- 'Lehrkräfteeinstellungsbedarf und -angebot in der Bundesrepublik Deutschland 2021 – 2035: Zusammengefasste Modellrechnungen der Länder' (Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 2022) 233
- 'List of Countries By Literacy Rate' (*WorldAtlas*, 12 August 2020) <<https://www.worldatlas.com/articles/the-highest-literacy-rates-in-the-world.html>> accessed 5 July 2023
- 'List of Supreme Court Judges' (*Department of Justice, India*, 1 April 2023) <<https://doj.gov.in/list-of-supreme-court-judges/>> accessed 19 April 2023
- 'Literacy Rate by Country 2023' (*World Population Review*) <<https://worldpopulationreview.com/country-rankings/literacy-rate-by-country>> accessed 5 July 2023

- ‘Literacy Rate in India 2023’ (*Find Easy*, 17 October 2021) <<https://www.findeasy.in/indian-states-by-literacy-rate/>> accessed 18 September 2023
- Mangla A, ‘Elite Strategies and Incremental Policy Change: The Expansion of Primary Education in India’ (2018) 31 *Governance* 381
- Mehta US, ‘Indian Constitutionalism: Crisis, Unity, and History’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)
- Möllers C, *Das Grundgesetz: Geschichte und Inhalt* (2nd edn, CH Beck 2009)
- , *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013)
- Morrow V and Singh R, ‘Corporal Punishment in Schools in Andhra Pradesh, India’ (2014) 123 *Young Lives: An International Study of Childhood Poverty*
- Mostafa T and Schwabe M, ‘Deutschland - Ländernotiz - Ergebnisse PISA 2018’ (OECD 2019)
- Murombo T, ‘Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?’ (2006) 6 *Law Environment and Development Journal* 165
- Nath D, ‘Literacy Rate in India 2022’ (2023) 5 *International Journal for Multidisciplinary Research* 1
- ‘National Education Policy 2020’ (Government of India, Ministry of Human Resource Development 2020)
- ‘National Policy on Education 2016: Report of the Committee for Evolution of the New Education Policy’ (Government of India, Ministry of Human Resource Development 2016)
- Nettesheim M, ‘Schule als Markt staatlicher Bildungsangebote: Anmerkungen zum Beschluss des BVerfG vom 19. November 2021 („Bundesnotbremse II – Schulschließungen“)’ (*Verfassungsblog*, 30 November 2021) <<https://verfassungsblog.de/schule-als-markt-staatlicher-bildungsangebote/>> accessed 17 May 2023
- Neuborne B, ‘The Supreme Court of India: Constitutional Court Profile’ (2003) 1 *International Journal of Constitutional Law* 467
- Nussbaum MC, ‘Capabilities and Human Rights’ (1997) 66 *Fordham Law Review* 273
- , *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000)
- , ‘Women’s Capabilities and Social Justice’ (2000) 1 *Journal of Human Development* 219
- , ‘Capabilities as Fundamental Entitlement: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33
- , ‘Beyond the Social Contract: Capabilities and Global Justice. an Olaf Palme Lecture, Delivered in Oxford on 19 June 2003’ (2004) 32 *Oxford Development Studies* 3
- , ‘Frontiers of Justice: Disability, Nationality, Species Membership’, *Frontiers of Justice* (Harvard University Press 2007)
- , ‘Constitutions and Capabilities: “Perception” Against Lofty Formalism’ (2007) 121 *Harvard Law Review* 1
- , *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press 2009)

- , *Creating Capabilities: The Human Development Approach* (Belknap Press of Harvard University Press 2011)
- ‘One Hundred Twenty Fifth Report on the Supreme Court – A Fresh Look’ (Law Commission of India 1988)
<<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080855-2.pdf>> accessed 19 April 2023
- Pandey JN, *Constitutional Law of India* (48th edn, Central Law Agency 2011)
- Pattanaik PK and Xu Y, ‘On Capability and Its Measurement’ in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021)
- Pepper SL, ‘Access to What’ (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 269
- Petry L and others, ‘Technologieauswahl im DigitalPakt: Wie werden Entscheidungen im Bildungssektor getroffen?’ (2022) 59 *HMD Praxis der Wirtschaftsinformatik* 912
- Piecha S, ‘Schulische Bildung: BVerfG kreiert neues Grundrecht’ (*Legal Tribune Online*, 1 December 2021) <<https://www.lto.de/recht/hintergruende/h/bundesnotbremse-schulschliessungen-wechselunterricht-recht-auf-bildung-schule-bverfg/>> accessed 18 May 2023
- Prasad A, ‘Right to Education: A Critical Analysis of the Indian Approach’ (The National University of Advanced Legal Studies 2021)
- Pratham, ‘Annual Status of Education Report (Rural) 2022’ (Pratham)
- ‘Quereinstieg in den Lehrerberuf’ (*Senatsverwaltung für Bildung, Jugend und Familie Berlin*, 1 June 2023)
<<https://www.berlin.de/sen/bildung/fachkraefte/einstellungen/lehrkraefte/quereinstieg/>> accessed 30 June 2023
- Quint PE, “‘The Most Extraordinarily Powerful Court of Law the World Has Ever Known’? Judicial Review in the United States and Germany” (2006) 65 *Maryland Law Review* 152
- Rath C, ‘Die öffentliche Wahrnehmung des Bundesverfassungsgerichts’ (*bpb.de*, 10 September 2021) <<https://www.bpb.de/shop/zeitschriften/apuz/herrschaft-des-rechts-2021/340007/die-oeffentliche-wahrnehmung-des-bundesverfassungsgerichts/>> accessed 10 May 2023
- ‘Reaching Equal Justice Report: An Invitation to Envision and Act’ (The Canadian Bar Association, Access to Justice Committee 2013)
<https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> accessed 18 April 2023
- ‘Rechtliche Grundlagen des Digitalpakts Schule’ (*Bundesministerium für Bildung und Forschung - BMBF DigitalPakt Schule*)
<<https://www.digitalpaktschule.de/de/rechtliche-grundlagen-des-digitalpakts-schule-1782.html>> accessed 30 June 2023
- Reshmi R and others, ‘Awareness about Right of Children to Free and Compulsory (RTE) Act 2009 among Elementary Teachers in Coimbatore District’ (2015) 9 *i-manager’s Journal on Educational Psychology* 27
- Rhode D and Wrase M, ‘Die Umsetzung des Digitalpakts Schule: Perspektiven der schulischen Praxis auf zentrale Steuerungsfragen und -herausforderungen’ <<https://www.uni->

- hildesheim.de/media/fb1/sozialpaedagogik/Forschung/Umsetzung_des_Digitalpakts_Schule/Projektbericht_DigitalPakt_final.pdf> accessed 3 July 2023
- Rhode DL, 'Access to Justice' (2001) 69 *Fordham Law Review* 1785
- , 'Whatever Happened to Access to Justice Symposium: Access to Justice: It's Not for Everyone' (2008) 42 *Loyola of Los Angeles Law Review* 869
- Richter D, Marx A and Zorn D, 'Lehrkräfte im Quereinstieg: sozial ungleich verteilt? Eine Analyse zum Lehrermangel an Berliner Grundschulen' (Bertelsmann Stiftung 2018)
- Ricken F, 'Krieg und Frieden in der griechischen Antike: Platon und Aristoteles' in Ines-Jacqueline Werkner and Klaus Ebeling (eds), *Handbuch Friedensethik* (Springer Fachmedien Wiesbaden 2017)
- Robbers G, 'Art.7' in Christian Starck (ed), *Kommentar zum Grundgesetz v. Mandoldt, Klein, Starck*, vol 1 (7th edn, Franz Vahlen GmbH 2010)
- Robeyns I, 'The Capability Approach: A Theoretical Survey' (2005) 6 *Journal of Human Development* 93
- , 'The Capability Approach in Practice' (2006) 14 *Journal of Political Philosophy* 351
- , 'Capabilitarianism' (2016) 17 *Journal of Human Development and Capabilities* 397
- , *Wellbeing, Freedom and Social Justice: The Capability Approach Re-Examined* (Open Book Publishers 2017)
- Robeyns I and Byskov MF, 'The Capability Approach' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Summer 2023, Metaphysics Research Lab, Stanford University 2023)
- Robinson N, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1
- , 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61 *American Journal of Comparative Law* 173
- Rux J, *Schulrecht* (6th edn, CH Beck 2018)
- Sadgopal A, 'Right to Education vs. Right to Education Act' (2010) 38 *Social Scientist* 17
- Sahai CS, 'Mid-Day Meal Scheme: Achievements and Challenges' (2014) 3 *International Journal of Humanities and Social Science Invention* 6
- Saito M, 'Amartya Sen's Capability Approach to Education: A Critical Exploration' (2003) 37 *Journal of Philosophy of Education* 17
- Salzgeber J and Brand S, 'Kosten steigen schneller als die Investitionen: Bedarfe für Schulen weiter hoch' (KfW Research Fokus Volkswirtschaft 2022) 401
- Sathe SP, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd edn, Oxford University Press 2003)
- Sato H, 'The Universality, Peculiarity, and Sustainability of Indian Public Interest Litigation Reconsidered' (2017) 100 *World Development* 59
- Schlitt A-L, 'Schule: Rund 4.000 geflüchtete Kinder warten in Deutschland auf Schulplatz' *Die Zeit* (Hamburg, 26 May 2023) <<https://www.zeit.de/gesellschaft/schule/2023-05/schule-gefluechtete-kinder-fehlende-plaetze-ukraine>> accessed 5 July 2023
- Schmidt-Aßmann, 'Art. 19 Abs. 4' in Dürig, Herzog and Scholz (eds), *Grundgesetz-Kommentar* (99th edn, 2022)

- Schöndorf-Haubold B, 'Rechtsbehelfe des Einzelnen bei den höchsten gerichtlichen Instanzen: eine Perspektive der Rechtsvergleichung, Deutschland' (EPRS, Wissenschaftlicher Dienst des Europäischen Parlaments 2017)
- Schrooten J-B, 'Art. 7' in Hans Hofmann and Hans-Günter Henneke (eds), *Schmidt-Bleibtreu Kommentar zum Grundgesetz* (15th edn, Carl Heymanns Verlag 2021)
- Schulz L, 'Funktionen des obiter dictum' (2018) 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 403
- Schulze-Fielitz H, 'Schattenseiten des Grundgesetzes' in Dreier Horst (ed), *Macht und Ohnmacht des Grundgesetzes* (Duncker & Humblot 2009)
- , 'Art.19 IV' in Horst Dreier (ed), *Grundgesetz Kommentar*, vol 1 (3rd edn, Mohr Siebeck 2013)
- Segatti M, 'A Capabilities Approach to Access to Justice: Unfulfilled Promises, and Promising Strategies in the US and in Europe' [2016] *Teoria politica* 335
- Sen A, 'Informational Bases of Alternative Welfare Approaches: Aggregation and Income Distribution' (1974) 3 *Journal of Public Economics* 387
- , 'Poor, Relatively Speaking' (1983) 35 *Oxford Economic Papers* 153
- , 'The Standard of Living' (The Tanner Lectures on Human Values, Clare Hall, Cambridge University, 11 March 1985)
- , *Inequality Reexamined* (Oxford University Press 1995)
- , *Development as Freedom* (Oxford University Press 1999)
- , 'Human Rights and Capabilities' (2005) 6 *Journal of Human Development* 151
- , 'Rights, Words, and Laws' *The New Republic* (23 October 2010)
- , 'Rights, Laws and Language' (2011) 31 *Oxford Journal of Legal Studies* 437
- Shivakumar S, *The Constitution of Development: Crafting Capabilities for Self-Governance* (Palgrave Macmillan 2005)
- Sripati V and Thiruvengadam A, 'India: Constitutional Amendment Making the Right to Education a Fundamental Right' (2004) 2 *International Journal of Constitutional Law* 148
- 'Statistische Veröffentlichungen der Kultusministerkonferenz: Vorausberechnung der Schüler- und Absolventenzahlen 2012 bis 2025' (Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 2013) 200
- Tarar IA and Rana AMK, 'Right to Education: Comparative Study of Constitutional Contours, Legislative Initiatives and Institutional Arrangements in India and Pakistan' (2020) 19 *Ilkogretim Online - Elementary Education Online* 3365
- Teschl M and Comim F, 'Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations' (2005) 63 *Review of Social Economy* 229
- 'The Right to Mother Tongue-Based Education in Tribal India: A Comparative Perspective' (Oxfam India 2023)
- Thiel H, 'Art. 7' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, CH Beck 2021)
- Thiruvengadam AK, *The Constitution of India: A Contextual Analysis* (Hart Publishing 2017)
- Tjarks E, *Zur Bedeutung der Landesgrundrechte: Materielle und prozessuale Probleme der Grundrechte in den deutschen Landesverfassungen* (Nomos 1999)

- Tomasevski K, 'Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25' (UN Commission on Human Rights 2000)
- Tomkins, *Public Law* (Oxford University Press 2003)
- Tushnet M, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *The Yale Law Journal* 1225
- 'Unified District Information System for Education Plus (UDISE+) 2020-21' (Government of India, Ministry of Education, Department of School Education and Literacy)
- van Laak C and Schröder A, 'Sanierungsstau an Schulen - Wenn der Putz von den Wänden bröckelt' (*Deutschlandfunk*, 25 December 2017) <<https://www.deutschlandfunk.de/sanierungsstau-an-schulen-wenn-der-putz-von-den-waenden-100.html>> accessed 4 July 2023
- Vanberg G, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 *Annual Review of Political Science* 167
- Vorländer H, *Die Verfassung: Idee und Geschichte* (3rd edn, CH Beck 2009)
- VP N, 'People's Constitutional Right to Education versus the Right of Children to Free and Compulsory Education Act 2009' [2010] *Exchanges*
- , 'Implementation of the Right of Children to Free and Compulsory Education Act 2009 in the State of Karnataka: An Empirical Study' (Center for Child and the Law, National Law School of India, Bengaluru 2017)
- Walker M, 'On Education and Capabilities Expansion' in Enrica Chiappero-Martinetti, Siddiqur Osmani and Mozaffar Qizilbash (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press 2021)
- Weinstein JB, 'The Poor's Right to Equal Access to the Courts Address' (1980) 13 *Connecticut Law Review* 651
- White JB, 'The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education' (1983) 54 *University of Colorado Law Review* 143
- Wohlfart O and Wagner I, "'DigitalPakt Schule 2019 bis 2024" – Analyse der strukturellen Digitalisierung des Bildungssystems in Deutschland' (2022) 4 *Zeitschrift für Schul- und Professionsentwicklung* 202
- Woods AK, 'Discounting Rights' (2018) 50 *International Law and Politics* 509
- Wrase M, 'Ein Beschluss mit weitreichenden Folgen: Das Recht auf schulische Bildung nach der Schulschließungs-Entscheidung des Bundesverfassungsgerichts' (*Verfassungsblog*, 5 December 2021) <<https://verfassungsblog.de/ein-beschluss-mit-weitreichenden-folgen/>> accessed 12 April 2023
- Yang T, *Die Appellentscheidungen des Bundesverfassungsgerichts* (Nomos 2002)
- Young KG, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113

9 CV Amely Zacharias

Berlin, Germany – amely.zacharias@web.de

Education

10/22-02/24 Master's Program in Peace and Security Studies, University of Hamburg, Germany

- Courses a.o.: Human Rights, Ethics of Peace, Reasons for War and Peace, Peacebuilding
- Sponsored by the Germany Scholarship
- Internship at the Institute for Theology and Peace (ITHF) Hamburg

2017-2022 Law Studies at Humboldt University Berlin, Germany

- Degree: first state examination in law (10,80 points)
- Main interest in constitutional and comparative law
- Internships in German law offices and courts
- Tutor at the Faculty of Law of Humboldt University

08-12/20 Law Studies at University of Helsinki, Finland

- Courses a.o.: Dispute Resolution, Law and Economics, Public International Law
- Meeting of the European schools of law through the exchange with students from all over Europe

02-04/20 Law Studies at Jindal Global University, India

- Intensive immersion and orientation in a different legal and social system
- Sponsored by the German Academic Exchange Service

Working Experience

11/22-06/23 Research assistant at Bird & Bird LLP, Public Procurement Department

01/19-09/20 Student assistant in the office of Andreas Geisel, Minister of the Interior and Member of the State Parliament of Berlin

02-04/17 Volunteer in the school project of the Basa Foundation Nepal

Languages

German - C2

English, French - C1

Spanish - B2

Hindi, Nepali - basic written and oral skills

10 Honor Statement

I pledge that this Master's Thesis, entitled *The Right to Education in Germany and India in the light of the Capability Approach* has not been submitted for academic credit in any other capacity and that this Master's Thesis has not yet been published.

I further pledge that I wrote this Master's Thesis myself, without help from others. I did not use any sources or aids other than those listed. I appropriately identified and acknowledged all words and ideas taken from other works.

Hamburg, 12.12.2023

(Signature)