



## Liability and responsibility in Education: Germany\*

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### A. Introduction

In German educational policy, a central problem is what legal responsibilities, duties and principles of liability exist. In the school environment, numerous different societal groups work together: teachers, students, parents and administrative staff.

Tensions between teachers and students, difficulties among the students themselves and differences between teachers on the one hand and parents on the other contain a great potential for conflict within society. Any forum in which various people encounter one another is one in which legal quarrels are in-built. Moreover, teachers have, in Germany's schools, an exposed and public position. They are responsible both for proper educational standards and for the bodily integrity of the pupils entrusted to their care.<sup>1</sup> They are to provide children and adolescents with the information they need in our information society and must also ensure that all parties happily co-exist at their school. This is admittedly a great burden, and teachers are not always able to bear it. If they cannot, legal liability and responsibility will ensue.

There is also the possibility of legal responsibility on the part of the school leadership and administration, which set down the general framework of instruction and thus carry a considerable degree of societal, but also legal responsibility. One must also come to terms with questions relating to the liability and responsibility of the pupils. Of no small importance are in addition constitutional and administrative-law issues dealing with important topics such as the suspension of the pupil from attendance or the marking of students' work. The relationship between pupils and a school is the subject of special legal rules, on which numerous rights and duties are founded – rights and duties which apply to teachers as well as to students.

I shall therefore touch on all three of the great divisions into which German law is traditionally divided: criminal law, civil law and public law. Owing to the width of the topics dealt with here, it is not possible to give more than an overview, which must be cursory and confined to state schools. The basic legal framework of German criminal, civil and public law can only be sketched in order to provide the basis for discussing the legal principles peculiarly applicable in education. The main emphasis is, as I mentioned at the start, the legal responsibility of all those who are directly or indirectly concerned with education.

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### B. Responsibility of each party

As the teacher is the central figure in public education, let me consider the teacher's responsibility first of all.

#### I. Responsibility of the teacher

Teachers can be legally responsible, in accordance with the three great legal divisions, both criminally and civilly. Moreover, there is a vast array of behavioural rules and duties which the public law requires of the teacher.

##### 1. Criminal law

I should like to place the criminal law in the foreground, as its classical task is to allocate responsibility and to punish. In addition, the criminal law is capable of translation into the civil law when compensation for tortious acts is sought.

In the area of criminal offences which can be committed only with *mens rea*, there are hardly any peculiarities applicable only to teachers. Teachers can be guilty of assaults or insulting behaviour committed against students if they clip pupils around the ears, insult them verbally or in any way treat them badly and inappropriately. Corporal punishment by teachers, which was still approved and carried out a few decades ago, no longer exists.<sup>2</sup> It is not in accordance with today's humanistic conceptions<sup>3</sup> which are supposed to be conveyed by schools themselves. Striking a student as punishment is the offence of assault under §223 of the Criminal Code. In fact, teachers can be subject to a higher than usual penalty under §340(1) of the Criminal Code, as corporal maltreatment of a pupil during class is in principle a crime committed in the course of official duties which is punishable by imprisonment for a minimum of three months and a maximum of five years.

Offences against sexual self-determination also can be committed:<sup>4</sup> the sexual abuse of persons entrusted to one's care is a crime under §174 of the Criminal Code with a maximum penalty of five years' imprisonment. If a teacher passes on confidential information to third persons without authorisation, up to one year's imprisonment or a fine can be imposed under §203(2) of the Criminal Code. Politically motivated crimes may also be relevant. Cases have occurred in which teachers have misused their privileged position in the classroom in order to disseminate their extreme views, and in particular neo-Nazi views.<sup>5</sup>

It is a criminal offence in Germany to deny that the persecution of Jews in the Third *Reich* took place – the so-called "Auschwitz lie". Denying the Holocaust can be punished

in Germany with up to five years' imprisonment for incitement of the populace under §130(3) of the Criminal Code. Whether this crime can be committed in the case of statements by a teacher to a class is however doubtful, as, in such a situation, there may be no dissemination to the public or in a public assembly. At all events, the dissemination of the "Auschwitz lie" at school functions to which not only pupils are invited will constitute the offence.

Although crimes committed intentionally are a great threat to public order, the most numerous class of offences is doubtless those which can be committed negligently. Negligent infliction of bodily injury under §229 of the Criminal Code as well as negligent manslaughter under §222 are the most practically significant crimes for everyday school life. These crimes involve a failure to keep to a standard of care which protects people – not least the pupils – from bodily injury or even death. Thus, there is the possibility of criminal liability for teachers who fail to supervise students adequately during school breaks, physical education classes or school excursions.

The teacher is *in loco parentis* and is thus criminally liable not only for his or her own acts, but also for failing to do something that was required in the circumstances to prevent harm occurring to the students in his or her care. Teachers are thus also liable for omissions. The case law demands that teachers must observe and supervise schoolchildren in accordance with the duty of care. If a teacher neglects this duty and a schoolchild suffers, the teacher may be sentenced to imprisonment for up to three years in the case of negligent infliction of bodily injury, or, in the case of negligent manslaughter, imprisonment for up to five years. In cases in which the teacher's guilt does not justify imprisonment, a fine can be imposed.

The Court of Appeals at Cologne has dealt with a typical case of non-observance of the duty of care.<sup>6</sup> The teacher of a junior secondary class was accused of negligent manslaughter. She had gone on a class excursion with her class to a lake designed for swimming which was a former gravel pit in which bathing and swimming were permitted at one's own risk. There was no lifeguard. During an earlier visit to the lake concerned she had therefore pointed out to her pupils that swimming in the lake was not without its dangers owing to the existence of cold and warm cross-currents. Non-swimmers should therefore confine themselves to knee-deep water. The 14-year-old girl who was the victim in the case was a non-swimmer. Unobserved by the teacher, she used an air mattress to sail out on to the lake. She lost her balance, fell into the water and went under immediately. The teacher, having been informed by a classmate, ran to the lake's edge as close as possible to the point where the accident had occurred. She attempted in vain to save the 14-year-old. The girl's body could only be recovered fifty minutes later by a diving group.

The conviction of the teacher for negligent manslaughter at Local Court and District Court level was confirmed by the Court of Appeals at Cologne.<sup>7</sup> The Court said in its reasons, 'Every teacher has the duty to protect the schoolchildren entrusted to him or her from risks to health during

school activities; he or she must keep dangers as minimal as the circumstances permit; he or she must take necessary precautionary measures, and, if the case requires and adequate precautions cannot be taken, he or she must avoid taking a risk altogether'.<sup>8</sup> For this reason, merely going to the lake concerned had been a breach of duty. Furthermore, the accused had herself not discharged her duty of supervision at the lake; because of the danger posed by the lake, the standard of care expected of her was particularly high.

At the same time, the standard of care required of teachers must not be over-extended. After all, it is hardly possible to supervise all students constantly, and even if it were possible it would not be a sensible use of resources.<sup>9</sup> Therefore, supervision is *in principle* sufficient if it so designed that the students have the feeling that they are under observation. Thus, teachers cannot be accused of wrongdoing if they do not observe every movement of a child and 'suspect danger in every movement'.<sup>10</sup> Teachers are allowed to assume that express prohibitions which have been explained to the students will be followed by them even if left unattended for a short time.

A particular difficulty with offences of negligence is that the standard of care depends on each individual situation. The boundary between adequate and inadequate discharge of a duty of care is thus fluid and can be difficult for teachers to observe.

## 2. Civil law

### a. Tortious liability (including proceedings against the state)

Similar considerations apply to the tortious liability of teachers. The offences mentioned – negligent infliction of bodily injury and negligent manslaughter – are also in principle applicable in tort law. There is thus also the possibility, on top of criminal proceedings, of damages in tort in favour of the schoolchild or the parents. Infliction of bodily injury and homicide are – generally speaking – also torts and thus give rise to claims for damages. The most important statutory basis for this is, first of all, §823(1) of the Civil Code, which permits claims in cases of intentional or negligent harm to life, the body or health. Secondly, §823(2) of the Civil Code is of relevance when a criminal offence is committed; it imports the offences of negligent manslaughter and negligent infliction of bodily harm into the civil law.

There are however certain peculiarities applicable to the tortious liability of teachers. The law relating to proceedings against the state by persons injured is set out in §839(2) of the Civil Code together with Article 34 of the Basic Law. I shall deal later with the peculiarities of the law relating to proceedings against the state. Let me first consider the principles of liability applicable under §839 of the Civil Code. This principle of liability for misfeasance in office essentially requires a civil servant to pay damages to a third party if the civil servant has intentionally or negligently failed to fulfil an official obligation owed by the civil servant to the third party. "Civil servant" for the purposes of misfeasance

in office includes all teachers in state schools, whether they have been permanently appointed or are merely employed temporarily at a particular school.<sup>11</sup> “Civil servant”, as the term is used in the law relating to proceedings against the state under §839(1) of the Civil Code and Article 34 of the Basic Law, can even include a schoolchild who has been asked by the teacher to help with supervision or is assisting in physical education classes.<sup>12</sup>

One of the duties owed by the teacher to the pupil is the protection of the legally recognised interests of the child such as life and health. In addition, duties of oversight and safety must – as in the criminal law – be discharged by the teacher; negligence is a tort under §839(1) of the Civil Code. Thus, steps and sport and play equipment must be secured against misuse, slippage and other risks of injury.<sup>13</sup> In the playground and in the school building, there must be proper supervision during breaks as the circumstances demand and, in particular, in areas in which injuries are particularly likely, such as near large glass walls and windows.<sup>14</sup>

Indeed, the duty to supervise exists not only in relation to the schoolchildren themselves, but also in relation to persons or property which might suffer damage as a result of the unsupervised behaviour of pupils.<sup>15</sup> In other words: schoolchildren must be supervised for their own protection and for that of others. The District Court of Aachen applied this principle in a case in which schoolchildren were throwing chestnuts on to cars as they drove past.<sup>16</sup>

Similar principles apply to school excursions and to school events. Here students must be supervised firstly for their own protection and in order to protect them from the danger of injury. Secondly, the duty to supervise exists in order to protect others from suffering damage by reason of students’ behaviour. Thus the Court of Appeals at Hamm had to deal with a case concerning the wrecking of a concert grand piano during the celebrations connected with the school’s twenty-fifth anniversary.<sup>17</sup> It stated that the duty to supervise applied only to the students of the teacher’s own school. There was no public-law or other legal duty in respect of the behaviour of other visitors, for example parents or former students.

It is doubtful whether, and, if so, to what extent, a duty to supervise arises when schoolchildren are travelling between the school property and other places at which school events are taking place. The Federal Supreme Court is inclined to reduce the standard of care in this situation.

In the case which reached the highest Court, a school student was on her way from a school church service to the school grounds proper and fell off her bicycle and under a lorry. There was no supervision or accompanying of the student during her return to the school grounds, which the Federal Supreme Court, however, did not consider improper: the use of bicycles by school students is so widespread that no blame can be attributed to teachers if they do not supervise a student’s journey from church to school.<sup>18</sup> The Federal Supreme Court said that the decisive factor was that parents generally permit children to use bicycles in traffic, and that therefore parents and their children, but not the school, had to bear the consequences.<sup>19</sup>

The District Court of Hamburg appears to have taken a different view and to impose strict requirements on teachers even outside the school grounds. The Judges in Hamburg said that teachers’ official duties had been infringed when they permitted a schoolchild to remain unsupervised on the way to a swimming class and he damaged someone else’s car.<sup>20</sup> This apparent contradiction between the Federal Supreme Court and the District Court of Hamburg can be resolved only if one takes into account the different interests that were to be protected by the supervision in each case: the Federal Supreme Court was concerned with the protection of the schoolchild herself, while the District Court of Hamburg was considering the protection of third parties, whose property was damaged by the behaviour of an unsupervised student. Whether the cases can be thus convincingly distinguished is nevertheless open to doubt.

As well as the duty to supervise, other public-law duties exist. A skiing trip in an area prone to avalanches must be preceded by a discussion of the precise itinerary of the planned trip with the school principal.<sup>21</sup> Furthermore, the duties of teachers include a duty not to permit a student to be absent from lessons without the consent of his or her guardians, that is, in most cases, of the parents. This duty is not fulfilled if a student leaves the school grounds with the permission of the responsible teacher but not of the parents.

The Court of Appeals for Schleswig was confronted by a case that was both difficult and unusual. The plaintiff was a dentist who sought compensation from the State, as vicariously liable defendant, for a portion of the ransom money which he had paid for his daughter, who had been abducted from the school grounds during school hours. Before the abduction, one of the perpetrators had rung the school secretary’s office, impersonated the father and stated that one of his employees would pick the child up in order to attend an important family event. The teachers innocently released the child from school. She was freed only after the payment of the ransom of DM 170,000.<sup>22</sup>

The Court of Appeals for Schleswig confirmed the basic principle that it was part of a teacher’s duties to allow a child to leave the school grounds only with parental permission. But there was no general duty in teachers, if parents rang up to seek a child’s release from school, to assure themselves of the genuineness of the request and of the identity of the person making it.<sup>23</sup> The reverse could be the case only if the child’s parents were well known because of their position or occupation to be at risk of attacks and abductions. As there was no reason to suspect this in the case at hand, the dentist’s claim for a portion of the ransom money was rejected.

Important, but at the same time rather uncertain, is the question of the extent to which teachers are required as part of their duties to correct written exercises properly. At University level it was decided recently that a student was entitled to damages because a Professor of Commerce had accidentally failed to read a page in the student’s final thesis and had furthermore made an arithmetical mistake in calculating the mark. The student had to repeat an examination as a result and was therefore unable to start a temporary job on

time. The District Court of Münster awarded him DM 8000 in damages for lost earnings.<sup>24</sup>

In extrapolating from this judgment and applying it to the secondary sector, caution is, in my view, required. It is certainly one of the duties of a teacher to mark class work, above all in the final years leading to University, in accordance with his or her best ability. If the teacher, in doing so, overlooks a page and thus fails to include it in the mark, this is a breach of the teacher's duties which exist precisely in the interests of the schoolchild.

However, a claim under §839 of the Civil Code also requires proof of concrete damage resulting from the breach of duty. Thus, the element of causation may not be present if, for example, the student would not have passed the test anyway.<sup>25</sup> Secondly, incompletely marked assignments will not normally cause concrete harm. The contrary may be true in the case of final-year assignments leading to University study or other final tests if the school student is, as a result, prevented from leaving school at the expected time and thus is unable to take up a job which was both to follow on *immediately* from school study and had already been promised to the student.

In every case, damage must be proved. It is not sufficient simply to assert that finishing one's secondary studies later than planned has resulted in the student's entering the workforce later than planned and thus – over the whole of the student's lifetime – in reduced earnings. There must be a certain temporal connexion between the end of school studies and the lost opportunity. In the case of occupations which require University qualifications, there are too many uncertainties to permit the conclusion that damage has been suffered – for example, it is uncertain whether the school leaver will be able to obtain a place at University at the desired time, whether his or her results at University will be sufficient for the desired occupation, and so on.

If a breach of official duty and causally related actual damage can be proved, §839 of the Civil Code is relevant. Compensation for actual damage suffered is available, together with non-material damages under §847 of the Civil Code<sup>26</sup> (for example, in serious cases of corporal punishment). Nevertheless, the District Court of Hanau has held that compensation for non-material loss is not available in cases of trivial and not very painful clips around the ears inflicted by a teacher who later apologises for the behaviour concerned, which was provoked by the student's own behaviour.<sup>27</sup>

If the facts permit a claim for damages for material or non-material loss against the teacher, the constitutional provision contained in Article 34 of the Basic Law is of importance. This provision states that the duty to compensate is transferred to the state or to the entity which employs the civil servant concerned. The claim which lies against the civil servant under §839 of the Civil Code is thus transferred to the state to the extent that the breach of official duties occurred during the course of carrying out the employee's duties.

The plaintiff must thus seek compensation from the federal or State government or from the entity employing

the civil servant; that is, as a rule, from the entity referred to as the "employing body".<sup>28</sup> Thus, in claims for damages which arise from a teacher's misconduct, the defendant is the particular State government which employs the teacher.

There is, however, no liability in the state if the teacher was acting not as part of his or her employment but purely privately. There are furthermore peculiar provisions applicable to claims arising out of accidents at school; here, there is no liability for breach of official duty or against the state.<sup>29</sup> Rather, the schoolchild should claim against the statutory accident insurance which I shall consider again later.

In other cases, the rule is that claims arising from breach of official duty lie against the state under Article 34 of the Basic Law. The advantage for the plaintiff is obvious: the State is normally able to pay, unlike the teacher him- or herself, who may have no means and be unable to pay for the damage which he or she has caused.

Nevertheless, the constitutional provision contained in Article 34 does not mean that, in the end result, the teacher concerned has no liability for the damage he or she has caused. In the first place, the liability for breach of official duties which lies against the state can most certainly be supplemented by a personal liability of the teacher.<sup>30</sup> Secondly, the entity which is required to compensate for damage may recover damages paid from the teacher. The second sentence of Article 34 of the Basic Law permits the state to seek compensation from its own civil servants when they commit acts requiring the payment of damages.<sup>31</sup> If, therefore, the teacher acts intentionally or negligently, the state is responsible externally but there is an internal liability of the teacher to the state for the damages paid by the latter.

#### *b. Contract law*

While the principles relating to breach of official duty and proceedings against the state which have just been sketched have a central role in public education, questions of contract law do not arise very often. The reason for this is that there is no contractual relationship between schoolchildren and state schools or teachers; rather, it is a public-law relationship, the details of which I shall consider below.

As there is, as a matter of principle, no contractual relationship, neither schoolchildren nor their parents can insist on the provision of instruction in Court proceedings. Nor can they claim damages either in the civil or in the administrative Courts if instruction is not provided or is sub-standard. Rights to be taught exist only in accordance with the timetable and according to the availability of personnel, expertise and property required to teach.<sup>32</sup> Therefore, there is no legal right to catch-up lessons if teaching could not be provided as planned. In this respect, state schools are clearly distinguishable from private schools, for in private schools schoolchildren and parents – depending on the precise details of the contract for education – are as a rule able to make contractual claims against the school and its teachers in accordance with the usual contractual rules relating to time, frustration and standard of performance.<sup>33</sup>

Contract law therefore intrudes into state schools only in specific areas of school life which are not, or not completely,

covered by the specific provisions of public law applicable to schools. This applies above all to the planning and carrying out of events such as school excursions, for example.

Both permanent and temporary teachers are in principle required to accompany school excursions as class teachers or as assistant teachers.<sup>34</sup> The question therefore arises whether it is unreasonable, in the light of this duty, to impose liability on teachers if students fail to pay for the costs of an excursion. And indeed the District Court of Wiesbaden has held that a teacher who orders railway tickets for a class excursion is not merely liable proportionately for his or her own ticket but for all tickets required by the school group.<sup>35</sup>

The appeal against this decision was correctly allowed. The Court of Appeals at Frankfurt was prepared to assume that, in buying tickets, the teacher represented the class for such purposes as filling in and signing the necessary forms.<sup>36</sup> The legal requirement for this was that the teacher should act in the name of the pupils in accordance with §164(1) of the Civil Code. It was sufficient if the circumstances showed that the teacher, in concluding contracts for a group journey, was not acting on his or her own behalf but on behalf of the students.

However, it was ‘obviously not the teacher’s intention to bind him- or herself contractually and, should the need arise, to be responsible [...] for all costs incurred during the school excursion’.<sup>37</sup> Thus the Court of Appeals came clearly to the conclusion that the teacher is responsible for the group but has no personal interest in providing the school excursion. As long as a contractual partner – whether it is a railway company or a youth hostel – is able to recognise in the circumstances that the teacher is acting on behalf of the class, contractual claims lie not against the teacher personally but against the schoolchildren or their guardians. Given that teachers are required to organise class excursions, a personal liability against the teacher would greatly exceed the scope of his or her employment.<sup>38</sup>

On the other hand, personal liability for travel and accommodation costs can exist in the teacher when he or she has acted in his or her own name and has thus become a party to the contract. This also applies if a teacher concludes a contract in the name of the school’s governing body or of the State without possessing the necessary authority as an agent. If this occurs, liability against the teacher can arise under §179(1) of the Civil Code, which permits, at the option of the plaintiff, damages or specific performance to be awarded in such cases.<sup>39</sup>

If a teacher is personally liable, it is however possible for there to be a right of recovery against the employer, that is the federal State. The teacher can only claim for costs here if the class excursion has been conducted in accordance with the relevant administrative guidelines.<sup>40</sup> The teacher must have obtained the prior consent of all guardians of the children concerned and have submitted a budget. If the teacher has booked a class excursion without complying with the relevant guidelines, that is, has acted on his or her own account, he or she is personally liable for the costs incurred.

### 3. Administrative law

Up to this point, teachers’ duties have been considered only in terms of the criminal and civil law. Independently of this, there are numerous additional and self-contained rules imposing duties on the teacher as an employee. These employees’ duties can coincide with criminal and civil provisions: thus, the duty of supervision mentioned earlier is also one of the duties imposed on the teacher in administrative law. There are other duties which have no equivalents in the criminal or civil law. These are rules of conduct which the teacher accepts as part of the employment relationship and which he or she owes *to the employer*.

If these duties are not fulfilled, disciplinary measures can be taken, including, in egregious cases, dismissal. Thus, for example, one teacher had his pay docked because he was absent from the classroom without a valid excuse for an entire day.<sup>41</sup> A teacher who was still in his probationary period as a civil servant was dismissed because, out of school hours, he was running a sex-film bar.<sup>42</sup> There can also be a duty to use a particular textbook which is prescribed in the school syllabus.<sup>43</sup>

A very important duty is that of political and religious neutrality.<sup>44</sup> The state is required to remain neutral in religious matters and not to force a particular religious belief on anyone. The Federal Constitutional Court has thus held constitutionally invalid a regulation in Bavaria which required a crucifix to be hanging on the walls of school classrooms.<sup>45</sup> The school is not allowed to undertake ‘missionary’ work in relation to the students. ‘Learning under the Cross’<sup>46</sup> is – held the Federal Constitutional Court – not something which can be required of atheists or adherents of other religions.

This enforced neutrality applies also to the teachers, who, in the final analysis, personify and represent the state. They are not allowed to misuse their position in order to disseminate their own political opinions or to proselytise for a religion. Religious or political “pressure” must not be placed on students; classrooms are not a platform for religious self-expression or political agitation by the teacher. Therefore, badges or clothes patches with political messages, such as party badges or nuclear-free slogans, are not allowed.<sup>47</sup>

A question currently causing great controversy is whether female Islamic teachers are permitted to wear their head-scarves in class.<sup>48</sup> The precise content of the duty of religious neutrality can depend not so much on societal or political value judgments as on constitutional ones. In this realm, the teacher’s freedom of religion and of religious expression, which includes the freedom not to be compelled to deny her faith in employment, collides with the school-child’s right to freedom of religion, which, in the classroom, demands neutrality and restraint on the part of teachers.

In the final analysis, a balancing of the competing interests is required. This balancing has had very different results in different Courts and regions.<sup>49</sup> A final decision by the highest Court is yet to be made. Until it is, the question of the extent of the duty of religious neutrality in individual cases will remain controversial.

The duties arising from employment which have just been mentioned are applicable in principle in the internal relationship between the teacher and the employer. It is therefore the employer's responsibility to deal with breaches of such duties. Schoolchildren and parents can enforce these duties only to the extent that they are duties which arise wholly or partly in their interests and thus provide the basis for claims against the state arising from a breach of official duty. At all events, parents and pupils can contact the superiors of a teacher with a complaint about his or her behaviour. There is no time limit or procedure specially applicable to such complaints to the authorities. Once the teacher's superiors are aware of a breach of duty, they can commence preliminary investigations and decide whether further measures are necessary, and, if so, which ones.

Legal commentators often neglect the possibility of a complaint to the authorities because it does not provide the pupil with any legally enforceable means of ending or correcting the offending behaviour of the teacher. But practice shows that a complaint to the authorities, if substantiated, is taken very seriously by them. The behaviour of the employee and the disciplinary consequences are very carefully considered. There are two main reasons for this: first, the administration can use the opportunity to conduct an internal audit. Secondly, the public pressure which can exist in many cases cannot be ignored. Experience shows that incorrect behaviour by teachers is certain to be of interest to the public or at least to the parents affected.

## II. Responsibility of the school leadership

What has been said about the duties of the teacher applies also, in essence, to the school leadership. Its role is of course generally confined to the creation of the administrative framework for instruction, for example by making up the timetable, but it has also a considerable shared responsibility towards pupils. Disciplinary measures can also be taken, as the circumstances require, against the school principal and his or her staff. Furthermore, breaches of duty are also possible which can lead to criminal responsibility for negligence and can justify an award of damages to children or their parents for breach of duty in combination with the principles relating to the liability of the state.

Breaches of duty are of course only possible if the school leadership is subject to duties which can influence the study of pupils. Inadequate supervision of students in the playground is in the first instance a breach of duty on the part of the supervising teacher. If, however, the school as a whole has failed completely or adequately to ensure that appropriate supervision is provided, this is a breach of duty on the part of the school leadership itself.<sup>50</sup>

Accordingly, breaches of official duty on the part of the school administration can occur, for example, in the placing and supervision of school bus stops. Thus the school administration is required to ensure that dangers are minimised and safety is maximised in the placement of bus stops.<sup>51</sup> On the other hand, there is no duty to supervise the mode of transport used by students when they are travelling from the school to a school event held outside the school grounds.<sup>52</sup>

As well as the question whether the school leadership has committed a breach of official duty which results in a right to damages in third parties, there are questions of internal liability to the administration. Thus, the school principal can be liable to compensate the employer (the State) and even the school's governing body (the local council) for breaches of his or her duty of care.<sup>53</sup>

## III. Responsibilities of the employer

The reverse also applies: the employer (the State) can be liable to compensate the school principal or a teacher if they suffer damage in the course of their employment. The liability of the employer is normally, however, not the result of a breach of an express legal right, but is a result of a breach of the duty of care which is expressed in particular statutory provisions.

If a teacher is a permanently employed civil servant, the Civil Servants' Emoluments Act is the exclusive<sup>54</sup> source of obligations in the case of an accident at work. §§30ff provide for worker's compensation in the case of an accident, which can include compensation for property damage or for the costs of medical treatment. In the case of teachers, it is specially provided that compensation for injury must be granted not only in the case of traffic accidents in the course of employment, but also if a student infects a teacher with a disease such as German measles or jaundice.

As well as worker's compensation, there are numerous special provisions such as the first sentence of §94 of the Hessian Civil Servants Act, which provides:

If items of clothing or other objects are damaged, destroyed or lost as a result of an external event which occurs suddenly and at an identifiable place and time, and which occurs during employment or as a result of it, an appropriate amount of compensation must be paid.

The problem with these and similar provisions in other States' statutes is that the payment of compensation depends on the *discretion* of the authorities and is thus not forthcoming in every case. In particular, grossly negligent behaviour on the part of the civil servant concerned can lead to a complete or partial denial of compensation.<sup>55</sup> This may appear at first blush to be unfair, but the reason may be found in the purpose which the law pursues by granting compensation to civil servants. It is not the aim of the law to compensate the civil servant for any damage suffered even if he or she is at fault.

Compensation should be granted, in whole or in part, above all in cases in which the civil servant, even though at fault, cannot be expected to carry some or all of the damage him- or herself. In the case of minor damage caused by the gross negligence of the civil servant, compensation is however usually denied. Compensation might, for example, be denied for a pair of glasses damaged during physical education classes if the teacher uses a normal pair of glasses which is not adapted for use during physical exercise (as some administrative guidelines require).<sup>56</sup> Many State statutes require that the damaged or destroyed object must be one which is *usually* required to carry out duties.<sup>57</sup>

Caution is also required in the case of teaching aids which the teacher owns and brings into the classroom. The teacher bears the risk that such aids may be lost or damaged to the extent that they are not *required* for teaching – even if they are useful for that purpose. A claim by a teacher whose video films were lost in class was therefore rejected.<sup>58</sup>

#### IV. Responsibility of pupils

Up to this point the legal responsibilities of teachers, the school leadership and employers (that is, the state and those branches of it responsible for education) have been considered. Let me however deal shortly with the recipients of instruction, that is, with the responsibility of school students. They are in principle legally liable for criminal offences and torts they commit in accordance with general rules of law. The criminal and civil provisions applicable to them allow for them to be liable, for example, for property damage or bodily injury under §§303 and 223 of the Criminal Code and for damages in tort under §§823ff of the Civil Code.

##### 1. Criminal law

It is necessary for a student who commits the *actus reus* of a criminal offence or who commits a tort to be subject to criminal or civil liability. Criminal liability requires the student to be *doli capax*, which, under §19 of the Criminal Code, is possible for those aged fourteen years and above. In other words: children who are younger than fourteen are conclusively presumed to be *doli incapax* and are thus incapable of committing criminal offences.

Offenders who are fourteen years or older are subject, under §10 of the Criminal Code, to the young offenders provisions and to the Youth Court Act. The first sentence of §3 of that Act nevertheless requires, for criminal responsibility, that the young person ‘at the time of the offence was mature enough, having regard to his or her moral and intellectual development, to recognise the wrongfulness of the act and to act accordingly’. Therefore, a school student above the age of fourteen can only be criminally liable if his or her personal intellectual capacity justifies the conclusion that he or she could recognise the consequences of his or her act.

Even then, school students who are criminally liable are not subjected by the young offenders provisions to a regime of deterrence and punishment as is usual in the criminal law. Rather, the aim of the law is, in the first instance, re-socialisation: the adolescent or young adult is to be reformed by means of the sanctions available with respect to young offenders.<sup>59</sup> For this reason, the maximum penalty is considerably reduced. Whereas the Criminal Code permits determinate penalties of up to fifteen years to be imposed on adults,<sup>60</sup> and, in the case of murder and similar capital crimes, permits life imprisonment, the young offenders provisions – even for homicide – have a maximum penalty of ten years.<sup>61</sup>

##### 2. Civil law

The aim of re-socialisation is not one that is pursued by the civil law, which deals exclusively with the question of whether, and to what extent, compensation must be paid for damage inflicted. §828 of the Civil Code has a special rule, however, which exempts minors from civil liability if they are not yet seven years old.

For minors who are older than seven years, the question is again the extent of their intellectual development and capabilities.<sup>62</sup> Their acts can be the basis of civil liability only if the minor, in committing the offending act, ‘had the insight required to recognise his or her responsibility’ (§828(2) (first sentence) of the Civil Code). Nevertheless, if civil liability cannot be attributed to a minor, it is still possible for there to be liability *ex aequo et bono* under §829 of the Civil Code when the person suffering damage cannot reasonably be expected in the circumstances to do without compensation.

##### 3. Administrative law

In addition to the criminal and civil liability of schoolchildren, their responsibilities within the school community must not be overlooked. In this area, too, a breach of the rules of behaviour can justify sanctions which have the purpose of re-socialisation. As an example, I should like to take §82 of the Hessian Schools Act. This statute distinguishes between pedagogical measures and disciplinary measures. Pedagogical measures are less far-reaching in effect and aim to assist in the development of the schoolchild as a member of the school or the wider social community. They include a discussion with the schoolchild, a reprimand, confiscation of property for limited periods, making up lost lessons (“detention”) and the imposition of tasks which are intended to indicate to the schoolchild the consequences of his or her behaviour.

On the other hand, the more drastic disciplinary measures include temporary suspension from school or exclusion from particular school events such as class excursions, moving the student to another class, expulsion from a particular school or transfer from one school to another. As disciplinary measures have an effect on the pupil which is not confined to the school itself, but can also have a considerable effect on his or her free time and private sphere, such measures can be taken only if the teacher and school leadership comply with a number of regulations.<sup>63</sup>

Disciplinary measures are, as a rule, only permissible if they are necessary to protect people or property or if schoolchildren have infringed the law, an administrative instruction or the school rules at school, and if pedagogical measures have proved fruitless. Certain disciplinary measures can be taken only if there is a significant disturbance in the classroom or if the safety of other persons is endangered. No measure may be imposed arbitrarily. Corporal punishment, as I mentioned at the start, is prohibited and, if carried out, can constitute a criminal offence.

### C. Insurance

Following on from these educational measures and the discussion of breach of duty, I should like to mention another area of great relevance in practice. It is the extent to which schoolchildren and teachers enjoy the protection of insurance.

§2(1)(viii)(b) of Book VII of the Social Code<sup>64</sup> provides that students enjoy statutory insurance in the case of accidents causing *bodily injury* which occur on the way to or from school, on school property or during other school events such as school outings or special academic coaching.<sup>65</sup> The insurance under the Social Code applies only if an accident occurs which has a direct relationship to the functioning of the school. Whether this condition is satisfied is to be judged in accordance with the principles applicable in worker's compensation, which must be 'applied *mutatis mutandis*' to schools.<sup>66</sup>

A peculiarity of the statutory accident insurance is the exemption from liability of those who work in the institution concerned. The principle applicable is that such people are not liable if they cause damage to another insured person or to another employee in the course of their employment and this did not occur *deliberately*.<sup>67</sup> In such cases, the statutory accident insurance is liable and the entity responsible for statutory social insurance must pay compensation for the accident.

This exemption from liability is in principle also applicable in schools. Thus the following are exempt:<sup>68</sup> schoolchildren as regards their liability to other schoolchildren, schoolchildren to teachers, teachers to schoolchildren, and also schoolchildren to people who are temporarily part of the school organisation. The reason for this statutory exemption is the preservation of harmony within the school, which would not be possible if members of the school community were required to sue each other after accidents or to conduct other forms of legal proceedings. The law always requires there to be a school activity in the course of which the injury occurred.

Statutory insurance covers, as I have already mentioned, only bodily injury. *Property damage* inflicted by schoolchildren is thus not covered; rather, the school's governing body (the local council) must pay for it. Accordingly, §150(1) of the Hessian Schools Act provides that the governing body must insure against the risk of property damage which pupils might inflict in the course of school activities, unless it can ensure that insurance or equivalent protection is available in some other form. In practice, compensation for property damage is provided by means of the equivalent protection offered by the "local authorities' damage compensation scheme".

Other provisions are applicable to teachers who, in the course of their employment, have suffered an accident or other damage. Here, the Civil Servants' Emoluments Act and the Civil Servants Act provide, as already mentioned, for the possibility of compensation. Compensation is provided under these statutes by the relevant federal State as employer, which is able to ensure against this risk. Experience shows, however, that such "re-insurance" is not

always economically sensible. The federal State of Lower Saxony has chosen not to insure itself and instead pays compensation out of its State budget, as this is cheaper than paying insurance premiums.

### D. Constitutional aspects

The numerous special legal requirements which must be observed in secondary education make the special status of education clear. This is also shown by the constitutional provisions applicable, for the acceptance of a pupil at a state school brings a public-law educational relationship into existence.<sup>69</sup> This relationship belongs to the category of public-law special status relationships – formerly also called special power relationships – to which the relationship between a civil servant and the state and between prison inmates and the state also belong. This underscores the special aspect of state sovereignty which exists in the relationship between the school and the pupil.

Schoolchildren are subject to a much greater degree than other citizens to the exercise of state power, as is shown by the disciplinary measures mentioned earlier which the school can impose on a pupil. It has admittedly now been recognised that the basic rights protected by the Constitution are applicable in the special legal relationship between the school and the pupil.<sup>70</sup> Nevertheless, the options available to the state for limiting those rights in special power relationships are considerably increased.

It is a matter of discussion whether state action taken against prisoners, civil servants and schoolchildren is constitutionally reviewable at all. In this respect, the distinction suggested by Ule<sup>71</sup> has been accepted. State action taken against the "subject" solely in the area of "subjection", that is to say solely in the "operational area", cannot infringe the person's basic rights because it does not affect the person as a natural person. If, however, the state action also has an effect on the private life of the person concerned – if, that is, it has an effect on him or her as a legally recognised bearer of personal rights as against the state –, it is possible for there to be an infringement of basic rights by the state, in which case the person affected may sue in the administrative Courts.

The theoretical justification for, and extent and effects of, special status relationships are an area in which the law is very much in flux. It is however recognised that state action taken within the area of employment, which is in fact within the "operational area", can nevertheless be so drastic that it also affects the person concerned as a bearer of personal rights and is thus capable of triggering the full extent of legal protection. In particular, this conclusion may be reached if disciplinary measures have a negative effect on the private life of the person who is subject to them.

In secondary education, this applies particularly to the more far-reaching disciplinary measures such as expulsion from school or enforced change of schools. It is obvious that these sanctions can cause difficulties for a pupil that are much more than simply internal to school life. Such disciplinary measures are therefore justifiable. This does not apply to the timetable, which is not justifiable and there-



fore cannot be challenged by pupils or teachers as long as the hours of instruction remain within the usual and reasonable parameters.<sup>72</sup> In the case of this and similar individual decisions of lesser weight, careful attention must be paid to the question whether the decision has caused any sort of concrete damage at all.<sup>73</sup>

Such concrete damage will not exist in the case of individual decisions without any significant effect on the progress of a pupil. If the marking of a test is concerned, and the mark has considerable influence on the student's school-leaving results or is to be considered administratively justifiable for other reasons, it is possible to challenge the mark.

This problem has become particularly widespread in the case of reviews of final-year work which affects the school leaver's results directly and substantially. At all events, the area of discretion left to the teacher in marking makes it impossible to review a mark with any degree of exactitude. Only the technical content of the subject can be the subject of administrative review:<sup>74</sup> whether a chemical formula has been correctly reproduced can be checked and determined to be right or wrong. Incorrect marking by a teacher can, to this extent, be challenged. In the case of tests which do not have a simple, right-or-wrong answer, the rule is that tenable views must not be marked as wrong.<sup>75</sup>

If a Court holds that a teacher has incorrectly marked a piece of work, it cannot, of course, substitute its own mark, because marking is part of the pedagogue's area of personal responsibility. There is an element of discretion in setting the precise mark<sup>76</sup> which may not be denied to the marker. An incorrectly marked piece of work must, in the first instance, be re-marked. The marker's value judgment – and that is what a mark is, in the final analysis – is not, as a rule, subject to control.

The control exercised by the administrative Courts is restricted to the procedures applicable to marking, the absence of irrelevant considerations<sup>77</sup> and whether the marker has used the correct factual basis for marking.<sup>78</sup> As well as the technical details of the subject concerned, it is also possible, within limits, to examine the criteria used in awarding marks which are the basis for a particular mark. If a dictation test is completely correct but receives a "fail" mark, this shows that the teacher has erred completely in setting the criteria used for marking. In such a case, the work must be re-marked, a task which the Court itself cannot carry out.

## E. Conclusion

The consideration of the various problematic areas of law has shown that German educational law contains a large number of specific rules dealing with questions of criminal, civil, social, constitutional and administrative law. In most areas in which legal conflicts can arise in everyday school life, the law provides sufficient protection. This applies both to claims for damages arising from breaches of official duty and involving proceedings against the state, which are within the province of the ordinary Courts,<sup>79</sup> and to claims arising

from the statutory accident insurance which are heard before the social Courts.<sup>80</sup>

The administrative Courts are often faced with disputes arising from the employment of teachers or dealing with marks. Only in exceptional cases can the Courts not deal with complaints of this sort, in whole or in part, as is the case in relation to the highly uncertain justifiability of sovereign acts in educational relationships discussed above.

There are limits to the extent of legal rules and to the degree to which they can be enforced by the Courts. But where there is a legal no-man's-land, it is especially important for society and schools themselves to deal with problems and difficulties. This is especially apparent in relation to the cancellation of classes, which in Germany has become a considerable problem. Parents and students have an educational and an ethical but not a legal claim to the provision of appropriate instruction. Decisions about the quantity and quality of education are thus taken not in Courtrooms, but in political fora.

That is, in my view, correct, because the democratic debate can truly develop to its full potential only in that way. How much a society thinks the education of its young people is worth can and must be decided by the sovereign people, influencing and controlling the debate through political parties and political groupings. Thus the cancellation of classes has become an important political question and has become an issue in election campaigns.

New solutions must be found. No-one can rely any more exclusively on the state, which often can only distribute scarcity. What would be the point of a legal right to appropriate instruction if, in fact, such instruction cannot be given owing to a lack of staff or of money? Rather, all parties involved must show more personal initiative and commitment. In this way, the legal dimension is enhanced by another dimension: the moral and political responsibility to ensure that a proper level of education is provided.

## Notes

1. See also §86(2) (first sentence) of the Hessian Schools Act.
2. See, for example, §82(3) of the Hessian Schools Act: 'Corporal punishment and other degrading measures are prohibited'.
3. §2(1) (first sentence) of the Hessian Schools Act.
4. See also §§176ff of the Criminal Code (sexual interference with children and the related more detailed offences), §177 of the Criminal Code (sexual duress and rape) and §182 of the Criminal Code (sexual abuse of young persons).
5. See also Batts, NJW 1992, 1208 (1209).
6. NJW 1986, 1947.
7. NJW 1986, 1947 (1948).
8. *Ibid.*, referring to Federal Supreme Court, LM §839 (Fd) BGB Nr. 6.
9. Court of Appeals at Cologne, NJW 1986, 1947 (1948) (also confirming the following statements in the text).
10. *Ibid.*, referring to Federal Supreme Court, VersR 1957, 612 (614).
11. This wide definition of "civil servant" applies only under Article 34 of the Basic Law.
12. Palandt/Thomas, BGB (60th edn. 2001), §839 BGB, para. 29.
13. See Federal Supreme Court, NJW 1980, 1745; *ibid.*, VersR 1957, 201 (202).
14. Federal Supreme Court, LM §839 (Fd) BGB Nr. 12a; Court of Appeals at Oldenburg, VersR 1968, 655 (656).
15. District Court of Aachen, NJW 1992, 1051.

16. District Court of Aachen, NJW 1992, 1051.
17. NJW 1994, 3236.
18. BGHZ 44, 103 (106).
19. BGHZ 44, 103 (105).
20. NJW 1992, 377.
21. See Court of Appeals at Munich, NJW-RR 1987, 370 (371).
22. NJW 1990, 913f.
23. NJW 1990, 913 (914).
24. *Süddeutsche Zeitung* of 7 November 2000, p. V2/24.
25. Federal Supreme Court, NJW 1983, 2241.
26. See in general BGHZ 12, 278.
27. NJW 1991, 2028.
28. BGHZ 99, 326 (330).
29. Palandt/Thomas, *BGB* (60th edn., 2001), §839 BGB, para. 109.
30. *Studienkommentar BGB/Medicus* (2nd edn., 1979), §839 BGB, note 4.
31. See Bavarian State Supreme Court, VersR 1984, 990; §78 of the Federal Civil Servants Act; §91 of the Hessian Civil Servants Act.
32. This is expressly provided by §69(2) (first sentence) of the Hessian Schools Act.
33. Gilles/Heinbuch/Gounalakis, *Handbuch des Unterrichtsrechts* (1988) para. 294.
34. Federal Labour Court, NJW 1986, 213.
35. NJW 1985, 1905.
36. NJW 1986, 1941 (1942).
37. NJW 1986, 1941 (1942); Local Court of Essen, NJW-RR 1993, 1401.
38. Local Court of Essen, NJW-RR 1993, 1401.
39. See Administrative Appeals Court at Kassel, NJW 1990, 202.
40. Administrative Appeals Court at Kassel, NJW 1990, 202 (also confirming the following statements in the text).
41. Lower Saxon Disciplinary Court, ZBR 1995, 87.
42. Administrative Appeals Court at Kassel, NVwZ-RR 1991, 100.
43. See Federal Constitutional Court, NVwZ 1994, 582 (583); Administrative Appeals Court at Lüneburg, RdJB 1994, 147.
44. See, in relation to teachers, Wagner, *Beamtenrecht* (6th edn., 1999), para. 279.
45. NJW 1995, 2477 – Crucifix case.
46. NJW 1995, 2477 (2488) – Crucifix case.
47. Federal Administrative Court, NJW 1990, 2265.
48. See Alan/Steuten, ZRP 1999, 209; Zuck, NJW 1999, 2948.
49. Compare the Administrative Court of Lüneburg's judgment of 16 October 2000 – 1 A 98/00 with that of the Administrative Court of Stuttgart, NVwZ 2000, 959.
50. See Holfelder/Bosse, *Sächsisches SchulG* (1991), Sonderteil Lehrdienstrecht, note 4.6.4, pp. 162f.
51. Federal Supreme Court, NJW 1982, 37.
52. BGHZ 44, 103; see also above, BI2a.
53. Burmeister, PersV 1997, 481 (483ff, 486).
54. See §46(1) (first sentence) of the Civil Servants' Emoluments Act.
55. As is expressly provided by §96(2) of the Lower Saxon Civil Service Act.
56. See, for example, the ruling of the Lower Saxon Minister of Education of 18 December 1973.
57. See, for example, §96 of the Lower Saxon Civil Service Act.
58. Court of Appeals at Cologne, NVwZ 1994, 618.
59. See §§9ff, 18(2) of the Youth Court Act.
60. §38(2).
61. §18(1) (second sentence) of the Youth Court Act.
62. Federal Supreme Court, LM §276 (Be) BGB Nr. 2.
63. See, in particular, §82(4) and (5) of the Hessian Schools Act.
64. Social Code – Book VII: Statutory Insurance (7 August 1996), published in [1996] 1 *Federal Gazette* 1254.
65. Federal Social Court, NJW 1992, 1525.
66. BGHZ 67, 279 (282); Federal Supreme Court, NJW 1982, 37 (38).
67. §105(1) of the Social Code, Book VII.
68. See Waltermann, NJW 1997, 3401 (3403).
69. See, for example, §69(1) of the Hessian Schools Act.
70. The basic principle is set out in BVerfGE 33, 1 (prison inmates).
71. VVDStRL 15, 133 (151f).
72. Schwerdtfeger, *Öffentliches Recht in der Fallbearbeitung* (10th edn., 1997), para. 212.
73. Maunz/Dürig/Schmidt-Aßmann, *GG* (36th service, 1999), Article 19(4) GG, para. 88.
74. BVerfGE 84, 34 (55); BVerfGE 84, 59 (79).
75. Federal Administrative Court, NVwZ 1993, 686 (687).
76. BVerwGE 99, 74 (77).
77. BVerfGE 84, 34 (53f).
78. BVerwGE 70, 143 (146f).
79. Article 34 (third sentence) of the Basic Law; §40(2) (second sentence) of the Ordinance on Administrative Courts.
80. §51(1) of the Social Courts Act.