

School attendance as a civic duty v. home education as a human right

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Abstract

The article presents the legal situation of home education in Germany as a multi-level problem touching upon German constitutional law, State (Länder) constitutional law as well as administrative law, and the liberties of the European Convention of Human Rights. Whereas the parents' right to care for their children is explicitly granted by German Basic Law, the state's mandate to educate is seen by the courts as a conflicting principle that usually prevails and justifies compulsory schooling. Exceptions are rarely accepted. The article argues that this mainstream interpretation of the law is unconvincing and not in line with legal reasoning in German constitutional law in general.

Keywords: Home education, compulsory schooling, Basic Law, European Convention of Human Rights, integration

Starting Point

Time and again, the media in Germany and, indeed, elsewhere report on German families who seek judicial protection from school authorities enforcing compulsory schooling. Occasionally, they also give accounts of those who leave the country after long battles with authorities (and courts) - particularly if the journey ends with political asylum as in the case of the Romeike family who now lives (and home-schools) in Morristown/Tennessee (Robertson, 2010). According to German public opinion, home education has long been seen as associated to fundamentalist Evangelicals who wish to shelter their children from an impure environment and in exchange accept state sanctions imposed for the breach of compulsory schooling. This cliché concerns both the facts and the law. In search of a more detailed and differentiated picture, this article tries to outline the factual situation in

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Germany as well as the legal framework and proposes a modified judicial and statutory approach.

The facts

Lack of statistics

It is unclear how many children in Germany are taught at home (or, indeed, not taught at all). This lack of statistics might be due to the fact that home education is almost unanimously regarded as illegal—so that, for different reasons, both school authorities and home-educating parents may not be interested in disclosure. Numbers range from a few hundred to thousands of children.¹ A majority of families seem to have a Christian—mostly Protestant—background; cases of Jewish or Muslim families have not been heard of;² there are, however, a number of parents without religious motives who sense that their children lack sufficient assistance at school, or simply prefer teaching them at home. From a sociological point of view, two main types of homeschoolers in Germany have been identified: the “pious” and the “alternative” (i.e. ecologically-minded).³

Exemplary cases

This somewhat anaemic summary might be illustrated by two prominent cases of home-schooling families in Germany.

Konrad family. Mrs. Konrad (of Swiss nationality) and Mr. Konrad (a Swiss and German national) living in the southwest of Germany—close to Freiburg—decided to educate their two children at home since education at school contradicted their beliefs regarding sex education, violence, and the appearance of witches and dwarfs in lessons. Instead, they used the materials of the Christian “Philadelphia Schule”⁴ for domestic education. Their application for exemption from compulsory schooling was rejected by the local Education Office and, subsequently, by the Upper Education Office. A lawsuit brought to the Freiburg Administrative Court by the Konrad family was unsuccessful, as was the appeal to the Upper Administrative Court⁵ and, later on, to the Federal Administrative Court.⁶ A constitutional complaint was dismissed by the Federal Constitutional court.⁷

¹ Cf. Spiegler (2008), p. 264; Edel (2007), p. 25, mentions the number of 500 families in Germany.

² Cf. Spiegler (2008), p. 76: almost non-existent in Germany.

³ Obviously, the list is not exhaustive. There are also, for example, ambitious parents wishing a more stringent and efficient education for their children; as well as parents who prefer “unschooling”.

⁴ An association established by parents to provide teaching materials (not approved as substitute for school attendance), cf. <http://www.philadelphia-schule.de/index.html>.

⁵ Cf. Verwaltungsgerichtshof Baden-Württemberg (VGH Mannheim), Judgment of 18.6.2002, 9 S 2441/01, reported in: *Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungsreport (NVwZ-RR)* 2003, p. 561 et seq.

⁶ Cf. Bundesverwaltungsgericht (BVerwG), Decision of 7.1.2003, 6 B 66/02.

⁷ Bundesverfassungsgericht (BVerfG), 2. Chamber of 1. Senate, Decision of 29.4.2003, 1 BvR 436/03, reported in: BVerfGK, vol. 1, p. 141 et seq. = *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2003, p. 1113 et seq. = *Deutsches Verwaltungsblatt (DVBl.)* 2003, p. 999 et seq.

The Konrad family then invoked the European Court of Human Rights whose Fifth Section rejected the application.⁸

Neubronner family. The Neubronner case might be viewed as the northern German counterpart of the Konrad case. Mrs. and Mr. Neubronner, living in Bremen, found that their two sons preferred to learn (and indeed learned more efficiently) at home and suffered from psychosomatic disorders after attending school. Their application to grant leave was rejected by the authorities on the grounds that school attendance not only served cognitive but also social competences. The family's reply that the boys did have contact with other children in, for example, a choir, an orchestra, a soccer club etc., was held to be irrelevant. The proceedings brought before the Bremen Administrative Court by the Neubronner family and later on before the Bremen Upper Administrative Court confirmed the school authority's position;⁹ the appeal to the Federal Administrative Court was unsuccessful.¹⁰ Subsequently, the family moved to France where home education—as in almost all European countries—is allowed.

The Law

While a glance at the constitutional and statutory regulations does not render it unambiguous, the case law seems to be clear: Home education is illegal in Germany. No different result is produced by the application of the European Convention of Human Rights. However, a re-lecture of the law appears to be necessary.

The German federal and Länder law

Fundamental rights protecting pluralism in society. Obviously, Germany is a pluralistic society, and its legal system is designed to safeguard this pluralism. As one of the lessons of the Nazi tyranny, the founding fathers of the German Constitution ("Grundgesetz", or Basic Law) after World War II put the fundamental rights and freedoms at the very beginning of the constitution. Among those guarantees Art. 6 § 2 address the parent-children relationship:

"The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty."¹¹

This so-called "parents' right" is not limited to the family home but extends to school matters, as is clear, *inter alia*, from Art. 7 § 2:

"Parents and guardians shall have the right to decide whether children should receive religious instruction."

⁸ Decision of 11.9.2006, 35504/03, accessible via <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

⁹ Oberverwaltungsgericht der Freien Hansestadt Bremen (OVG Bremen), Decision of 3.2.2009, 1 A 21/07, reported in: *NordÖR* 2009, p. 158 et seq.

¹⁰ Bundesverwaltungsgericht (BVerwG), Decision of 15.10.2009, 6 B 27/09.

¹¹ Translations of the Basic Law: Christian Tomuschat/David P. Currie, accessible via Centre for German Legal Information, <http://www.cgerli.org/index.php?id=61> (31.5.2010).

It applies to federal as well as State (*Länder*) legislation, administration and adjudication¹² and opens the door, for example, to the participation of parents in schools, thereby granting a right to influence the education of their children at school. It is worth noting that fundamental rights such as the parents' right are by no means mere affirmations but can be enforced by way of a constitutional complaint to the Federal Constitutional Court. However, the Court has to deal with some 5,000 complaints every year of which only about 2% are successful.¹³

Compulsory schooling as an inconsistency? How, then, can home education be ruled out as a legitimate choice of the parents by school authorities and courts? The federal Constitution does not speak of compulsory schooling. This is not surprising, however, given the fact that school matters fall into the competence of the *Länder*. It is only Art. 7 § 1 of the (federal) Constitution that touches upon the problem, providing:

“The entire school system shall be under the supervision of the state”.

The Federal Constitutional Court and most courts as well as the majority of scholars see this provision as the legal cornerstone of the state's mandate to educate (“staatlicher Erziehungsauftrag”) which can be realized by compulsory schooling: “Compulsory schooling serves as an apt and necessary instrument to reach the objective of enforcing the state's mandate to educate.”¹⁴ Since the *Länder* are competent to regulate the school system, it then depends on their respective Constitutions or Education Acts. All 16 *Länder* provide for compulsory schooling, some of them actually do according to their Constitution. For example, Art. 14 § 1 of the Constitution of the Land of Baden-Württemberg reads:

“Schooling is compulsory.”¹⁵

Art. 56 § 1 of the Constitution of the Land of Hessen is even more explicit:

“Schooling is compulsory. The school system is matter of the state.”¹⁶

The resulting duties are laid down more precisely in the Education Acts of the *Länder*, e.g. in sec. 56 § 2 of the Hessian School Act:

Compulsory schooling has to be complied with by attendance at a German school. Foreign children can comply with their duty in private

¹² Cf. Art. 1 § 3 Basic Law: “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

¹³ In 2009: 5911 constitutional complaints, successful: 111 (1,9 %) (<http://www.bverfg.de/en/organization/gb2009/A-IV-2.html>, 31.5.2010).

¹⁴ Federal Constitutional Court (Bundesverfassungsgericht), Decision of 31.5.2006, 2 BvR 1693/04 = BVerfGK 8, 151, also accessible via <http://www.bverfg.de/entscheidungen.html>; similarly: Decision of 29.4.2003, 1 BvR 436/03 (cf. above N. 7), here relating to primary schools only.

¹⁵ The translation used by the European Court of Human Rights in the Konrad case (cf. supra N. 8) reads “School attendance is compulsory”. Given the fact that “school” as a legal term in Germany is normally understood to exclude home education (“home schooling”), this does not seem to make a difference.

¹⁶ “Es besteht allgemeine Schulpflicht. Das Schulwesen ist Sache des Staates.”

schools approved as complementary schools which lead to an international baccalaureate or graduation of a member state of the European Union. Exceptions are decided upon by the School Authority. They need a compelling reason.¹⁷

It could seem that, if the parents' wishes and compulsory schooling collide, a proper balance can be found. Indeed, in German constitutional law, a proper balance *must* be found where basic rights conflict among themselves or collide with other rights or certain overriding competences. Given a clash of the parents' right to care (Art. 6 § 2 of the federal Constitution) and the state's right to educate at school (Art. 7 § 1 of the federal Constitution and the respective provisions of the *Länder* Constitutions), the usual way of coordinating those conflicting positions would be to seek "praktische Konkordanz"¹⁸, i.e. an optimal balance. This was explicitly confirmed in the Konrad Case by the Federal Constitutional Court. What does this mean *in casu*? According to the Court, education means conveyance not only of knowledge but also of social and civic competences, e.g. tolerance, assertiveness, and the upkeep of minority convictions. "The general public has a justified interest in counteracting the rise of religious or ideologic 'parallel societies' (*religiös oder weltanschaulich motivierten 'Parallelgesellschaften'*) and in integrating minorities in this field." The infringement of the parents' right to care for their children was held to be proportionate since

- parents can influence the education of their children at school (particularly as far as religious education is concerned, cf. Art. 7 § 2 of the Basic Law),
- State schools are obliged to be neutral and tolerant, and
- parents still have considerable freedom to educate their children after school.

Sometimes, additional reference is made to the right of parents to establish private schools. This right is granted by the Constitution, too.¹⁹

¹⁷ My translation; the original text reads: „Die Schulpflicht ist durch den Besuch einer deutschen Schule zu erfüllen. Ausländische Schülerinnen und Schüler können die Schulpflicht auch an als Ergänzungsschulen staatlich anerkannten Schulen in freier Trägerschaft erfüllen, die auf das Internationale Baccalaureat oder Abschlüsse eines Mitgliedstaats der Europäischen Union vorbereiten. Über Ausnahmen entscheidet das Staatliche Schulamt. Sie setzen einen wichtigen Grund voraus.“

¹⁸ Famous concept by Hesse (1995), p. 28, 142 et seq.

¹⁹ Art. 7 § 4 Basic Law: "The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured." Restrictions, however, apply to private elementary schools according to Art. 7 § 5 Basic Law. Generally, the *Länder* provide for generous funding of private schools (cf. e.g. [Hessian] Gesetz über die Finanzierung von Ersatzschulen of 6.12.1972).

Consequently, the duty to attend school can be fulfilled by attendance of those (approved) private schools.

This line of reasoning has been upheld by almost all courts dealing with home education in Germany. It should be noted that not only Administrative Courts but also the ordinary jurisdiction and in particular Family Courts can, and in fact tend to, enforce compulsory schooling. Ordinary courts fine parents practising home education on the basis of *Länder* Education Acts (partly providing for administrative offences, partly for criminal offences). Family courts, on the basis of sec. 1666 § 1 and § 3 German Civil Code (Court measures in the case of endangerment of the best interests of the child)

“(1) Where the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish or are not able to avert the danger, the family court must take the measures necessary to avert the danger.

[...]

(3) The court measures in accordance with subsection (1) include in particular

1. [...]

2. instructions to ensure that the obligation to attend school is complied with,

3. – 6. [...]”, revoke elements of the parents’ child custody (such as the right to determine school matters, or even matters of residence) and appoint a guardian on the premise that home education endangers the psychic welfare of the child.²⁰

In sum, compulsory schooling is seen as an important duty for parents and children which leaves practically no room for parental choice. The parents’ right to care (Art. 6 § 2 Basic Law) is sometimes termed a right “within compulsory schooling, not against compulsory schooling.”²¹ Consequently, the courts, as well as the vast majority of commentators (Achilles 2004, p. 222 et seq.; Hebel/Schmidt 2005, p. 1368 et seq.; Tangermann 2006, p. 408 et seq.; Thurn 2008, p. 718 et seq.) do not regard this line as an inconsistency within the system of basic rights granted by the Constitution.

The European Convention of Human Rights

Unlike the UN Special Rapporteur on the right to education,²² the European Court of Human Rights²³ did not object to the German practice. The legal

²⁰ Cf. Federal Court of Justice (Bundesgerichtshof), decision of 11.9.2007, XII ZB 41/07.

²¹ Bremen Upper Administrative Court (N. 9): “Das Elternrecht bleibt aber ein Recht, das sich innerhalb der Schulpflicht entfaltet, und ist kein Recht, das sich gegen die Schulpflicht durchsetzen kann.” This statement, however, seems to be too general to be compatible with the principle of optimal balance (praktische Konkordanz).

²² United Nations, General Assembly, Human Rights Council, Implementation of General Assembly Resolution 60/521 of 15 March 2006 entitled “Human Rights Council”, Report of the Special

basis of the proceedings was Art. 2 of the Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, reading

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Based on this provision in conjunction with Art. 9 of the Convention (Freedom of thought, conscience and religion), Mrs. and Mr. Konrad and their children, in 2003, filed an application which was, in late 2006, dismissed by the Fifth Section of the European Court of Human Rights. The Court found that the second sentence of the guarantee cited above must be read together with the first, suggesting that the welfare of the child is of paramount importance. Agreeing with the findings of the Freiburg Administrative Court, the Court supposed that the children were not able to foresee the consequences of their parents’ decision in favour of home education and that “it would be very difficult for the applicant children to make an autonomous decision for themselves at that age”,²⁴ suggesting that the children must be protected from their parents. An actual danger for the children’s well-being, however, had not been ascertained. Not surprisingly, the main point of the Court seems to be the wide margin of appreciation of the Contracting States under the Convention:

“In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education. The German courts found that those objectives could not be met to the same extent by home education [...]. The Court considers that this presumption is not erroneous and falls within the Contracting States’ margin of appreciation in setting up and interpreting rules for their education system.”

It may be noted that, whilst the concept of an ample margin of appreciation of the Contracting States remains (convincingly) in line with

Rapporteur, Addendum, Mission to Germany (13-21 February 2006), A/HRC/4/29/add.3 of 9 March 2007, p. 16: “... it should be noted that education may not be reduced to mere school attendance and that educational processes should be strengthened to ensure that they always and primarily serve the best interests of the child. Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school.”

²³ Part of the Council of Europe system of protecting Human Rights based at Strasbourg (http://www.echr.coe.int/echr/Homepage_EN) and not to be mistaken for the Court of Justice of the European Union, based in Luxemburg (http://curia.europa.eu/jcms/jcms/j_6/).

²⁴ Cf. above N. 8.

the Court's jurisprudence, the application *in casu* seems to reduce the review to a mere procedural control.

Balancing the parents' right with the state's mandate to educate

The practice of German school authorities as well as the jurisprudence of the German courts must be seen in, and understood within, their context. Part of this picture is the influence of parents within the schools (e.g. by virtue of Art. 7 § 3 Basic Law, as far as religion is concerned, or indeed Art. 6 § 2) and the freedom to establish (as well as generous funding of) private schools. Nevertheless, the mainstream interpretation of the law and resulting situation in society, as indicated by the number of emigrating families (not to mention the dark figure of home-schooling families), is dissatisfactory.

Therefore, a closer scrutiny of the factual - sociological, pedagogical, and political - premises and a re-lecture of the law appear to be necessary. This implies four points:

First of all, additional research must be done, particularly in the field of pedagogics. Reliable studies concerning the biographical impact of home education do not exist yet (cf. Spiegler 2008, p. 139 et seq.) Considering the (at least) thirty years of a home education movement in Germany, it would (in principle) be feasible to gather empirical evidence on the biographies of home-schooled children. As long as the effect of home education on the children is unclear, however, the courts must not infringe upon the individual liberties by enforcing compulsory schooling. If the preconditions necessary for the encroachment of rights are not reliably shown, the encroachment may not be executed. If the duty to secure education (cognitive, social, civic, and otherwise) should amount to a duty to secure school attendance, i.e. if the state not only insists on an overall objective but also on a certain (specific) means, this needs additional and well-reasoned justification.

Second, the argument of "parallel societies" which are to be repelled should be avoided; it is fallacious.²⁵ Fundamental rights and liberties safeguard the option to live in different ways, even separately from society; they want to grant these rights not only to a majority, but also (or rather: in particular) to minorities; that is precisely their rationale. Therefore, "parallel societies" are not shunned but guaranteed by the Basic Law and its catalogue of basic rights. The fear of the disintegration of society cannot be a leading aspect in interpreting constitutional rights.

Third, the optimal balance (*praktische Konkordanz*) of the parents' right to care for their children and the state's claim to educate cannot be found in a schematic, rigid way. For example, the Courts' explicit or implicit assertion that the parents' right is a right "*within* compulsory schooling, not

²⁵ For – cautious – criticism cf. Möllers (2006), p. 31 (relating to the Federal Constitutional Court decision of 31.5.2006, N. 14); Ladeur/Augsberg (2007), p. 105; Langer (2007), p. 277 et seq.

against compulsory schooling”²⁶ can hardly be persuasive as a general statement. If, for instance, the State decided to double (or triple) the hours of compulsory school attendance, this would certainly touch on the parents’ right to care. Accordingly, Art. 6 § 2 Basic Law would grant a *locus standi* – which could not be explained if this guarantee was not a right *against* compulsory schooling at all. Of course schooling is, and remains, a civic duty (so that in this respect the parents’ right is in fact a right *within* compulsory schooling). It is not even a duty without exceptions. However, it does not seem cogent to grant exceptions for health reasons but not for principled objections. Similarly, it appears odd that compulsory schooling is justified by its beneficial effect on tolerance of the children: “Pluralistic tolerance turns into intolerance if the state, by way of compulsory schooling, forces devout Christians to be tolerant.” (Langer 2007, p. 283). In short, the heterogeneity of constellations, motivations, and impacts of home education must be taken into account by the courts. The fact that German courts have invariably decided against home education might indicate the lack of serious consideration.

Fourth, the constitutional principle of proportionality as used by the courts in home education matters has changed from protecting liberty to infringing on it. For instance, the argument (made by both the German courts and the European Court of Human Rights) that the parents’ right to educate their children was not restricted in a disproportioned manner because “the applicant parents were free to educate their children after school and at weekends” sounds slightly cynical – it justifies the infringement of liberty by pointing to a remaining piece of liberty. Equally, the right to establish private schools can not justify the prohibition of home education; otherwise the use of constitutional rights would depend on the choice of the state rather than on that of the individual. Not surprisingly (though erroneously), however, in one of its decisions, the Federal Constitutional Court demands that the parents – rather than the state authorities – behave in a proportionate manner.²⁷ This may be seen as a singular mistake; but it might equally show that, in the view of the courts, the inconvenient use of freedoms by minorities requires justification before the law.

Conclusions

“The liberal secular state”, as one of the most famous quotations of German jurisprudence in the 20th century says, “lives on premises that it cannot itself guarantee. [...] On the one hand, it can subsist only if the freedom it consents to its citizens is regulated from within, inside the moral substance of individuals and of a homogeneous society. On the other hand, it is not able to guarantee these forces of inner regulation by itself [...] without

²⁶ Cf. N. 21.

²⁷ Decision of 31.5.2006 (N. 14): “In addition, the complete keeping away from school of the three eldest daughters was an unproportionate means”; critically Möllers (2006).

renouncing its liberalism.”²⁸ The German school authorities and courts, in fear of “parallel societies”, seem to be tempted to renounce their liberalism at times. Even though parental choice has a well-defined place *within* German schools, even though private schools can be founded and are subsidised, the rigid containment of home education is unnecessary; it might even prove counter-productive.

Instead, the judicial and statutory approach in Germany should be modified. (Spiegler, 2008, p. 264 et seq.; Reimer, 2008, p. 720 et seq.; cf. also Langer, 2007, p. 289 et seq.). Many countries have adopted the model of admitting home education under state supervision.²⁹ It is a viable solution of the “regulated self-regulation” type. In Germany, it could be introduced under the existing Länder statutes either by way of using the existing exception clauses (which would have to be applied in a more flexible manner) or, more explicitly, by way of statutory changes. In the practice of school authorities, this requires time and effort; but the result could be a better balance of individual and society interests, beneficial to the society as a whole.

In the end, two concepts of pluralism seem to face each other: the notion of a society procuring tolerance and other social skills by creating and directing compulsory fora (such as schools), and the notion of a society leaving the emergence of such fora to the social groups and organizations themselves. There can be no doubt that common fora—even beyond parliament and the media—should exist. But does not pluralism betray its ideals by forcing individuals into such institutions, sacrificing liberty to “integration”? Again and again, members of minorities have proved to be the most creative points in society—without being integrated, or indeed by virtue of not being integrated. The state’s mandate to educate (and its supposed right to integrate) could amount to a counterproductive pretence of knowledge. For there “can be no assumption that today's majority is “right” and the Amish and others like them are “wrong.” A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”³⁰

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²⁸ Böckenförde (1991), p. 112; translation: http://en.wikipedia.org/wiki/Ernst-Wolfgang_Böckenförde (31.5.2010).

²⁹ E.g. sec. 11 [Austrian] Schulpflichtgesetz.

³⁰ Chief Justice Warren Burger, *Wisconsin v. Yoder et al.*, 406 U.S. 205, 223 f. (decided May 15, 1972).

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