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The Human Right of Home Education

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ABSTRACT

Homeschooling is legal and growing in many countries but is virtually forbidden by law in Germany and a few others. The European Court of Human Rights (ECtHR) has reviewed and upheld this ban. Is home education a human right? How do these courts employ their jurisprudence of proportionality to find banning home education does not violate relevant constitutional or human rights norms? Why does Germany forbid home education? Why does the ECtHR uphold Germany's position? What does this divergence imply about the right of home education and the jurisprudence of these courts? If the promise of human rights is individual liberty then a system that justifies or endorses state control of education for the purpose of cultural conformity can be said to be far too statist for a free and democratic society. In this article, I argue that both the German Constitutional Court (FCC) and the ECtHR have adopted an approach to education rights that is profoundly mistaken. I conclude that home education is a right of parents and children that must be protected by every state. Nations that respect and protect the right of parents and children to home educate demonstrate a commitment to respecting human rights; nations that do not, such as Germany and Sweden need to take steps to correct their failure to protect this important human right.

KEYWORDS

education; home education; homeschooling; human rights; proportionality

Introduction

> I find that [the Romeikes] belong to a particular social group of homeschoolers who, for some reason, the [German] government chooses to treat as a rebel organization, a parallel society, for reasons of its own. As I stated above, this is not traditional German doctrine, this is Nazi doctrine, and it is, in this Court's mind, utterly repellant to everything that we believe in as Americans. … [I]f Germany is not willing to let them follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for the applicants. (Burman, 2010; Immigration Judge Lawrence O. Burman, granting political asylum to the Romeike family because of Germany's antihomeschooling policy.[1])

Reflecting a striking international contrast, homeschooling is a legal and flourishing form of education in the United States but is forbidden in Germany and effectively banned in Sweden; this total prohibition on home education has been upheld by the European Court of Human Rights

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(ECtHR). This contrast reflects a curious divergence between countries that are otherwise seen as similar in their protections of most other basic human rights. If the promise of human rights is individual liberty then a system that justifies or endorses state control of education for the purpose of cultural conformity can be said to be far too statist for a free and democratic society. In this article, I will articulate the case for home education as a human right, a subject I have written on in more detail elsewhere (Donnelly, 2016), and critically assess the proportionality model of rights review used by Germany and the ECtHR to arrive at the conclusion that banning home education does violate accepted constitutional and human rights norms.[2]

With over 2 million children, the United States has by far the largest and fastest-growing homeschooling population. Murphy (2012) describes home education as much as a social movement as a form of education. He writes that it is effective and delivers no less on academic and social outcomes than other forms of education. Although parents give many reasons for choosing home education, including concern about the environment in schools, quality of academic instruction, or the desire to give instruction in morality or religion (U.S. Department of Education, 2012), homeschooling is a legal form of education in all of the states and territories of the United States and in most western democratic countries.

This is not the case in Germany, however. Spiegler (2015) observes that "home education is not allowed in Germany as an alternative to public schooling." He affirms that fines, criminal prosecution, and loss of custody of children are possible state actions against families who persist in homeschooling. It is widely reported that many families who wish to home educate their children have felt they had no choice but to emigrate. This cultural hostility in Germany, and similarly in Sweden, have contributed to the bulk of international human rights case law on the issue. We will focus on the German cases because they are the most recent and well documented, and because Germany has a highly regarded constitutional court.

Why doesn't Germany, a highly regarded democracy with a strong human rights record, protect this right? Why it that while Germany accepts hundreds of thousands of refugees fleeing from war in the Middle East, it creates its own exodus (admittedly in smaller numbers) of parents who wish to homeschool their children? What does this divergence imply about the right of home education and the jurisprudence of the court's ruling on the issue? In this article I argue that both the German Constitutional Court (FCC) and the ECtHR have adopted an approach to education rights that is profoundly mistaken.

Home education as a right

Some countries and some international human rights treaties explicitly identify education as a right—although most also explicitly recognize the rights of parents to make decisions about the education of their children.

And while home education is not mentioned by name in international human rights treaties, it can be identified as a specific nexus of other explicit human rights such that it demands respect and protection by the state (Donnelly, 2016). The human right of home education emanates out of the demands of other explicitly identified rights including the right to education, the rights of parents to make decisions for and about their children's education, the rights to freedom of conscience and religion and the recognition of the family as the fundamental group unit of society.

Although the United States Supreme Court has declined to recognize "education" itself as a constitutionally protected right, virtually every state has recognized education as a right. In 1925, the U.S. Supreme Court ruled that the liberty protected by the 14th Amendment included the substantive rights of parents to direct the education of their children. This was one of the main justifications the court gave in *Pierce v. Society of Sisters*, when it struck down an Oregon statute that would have eradicated all private education (*Pierce, Governor of Oregon, et al. v. Society of the Sisters of the Holy Names of Jesus and Mary*, 1925).

In *Pierce*, the U.S. Supreme Court overturned the Oregon law and declared that although the state may reasonably regulate education to ensure minimum standards,

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The international human rights framework is founded on the Universal Declaration of Human Rights (UDHR; United Nations, 1948). In response to the atrocities committed during the Second World War, the UDHR recognizes education as both an individual and a parental right. Article 26.1 establishes the right to education, and Article 26.3 establishes that "parents have the prior right to decide what kind of education their children shall receive" (United Nations, 1948). The parental right includes both the right to provide for and also the right to exempt a child from any particular instruction in religious or moral subjects.[3] The International Covenant of Economic Social and Cultural Rights (ICESCR) specifically recognizes that "individuals" as well as "bodies" may form educational institutions (United Nations, 1966a). The International Covenant of Civil and Political Rights (ICCPR) recognizes that the right of parents to ensure the education of their children in conformity with their religious and philosophical convictions is non-derogable (United Nations, 1966b, Article 18 and Article 4.2). Article 2 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) strongly enjoins the state in "all areas of education" to respect the convictions of parents (Council of Europe, 1950).

However, in contrast to the United States, where homeschooling is legal in every state and territory, and in spite of these internationally recognized rights of parents in education, the FCC has applied the jurisprudential model of proportionality to totally ban home education. The court ruled that it was not a disproportionate interference with the constitutional rights of parents to direct the education of their children, because "the state's educational mandate has equal ranking with the parents' right to educate [Article 6 of the basic law] as derived from Art. 7 Sec 1 of the Basic Law" (*In the matter of Konrad*, 2003). This reasoning was upheld by the ECtHR (Konrad, 2006). The ECtHR built on previous cases on the issue of home education (*Family H. v. United Kingdom*, 1984; *Leuffen v. Germany*, 1992; *B.N. and S.N. v. Sweden*, 1993) to uphold a state "right" to compel public school attendance. It ruled that Germany's ban on home education was within Germany's "margin of appreciation"[4] and thus not a violation of the treaty.

In 2014, both courts had the opportunity to reconsider these findings, but declined to do so. In *Schaum v. Germany* (2014), a family who homeschooled their nine children were criminally fined for not sending their children to school.[5] These fines were distinct from the Konrad's, who received civil fines, not criminal fines; nevertheless, the FCC refused to revisit its ban on home education and the ECtHR denied the family's application. For the time being, both courts appear fixed in their determination to deny that home education is a right that should be recognized and protected. How does Germany and the ECtHR arrive at such a disparate outcome from other democratic countries that permit homeschooling?

Between a rock and a rights place: Proportionality

Critics argue that balancing may not be appropriate when talking about rights. They use the analogy that balancing rights is like balancing the length of a line with the weight of a rock (Tsakyrakis, 2009). European rights jurisprudence, however, is characterized by the application of balancing rights and interests. This is generally described as the proportionality model of rights analysis. Under the proportionality review model, virtually any course of action is considered a "right"—the question is whether the government has interfered in a way that is disproportionate.

Kai Moller says that the "doctrine of balancing holds the central position in the global model of constitutional rights … the final and often decisive stage of the proportionality test, where it is used to resolve a conflict between a right and a competing right or public interest" (2012, p. 134). Proportionality review involves a four-step court analysis to determine whether or not government interference may be justified as "proportional." The ECtHR has explicitly adopted a review of proportionality in its case law (Council of Europe/European Court of Human Rights, 2015).

First, the court assesses whether the alleged interference pursues a *legitimate* goal. For example, is it a *legitimate* policy goal to sanction certain

behavior, such as speeding? Second, the court evaluates whether the interference is *suitable*, or rationally connected to achieving (even if only to a small extent) that goal. For example, is it *suitable* to achieve the goal of prohibiting speeding to permit the use of photo enforced speed limits? Third, the court must determine whether the interference is *necessary*. Here the court must ask whether there is any less intrusive but equally effective alternative to the government's infringing action. Finally, the law must not impose a *disproportionate* burden on the right-holder—this is the *proportionality/balancing* stage. Here the court will balance the value of the right versus the public interest to determine whether the interference is in fact proportional.

In *Konrad*, religious parents sought to home school their children. They were fined by the local authorities for not sending their children to school. The parents appealed to the German courts all the way to the FCC, arguing they had a right under Article 6 of the German Basic Law, which says, "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them."[6] In 2003, the FCC denied their claim, arguing that a ban on home education in the Federal Republic of Germany was consistent with the Basic Law because "society has an interest in counteracting the development of parallel societies and integrating minorities" (*In the matter of Konrad*, 2003; *Schaum v. Germany*, 2014). The FCC interpreted the states' Article 7 duty to supervise the "entire school system" to mean that the state was endowed with an *equal* interest in the education of children, and could thus prevent a parent from home educating their children.

The FCC reasoned that even if home education could meet the academic needs of students, the social integration required for a "tolerant" society could not be achieved in any other way than attending the closely supervised and controlled system of state and private schools (*In the matter of Konrad*, 2003). The FCC further reasoned that because children were unable to foresee the long-term consequences of home education (presumably harmful in the court's mind), the court had an obligation to protect children from such potential consequences. Spiegler (2015) questions this concern, suggesting that German education policy may be more focused on the overarching goal of maintaining cultural homogeneity—a view which underscores the FCC's concern about the development of "parallel societies" as a major reason for their willingness to ban home education.

Is the challenged policy legitimate?

Applying the first stage of proportionality review, we inquire whether counteracting the development of parallel societies is a *legitimate* goal of the state. This appears to have been the primary policy goal advanced by the

government and evaluated by the court. The German court explicitly indicated that the educational needs of children were a secondary consideration.

Regrettably, the FCC does not explain what is meant by parallel societies. Elsewhere, I have suggested that a parallel society is a group of people who live inside or within another society, but who do not share a minimum set of common characteristics (Donnelly, 2007). I define these *commons* as a common boundary, common language, common economic system, common legal system, and common political authority that reflects the will of the people with respect to laws that apply equally to all.

A parallel society would be one that seeks to effectively eliminate its connection with the larger society. It would seek to operate its own civic institutions and judiciary, reject using a common language, maintain a separate economic system, and apply its own political will through its own political institutions. It might even dispute the boundary authority of the larger society (e.g., the Kurds in Iraq).

It is a well-established principle in a liberal democracy that the state must protect the rights of its citizens and apply the law equally to all people who live within its jurisdiction. On that basis, perhaps one may accept that parallel societies could be dangerous in a democratic nation. Such societies might deny to some citizens the equal protection of the laws. For example, some have expressed concern that sharia courts do not treat women equally (Friedland, 2014). But even if parallel societies are contrary to the principles underlying the liberal democratic state, isn't a kind of coerced uniformity (of education) contrary to pluralism, which is another of those crucial underlying principles? When we look at the context of a complete ban on home education, we are left to wonder if such a strict view of parallel societies is really consistent with the idea of pluralism.

Pluralism is an important principle for liberal democracies where people with significant religious, cultural, linguistic, philosophical (even pedagogical) differences are able to live together peacefully pursuing their own concepts of the good life. Are Belgium's French, Fleming, and Walloon populations, who each maintain their own parliaments, parallel societies? What about German, Italian, and French cantons in Switzerland? The Amish in the United States are very different from the general population but are not a true parallel society, because they speak English and do not seek total isolation from the larger society.

At what point does a cultural difference become the kind of rebellion that leads to a parallel society, and thus deserve to be completely banned? Critics of home education in the United States have argued that home education should be severely limited through greater regulation (Ross, 2010; West, 2009; Yuracko, 2008) or even completely banned (Albertson-Fineman & Worthington, 2009). This approach has caused concern for advocates of liberal policy in education.

Glanzer (2013) says home education is *needed* in a liberal society. "Although a concern with the political dimension of our human personhood is understandable and necessary in education, we are more than political citizens." The "beauty of a liberal democracy" is that it allows pluralism to flourish. The political dimension of education in liberal democracies, however, endangers pluralism when it becomes an "all encompassing, exclusive life philosophy or functional religion." This "increasing tendency of educational philosophers" appears to be the trend, as "leaders and practitioners think about education primarily in terms of our political identity," and it signals a potential danger. Glanzer criticizes scholars such as Amy Gutmann (1999) who write about the "primacy of political education." Instead, Glanzer proposes that "leaders of liberal democracies, including educational leaders, need reminders of liberal democracy's limits and the fact that the child is not the mere creature of the state." He says that homeschooling and a meaningful protection of parental decision making in education provide these needed reminders to policymakers and citizens (see also Eichner, 2005; Farris, 2013).

At this stage of proportionality jurisprudence, however, the court must determine whether the government is pursuing a *legitimate* goal. Defined in this way, parallel societies could be seen as threatening. Thus, counteracting parallel societies may constitute a *legitimate* goal of state action.

Is the policy suitable?

In step two, the court assesses the policy for *suitability*, asking whether banning home education will achieve the sought-after goal—in this case, counteracting the development of parallel societies. The policy need not be perfect to survive; it must only contribute to the legitimate goal, even if only a little.

In *Konrad*, the FCC asserts that inculcating the value of "lived tolerance" is also needed to counteract the development of parallel societies, and can only be obtained by exposing children to others who have different beliefs—and, importantly, this necessary exposure can only be achieved by requiring children to attend a public school or a state-approved private school. Regrettably, the FCC doesn't reason its way to this conclusion with facts and evidence, but asserts it as an obvious truth. Neither does the court examine any evidence to supports the claim that homeschooling contributes to a lack of tolerance, an allegation that recent research suggests may be questionable.

Cheng (2014) has shown that political tolerance is actually positively correlated with more exposure to home education—exactly the opposite of the FCC's presumption. Both Wolf (2007) and Campbell (2001) have also shown that in the American context, private schools are better at inculcating tolerance and good citizenship than public schools. Both of these strands of

research contradict the German court's presumption, albeit in an American context. It does not appear that the German court made any effort at comparative jurisprudence. Instead, it relied solely on its own inherent presuppositional bias that only public schools are an acceptable way to help children be tolerant of the differences in others.

Still, the metric for the court at this stage is that the state action only has to justify contributing to the *legitimate* goal "a little bit." Requiring all children to attend school may be said to logically increase the chances of interaction with others. Does this mere fact make them more tolerant? Does this contribute to the policy of counteracting the development of "parallel societies?" The hurdle is not very high to overcome at this stage; thus, the policy might be seen as suitable.

Is the interference necessary?

The third step in proportionality analysis is to determine whether the policy is *necessary*. As Moller (2014) puts it, the "principle of necessity requires that there must be no other, least restrictive policy that achieves the legitimate goal equally well." In the U.S. constitutional jurisprudence this would be the "least restrictive means" test. At this stage, the court should determine if there are any other ways the state can achieve its goal without interfering with the parents' rights.

A comparative assessment of other countries where homeschooling is tolerated clearly shows that homeschooling does not contribute to parallel societies. Murphy (2012, p. 151) cites numerous researchers who found that homeschooled adults were "indeed heavily involved in community life at the local and national levels and were more civically involved than the general population of adults." Furthermore, in countries where home education is regulated, authorities have not found the need to impose significant regulation to address tolerance or the development of parallel societies (Donnelly, 2012). It would seem even from this cursory examination that a *complete ban* on homeschooling is not *necessary*, at least not in a *judicial* sense. Even taking the United States out of the set of comparators would show that most European countries allow for home education, and that they are not concerned about parallel societies arising as a result. On the contrary, Beck, a Norwegian professor of education (2015, p. 96), observes that "home educated students appear to be well socialized" and that home schooling is "essential for maintaining social integration and social and knowledge diversification in postmodern societies."

Neither the FCC or the ECtHR conducted any rigorous comparative analysis. In fact, the FCC does not reference any comparative law at all in Konrad. The ECtHR goes along with the FCC, stating that it:

> observes in this respect that there appears to be no consensus among the Contracting States with regard to compulsory attendance of primary schools. While some countries permit home education, other States provide for compulsory attendance of its State or private schools. (Konrad, 2006, p. 7)

The idea of consensus is related to the court's use of the margin of appreciation. In some cases, the court has reasoned that where some large number of states allows for a practice, then the court will find that a consensus exists, and it may then narrow the "margin of appreciation" that a nation may be afforded with respect to a particular policy. However, I have personally reviewed the laws of the states in Europe and have demonstrated that most states allow for home education, even as they also universally have compulsory attendance laws (Donnelly, 2012). The fact that a majority of European nations explicitly permit home education proves that there is a less restrictive way to counteract the development of parallel societies. Such assumptive reasoning has been criticized as undermining the court's credibility (Dzehtsiarou, 2015).

A total ban on home education is NOT *necessary* to achieve the state's "legitimate goal" of promoting tolerance and counteracting the development of parallel societies. Both the FCC and ECtHR would have been able to find a violation of the parental constitutional rights or the treaty rights under this analysis. But even if the decision regarding the necessity of the policy was protected within Germany's margin of appreciation, is the interference a proportionate interference?

On balance, is the interference proportional?

In the fourth stage of *proportionality* review, the court *balances* or weighs the rights and interests to find whether "on balance" the interference was proportional or not. In evaluating the Konrad's claims that Germany violated their treaty rights, the ECtHR had to determine whether Germany's interference with homeschooling violated its treaty obligations. The family's primary claim was that Germany's antihomeschooling policy violated Article 2 of Protocol 1 of the ECtHR. Article 2 of Protocol 1 is considered the *lex specialis* of education rights by the ECtHR (COE/ECHR, 2015).

Article 2 of Protocol No. 1 says:

> 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.

The Konrads also made claims under Articles 8 (right to respect for private and family life) and 9 (freedom of thought, conscience, and religion), which allow the state to interfere with these rights but only if the interference is "prescribed by law," is "necessary in a democratic society" and "in the

interests" of *inter alia* public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others. Article 2 of Protocol 1 does not contain these same exceptions. However, the court only addressed the other claims in a perfunctory manner, focusing primarily on the Article 2 of Protocol 1 claim. I have analyzed the court's legal reasoning at more length elsewhere (Donnelly, 2016), and I encourage interested readers to look there for more detail on why I believe the court misapplied its own precedent in upholding Germany's ban on home education.

In addition to balancing the state's interest (in counteracting parallel societies), the FCC also sought to balance the interests of the parents and their (potentially) homeschooled children. The FCC determined that it had to protect the children from their parents' decision to homeschool because the children could not foresee the long term consequences of such a decision, since they were too young. The ECtHR stated Germany's reasoning this way:

> The [German] court noted that the State's obligation to educate would also further the children's interests and served the protection of their personal rights. Because of their young age, the applicant children were unable to foresee the consequences of their parents' decision for home education.

This is a curious argument that is at some odds with a well-known legal understanding that minors lack capacity to make decisions for themselves. Even the child-centered view contemplated by the United Nations Convention on the Rights of the Child requires those responsible for a child to provide guidance and direction consistent with the evolving capacities of the child (UNCRC; United Nations, 1989, Article 5). For the state to intervene in such a clearly protected realm of decision making and uphold a total ban without strong evidence of actual harm is striking; yet this is exactly what the FCC did.

In exercising review of the FCC in light of Germany's treaty obligations, the ECtHR essentially *deferred* to the findings of the FCC as "not being erroneous and falling within its margin of appreciation" as a contracting party to manage its internal educational matters in this way. Put another way, the FCC and the ECtHR upheld the total prohibition on a form of education that is widely acknowledged to serve the interests of children and society in most jurisdictions within Europe and other liberal democracies. That they would make such a sweeping determination with so little support is also striking.

Regrettably, neither court engages in any real balancing—either in the previous stages or at the fourth stage. They did not rigorously examine the weights of the interest, the severity of the restrictions, or evidentiary support for their conclusions. Some commentators have criticized the ECHR for taking this kind of approach because it is de-legitimizing. Dzehtsiarou

(2015, Kindle Locations 2905–2906) recommends that by showing its reasoning openly to the public that the ECtHR explain its balancing test openly as a way to enhance the court's legitimacy.

"It is suggested that the Court should not clearly indicate how it has arrived at a particular solution," Dzehtsiarou writes:

> but provide a smokescreen to cover its motives. It is very doubtful that such a strategy can be sustainable in the long run. Such reasoning is open for criticism from a wide range of stakeholders, for not presenting clear evidence supporting the judgment. One can argue that transparent and fair examination of comprehensive comparative data would increase trust in the Court's rulings.

I argue here, and in more detail elsewhere (Donnelly, 2016), that both courts' reasoning suffers from serious defects. They assumed facts not in evidence, failed to properly analyze the comparative jurisprudence and legislative status of home education in relevant jurisdictions, and essentially *presumed* that the challenged public policy—a complete ban on home education—was the only way to achieve the desired outcome. But this was a total ban on an activity that other reputable nations who respect human rights allow under their laws. Such a ban demands a higher-quality judicial response and ought to be viewed with suspicion.

Conclusion

Herein I have proposed that home education is a human right which emanates from, or can be properly understood as a synthesis of, other important rights that are clearly articulated in the modern international human rights framework. As such, home education is itself worthy of status as a human right which should be protected. The outcomes of proportionality review for home education as a right in its specific application in the FCC and the ECtHR cast doubt on proportionality as a judicial technique that is able to protect, at least some, human rights.

Spiegler (2015) suggests that the FCC's failure to seriously grapple with the right of parents to choose home education may result from bias and cultural preferences for homogeneity. The ECtHR's failure to intervene and address these rights in a transparent and evidentiary manner detracts from its credibility and fails to adhere to the purpose of a human rights review court—to protect individual rights from the state, not the other way around. Moreover, these failures have resulted in the dislocation of families and in a form of persecution, as Judge Burman found, on those who are excessively fined and prosecuted over their desire to home educate their children.

I maintain that home education is a right of parents and children that must be protected by every state. Nations that respect and protect the right of parents and children to home educate demonstrate a commitment to

respecting human rights; nations that do not, such as Germany and Sweden, should be encouraged to reexamine their effective bans on homeschooling, and to take steps to correct their failure to protect this important human right.

Notes

1. Ultimately the Romeikes claim for asylum was rejected by the U.S. Supreme Court although the family remain in the United States subject to an order of removal that has been indefinitely deferred. The author was an attorney representing the family.
2. By home education I mean elective home education where a parent for religious, philosophical, or pedagogical reasons prefers home education to education at a state or private institutional school. The FCC and the ECHR have made technical distinctions between parents who are motivated by reasons of conscience from those motivated by "practical" reasons of children's medical conditions or parental job requirements.
3. Human Rights Committee, General Comment 22 (September 27, 1993). Para. 4 and 6.
4. For a more detailed and technical critique of the ECtHR use of the margin of appreciation in this context see: http://www.ghec2016.org/sites/default/files/thursday_farris_home_education_its_a_right_1.pdf. The presentation can be watched at: https://www.youtube.com/watch?v=FdZOqTnRdKo&index=19&list=PLlnNEcPjg5O6xvSd8FZD6KauzONXfSKE3 beginning at 25:44.
5. By way of disclosure, the author was an attorney in the case. The case was denied review by the FCC in 2013 and by the ECtHR in 2014. However, a second case challenging the removal of children from the Wunderlich family because of homeschooling is still pending at the court.
6. German Basic Law Article 6 §2. https://www.btg-bestellservice.de/pdf/80201000.pdf at 16.

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