

Homeschooling in Austria: A Fundamental Right

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I. Introduction

As in many other European countries, in Austria homeschooling is legal.¹ What is more, there is even a fundamental right to this form of teaching enshrined in the Austrian constitution. Statistically speaking, the number of homeschooled pupils is very small, comprising considerably less than 0.5 % of the pupils at compulsory school age (i.e. 6-15) in Austria.²

There is a variety of reasons for homeschooling: Some parents do not want their children – who have reached compulsory school age (i.e. 6) but not school readiness – to attend pre-school being mandatory in such situations. Alternatively, they resort to homeschooling which enables them to keep their children another year in kindergarten.³ Thus these parents use homeschooling only transitionally till their children have reached school readiness allowing them to attend primary school. Strictly speaking, therefore, these parents do not teach their children at home, as the latter usually attend kindergarten.

Besides, there are, of course, also parents who decide on homeschooling, because they reject schooling as a matter of principle.⁴ By the same token, religious reasons seem to be of minor importance.⁵ Unfortunately, we do not have reliable empirical data on the reasons for homeschooling in Austria, for parents do not have to inform the authorities about them.

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II. Article 17(3) StGG: The legal base of homeschooling in Austria

A. The historical background of Article 17(3) StGG

The main Austrian constitutional document is the Federal Constitutional Act (*Bundesverfassungsgesetz*, hereafter: B-VG), the first version of which was adopted in 1920, that is, two years after the establishment of the First Austrian Republic. The B-VG, however, referred to a number of acts that had been adopted before its coming into force as constitutional law. In this manner, also the Basic Act on the General Rights of Nationals (*Staatsgrundgesetz vom 21. Dezember 1867 über die allgemeinen*

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1 The following contribution is based on Palmstorfer, R. (2011), 'Häuslicher Unterricht in Österreich: Das Grundrecht auf Homeschooling', *Recht der Jugend und des Bildungswesens*, pp.115-22.

2 Cf the statistical data of the Austrian Ministry for Education <http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_07837/fname_218766.pdf> accessed 27 August 2012.

3 Stanzel-Tischler, E. (2007), *Teilnahme am häuslichen Unterricht und Befreiung von der allgemeinen Schulpflicht wegen Schulunfähigkeit in der Schuleingangsphase*, ZSE Report 72/2007 <<http://pubshop.bmukk.gv.at/download.aspx?id=245>> accessed 27 August 2012; Stöger, K. (2012), 'Homeschooling: Rechtslage und Rechtspraxis in Österreich – ein Modell für Deutschland?' in: Reimer F. (ed), *Homeschooling: bedrohung oder Bewahrung des freiheitlichen Rechtsstaats?*, Nomos, Baden-Baden, pp. 109-26 (p. 121).

4 Doring, G. (27 May 2011), 'Eine Klasse für sich', *Salzburger Nachrichten*, p. 3.

5 Stöger (n 4) p. 125.

Rechte der Staatsbürger für die im Reichsrath vertretenen Königreiche und Länder, hereafter: StGG)⁶ was recognized as constitutional law under the B-VG. The StGG contained a number of fundamental rights. This was done because then no consensus on a new catalogue of fundamental rights could be reached. Therefore, the StGG was and still is one of the most important sources of fundamental rights in the Austrian legal order. The reason for this brief excursion into Austria constitutional history is that the StGG also contains the provision from which the right to homeschooling can be derived, for in Article 17 StGG reads as follows:

Knowledge and its teaching are free.

Every national who has furnished in legally acceptable manner proof of his qualification has the right to found establishments for instruction and education.

Instruction at home is subject to no such restriction.

The Church or religious society concerned shall see to religious instruction in schools.

The right to supreme direction and supervision over the whole instructional and educational system lies with the state.⁷

This being said, the fundamental right to homeschooling finds its expression in Article 17(3) StGG. However, the drafters of this Article did not have parents teaching their children in mind. Rather they thought of home tutors. This explains why Article 17(3) StGG is drafted as exception to Article 17(2) StGG, for the latter paragraph makes the founding of establishments for instruction and education dependent upon qualification certificates. Thus there is a close relationship between these two paragraphs.⁸ In short, not anyone can establish a school.

Tellingly, in the first half of the 19th century, home tutors were required to have qualification certificates.⁹ In 1850, the Provisional Act on Private Instruction (*Provisorisches Gesetz über den Privatunterricht*)¹⁰ exempt home tutors from these requirements (cf § 16 leg cit) and this step found its way into the sphere of fundamental rights (i.e. Article 17(3) StGG).

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More importantly, the newly adopted Act on Primary Schools of 1869 (*Reichsvolksschulgesetz*)¹¹ conceptualized homeschooling as surrogate for mandatory schooling. Under this act, parents were obliged to safeguard that their children got teaching comparable to the one in primary schools. Thus schooling was not compulsory, but tuition was.

In 1905, a regulation (*Definitive Schul- und Unterrichtsordnung für allgemeine Volksschulen und für Bürgerschulen*)¹² was adopted that elaborated on this mandatory tuition. For example, homeschooled children had to take exams in public schools in order to prove that they were taught sufficiently and there was the possibility of mandatory schooling if these exams were failed.

As we will see below, the legal framework of present-day homeschooling strongly resembles the one in the last years of the Habsburg Empire. However, there is a marked difference. Back then, homeschooled pupils were primarily taught by a home tutor and not by their parents.

B. The scope of protection of Article 17(3) StGG

Though Article 17(3) StGG belongs to the oldest parts of Austrian constitutional law, there is hardly any case law on it. The right enshrined in it is clearly a constitutional one. However, its scope of protection

6 Imperial Law Gazette (*Reichsgesetzblatt*) 142/1867.

7 Article 17 StGG as translated by Kessler, C. (1972), *The Austrian Federal Constitution*, Manz, Wien, p. 133.

8 Austrian Constitutional Court, VfSlg. 4.990/1965.

9 Palmstorfer (n 2) p. 116.

10 Imperial Law Gazette (*Reichsgesetzblatt*) 309/1850.

11 Imperial Law Gazette (*Reichsgesetzblatt*) 62/1869.

12 Imperial Law Gazette (*Reichsgesetzblatt*) 159/1905.

is still being disputed.¹³ This is because the provision allows for two possible readings. One could argue that the right under Article 17(3) StGG is a narrow one, only entitling to teach pupils without exempting them from mandatory schooling. On this view, Article 17(3) StGG would just mean that nobody needs a qualification to teach at home. Alternatively, it can be argued that the provision has to be interpreted in a much broader sense, that is, as safeguarding instruction at home being understood as surrogate of mandatory schooling. Therefore this discussion ultimately boils down to the following question: What is meant by ‘instruction at home’?

Going back to the historical background of Article 17(3) StGG, we see that then instruction at home was clearly conceptualized as surrogate for instruction at school. As shown above, Article 17(3) StGG can be regarded as a response to the situation at the beginning of the 19th century, when also home tutors were required to have certain qualifications. Then the main question was how to organize instruction and, as nowadays, three ways alternatives were recognized: instruction at state schools, instruction at private schools and instruction at home, the latter concept being now referred to as ‘homeschooling’. This structure also found its expression in above school acts:¹⁴ Pupils could be taught at home and, therefore, they were not required to attend a school provided that it was established – by means of exams – that these pupils met the teaching objectives defined by state curricula.¹⁵ Moreover, instruction at home does not require that the pupils belong to the same family.¹⁶

Interestingly enough, above approach has been followed up to now. Mandatory schooling is enshrined both in the Austrian constitution (Article 14(7a) B-VG) and in the Mandatory Schooling Act (*Schulpflichtgesetz*, hereafter: SchPflG).¹⁷ Under Sections 2, 3 SchPflG, children having turned 6 are obliged to attend school for 9 years. However, pursuant to Section 11(2) SchPflG, for most school types this obligation can be met by means of instruction at home (‘häuslicher Unterricht’) if the latter is at least equivalent to instruction at schools competent for mandatory schooling.

If one decides upon this possibility, one has to inform the district school councillor (*Bezirksschulrat*) at the start of the school year (Section 11(3) SchPflG). Within one month, the district school councillor may prohibit the participation in such instruction if it is highly likely that above equivalence is not met. In other words, it is the objectives of the respective state curriculum that have to be achieved. This thought also underlies Section 11(4) SchPflG, which requires pupils instructed at home to sit annual exams at schools competent for mandatory schooling. These exams have to be taken before the end of the school year. If pupils fail these exams, which can be repeated, they have to attend school and repeat the respective school year. Therefore schooling becomes compulsory. Consequently, instruction at home does not lead to a certificate recognized by the State.¹⁸ This recognition is achieved only by means of above exams¹⁹ and the vast majority of pupils (2010: 98.9 %) pass these.²⁰ Let us now come back to above question: What is covered by Article 17(3) StGG or, put differently, could the Austrian legislator abolish homeschooling without amending constitutional law (ie Article 17(3) StGG)?

The answer to the last question is ‘no’, for, as has been shown above, a historical and systematic interpretation of the said provision shows that ‘instruction at home’ was and is conceptualized as surrogate for instruction at mandatory schools. Thus this kind of instruction is protected by Austrian

13 Assuming such a broad scope of protection Wieser, B. (2010), *Handbuch des österreichischen Schulrechts I*, NWV, Graz, p.48; construing Article 17(3) StGG in a narrow sense Spielbüchler, K. (1985), ‘Das Grundrecht auf Bildung in Österreich’, *Europäische Grundrechte-Zeitschrift*, pp. 437-46 (p. 444).

14 See 2.a.

15 See Section 23, *Reichsvolksschulgesetz* 1869

16 Stöger (n 4) p. 113. However, as the law differentiates between private schools and instruction at home, these two concepts need to be demarcated from each other, the main difference being that private schools show a higher degree of organization, see Cf Matzka, M. (1980), ‘Schulrecht und „freier Unterricht“: Zur Abgrenzung von häuslichem Unterricht und Privatschule’, *Recht der Schule*, pp.4 et seq.

17 Federal Law Gazette (*Bundesgesetzblatt*) 76/1985

18 Ermacora, F. (1963), *Handbuch der Grundfreiheiten und der Menschenrechte*, Manz, Vienna, paragraph 829.

19 Cf Wieser (n 14) p. 49.

20 Doring (n 5).

constitutional law and, more importantly, there is even a fundamental right to it.²¹ We may thus speak of an institutional guarantee of home schooling in Austria.

However, this does not mean that the legislator cannot impose any limits on homeschooling. Statements of the Austrian Constitutional Court according to which instruction at home is not restricted,²² are to be interpreted in a sense that anyone may give this kind of instruction. This reading may be also supported by the structure of Article 17 StGG, with paragraph 3 thereof being drafted as an exemption to paragraph 2.

The legislator's possibility to adopt requirements for homeschooling is also expressed by 17(5) StGG, according to which 'the right to supreme direction and supervision over the whole instructional and educational system lies with the state.' Consequently, the protection of home schooling does not cover subject matters. Thus it is the state that sets the curricula and the respective teaching objectives. Homeschooling is only protected in so far as these objectives can be achieved, which has to be established by above exams.

This being said, there are nevertheless other constitutional concerns regarding homeschooling. The approach to homeschooling, first and foremost, equates schooling with the teaching of knowledge in certain subjects (e.g. mathematics). However, schooling is also considered to aim at the integration of the individual into society.²³ This idea also finds its expression in the B-VG, which determines much broader teaching objectives of schooling, for Article 14(5a) B-VG provides for the following:

'Democracy, Humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school, based on which it secures for the whole population, independent from origin, social situation and financial background a maximum of educational level, permanently safeguarding and developing optimal quality. In a partnership - like cooperation between pupils, parents and teachers, children and juveniles are to be allowed the optimal intellectual, mental and physical development to let them become healthy, selfconfident, happy, performance - oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values. Any juvenile shall in accordance with his development and educational course be led to independent judgement and social understanding, be open to political, religious and ideological thinking of others and become capable to participate in the cultural and economic life of Austria, Europe and the world and participate in the common tasks of mankind, in love for freedom and peace.'

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According to this Article, which was introduced in 2005, schooling also has to aim at what we may refer to as 'social skills'. Compared with Article 17(3) StGG, Article 14(5a) B-VG follows a more recent pedagogic approach, under which the objectives of schooling cannot be reduced to the obtainment of formal qualifications. In short, between 1867 and 2005 pedagogy has considerably changed. It is doubtful whether the objectives of Article 14(5a) B-VG can be reached by homeschooling. Let us think of a pupil taught by parents who think that the democratic society is evil and harmful to their child. Thus they isolate their child in order to protect it.²⁴ Once a year this child takes its exams and passes them without any problems. From the perspective of Article 17(3) StGG and Section 11 SchPflG, this case poses no problems. But what about Article 14(5a) B-VG? This question cannot be answered easily, for there are still many open points as to the legal nature and the scope of application of Article 14(5a) B-VG. Therefore in how far homeschooling has to meet above requirements shall be analysed in more detail in a further article, as this question would undoubtedly go beyond the scope of this contribution.

21 Cf Berka, W. (1999), *Die Grundrechte*, Springer, Vienna, paragraph 690; Stöger (n 4) p. 117.

22 Austrian Constitutional Court, VfSlg 2.670/1954.

23 Cf the views held by German courts in *Konrad et al v Germany* App. no. 35504/03 (ECHR, 11 September 2006).

24 This constellation is comparable to the one in *Konrad* (n 24).

III. Homeschooling in the light of the ECHR

So far we have only been talking about Article 17(3) StGG. However, Austria has ratified the ECHR and, more importantly, the Convention is also a part of Austrian constitutional law. This raises the question whether or not homeschooling is protected by the Convention. In *Konrad*, the Court has already dealt with this issue. Parents whose children were obliged to attend primary school under German law rejected this attendance for religious reasons, invoking Articles 8 and 9 of the Convention as well as Article 2 of Protocol No. 1. The Court declared the application as inadmissible and held as follows:

The right to education as enshrined in Article 2 of Protocol No. 1 by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals (...). Therefore, Article 2 of Protocol No. 1 implies the possibility for the State to establish compulsory schooling, be it in State schools or private tuition of a satisfactory standard (...). The Court 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.²⁵

Thus the ECtHR followed the German courts' reasoning that education also involves the acquisition of social competence and the latter aim cannot be achieved by homeschooling. Consequently, the right of parents under the second sentence of Article 2 of Protocol No. 1 does not trump the child's right under the first sentence thereof. To sum up, according to the Court, compulsory schooling is – in principle – compatible with the Convention and, more importantly, a parental right to homeschooling cannot be derived from the Convention.²⁶

IV. Conclusion

The fact that there is hardly any cases relating to instruction at home as enshrined in Article 17(3) StGG and Section 11 SchPflG suggests that this issue seems to be unproblematic from a legal point of view. Homeschooling is made use of in a small number of cases, the vast majority of which clearly fulfil the requirements of Section 11 SchPflG. This being said, homeschooling is nevertheless a controversial political topic in Austria.

²⁵ *Konrad* (n 24).

²⁶ This being said, some authors consider homeschooling to be exceptionally protected by the Convention see Thurn, J.P. and Reimer, F. (2008), 'Homeschooling als Option?', *neue Zeitschrift für Verwaltungsrecht*, pp. 718-22 (p. 722); Marauhn, T. (2012), 'Hausunterricht zwischen Bildungsrecht und Elternrecht: "Homeschooling" im Lichte der EMRK', in Reimer (n 4) pp. 99-108 (p. 108).