

THE AUSTRIAN CONSTITUTIONAL COURT'S JUDGMENT ON A HEADSCARF BAN AT PRIMARY SCHOOLS - LIBERALIZING THE ILLIBERAL?

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On 11 December 2020, the Austrian Constitutional Court repealed Sec 43a of the Federal School Education Act as unconstitutional (Judgment G 4/2020-27). This provision, enacted in 2019 (BGBl I 2019/54), had prohibited all (6 to 10 year old) pupils in primary schools from wearing head-covering clothes of a religious or ideological nature. The provision had explicitly stressed that all pupils should be guaranteed the best possible development and that it aimed at the social integration of children in accordance with local traditions and manners, the protection of constitutional values and education principles as well as the equality between men and women. It had also provided that in case of a violation of the headwear ban the legal guardians of the respective child would be invited to discuss the ban and the reasons for violating it with the education authority. If the legal guardians did not follow this invitation or if the ban was violated even after such a talk, a penalty of up to 440 euros could be imposed.

Several Muslim parents and some of their daughters had directly

lodged an individual complaint against that provision before the Austrian Constitutional Court in which they had, inter alia, claimed a violation of the Austrian equality principle as well as of freedom of religion under Art 9 ECHR in conjunction with Art 14 StGG. In turn, the Federal Government argued that no violation had taken place, since there was no general rule in Islam that small girls at that age had to wear a headscarf at all. Moreover, even though the wording of the provision targeted all sexes and all kinds of headwear, only the Muslim headscarf - differently from the Jewish kippah or Sikh patka - was based on a sexualised notion that women should not show certain parts of their bodies in public. Small girls should, however, be protected from early sexualisation, in particular with a view to end the segregation between the sexes and the social exclusion of girls as well as to promote the parity of men and women.

The Constitutional Court admitted that the wording of the provision did not explicitly refer to a certain religion or sex, but referred to the explanatory materials which problematized the Muslim headscarf while the kippah or patka were not intended to be banned from schools. The Constitutional Court rightly concluded that only the Muslim headscarf was de facto prohibited at primary schools. According to the Court, the provision thus violated the Austrian equality principle (Art 7 B-VG and Art 2 StGG) in conjunction with religious freedom (Art 14 para 2 StGG and Art 9 para 1 ECHR). Its reasoning, however, confuses both fundamental rights - equality and religion - inasmuch as the respective reasonability and the proportionality tests are applied in a muddled way. According to the Court, if a provision targeted only one particular religion it would not treat all religions neutrally and would thus particularly need to be reasonably justified. The question whether the ban interfered with religious freedom at all did not depend on whether the need for small girls to wear a headscarf for religious reasons was seen differently within the Muslim community. The Muslim headscarf could "in one way or another" be compared to other kinds of

(however, non-prohibited) headwear. Such a discrimination would have to be particularly justified. Even though social integration and parity of the sexes were fundamental goals the provision would need to be proportional and reasonable, particularly in accordance with the fundamental values of schools as entrenched in Art 14 para 5a B-VG. Wearing the headscarf could have different meanings, such as the affiliation to an Islamic tradition or to the religious values of Islam. The Constitutional Court was not allowed to choose one of these meanings when assessing the constitutionality of the contested provision. The provision was not even suited to reach the goals intended by the lawmaker. Rather, the provision could “also” have negative impact on the situation of Muslim girls because they might be socially excluded and have difficult access to education. As a consequence of the provision, Muslim girls would thus rather be educated at home or at private schools which would further their social exclusion. The provision excluded “Islamic origin and tradition as such” (the Court obviously forgot that the ban - indirectly - related only to Muslim girls, but not to boys) and stigmatized such persons. The Constitutional Court vaguely admitted the reality of social and religious conflicts at schools, but considered it unreasonable that the provision did not target persons that bullied Muslim pupils into wearing the headscarf at school but these pupils themselves even though “they did not themselves disturb peace at school”. The lawmaker should create “suitable instruments” to cope with such conflicts if other measures in order to secure the applicable school rules were not held sufficient.

A headscarf ban is a complex issue that needs to be discussed with care and subtlety. Rather than that, the decision largely consists of the various parties’ arguments that are repeated over and over again, while the Court’s own arguments do not cover more than a couple of pages. Its thin reasoning starts with the assumption that the provision does indeed not mention a particular sex or religion and ends with the assumption that the provision only refers to one particular sex and religion, because the explanatory materials

problematize the Muslim headscarf. The Court does, however, not at all inquire into the possible justification of such a “hidden” discrimination: namely, that only the Muslim headscarf is based on a sexualized notion of (just) female pudency and that early sexualisation might be detrimental to small girls and gender roles in liberal democracies so that it does perhaps not resemble other kinds of headwear “in one way or another” (whatever this superficial phrase means). Neither does the Court much inquire into actual problems at many Austrian schools where Muslim girls (mostly, however, at an older age) are bullied, in particular by male relatives or their friends, for not wearing the headscarf at school. That the lawmaker should find “more suitable” measures in order to solve these conflicts is an easy answer to a much more complex social problem.

In particular, it would have been necessary for the Court to inquire into whether there is a kind of “mainstream” Islam that indeed requires girls to wear a headscarf before their puberty. An interference with the right of religion cannot be assumed while the actual rules of a religion are eclipsed. Neither is it clear why the Court feels unable to choose from a “pluralism of meanings” for wearing the headscarf when each and every single meaning enlisted by the Court relates to Islam. The Court’s very fear that some girls would be forced to receive education at private schools or at home (where they could wear the headscarf) instead of state schools admits that there might indeed be pressure on girls to wear the headscarf. Whether girls might be more isolated if they wear the headscarf or not, may be questionable - this seems to depend on the view into which kind of society they should be integrated. That the provision just targets those “that do not disturb peace at school” is wrong: it surely targets Muslim girls that do not want to wear the headscarf as well as those that want to wear it (quite apart from the question whether 6-10 year old children really have a full-fledged autonomous opinion on this issue). But it also targets their legal guardians that need to discuss the issue with the school authorities

and might be punished if not complying with the request. The provision therefore also targeted parents and indirectly also others that might otherwise have bullied these girls into wearing the headscarf.

According to surveys, the vast majority of muslims in Austria does not believe a headscarf to be necessary for girls at that age, so that the number of legal proceedings under this provision is deemed to be low. Thus, it has been rather a symbolic conflict about a symbol that has nevertheless much impact on the general discussion regarding parallel societies and social inclusion. Similar headwear bans in regional laws are still in force regarding children in nursery schools (3- 6 years old). An at least discussed headscarf ban for older pupils would indeed raise more doubts on its constitutionality, in particular because the interference with the freedom of religion would then be more obvious. Also the Austrian face veil ban is still in force (as well as its exception regarding health-protecting masks, enacted even before the corona crisis). Whatever the ideological perspectives on such a ban are, however, the Constitutional Court's superficial and incomplete reasoning is hardly helpful for weighing clashing claims of liberalism.