CUREDI045AT006

Question(s) at stake:

Whether Article 43a of the School Education Act, which prohibits children under the age of ten from wearing religious headwear in school, violates the freedom of religion and the right of parents to have their children educated in accordance with their religious and philosophical convictions.

Outcome of the ruling:

The Constitutional Court ruled that Article 43a of the Act was unconstitutional and should be repealed because it violated the principle of equality protected by Article 7 of the Constitution and Article 2 of the Constitutional Act on the Fundamental Rights of Citizens, and the applicants' right to freedom of thought, conscience and religion guaranteed by Article 9(1) of the European Convention on Human Rights and Article 14(2) of the Constitutional Act.

Topic(s):

- Culture and Cultural Heritage
- Education

Keywords:

- Attire
- Cultural diversity
- Cultural expressions
- Equality between men and women
- Freedom of thought, conscience and religion
- Non-discrimination
- Protection of the rights and freedoms of others
- Public authorities' schools

- Religion or belief
- Religious and cultural symbols
- State neutrality

Tag(s):

- Islam
- Hijab

Author(s):

- Wonisch, Kerstin (Eurac Research Institute for Minorities Rights, Bolzano, Italy)
- Ganepola, Alexander (Eurac Research Institute for Minorities Rights, Bolzano, Italy)

Country:

Austria

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ECLI:

ECLI:AT:VFGH:2020:G4.2020

Date:

11 December 2020

Jurisdiction / Court / Chamber:

Constitutional Court of Austria

Remedy / Procedural stage:

Decision

Previous stages:

- None

Subsequent stages:

- European Court of Human Rights

Branches / Areas of law:

Constitutional law; Administrative law; Human rights law

Facts:

This case concerns Article 43a of the School Education Act, which prohibits pupils under the age of ten from wearing ideological or religious headwear. There were six applicants represented by two parties who challenged the constitutionality of this article. The first party includes the first and second applicants, who are Austrian nationals and the parents of the third applicant. The second party consists of the fourth and fifth applicants, who are the parents of the sixth applicant. According to the first and second applicants, the ban on wearing garments of a religious nature is irreconcilable with their right to educate their daughter in accordance with their Islamic beliefs. The fourth and fifth applicants mainly argued that the ban imposed by Article 43a of the Act infringes on their and their daughter’s freedom of religion.

Both groups of parents intend to educate their daughters in accordance with Islamic doctrines. The first and second applicants adhere to Sunni Islam while the fourth and fifth applicants adhere to the Shiite school of Islam. According to both groups of parents, their children made the decision to wear a hijab at school on their own initiative and based on their religious convictions. The applicants argued that according to Islam, women are generally required to wear a headscarf. The Shiite school of law further specifies that girls should begin

wearing the hijab from the age of nine by the lunar calendar, approximately equivalent to eight years, eight months, and 23 days by the solar calendar.

Conversely, the government contests the assertion that this practice is universally obligatory, noting that the “Islamic Shiite Religious Community in Austria” does not mandate the hijab at this specific age. Additionally, it is highlighted that in countries where Sunni Islam prevails, the requirement to wear a hijab does not typically apply at such an early age.

The parents argue that Article 43a of the Act, which bans hijabs in schools, directly impacts them and their children, posing potential consequences for noncompliance. They argued that the School Education Act of 1985 gives them the right to determine their children’s religious education and that the hijab prohibition contravenes both the children’s and parents’ religious freedom as protected under the Constitutional Act and the European Convention on Human Rights. They also noted that according to previous court decisions, wearing the hijab would not disturb public order or violate good morals, adding that the ban was not necessary for a peaceful society. They argued that the state should instead tolerate religious symbols and customs.

The state argued that the case law of the European Court of Human Rights does not explicitly support the view that restrictions on freedom of religion are never justified. It underscored the latitude typically afforded to states in enacting measures that affect religious groups and emphasized the legitimate purposes that such measures may serve. Regarding Article 43a of the Act, the government argued that its objectives include ensuring the best possible development of pupils, promoting social integration in accordance with local customs and traditions, safeguarding fundamental constitutional values, and supporting equality between men and women. In this context, the government argued that Article 43a of the Act not only addresses a legitimate public interest in maintaining order and protecting the rights of others but is also a proportionate and necessary means to attain these ends.

The applicants contended that Article 43a of the Act unjustly discriminates since it does not encompass head coverings such as the Jewish *kippa* or the Sikh patka while singling out the hijab. This selective treatment, they argued, violated the principle of equality enshrined in Article 7 of the Constitution and Article 2 of the Constitutional Act.

The government defended the difference in treatment on the basis of the different implications and scope associated with each religious manifestation. Specifically, the government associated the wearing of the hijab with potential early sexualization of Muslim girls – arguing that it is intended to cover certain body parts upon reaching sexual maturity – and also with promoting segregation.

Lastly, the applicants argued that Article 43a of the Act does not conform to the principle of certainty and clarity outlined in Article 18 of the Constitution, as it does not clearly define what constitutes clothing of an “ideological or religious nature” and what is meant by “covering of the head.”

Ruling:

In its decision, the Constitutional Court ruled that the “headscarf ban” outlined in Article 43a of the School Education Act was unconstitutional. According to the Court, the regulation – which affects a certain group of schoolgirls and seeks to ensure religious and ideological neutrality and gender equality – is discriminatory and does not achieve the intended goal of preventing social segregation and achieving equal treatment of men and women. Therefore, according to the Constitutional Court, Article 43a of the School Education Act violates the principle of equality in conjunction with the right to freedom of thought, conscience, and religion.

In its assessment, the Court first determined whether the applicants’ joint complaint was admissible and if their rights were directly infringed by the contested provision. The Court found that the provision directly affected not only the third and sixth applicants with regard to their right to freedom of religion as guaranteed by Article 9 of the ECHR, but also the first, second, fourth, and fifth applicants in a similar manner since the parents would be sanctioned in the event

of a violation of Article 43 of the Act. This rendered the applicants' complaint admissible.

According to the Court, the intention of Article 43a, which refers to clothing of an ideological or religious nature covering pupils' heads in general, is to be interpreted strictly as pertaining to a form of head covering associated with the Islamic tradition, particularly the hijab. The Court recalled that the legislator had relied upon a differentiation between religious garments that was not objectively justified. Reiterating its settled case law that religious symbols in educational institutions are permissible, the Court further observed that neither school procedures nor the peace at school would be impaired by pupils wearing headscarves. The Court, therefore, determined that the freedom of religion of people sharing a different belief (i.e., the rights and freedoms of others) could not be relied upon to justify the prohibition outlined in Article 43a of the Act. In addition, the Court concurred with the applicants' view that Article 43a of the Act violated the applicant parents' educational right as guaranteed by the Constitution. The parents' desire to educate their children with respect to the meaning and symbol of the headscarf is further protected by Article 9 of the ECHR.

According to the Court, the principle of equality obliges the state to remain religiously and ideologically neutral to establish a school system for different religious and ideological convictions. Although the state is granted discretion in this regard, the rights of pupils and their parents may only be restricted with provisions that are proportionate and objectively justified. Thus, a provision that singles out a particular religious or ideological belief, such as Article 43a of the Act, does not meet the requirements of religious and ideological neutrality. The Court found that such a provision does not meet these requirements and may lead to discrimination and segregation of Muslim girls, as well as promote social segregation and limit the girls' access to different ideologies. This, according to the Court, is contrary to the official aim of the state's educational mandate, which is enshrined in Article 14 of the Constitution.

The Court ruled that the government could not justify a selective prohibition under Article 43a of the School Education Act on the grounds that schools could be sites of ideological or religious conflicts among pupils. Instead, it is incumbent on the government to provide an institutional and legal framework to confront such conflicts in accordance with its requirement of neutrality and the constitutional mandate of education. The Court therefore concluded that the prohibition in Article 43a of the Law was discriminatory against Muslim girls and contrary to the State's obligation of neutrality and that it failed to achieve its regulatory objectives and was not objective. As a result, the Court found that Article 43a of the Act violated Article 7 of the Constitution and Article 2 of the Constitutional Act (Constitutional Act) in conjunction with Article 9(1) of the ECHR and Article 14(2) of the Constitutional Act. It subsequently ordered its repeal. With regard to other complaints raised by the applicants, i.e., the requirement of certainty and clarity enshrined in Article 18 of the Constitution, the Court held that, in the light of these findings, no separate examination was necessary.

Main quotations on cultural or religious diversity:

- “Neither school operations nor the peace of the school would be impaired by the wearing of a headscarf. The Constitutional Court had also ruled in VfSlg. 19.349/2011 that the presence of religious symbols in educational institutions was permissible. The principle of parity and equal treatment of religions requires this case law to be applied to the Islamic headscarf. For this reason, the negative religious freedom of people of different faiths or beliefs could not be used as justification for a ban. In addition, Article 43a of the School Education Act also violates the parents’ right to education, which is guaranteed by the Constitution. Any wish of parents to educate their children with the symbol of the headscarf is protected by Article 9 of the ECHR.” (para. 127)
- “The legislator justifies the prohibition provision of Article 43a of the School Education Act ostensibly with considerations of equality. At the same time, the explanatory notes to the initiative refer exclusively to ‘adherents of some

Islamic currents, directions, or traditions'. In its report, the Education Committee expressly emphasizes that 'the Jewish Kippa and also the patka, which is worn by Sikhs at this age, do not fall under this regulation'. The legislature itself thus makes a differentiation between different religious garments that is not objectively justified. If the legislator really wanted to secure freedom of choice in the exercise of religion and promote a successful integration by the contested provision, other visible religious symbols, or items of clothing such as the kippa or the patka, would also have to be prohibited. These are just as suitable or serve to identify the respective wearer as a follower of a particular religious denomination. It makes no difference to others which parts of the 'head' are covered." (para. 128)

- "In organizing the school system, the legislator is required to comply with this requirement of religious and ideological neutrality by treating different religious and ideological convictions in accordance with the principle of equality. […] the school should impart the ability to be open to the religious and ideological thinking of others. Accordingly, the school is based, among other things, on the fundamental values of openness and tolerance." (para. 136)
- "Against the background of the case law of the European Court of Human Rights, the ban on covering the head at school in accordance with Islamic tradition, as provided for in Article 43a of the School Education Act, constitutes an encroachment on the legal sphere of the schoolgirls concerned and their legal guardians, which is constitutionally guaranteed by Article 9 of the ECHR. Contrary to the statements of the Federal Government, it is not important whether there are different views within Islam on the requirement for Muslim women to cover their heads, such as the question of the age at which a headscarf should be worn. Any differences of opinion within a religious or ideological community are not decisive for the assessment of whether an act or conduct motivated by religion or ideology falls within the scope of protection of Article 9 of the ECHR." (para. 138)

- “Article 43a of the School Education Act specifically prohibits the covering of the head according to Islamic tradition, in particular the Islamic headscarf. With this regulation, the legislator thus singles out a specific form of clothing with religious or ideological connotations, which is comparable in one way or another to other, but not prohibited, clothing habits with religious or ideological connotations.” (para. 139)
- “A regulation that counteracts undesirable gender segregation and thus serves the educational goal of social integration and gender equality pursues an important objective that is prescribed by constitutional law in general (Article 7(2) of the Constitution) and for schools in particular (Article 14(5a) of the Constitution). However, such a regulation must be proportionate and objective, and in particular in harmony with the other basic values of the school.” (para. 142)
- “First of all, it is important to note that wearing the Islamic headscarf is a practice that is carried out for various reasons. The possible interpretations that the wearers of a headscarf give to this clothing and thus to the wearing of the headscarf against the background of their specific religion or worldview are manifold […]. Wearing a headscarf can simply express association with Islam or the orientation of one’s life to the religious values of Islam. Furthermore, the wearing of the headscarf can be interpreted as a sign of belonging to the Islamic culture or adherence to the traditions of the society of origin. The Islamic headscarf therefore does not have a clear and unambiguous meaning. However, in questions of freedom of religion and belief, the Constitutional Court is precluded from adopting a particular interpretation of a religious or ideological symbol when there are several possible interpretations and from basing its fundamental rights assessment of the permissibility of the presence of such symbols in state educational institutions on that interpretation.” (para. 143)
- “The selective prohibition regulation according to Article 43a of the School Education Act, which only applies to girls and prohibits them from wearing

an Islamic headscarf under the age of ten, is not suitable from the outset to achieve the objective formulated by the legislator. On the contrary, the selective prohibition under Article 43a School Education Act can also have a negative effect on the inclusion of affected schoolgirls and lead to discrimination, because it bears the risk of making access to education more difficult for Muslim girls or excluding them socially […]. The provision of Article 43a of the School Education Act excludes Islamic origin and tradition as such. The prohibition of the Islamic headscarf, which singles out a specific religiously or ideologically based clothing regulation, specifically stigmatizes a specific group of people." (para. 144)

- "The Constitutional Court does not fail to recognize that conflicts of a secular and religious nature can also arise in schools […]. However, this circumstance cannot justify the selective prohibition under Article 43a of the School Education Act. For the Constitutional Court, it is not objectively justifiable that the solution to such conflict situations does not start with those persons who exert pressure on the schoolgirls concerned, for example in the form of hostility, devaluation, or social exclusion. Rather, the prohibition under Article 43a of the School Education Act applies precisely to those students who do not disturb the peace at school." (para. 147)
- "It is incumbent on the legislator to create suitable instruments for conflict resolution, taking into account the requirement of neutrality and the constitutional mandate of education, and to provide the necessary resources if the educational and safety measures provided by law for the maintenance of school regulations […] are not sufficient to resolve such conflict situations and to put an end to forms of gender-based or religion-based bullying." (para. 148)
- "The selective prohibition pursuant to Article 43a of the School Education Act exclusively affects Muslim pupils and thus separates them from other pupils in a discriminatory manner. The enforcement of the religious and ideological neutrality of the state can, in principle, also justify restrictions of the

individual legal sphere. The focus on a certain religion or ideology and its specific expression in one (and only this) type of clothing, which is also comparable to other non-prohibited clothing habits in one way or another, is not compatible with the requirement of neutrality. A regulation which in this respect only affects a certain group of schoolgirls and remains selective in order to ensure religious and ideological neutrality as well as gender equality fails to achieve its regulatory objective and proves to be unobjective. Article 43a of the School Education Act therefore violates Article 7 of the Federal Constitution and Article 2 of the Constitutional Act (Constitutional Act) in conjunction with Article 9 (1) of the ECHR and Article 14 (2) of the Constitutional Act." (para. 149)

Main legal texts quoted in the decision:

Domestic law

- Articles 1, 43, 43a, 47, 48,49, 51 Of the School Education Act, Federal Law Gazette 472/1986 (WV), as amended by Federal Law Gazette I 80/2020
- Section 2 of the School Organization Act, Federal Law Gazette 242/1962, as amended by Federal Law Gazette I 38/2015
- Section 11 of the Compulsory School Education Act 1985, Federal Law Gazette 76/1985 (WV), as amended by Federal Law Gazette I 35/2018
- Section 1, 8 of the Ordinance of the Federal Minister for Education and Arts of 24 June 1974 concerning School Regulations, Federal Law Gazette 373/1974, as amended by Federal Law Gazette II 256/2020
- Articles 2, 14 Constitutional Act on the Fundamental Rights of Citizens
- Article 63 of the State Treaty of St. Germain
- Articles 7, 14, and 18 of the Austrian Constitution

International law

- Articles 9 and 10 of the European Convention on Human Rights

Cases cited in the decision:

Relevant European Court of Human Rights case law:

- *Campbell v. Cosans*, App no 7511/76, 25 February 1982
- *Dahlab v. Switzerland*, App no 42393/98, 15 February 2001
- *Dogru v. France*, App no 27058/05, 4 December 2008
- *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App nos 5095/71, 5920/72, 5926/72, 12 July 1976
- *Kokkinakis v. Greece*, App no 14307/88, 25 May 1993
- *Leyla Şahin v. Turkey*, App no. 44774/98, 10 November 2005
- *Osmanoğlu and Kocabaş v. Switzerland*, App no 29.086/12, 10 January 2017
- *Valsamis v. Greece*, App no 21787/93, 18 December 1996

Commentary

Islamic Headscarves in Austrian Schools: Judicial Balancing of Educational Rights and Social Consequences

The dispute over headscarves worn by teachers and pupils at school has been going on across Europe for more than 30 years. However, the recent decision by the Constitutional Court is the first to address the issue in Austria, a country with a long history of accommodating Islam and the needs of its believers in a secular state.

The remarkably early legal recognition of Islam in 1912 provided Austrian Muslims with a stable framework, which granted legal privileges such as the promotion of Muslim identity and organizational life. But this did not result in a social acceptance of Muslim presence in the public sphere or prevent the exploitation of societal tensions for political reasons. In 2015, a new Islam Law Act was enacted, providing privileges and guarantees for Islamic communities, as well as increased state oversight (see CUREDI045AT004). The government also declared fighting political Islam one of its primary goals and enacted controversial legal measures and policies such as the present Article 43a of the School Education Act. This provision prohibits students from wearing clothing of an ideological or religious nature that covers the head until the end of the school year in which they turn ten. The goal of this provision is to promote social integration and gender equality

while preserving basic constitutional values and educational objectives (Article 43a(1) of the School Education Act). However, the provision does not specify exactly which forms of headwear it seeks to target.

Therefore, the Constitutional Court began by analyzing the scope of the provision and interpreting the wording “the wearing of clothing of an ideological or religious nature that involves the covering of the head”, for which the Court relied on legislative materials and explanatory notes, an approach frequently used by the Court (VfSlg. 19.665/2012, 20.241/2018; VfGH 5.3.2020, G 178/2019) to shed light on the intention of the legislator. According to the notes of the Education Committee of the Parliament, the provision sought to tackle head coverings that conceal the entire head or hair or large parts of it, e.g., the Jewish *kippa* and the *patka* worn by Sikhs of this age, which were explicitly exempted. Thus, the Court interpreted the ban on head coverings in schools as targeting the wearing of head coverings in accordance with Islamic tradition, primarily the Islamic headscarf (paras. 122–123). However, the right to freedom of religion and belief – as enshrined in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), Article 9 of the European Convention on Human Rights (ECHR), and Article 14 of the Austrian Constitutional Act (Constitutional Act) – encompasses the right to manifest one’s religion, including by wearing religious symbols in both private and public places (HRC 1993: para. 4). In fact, in a 2011 case concerning crucifixes in nursery schools, the Constitutional Court stated that the presence of religious symbols in educational institutions is permissible (VfSlg. 19.349/2011 discussed in CUREDI001AT062).

The Court stated that the principle of parity and non-discrimination is deeply rooted in the Austrian legal framework for religious diversity. The state, it further ruled, must treat different religious and ideological convictions accordingly while maintaining neutrality. Although the government is permitted a certain margin of appreciation, the Court nevertheless affirmed the Austrian state’s principle of religious and ideological neutrality. The Court did not accept the government’s justification for the ban, i.e., that the wearing of the Islamic headscarf at primary school age would lead to early sexualization of schoolgirls and thus to undesirable

gender segregation, which would be contrary to the educational goal of successful social integration and gender equality. However, as Tonolo points out, the Islamic headscarf can signify different things such as religious identity, loyalty to tradition, belief in the chastity of women, not being sexually available, respect for wishes of parents and families, or an expression of cultural identity (Tonolo 2014: 3). Even within Muslim communities, there is no uniform position on whether and when to wear a headscarf. In its assessment, the Court therefore not only explained that the wearing of an Islamic headscarf may be for different reasons but also clearly stated that it is not for the courts to adopt a particular interpretation of a religious or ideological symbol when several interpretations are possible (para. 143).

Thus, the Austrian Court did not follow the approach of the European Court of Human Rights, which considered the Islamic veil to be a powerful religious symbol imposed on women (*Dahlab v. Switzerland*, App no 42393/98, 15 February 2001: para. 13). It refrained from endorsing the view that such a ban would liberate women from subordination and patriarchal practices (Brems 2020: 3; *Leyla Şahin v. Turkey*, App no. 44774/98, 10 November 2005: para. 111).

Instead, the Constitutional Court considered the potential social consequences of a headscarf ban for Muslim girls and referred in its assessment to the latest country report of the European Commission against Racism and Intolerance (ECRI). The report not only found high levels of Islamophobia in Austria but stated that Article 43a of the School Education Act would single out and stigmatize a certain group of people, i.e., Muslim girls, to the detriment of their inclusion, potentially resulting in intersectional discrimination and impeded access to education (ECRI 2020: para. 17).

Indeed, many European and North American states grant parents who are not satisfied with pluralistic and more secular schooling the right to choose either a private school more in line with their own worldview and beliefs, or to homeschool (Permoser and Stoeckl 2021; Temperman 2012). The Constitutional Court in Austria recognizes the risk for girls wearing headscarves who may be excluded from public education due to the option of fulfilling compulsory schooling through

homeschooling or private/denominational schools. This exclusion, according to the Court, would prevent equal participation in public schools and compromise pluralistic objectives and fundamental constitutional values.

Finally, the Court dismissed the government's argument that the ban was necessary to protect Muslim girls from social pressure from classmates. According to the Court, the wearing of headscarves alone does not disturb the peace at school and therefore a ban is hardly justifiable. Instead, the Court upheld the principles of neutrality and the state's educational mandate, emphasizing the need to provide adequate measures to promote gender equality and inclusion, and to end different forms of gender-based or religious-based bullying and discrimination.

Literature related to the main issue(s) at stake:

General legal literature on the topic

- Brems, Eva. 2021. "Hidden under Headscarves? Women and Religion in the Case Law of the European Court of Human Rights". *Religion & Human Rights* 16 (2–3): 173–200.
- Permoser, Julia Mourão and Kristina Stoeckl. 2021. "Reframing Human Rights: The Global Network of Moral Conservative Homeschooling Activists". *Global Networks* 21 (4): 681–702.
- Temperman, Jeroen. 2012. "Religious Symbols in the Public School Classroom". In Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, vol. 11, 143–176. Leiden: Martinus Nijhoff Publishers.
- Tonolo, Sara. 2014. "Islamic Symbols in Europe: the European Court of Human Rights and the European Institutions". *Stato, Chiese e pluralismo confessionale Chiese e pluralismo confessionale* (5/2014).

Materials relevant to the case

- ECRI, "Report on Austria (Sixth Monitoring Cycle)," Council of Europe, April 2020, available at <https://www.coe.int/en/web/european-commission-

against-racism-and-intolerance/austria> accessed 23 June 2023.

- HRC, “General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion),” CCPR, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at <https://www.refworld.org/docid/453883fb22.html> accessed 26 June 2023.

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