

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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No face-veil (Part of Islamic Burqa) in Austrian Courtrooms

Austrian High Court
Decision from August 27th, 2008
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Circumstances of the Case

Mohammed M and Mona S were convicted in a trial by jury on March 12th, 2008, for (among other crimes) being member of a terrorist group according to § 278 b para 2 Criminal Code (StGB). It was found that at least since March 2007 the accused were members of Al-Qaida and further internationally operating radical-Islamic terrorist-networks, especially Afghan and Iraki Mujahedin-groups.

Respectively, Mohammed M has called on others in general to commit terrorist attacks and precisely on September 9th, 2007, to attack stadiums and spectators of the European Football Championship 2008, national and international politicians, and international buildings in Vienna. Since March 2007 he repeatedly published messages on the Internet, distributing and promoting the ideology of Al-Qaida and the Mujahedin, and tried to recruit members for these terrorist groups. He published worldwide accessible video-messages threatening the Austrian government with terrorist offences in order to remove its soldiers from Afghanistan.

Mona S was found to knowingly support the mentioned terrorist groups by revising and translating propagandistic messages distributing the ideology of Al-Qaida, as well as accompanying texts and headlines of videos glamorising terrorist attacks, and by forwarding propagandistic messages, accompanying texts and headlines of videos to Mohammed M for publication on the Internet or partly by publishing herself.

During the trial Mona S was called by the chairperson of the panel to remove the scarf, covering her face while leaving a slip for the eyes. After her refusal she was found to disturb the hearing with inappropriate conduct ("ungeziemtes Benehmen") and was banned from the hearings according to § 234 Criminal Procedure Act (StPO). She was allowed to return only when showing her face. During the entire criminal trial Mohammed M and Mona S were both represented by a lawyer.

Relevant provisions

§ 278b – Criminal Code

(1) Who leads a terrorist group (para 3), has to be punished with five to fifteen years of imprisonment. Who leads a terrorist group, who restraints on the

threatening of terroristic crimes (§ 278c para 1), has to be punished with one to ten years of imprisonment.

(2) Who is a member (§ 278 para 3) of a terrorist group, has to be punished with one to ten years of imprisonment.

(3) A terrorist group is a consortium of more than two persons, established of a longer period, with the aim, that one or more members of this group commit one or more terroristic offences (§ 278c).

§ 234 – Criminal Procedure Act

If an accused disturbs the order of the hearing with inappropriate conduct, and does not abandon it, after admonition of the chairperson and warning to be banned from the hearing, he may be banned temporarily or for the entire hearing by decision of the court. The hearing may be continued in his absence and the judgement may be pronounced to him in presence of the recording clerk.

Article 6 – Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Art 9 ECHR

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in group with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Decision of the High Court (Shorted)

The High Court suspended the main parts of the conviction and remanded the case to the first instance for a new hearing and judgement.

Regarding the ban of Mona S the High Court expressed the following:

From the fact that the court regarded the complete covering of the accused Mona S as inappropriate conduct according to § 234 StPO, invalidity from preoccupation and partiality of the court can not be concluded, due to the remark to the accused that "she can reappear any time, if she removes the cover of her face". The allegation that the criticised order shows a tendency to constrain the accused to "revoke her belief" in the sense of "witch trials" is nonsense by all means.

Insofar as the ban itself was claimed to be a fault of the procedure, it was applied only regarding the accused Mona S in the determination required by law. Since the lawyer objected expressively after the ban from the hearing against this measure, that "the rights of the accused are deprived and the covering does not constitute inappropriate conduct", he fulfilled the requirement of the application according to § 345 para 1 no 5 StPO, regarding the right of the accused to a fair trial.

It is part of the uncontested fundamental rules of common human communication in Austria to leave the face uncovered (even transparent face-veils are restricted to rare cases outside of courtrooms). Hence, it would have been the duty of the appellant to argue convincingly why her conduct before the court and the jury should not be regarded as a mere political-ideological motivated demonstration, out of place in courtrooms, considering that she would have had the possibility "to cover her face while entering and leaving the courtroom and wear a headscarf (cover of the hair) during the hearing" combined with the prohibition to broadcast, film and take photos in courtrooms (§ 22 Media Act; at least her lawyer can be regarded as knowing this provision).

The observation of the court to regard this conduct as disrespect of the jury-court was pointed out clearly to the accused and her lawyer. The denial of readmission was legal, considering that the accused did neither clear the concerns out nor ensured unambiguously the respect of the dignity of the court even if her face-veil indicated disrespect. It is mentioned, that the prohibition of covering according to § 162 StPO aiming to preserve evidence, refers only to testimonies and the already mentioned § 5 para 1 StPO prohibits the applicability to accused.

It remains to note that Art 9 ECHR does not cover the denial of the fulfilment of general duties of citizens. The method of exercise "consideration of religious customs" protects customs, in connection with religious activities, and activities relating to everyday's life. A behaviour which does not constitute a common practice in the concerned religious community is not an exercise of a religious custom. Furthermore § 234 StPO can be regarded as a legal provision enabling interferences according to Art 9 para 2 ECHR, the requirements for justification

of which are similar to para 2 of Art 8, 10 and 11 ECHR. Due to the explicit assurance to be readmitted to the hearing at any time when uncovering even only the face, together with the already mentioned prohibition to broadcast, film and take photos in courtrooms and the permission to cover the face "while entering and leaving the courtroom" and to wear "a headscarf (cover of the hair) during the hearing", the fundamental rights boundaries were not overstepped as well regarding the aspect of proportionality of the measure of the court guards (refer to ECHR 10.11.2005 (GK) *Leyla Sahin*, 44.774/98, 115 ff, EuGRZ 2006, 28, submitted justification of the prohibition, to wear (even only) the Islamic headscarf in Turkish universities).' ...

Comments

The judgement of the first instance became widely popular and the decision to ban the accused Mona S from the hearings for wearing a face-veil was discussed controversially. Although the High Court suspended and remanded the main parts of the conviction back to the first instance, the order to ban was confirmed. This, however, leaves no possibility to challenge the High Court's decision at the European Court of Human Rights. During the repeated hearing at the first instance the accused Mona S was again banned from attending the hearings after refusing to remove the burqa. This time the chairperson of the trial relied heavily on the High Court to reason its decision.

The standing of the Austrian Court appears to be obvious: The repeated refusal to remove the face-veil was seen as a "mere politic-ideological motivated demonstration" which must not be tolerated especially during a trial where religious motivated terrorist activities were at stake. This view, however, does not release the judicial decision-makers to consider the fundamental rights background.

Freedom of Religion

The fundamental right most obviously concerned is the freedom of religion enshrined in Art 9 ECHR. The High Court accepted its interference by banning Mona S, but regarded the measure as being in accordance with the law (§ 234 StPO) and proportional to serve public interests, most likely the protection of public order or safety. Especially the issue of proportionality needs to be scrutinised.

Prohibitions of headscarves were already confirmed by the European Court of Human Rights to be in accordance with the freedom on religion: In *Leyla Sahin*¹ the prohibition of headscarves, burqas, and full beards at Turkish Universities was seen to guarantee the secularity of the State. The prohibition of a headscarf of a teacher in a Swiss elementary school during lessons was regarded to ensure the confessional neutrality in public schools.²

However it remains questionable whether the situation of Mona S can be compared with these precedents. Even if the right to education or the necessity

1 ECHR 10.11.2005 *Leyla Sahin* (GK), 44.774/98. This decision is cited as well by the High Court.

2 ECHR 15.2.2001, *Dahlab*, 42.393/98.

(and right) to work are regarded to be fundamental, the accusation of serious crimes combined with the threat of long term imprisonment reaches a different level of intensity, due to the absolute lack of voluntariness. The accusation of serious crimes and the subsequently deprivation of fundamental procedural rights needs to be taken very seriously in connection with the assessment of proportionality. Hence, especially regarding the importance (and the fundamental right) to attend ones criminal trial, it remains questionable whether less intense measures would have been available. This issue will be discussed in context with the right to a fair trial.

If the Court regards uncovered faces as "uncontested fundamental rules of common human communication in Austria", it would have been possible to refrain from interrogating the accused but not from attending the hearing combined with the possibility of listening.

Right to a Fair trial

The High Court did not consider the right to a fair trial at all.

The right to a fair trial inter alia guarantees in Art 6 para 3 lit c ECHR a right to (self-) defence which includes the right to be present during the hearing.³ Therefore the accused must "be able effectively to participate in the proceedings".⁴ The concept of "equality of arms" includes a right of the accused to examine witnesses against them. This right demands that witnesses be presented during the hearing in presence of the accused in order to enable him or her to question the testimony.⁵ The nemo-tenetur-principle⁶ guarantees the right to remain silent and not to accuse himself or herself.

With the ban from attending the hearing Mona S was not only denied the ability to be present but also to participate effectively in the proceedings. The presence of her lawyer during the entire trial (as it is obligatory according § 61 para 1 no 4 StPO) does not substitute the right of attendance of the accused. Furthermore regarding the "equality of arms" principle Mona S was able neither to hear witnesses against her nor to examine them, question their credibility or point out contradictions to her lawyer.

The High Court furthermore declared that it is "part of the uncontested fundamental rules of common human communication in Austria to leave the face

3 *Grabenwarter*, Art 6 EMRK, in *Korinek/Holoubek* (Hrsg) Österreichischen Bundesverfassungsrecht (2007) Rz 197.

4 *Jacobs and White*, The European Convention on Human Rights⁴ (2006) 180.

5 *Grabenwarter*, Art 6 EMRK, Rz 221.

6 The Austrian Constitutional Court deduced the nemo-tenetur-principle originally from Art 90 para 2 B-VG ("In criminal proceedings the procedure is by indictment.") but followed the view of the ECtHR (eg 25.2.1993, *Funke*, 10.828/84; 8.2.1996, *Murray* [GC] 18.731/91) and literature (*Lienbacher*, Verwaltungsstrafverfahren – Anklageprinzip – Menschenrechtskonvention, ZfV 1986, 536; *Öhlinger*, Das Recht auf Parteistellung im Strafverfahren, im besonderen das Recht, nicht gehen sich selbst aussagen zu müssen, in *Machacek et al* [Hrsg] Grund- und Menschenrechte in Österreich II [1992] 767). Refer to *Marx*, Verfahrensgarantien in Zivil- und Strafsachen, in *Heißl* (Hrsg) Handbuch Menschenrechte (2009) Rz 26/47, and VfSlg 11.829/1988.

uncovered". This argument implies the importance of seeing one's face while communicating to observe the mimic and gesture in order to judge whether he or she is lying or telling the truth.⁷ This point of view does not take the *nemo-tenetur*-principle into account. It ensures the right not to be forced to provide evidence of any kind and also covers the right to remain silent and not to communicate with the court.⁸

Furthermore regarding the presumption of innocence until proved guilty (Art 6 para 2 ECHR), the argumentation of the High Court is controversial. It argues that "it would have been the duty of the appellant to argue convincingly, why her conduct before the court and the jury should not be regarded as mere politic-ideological motivated demonstration". The wording of the presumption of innocence in contrary points out that it is incumbent on the State to prove the guilt of the accused and not the burden of the accused to prove his or her innocence. This principle must not only be valid for the criminal charge but as well for procedural orders such as the one at stake. Hence, this shift of the burden of proof from the State to the accused contravenes Art 6 para 2 ECHR.

Conclusion

Regarding the freedom of religion, the point made clearly is that religious customs in form of a face-veil will not be tolerated. This, however, leaves room for interpretation why the oath of the jury "So help me God",⁹ spoken only minutes after the ban of *Mona S*, does not contravene this principle.

Due to the importance and controversy of the issue, the decision of the High Court must be criticised for not considering any of the fair trial aspects, which are fundamental and constitutional human rights of the accused. In any event, during the renewed hearings at the first instance *Mona S* was again banned for covering her face. Hence, it is submitted that the High Court will again back this decision but subsequently it remains to be seen (provided the opportunity) how the European Court of Human Rights will deal with that issue.

EXCURS: Separation of State and Religion in Austria

Introduction

Due to the statement of the High Court that "mere politic-ideological motivated demonstrations" are "out of place in courtrooms" in connection with the oath of the jury "I swear, so help me God" leads to the question of the relationship between religion and State in Austria.

7 The importance to see one's face in order to evaluate the credibility (as said by § 162 StPO) of witnesses does not apply to accused. This opinion is expressed as well by the High Court.

8 The hypothetical example of a guilty person who is bad liar demonstrates the consequences of the High Courts view. If he would claim to be innocent everybody could judge from his mimic and gesture that he is lying. As soon as he is forced to uncover his face in order to show his face to the court, he would be forced to give evidence against himself, which is prohibited under the *nemo-tenetur*-principle.

9 § 305 StPO.

Religion and State were linked together strongly throughout the last centuries and were separated just in younger history. Anyhow controversial issues and cases occur repeatedly which indicates tensions between these two powers. Examples apart from the case at stake are prohibitions of movies vilifying the dominating religion in (parts of) Austria,¹⁰ of crucifixes in schools¹¹ or discussions on permissions to build mosques with or without minarets or on the reference to God in the domestic or European Constitution.¹²

Due to the actuality of the issue, the rank of separation of Religion and State in the Austrian Constitution will be assessed briefly.

The relationship between religion and State in Austria is generally dominated by two leading principles. On the one hand the already mentioned fundamental right to freedom of religion (Art 9 ECHR which is part of the Austrian Federal Constitution and Art 14 Fundamental Law of 1867 on the General Rights of Nationals [StGG])¹³ and on the other the constitutional safeguards regarding the exercise of acknowledged religious groups.¹⁴ Due to the lack of a state church in Austria, the State acts neutrally towards religion and ideology.¹⁵

Rank in the Constitution

Austria's legal system forms a hierarchy.¹⁶ At the top are fundamental constitutional principles of the State, such as principles of democracy, rule of law,

10 EGMR 20.9.1994, *Otto Preminger Institut*, 13.470/87.

11 BVerfG 16.5.1995, 1 BvR 1087/91, NJW 1995, 2477; JZ 1995, 942; EuGRZ 1995, 395. Refer to *Kalb/Potz/Schinkele*, *Das Kreuz im Klassenzimmer und Gerichtssaal* (1996).

12 It was discussed in the convents for an Austrian and European Constitution, whether to include a reference to God. The preamble of the Tyrolean Constitution refers to the "faithfulness to God" as one of the spiritual, politic, and social bases of Tyrol. Refer to *Noll/Welan*, *Gott in die Verfassung?* (2003) and *Pernthaler*, *Gott in der Verfassung*, öarr 2000, 177.

13 Art 14 (1) Everyone is guaranteed complete freedom of conscience and creed.

(2) The enjoyment of civil and political rights is independent of religious belief. Nevertheless, duties incumbent on nationals may not be prejudiced by religious beliefs.

(3) No one can be forced to observe a ritual act or to participate in an ecclesiastical ceremony in so far as he is not subordinate to another who is by law invested with such authority.

14 Art 9 ECHR enshrines as well corporate aspects of the freedom of religion, including the foundation, organisation and administration of religious communities (refer to *Raptis*, *Religions- und Weltanschauungsfreiheit*, in *HeiBl* [Hrsg] *Handbuch Menschenrechte* [2009] Rz 18/18).

Art 15 StGG: Every Church and religious society recognized by the law has the right to joint public religious practice, arranges and administers its internal affairs autonomously, and retains possession and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare, but is like every society subject to the general laws of the land.

Art 16 StGG: The members of a legally not recognized confession may practice their religion at home, in so far as this practice is neither unlawful, nor offends common decency.

15 For an intensive discussion on the relationship between religion and State in Austria refer to *Potz*, *Staat und Kirche in Österreich*, in *Robbers* (ed) *Staat und Kirche in der Europäischen Union* (1995) 257.

Anyhow there are a number of international treaties between Austria and the Holy Chair such as the Concordat of 1933/34, the Estate Treaty of 1960 and the Treaties on the Establishment of Dioceses (*Leisching*, *Kirche und Staat in den Ordnungssystemen Europas* [1973] 142; *Ermacora*, *Österreichische Verfassungslehre* [1998] 367).

16 See *Öhlinger*, *Verfassungsrecht*⁷ (2007) Rz 62 and *Walter/Mayer/Kucsko-Stadlmayer*, *Bundesverfassungsrecht*¹⁰ (2007) Rz 146.

separation of powers, federalism and the republican principle. These can only be changed by a majority of 2/3 in the parliament and a referendum. Next is the (ordinary) constitutional law, established by a mere majority of 2/3 in the parliament. Further down are all the other legal provisions. This hierarchy requires each law to be in accordance with the constitution, which itself has to be in accordance with the fundamental principles.

Apart from the Human Rights sources mentioned above, the Austrian constitution does not include a provision regulating the relationship between State and Religion. Due to the lack of positive guidelines, the rank of separation of State and Religion in the constitution can be examined from different standpoints. Firstly, it can be seen as being part of the republican principle. Secondly, there are attempts to argue in favour of an own principle of secularity. Thirdly, the separation of State and Religion deduced from the fundamental human rights. And lastly, it can be regarded as being part of the rule of law principle.

Part of the Republican Principle

Art 1 of Austria's Federal Constitution states: "Austria is a democratic republic. Its law emanates from the people".¹⁷ Hence, the form of government and of the State needs to be a republic, and it can be seen as a refusal of the monarchy.¹⁸ The head of the State has to be elected (directly or indirectly) by the people for a limited period of time, and has to be liable politically and legally.¹⁹

Öhlinger argues that apart from the refusal to a merely sacral justified monarchic head of state, the notion of "republic" moreover demands a secular orientation of the state in general.²⁰ Due to the referral to the "people" as source of the law, it does not emanate from God.²¹

Autonomous Fundamental Principle of Secularity

Gampl regarded secularity and religious neutrality as an autonomous fundamental principle of Austria's Constitution. It requires firstly the duties and aims of the State to be secular and mundane. Secondly, measures and sanctions to enforce the legal order must not include any transcendental aspects. The principle of religious neutrality prohibits solidarity with one or more churches or

17 See *Rill*, Die Republik und ihre Absicherung in der österreichischen Bundesverfassung, in *Weber/Wimmer* (Hrsg) FS *Pernthaler* (2005) 345.

18 *Walter/Mayer/Kucsko-Stadlmayer*, Bundesverfassungsrecht Rz 159

19 *Öhlinger*, Verfassungsrecht Rz 67

20 *Öhlinger*, Verfassungsrecht Rz 69. Relying on *Gampl* (Staatskirchenrecht [1989] 2) the duties and aims of the State have to be secular and mundane. Furthermore, legitimate measures and sanctions to enforce the legal order must not include any transcendental aspects. Lastly, a high notion of separation of religion and church (which need not to be absolute) and a fundamental religious neutrality of the State must be guaranteed; hence the State is allowed to support religion, but in a way, which is interconfessionally balanced.

21 *Pernthaler*, öarr 2000, 177. The same applies to the European Law as well, which does not emanate from the (Austrian) people, but definitely not from God.

religious communities. Nevertheless, the State is allowed to support religion, but in a way which is balanced interconfessionally.²²

This view was based on the lack of any reference to God in the Austrian Constitution.²³ Hence a "negative system" can be reasoned systematically to argue in favour of that fundamental principle.²⁴

Deduction from Human Rights

The fundamental rights guarantees in Austria (mentioned above) require the State to act in accordance with them. From the extensive freedoms of religion and ideology in connection with the constitutional safeguards regarding the exercise of acknowledged religious communities the principle of confessional, ideologic and religious neutrality is deduced.²⁵

The ECtHR expresses repeatedly that Art 9 ECHR "is, in its religious dimension, one of the most vital elements" entailing "the freedom to hold or not to hold religious beliefs and to practise or not to practise a religion". It ensures that the State has to be "the neutral and impartial organiser of the exercise of various religions, faiths and beliefs and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society". Out of that a "State's duty of neutrality and impartiality" is concluded, because "pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'".²⁶

The European Convention of Human Rights was ratified in 1958 as part of the Austria's Federal Constitution.²⁷ Thus, every Act has to be in accordance with these fundamental human rights safeguards. Due to attempts to include the ECHR in a liberal constitutional principle, the protection of human rights can be regarded as being at the highest possible level of Austria' legal system.²⁸

By the same token, out of the jurisdiction of the ECtHR it can be concluded that secularity is a fundamental principle of the State and an inseparable precondition for an effective guarantee of the freedom of religion.²⁹

22 *Gampl*, Staatskirchenrecht (1989) 2 f.

23 *Gampl*, Österreichisches Staatskirchenrecht (1971) 12.

24 *Ortner*, Religion und Staat (2000) 103 f.

25 The German Federal Constitutional Court ruled that crucifixes in classroom contradict the confessional and ideological neutrality of the state and subsequently the constitution (BVerfG 16.5.1995, 1 BvR 1087/91, NJW 1995, 2477; JZ 1995, 942; EuGRZ 1995, 395). Refer to *Kalb/Potz/Schinkele*, Das Kreuz im Klassenzimmer und Gerichtssaal (1996).

26 ECtHR *Leyla Sahin* 104–108. This duty of neutrality and impartiality is furthermore incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed, and it requires the State to ensure mutual tolerance between opposing groups. It is moreover obliged to "ensure that the competing groups tolerate each other".

27 BGBl 1958/210.

28 *Öhlinger*, Verfassungsrecht Rz 76 and *Walter/Mayer/Kucsko-Stadlmayer*, Bundesverfassungsrecht Rz 164.

29 *Grabenwarter*, Art 9 EMRK, in *Korinek/Holoubek* (Hrsg) Österreichischen Bundesverfassungsrecht (2003) Rz 7.

Conclusion

As indicated, the separation of State and religion stands at a very prominent level in Austria. No matter whether the principle of secularity is seen as part of the republican principle, the liberal principle, or as an autonomous principle, the content is roughly similar. Even if the rank is not regarded at the level of a fundamental constitutional principle the human rights safeguards demand religious neutrality of the State.

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