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NEWS REPORT

Country:	Hungary
Title:	Constitutional Court abolishes municipal decree on burqa ban
Date:	18 April 2017
Expert:	Kádár, András
Update of news report published at 4 January 2017:	Ombudsman challenges before the Constitutional Court a local decree banning the wearing of burqas, chadris, niqabs and other similar clothing as well as any activity questioning that marriage is only possible between a woman and a man
<u>Context</u>	
Issue at stake:	Whether a municipal decree banning religious clothing and on expressing support for homosexual marriage is constitutional in Hungary
Ground of discrimination:	Religion/belief and sexual orientation
Source:	Constitutional Court decision no. II/2034/2016, 11 April 2017
Field:	Other
Applicable law:	Article I of the Fundamental Law, Article 24 of Act 151 of 2011 on the Constitutional Court

Content

Case development: The mayor of Ásotthalom (a village on the Southern border of Hungary) is a well-known right-wing extremist. On 23 November 2016, the municipal council adopted Decree 25/2016 (XI.23.) on Amending Decree 12/2014 (IV. 30.) on the Rules of Communal Cohabitation. (Municipal councils are entitled to adopt decrees on the fundamental norms of communal cohabitation and the sanctions of behaviours breaching such norms.) The amendment runs as follows:

It is forbidden in public premises to

- a) perform calls for muezzin, because it is capable of disturbing public peace and causing fear, alarm and indignation among local residents;*
- b) wear burqas, chadris, niqabs covering the whole body, head and the whole face or a part of it as well as bathing suits covering the whole body, including the so-called burkini;*
- c) carry out any type of propaganda activity that presents marriage as anything different from a life partnership between a man and a woman as stipulated in the Fundamental Law, including any type of activity in public premises, with*

special regard to performances, demonstrations, billboards, leaflets and audio-advertisements;

- d) carry out any type of propaganda activity that violates the Fundamental Law by acknowledging as the basis of a family, any relation other than marriage or the relationship between parent and child, including any type of activity in public premises, with special regard to performances, demonstrations, billboards, leaflets and audio-advertisements.*

On 20 December, the Commissioner for Fundamental Rights (the Ombudsman) filed a petition with the Constitutional Court (CC), asking the CC to abolish the unconstitutional amendment on the basis that the amendment severely restricts fundamental rights although, according to the Fundamental Law, fundamental rights may only be restricted in an Act of Parliament. Furthermore, the contents of the regulation would be unconstitutional even if they were adopted in an appropriate normative form, since they violate the requirement of equal treatment by only banning the external manifestations of one particular religion, whereas no similar ban is prescribed for any other religion. Furthermore, the ban is unconstitutional, because it is targeted against one particular view in the debate on the concept of marriage and family, so it interferes with the freedom of expression on a content-basis.

Decision of the Court: In its decision no. II/2034/2016 of 11 April 2017, the CC declared the amendment null and void with a retroactive effect. It pointed out that under Article I Par. (3) of the Fundamental Law, fundamental rights and duties shall be regulated in Acts of Parliament. While the authorization of municipal councils to adopt decrees on the norms of communal cohabitation may inevitably concern fundamental rights, municipal councils are not authorised to adopt legislation (decrees) that would directly impact or limit the exercising of such rights. On this basis, the amendment passed by the Ásotthalom municipal council is unconstitutional, therefore it must be declared null and void with retroactive effect.

Three CC judges (out of the 14 signatories) attached a concurring opinion to the decision, emphasising – “with a view to the problems stemming from the obvious threats caused by the Islamisation of Europe” – that while they agree with the decision on a procedural basis, this should not be interpreted as excluding the possibility of restricting the exercise of the Muslim religion in Acts of Parliament.

Key points of analysis: As opposed to the Ombudsman’s request for constitutional review, the CC’s decision has fully evaded the substantive issues raised by the decree (freedom of religion and expression, non-discrimination, etc.): the decision was made on a fully formal, procedural basis. The concurring opinion seems to suggest that fierce debates could be expected within the body if similar restrictions were adopted in the required legislative format.

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