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EU companies can ban headscarves as part of broader policy, court adviser says

WWRN (31.05.2016) - <http://bit.ly/1Ujopwa> - Private companies have the right to ban employees from wearing headscarves at work, provided the prohibition is part of a broader policy prohibiting political or religious symbols, an adviser to the European Union's top court said Tuesday.

The case at the European Court of Justice concerned Samira Achbita, a Muslim woman who worked as a receptionist for the Belgian arm of U.K. security firm G4S PLC. Three years into her employment at G4S, Ms. Achbita wanted to start wearing a headscarf at work and was subsequently dismissed. She challenged the decision in the Belgian courts, asking for damages. Belgium's Court of Cassation, the appeals court where the case is now pending, made a request for a preliminary ECJ ruling to clarify EU antidiscrimination rules.

In her opinion Tuesday, Advocate General Juliane Kokott took the view a corporate ban on headscarves doesn't constitute direct discrimination on religious grounds, provided that it is founded on a broader company policy prohibiting visible political, philosophical and religious symbols in the workplace. The opinion isn't binding for the court's judges, but is often a good pointer for the final ruling.

Ms. Kokott conceded that a ban may constitute indirect religious discrimination but "may be justified in order to enforce a legitimate policy of religious and ideological neutrality." To ensure that no discrimination is taking place, national courts should check the proportionality of a ban and its broader context, such as the size and conspicuousness of the religious symbol in question as well as the national identity of, in this case, Belgium, she wrote.

According to the opinion, the ban in place at G4S appeared to be in line with EU law. "While an employee cannot 'leave' his sex, skin color, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises, he may be expected to moderate the exercise of his religion in the workplace," it said.

Army grants religious accommodation to three more Sikhs

Soldiers push to make decision permanent for all Sikhs who want to serve

The Becket Fund (11.04.2016) - The Army is taking historic steps toward allowing Sikhs to serve in the military. Just one week after deciding to accommodate Bronze Medal recipient Captain Simratpal Singh, the Army is now allowing three more Sikhs to serve with their religious beards and turbans in place. Specialist Kanwar Singh, Specialist

Harpal Singh, and Private Arjan Ghotra can finally report to Basic Combat Training in May with their conscience protected.

Although the Army has granted thousands of exceptions to its shaving rules for medical reasons, the four religious exceptions in the last week are more than all accommodations granted to Sikhs in the last thirty-five years since the beard-ban has been enforced. The Army's decision is not legally binding, however, and may be withdrawn at any time. In fact, the Army has already stated that the accommodations will be re-evaluated in approximately one year. So the soldiers will continue their lawsuit to ask the court to make their accommodations lasting and legally binding.

"For decades, Sikhs have been excluded from serving our country because of their faith while many other countries recognize their valor and patriotism—and benefit from it," said Eric Baxter, senior counsel at Becket, which represents the three Sikh soldiers. "The Army's current agreement to stop discriminating against these individual soldiers is an important step, but the court should still issue a ruling to extend that protection to all Sikhs."

"After months of waiting, I'm ecstatic that I can finally serve both God and country," said Private Arjan Ghotra, a high school senior who joined the Virginia Army National Guard. "I will be forever grateful to the Army for at least letting me go to boot camp. I look forward to proving that I can serve as well as anyone and am hopeful the Army will extend my accommodation afterward."

All three soldiers were already admitted into the National Guard or Reserve, but were in danger of being forced to either shave in violation of their faith or face a court-martial for refusing. Specialist Kanwar Singh was even segregated from his unit for six months and then pressured by top Army officials to shave if he wanted to start Basic Training. The Army's treatment of these soldiers is a violation of the Religious Freedom Restoration Act and stands in stark contrast to how Sikhs are treated in the militaries of other nations. For example, Canada's Minister of National Defense is himself an observant Sikh who served in Afghanistan as a special assistant to the American commander in the region.

Meanwhile, in the U.S. Army, Captain Singh became the first and only Sikh soldier in a combat brigade to be granted an accommodation. Even that victory, however, was loaded with caveats, requiring Captain Singh to also continue seeking relief in Court.

"The Army complained to a judge that Captain Singh was saying nice things about them in the media, but still pressing forward with his lawsuit in court," said Baxter. "The Army is understandably sensitive about its history of discrimination against Sikhs. But after dragging its feet for years, and still admitting Sikhs only slowly and grudgingly, the need for a decisive court order is regrettably clear."

"We commend the U.S. Department of Defense for its decision to allow these soldiers to serve with their religious turbans and beards," said Harsimran Kaur, legal director of the Sikh Coalition. "However we know, the federal court knows, and even our nation's largest employer, the DoD, knows that engaging in case-by-case, burdensome accommodation processes while enforcing a discriminatory ban is illegal and indefensible."

Becket is joined by the Sikh Coalition and the law firm McDermott Will & Emery in representing the Sikh soldiers.

Our failed religious freedom policy

First Things (November 2013) - <http://bit.ly/1pcIsBy> - The religious freedom policy mandated by the 1998 International Religious Freedom Act has now been in operation for fifteen years. Not with standing the hard work of the State Department's Office of International Religious Freedom, it would be difficult to name a single country where that policy has reduced persecution or increased freedom. In most of the countries into which the United States has in recent years poured blood and treasure—Iraq, Afghanistan, Pakistan, Egypt, China, Saudi Arabia, and Russia in particular—freedom is on the decline, persecution on the rise.

The basis of America's support for religious freedom abroad is the assertion that religious freedom is not only a good in itself but one that also advances our national interests. In approximately seventy countries, persecution and restrictions on religion are severe. That list includes virtually all the nations whose internal stability, economic policies, and foreign policies are of substantial concern to the United States, including China, Indonesia, Russia, India, Pakistan, Afghanistan, Iran, Turkey, Saudi Arabia, Syria, and Iraq, as well as Egypt, Libya, and most of the nations comprising what was once called "the Arab Spring." In many of these countries, the lack of religious freedom has led to religious conflict and has increased social, economic, and political instability.

The terrible Syrian civil war in large part stems from generations of religious persecution, first of Alawites by Sunnis, and then of Sunnis by the Alawite regime of the Assads. Today the religious dimensions of the conflict have deepened with the entry of Iranian and Lebanese (Hezbollah) Shia terrorists in support of Assad's Alawites, and of al-Qaeda-affiliated terrorists in support of Syrian Sunni insurgents.

With the passage of IRFA, Congress provided several vehicles to advance religious freedom. The centerpiece is the State Department's Office of International Religious Freedom, headed by a very senior diplomatic official—an ambassador-at-large—who has authority to represent the United States in implementing American policy. The act also requires the department to issue annual reports on the status of religious freedom in every country abroad, and an annual list of the most severe violators, the "countries of particular concern."

IRFA also created an independent advisory Commission on International Religious Freedom with a mandate to issue its own reports, make recommendations to the president and Congress, and act as a watchdog over American policy. Unlike the State Department office and its ambassador, both of which are by law permanent diplomatic entities, the commission requires periodic reauthorization by Congress.

The "countries of particular concern" list has had virtually no impact. The president is required to take some action against those on the list or explain why no action is warranted. IRFA requires that the list be issued annually, but as of this writing the Obama administration has not done so since 2011. Congress, it seems, takes little notice of this omission, although the commission, under its new chair, Robert George, has publicly and vigorously voiced its concern.

IRFA permits economic sanctions against the nations on this list, but in fifteen years only one country, Eritrea, has ever been sanctioned anew, and religious freedom has declined there. For the most part, the "actions" taken against severe violators (as permitted under IRFA) have been to reaffirm existing sanctions, such as those in place barring the export of crime-control and detection equipment to China. In countries where there are no sanctions in place, such as Saudi Arabia, the president is permitted to waive any action if a waiver will further the purposes of the law or is deemed to be in the "important national interests of the United States."

In other words, nothing has ever really been done, except perhaps to irritate our banker (China) or our erstwhile ally in oil (Saudi Arabia). I know of no evidence that either the listing or the sanctions have improved the status of religious freedom in any country. At one time there was an argument to be made that Vietnam had improved, but that no longer seems to be the case. The commission has recommended that Vietnam, which was removed from the list a few years ago because of improvements in religious freedom, be returned to the list this year.

Religious freedom has played little or no role in diplomatic programs to achieve fundamental American interests. Officials, including presidents and secretaries of state, have done almost nothing to integrate religious freedom into our democratic, economic, and counter-terrorism strategies. Some have spoken publicly about religious freedom, but foreign policy speeches are empty words if they are not followed by strategic planning and policy action.

In June 2009, President Obama traveled to Cairo to give his first major address on Islam and American interests. In that speech, he identified a number of issues, including religious freedom, that were to be part of his new engagement with the Muslim world. Afterward, our foreign policy agencies geared into action, forming interagency working groups to develop strategies on all the issues identified by the president in the Cairo speech except for one. There was no working group on religious freedom. Indeed, it took the administration two and a half years even to get its ambassador for religious freedom in place. Since then, the administration's religious freedom policy has largely been passive and ineffective.

But there is substantial evidence that an increase in religious freedom in the Middle East, China, India, Russia, Nigeria, and elsewhere could enhance American interests by helping to reduce religious violence and religion-based terrorism. Religious freedom plays a necessary role in the consolidation of democracy, in economic development, and in social harmony. Sociologist Brian Grim has written in the *International Journal for Religious Freedom* that "the empirical data are clear [that] religious freedom is part of the 'bundled commodity' of human freedoms that energize participation in civil society by all religious groups, which is conducive to the consolidation of democracy and to socioeconomic progress." And yet American programs to advance and support religious freedom have played little or no role in American strategies to stabilize key struggling democracies such as Iraq or Pakistan, encourage economic growth in places like Egypt or Nigeria, or undermine the religion-related terrorism that is still being incubated in many nations of the broader Middle East.

What is the explanation for this ineffectiveness? There is much to be said here, but let me focus on two problems: first, the anemic, largely rhetorical methodology employed by all three administrations under which IRFA has operated, and second, the decline among our policy makers of the conviction that religious freedom is "the first freedom" and that religious freedom benefits all people, whether they are religious or not.

None of the three administrations responsible for IRFA have adopted a capacious view of the law and the policy it mandates. Each has assumed a narrow, highly rhetorical approach, characterized by reports, speeches, lists of severe persecutors that have little effect on the persecutors' actions, and a State Department activity known as "raising the issue" with governments (an activity that should not be confused with "solving the problem").

IRFA has driven some internal progress at the State Department. For example, in Afghanistan, the American embassy has established a program "to support traditional [Afghan] voices that oppose violent extremism." There is a powerful logic here: Muslims throughout the Middle East who want to make liberal arguments from the Qur'an—for example, that God forbids suicide bombing and stoning, that men and women are equal,

or that non-Muslims must be treated with respect—risk criminal prosecution for blasphemy. A few years ago, an Afghan graduate student was sentenced to death for writing a paper arguing that the Qur'an supports the equality of men and women. In 2011, two Pakistani officials, one a Christian and one a Muslim, were murdered for opposing blasphemy laws and supporting religious freedom. Polls showed support for the laws, and for the murderers.

Anti-blasphemy laws and practices ensure that public discourse in these countries is dominated by extremists. The United States should be doing everything it can to convince erstwhile democracies such as Pakistan, Afghanistan, Iraq, and Egypt that they will not succeed unless they move toward greater religious freedom. Their failure to do so will not only prevent the emergence of stable democracies but also increase extremist threats to American national security. Unfortunately, American programs designed to address this problem, such as that in Afghanistan, are entirely ad hoc. They are not part of a comprehensive religious freedom strategy.

Indeed, there is no comprehensive American strategy in place to advance religious freedom in the Muslim world or anywhere else. While Congress appropriates millions of dollars annually for democracy and counter-terror programs, little of that money is spent on promoting religious liberty. All three presidents, and all secretaries of state who have presided over the implementation of IRFA (Albright, Powell, Rice, Clinton, and Kerry), have insisted that they support international religious freedom.

But none has made any serious attempt to integrate the advancement of religious freedom into the foreign policy of the United States, even though that is the express purpose of the International Religious Freedom Act. Madeleine Albright admitted as much in her book *The Mighty and the Almighty*. Religion, she wrote, "was above and beyond reason; it evoked the deepest passions; and historically, it was the cause of much bloodshed. [American] diplomats of my era were taught not to invite trouble, and no subject seemed more inherently treacherous than religion."

The State Department's annual report has had some positive effects, and Ambassador-at-Large Suzan Johnson Cook and her staff are to be congratulated for its quality and breadth. It has taught younger American diplomats (who typically provide the initial drafts) to ferret out the status of religious freedom in the countries in which they serve. The report has long been considered the gold standard in showcasing the facts. But illuminating the persecutory acts of governments and others, and the fates of victims, has, at best, limited effects. Rarely does it lead persecutors to change their behavior.

Chinese actions, for example, have no more been affected by these reports than they have by China's perennial appearance on the list of "countries of particular concern." Beijing still imprisons, tortures, and generally terrorizes religious groups that don't conform. It still supports forced sterilizations and abortions and forbids Catholic priests and Protestant ministers from criticizing the "one-child" policy from the pulpit. It continues to brutalize Uighur Muslims in China's northwest province, and to attack the culture and religion of the people of Tibet.

IRFA also mandates training for diplomats, a necessary element of any worldwide foreign policy initiative. The Obama administration has experimented with a potentially useful training program conceived under its predecessor. I have had the opportunity to teach in this program at the Foreign Service Institute, and several scores of foreign service officers have attended the courses offered.

Unfortunately, the program remains voluntary, which ensures that the busy diplomats who run American foreign policy seldom participate. Moreover, the overall curriculum is diffuse and confusing on the meaning and value of religious freedom. Some presenters suggest that a vigorous American policy may transgress the constitutional ban on

establishment of religion, or that advancing religious freedom constitutes cultural imperialism (do we really have the right to “impose our values” on others?). Diplomats who attend these courses have the right to wonder whether they are being trained to advance religious freedom or to protest the religious freedom policy mandated by Congress.

The stark reality is that fifteen years after IRFA’s passage, our diplomats are not being trained to know what religious freedom is and why it is important, let alone how to advance it. This deficiency reflects a continuing, deep-seated skepticism in our foreign policy establishment. Its members continue to doubt that religious freedom should be considered real foreign policy.

That skepticism also helps explain why all ambassadors-at-large for religious freedom have been isolated within the State Department, and severely under-resourced. Other ambassadors-at-large report directly to the secretary of state (for example, those for global women’s issues and for global AIDS coordination). But the religious freedom ambassador and office have been placed many levels below the secretary. The ambassador has reported, and reports today, to a lower-ranking official. It is as if an army general were reporting to an army colonel. The religious freedom ambassador does not attend meetings of other senior State Department officials on a regular basis.

In addition, the ambassador-at-large and the Office of International Religious Freedom are marginalized in a bureau (Democracy, Human Rights, and Labor) that itself has long been marginalized at the State Department, notwithstanding the outstanding people who serve there. Sadly, foreign service officers tend to avoid that bureau in general, and the religious freedom office in particular, as dead ends for their careers, places where real foreign policy is not practiced. Neither the office nor the ambassador have direct control over the modest amounts of funding available that could be marshaled to develop effective strategies abroad.

Given this isolation, it is hardly surprising that neither American diplomats nor foreign governments see religious freedom as a priority for American foreign policy. Many diplomats seem already to believe that a vigorous pursuit-of-religious-freedom policy would be unconstitutional, or would constitute cultural imperialism. Others think it is a policy imposed by Christians and is designed to clear the way for Christian missionaries. Some conservatives are hesitant to support religious freedom for Muslims around the world.

This latter attitude is particularly damaging. Conservatives, for the most part, are defenders of religious freedom in the United States. Given the well-founded fear of Islamist terrorism, the hesitancy of some conservatives to afford the same right to Muslims abroad is perhaps understandable. But their logic rests on the erroneous assumption that religious freedom means clearing the way for extremist versions of Shari’a law or other forms of Islamist extremism. As Richard John Neuhaus was fond of saying, religious freedom carries with it a self-denying ordinance. In a democratic polity, religious liberty does not mean “anything goes.” To the contrary, it imposes its own limits, the most important of which is equality under the law.

An Egyptian democracy grounded in religious freedom, to take but one example, would permit Muslim reformers to speak openly about their own religion, criticize the Muslim Brotherhood, and present liberal conceptions of Islamic practice without fearing criminal prosecution for blasphemy. It would broaden and deepen public debates over what stable democracy requires of Islam. To date, that debate has been dominated by the extremists, as it is in most Muslim-majority countries. Equally important, religious freedom would not only provide protections to Coptic Christians. It would also grant them the right to build churches and establish Coptic institutions in civil society, run for political office, and make Christian arguments in debates over Egyptian laws and policies.

False perceptions and destructive attitudes exist among secular liberals and conservative Christians—I personally have encountered each of them. But they do not, in my view, sufficiently explain our diplomatic ineffectiveness. The major problem, it seems to me, is that a significant proportion of our foreign policy officials no longer believe that religious freedom is the “first freedom” of American history, of the Constitution, and of all people everywhere.

At the State Department, and in the foreign affairs establishment in general, too many have rejected the proposition, central to our founding, that religion is necessary for the survival of democracy. For America’s founding generation, and most generations since, religious freedom constituted the “first freedom” because it was thought necessary for the well-being of individuals and societies. In particular, religion in the public square was considered crucial for the health of democracy. The founders believed that religious freedom entailed not only the right to believe and worship but also the right to act on the basis of religious belief, individually and in concert with others, privately and in civil society and political life—all within broad and equally applied limits. James Madison viewed religious actors in civil society as a critical check on the power of government. In his farewell address, George Washington argued that religion was necessary for the “dispositions and habits which lead to political prosperity.”

Many of our political and foreign policy leaders today, however, see religious freedom as a private matter with few legitimate public purposes. Religious liberty is in no sense necessary to individuals and societies. Rather, it is merely one in an ever-growing list of rights claims—in this case, a claim of privilege by religious people. As such it warrants no special protection but must be “balanced” against all other claims. Such views are reflected in positions taken by the Obama administration on the HHS mandate, but also in its international religious freedom policy. In a 2009 speech on the importance of human rights in foreign policy, which remains the clearest explanation of the administration’s human rights priorities to date, Secretary of State Hillary Clinton insisted that “to fulfill their potential, people . . . must be free to worship . . . and to love in the way that they choose.”

Secretary Clinton invokes the freedom to worship, not religious freedom. But “worship” is essentially a private activity, with few if any civic implications. It is certainly easier to balance against other rights claims. Clinton also suggests that a putative “right to love” is a comparable right. Clearly the Obama administration has in its domestic policy weighed religious freedom against other rights claims it believes important, such as the right to contraceptives and abortifacients, or to same-sex “marriage,” and religious freedom has been found to be an inferior right. This helps to explain why, in its foreign policy, the Obama administration has applied far more policy energy in its international pursuit of a “right to love” than in its pursuit of religious freedom.

It is no accident that the first affirmation in our Bill of Rights is that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Establishment Clause was intended to protect the free exercise of religion, in part by ensuring that no particular religious group was given any privileged position within the country.

Today the threat of “establishment” comes not from any church but rather from a secular ideology quite willing to abridge religious freedoms. For these new ideologues, “error has no rights.” Religious individuals and entities must toe the line on abortion, contraception, and the redefinition of marriage. Recently, the New Mexico “Human Rights” Commission swept aside concerns about religious liberty and fined Elane Photography over \$6,000 for refusing on religious grounds to participate in a same-sex-commitment ceremony. In August, the New Mexico Supreme Court unanimously upheld that ruling. In his decision upholding the Obama administration’s position on same-sex “marriage” (U.S. v. Windsor

), Justice Anthony Kennedy declared that those who resist this innovation in human affairs—that is, those who continue to support a religious view of marriage as between one man and one woman—are acting with malice, seeking to “disparage and injure,” to “demean” and “humiliate” same-sex couples.

Is it any wonder that this new aggressively secular creed, which privatizes and relativizes religious freedom, undermines our will and our capacity as a country to defend religious freedom abroad?

Europe provides an example of what lies ahead. The official American understanding of religious freedom is in many ways reminiscent of the French ideology of *laïcité*, which relegates religion to an entirely private role in society and politics. Roger Trigg, a philosopher at the University of Oxford, notes that one of the characteristics of the European privatization project is its willful dilution of religious freedom to a right of freedom of “religion and belief.” The problem here is that “belief” can mean virtually anything one feels strongly about, from environmentalism to the Manchester soccer club. Religion in Europe has long since lost much of its special status in law, society, and politics and is now routinely treated as merely one human preference among an infinite possible number of preferences.

Thus the problem with the appearance of the following sentence at the beginning of the 2012 State Department annual report, in a section describing why this right is important for the United States: “Freedom of religion and belief and the right to worship as one chooses fulfill a deep and abiding human need.” To drive this point home, Secretary of State John Kerry, in his remarks on the release of the report, used the “worship” phrase twice to describe the content of U.S. policy. Regarding his own actions, Kerry said he pressed foreign leaders “to safeguard freedom of belief.”

Although the problem is deeply ideological, some concrete steps can be taken to remedy it. Members of Congress should speak out about the value of religious freedom as the first freedom, pay more attention to this issue in our foreign policy, and demand answers from State Department officials in public hearings and private meetings.

In addition, five simple amendments to the International Religious Freedom Act would remove some of the institutional obstacles to a more effective religious freedom policy.

First, require that the ambassador-at-large for international religious freedom report directly to the secretary of state and attend all regular meetings of senior State Department officials. This will ensure that foreign governments and American diplomats alike see that the administration takes religious freedom seriously enough to give it the same priority they do other key issues.

Second, give the ambassador resources to develop and implement new strategies. This need not involve the appropriation of new monies. Funds can be reallocated from existing appropriations for programs such as democracy promotion and counter-terrorism. For example, require 20 percent of congressional appropriations for the promotion of democracy abroad to be allocated to the Office of International Religious Freedom.

Third, make training of American diplomats in religious freedom mandatory at three stages: when they enter the Foreign Service, when they receive “area studies” training prior to departing for post, and when they become deputy chiefs of mission and ambassadors. This training should tell them what religious freedom is, why it is important for individuals and societies, why advancing it is important for America’s national interests, its status in the country and region to which they have been assigned, and how to advance it.

Fourth, amend the IRFA to require that the list of particularly severe violators (the “countries of particular concern”) be issued annually with the report. Require the State Department to provide a comprehensive analysis of policy tools being applied in each country, including programs that target democratic stability, economic growth, and counter-terrorism.

Fifth and finally, require the State Department to respond in writing to recommendations by the U.S. Commission on International Religious Freedom. At the same time, require the commission to report on why the United States is not succeeding in advancing religious freedom, as gauged by objective reports such as those by the Pew Research Center.

Such changes will not transform our policy overnight. But until they are made, America’s religious freedom policy will remain a powerful idea that has not yet gelled, one that is not reducing religious persecution, advancing the institutions and habits of religious freedom, or serving the national security of the United States.
