



Global Developments in Religious Freedom and Equal Treatment

May 2018

Dear Friends:

Welcome to the International Network of Civil Liberties Organizations' (INCLO) newsletter, *Global Developments in Religious Freedom and Equal Treatment* – back after a temporary hiatus. This newsletter highlights recent international developments, including cases and legislation, concerning religious freedom, equal treatment, and the intersection of the two.

Here are a few brief highlights from this issue: In a historic election, with a turnout of 64.1% of the electorate, including voters who travelled home from around the world, Ireland voted to amend its constitution to repeal its ban on abortion; Argentinian lawmakers will vote on legislation that would make abortion legal in the first 14 weeks of pregnancy in June; the Argentine Supreme Court banned religious education during school hours; the Mexican Supreme Court determined that the denial of a legal abortion after rape constitutes a reproductive rights and human rights violation; Colombia's Constitutional Court recognized sexual orientation as a suspect category in two cases; the Constitutional Court of Chile upheld a law decriminalizing abortions in specific situations; the High Court of South Africa required applications to change a person's sex description to be considered, irrespective of the person's marital status; the Court of Justice in Northern Ireland declined to permit gay marriage in Northern Ireland; and the Supreme Court of India outlawed the practice permitting a Muslim man to legally divorce his wife by saying "talaq" three times.

As always, please note that this newsletter does not purport to be comprehensive or definitive. Instead, it is our best effort to identify and characterize the international legal developments in this arena. Please feel free to alert us to developments you think should be included in future issues of INCLO's newsletter.

If there is someone you think would benefit from this newsletter or if you would prefer not to receive future issues, please contact Deepa Patil at INCLONewsletter@aclu.org.

Best,
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About INCLLO: The International Network of Civil Liberties Organizations (INCLLO) is a group of civil liberties and human rights organizations committed to addressing, among other issues, questions of religious freedom and equal treatment. INCLLO's members include: American Civil Liberties Union, Association for Civil Rights in Israel, Canadian Civil Liberties Association, Centro de Estudios Legales y Sociales (Argentina), Dejusticia (Colombia), Egyptian Initiative for Personal Rights, Human Rights Law Network (India), Hungarian Civil Liberties Union, International Human Rights Group Agora of Russia, Irish Council for Civil Liberties, Kenya Human Rights Commission, Legal Resources Centre (South Africa), and Liberty (United Kingdom).

Religious Freedom & LGBT Rights

Services & Public Accommodations

United Kingdom: The U.K. Supreme Court will [review](#) a Northern Ireland Court of Appeal decision holding that a bakery unlawfully discriminated based on sexual orientation when it refused to serve a customer who sought a cake marking the International Day Against Homophobia and Transphobia. The customer had asked for a cake featuring the slogan "support gay marriage," together with a picture of Bert and Ernie from the children's show Sesame Street. The bakery asserted that it refused the cake order because it was "at odds" with the company's Christian beliefs. The appeals court rejected the bakery's argument that it would have been endorsing marriage equality for same-sex couples by baking the cake, writing: "The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either." The court further held that legislation prohibiting discrimination based on sexual orientation in the region could not be changed to suit a particular religious or political group. The Supreme Court held a two-day hearing on the matter, starting on May 1, 2018.

United States: On December 5, 2017, the U.S. Supreme Court [heard](#) oral argument in a case where a bakery, in violation of state law, turned away a couple seeking a cake for their wedding reception because the couple is gay. The cake shop argues that requiring it to comply with the state law barring discrimination would violate its constitutional rights to free speech and freedom of religion; the lower court rejected these claims. The US Department of Justice filed a brief in support of the cake shop, arguing also that the constitution protects the right to discriminate in certain circumstances. INCLLO-member ACLU represents the couple who were denied service, and other INCLLO members filed a friend-of-the-court brief in support of the couple.

Ireland: In July 2017, Ireland's Workplace Relations Commission [ruled](#) that a Dublin bakery did not discriminate when it refused to fill an order for a cake with the message: "By the grace of the good Lord, I [name redacted], that in my honest opinion – 'Gay Marriage' is a perversion of equality and the 34th Amendment to the Irish Constitution should be repealed." The bakery argued that it declined to make the cake due to its complexity and because it was no longer accepting orders for custom cakes given how busy it was. The Commission determined that the complainant had not proven that he had been treated less favorably than another person because of his religious beliefs. The man who ordered the cake acknowledged that he initiated the action against the bakery under the Equal Status Act to "balance out" the Northern Ireland Court of Appeal's decision in the case described above.

Colombia: In two recent cases, the Constitutional Court held a mall and its security officers impermissibly discriminated based on sexual orientation. In the first case, on June 2, 2016, the Constitutional Court [determined](#) that the mall violated the rights of a man when it removed him for allegedly engaging in obscene acts with another man in a public bathroom. The court determined that those acts did not occur, and that the fundamental right not to be discriminated against included sexual orientation as a suspect category of discrimination. The court ordered the mall to offer the man a public apology and to ensure its officers receive LGBTI rights training. In the second case, on January 24, 2017, the court [ruled](#) in favor of a same-sex couple who had been ordered to leave the mall. The court rejected the mall's claims that the couple was asked to leave because it was closing, and determined instead that the guard had asked them to leave because they had displayed affection. The decision is notable because the court applied the rights regime and the prohibition on discrimination to the private security company.

Colombia: On March 7, 2017, the Constitutional Court [determined](#) that a man's neighbors had violated his fundamental rights by physically and verbally attacking him because of his sexual orientation, calling him slurs, and threatening to kill him. The man had charged that his neighbors violated his fundamental rights to equality, dignity, sexual diversity, life, and work.

Canada: In September 2016, the Saskatchewan Court of Queen's Bench [dismissed](#) an action brought by a man after a newspaper rejected his request to purchase advertising space to cite bible passages that oppose homosexuality. The newspaper had run the advertisement for several years, but in 2013 declined to do so because it considered the advertisement offensive. The court determined that the newspaper regularly screened out advertisements it considered offensive, which was not discriminatory, and that the advertisement was not rejected because of the man's faith. Instead, it found, "the advertisement targeted and offended a traditionally disadvantaged group. Declining for those reasons brings Post Media's action within the ambit of adopting or implementing a reasonable and justifiable measure designed to prevent disadvantages suffered by a group of individuals based on a prohibited ground." The Court also reasoned that, even had the man established that the rejection of his advertisement was discriminatory, the newspaper's freedom of expression was more significantly impacted than his freedom of religion, as he does not have the right to require the newspaper to communicate his religious beliefs.

[Marriage](#)

South Africa: On September 6, 2017, the High Court of South Africa [ruled](#) that the Department of Home Affairs was obligated to consider applications to alter records containing a person's sex description, irrespective of the person's marital status. The Alteration of Sex Description and Sex Status Act 49 of 2003 allows for applicants to alter their sex description as recorded in the national population register. However, a separate law only recognizes the right of heterosexual couples to marry, so the Department believed that it would be unlawful to alter the sex description of a person if it would lead to a same sex-marriage. The case was brought by three couples: For two of the couples, the Department refused to amend their sex description unless they first divorced. For the third couple, the Department deleted their marriage before altering the transgender spouse's sex description. The court determined that the Department's conduct infringed on the transgender individuals' constitutional rights, and that the Department must consider all applications submitted to alter sex description. INCLO-member Legal Resource Centre represented the couples.

United Kingdom: On August 17, 2017, the High Court of Justice in Northern Ireland [rejected](#) a challenge to Northern Ireland's continued refusal to permit gay marriage. The court recognized the compelling nature of the evidence "about the effect on the gay and lesbian community of being treated less favourably than others so repeatedly and for so long." It nonetheless concluded that the European Convention on Human Rights does not recognize a right to same-sex marriage, and that the right would need to be achieved through legislation. The Northern Irish Assembly last [considered](#) legislation that would have legalized marriage for same-sex couples in November 2015; however, members of the Democratic Unionist Party blocked the vote, despite majority support.

[Employment](#)

United Kingdom: The Court of Appeal has [dismissed](#) the appeal from an order holding that the Church of England did not violate the U.K.'s Equality Act when it barred Rev. Jeremy Pemberton from working as a hospital chaplain because he married his same-sex partner. Although Rev. Pemberton was employed by the National Health Service, he needed a license from the diocese to work as a chaplain. In its [decision](#), previously reported in this newsletter in January 2016, the Nottingham Employment Tribunal reasoned that the Church had valid grounds to revoke Rev. Pemberton's permission to officiate as a hospital chaplain with the National Health Service because he had breached his oath of obedience by marrying a same-sex partner. The Court of Appeal held that discrimination on sexual orientation grounds was permissible where necessary to comply with the doctrines of a religion.

United States: On March 7, 2018, the U.S. Court of Appeals for the Sixth Circuit [ruled](#) that a funeral home engaged in unlawful discrimination on the basis of sex when it refused to permit a transgender employee to adhere to the dress code consistent with her gender identity. The court held that the Religious Freedom Restoration Act – a federal statute – did not provide a defense in this case, reasoning that it did not substantially burden the employer's religious exercise to comply with a federal statute that prohibits workplace discrimination. The owner of the funeral home had argued that he "would be violating God's commands" if he supported the "idea that sex is a changeable social construct" and permitted employees to dress consistent with their gender identity. INCLO-member ACLU [intervened](#) on appeal on behalf of the employee.

Hungary: In September 2016, the Equal Treatment Authority [issued](#) a decision finding that a local mayor had harassed an individual based on the individual's gender identity and sexual orientation. On at least two occasions, the mayor had publicly yelled at the individual about what they were wearing, as well as saying that they could not enter the village and that the mayor would never hire them for a government job, even though they applied for one each month. The Authority found that the mayor had violated the Equal Treatment Act by making statements that created an intimidating, humiliating, and degrading environment around the individual, and prohibited the mayor from continuing the conduct, as well as imposed a fine against the mayor.

[Fundamental Rights](#)

India: On January 8, 2018, the Supreme Court of India [issued notice](#) that it will hear a plea to have the "right to choice of sexual orientation" be declared as part of the fundamental right to life and personal liberty under Article 21 of the Indian Constitution. The law at issue criminalizes certain sexual acts – including between same-sex partners – and carries a penalty of up to life imprisonment. In 2009, the Delhi High Court determined that the law violated fundamental constitutional rights, but on appeal in 2013, the Supreme Court reinstated the law. Now, the

Court has said that a larger group of judges should reconsider the law's constitutionality, as "people who exercise their choice should never remain in a state of fear."

IACHR: On November 24, 2017, the Inter-American Court on Human Rights [issued](#) an advisory opinion, providing that States are obligated to recognize individuals' right to change their names and rectify public records to conform with their gender identity, based solely on the free and informed consent of the applicant. Further, States must recognize and protect the rights of same-sex couples, including access to marriage and the full protection of domestic laws related to the rights of families. As a result, Costa Rica, which requested the advisory opinion, has announced it will take steps to comply, and efforts are underway in Honduras to challenge the constitutionality of laws that prohibit same-sex marriage and restrict name changes.

[*Government-Sanctioned Discrimination*](#)

United States: On January 18, 2018, the U.S. Department of Health and Human Services (HHS) announced the creation of a new division within HHS's Office for Civil Rights called the "Conscience and Religious Freedom Division." The following day, HHS issued a [proposed rule](#) that aims to dramatically expand existing law to enable health care institutions and individuals to refuse to provide services, and that could allow widespread discrimination, particularly against women, LGBT people, and people living with HIV. Many groups and individuals have [commented](#) on the proposed rule, including INCLC-member ACLU.

[*Religious Freedom & Women's Rights*](#)

[*Access to Contraception*](#)

United States: On October 6, 2017, the Trump Administration issued two interim final rules (IFRs) that permit virtually any employer to refuse to comply with federal law requiring contraceptive coverage in health insurance. One IFR allows *any* entity, including any for-profit company or non-profit organization, to invoke religious beliefs to block their employees' or students' health insurance coverage for contraception. The second IFR provides, for the first time, that employers with moral objections (except publicly traded for-profit entities) can also secure an accommodation or an exemption. Previously, the rules provided limited accommodations, with the insurer still providing coverage. The IFRs allow entities to claim an exemption, meaning their employees would get no coverage.

There are currently six cases in the courts challenging the IFRs, including one brought by INCLC-member ACLU: In [two cases](#), the courts have blocked the enforcement of the IFRs, and the government is appealing both decisions.

[*Access to Abortion*](#)

Ireland: On May 25, 2018, Ireland voted to repeal the Eighth Amendment to its constitution, overturning the ban on abortion by a [margin](#) of 66.4% to 33.6%, with all but one constituency voting in favor of repeal. The now-repealed amendment gave fetuses and pregnant women an equal right to life, banning abortion in the country unless the life of the woman was at "real and substantial risk." INCLC-member Irish Council for Civil Liberties [supported](#) efforts to overturn the ban, as it resulted in serious human rights violations. Legislation has been [drafted](#) and will be introduced in the coming weeks that would permit abortion up to 12 weeks for any reason, and until viability if there is a serious risk to the health of the woman.

The repeal followed two decisions issued by the United Nations Human Rights Committee finding that Ireland subjected women to ill-treatment by failing to provide access to abortion when the pregnancy was not viable. In both cases – one decided in [2016](#), the other in [2017](#) – a woman whose fetus had fatal birth defects had to travel outside the country to obtain an abortion and was not provided with information or counseling due to the stigma around abortion. In both cases, the Committee found the state violated the International Covenant on Civil and Political Rights – regardless of the illegality of abortion in Ireland.

In addition, on November 2, 2016, the Irish High Court [refused](#) an application to force a pregnant woman to give birth by caesarean section, when her preference was for a natural birth. The woman had undergone three prior caesarean sections, which heightened the risk of uterine rupture should she deliver naturally. The court found that the woman was taking an unnecessary risk by deciding to have a natural delivery, but that she nonetheless had the capacity to make such a decision. The court appointed counsel for, in its own words, her “unborn child,” but the court did not consider the case to be exceptional enough to justify court intervention and declined to order a forced caesarean section.

Argentina: On June 13, 2018, lawmakers in Argentina will vote on [legislation](#) that would make abortion legal in the first 14 weeks of pregnancy. If approved by the Chamber of Deputies, the bill will next go to the Senate. A special commission has been meeting twice a week for two months to consider the bill and hear testimony from hundreds of experts and witnesses. Many see the bill as a result of a broader women’s rights movement in the country, which started with a 2015 campaign against femicides. If the legislation passes, Argentina would be the fourth (and most populous) country in Latin America to allow abortion without limiting it to circumstances where the pregnancy resulted from rape or the woman’s life was threatened.

Mexico: On April 4, 2018, the Mexican Supreme Court [voted](#) unanimously that the denial of a legal abortion after rape constitutes a reproductive rights and human rights violation. The case was brought on behalf of a young woman who was raped when she was 17 years old and was unable to obtain an abortion due to delays, discrimination, and barriers put in place by Mexican authorities. Although the Court has previously discussed abortion, this is the first time the Mexican Supreme Court has issued a ruling directly addressing the denial of a woman’s access to abortion.

Canada: On January 31, 2018, a superior court of Ontario [upheld](#) a policy requiring physicians with religious objections to performing certain procedures to refer patients to a non-objecting physician and to perform the procedures in an emergency. The court found that the policy did engage the physicians’ religious freedom rights in a manner that is non-trivial, but that the policies were justified to ensure equitable access to healthcare. The court noted that the limited alternatives proposed by the physicians “would compromise the goal of ensuring access to healthcare in many situations, often involving vulnerable members of our society at the time of requesting medical services.” Each of the applicant physicians challenging the policy objected on religious grounds to one or several legally available procedures, including euthanasia, abortion, contraception, fertility treatments, prenatal screening, and/or treatments for transgender patients.

United Kingdom: On February 23, 2018, a United Nations committee [reported](#) that the U.K. and Northern Ireland has committed “grave and systemic violations” of the Convention on the Elimination of All Forms of Discrimination against Women due to restrictions on access to abortion in Northern Ireland. The U.K. government [responded](#) to the report.

Meanwhile, the U.K. Home Office is [considering](#) new national legislation to impose buffer zones around abortion clinics, in response to reports that women have been experiencing intimidation from anti-abortion protestors at clinics. A number of local councils have proposed issuing what are known as “public space protection orders” around clinics in their localities.

Chile: On August 28, 2017, the Constitutional Court of Chile [upheld](#) the law decriminalizing abortions in three situations: when there is imminent risk to the life of the woman; in cases of fatal fetal disease; and in cases of rape during the first 14 weeks of pregnancy when a woman is under 18 years old, and in the first 12 weeks for women over 18. The law also allows “professionals” with conscientious objections to decline to participate in abortions, which the Court extended to non-professionals and institutional participants.

India: On May 9, 2017, the Supreme Court of India [denied](#) an abortion request from an HIV-positive woman who had become pregnant as a result of rape, based on a medical board’s opinion that an abortion at 26 weeks posed a risk to the “life of the petitioner and the fetus in the womb.” The woman initially requested an abortion at 17 weeks, but despite Indian law allowing pregnancies resulting from rape to be terminated up to 20 weeks, she experienced significant delays at the hospital. A lower court [rejected](#) her request for an abortion at 24 weeks, finding that the permissible period for abortion had passed and there was no evidence of health risk to the woman or fetus. The Supreme Court did award her monetary compensation due to the delay, and directed the state to provide medical treatment.

IACHR: On October 23, 2017, the Inter-American Commission on Human Rights [issued](#) a comment urging all States to “adopt comprehensive, immediate measures to respect and protect women’s sexual and reproductive rights.” The comment asserts that criminalizing abortion in all cases limits the rights of women and facilitates high rates of maternal mortality. It also recognizes the necessity of guaranteeing reproductive rights to particularly vulnerable populations – girls, adolescents, and victims of sexual violence or incest – and equates sexual and reproductive rights with the right to live free from violence and discrimination.

[Marriage](#)

India: On August 22, 2017, the Supreme Court of India [held](#) that “triple talaq” – a practice permitting a Muslim man to legally divorce his wife by saying “talaq” three times – was unconstitutional and violated Muslim women’s fundamental rights. Supporters of the practice argued that it is a religious right. The Court banned the practice for six months, asking Parliament to bring legislation governing marriage and divorce in the Muslim community. The Lok Sabha subsequently [passed](#) a bill making any pronouncement of talaq void and punishable by up to three years imprisonment, among other protections for married Muslim women.

[Religious Freedom & Individual Rights](#)

[Religious Freedom](#)

European Court of Human Rights: On March 14, 2017, the European Court of Human Rights issued two decisions regarding employers’ bans on Islamic headscarves in the workplace. In the first opinion, coming out of a [Belgian](#) case, the court determined that the freedom of religion protected by the Charter of Fundamental Rights of the European Union includes the freedom of persons to manifest their religion, but that a prohibition on headscarves in the workplace is not

direct discrimination. The court did not rule as to whether the prohibition constituted indirect discrimination, but provided guidance for the national court, observing that, although the workplace had a generally applicable rule that required all employees to dress neutrally with regard to their religious or political beliefs, such neutral obligation can result in “persons adhering to a particular religion or belief being put at a particular disadvantage.” In the second case, coming out of [France](#), the question was whether employers could consider the effect on customers in barring an employee from wearing an Islamic headscarf. The court determined that customers’ preferences were not a genuine occupational requirement that the employer could consider.

Canada: On November 2, 2017, the Supreme Court of Canada [established](#) that the right to religious freedom does not protect the objects of the religion. The case was brought by citizens of the Ktunaxa Nation, who objected that the development of a ski resort in a particular location would drive the Grizzly Bear Spirit from its home there, and therefore irrevocably impair their religious beliefs and practices. The Court held that the right to freedom of religion does not extend beyond the right to have and to manifest those beliefs, and thus does not include the right to protect the object or spiritual focal point of those beliefs – here, the Grizzly Bear Spirit. Further, the Court determined that the legal duty to consult and accommodate Aboriginal interests is a right to a process, not to a particular outcome, which the Court found was fulfilled after years of negotiations between the local government, the Ktunaxa Nation, and developers.

[Religious Discrimination](#)

Argentina: The Argentine Supreme Court [ruled](#) against religious education in Salta province’s public schools, determining that the schools may not provide religious education during school hours. Notably, the Court’s decision recognized that, while the rule integrating religious education into the curriculum appeared neutral as to which beliefs would be taught, it created a “systemic effect of inequality.” To reach its decision, the Court referred to jurisprudence from the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Inter-American Court of Human Rights. The Court’s approach moves antidiscrimination law in Argentina forward, and reaffirms that the government must be neutral as to the plurality of groups within the country. INCLO members joined a friend-of-the-court brief and participated in the public hearing articulating the importance of the separation of religion and state.

Hungary: On April 12, 2017, Hungary’s Constitutional Court [repealed](#) several anti-Islamic measures put in place by the mayor of a Hungarian border town in November 2016. The mayor had instituted a ban on building mosques, women wearing burkas and chadors and other head coverings, and Muslim calls to prayer in public areas. The Court ruled that the prohibitions “aim to limit directly freedom of conscience and religion, as well freedom of speech,” which [violates](#) the Hungarian constitution. Reportedly, the measures were instituted when there was not even a Muslim community in the town.

United Kingdom: On April 27, 2018, a divisional court [ruled](#) that a coroner’s policy not to prioritize any death over another on the basis of religion violated the European Convention on Human Rights and amounted to indirect discrimination contrary to the U.K.’s Equality Act. Under the policy, the coroner had refused all requests for expedition due to religious beliefs while holding the deceased’s body and deciding whether to open an investigation into the death, leading Jewish and Muslim families to face delays in burials that were incompatible with their religious beliefs. The court determined that the blanket policy not to consider the circumstances of individual families when they have a religious basis unlawfully limited the coroner’s discretion,

and was irrational because the coroner considered other factors for expedition, such as eligibility for organ donations. The policy also indirectly discriminated against members of religious groups that prioritized prompt burial, because they were placed at a distinct disadvantage compared with those who did not share those beliefs.

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