



## Global Developments in Religious Freedom and Equal Treatment

July 2015

Dear Friends:

Welcome to the sixth issue of the International Network of Civil Liberties Organizations' (INCLC) quarterly newsletter, *Global Developments in Religious Freedom and Equal Treatment*. 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 quarter's issue: Ireland legalized same-sex marriage in a nationwide referendum, while the supreme courts of Mexico and the United States upheld same-sex marriage as a constitutional right; a county court in Northern Ireland held that Ashers 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; a second wave of cases challenging rules providing for insurance coverage for contraception are slowly making their way to the United States Supreme Court; and the Hungarian government reached a compensation agreement with two religious organizations unlawfully deprived of church status, following a decision by the European Court of Human Rights.

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 INCLC'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 Priya Nair at [INCLCNewsletter@aclu.org](mailto:INCLCNewsletter@aclu.org).

Best,

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

## Religious Freedom & LGBT Rights

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### *Marriage & Family*

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**Ireland:** On May 22, Ireland legalized same-sex marriage through a nationwide [referendum](#), with a 61% majority of votes cast supporting legalization. Previously, same-sex couples in Ireland could enter into civil partnerships, which conferred rights and responsibilities similar but not equal to marriage. Ireland is now the first country in the world to legalize same-sex marriage through a popular vote. Father Brendan Hoban, co-founder of the Association of Catholic Priests, [called](#) the referendum a “significant body-blow to the position of the Catholic Church,” which campaigned heavily against legalization of same-sex marriage. INCLO member ICCL played a leading role in passing the referendum.

This is not the only important news from Ireland. On April 6, the Irish government enacted an amendment to the Children and Family Relationships Bill, extending full adoption rights to cohabiting couples and those in civil partnerships. Previously, children in Ireland could be adopted only by married couples or single applicants, making it impossible for a same-sex couple to jointly adopt. The bill was passed ahead of Ireland's referendum on same-sex marriage, thereby removing the adoption issue from the same-sex marriage debate.

And, on June 3, Joan Burton – the Irish Deputy Prime Minister and Minister for Social Protection – announced that the Cabinet had agreed to drop a controversial “forced divorce” clause from the Gender Recognition Bill, which would have required married individuals who transitioned to divorce before their new gender status would be recognized. The Bill is also being amended to allow persons over 18 years of age to obtain a gender recognition certificate based on a statutory self-declaration of gender identity. Previously, the Bill would have required applicants to supply a statement from an endocrinologist or psychiatrist affirming that the applicant is transitioning or has transitioned to his or her preferred gender.

**Italy:** On July 21, the European Court of Human Rights (ECtHR) [ruled](#) that Italy is violating the European Convention on Human Rights by refusing to offer adequate legal protection and recognition for same-sex couples. At present, same-sex couples in Italy are unable to get married or enter into civil partnerships. The court found that although same-sex couples may live openly in Italy, they do not receive any formal recognition for their status as a family and must frequently turn to the country's overburdened judicial system to obtain protection for even “the most basic issues arising in a relationship.” The court held that these hindrances violate

Article Eight of the European Convention on Human Rights, which guarantees the right to respect for privacy and family life. Given the absence of marriage equality for same-sex couples in Italy, the ECtHR suggested that the passage of legislation authorizing civil unions or registered partnerships would be “the most appropriate way for same-sex couples . . . to have their relationship legally recognized.” The Court did not, however, reverse its previous decisions which have held that Article 12, the right to marry, does not require member States to allow same-sex couples to marry.

In its decision, the Court pointed to a growing trend towards legal recognition of same-sex couples, noting that 24 out of the 47 Council of Europe member States have legislated in favour of such recognition. The Court also noted that, according to recent surveys, a majority of the Italian population supported legal recognition of homosexual couples. In the Court's opinion, the Italian government had failed to identify any community interests which weighed against such recognition.

**Mexico:** On June 3, Mexico's Supreme Court [held](#) that any state law barring same-sex couples from marriage violates the country's constitution. The ruling was issued in the form of a “jurisprudential thesis,” which means that although it is binding on lower federal courts, it does not directly invalidate any state laws. Accordingly, civil registry authorities abiding by state laws may still refuse to authorize same-sex marriages. Couples subject to such refusals may, however, obtain a federal court order compelling the issuance of a license.

**United States:** On June 26, the U.S. Supreme Court [ruled](#) that the Constitution guarantees same-sex couples the right to marry. The Court reasoned that marriage is a fundamental right that may not be discriminatorily denied to gay and lesbian individuals, writing: “It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.” The decision was greeted with joy, as well as with politicians calling for protections for the religious liberty of those who object to marriage for LGBT couples. Legislative proposals – to permit individuals and institutions to refuse to recognize marriages of same-sex couples – will likely emerge in the coming months. INCLC member ACLU represented plaintiffs in [two](#) of the four cases before the Court. INCLC members CELS, CCLA, LRC and Liberty joined in [a friend-of-the-court brief](#) that highlighted the lessons and perspectives from other countries affording marriage for same-sex couples.

### [\*Services & Public Accommodations\*](#)

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**Canada:** Courts in British Columbia, Nova Scotia, and Ontario have been asked to decide whether those provinces' legal societies must accredit law degrees issued by Trinity Western University (TWU), a private Christian university in British Columbia. The provincial legal societies take issue with TWU's student conduct policy, which prohibits sexual intimacy outside of “traditional marriage.” During the first week of June, an Ontario Divisional Court [heard](#) oral argument in a case by TWU against the Law Society of Upper Canada. The Law Society has declared that it will not accredit TWU – thereby preventing the university's graduates from practicing law in Ontario – because the school's “discriminatory” policy “would jeopardize the public's confidence in the legal profession.” In its arguments before the court, TWU relied heavily on a 2001 Supreme Court of Canada precedent requiring the British Columbia College of Teachers to recognize TWU's education school.

As reported in our previous issue, in a case similar to that just argued in Ontario, a Nova Scotia trial court [held](#) that the Nova Scotia Barrister's Society lacked the authority to condition its recognition of TWU's law school on a change in the school's student conduct policy and

determined that the law society did not appropriately balance equality concerns against freedom of religion. That decision is now on appeal. And, in August, a British Columbia court will hear TWU's case challenging the Law Society of British Columbia's refusal of recognition.

**United Kingdom:** On May 19, a Belfast county court [held](#) that a Northern Ireland 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. As reported in our December 2014 issue, 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 family-owned bakery asserted that it refused the cake order because it was "at odds" with the company's Christian beliefs and maintained that it has acted lawfully. Although the court acknowledged the bakery owners' religious beliefs, it emphasized that "they are in a business supplying services to all." The court also rejected the argument that the bakery should not have been required to endorse same-sex marriage through its cake decorations, holding: "[Defendants] were contracted on a commercial basis to bake and ice a cake with entirely lawful graphics and to be paid for it. The Plaintiff was not seeking support or endorsement." The bakery has [indicated](#) that it will appeal the court's ruling.

**United States:** On April 27, a county court judge in Kentucky [ruled](#) that the print shop Hands On Originals did not violate a local anti-discrimination ordinance by refusing on religious grounds to print shirts promoting the Lexington Pride Festival. The court held that Hands On Originals discriminated on the basis of the content of the requested message, rather than the sexual orientation of its customers. The Lexington Human Rights Commission has appealed the court's decision.

Over the course of the year, many bills were introduced in the states that would have authorized the use of religion to discriminate. Most have gone down in defeat; only seven of more than 70 were enacted into law. Both Arkansas and Indiana enacted state Religious Freedom Restoration Acts. The measures were narrowed after widespread opposition because of concerns the laws could be used to justify discrimination. Michigan enacted a trio of laws allowing agencies that place children for adoption or foster care to refuse to provide services that conflict with their religious beliefs, including the placement of children with LGBT foster parents referred by the state. North Carolina passed a law allowing state officials to recuse themselves from issuing all marriage licenses and performing marriage ceremonies, subject to certain safeguards designed to ensure that such recusals do not prevent state residents from getting married. Utah, in turn, passed a law that requires certain government officials to ensure that someone is available to solemnize all civil marriage ceremonies, while not expressly requiring the officials themselves to perform the ceremonies. INCLO-member ACLU lobbied against many of the refusals bills introduced this year, and maintains a [website](#) tracking the progress of such legislation throughout the United States.

## [Employment](#)

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**United Kingdom:** A Nottingham Employment Tribunal recently heard oral arguments in an employment discrimination [lawsuit](#) brought by a Church of England clergyman who was barred from working as a hospital chaplain because he married a same-sex partner. Although the plaintiff, Jeremy Pemberton, was employed by the National Health Service, he needed a license from the diocese to work as a chaplain at King's Mill Hospital in Mansfield. He alleges that the acting bishop for Southwell and Nottingham discriminated against him under the Equality Act by refusing the license. The Church maintains that those in holy orders cannot enter into marriage with a same-sex partner.

## Other

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**Kenya:** On April 24, a Nairobi High Court [ordered](#) the Kenyan Non-Governmental Organizations Coordination Board to recognize and register the Gay and Lesbian Human Rights Commission. The Board had rejected the Commission's petitions for registration on five separate occasions, explaining that "any association bearing names gay and lesbian could not be registered," because "the associations were furthering criminality and immoral affairs." Although the court acknowledged that same-sex sexual activity remains illegal in Kenya, it held that the Kenyan Constitution's right to free association applies to all people living within Kenya, regardless of their sexual orientation. The court further held that the Kenyan government "cannot rely on religious texts or its views of what the moral and religious convictions of Kenyans are to justify the limitation of a right" protected under the Constitution. Christian groups in Kenya have protested the ruling, and the Kenyan Christian Professionals Forum [said](#) it would appeal the decision "on behalf of the public interest."

## Religious Freedom & Women's Rights

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### Access to Contraception

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**Hungary:** The Hungarian Ministry of Human Capacities recently [announced](#) that the *EllaOne* emergency contraception pill (also known as the morning-after pill) will continue to be available only with a prescription, due to the Ministry's concerns about patient safety. INCLC-member HCLU and other women's rights groups [condemned](#) the decision. Both the European Medicines Agency and the European Commission have [voiced](#) support for making the *EllaOne* pill available without a prescription, and it can now be accessed over the counter in all European Union member states except Hungary and Malta (where it is not available).

**United States:** As reported previously, the U.S. Supreme Court held in [Burwell v. Hobby Lobby](#) that a federal rule requiring insurance to cover contraception impermissibly burdened the religious rights of closely held for-profit corporations that objected to providing coverage. (A closely held corporation is, loosely speaking, one whose stock is not freely traded and is held by a relatively small number of shareholders.) The government responded to the Court's ruling by issuing a rule extending the accommodation for objecting religiously affiliated non-profits to closely held for-profit corporations. Under the accommodation, qualifying organizations that object to insurance coverage for contraception can certify their objection to their insurers, third-party administrators, or the federal government; the insurer or third-party administrator would then arrange and pay for the contraceptive coverage separately.

At the same time as the Administration is extending the accommodation, legal challenges to it continue. To date, every appeals court to have addressed the issue has rejected challenges to the accommodation. Most recently, the U.S. Courts of Appeals for the Fifth and Tenth Circuits joined the Third, Sixth, Seventh, and D.C. Circuits in rejecting non-profit challenges to the accommodation. In [East Texas Baptist University v. Burwell](#), the Fifth Circuit held that the accommodation's certification requirements do not require religious non-profits to provide or facilitate access to contraception, and that religious non-profits have no right to challenge the government's independent arrangements with insurance companies regarding contraception coverage. The Tenth Circuit reached a similar result in [Little Sisters of the Poor v. Burwell](#).

There are now petitions for Supreme Court review in three of these cases. For more information, contact [LibertyNewsletter@aclu.org](mailto:LibertyNewsletter@aclu.org) for a subscription to INCLO-member ACLU's newsletter on U.S. religious refusals.

## ***Marriage & Family***

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**South Africa:** Last September, the South African Human Rights Commission (SAHRC) [filed](#) a lawsuit in the Western Cape High Court challenging the Birth and Death Registrations Act 51 of 1992, which requires a man to give his consent before he may be registered as the father of a child born outside of marriage and which, in these cases, prohibits a child from using his father's surname without the father's consent or leave of court. SAHRC challenges these requirements on a number of grounds, including that they unconstitutionally discriminate between mothers and fathers who have children outside of marriage, between married and unmarried mothers, and between children born inside and outside of marriage. INCLO-member LRC represents SAHRC and two individual plaintiffs in the lawsuit.

## ***Other***

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**United Kingdom:** Leaders of an ultra-Orthodox Jewish sect in North London recently [issued](#) a letter warning that the sect's schools would not educate students driven to class by their mothers. "There has been an increase in incidences of mothers of our students who have begun driving cars," the letter stated, "something that goes against the laws of modesty within our society." Addressing the letter, Education Secretary and Minister for Women and Equalities Nicky Morgan said: "This is completely unacceptable in modern Britain. If schools do not actively promote the principle of respect for other people they are breaching the independent school standards. Where we are made aware of such breaches we will investigate and take any necessary action to address the situation."

## **Religious Freedom & Racial Justice**

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**Hungary:** On April 22, the Hungarian Supreme Court [held](#) that a parochial elementary school in Nyíregyháza (a city in north-eastern Hungary) which educates exclusively Roma children is not impermissibly segregating but rather serving a Church program. The school, which was shut down in 2007 after an earlier anti-segregation lawsuit by Chance For Children Foundation (CFCF), was reopened in 2011 under the auspices of the Greek Orthodox Church. Although the parochial school serves only Roma children as part of a special Church program, Roma families may also choose to send their children to several other schools located nearby. The CFCF initiated a new lawsuit against the parochial school, claiming that it segregates Roma children and deprives them of the educational opportunities offered in other town schools. Although the trial and appellate courts both agreed that the parochial school violated anti-segregation laws, the Supreme Court reversed those decisions, holding that the Church's right to freedom of religion and the Roma parents' right to send their children to the school of their choice superseded anti-segregation requirements. The CFCF now looks to the European Commission to clarify whether the Supreme Court's ruling is in accord with Council of Europe recommendations on Roma integration.

## **Religious Freedom & Individual Rights**

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## Clothing and Garb

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**United States:** On June 1, the U.S. Supreme Court issued its decision [Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.](#), which involved a Muslim woman's claim that she was denied a job because her religious headscarf, or hijab, did not meet the company's "look policy." Under U.S. federal employment discrimination law, employers are required to accommodate the religious beliefs and practices of employees and applicants unless doing so would place an undue burden on the employer. The company maintained that it should not be held liable for religious discrimination, because the woman had never informed them that she needed to wear her *hijab* for religious reasons. The Supreme Court rejected this argument, holding that a company may be held liable for religious discrimination where its failure to hire a prospective employee is motivated by a desire to avoid making a reasonable religious accommodation, even if the prospective employee cannot show that the company had "actual knowledge" of her need for such an accommodation. INCLC member ACLU joined a [friend-of-the-court brief](#) in the case.

## Employment

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**United Kingdom:** Two employment decisions out of the U.K. illustrate how courts are grappling with religious speech in the workplace. On February 27, an employment tribunal [held](#) that the East London National Health Service Foundation Trust did not unlawfully discriminate based on religion or restrict freedom of conscience when it suspended a Christian occupational therapist, Victoria Wastenev, for proselytizing a Muslim coworker who was experiencing health problems. The Trust suspended Ms. Wastenev after her coworker complained that Ms. Wastenev had offered to pray for her, invited her to attend church events, and gave her a book about a Muslim woman who converts to Christianity. Ms. Wastenev maintained that her suspension violated the religious discrimination provisions of the Equality Act and the religious freedom protections enshrined in the European Convention on Human Rights. The employment tribunal, however, concluded that Ms. Wastenev had been disciplined because her actions "blurred professional boundaries and placed improper pressure on a junior employee rather than [because] they were religious acts." On April 2, Ms. Wastenev [appealed](#) to the Employment Appeals Tribunal.

In June, a separate employment tribunal in Watford [concluded](#) that a childcare service unlawfully discriminated against Sarah Mbuyi, an evangelical Christian who was terminated from her nursery assistant position after she told a lesbian coworker that she believed homosexuality to be a sin. The conversation so upset the coworker that she asked to be transferred to a different room so she would not have to work with Ms. Mbuyi. The employment tribunal concluded that the termination of Ms. Mbuyi was a disproportionate response under the circumstances of her actions.

## Government Recognition and Funding of Religion

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**Hungary:** As reported in previous issues, the ECtHR held in [Magyar Keresztény Mennonita Egyház and Izsak-Bacs v. Hungary](#) that Hungary's Church Act of 2012 violated the freedom of religion and association provisions of the European Convention on Human Rights by selectively removing church status and state subsidies from several religious organizations previously registered as churches, by establishing a politically tainted re-registration procedure, and by treating the deprived churches differently from the incorporated churches. Pursuant to the ECtHR's ruling, the Hungarian government had six months to reach an agreement with the claimant religious organizations regarding just compensation. Two religious organizations

[accepted](#) the government's offer of compensation, which did not include a provision restoring church status. The ECtHR will determine appropriate compensation for the [other religious organizations](#). INCLO-member HCLU, which represents nine of the seventeen claimant religious organizations in the dispute, maintains that, in addition to providing compensation, the government must amend both the Church Act and the Fundamental Law to restore the organizations' church status.

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