



Global Developments in Religious Freedom and Equal Treatment

November 2015

Dear Friends:

Welcome to the seventh 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: Kim Davis, a county clerk in the United States, was found in contempt of court after she refused to issue marriage licenses in the wake of the Supreme Court's same-sex marriage ruling; a new report on Nigeria's Same Sex Marriage Prohibition Act, which prescribes up to 14 years' imprisonment for those who enter into same-sex marriages or co-habit, states that the law has led to mob attacks, police torture, evictions, and health risks; Spain's Constitutional Court held that a pharmacy could not be legally required to sell emergency contraception over religious objections; Canada's Federal Court of Appeal upheld a lower court decision striking down a requirement that Muslim citizenship applicants remove the niqab before taking the citizenship oath; the Indian Supreme Court stayed a decision ruling that the Jain practice of Santhara, which involves death by fasting, qualifies as suicide; and INCLC released a report examining how courts in different countries address tensions between religious freedom and equality.

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.

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

Marriage & Family

United States: On June 26, the U.S. Supreme Court [ruled](#) that the federal Constitution guarantees same-sex couples the right to marry. The Court reasoned that marriage is a fundamental right that may not be denied to gay and lesbian individuals: "It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society." Although most officials throughout the country are complying with the Supreme Court's ruling, there are some efforts to resist the ruling in the name of religion.

For example, following the Supreme Court decision, Kim Davis – the head clerk for Kentucky's Rowan County – [stopped](#) issuing all marriage licenses, stating that issuing marriage licenses to same-sex couples goes against her religious beliefs. Four couples brought a lawsuit challenging the denial of their marriage licenses, and a federal district court ruled that Ms. Davis's "religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk." When Ms. Davis refused to comply with the court's order, the court found her in contempt and ordered her held in jail. In Ms. Davis's absence, Rowan County deputy clerks began issuing marriage licenses to all eligible couples. The district court released Ms. Davis from jail on the condition that she not interfere with the issuance of marriage licenses. When Ms. Davis returned to work, she altered the marriage licenses so they state they are issued pursuant to a federal court order (rather than the clerk), and she directed deputy clerks to sign the licenses in their capacity as notaries public rather than as county officials. Plaintiffs have argued that these alterations cloud the licenses' validity. Litigation remains ongoing. The plaintiff couples are represented by INCLO-member ACLU.

Services & Public Accommodations

Canada: As reported in previous issues, courts in British Columbia, Nova Scotia, and Ontario have been asked to decide whether those provinces' legal societies must accredit a proposed law school at Trinity Western University (TWU), a private Christian university in British Columbia. The provincial legal societies take issue with TWU's mandatory Community Covenant, which prohibits sexual intimacy outside of "traditional marriage between a woman and a man."

In July, the Ontario Divisional Court [upheld](#) the Law Society of Upper Canada's decision not to accredit TWU's law school. Noting that the Society's refusal of accreditation "does not, in fact,

preclude TWU from opening a law school,” the court determined that the conduct policy discriminates against LGBTQ individuals by “reduc[ing] their opportunities for acceptance to law school in comparison with all other persons.” TWU says it will appeal the judgment.

By contrast, a Nova Scotia court [held](#) in January 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.

The court in British Columbia has [reserved judgment](#) in TWU’s case challenging the Law Society of British Columbia’s refusal of recognition.

Other provinces and territories have accredited the proposed school.

United States: On August 13, the Colorado Court of Appeals issued an [opinion](#) in *Craig & Mullins v. Masterpiece Cakeshop, Inc.*, affirming that the cake shop violated the state’s anti-discrimination law when it refused to sell a wedding cake to a same-sex couple. Rejecting the argument that the anti-discrimination law violates the cake shop’s right to religious exercise, the court wrote that “Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, [the law] prohibits it from picking and choosing its customers based on their sexual orientation.” The court also rejected the cake shop’s First Amendment free expression argument, reasoning “that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings,” and that any political sentiment inferred from the wedding cake “is more likely to be attributed to the customer than to Masterpiece.”

This is one of a number of such cases involving businesses that refused for religious reasons to provide services to LGBT people. Other cases of which we are aware involve wedding venues, a photography studio, a bakery, a flower and gift shop, and an inn. We will report on these cases when there are significant developments.

[Employment](#)

South Africa: Ecclesia de Lange – a minister fired by the Methodist Church in 2010 for marrying her same-sex partner – has [appealed](#) her case challenging her dismissal to the Constitutional Court, after adverse rulings by the Western Cape High Court and the Supreme Court of Appeal. Ms. de Lange has told the Constitutional Court that her relationship and cohabitation were well known to the Church, but that she was subjected to discipline and ultimately terminated only after she announced her wedding plans. Freedom of Religion South Africa, a religious rights organization, has filed papers arguing that the Court must appreciate the Methodist Church’s longstanding doctrinal position on same-sex marriage.

[Education](#)

Canada: On August 26, the Nova Scotia Court of Appeal [held](#) in *Bonitto v. Halifax Regional School Board* that a school may prohibit a parent from distributing religious materials on school premises during school hours. Sean Bonitto, a fundamentalist Christian and parent at Park West School in Halifax, distributed to students and others religious materials asserting, among other things, that homosexuality is a sin. The school board’s policy provides that distribution of

materials at the school requires principal approval, which was denied to Mr. Bonitto. Mr. Bonitto argued that the prohibition infringed his freedom of religious expression under the Canadian Charter of Rights and Freedoms, but the court concluded that the prohibition was reasonable and proportionate to the school's interest in promoting a safe learning environment and a religiously neutral public space.

Government Discrimination

Hungary: The advertising company used by Budapest's municipal transport agency has [refused](#) to contract with melegrandi.hu, a dating site for LGBT people that wanted to place advertising posters on city buses. In its refusal, the advertising company argued that the posters would be harmful to the moral development of young people, which is prohibited by the law on advertising. The dating site has filed a challenge before the Hungarian Equal Treatment Authority, arguing that it does not offer sexual services and its advertisements therefore do not violate the advertising law's youth-protective rules. Moreover, the dating site has asked the Authority to examine whether advertisements are allowed for heterosexual dating sites. The dating site is represented by INCLO-member HCLU.

India: In early 2014, the Gujarat state government authorized tax exemptions for all movies made in the Gujarati language, except those depicting social evils, evil customs, or blind faith. The government denied the tax exemption to a movie called Meghadhanushya (Spectrum of the Rainbow), which is about a gay youth's struggle to understand his identity, on the grounds that it depicted a "social evil" and is "opposed to public policy." The Gujarat High Court held that the movie is entitled to the tax exemption, stating that depicting the life of a gay person is not equivalent to depicting a social evil or custom. The Indian Supreme Court [stayed](#) the High Court's order and, in August, agreed to review the merits of the case.

Nigeria: A new [report](#) on Nigeria's Same Sex Marriage Prohibition Act – which prescribes up to 14 years' imprisonment for those who enter into same-sex marriages or co-habit and also criminalizes "gay clubs, societies, and organizations" – states that the law has led to mob attacks, police torture, evictions, public whippings, and health risks. The report, authored by PEN American Center and the Leitner Center for International Law and Justice, calls on Nigerian President Muhammadu Buhari to repeal the legislation, charging that it denies freedom of expression and other rights protected under Nigeria's Constitution. Nigerian groups documented 105 human rights violations against LGBT people in the year after the law's enactment in January 2014.

Religious Freedom & Women's Rights

Access to Contraception

Spain: On July 8, Spain's Constitutional Court [held](#) that the government violated a pharmacy's "ideological freedom" as protected under Article 16 of the Spanish Constitution when it sanctioned the pharmacy for refusing to sell emergency contraception. Citing different positions on the possible abortive effects of emergency contraception, the Court reasoned that the plaintiff pharmacy's beliefs involving the right to life outweighed the government's interest in ensuring that all pharmacies provide the medication. In so holding, the Court noted that the plaintiff pharmacy was located in the urban center of Seville and there was no showing that women's access to the contraception was obstructed. The Court, however, upheld sanctions imposed on the pharmacy for refusing to sell condoms on the ground that there was in that case

“no conflict of conscience with constitutional relevance.” Dissenting, Judge Adela Asua argued that Article 16 should not be used to excuse citizens from performing their legal duties and expressed concern that the decision could “bring ill-fated consequences for our state and our existence.”

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. Now, pursuant to new federal rules, closely held for-profit organizations (like Hobby Lobby) and religiously affiliated non-profits that object to providing insurance for contraception may avail themselves of an accommodation. Under the accommodation, closely held corporations and religiously affiliated non-profit organizations can certify their objection to their insurers, third-party administrators, or the federal government; the insurer or third-party administrator will then arrange and pay for the contraceptive coverage separately. This accommodation too has been challenged in court.

Thus far, seven federal appeals courts have rejected challenges to the accommodation, primarily on the ground that it does not substantially burden religious exercise. On September 17, however, the Eighth Circuit Court of Appeals parted ways with its sister courts and held that the accommodation impermissibly burdens religious exercise. The split between the circuit courts significantly increases the chance that the issue will be taken up by the Supreme Court. There are currently petitions for Supreme Court review in seven of these cases; the Supreme Court has scheduled the cases for a conference on November 6. For more information, contact LibertyNewsletter@aclu.org for a subscription to INCLC-member ACLU’s newsletter on U.S. religious refusals.

[Access to Abortion](#)

Argentina: In 2012, the Argentina Supreme Court ruled that abortion is lawful in cases of rape or threat to the woman’s life and instructed the country’s national and regional governments to establish protocols for ensuring access to lawful abortions. The National Ministry of Health recently updated its abortion care [protocol](#), which is mandatory across the whole country. The updated protocol clarifies that healthcare professionals may refuse to provide service on conscientious objection grounds, “provided [the refusal] does not delay, slow down, or impede access” to a lawful abortion. Healthcare professionals who conscientiously object to providing abortion care must still inform women about their right to access lawful abortion under appropriate circumstances and, if the patient wishes to obtain an abortion, must refer the patient to another physician. An attending physician may not refuse to perform an abortion if no other physician is available. Healthcare professionals who conscientiously object to providing abortion care are instructed to notify the proper authorities at the healthcare institution in which they work. Healthcare institutions do not have conscientious objection rights and must ensure that patients have access to lawful abortions.

Canada: On July 29, Canada’s national public health service [announced](#) that it has approved RU-486, a pill used to terminate a pregnancy. Under Canada’s national ethics rules, doctors may refuse to perform abortions or refer patients for abortions, so long as they connect the patient with other service providers. In Ontario, doctors will reportedly also be able to refuse to prescribe RU-486. Other provinces’ policies on refusals to prescribe the medication remain unclear.

Uruguay: In October 2012, the National Congress of Uruguay enacted the Voluntary Interruption of Pregnancy Act, which legalized abortion within the first twelve weeks of pregnancy. President José Mujica subsequently issued Decree 375/012, which contains various regulations pertaining to abortion. A group of gynecologists from the Integrated National Health System filed a legal challenge to the Decree. As part of the challenge, the gynecologists called on the court to suspend immediately 11 articles in the Decree that deal with conscientious objection, claiming they violate the doctors' freedom of conscience and right to practice medicine by limiting objections to performance of the procedure and thus do not include pre- and post-abortion procedures. They also maintained that the regulations unduly restrict their freedom to counsel patients regarding alternatives to abortion.

In the December 2014 issue, we reported that the Uruguayan Court of Administrative Disputes (TCA) issued a preliminary decision suspending the challenged articles. In August, the court [reaffirmed](#) that ruling in a final decision, holding that the plaintiff physicians may refuse to participate in any stage of the abortion process. In several regions of the country, more than 80% of gynecologists refuse to perform abortions on religious or moral grounds, according to a report released by Women and Health in Uruguay.

[Other](#)

India: In 2012, the Haji Ali Dargah Trust, which is charged with maintaining a prominent mosque and tomb located in Mumbai, banned women from entering the tomb's inner sanctum. The Indian Muslim Women's Movement filed a public interest litigation before the High Court of Bombay challenging the ban. In August 2015, the court [asked](#) the trust to reconsider the ban, possibly by reverting to its previous practice of using separate entrances for men and women. If the parties cannot reach an amicable resolution, the court will resolve the issue.

In July, the Kerala High Court [dismissed](#) a public interest litigation challenging the constitutional validity of Sharia-based Muslim Personal Law, which governs family proceedings in India's Muslim communities. The petitioners in the case maintained that the law's inheritance provisions discriminate on the basis of gender because the provisions stipulate that daughters – but not sons – must share inherited property with their relatives. The court ruled that the issues raised in the case could not be adjudicated in public interest litigation and must instead be resolved by the legislature through the enactment of a Uniform Civil Code for family law. The Indian Supreme Court has on numerous occasions since the 1970s requested that the legislature implement such a law.

Religious Freedom & Individual Rights

[Clothing and Garb](#)

Belgium: The European Court of Human Rights (ECtHR) has asked for the Belgian government's response in the case of *Dakir v. Belgium*, which involves a Muslim woman's challenge to a ban on face coverings in public places. The plaintiff complains that the prohibition on her wearing the niqab – a veil covering the face with the exception of the eyes – violates her right to manifest her religion, her right to respect for her private life, and her right to freedom of expression. INCLO member Liberty has been granted permission to intervene in the case.

Canada: In September, Canada's Federal Court of Appeal [upheld](#) a lower court's [decision](#) striking down a government policy requiring women who wear a niqab to unveil in order to take

the oath of citizenship. The court declined to address whether the policy was consistent with the Canadian Charter of Rights and Freedoms, instead holding that the mandatory nature of the policy contravened the Citizenship Regulations, which require a citizenship judge to “administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof.” The government has filed leave to appeal the decision to the Supreme Court of Canada.

India: In July, the Kerala High Court [ruled](#) that two female students must be allowed to wear hijabs for the All-India Pre-Medical Test. The examination’s administrators had previously stipulated a strict dress code to prevent malfeasance. In response to the students’ challenge, the High Court ruled that it was improper for any authority to deny a woman the right to wear her religious attire, and indicated that the authorities could prevent cheating by authorizing a female invigilator or other official to examine the students at the hall before the exam commenced.

Kenya: In *Methodist Church v. Teachers Service Commission*, the High Court of Kenya [held](#) that Muslim students cannot be allowed to wear hijabs, white trousers, and open shoes instead of the regular school uniforms, as this would amount to preferential treatment over other students who profess different faiths. The court further noted that the school uniforms assist in the identification of students, promote discipline, and instill a sense of inclusivity and unity of purpose among students.

[Employment](#)

United Kingdom: 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, Enya Nawaz, 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 October 5, Ms. Wastenev received [permission](#) to appeal her case to the Employment Appeals Tribunal.

[Government Recognition and Funding of Religion](#)

Argentina: The Ombudsman of Buenos Aires ruled, in Resolution 841/15, that religious figures and images should be banned in public schools. The ruling came in response to a claim brought by a student’s mother, who asserted that the display of religious figures and images in public schools violates Article 24 of the Constitution of Buenos Aires, which requires the city to provide free and secular public education.

[Other](#)

Hungary: Judit Kende, a psychology student at Eötvös Loránd University in Budapest, was [denied](#) her doctoral degree because she conscientiously objected to take an oath supporting the Fundamental Law of Hungary. Ms. Kende is challenging the denial of her degree, arguing that

the oath requirement unduly interferes with her freedom of conscience because some passages of the Fundamental Law reflect controversial political and moral views with which she disagrees. She also argues that the oath requirement is contrary to the law on higher education and that the values espoused in the Fundamental Law have no proper bearing on her vocation. Although the university promised to address the issue, it has thus far failed to do so. Ms. Kende is represented by INCLO-member HCLU.

India: In March, the Maharashtra State government [joined](#) a number of other Indian state governments in banning the slaughter of cows, which are considered holy by Hindus. (In 2004, the Indian Supreme Court ruled that a ban on the slaughter of cows is constitutionally valid.) In addition to the slaughter ban, however, the Maharashtra government has also made the purchase, sale, and possession of beef illegal, except for the meat of water buffaloes. [Petitions challenging](#) the Maharashtra law have been filed with the Bombay High Court, arguing among other things that the law violates Article 29 of the Indian Constitution, which protects the interests of cultural minorities. INCLO-member HRLN is appearing on behalf of some of the petitioners.

Other

Aid in Dying

Canada: In March, we reported on the Supreme Court of Canada's [decision](#) holding that the Criminal Code's absolute prohibition against assisted suicide violates the right to life, liberty, and security of the person, as protected under Section 7 of the Canadian Charter of Rights and Freedoms. In the wake of that decision, the Canadian government has [appointed](#) a panel to study how to implement the court's decision. The panel will focus on which forms of assisted dying should be permitted, on eligibility criteria, and on safeguards to protect a doctor's "freedom of conscience" not to participate in such procedures.

India: On August 10, the Rajasthan High Court [held](#) that the Jain practice of Santhara, which involves death by fasting once a person believes he or she has completed his or her earthly purpose, qualifies as suicide and ruled that any person who supported the practice would be culpable for abetting suicide. The court ruled that Santhara is not an essential religious practice of the Jain community and is therefore not entitled to protection under Article 25 of India's Constitution. The Indian Supreme Court [stayed](#) the High Court's order and admitted the appeal for hearing.

Disability Rights

Canada: A hearing-impaired student at Memorial University in Newfoundland has [filed](#) a complaint against the university with the Newfoundland and Labrador Human Rights Commission, alleging that he was forced to drop a course because the professor refused on religious grounds to wear a sound-transmitting device. In 1996, the professor entered into an agreement with the university allowing her to refuse to wear the device because of her Hindu religious beliefs. The university stated that its agreement with the professor is currently under review.

INCLO Report

On September 21, INCLC released a [report](#) that addresses the tension between freedom of religion and equality rights in three areas: LGBT rights, reproductive rights, and religious appearance. The report, "[Drawing the Line: Tackling Tensions Between Religious Freedom and Equality](#)," examines how courts in a number of countries have tackled these issues, and offers recommendations for resolving competing religion and equality claims. Editions in Spanish, French, and Hungarian will be released in the coming months.

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