



Global Developments in Religious Freedom and Equal Treatment

January 2016

Dear Friends:

Welcome to the eighth issue of the International Network of Civil Liberties Organizations' (INCLO) 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: a Belfast court is considering whether marriages between same-sex partners in England and Wales must be accorded equal status in Northern Ireland; the South African Constitutional Court dismissed an appeal filed by a Methodist minister who was fired for marrying a same-sex partner, citing procedural concerns; in a sequel to its *Hobby Lobby* decision, the US Supreme Court agreed to review whether the religious accommodation for organizations that object to the Affordable Care Act's contraceptive coverage rule itself violates their religious exercise rights; a court in Northern Ireland held that the European Convention on Human Rights requires the province to allow abortion access for women who are pregnant with fatal fetal abnormalities or who are pregnant as a result of sexual crime; the European Court of Human Rights upheld France's ban on the wearing of "conspicuous religious symbols," including the niqab, by public employees; and an Egyptian court imprisoned a television presenter for contempt of religion.

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 Priya Nair at INCLONewsletter@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 Kingdom: Late last year, a Belfast High Court [heard](#) challenges brought by two same-sex couples, now living in Northern Ireland, who seek recognition of their English marriages. Under the UK's Marriage (Same Sex Couples) Act 2013, marriages between same-sex couples in England and Wales are recognized only as civil partnerships in Northern Ireland. On November 2, the Northern Irish Assembly [considered](#) legislation that would have legalized marriage between same-sex partners; however, members of the Democratic Unionist Party blocked the vote, despite majority support. The petitioners in the court cases contend that Northern Ireland's refusal to recognize their marriages violates Article 8 of the European Convention on Human Rights, which protects the right to privacy and a family life. Both the Attorney General of Northern Ireland and the UK Government Equalities Office have opposed the challenges. The court has reserved judgment in both cases.

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 have declined to do so given TWU's mandatory Community Covenant, which prohibits sexual intimacy outside of "traditional marriage between a woman and a man."

On December 10, 2015, a British Columbia court [overturned](#) the provincial Law Society's decision not to accredit TWU's law school, citing procedural improprieties. The Society's board of directors had initially accredited the school in April 2014, but reversed their decision six months later out of deference to a non-binding vote by the Society's membership. The court ruled that the board of directors had allowed the membership's vote to "wrongfully fetter" their discretion and "supplant" their judgment, thereby depriving TWU of a "meaningful opportunity to present their case fully and fairly." The Society has said that it needs to review the decision before deciding whether to appeal.

The British Columbia court's decision follows decisions in Nova Scotia and Ontario. In January 2015, a Nova Scotia 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. And, in July 2015, the Ontario Divisional Court [upheld](#) the Law Society of Upper Canada's decision not to accredit TWU's law school. Both those decisions are now on appeal. Other provinces and territories have accredited the proposed school; however, TWU has said that the law school will not open its doors until all barriers to its graduates have been removed.

[Employment](#)

South Africa: On November 24, 2015, the South African Constitutional Court [dismissed](#) an appeal filed by Ecclesia De Lange, a minister fired by the Methodist Church in 2010 for marrying her same-sex partner. The case was dismissed largely for procedural reasons. In particular the Court [emphasized](#) that she had not shown good cause to set aside the arbitration agreement and that she had failed to adequately raise and preserve her claim below. The Court accordingly concluded that Ms. De Lange's unfair discrimination claim had not "been properly ripened," especially given the "considerable complexity and vast public repercussions" arising from the competing equality and religious freedom concerns at stake in the dispute.

United Kingdom: On October 28, 2015, a Nottingham Employment Tribunal [held](#) that the Church of England did not violate the UK's Equality Act when it barred Rev. Jeremy Pemberton from working as a hospital chaplain because he married a 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 at King's Mill Hospital in Mansfield. In its [decision](#), the tribunal reasoned that the Church had valid grounds to revoke his 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.

[Education](#)

United States: Recently, there has been a marked increase in the number of religiously affiliated colleges and universities applying for and [receiving](#) exemptions from compliance with a federal statute that prohibits sex discrimination at any institution or activity that receives federal funding. Title IX, as the statute is commonly known, allows any school "controlled by a religious organization" to apply for an exemption from those parts of the law that "would not be consistent with the religious tenets" of the organization.

Shortly after the law passed in 1972, scores of colleges and universities secured waivers. (Documents from 2013 showed more than 250 colleges and universities having received some kind of waiver as of that date, with the vast majority having been granted in the 1970s.) A second wave of waiver requests has followed closely on the heels of the Obama administration's guidance that the Title IX discrimination prohibitions extend to "claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Since 2014, more than thirty schools have applied for Title IX religious exemptions, and twenty-seven have been granted. Many of the granted exemptions are broad and allow schools that receive federal funding to discriminate based on gender identity, sexual orientation, marital status, and whether a person has had an abortion.

[Government Discrimination](#)

South Africa: On December 8, 2015, a trans man filed a lawsuit seeking to compel the South African Department of Home Affairs to alter his gender markers in government identification

documents, as required under the Alteration of Sex Description and Sex Status Act. Government officials had previously told the plaintiff that his application to alter his gender markers could not be finalized without a letter from medical personnel confirming that he had undergone gender reassignment surgery. He maintains, however, that the Alteration of Sex Description and Sex Status Act requires only medical gender reassignment, not gender reassignment surgery, as a condition for altering gender markers in government identification. He alleges that the disjunction between his gender identity and the gender markers on his government identification often requires him to divulge details about his personal life, which violates his rights to dignity, privacy, and equality. The Department of Homeland Affairs has not yet responded to the claims raised in the case. The plaintiff is represented by INCLO-member LRC.

Religious Freedom & Women's Rights

Access to Contraception

United States: The US Supreme Court has agreed to review whether the religious accommodation for organizations that object to the Affordable Care Act's contraceptive coverage rule itself violates religious exercise rights. As reported previously, the US 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. In so holding, the Court emphasized that the government had less restrictive means of accomplishing its aims; in particular, it could extend its accommodation for religiously affiliated non-profits to entities such as Hobby Lobby.

It is that very accommodation – which was extended to closely held for-profit organizations (like Hobby Lobby) – that is now contested. Under the accommodation, closely held corporations and religiously affiliated non-profit organizations can certify their objection to contraception coverage 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.

Petitioners challenging the accommodation maintain that, even though they are not required to pay for or administer contraceptive coverage under the accommodation, the form noting their objection itself “triggers” the provision of contraceptive coverage by their insurers and thereby implicates them in actions contrary to their religious beliefs. Seven of eight federal appeals courts have rejected challenges to the accommodation, primarily on the ground that it does not substantially burden religious exercise. Briefing in the cases will be complete in March. Oral arguments are also expected sometime in March.

For more information, contact LibertyNewsletter@aclu.org for a subscription to INCLO-member ACLU's newsletter on US religious refusals.

Access to Abortion

Italy: Although abortion is legal in Italy within 90 days of pregnancy — and later for women in mental or physical danger, or in cases of serious fetal pathologies — women [continue](#) to face serious obstacles in obtaining the procedure. A recent [report](#) by the Italian Ministry of Health notes that only about 60 percent of Italian hospitals perform abortions. The figures among individual practitioners are even starker: Roughly 70 percent of Italian gynecologists, and up to 83 percent in conservative southern regions, refuse to perform abortions on religious or moral

grounds. Experts have noted that the Roman Catholic Church's opposition to abortion has created a strong stigma around the procedure in the overwhelmingly Catholic country, and that doctors who did agree to perform the procedure faced professional backlash. The Italian Association for Demographic Information has attempted to respond to the lack of abortion access in Italy by sending doctors to perform outpatient procedures in underserved regions. Nonetheless, women in Italy continue to face serious obstacles to obtaining timely access to legal abortion.

United Kingdom: On November 30, 2015, a Belfast High Court [held](#) that Northern Ireland's near-total ban on abortion violates the European Convention on Human Rights. The UK's Abortion Act 1967, which legalized abortions by registered practitioners, has never applied in Northern Ireland; instead, the region prohibits abortion except where continuing the pregnancy would either endanger the woman's life or impose long-term negative effects on her health. In its [decision](#), the Belfast court held that Article 8 of the European Convention on Human Rights – which protects the right to privacy and family life – prohibits the government from denying access to abortion for women “who are pregnant with fatal fetal abnormalities or who are pregnant as a result of sexual crime.” In light of the Northern Irish Assembly's record of inaction on abortion issues, the court suggested that a referendum might be required to bring the region's abortion law into compliance with its obligations under the Convention. In a separate decision, Northern Ireland's Department of Justice has [recommended](#) that abortion be permitted in Northern Ireland in cases of fatal fetal abnormality.

Religious Freedom & Individual Rights

Clothing and Garb

France: On November 26, 2015, the European Court of Human Rights [upheld](#) France's ban on the wearing of “conspicuous religious symbols” by public employees. Christiane Ebrahimiyan, who lost her job in the psychiatric department of a French hospital because patients complained about her refusal to remove her niqab (a headscarf), argued that her termination violated Article 9 of the European Convention on Human Rights, which protects the right to freedom of religion. The Court, however, held that France's national courts had not exceeded their discretion under the Convention in deciding to prioritize the state's interest in ensuring separation of church and state over Ms. Ebrahimiyan's religious convictions.

Government Involvement in Religious Affairs

Hungary: On December 1, 2015, the European Court of Human Rights [held](#) by a 4-3 vote that Hungary had not violated Article 6(1) of the European Convention on Human Rights – which guarantees the right to a fair hearing on civil rights claims – by refusing to adjudicate a dispute between a pastor and the Hungarian Calvinist Church. The pastor, who was terminated by the Church for stating in a local newspaper that government subsidies had been unlawfully paid to a Calvinist boarding school, filed contractual claims in the Hungarian civil courts. In its [decision](#), the European Court of Human Rights concluded that the Hungarian Supreme Court's decision effectively determined that the pastor's claims were based on ecclesiastical, rather than civil, law, and therefore dismissal of the case by Hungarian courts did not deprive him of a fair hearing.

India: On December 16, 2015, the Supreme Court of India [upheld](#) an administrative order issued by the State of Tamil Nadu, which opened positions as priests in Hindu temples to

suitable candidates from any caste who had obtained the requisite qualification and training. An association representing Hindu priests, as well as individual priests, challenged the order on the ground that it infringed the constitutional protection for “essential religious practices” by religious denominations. In upholding the State’s order, the Court made clear that although essential religious practices enjoy protection under the Indian Constitution, practices that offend constitutional principles – such as caste discrimination – do not. The Court added, however, that the State’s order could still be challenged in cases where its application goes against religious practices that are not constitutionally offensive.

Government Discrimination

Egypt: On October 22, 2015, the Egyptian Ministry of Religious Endowments [ordered](#) the shrine of Imam Hussein closed for three days, effectively blocking Egyptian Shi’ites from celebrating Ashura, an important holy day commemorating the death of Imam Hussein. The Ministry officially announced that the closure was intended to prevent “Shi’a unorthodox rites from desecrating the shrine on the day of Ashura,” and added that the Shi’a rites “have no roots in Islamic doctrine.” This closure is just one of many episodes of discrimination against Egypt’s Shi’ite religious minority by the country’s Sunni religious establishment and State Security Service. For more information, see INCLO-member EIPR’s report, [“The Turbaned State: An Analysis of the Official Policies of the Administration of Mosques and Islamic Religious Activities in Egypt.”](#)

United States: On January 7, 2016, a settlement was [announced](#) in two federal lawsuits – *Raza v. City of New York* and *Handschu v. Special Services Division* – challenging the constitutionality of a New York Police Department (NYPD) surveillance program directed at Muslim religious and community leaders, groups, and institutions. The *Raza* case, which was filed in 2013, claimed that the NYPD violated the US and New York Constitutions by singling out and stigmatizing New York’s Muslim communities based on their religion. The *Handschu* case was originally filed in 1971 in response to surveillance operations conducted by the NYPD against anti-war protestors, and was settled in 1985 when the NYPD agreed to refrain from investigating political and religious organizations unless there is “specific information that the group is linked to a particular crime.” The lawyers in the *Handschu* case filed papers in 2013 arguing that the NYPD’s Muslim surveillance program violated the 1985 settlement agreement. Pursuant to the new settlement agreement, the NYPD will, among other things: specifically ban investigations based on race, religion, or ethnicity; implement time limits for investigations that fail to turn up threats; and use the least intrusive surveillance techniques possible to prevent undue interference with the political or religious activity of individuals, groups, or organizations. The settlement also provides for a civilian representative, appointed by the mayor, who will review investigations and report suspected violations of the agreement to City Hall or a federal judge. The settlement is currently awaiting court approval. INCLO-member ACLU acted as counsel in the litigation.

Freedom of Conscience and Expression

Egypt: In early 2015, a report released by the Supreme Islamic Research Council at al-Azhar University accused Islam el-Buheiri – a researcher and presenter for an Egyptian television program called “With Islam” – of “destroying the very tenets of Islam” through his work. Following the report’s publication, a number of court cases were filed against el-Buheiri and his program. In one of these cases, the Misdemeanour Court of Misr el-Qadima in South Cairo convicted el-Buheiri of “contempt of religion” under Article 98(f) of the Egyptian Penal Code. On

December 29, 2015, the court commuted the criminal sentence imposed against Islam el-Buheiri from five years imprisonment to one year. Although the Egyptian Constitution ostensibly protects freedom of conscience and expression and freedom of publication, INCLO-member EIPR has documented a number of similar prosecutions. For more details, please see EIPR's report, "[Besieging Freedom of Thought: Defamation of Religion Cases in Two Years of the Revolution.](#)"

Other

INCLO Report

On September 21, 2015, INCLO 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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