

Drawing

Tackling Tensions Between Religious Freedom and Equality

the Line



INCLO

INTERNATIONAL NETWORK OF
CIVIL LIBERTIES ORGANIZATIONS

Drawing the Line:

Tackling Tensions Between Religious Freedom and Equality

September 2015

This report was produced by the International Network of Civil Liberties Organizations (INCLLO), which comprises eleven domestic human rights organisations: the American Civil Liberties Union, the Association for Civil Rights in Israel, the Canadian Civil Liberties Association, Centro de Estudios Legales y Sociales (Argentina), the Egyptian Initiative for Personal Rights, the Human Rights Law Network (India), the Hungarian Civil Liberties Union, the Irish Council for Civil Liberties, the Kenya Human Rights Commission, the Legal Resources Centre (South Africa), and Liberty (United Kingdom). Each organisation is multi-issue, multi-constituency, domestic in focus, and independent of government. We advocate on behalf of all persons in our respective countries through a mix of litigation, legislative campaigning, public education, and grass-roots advocacy. These organisations have come together to advocate jointly for fundamental rights and freedoms.

©2015, International Network of Civil Liberties Organizations (INCLLO)



Egyptian Initiative for Personal Rights



Drawing

Tackling Tensions Between Religious Freedom and Equality

the Line

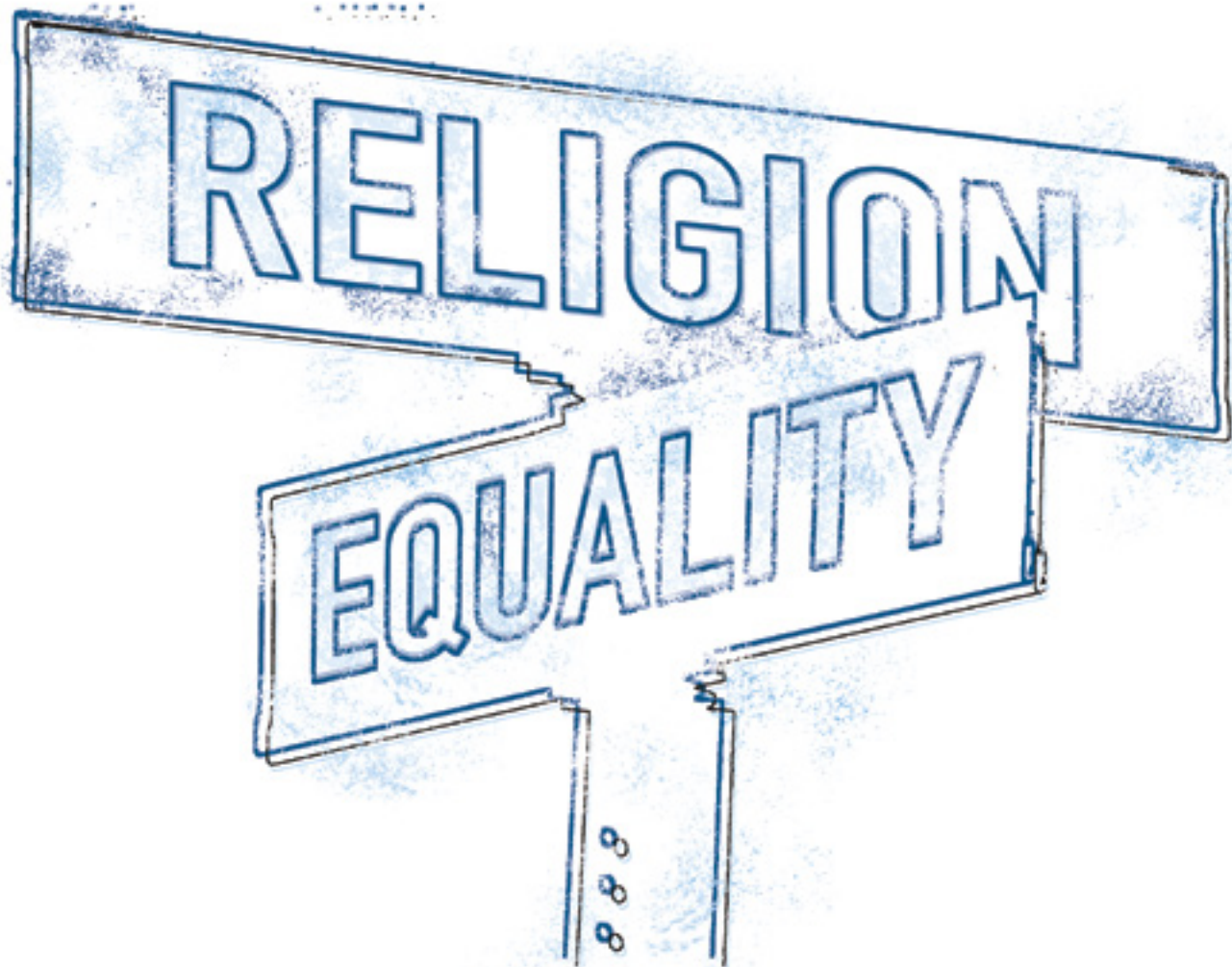


Table of Contents

INTRODUCTION 1

A FRAMEWORK FOR ANALYSIS 4

RELIGIOUS FREEDOM AND LGBT RIGHTS 7

- I. Civil Servants, Marriages and Unions for Same-Sex Couples, and Religious Exemptions **8**
- II. Goods and Services Providers, LGBT Customers, and Religious Exemptions **13**
- III. Religiously Affiliated Institutions, LGBT Customers, and Religious Exemptions **17**
- IV. Religious and Religiously Affiliated Institutions, LGBT Employees, and Religious Exemptions **20**
- V. Conclusion and Recommendations **22**

RELIGIOUS FREEDOM AND REPRODUCTIVE RIGHTS 24

- I. Institutions, Reproductive Rights, and Religious Exemptions **25**
- II. Individuals, Provision of Services, and Religious Exemptions **29**
- III. Individuals, Facilitation of Reproductive Health Care, and Religious Exemptions **33**
- IV. Conclusion and Recommendations **36**

RELIGIOUS FREEDOM AND RELIGIOUS APPEARANCE 37

- I. Public Places and Religious Appearance **38**
- II. Government Institutions and Religious Appearance **42**
- III. Businesses and Religious Appearance **47**
- IV. Conclusion and Recommendations **49**

CONCLUSION 51

Acknowledgements

The primary authors of the report are Louise Melling (Deputy Legal Director, ACLU), Marvin Lim (former Gruber Fellow, ACLU), Rosie Brighthouse (Legal Officer, Liberty), and Noa Mendelsohn Aviv (Director, Equality Program, CCLA). At every stage, the report benefitted from editorial and other assistance from the Association for Civil Rights in Israel, Centro de Estudios Legales y Sociales (Argentina), the Egyptian Initiative for Personal Rights, the Human Rights Law Network (India), the Hungarian Civil Liberties Union, the Irish Council for Civil Liberties, the Kenya Human Rights Commission, and the Legal Resources Centre (South Africa).

The International Network of Civil Liberties Organizations (INCLC) also thanks for their contributions to this report: Brigitte Amiri, Jennifer Dalven, Rebecca Guterman, Brian Hauss, Daniel Mach, Priya Nair, Rose Saxe, Neil Shovelin, and Kelsey Townsend of the American Civil Liberties Union; Stephen O'Hare of the Irish Council for Civil Liberties; Bella Sankey and Holly Williams of Liberty; and in particular Lucila Santos of INCLC. INCLC also thanks for design and editorial assistance Grace Duggan and Brucie Rosch.

INCLC thanks for their generous support of its work in this area the Open Society Foundations and the Ford Foundation.

Your opinion matters!

Please [click here to let us know your thoughts on this report.](#)



INTRODUCTION

On 23 May 2015 Ireland became the first country in the world to introduce legal marriage for same-sex couples by popular vote. As 62% of Irish voters voted in favour, Prime Minister Enda Kenny declared: “With today’s vote we have disclosed who we are. We are a generous, compassionate, bold and joyful people who say yes to inclusion, yes to generosity, yes to love, yes to gay marriage.”¹

Cardinal Pietro Parolin, the Vatican’s Secretary of State, described the very same result as “[not just] a defeat for Christian principles, but . . . a defeat for humanity.”²

As organisations working to defend civil liberties and fundamental human rights across five continents, members of INCLO are committed to upholding freedom of religion and conscience as a fundamental human right to be valued, defended, and protected. At the same time, we are engaged in, and supportive of, efforts to advance equal treatment for groups that have long been oppressed, including lesbian, gay, bisexual, and transgender (LGBT) people, women, and racial and religious minorities.

Throughout history, religious belief has often been a wellspring of motivation and inspiration for those seeking to advance justice and equality. It has also been a source of conflict. As illustrated by the stark contrast between the different responses to the Irish referendum result highlighted above, these conflicts can reveal a chasm between competing views. A referendum result that we, as INCLO members, view as an entirely necessary and long overdue step towards equality is experienced by others as a source of real grief and concern.

Our organisations have witnessed widely varying ways in which the rights to religious freedom and to equality have been under challenge in recent years. A number of particular themes can be highlighted:

- In a number of countries, religious precepts are embedded in the law in ways that constitute *de facto* violations of other freedoms, particularly those of women. This is most apparent in religious as well as customary laws and practices around

1. Henry McDonald, *Ireland becomes first country to legalise gay marriage by popular vote*, The Observer, May 23, 2015, available at <http://www.theguardian.com/world/2015/may/23/gay-marriage-ireland-yes-vote>.

2. Stephanie Kirchgassner, *Vatican says Ireland gay marriage vote is ‘defeat for humanity’*, The Guardian, May 26, 2015, available at <http://www.theguardian.com/world/2015/may/26/vatican-ireland-gay-marriage-referendum-vote-defeat-for-humanity>.

divorce, remarrying, succession, inheritance, and harmful practices such as female genital mutilation. Concepts of religious morality and custom are also often invoked to justify the criminalisation of homosexual acts.

- We have witnessed profiling of members of the Muslim faith in the name of national security and gender equality; restrictions on religious appearance ranging from crosses on necklaces to head coverings to nose rings; and discrimination against those of no faith in countries dominated by faith.
- We have encountered those of faith relying on their right to religious freedom in a manner that conflicts with others' right to equal treatment. Shop owners and others on several continents have considered themselves constrained by their religion from being able to serve lesbian and gay customers. Similarly, hospitals and doctors have invoked religious freedom and conscience when they have turned away women seeking abortions and contraception. In some countries, men who have sex with men are largely unable to access medical care.
- In some countries, faith remains inseparable from the state in ways that complicate questions of religious pluralism and equality.

As civil liberties and human rights organisations, we are concerned about encroachment on the freedom to practice religious or customary rites. Valuing religious freedom as we do, we consider that it can be properly restricted by the state only where justified on robust, principled, and evidenced grounds. Any claim that the interests of the majority justify restrictions on the religious freedom of the minority must be subject to the most rigorous scrutiny.

No matter the nation, and no matter the context, we bring our deep abiding commitment to religious freedom and to equality.

On the other hand, valuing equality as we do, we consider that claims to religious freedom must be subjected to the most rigorous level of scrutiny when they are invoked to justify harm to others, and we are concerned that the right to equality is not always given its proper weight when balanced against these claims.

As organisations working to defend civil liberties and fundamental human rights in countries across several continents, we have been involved in some of the public debate and policy discourse on these matters, including direct involvement in certain of the legal cases discussed in the report. We work on behalf of those affected by these concerns in environments that vary widely. The state of religious freedom and equal treatment is very

different in Egypt than it is in Canada, for example. We each have our own priorities when working on these issues. Nevertheless, no matter the nation, and no matter the context, we bring our deep abiding commitment to religious freedom and to equality.

It is with those commitments that we issue this report, *Drawing the Line: Tackling Tensions Between Religious Freedom and Equality*, which examines several of the questions now the subject of litigation, public debate, and policy discourse. We begin by setting out a framework that we believe should guide our analysis before focusing on three specific areas: religious freedom and the rights of LGBT individuals, religious freedom and reproductive rights, and religious freedom as expressed in appearance. Through the examination of a sampling of key cases, we strive in this report to articulate principles and recommendations that can guide advocates and policymakers. We hope this report will prove helpful for those who wish to move towards a rights-based resolution of these debates.

No report of this nature would be complete, however, without some caveats. As we have noted, this report looks only at a modest set of the questions arising in the area of religious freedom and equal treatment. It does not deal with many of the life-and-death issues that too unfortunately mark these conflicts in some countries. The issues we address, however, are ones giving rise to some important trends in the law where we believe our analysis could be influential. Our sampling of cases is just that – a sample – and our recommendations a beginning.



A FRAMEWORK FOR ANALYSIS

“We would close down the bakery before we would complicate our beliefs [against participating in a same-sex wedding by making a cake].” Jack Phillips, owner of Masterpiece Cakeshop.³

“The next time a gay couple wanders in there asking for a wedding cake, they won’t have the experience we had [of being turned away].” David Mullins, who was denied a wedding cake at Masterpiece Cakeshop.⁴

The stark contrast in the reactions to the Irish referendum on marriage for same-sex couples – between claims of equality and of religious freedom – is also surfacing in personal interactions in the public sphere. Clerks refuse to issue marriage licences, inns to rent lodgings, and bakers to make cakes for same-sex couples because of faith. Doctors and nurses and hospitals will not facilitate, refer for, or provide abortions because of faith. And governments and schools and employers turn away or criminalise people because they don’t wear niqabs or turbans or crosses.

Religious freedom means the right to our beliefs. That right is fundamental and must be vigorously defended. But religious freedom does not give us the right to impose our views on others, including by discriminating against or otherwise harming them.

In every interaction, and in the litigation that often ensues, there are principles and there are people. The baker who believes marriage is a sacrament for a man and a woman faces the decision whether to abide by his faith and violate the law, or to adhere to the law and violate his deeply held beliefs. The couple denied service by the shop faces the harm to their dignity of being turned away because of who they are and the betrayal of the promise of long-awaited equality. The cases arising from these interactions involve sincerely held beliefs, the promise of equality, and the balance to be struck by the law faced with these competing claims.

3. CBS Denver, *Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case*, CBS Denver, May 30, 2014, <http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case>.

4. *Id.*

In approaching these cases as civil liberties and human rights organisations, we are guided by a simple but fundamental principle: Religious freedom means the right to our beliefs. That right is fundamental and must be vigorously defended. But religious freedom does not give us the right to impose our views on others, including by discriminating against or otherwise harming them. No matter how sincere our beliefs, we cannot refuse service in our restaurant to someone of a different race because we believe God intended the races to be separate, we cannot deny our child lifesaving care because our faith opposes medical intervention, and we cannot refuse to treat women in a hospital because our faith tells us not to touch women who are not relatives. We can hold all those beliefs, deeply, but we cannot act on them to the detriment of others while in the public sphere.

In applying this principle, we often begin by asking who is seeking the exemption or accommodation from complying with a law because of faith.

- Is the accommodation for an institution or an individual? Exemptions from laws for institutions – be they small businesses or hospitals – often have implications for third parties. Unless the institution hires and serves only people who share the beliefs of its owners, any exemption or accommodation will reverberate for those who patronise or work for the institution. In other words, loosely stated, institutions operating in the public sphere should play by public rules.
- If the exemption or accommodation is for an individual, is the person an officer of the government? If so, different questions arise than if the person were working in the private sector. Exemptions for public officials put the government's imprimatur on the conduct, which is particularly problematic where issues of discrimination and health are concerned.
- If the individual is not an officer of the government, what is the cost of accommodating her or his religious beliefs?

Applying our core principle to the expressions of faith addressed in this report, we arrive at some essential conclusions:

- Institutions that open their doors to the public to provide services – whether for lodging, catering, or health care – should not be able to claim a religious exemption to rules furthering equality or public health. Any contrary rule would permit the institution to impose its faith on others, with resulting harm to health, equality, and dignity.

Institutions that provide goods or services to the public differ from churches, synagogues, mosques, and other houses of worship. In those institutions, the rules of the faith are typically being imposed only on those who have chosen to accept or at least explore the faith.

- Government officials, such as clerks charged with issuing marriage licences, should not be afforded an exemption from laws advancing equality. This is true even if the objector can be accommodated such that the person or couple can be served without being aware of the objection. Any accommodation of a government official, even behind the counter, puts the imprimatur of the government on the discrimination.
- Outside of the government context, individuals should be accommodated where doing so does not result in harm. Consistent with this principle, expressions of faith manifested in appearance should be accommodated absent a showing of harm to others, a showing we think can rarely be made.

We appreciate the consequences of these stances. We appreciate the challenge they pose for people whose faith counsels principles different from those embodied in the law. We arrive at these conclusions based on a principled approach; it is one informed by a sense of history. In some of our countries, in earlier decades, significant numbers of people sincerely believed as a matter of faith that the races were to be separate. Those beliefs animated calls for exemptions from laws barring discrimination based on race in education and in the provision of goods and services, for example. We decided then, as a matter of law, that religious freedom did not mean that schools and stores and medical practices could deny service to different races. We accepted that vision of religious freedom even though it meant that storeowners, hospitals, and universities would face the decision either to comply with laws against their faith or to change their work. We find no principled basis to reason differently now.

It is with this framework that we look at emerging cases from around the world that address competing claims of religious freedom and equality in the contexts of religious freedom and LGBT rights, religious freedom and reproductive rights, and religious freedom as manifested in appearance.



RELIGIOUS FREEDOM AND LGBT RIGHTS

In recent decades, the rights of lesbian, gay, bisexual, and transgender people to be free from discrimination have advanced in many countries across the world. With those advances have come calls for a right to be exempt from laws barring discrimination where compliance with the law conflicts with religious beliefs. Courts in Canada, France, Hungary, Israel, South Africa, and the United Kingdom, among others, have confronted such claims.

In this section, we look at the tension between claims of religious freedom and LGBT rights as it has arisen in four scenarios: where civil servants object to requirements that they register marriages or partnerships for same-sex couples; where businesses that serve the public assert a right to turn away LGBT customers or to deny them certain services; where religiously affiliated institutions that provide services to the public object to serving LGBT individuals; and where religiously affiliated institutions object to employing LGBT people.

To date, in these contexts, the courts are often reaching resolutions consistent with the recommendations found in this report. They are rejecting the claims of public servants that their faith should exempt them from complying with laws allowing same-sex couples to marry. On the whole, they are similarly rejecting the claims of institutions that provide services to the public, whether secular or religiously affiliated, that their faith should exempt them from laws prohibiting discrimination against LGBT people. In the context of employment by religiously affiliated organisations, the trend is less clear, but some courts are reasoning that discrimination is not permissible, even if motivated by deeply held beliefs, unless the position is ministerial in nature.

Parts I through IV of this section discuss comparative case law developments in each of the four scenarios noted above. Part V offers a conclusion and recommendations for advocates and policymakers considering similar claims. The recommendations derive from our central principle that religious freedom does not include the right to infringe the rights of, or otherwise harm, others.

I. Civil Servants, Marriages and Unions for Same-Sex Couples, and Religious Exemptions

As more countries recognise partnerships of same-sex couples, whether through marriage or domestic partnership,⁵ civil servants and government agents have asserted a right to refuse to register marriages or unions of same-sex couples; they have looked to their religious beliefs to justify the refusal. Cases addressing these claims pose many questions, including whether religious freedom protections extend to civil servants while they are acting in the scope of their public employment. As the discussion below shows, several courts have concluded that government employees have a duty to apply laws neutrally, even where the employees have strongly held religious beliefs that counsel otherwise.

The Court recognised that being required to solemnise marriages for same-sex couples had serious implications for the religious freedom of the commissioners. The Court concluded, however, that the deleterious effects of the proposals outweighed these interests.

One such case comes from Canada, where marriage for same-sex couples has been nationally recognised since 2005. The case, *In re Marriage Commissioners Appointed Under The Marriage Act*, addressed the constitutionality of possible amendments to Saskatchewan's Marriage Act. The amendments would have permitted government-appointed marriage commissioners to refuse to solemnise marriages of same-sex couples on the basis of the commissioners' religious beliefs.⁶ The amendments were proposed, and questions as to their constitutionality referred to the Court, after a series of legal developments that included a lawsuit by three commissioners seeking a declaration that any requirement that they solemnise same-sex marriages violated their religious freedom.⁷

The Saskatchewan Court of Appeal concluded the proposed amendments would violate the Canadian Charter of Rights and Freedoms.⁸ In reaching its conclusion, the Court recognised that being required to solemnise marriages for same-sex couples had serious implications for the religious freedom of the commissioners, writing: "Marriage commissioners have to make a choice. They can either perform same-sex marriages or they can leave their offices."⁹

The Court concluded, however, that the deleterious effects of the proposals outweighed these interests. Enabling commissioners to refuse to provide services because of the

5. For a list of countries in which same-sex marriage is currently recognised, see *Gay Marriage Around the World*, Pew Research Center, June 26, 2015, <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>.

6. [2011] 366 Sask. R. 48, para. 2 (Can.). In the province of Saskatchewan, the only way a couple could have a marriage solemnised in a non-religious ceremony was with a commissioner.

7. *Id.* at para. 13.

8. *Id.* at para. 3.

9. *Id.* at para. 65.

couple's sexual orientation "would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions."¹⁰ The concurrence went further, stating: "[T]o refuse to perform a same-sex marriage on this basis without doubt expresses condemnation of same-sex unions [R]efusing . . . is an overtly discriminatory act that causes psychological harm to couples so refused and perpetuates the prejudice and inequality that gays and lesbians have suffered historically."¹¹

"It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions."

It would not matter, the Court stressed, that a couple could get services elsewhere. Any such analysis "overlooks, or inappropriately discounts, the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union."¹² The Court noted that the harm would be particularly great because it was done in the name of the government: "It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions."¹³

The Court also considered the propriety of a government agent bringing such a claim: "Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs."¹⁴ The Court continued:

Marriage commissioners do not act as private citizens when they discharge their official duties. Rather they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of the commissioners would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.¹⁵

10. *Id.* at para. 45.

11. *Id.* at para. 142 (Smith, J., concurring) (emphasis omitted). For several reasons, the concurrence concluded that the proposed exemptions were not justified in a free and democratic society. Among other reasons, Justice Smith noted that accommodating the commissioners' religious objections undermined the distinction between religious and civil marriages and that the religious disapproval of same-sex relationships might exist in numerous contexts. Justice Smith also questioned the very idea of trying to accommodate religious objections where, in her view, religious belief has been "the root of much if not most of the historical discrimination against gays and lesbians." *Id.* at para. 145.

12. *Id.* at para. 41.

13. *Id.* at para. 94.

14. *Id.* at para. 97.

15. *Id.* at para. 98.

The French Constitutional Council similarly rejected a challenge to a national marriage equality law. In that case, seven mayors argued that the Constitution's freedom of conscience clause required a religious exemption for civil servants who objected to officiating marriages of same-sex couples.¹⁶ In the case, *Franck M.*, the Court emphasised that the legislature had an interest in "the neutrality of the public services."¹⁷

In Hungary, which legalised partnerships for same-sex couples in 2009,¹⁸ claimants challenged the law, arguing that it violated the constitutionally protected freedom of conscience of civil registrars who were now required to register partnerships for same-sex couples.¹⁹ Like the French Constitutional Council, the Hungarian Constitutional Court rejected the claim, reasoning that the registrar is a state official who is to remain neutral in his or her office.²⁰

Finally, in *Ladele v. London Borough of Islington*, the U.K. Court of Appeal addressed the claim of a British civil servant who had been fired for refusing to register civil partnerships for same-sex couples.²¹ Rejecting the claimant's argument that she had been discriminated against on the basis of her religious beliefs, the Court emphasised: "[She] was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job."²² Furthermore, the Court observed, her refusal to perform that task "involved discriminating against gay people in the course of that job," in opposition to the government's "laudable aim . . . to avoid, or at least minimise, discrimination . . . between Islington (and its employees) and those in the community they served."²³

16. Conseil constitutionnel [CC] [Constitutional Council] decision no. 2013-353 QPC, Oct. 18, 2013, Rec. 1000, para. 1 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc2013353qpc.pdf>.

17. *Id.* at para. 10.

18. 2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatokról (Act XXIX on registered partnerships) (Hung.).

19. Alkotmánybíróság [AB] [Constitutional Court] Mar. 25, 2010, No. 32/2010 (Hung.) [translated summary of decision on file with authors].

20. *Id.* Similar points have been made in other contexts. In *Rodriguez v. City of Chicago*, for example, the U.S. Court of Appeals for the Seventh Circuit dismissed an employment discrimination claim brought by a police officer who objected to guarding an abortion clinic because of his faith. He filed suit after being told that he would have to police the clinic or accept a transfer to another district. 156 F.3d 771 (1998). Notable was the concurrence, which stressed the importance of neutrality of police officers: "The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty – that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews . . ." *Id.* at 779 (Posner, J., concurring).

21. [2009] EWCA Civ 1357. The case ultimately reached the European Court of Human Rights (ECtHR), which upheld the Court of Appeal's decision. *Eweida v. United Kingdom* 37 Eur. Ct. H.R. [2013], available at <http://hudoc.echr.coe.int/eng/?i=001-115881>. The ECtHR reasoned that, because the practice regarding recognition and protection of relationships for same-sex couples was still evolving in Europe, the United Kingdom enjoyed a wide margin of appreciation as to how this was achieved. *Id.* at para. 105. (The margin of appreciation is a doctrine of the ECtHR by which the Court assesses if measures taken by states are "justified in principle and proportionate." *Id.* at para. 84. Reflecting the Court's status as a supervisory body, the doctrine recognises that state authorities are, in principle, in a better position than the Court to assess the necessity of a restriction on rights. *Id.*)

22. *Ladele*, *supra* n. 21, at para. 52.

23. *Id.*

These cases are noteworthy in several respects:

- Several of the courts recognised the special considerations in play when a civil servant or government agent calls for an exemption. As these courts emphasised, such a claim conflicts with the very notion of being an officer of the state and in particular the neutrality of the office. Such a claim, moreover, uniquely undermines the principle served by the laws at issue – in these cases, laws fostering equality.

“[K]nowing that legislation would legitimize such discrimination is itself an affront to the dignity and worth of homosexual individuals.”

- These decisions also explain in compelling terms the harm that would result if religious exemptions were granted in this context. As Canada’s *Marriage Commissioners* decision states: “It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer ‘I won’t help you because you are black (or Asian or [Native Canadian]) but someone else will’ or ‘I won’t help you because you are Jewish (or Muslim or Buddhist [sic]) but someone else will.’ Being told ‘I won’t help you because you are gay/lesbian but someone else will’ is no different.”²⁴ The harm, that Court recognised, extends beyond the individuals turned away: “A more generalized version of [this harm] would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole.”²⁵
- What is not squarely addressed in these cases is the propriety of a “behind-the-counter” accommodation of a clerk or official who objects to issuing marriage licences for same-sex couples – that is, where other clerks provide the services seamlessly such that the couple is unaware of the objection. The Canadian *Marriage Commissioners* case only briefly addressed the possibility of such a scheme, stating that, while it might be relatively less harmful to equality principles, that would not necessarily be enough to show “that any such system would ultimately pass full constitutional muster.”²⁶

24. *Marriage Comm’rs*, *supra* n. 6, at para. 41.

25. *Id.* at para. 96.

26. *Id.* at para. 89.

For INCLO, this type of behind-the-scenes accommodation is also unacceptable. It calls into question the neutrality of the office and puts the government imprimatur on discrimination. While that discrimination may not be visible to couples seeking to register a relationship, it is visible to others in the office. Indeed, the U.K. Court of Appeal noted in the *Ladele* case that at least two gay colleagues had complained that Ladele's refusal was causing offence.²⁷ Further, as the concurrence in the Canadian *Marriage Commissioners* case stated when considering a legislative permission to refuse service, "knowing that legislation would legitimize such discrimination is itself an affront to the dignity and worth of homosexual individuals."²⁸

As these cases demonstrate, the law should leave no space for discrimination by public officials, regardless of whether such discrimination is religiously motivated.

27. *Ladele*, *supra* n. 21, at para. 52.

28. *Marriage Comm'rs*, *supra* n. 6, at para. 107 (Smith, J., concurring).

II. Goods and Services Providers, LGBT Customers, and Religious Exemptions

Civil servants are not alone in seeking exemptions from laws barring discrimination against LGBT people because of religious beliefs. Looking to faith, businesses and other institutions that are open to the public have also sought exemptions to laws prohibiting discrimination based on sexual orientation and gender identity. These claims often involve, but are not limited to, objections to serving couples who are seeking to celebrate their relationships. In these cases, the owners often argue that they cannot be required to engage in acts that facilitate, or may be seen as approving, relationships that are not sanctioned by their faith.

To date, the trend in the case law is to resist these claims and to do so without regard to whether LGBT people could have obtained the good or service elsewhere. In this context, as in that addressed in the preceding part, the courts understand the harm is to equality and dignity.

The trend in the case law is to resist these claims and to do so without regard to whether LGBT people could have obtained the good or service elsewhere.

Bull v. Hall, which arises from the United Kingdom, is illustrative. In *Bull*, a bed and breakfast denied a same-sex couple lodging because of the owners' religious beliefs.²⁹ The couple brought a case against the bed and breakfast owners, claiming that their conduct amounted to unlawful discrimination, and the U.K. Supreme Court upheld the couple's claim. In doing so, the Court stated that, while freedom of religion includes the right of a person to manifest his or her beliefs, the right is limited where it conflicts with the rights of others.³⁰ In this case, the Court reasoned, the couple had "the right not to be unlawfully discriminated against."³¹

The Court emphasised that sanctioning the claims of the owners would harm the dignity of those turned away, as well as exacerbate the long history of discrimination against LGBT people.³² As Lady Hale stated in her judgment:

Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of

29. [2013] UKSC 73 para. 10.

30. *Id.* at para. 44.

31. *Id.*

32. *Id.* at paras. 36-37, 53.

discrimination, persecution even, which is still going on in many parts of the world It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.³³

Lady Hale also noted that the owners were “free to manifest their religion in many other ways,” including “by the symbolism of their stationery and various decorative items in the hotel, by the provision of bibles and gospel tracts, and by the use of their premises by local churches.”³⁴

Eadie v. Riverbend Bed and Breakfast, which arises from Canada, reaches a similar result.³⁵ *Eadie* concerned a couple whose reservation at a bed and breakfast was cancelled when the owners discovered the couple was gay.³⁶ The couple filed a human rights complaint against the bed and breakfast; the owners responded that they had a constitutional right to religious freedom that justified their denial of services.³⁷

“[The defendants] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead.”

The British Columbia Human Rights Tribunal recognised that the owners of the bed and breakfast held “a sincere, personal and core religious belief that marriage is between a man and a woman,” that “sex outside of such a marriage . . . is a sin,” and that “to allow a same-sex couple to stay in a single bed in their home would harm their relationship to the Lord.”³⁸ These beliefs, however, did not entitle the bed and breakfast owners to an exemption.

In so ruling, the Tribunal emphasised that when the owners entered into the commercial sphere, they were required to comply with the human rights laws governing it.³⁹

The Tribunal noted: “[T]he function of the Riverbend was to offer temporary accommodation, without any express restriction, to the general public;”⁴⁰ it operated as a for-profit

33. *Id.* at para. 53. A related case arising from the United Kingdom is *McFarlane v. Relate*, which was consolidated with *Eweida* in the ECtHR. In that case, a therapist claimed his employer discriminated based on religion when it dismissed him for refusing to provide sexual counseling to same-sex couples. *Eweida*, *supra* n. 21, at paras. 34-37. The ECtHR rejected the claim, noting that while losing one’s job is a serious consequence, the employee assumed his position “knowing that [the employer] operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible.” *Id.* at para. 109. The ECtHR also emphasised the employer’s significant interest in securing the implementation of its anti-discrimination policy. *Id.*

34. *Bull*, *supra* n. 29, at para. 39. Of course, these other manifestations might themselves give rise to a claim of discrimination. A bed and breakfast blanketed in materials condemning homosexuality may create an environment as hostile as if the facility accepted reservations only from heterosexuals.

35. 2012 BCHRT 247 [Can.].

36. *Id.* at para. 1.

37. *Id.* at para. 2.

38. *Id.* at para. 139.

39. *Id.* at para. 169.

40. *Id.* at para. 141.

business⁴¹ and was “marketed broadly, and to persons who may have held beliefs or religious views that differed from those held by the [owners].”⁴² The Tribunal also noted that, although the couple was “able to secure alternative accommodation relatively quickly and there was no evidence of ongoing psychological trauma,” the couple “suffered indignity and humiliation as a result of the [owners’] discriminatory conduct.”⁴³ It therefore awarded the couple “damages for injury to dignity, feelings and self-respect.”⁴⁴

Finally, a recent case from the United States also rejected a business’ claim that it was entitled to an exemption from a law barring discrimination based on sexual orientation. In *Elane Photography v. Willock*, a same-sex couple brought a claim of discrimination against a photography business that refused to take pictures for the couple’s commitment ceremony.⁴⁵ The New Mexico Supreme Court rejected the owners’ argument that providing this service would violate their religious exercise and free speech rights.⁴⁶ The most compelling argument from this case comes from a concurrence, which stated:

[The defendants] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead In the smaller, more focused world of the marketplace, of commerce, of public accommodation, [they] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different.⁴⁷

The courts’ conclusions in these cases are consistent with INCLLO’s guiding principles, as is the reasoning many advance. They have recognised the sincerity of the beliefs motivating the conduct, but in their conclusions the decisions reject the notion that religious freedom includes a right to impose those views on others; they have acknowledged the significant dignitary harm imposed on someone turned away from a business because of who they are; and they have articulated how exemptions undermine the very principle of equality the laws are meant to serve.

In the course of reaching these conclusions, these courts have also addressed a number of other arguments that may be relevant to advocates and policymakers engaged in these issues.

41. *Id.*

42. *Id.* at para. 142. The Tribunal noted that it was not making a finding as to whether it would have made a difference if the Riverbend had been marketed only to a Christian clientele. *Id.* at para. 166.

43. *Id.* at para. 173.

44. *Id.*

45. 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014). This is but one of a number of such cases in the United States. The others – involving a florist, a bakery, and inns – do not have final decisions.

46. *Id.* at para. 3.

47. *Id.* at paras. 91-92 [Bosson, J., concurring].

- In *Eadie*, the owners of the bed and breakfast maintained they had not discriminated, as they had no issue with sexual orientation but only with sexual conduct.⁴⁸ The Human Rights Tribunal rejected this argument. Quoting a Supreme Court of Canada decision, the Tribunal dismissed the “idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.”⁴⁹ It further noted that, if such reasoning were accepted, the prohibition on discrimination based on sexual orientation would offer “scant protection.”⁵⁰
- The plaintiffs in the *Elane Photography* case advanced a related but different argument. They maintained their objection was not discriminatory as it was not based on sexual orientation but to involvement in a ceremony celebrating a same-sex relationship. The New Mexico Supreme Court rejected this argument in language similar to that used in *Eadie*: “To allow discrimination based on conduct so closely related with sexual orientation would severely undermine” the purpose of the anti-discrimination law.⁵¹
- The Court in *Elane Photography* also rejected an argument, increasingly surfacing in some jurisdictions, that any rule mandating the business to provide services for a same-sex wedding would violate the owners’ rights of expression by requiring them to engage in activity “that sends a positive message about same-sex marriage not shared by its owner.”⁵² In so holding, the Court emphasised that the government did not require the business to facilitate the message of a third party, except to the extent it “already facilitates third parties’ messages, for hire, as part of the services that it offers as a for-profit public accommodation.”⁵³

The courts have thus rejected claims, posed in myriad ways, that denying service to a same-sex couple is justifiable or does not constitute discrimination based on sexual orientation. In the context of these goods and services, the courts have said, and INCLC agrees, that the harm to those of faith who are denying the service is, on balance, outweighed by the harm to those turned away and to the LGBT community more generally.

48. *Eadie*, *supra* n. 35, at para. 64.

49. *Id.* at paras. 112-13 (quoting *Trinity Western Univ. v. British Columbia Coll. of Teachers*, [2001] 1 S.C.R. 772, para. 69 (in dissent but not on this point)).

50. *Eadie*, *supra* n. 35, at para. 114 (quoting *Hayes v. Vancouver Police Dep’t*, [2005] BCHRT 590, para. 22); see also *Lawrence v. Texas*, 539 U.S. 567, 583 [2003] [O’Connor, J., concurring in the judgment] (“While it is true that the law [criminalising sodomy] applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

51. *Elane Photography*, *supra* n. 45, at para. 16; see also *id.* at paras. 17-19.

52. *Id.* at para. 23.

53. *Id.* at para. 57.

III. Religiously Affiliated Institutions, LGBT Customers, and Religious Exemptions

There are also a number of cases involving religiously affiliated institutions that open their doors to provide a service but object to serving LGBT people. Because the institutions in these cases are in many ways acting like businesses for purpose of the service at issue, the cases are often reasoned like those discussed above. Looking to our guiding principle, INCLLO supports this approach. This is the case even though the institutions, given their religious affiliations, strive to function according to a set of religious values.

One case from Australia, *Christian Youth Camps (CYC) v. Cobaw Community Health Services*, is illustrative.⁵⁴ In that case, a church-owned youth camp (CYC) refused to rent its facility to an LGBT youth suicide prevention group; it did so in the face of a law barring discrimination based on sexual orientation. The Supreme Court of Victoria's Court of Appeal held that, because the youth camp operated as a commercial entity, it did not qualify for a religious exemption within the meaning of the governing statute.⁵⁵

The Court held that, under the statute, religiously affiliated institutions serving the public cannot discriminate even if their public work is intended to “manifest” religious faith.⁵⁶ While recognising that the CYC was “informed by the Christian beliefs of those who established” it,⁵⁷ the Court noted that “no limits [are] imposed, either by CYC’s founding documents, or by its promotional material, or by its booking practices, on who may hire the facilities or for what purpose.”⁵⁸ In other words, CYC rented out its facilities to “all comers” without requiring any sort of religious observance from those groups.⁵⁹ The Court concluded: “Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant aspects, CYC’s activities are indistinguishable from those of the other participants in that market.”⁶⁰ “In those circumstances,” the Court continued, “the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject.”⁶¹

54. [2014] VSCA 75 (Austl.), available at <http://www.gaylawnet.com/laws/cases/14AUSCV-16AP.pdf>.

55. *Id.* at paras. 156, 159. The statute at issue had two exemptions, one for institutions “established for religious purposes” and one for discrimination “by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.” *Id.* at para. 160. The Court rejected the notion that CYC was established for religious purposes and it held CYC also could not avail itself of the second exemption. It noted that beliefs are individual and that the law mentioned corporations specifically where it wanted the law to apply to them. *Id.* at paras. 162, 309-17.

56. *Id.* at paras. 262-268.

57. *Id.* at para. 268.

58. *Id.* at para. 252.

59. *Id.* at para. 253.

60. *Id.* at para. 269.

61. *Id.*

A decision from Israel, *Tal Ya'akovovich v. Yad Hashmona Guest House*, similarly concludes that religiously affiliated institutions that open their doors to the public should not be allowed to turn away LGBT people, despite their sincere beliefs. *Tal Ya'akovovich* concerned a claim of discrimination brought by a same-sex couple when a reception hall, owned by a cooperative primarily made up of Messianic Jews, refused to host the couple's wedding reception.⁶² In defence, the hall asserted its religious purpose. The Court ruled in the couple's favour.⁶³

In its ruling, the Jerusalem Magistrate Court emphasised that the hall “provides service to the entire public, both religious and secular, Jewish and not Jewish,” and that the business marketed itself accordingly.⁶⁴ Thus, “[a]s soon as the defendants opened their doors to all, they cannot close them to those whom they believe do not meet their interpretation of the requirements found in the Old and New Testaments, while offending their dignity and sensitivities.”⁶⁵

“[A]s soon as the defendants opened their doors to all, they cannot close them to those whom they believe do not meet their interpretation of the requirements found in the Old and New Testaments, while offending their dignity and sensitivities.”

The courts' decisions in this context, however, are not uniform. In *St. Margaret's Children and Family Care Society v. Office of the Scottish Charity Regulator*, for example, the Scottish Charity Appeals Panel reversed an order from Scottish charity regulators. That earlier order had held a Catholic-affiliated adoption agency, in order to retain its charitable status, must amend its procedures and practices to ensure full compliance with equality legislation and prevent unlawful discrimination against prospective parents based on sexual orientation.⁶⁶ The Appeals Panel emphasised that, while the agency engaged in discrimination,⁶⁷ same-sex couples had access to other adoption agencies as well as the other charitable

62. CS 5901/09 *Tal Ya'akovovich v. Yad Hashmona Guest House*, [2012] (Isr.) (decision on file with author).

63. *Id.* at para. 34.

64. *Id.* at para. 32. The Court also observed that the hall “does not note that it has unique religious characteristics, and it even avoids mentioning that the owners of the place are Messianic Jews.” *Id.* at para. 33.

65. *Id.* at para. 35.

66. [2014] SCAP 02/13 (Scot.) at 70, available at <http://www.scap.gov.uk/pdf/Saint%20Margarets%20Children%20and%20Family%20Care%20Society.pdf>.

67. *Id.* at para. 56.

services provided by the agency.⁶⁸ Furthermore, the Panel found that the adoption agency could not continue its activities without the support of the Catholic Church and concluded that such a result would be disproportionate to the harm posed by the discrimination.⁶⁹

For INCLC, those cases are correct that reason that, like other public establishments, religiously affiliated organisations must abide by public rules when they open their doors to the public. When they offer to rent their halls, for example, they are not materially different from the inns and other businesses.

68. *Id.* at para. 27.

69. *Id.* at para. 65.

IV. Religious and Religiously Affiliated Institutions, LGBT Employees, and Religious Exemptions

Another body of case law still developing concerns claims of discrimination in employment brought against religious and religiously affiliated institutions. These institutions are recognised to have discretion in employment decisions concerning those acting in a ministerial capacity or otherwise teaching the faith. The question concerns other employees in these institutions. While the institutions are often afforded leeway to hire co-religionists, the issue is how far that doctrine should expand: Can institutions limit their employees to those deemed to live their lives consistent with the institution's precepts, even when that amounts to discrimination against LGBT people? For INCLC, precepts of faith do not justify an exemption to equality laws in the context of non-ministerial jobs.

For INCLC, precepts of faith do not justify an exemption to equality laws in the context of non-ministerial jobs.

Ontario Human Rights Commission v. Christian Horizons, a case arising from Canada, concerned a woman whose employer discriminated against her because she was a lesbian. She had been a support worker at Christian Horizons, a Christian-affiliated social services organisation.⁷⁰ The Ontario Divisional Court ruled in her favour, rejecting the organisation's defence that, consistent with its faith, refraining from participating in relationships with someone of the same sex was a *bona fide* occupational requirement for the position.⁷¹ The Court acknowledged that it was "clear that Christian Horizons operates its group homes . . . to carry out a Christian mission, imitating the work of Jesus Christ by serving those in need."⁷² The organisation "is, in fact," the Court continued, "primarily engaged in serving the interests of persons identified by their creed, with resultant benefits to individuals with developmental disabilities who live in their group homes and the families of those residents."⁷³

Nevertheless, the Court rejected the organisation's argument that a "religious ethos infuses the very work that support workers do and, therefore, the Christian ministry and how the work is carried out cannot be distinguished in any meaningful way."⁷⁴ Instead, the Court concluded: "There is nothing about the performance of . . . helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments [] that requires an adherence by the support workers to a lifestyle that precludes same sex relationships."⁷⁵

70. [2010] ONSC 2105 (Can.) at para. 11.

71. *Id.* at para. 105 (stating that, even though "[i]t may be that from Christian Horizons' perspective, the support worker's job is of a religious nature . . . [t]here is nothing in the nature of the employment itself which would make it a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship").

72. *Id.* at para. 75.

73. *Id.* at para. 77.

74. *Id.* at para. 93.

75. *Id.* at para. 104.

Strydom v. Nederduitse, a decision from South Africa, reasons that even a religious institution must comply with governing employment laws when the employee does not serve in a ministerial function. *Strydom* concerned a music teacher at a church who brought a discrimination claim after being fired for being gay.⁷⁶ The defendant argued that the employee would not be able to “lead an exemplary Christian life due to his homosexual lifestyle.”⁷⁷ The South African Equality Court rejected this argument. The Court found there “was not a shred of evidence that the [employee] had to teach Christian doctrine.”⁷⁸ Nor did the Court find any “evidence that the complainant wanted to influence the students or any other church member” by serving as a “role model for Christianity.”⁷⁹ Finally, the Court stated that the teacher’s “commitment to [Christian] values was never questioned It was only when the fact that he was in a homosexual relationship had come to light that his belief was questioned.”⁸⁰

This case law is still very much in development and without consensus. The law generally respects the right of institutions to make fundamental decisions about core ministerial functions. In other positions, however, as some of the cases discussed above illustrate, the courts sometimes recognise that considerations of religious freedom and equality weigh differently. In this context, as in those discussed earlier in this section, these courts recognise the harm of discrimination to those who are turned away and the harm to the promise of equality generally.

In the context of employment, there is economic harm as well as harm to dignity. Thus, in *Christian Horizons*, the Ontario Divisional Court upheld awards for restitution for loss of employment, as well as for “the wilful and reckless infliction of mental anguish.”⁸¹ In *Strydom*, the Equality Court awarded compensation “for the impairment of the complainant’s dignity and emotional and psychological suffering.”⁸² Recognising that there was no direct precedent for such an award, the Court justified this remedy by reaffirming the prescient words of Justice Sachs from an earlier decision of the South African Supreme Court:

To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.⁸³

76. 2009 (4) SA 510 [Equality Court] (S. Afr.) at para. 1.

77. *Id.* at para. 21.

78. *Id.* at para. 17.

79. *Id.* at para. 22.

80. *Id.* at para. 18.

81. *Christian Horizons*, *supra* n. 70, at paras. 19, 111-12.

82. *Strydom*, *supra* n. 76, at para. 37.

83. *Id.* at para. 35 [citing *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) at para. 60 (S. Afr.)].

V. Conclusion and Recommendations

As the preceding analysis shows, the surveyed decisions on religious exemptions and LGBT rights have, for the most part, agreed on how to weigh burdens on religious exercise imposed by laws fostering equality. In general, these courts have recognised the sincerity of beliefs. They have recognised the harm that would be caused by exemptions to laws fostering equality. And they have found that in the context of government employees, services open to the public, and employment outside ministerial functions, such harm would be too grave to sanction.

The story is, of course, far from over. In some countries, such as the United States, the case law in this area is only now developing, as protections for LGBT people are still all too new or even lacking. In other countries, the questions are only beginning to emerge – in Kenya, for example, the High Court just this year ordered the government agency responsible for facilitating the work of nonprofits to register a gay rights group over an objection on moral grounds.⁸⁴ For these countries, INCLLO believes that many of the cases addressed above can provide important guidance.

In general, these courts have recognised the sincerity of beliefs. They have recognised the harm that would be caused by exemptions to laws fostering equality. And they have found that in the context of government employees, services open to the public, and employment outside ministerial functions, such harm would be too grave to sanction.

Going forward, INCLLO offers the following recommendations for resolution of the competing claims of religious freedom and LGBT rights addressed above:

Faith Claims:

- Recognise that faith and religious observance are deeply personal matters. Claims of religious freedom must be assessed based not on the content of the belief or competing religious interpretations, but on the sincerity of the belief.

84. *Eric Gitari v. Non-Governmental Organisations Co-ordination Board*, [2015] (Kenya), available at <http://kenyalaw.org/caselaw/cases/view/108412/>.

Civil Servants:

- Affirm that civil servants must neutrally enforce and apply the laws.
- Account for the harm to individual dignity that will arise if civil servants are permitted to refuse service to LGBT people. This harm is all the greater because the person denying services is an agent of the government, which itself is required to treat all people equally.
- Account for the broader harms to society as a whole that will arise if civil servants are permitted to refuse service to LGBT people. Again, this harm is exacerbated because it is a representative of the government who refuses service.

Goods and Services Providers:

- Affirm that institutions offering services to the public, whether for-profit or nonprofit or religiously affiliated, should not be exempt from anti-discrimination laws, even if the service providers have religious objections.
- Account for the harm that arises when business and other establishments open to the public deny services in a manner that discriminates, even if this is because of faith. The harm – both to those turned away and to society more generally – is not averted simply because the individual can obtain services elsewhere.
- Refuse to accept arguments that seek to justify discrimination based on sexual orientation as objections to marriage or same-sex intimacy.

Religious and Religiously Affiliated Employers:

- Respect in law the rights of religious institutions to adhere to principles of their faith in employment decisions for ministers.
- Affirm that laws that permit religious and religiously affiliated institutions to favour co-religionists in hiring should not be used to justify discrimination against LGBT people, among other protected groups, for non-ministerial functions.



RELIGIOUS FREEDOM AND REPRODUCTIVE RIGHTS

To date, courts addressing competing claims of religious freedom and reproductive rights have differed more in their analyses and conclusions than have the courts addressing claims of religious freedom and LGBT rights. Indeed, the case law to date is surprisingly limited in volume and scope. This may be in part because there are few laws explicitly requiring that reproductive health care be provided and the context in which these mandates arise is limited; we thus see fewer demands for exceptions or accommodation. The case law in this area also does not yet robustly engage questions about discrimination, stigma, and harm to dignity.

The cases presented below address three principal ways in which the tensions between claims of religious freedom and reproductive rights have arisen: where institutions such as hospitals have claimed a right to an exemption from an existing mandate because of faith; where health care professionals assert a right to refuse to provide a service, whether abortions or contraception, because of faith; and where individuals assert a right to be exempt from any task they believe facilitates health care to which they object.

As we detail in the discussion that follows, several cases illuminate principles that, in INCLO's view, should guide future cases. First, institutions such as hospitals should not be afforded exemptions, just as the businesses and other organisations addressed in the previous section should not. Second, at minimum, individuals who object to providing reproductive health care should not be accommodated where the accommodation would result in harm to life or health. Third, exemptions are not appropriate where individuals object to performing tasks they believe facilitate an abortion, contraception, or access to either. The conduct is too attenuated, the theory too expansive, and the harm too great.

Parts I through III discuss case law developments in these three areas, highlighting the reasoning we think instructive. Part IV offers a conclusion and recommendations for advocates and policymakers considering similar claims. Here, as in the previous section, the recommendations derive from the central principle that religious freedom does not include the right to infringe the rights of others.

I. Institutions, Reproductive Rights, and Religious Exemptions

Competing claims of religious freedom and equality emerge in the context of institutions that object on grounds of faith to complying with laws requiring reproductive health services. The cases whose reasoning INCLC supports decline to grant exemptions in this context because of the harms that would otherwise result. These cases parallel those highlighted in the previous section, in which the courts have denied exemptions for institutions that offer a service to the public yet, for reasons of faith, seek to be able to deny services to LGBT people.

“[Religious exemptions can] trigger or unleash consequences for third persons. It is therefore impossible to characterize conscientious objection as a right that affects solely those who exercise it.”

One such case is *Decision T-388/09* of the Colombian Constitutional Court.⁸⁵ In this decision, which built on the discussion of conscientious objection rights in its prior decisions,⁸⁶ the Court put forth a broad framework for analysing religious exemptions to the provision of reproductive health care.⁸⁷ The Court recognised the importance of protecting “freedom of religion, freedom of conscience and thought, as well as freedom of expression,”⁸⁸ but also noted the limitations that must attend:

[Religious exemptions can] trigger or unleash consequences for third persons. It is therefore impossible to characterize conscientious objection as a right that affects solely those who exercise it. When one objects for reasons of conscience, a legal duty has necessarily been breached. . . . The question then becomes what are the limits to conscientious objection – which *prima facie* may seem justified – given the negative impact it can have on the rights of third persons.⁸⁹

85. Corte Constitucional [CC] [Constitutional Court], May 28, 2009, *Sentencia T-388/09* (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2009/T-388-09.htm> (in Spanish). For excerpts of the case in English, see *Sentencia T-388/2009: Excerpts from the Colombian Constitutional Court Decision*, O’Neill Institute Report on Conscientious Objection and Abortion, 25, 25-57 (2014), available at <http://www.law.georgetown.edu/oneillinstitute/research/documents/WLWT-388-09English-FINAL.pdf>.

86. Corte Constitucional [CC] [Constitutional Court], May 10, 2006, *Sentencia C-355/06*, at § 10.1 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm> (in Spanish). For excerpts of the case in English, see Women’s Link Worldwide, *Excerpts of the Constitutional Court’s Ruling that Liberalized Abortion in Colombia*, 15(29) Reproductive Health Matters, 160, 160-162 (2007), available at <http://www.jstor.org/stable/25475303>; see also Corte Constitucional [CC] [Constitutional Court], Feb. 28, 2008, *Sentencia T-209/08* (Colom.), available at <http://www.globalhealthrights.org/wp-content/uploads/2013/10/T-209-08-Colombia-2008.pdf> (in Spanish).

87. *Sentencia T-388/09*, *supra* n. 85, at § 5.2 (and Case T-209/08 as discussed therein). In *T-388/09*, the Court rejected the claim of a judge to a right to object on religious grounds to enforcing an administrative authorisation of an abortion. In so ruling, the Court stated: “[I]t is impermissible for someone acting as a public authority to conscientiously object.” *Id.* That is, the Court reasoned, because “a judicial employee’s decision is not grounded in her own free will . . . [her] primary duty is to apply the law.” *Id.* at § 5.3. In this respect, the reasoning resonates with that of the cases discussed in the prior section addressing the religious objections of civil servants charged with registering marriages.

88. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 37.

89. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 39.

Addressing the claim of the institutions to refuse to provide those abortions allowed by law – the institutions at issue being hospitals in the state-run public health system – the Court emphasised first and foremost that “legal persons do not have a right to conscientious objection” as they cannot experience “intimate and deeply-rooted convictions.”⁹⁰ Institutions thus cannot “limit the freedom of their individual employees who might be coerced by the restrictive positions imposed on them by these institutions’ managerial staff.”⁹¹

While the Court’s discussion specific to institutional claims of conscience does not focus on the consequences for patients, the decision is replete with concern for the harm women would experience if those opposed to abortion as a matter of faith were accommodated. The Court speaks of women’s health, as well as “fundamental constitutional rights to life, sexual and reproductive health, personal integrity, and human dignity.”⁹²

The French Constitutional Council also addressed a similar issue and reached a similar conclusion.⁹³ *Decision 2001-446* concerned a constitutional challenge to the Voluntary Interruption of Pregnancy (Abortion) and Contraception Act. Among other things, the Act repealed provisions of France’s Code of Public Health that had permitted “heads of departments in public health establishments to refuse to allow terminations to be practiced in their department.”⁹⁴ The Court upheld the Act.⁹⁵ Like the Colombian Constitutional Court, the French Constitutional Council reasoned that, while the head of a department might possess some right of free exercise, he cannot prevent the entire department from providing this service, because doing so would be “at the expense of [the conscience] of other doctors and medical staff working in his service.”⁹⁶

In at least two other cases, courts refused to let pharmacies claim an exemption from requirements to fill prescriptions. Both cases address faith-based objections to birth control. In *Pichon v. France*,⁹⁷ the European Court of Human Rights (ECtHR) affirmed the familiar and important principle that freedom of religion extends to a freedom to manifest one’s beliefs, but emphasised that the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) “does not always guarantee the right to behave in public in a manner governed by that belief.”⁹⁸ The Court concluded that “as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose

90. *Sentencia T-388/09*, at § 5.2. For English, see *Excerpts*, O’Neill Institute, at 44.

91. *Id.*

92. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 42.

93. Conseil Constitutionnel [CC] [Constitutional Council] decision no. 2001-446 DC, June 27, 2001 [Fr.], available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf.

94. *Id.* at para. 11.

95. *Id.* at para. 17.

96. *Id.* at para. 15.

97. 2001-X Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/eng?i=001-22644>.

98. *Id.*

them on others as justification for their refusal to sell such products.”⁹⁹ A more recent case from the United States, *Stormans, Inc. v. Wiesman*, rejects the notion that the government could accommodate a pharmacy’s objection by letting it facilitate referrals, noting that the referral would result in delay and “could lead to feelings of shame in the patient.”¹⁰⁰

“[A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products.”

Not all courts agree. For example, in *Imbong v. Ochoa*, the Supreme Court of the Philippines treated the propriety of an exemption for an institution as no different than one for an individual.¹⁰¹ It thus readily struck down parts of a national law requiring referrals for information about reproductive health care as they applied “to non-maternity specialty hospitals and hospitals owned and operated by a religious group and health care service providers,”¹⁰² just as it struck down a similar requirement for individuals.¹⁰³ As to resulting harm, the Court simply stated: “The health concerns of women may still be addressed by other practitioners who may perform reproductive health-related procedures with open willingness and motivation.”¹⁰⁴

One other case merits note although its context is quite different. That is the case of *Burwell v. Hobby Lobby Stores, Inc.*, in which the U.S. Supreme Court afforded a for-profit business an accommodation from a rule requiring coverage of contraception in health insurance plans for employees.¹⁰⁵ Several factors influenced the decision: It arose under a statute protecting religious liberty,¹⁰⁶ the business was closely held (meaning not publicly traded),¹⁰⁷ and the Court believed the employees could still receive coverage seamlessly.¹⁰⁸

99. *Id.*

100. Nos. 12–35221, 12–35223, --- F.3d ---, 2015 WL 4478084, at *7 (9th Cir. July 23, 2015). Other courts have reached different results. A state court of appeals in Illinois, for example, affirmed that a pharmacy could refuse to fill prescriptions for birth control. In so holding, it looked to a state law providing broad protections for claims of conscience by health care personnel. *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. 4th Ct. 2012).

101. *Imbong v. Ochoa*, G.R. No. 204819, 74 (S.C., Apr. 8, 2014) (Phil.), available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/204819.pdf>.

102. *Id.*

103. *Id.* at 72.

104. *Id.* at 78.

105. 134 S. Ct. 2751 (2014).

106. *Id.* at 2760.

107. *Id.* at 2774.

108. *Id.* at 2786 (Kennedy, J., concurring).

The different results in the cases rest in large part on differences as to reasoning on two points: first, whether an institution can assert a claim of conscience, and, second, whether granting an institution an exemption results in harm. It is the latter that is relevant for this report. As to the analysis of harm, a few points merit attention:

- The discussion of harm in this line of cases is limited. Issues of dignity and equality do not feature prominently in the consideration of cases on reproductive rights as they do in the cases concerning LGBT rights addressed in the prior section. They should, however, as reproductive rights are intrinsic to women's equality, as well as essential to health.
- Even when considering harm to health or access to care, the discussion is often limited. It is limited even in those cases rejecting claims for exemptions. The decision of the French Constitutional Council, for example, includes only a reference and a rather oblique one at that.¹⁰⁹ And in the case from the Philippines, there is no serious inquiry about the harm of granting an exemption. The Philippine Supreme Court stated that, if conscientious objectors were exempt from the law's requirements, other practitioners could provide care. There is, however, no analysis as to how women would find alternative providers and whether such providers were actually available.

Recent incidents, however, underscore the harm that can result when institutions attempt to enforce a particular religious belief.

Recent incidents, however, underscore the harm that can result when institutions attempt to enforce a particular religious belief. *Means v. United States Conference of Catholic Bishops*, a case in the United States, concerns a negligence claim by a woman who asserts her health was put at risk when the Catholic hospital at which she sought care for a miscarriage denied her information and timely care.¹¹⁰ The lawsuit charges that the U.S. Conference of Catholic Bishops is responsible for the harm she suffered because it issues the ethical directives that govern Catholic hospitals in the United States. Among other things, these directives prohibit Catholic hospitals from providing or recommending pregnancy termination prior to fetal viability, regardless of the risk to the woman's health.¹¹¹

109. The Council said only that prohibiting the department refusals served "the constitutional principle of equality of users before the law and before the public service." *Decision 2001-446*, *supra* n. 93, at para. 15.

110. Complaint at 1-3, 12-17, *Means v. U.S. Conf. of Catholic Bishops*, No. 2:13-cv-14916, 9 (E. D. Mich. Nov. 29, 2013), available at https://www.aclu.org/sites/default/files/assets/complaint_final_1.pdf.

111. *Id.* at 10-11. The district court dismissed the lawsuit, reasoning in part that resolution of the case would require it to review religious doctrine in ways it found impermissible. Opinion at 21-24, *Means v. U.S. Conf. of Catholic Bishops*, No. 2:13-cv-14916, 9 (E. D. Mich. June 30, 2015), available at https://www.aclu.org/sites/default/files/field_document/06.30.15_means_opinion.pdf. The case is currently on appeal.

A more tragic case comes from Ireland and involves the death of Savita Halappanavar at a publicly funded hospital. Facing a diagnosed inevitable miscarriage, Halappanavar repeatedly requested an abortion. She was denied one on the ground that at the time, the health care providers did not consider her life to be at risk, as is necessary for an abortion to be legal in Ireland.¹¹² Shortly thereafter, Halappanavar developed a fatal infection. It is reported that, at the time the request for an abortion was made, at least one health care professional informed the couple that an abortion was not possible because “[Ireland] is a Catholic country.”¹¹³ The subsequent report of the Health Service Executive into Halappanavar’s death found the interpretation of Irish law concerning lawful termination of pregnancy to be a “material contributory factor” in the case.¹¹⁴

The above cases, and in particular *Means* and the story of Savita Halappanavar, highlight why INCLC stands in support of those decisions that decline to embrace an accommodation for institutions seeking to deny abortions and other reproductive health services otherwise required.

II. Individuals, Provision of Services, and Religious Exemptions

Another area where claims of religious freedom and reproductive rights have competed arises when individual health care providers – as distinct from institutions – have refused on religious grounds to provide abortions or contraception in cases where the service was otherwise required. These cases thus differ from those presented in the section addressing claims of religious freedom and LGBT rights, which involved either institutions or public officials seeking to deny a service because of faith. The cases in this section most often concern abortions where the woman’s health is at issue or they concern the provision of information and referrals.

On one end of the spectrum is the decision of the Colombian Constitutional Court discussed earlier. In addition to addressing institutional claims of conscience, that case sets clear limitations on the right of an individual health care professional to decline to provide an abortion because of religious objections. The decision must be understood in the context of that state’s legal regime, where abortion is legal only in cases where the pregnancy poses a threat to the woman’s life or health; the pregnancy results from reported rape, incest, or nonconsensual artificial insemination; or the fetus has conditions incompatible with life.¹¹⁵

112. Health Service Executive, *Investigation of Incident 50278 from Time of Patient’s Self Referral to Hospital on the 21st of October 2012 to the Patient’s Death on the 28th of October, 2012*, 33 (June 2013), available at <http://www.lenus.ie/hse/bitstream/10147/293964/1/nimtreport50278.pdf>.

113. Paul Cullen & Kitty Holland, *Midwife Manager ‘Regrets’ Using ‘Catholic Country’ Remark to Savita Halappanavar*, *The Irish Times*, April 10, 2013, available at <http://www.irishtimes.com/news/health/midwife-manager-regrets-using-catholic-country-remark-to-savita-halappanavar-1.1355895>

114. Health Service Executive, *supra* n. 112, at 73.

115. *Sentencia C-355/06*, *supra* n. 86, at § 10.1. For English, see Women’s Link Worldwide, *Excerpts*, at 160.

In this decision, the Court stated that conscientious objection is permissible only “when it is feasible for another healthcare professional to provide the voluntary termination of pregnancy and it is provided in a manner that protects the rights of the pregnant women who seeks [sic] an abortion”¹¹⁶ Elaborating, the Court provided:

[H]ealthcare professionals can object to terminating a pregnancy for reasons of conscience if and only if there is a guarantee that the pregnant woman will have access to the procedure in conditions of quality and safety, that she will face no additional barriers that interfere with her ability to access necessary healthcare services and that her fundamental constitutional rights to life, sexual and reproductive health, personal integrity and human dignity will be respected.¹¹⁷

In reaching its decision, the Court emphasised that the free exercise of liberties is protected only to the extent that it does not result in “abuse or unjustified, disproportionate or arbitrary interference with the rights of other individuals.”

Stated otherwise, “If there is only one healthcare professional that can perform voluntary termination of pregnancy – under the circumstances that it is permitted under – then they should perform the termination – regardless of whether the physician is affiliated with a hospital that is private or public, religious or secular.”¹¹⁸

In reaching its decision, the Court emphasised that the free exercise of liberties is protected only to the extent that it does not result in “abuse or unjustified, disproportionate or arbitrary interference with the rights of other individuals;”¹¹⁹ that people are to recognise their duty to promote conduct that is “supportive, just and equitable and respectful of the general public good;”¹²⁰ and that health care professionals have a special role within society.¹²¹

An ECtHR case arising from Poland also supports the argument that objecting health care professionals may be accommodated only if other procedures are in place to provide for care otherwise required. In *P & S v. Poland*,¹²² the ECtHR held that Poland had violated the European Convention by failing to ensure that religious exemptions did not hinder women’s

116. *Sentencia T-388/09*, *supra* n. 85, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 41.

117. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 42.

118. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 41.

119. *Id.*

120. *Id.*

121. *Id.*

122. [2012] ECtHR, available at <http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx?i=001-114098> (last visited Aug. 13, 2015).

access to lawful reproductive health services.¹²³ More specifically, the Court held that Poland violated the Convention by failing to provide patients the protections guaranteed by Poland's own refusals law, which permits physicians to refuse to perform medical procedures such as abortion, but requires that they refer patients to willing physicians.¹²⁴

In its decision, the Court affirmed that the right of religious exercise “does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief.”¹²⁵ It emphasised that member states “are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health care professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”¹²⁶ The ECtHR stopped short of asserting that Poland's conscientious objection law, when properly enforced, amounts to a standard that other Council of Europe countries must also meet. Still, it is noteworthy that the ECtHR found a country to have violated the Convention by failing to provide patient protections guaranteed by its own limited refusals law.

“[W]e believe public trust and confidence requires that a public hospital's health care practitioners – with professional ethical obligations to care for the sick and injured – will provide treatment in time of emergency.”

And in *Shelton v. University of Medicine & Dentistry*, the U.S. Court of Appeals for the Third Circuit rejected a nurse's claim that she was subject to discrimination when she was fired from a public hospital for having refused on religious grounds to participate in two emergency procedures. She had refused because the procedures would have required the termination of pregnancies.¹²⁷ In dismissing the claim, the Court noted: “It would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors [W]e believe public trust and confidence requires that a public hospital's health care practitioners – with professional ethical obligations to care for the sick and injured – will provide treatment in time of emergency.”¹²⁸

123. *Id.* at paras. 106, 110-12.

124. *Id.* at para. 107. In addition to requiring referrals, the law requires objectors to record their refusal and reason for refusal in writing and to include this information in the patient's medical record. *Id.*

125. *Id.* at para. 106.

126. *Id.*

127. 223 F.3d 220 (3d Cir. 2000). The hospital first offered the nurse transfer to a position in another department, which she declined. *Id.* at 223-24.

128. *Id.* at 228. The case thus harkens back to *Rodriguez v. City of Chicago* discussed *supra* n. 20.

Imbong from the Philippines offers a contrast. The issue in *Imbong* concerned mandates that health care practitioners provide information about contraceptives. The law permitted objecting professionals to refuse to provide information but required that they then refer the patient to a practitioner “who would be able to provide for the patient’s needs.”¹²⁹ The law further provided that skilled health care professionals who were public officers could not be considered conscientious objectors.¹³⁰ The Court held both provisions violated protections for religious freedom. The Court reasoned: “Though it has been said that the act of referral is an opt-out clause, it is, however, a *false* compromise because it makes pro-life health providers complicit in the performance of an act they find morally repugnant or offensive One may not be the principal, but he is equally guilty if he abets the offensive act”¹³¹

The Court, moreover, summarily rejected any distinction between professionals acting as public officials and those operating in their private professional capacity, finding “no perceptible distinction” why public actors should not also be exempt.¹³² The Court went so far as to state that “the protective robe” that guarantees free exercise “is not taken off even if one acquires employment in the government.”¹³³

The cases discussed above are nearly uniform in holding that, no matter how strong the faith objection, providers cannot be exempt from providing the care if necessary to prevent harm to a woman’s life or health.

The cases discussed above address a range of contexts in which individuals object to providing reproductive health care. Those that specifically address a question of care necessary to prevent harm to a woman’s life or health are uniform in holding that the provider cannot be exempt. The cases in this section are also nearly uniform in holding that health care professionals should not be exempt from requirements to provide referrals, despite heartfelt objections that this requires them to facilitate conduct they believe immoral.

A few points are particularly noteworthy:

- As noted above, when the question is addressed, the cases specific to abortion are uniform in reasoning that providers cannot be exempt from performing abortions if necessary for the woman’s life or health. This uniformity may reflect the fact that

129. *Imbong*, *supra* n. 101, at 61.

130. *Id.* at 74-75 (emphasis omitted).

131. *Id.* at 72 (emphasis in the original).

132. *Id.* at 75.

133. *Id.* The *Imbong* decision thus stands in contrast to those decisions addressing claims of civil servants discussed in the earlier section of the report on religious freedom and LGBT rights.

these cases most often arise in contexts where abortion is legal only in limited circumstances. We do not yet know how the courts will reason when the issue of a provider refusing to provide care or give a referral arises in a different context.

- The principle that animates this report – that religious freedom does not mean the right to limit the rights of another – should require, at minimum, that referrals be required in all contexts. That is both because the referral is necessary if a woman is to get timely care and because of the harm to dignity that otherwise results.
- The cases addressing reproductive rights discussed above differ from those addressing religious freedom and LGBT rights in how they think about harm. In the reproductive rights context, the cases are concerned more with access to care and less with dignity and the promise of equality. That is the case even though there is a clear stigma placed on the woman when the doctor refuses to provide her a legal abortion.

III. Individuals, Facilitation of Reproductive Health Care, and Religious Exemptions

Increasingly, courts also confront cases involving health care professionals who refuse to do tasks that they believe facilitate abortion or contraception in any way and thus violate their faith. Some health care professionals have objected, for example, to taking the blood pressure of abortion patients or ensuring they have a ride home.¹³⁴

Decision T-388/09 of the Colombian Constitutional Court speaks to this issue. In that case, the Court reaffirmed “that conscientious objection only applies to personnel that are directly involved in performing the medical procedure necessary to terminate the pregnancy.”¹³⁵ The right, the Court held, “does not extend to administrative personnel, medical personnel who perform only preparatory tasks and medical personnel who provide care during the patient’s recovery phase.”¹³⁶ Speaking about objections to tasks during recovery, the Court emphasised: “Refusal to do this kind of work cannot be based in any legitimate moral, religious or psychological convictions and merely indicates that they disapprove of conduct that has already taken place, which is not a proper basis for a conscientious objection claim.”¹³⁷

134. There are also cases in various jurisdictions of individuals objecting to their tax dollars or student fees supporting abortions or contraception. This report does not address those cases. We note only that, in the cases of which we are aware, the courts appear quite uniformly to reject such challenges. See, e.g., *Imbong*, *supra* n. 101, at 71.

135. *Sentencia T-388/09*, *supra* n. 85, at § 5.1.

136. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 42-43.

137. *Sentencia T-388/09*, at § 5.1. For English, see *Excerpts*, O’Neill Institute, at 43.

More recently, the U.K. Supreme Court addressed similar questions in a case brought by Catholic midwives after the Scottish hospital where they worked refused to confirm that they would not be “required to delegate, supervise and/or support other staff in the participation and provision of care to patients” opting for abortion.¹³⁸ The case turned on the interpretation of the United Kingdom’s Abortion Act 1967, which permits religious refusals for health care professionals who “participate” in abortion.¹³⁹ The Scottish Court of Session had ruled in favour of the midwives, reasoning that the Act extended “not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.”¹⁴⁰ In so holding, the Scottish Court reasoned that attempting to distinguish between “direct” and “indirect” involvement was unworkable, as “there will always be uncertainty as to where the line should be drawn,” uncertainty that could “compromise safety and be difficult to manage.”¹⁴¹

“It is unlikely that, in enacting the conscience clause, Parliament had in mind . . . the hospital managers who decide to offer an abortion service . . . the caterers who provide the patients with food, and the cleaners.”

The U.K. Supreme Court reversed this decision, stating:

It is unlikely that, in enacting the conscience clause, Parliament had in mind the host of ancillary, administrative and managerial tasks that might be associated with those acts. Parliament will not have had in mind the hospital managers who decide to offer an abortion service, the administrators who decide how best that service can be organised within the hospital . . . , the caterers who provide the patients with food, and the cleaners who provide them with a safe and hygienic environmentThe managerial and supervisory tasks carried out by the Labour Ward Co-ordinators are closer to these roles than they are to the role of providing the treatment which brings about the termination of the pregnancy. “Participate” in my view means taking part in a “hands-on” capacity.¹⁴²

138. *Doogan v. Greater Glasgow Health Board*, [2013] CSIH 36, para. 6.

139. *Greater Glasgow Health Board v. Doogan*, [2014] UKSC 68, para. 10.

140. *Doogan*, [2013] CSIH 36, at para. 37.

141. *Id.* at para. 34.

142. *Greater Glasgow Health Board*, [2014] UKSC 68, at para. 38.

In reaching this conclusion, the Court referenced an earlier decision that held that the Act's protections for conscientious objection did not extend to receptionists who objected to typing a letter referring a woman for a possible abortion or to doctors charged with signing the certificate authorising the abortion.¹⁴³ The case is significant in highlighting how wide-reaching claims of conscientious objection can run. It does not, however, consider whether the Human Rights Act 1998 or the Equality Act 2010 required the midwives' employers to make reasonable adjustments to accommodate the midwives' religious beliefs; the Court left this issue for resolution in the related Employment Tribunal proceedings.¹⁴⁴

One other case is worth noting here. That is the case of *Burwell v. Hobby Lobby*, discussed earlier, in which the U.S. Supreme Court addressed the claims of for-profit corporations seeking not to comply with a federal rule requiring insurance plans to cover contraceptives. The case did not concern the claim of an individual – the subject of this part – but merits discussion because of the scope of the claim and the manner in which it was analysed. In this case, the businesses objected to providing insurance coverage for contraception because doing so facilitated the use of birth control to which the owners objected. The U.S. Supreme Court held in favour of the corporations.¹⁴⁵ In so concluding, it rejected the argument that any burden the regulation imposed was too attenuated because the companies were only providing insurance – an act several steps removed from women actually using contraception.¹⁴⁶ And, as noted previously, the Court thought the government could provide an accommodation that would ensure that women would get the coverage seamlessly.¹⁴⁷

While appreciating the sincerity of the professionals involved, INCLO supports the conclusions ultimately reached by the Colombian and U.K. courts. We believe that the requirement to undertake indirect, preparatory, or ancillary tasks is too attenuated and the consequences are too expansive, threatening serious disruption to care, as well as compromising the dignity of women involved, to allow such exemptions.

143. *Id.* at para. 36 [citing *Janaway v. Salford Health Authority* [1989] AC 537, 572].

144. *Id.* at paras. 23-34. The United States has seen similar suits. In one case, nurses employed by a public hospital claimed they had a right to refuse to provide pre- and post-operative care for women obtaining abortions. Defs.' Br. in Opp'n to Pls.' Appl. for Prelim. Inj. Relief at 1-5, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 11-cv-6377 [D. N.J. Nov. 22, 2011]. This case settled when the hospital agreed to exempt the nurses from assisting with abortions in any manner, except where there is no other nurse present in "emergency situation[s]." Transcript of Proceedings held on Dec. 12, 2011, at 6, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 11-cv-6377 [D. N.J. Jan. 3, 2012].

145. 134 S. Ct. at 2785.

146. *Id.* at 2777-79.

147. *Id.* at 2786 [Kennedy, J., concurring].

IV. Conclusion and Recommendations

As discussed above, the case law in this area is not yet robust, in volume or analysis. As we reflect on this set of issues, one point merits note. The cases discussed in this section arise in the special context of health care. Failure to provide information, services, and referrals can thus have greater implications for the client than do refusals in some other contexts. With abortion, there are also time considerations that must weigh in the balance.

Going forward, INCLO offers the following recommendations for resolution of the competing claims of religious freedom and reproductive rights addressed above:

Faith Claims:

- Recognise that faith and religious observance are deeply personal matters. Claims of religious freedom must be assessed based not on the content of the belief or competing religious interpretations, but on the sincerity of the belief.

Institutions:

- Affirm that, where institutions serve people of all faiths, the law cannot exempt them from requirements that are meant to prevent harm, be it to health, dignity, or equality.

Direct Performance or Provision of Reproductive Health Care:

- Affirm that health care providers' objections to reproductive health care cannot be accommodated where the accommodation would compromise women's health or lives.
- Affirm that the law should not exempt health care professionals from giving patients referrals and information given the harm to patients that would result.

Facilitation of Reproductive Health Care:

- Recognise that, whilst objections to tasks facilitating health care are rooted in faith, they cannot be accommodated as the conduct is too attenuated and the implications of exemptions too expansive, risking the dignity of women and creating the potential for serious disruption in care.



RELIGIOUS FREEDOM AND RELIGIOUS APPEARANCE

The debates so far discussed in this report involve occasions where the exercise of religion conflicts with the rights of others, whether it is the party seeking services from a business, a woman seeking reproductive health care, or a couple seeking to register a marriage. But not all disputed exercise of religious liberty presents such clear occasions of harm. This section explores one variation of religious exercise – manifested in appearance – where the countervailing harms are often diffuse and unsubstantiated and thus insufficient in our view to justify restrictions on religious freedom.

The discussion below sets forth only a sampling of the relevant cases. Each involves a claim of the right of a private individual to appear – in dress and other manner of personal comportment – consistent with one’s faith in public spaces and in employment. The cases often concern the appearance of members of a minority community, frequently Muslims. The interests asserted for restricting appearance are wide ranging, including public health, public security, secularism, gender equality, and brand identity.

In many of these cases, religious expression is being inappropriately restricted, to the detriment of liberty and equality.

This section of the report functions differently than those preceding it. Rather than resolving a discrete number of questions currently occupying public debate, it presents a sampling of the many arenas in which public appearance is being restricted and the array of justifications offered. It serves to illustrate ways in which religious freedom is all too often being inappropriately restricted, as here, unlike in the preceding sections, there is rarely harm to others.

Parts I through III of this section address restrictions on religious appearance in public spaces, in government institutions, and in businesses. Part IV offers a conclusion and recommendations for advocates and policymakers considering similar claims. Resolution of these cases for INCLC rests on the same principle as should inform the debates on religious freedom, LGBT rights, and reproductive rights: Religious liberty should not be restricted unless its exercise harms others. In many of these cases, religious expression is being inappropriately restricted, to the detriment of liberty and equality.

I. Public Places and Religious Appearance

Among the most far-reaching restrictions, and thus those with the greatest consequences for religious adherents, are those that restrict religious appearance in public spaces. Confronted with such restrictions, people of faith face the difficult choice to forego manifestations of faith or to limit their movement. The recent cases that have garnered significant attention are those involving bans that reach the veil. In these cases and others, a broad range of interests are invoked to justify restrictions on religious appearance in public spaces – gender equality, tradition, secularism, and political volatility among them.

The restrictions on appearance often amount to stereotyping and discrimination against minority groups, in violation of the principle of equality.

As this part will argue, restrictions on religious appearance are rarely necessary to advance these goals. More significant for purposes of the analysis we urge, religious freedom as expressed in appearance rarely harms third parties. Indeed, the restrictions on appearance often amount to stereotyping and discrimination against minority groups, in violation of the principle of equality.

One of the most prominent cases of this nature is *S.A.S. v. France*, the recent ECtHR case addressing France’s ban on face concealment in public.¹⁴⁸ The ban effectively prohibits the wearing of face-covering Muslim headwear, except under specific circumstances.¹⁴⁹ The government justified the ban on three grounds: equality, security, and conditions necessary to “live together” as a society in accordance with the values of the French Republic. In the end, the ECtHR looked to the latter interest to uphold the ban.¹⁵⁰

All seventeen judges held that the ban was disproportionate to the French government’s claimed goal of promoting gender equality.¹⁵¹ In so ruling, the Court reasoned that the state “cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant.”¹⁵² Furthermore, addressing the assertion that the garb might hurt the dignity of others, the Court stated that the government did not “have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.”¹⁵³

148. 2014 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466> (last visited Aug. 13, 2015).

149. *Id.* at para. 28. The ban does not apply “if the clothing is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.” *Id.*

150. *Id.* at paras. 137-63.

151. *Id.* at paras. 118-19.

152. *Id.* at para. 119.

153. *Id.* at para. 120.

The Court was also unconvinced by the public safety rationale: “[I]n view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government [has] not shown that the ban . . . falls into such a context.”¹⁵⁴

Fifteen of the judges, however, found that the ban was proportionate to the government’s goal of facilitating “social communication and more broadly the requirements of ‘living together.’”¹⁵⁵ In so holding, the Court emphasised that the ban was not based expressly on religion, but applied to all face concealment,¹⁵⁶ and the punishment for violating the ban was relatively light.¹⁵⁷ Critical to the ruling was the Court’s conclusion that the French government had a “wide margin of appreciation” – meaning significant discretion – to “protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness.”¹⁵⁸

The government did not “have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.”

In so ruling, the Court noted the hardship the ruling would pose for women who wear a veil as an expression of faith; the concerns of the Muslim community; the large number of actors, both international and national, who critique a total ban as disproportionate; the intolerance – which the Court castigated as inappropriate – that may motivate some to pursue such a ban; and the fact that the ban could be seen as restricting pluralism.¹⁵⁹ But the Court returned to the margin of appreciation. It thus deferred to the state’s asserted need to “protect a principle of interaction between individuals” that the French government viewed as essential to the principle of “fraternity” and therefore its democratic society.¹⁶⁰ The ECtHR thus gave the government wide berth to define for itself what the concept of “living together” means, allowing it to dictate that the way to achieve this goal was to remove certain forms of religious appearance from places of public gathering.

154. *Id.* at para. 139.

155. *Id.* at para. 153.

156. *Id.* at para. 151.

157. *Id.* at para. 152.

158. *Id.* at paras. 153, 155; see also *supra* n. 21 for a definition of margin of appreciation.

159. *Id.* at paras. 144-53.

160. *Id.* at paras. 153-55.

A decision from Israel, also involving restrictions in a public space, albeit a holy one, offers a contrast. In that case, *State of Israel v. Ras*, the Jerusalem District Court took a harder look at the interests asserted by the state. The case concerned a claim of religious discrimination brought by Jewish women who had been arrested for praying at the Western Wall while wearing prayer shawls (tallitot).¹⁶¹ The women were arrested for violating “local custom” and causing a public disturbance.¹⁶² “In light of the tense atmosphere which prevails at the site,” the state argued, such conduct is capable of “giving rise to severe confrontations.”¹⁶³ The Court rejected the argument: “The very fact of the fear that confrontations . . . will arise, in the absence of an argument which holds that any of the Respondents had recourse to violence . . . is not sufficient to give rise to reasonable grounds for the suspicion that the Respondents were the ones who endangered public security or the security of any human being who was present in the [Western] Wall plaza.”¹⁶⁴

Israel also appealed to a law that made it illegal to violate “local custom.”¹⁶⁵ Without rejecting the idea that custom could ever serve as a legitimate interest for regulation, the Court reasoned that “the phrase ‘local custom’ should not necessarily be interpreted according to Jewish law or according to the status quo. The nature of a custom is that it changes according to the changing times, and [the phrase] should express a pluralistic and tolerant approach to the opinions and customs of others”¹⁶⁶ Pluralism in this case was thus a predicate for striking down, rather than upholding, the restriction.

One other case bears note in this section, although the context differs. That is the case of *Şahin v. Turkey*, also decided by the ECtHR, which involved a ban in Turkey on headscarves in university classrooms.¹⁶⁷ That ban, like France’s ban on face concealment, was upheld by the Court. In its decision, the ECtHR emphasised freedom of religion, conscience, and thought as vital,¹⁶⁸ while also cautioning that “it may be necessary to place restrictions on freedom to manifest one’s religion,” citing as reasons “the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society.”¹⁶⁹

161. DC (Jer) 23834-04-13 *State of Israel v. Ras* [2013] (Isr.), available at http://womenofthewall.org.il/wp-content/uploads/2012/06/Final-File_Women-of-the-Wall-Ruling_April-25-2013-2.pdf (last visited Aug. 13, 2015) (English translation). According to some Jewish religious authorities, it is not appropriate or permitted for women to wear the prayer shawl, http://www.chabad.org/library/article_cdo/aid/587787/jewish/Is-it-appropriate-for-a-woman-to-wear-a-tallit.htm, whereas in egalitarian Jewish movements, women are permitted and usually encouraged to do so, <https://en.wikipedia.org/wiki/Tallit>.

162. *Id.* at paras. 2, 8, 9.

163. *Id.* at para. 4.

164. *Id.* at para. 9 (alteration in original) (emphasis omitted).

165. *Id.* at paras. 2, 8.

166. *Id.* at para. 8 (quoting HCJ 257/89, *Hoffman v. Official in Charge of the Western Wall* [1994] IsrSC 48(2) 265, 357 (opinion of S. Levin, J.)) (alteration in original).

167. 2005-XI Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956> (last visited Aug. 13, 2015). The ban also prohibited beards in the classroom. The claimants’ challenge ran only to the headscarf.

168. *Id.* at para. 104.

169. *Id.* at paras. 106-10.

In upholding the ban, the Court looked to the state’s margin of appreciation and to the context in which the ban was enacted. Secularism for Turkey, the Court emphasised, was “the guarantor of democratic values” and thus “the meeting point of liberty and equality.”¹⁷⁰ In the context of the universities, the ECtHR wrote:

Where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.¹⁷¹

The Court also spoke of secularism as necessary “to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements.”¹⁷²

The harm caused to Muslim women – limiting their access to education, for example – is not justified given the absence of actual harm to others in these cases.

Judge Tulkens’ dissent takes the majority to task, noting that there would be no harm to others or to secularism if women were to wear headscarves.¹⁷³ Rather, the dissent emphasised, the concern was not the headscarf, but “the threat posed by ‘extremist political movements’ seeking to ‘impose on society as a whole their religious symbols and conception of a society founded on religious precepts.’”¹⁷⁴ But any need to prevent radical Islam, the dissent noted, could not justify a ban on all religious expression of this nature.¹⁷⁵

A few points are worth noting about these cases:

- The ECtHR cases accept restrictions on religious appearance as necessary to democracy, diversity, and pluralism. It is a starkly different view than is adopted in some of the cases discussed, which understand restrictions on appearance as limiting pluralism and indeed fostering discrimination.

170. *Id.* at para. 113.

171. *Id.* at para. 116.

172. *Id.* at para. 113.

173. *Id.* at paras. 5-9 (Tulkens, J., dissenting).

174. *Id.* at para. 10 (Tulkens, J., dissenting).

175. *Id.* (Tulkens, J., dissenting).

- Interestingly, in both *S.A.S.* and *Ras*, the courts had addressed manifestations of religious appearance by women that were viewed as “shocking” because they were outside the cultural norm. The courts in both cases are to be applauded for refusing to uphold the restrictions on the basis of offence to others. (We say this appreciating that the *S.A.S.* Court upheld the ban on other grounds.)
- As some of the language in *Şahin* suggests, the interest in secularism or facilitating communication may reflect concern that students and others may feel pressure to conform their appearance and conduct if certain religious attire is tolerated. It remains to be addressed whether there may be occasions where such pressure may constitute harm to others. The cases discussed above, however, present no such case.
- The ECtHR accords significant deference to the interests asserted by France and Turkey. It looks to the margin of appreciation to justify the deference. From the standpoint of INCLC, this deference and the conclusions that follow strike the wrong balance. The harm caused to Muslim women – limiting their access to education, for example – is not justified given the absence of actual harm to others in these cases.

II. Government Institutions and Religious Appearance

Restrictions on religious appearance also arise in the context of government institutions – courts, prisons, schools, and public hospitals, for example. The question is whether restrictions on manifestations of faith in appearance are necessary for the institutions to fulfill their responsibilities and in particular to avert harm to others. As set forth below, in this context as in that discussed above, there often is not sufficient evidence of harm to justify the restrictions. A sampling of cases follows.

A. Courts and Religious Appearance

Religious appearance is sometimes restricted in the name of due process rights in court and, in particular, the right to confront the accusing witnesses.

The issue is illustrated in the case of *R. v. N.S.*, where the Supreme Court of Canada addressed an appeal brought by a Muslim woman who had been required to remove her full-face veil (or niqab) if she were to testify in court;¹⁷⁶ she was the complainant in a criminal sexual assault case.¹⁷⁷ One of the accused argued his right to a fair trial would be harmed if the complainant were permitted to testify while wearing her niqab, as it would prevent effective cross-examination and interfere with the assessment of her credibility.¹⁷⁸

176. [2012] 3 S.C.R. 726 (Can.), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/12779/1/document.do> (last visited Aug. 12, 2015).

177. *Id.* at 736.

178. *Id.* at 740.

The Court held that this question must be decided on a case-by-case basis, taking into account the consequences for the witness of being required to remove the niqab, the implications for the trial, alternative approaches, and a balance of harms that included “the broader societal harms” of requiring the witness to remove the niqab, such as discouraging niqab-wearing women from reporting offences and participating in the justice system.¹⁷⁹ Having given this guidance, the Court sent the case back to the preliminary inquiry judge to determine whether the woman had to remove the veil; the judge concluded that she did.¹⁸⁰

In the end, the Court acknowledged the harm to the claimant’s religious freedom and access to court, while also recognising the potential for harm to a third party that could result from religious exercise. There was, however, no expert testimony presented contesting the value of seeing a face to assess credibility, thus leaving the Court less able to scrutinise the state’s interest.¹⁸¹

The question is whether restrictions on manifestations of faith in appearance are necessary for the institutions to fulfill their responsibilities and in particular to avert harm to others.

B. Prisons and Religious Appearance

Prison is another context in which restrictions on religious appearance are imposed, both on prisoners and staff. The rationale offered to justify the restrictions is often security, an interest aligned with the obligations of the institution. Two cases are illustrative.

In *Department of Correctional Services v. Police and Prisons Civil Rights Union*, the Supreme Court of Appeal of South Africa addressed a religious discrimination claim brought by correctional facility officers.¹⁸² The officers had been fired after they refused to cut dreadlocks they wore in observance of their Rastafarian beliefs and Xhosa cultural customs.¹⁸³ The Supreme Court of Appeal upheld a lower court decision that found the correctional facility had impermissibly discriminated.¹⁸⁴ In defence of the dress code requirement, the facility argued that dreadlocks rendered Rastafarian officers conspicuous and thus susceptible to manipulation by Rastafarian inmates seeking to smuggle an illegal drug used in their religious rituals.¹⁸⁵

179. *Id.* at 747–48. The concurrence spoke in language akin to that of *S.A.S.*, characterising a trial as an “act of communication with the public at large” and a niqab as “not facilitating acts of communication.” *Id.* at 730.

180. *N.S. v. H.M.Q.*, [2013] ONSC 7019 (Can.), available at <http://canlii.ca/t/g1vz7> (last visited Aug. 13, 2015).

181. *R. v. N.S.*, *supra* n. 176, at 741–42.

182. 2013 (4) SA 176 (SCA) (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2013/40.pdf> (last visited Aug. 13, 2015).

183. *Id.* at paras. 6–9.

184. *Id.* at paras. 22–26.

185. *Id.* at paras. 19–20.

The Court found there was no evidence that the dreadlocks had ever rendered officers vulnerable to such manipulation.¹⁸⁶ Rejecting the legitimacy of this justification, the Court held that the prison was instead discriminating against the Rastafarian religion and Xhosa cultural customs.¹⁸⁷ The Court stated: “Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound.”¹⁸⁸

Deciding a thematically similar case, the U.S. Supreme Court in *Holt v. Hobbs* held unanimously that a state prison policy that had prohibited a prisoner from having a half-inch beard in accordance with his Muslim beliefs violated a federal statute protecting free exercise rights of prisoners.¹⁸⁹ The prison defended the policy as necessary for security, arguing that a prisoner could hide contraband in a longer beard or alter his appearance to evade security measures.¹⁹⁰ In rejecting the claim, the Court reasoned that, while prisons have latitude to institute reasonable security regulations that might burden religious exercise, they cannot do so when, as in this case, there was no evidence that the religious exercise at issue would pose a security threat.¹⁹¹

The government should not be able to engage in religious discrimination, in violation of the equality principle, under the guise of seemingly neutral regulations.

In both of these cases, the courts scrutinised the rationales the government offered. In both, they found the justifications wanting. Both decisions are thus consistent with the principle that institutions should not restrict harmless religious expression. In one case explicitly and in the other implicitly, the courts affirmed that the government should not be able to engage in religious discrimination, in violation of the equality principle, under the guise of seemingly neutral regulations.

186. *Id.* at para. 254.

187. *Id.* at para. 19.

188. *Id.* at para. 22.

189. *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

190. *Id.* at 863-64.

191. *Id.* at 863-67.

C. Schools and Religious Appearance

Schools also sometimes limit religious appearance. Restrictions are sometimes imposed as a matter of law – the ECtHR detailed many such policies in its *Şahin* decision¹⁹² – and sometimes as a matter of policy in an individual school. Schools often defend the restrictions as necessary for an effective learning environment. Illustrative cases follow.

In *KwaZulu-Natal v. Pillay*, the South African Constitutional Court held that public school administrators had discriminated based on religion when they prohibited a student of Hindu faith from wearing a nose stud to school.¹⁹³ To justify this restriction, the school argued uniformity was necessary for discipline and thus education.¹⁹⁴

Telling the student to remove her nose stud, the Court emphasised, sent a message to the student that she, her religion, and her culture were unwelcome.

Ultimately, the Court was sceptical of the government’s rationale. The Court held that the school’s objective of “promot[ing] uniformity and acceptable convention amongst [students]” was legitimate.¹⁹⁵ It found an exemption would not undermine these interests, however:¹⁹⁶ “There is no reason to believe, nor has the School presented any evidence to show, that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others.”¹⁹⁷ In other words, there was no actual harm to justify restricting the student’s religious appearance. Moreover, absent harm, the Court reasoned, an accommodation of the student was essential to pluralism and dignity.¹⁹⁸ Telling the student to remove her nose stud, the Court emphasised, sent a message to the student that she, her religion, and her culture were unwelcome.¹⁹⁹

Dogru v. France, decided by the ECtHR,²⁰⁰ offers a contrast. In that case, the Court upheld the decision of a school to require its students to remove Muslim headwear in physical

192. *Şahin*, *supra* n. 167, at paras. 30-35, 55-65.

193. 2007 (1) SA 474 (CC) at para. 119 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2007/21.html> (last visited Aug. 13, 2015).

194. *Id.* at para. 96.

195. *Id.* at paras. 14, 98.

196. *Id.* at paras. 100-02.

197. *Id.* at para. 101.

198. *Id.* at paras. 103-07. It can be argued that religious adherents opposed to providing services to LGBT people or to women seeking reproductive care similarly suffer dignitary harm when their religious beliefs are not recognised. In those cases, however, in contrast to *Pillay*, the expression of religious beliefs caused harm to others.

199. *Id.* at 85.

200. [2009] ECtHR, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039> (last visited Aug. 13, 2015). While the case was making its way through the courts, the French government passed a law barring signs that “make the wearer’s religious affiliation immediately identifiable” in schools. *Id.* at paras. 29-32.

education classes.²⁰¹ Whereas the Court in *KwaZulu-Natal* looked to diversity as a reason for an exemption to a restriction on religious appearance, the ECtHR in *Dogru* invoked pluralism to justify denying an exemption. The ECtHR noted that “in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom [of religious exercise] in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”²⁰² The Court found the interest in secularism sufficient, noting its constitutional status in France and the margin of appreciation as bases for the decision.²⁰³

The Court also looked to the student’s safety to justify the restriction. The Court analogised the case to one in which it upheld a requirement that motorcyclists wear helmets against a claim by a Sikh who had sought to continue wearing his turban instead.²⁰⁴ The Court reasoned: “The conclusion reached by the national authorities that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety is not unreasonable.”²⁰⁵

These cases evidence very different approaches to pluralism and dignity, with the South African Constitutional Court seeing restrictions on appearance as harming dignity and equality and the ECtHR viewing such restrictions as essential to pluralism. Looking to the principles that animate this report, it is the South African court that properly accounts for the harm to the student, with no harm to others weighing in the balance.

D. Hospitals and Religious Appearance

Public hospitals have restricted religious appearance, with safety being a rationale offered for the restriction. *Chaplin v. United Kingdom*, decided by the ECtHR,²⁰⁶ is one case addressing such a restriction. In that case, a nurse claimed a hospital had discriminated against her on the basis of religion when it barred her from wearing a Christian cross necklace pursuant to its ban on most jewellery.²⁰⁷

Though the Court recognised that this regulation burdened the nurse’s religious exercise, it held that the employer’s interest justified this burden: “[T]he reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was

201. *Id.* at paras. 5-16, 78, 84.

202. *Id.* at para. 62.

203. *Id.* at paras. 71-72.

204. *Id.* at para. 64 (citing *X v. United Kingdom*, App. No. 7992/77, 14 Eur. Comm’n H.R. Dec. & Rep. 234 (1978)).

205. *Id.* at paras. 64, 73.

206. The ECtHR consolidated *Chaplin* with the case of *Eweida*. *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881> (last visited Aug. 13, 2015).

207. *Id.* at paras. 18-22.

inherently of a greater magnitude than that which applied in respect of Ms. Eweida.”²⁰⁸ (Ms. Eweida’s case is described below.) According to the Court, “there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself or the applicant, or that the cross might swing forward and could, for example, come into contact with an open wound.”²⁰⁹

Ultimately, given the context-specificity, it is difficult to assess whether the Court’s analysis comports with INCLC’s framework. On the one hand, the institution was seemingly not regulating religious appearance because of hostility to the faith. On the other hand, it is not clear that wearing a cross necklace would cause harm or that there was no acceptable alternative that could accommodate the religious claimant while protecting health and safety.

III. Businesses and Religious Appearance

One other line of cases – those that address restrictions on religious appearance in the private sphere – merits a brief discussion. In this context, an interest in brand has been asserted to justify the restriction and is properly rejected.

According to the Court, there was no evidence that any employee’s religious garb, let alone a small cross necklace, had ever detracted from the company’s professional brand image.

One such case is *Eweida v. United Kingdom*.²¹⁰ In that case, an airline worker had been unable to persuade the British courts that British Airways had discriminated against her on the basis of religion when it directed her to conceal her Christian cross necklace in accordance with its uniform policy.²¹¹ The ECtHR ruled for the claimant, reasoning that the uniform policy was disproportionate to the airline’s objective of maintaining a particular professional image.²¹² According to the Court, there was no evidence that any employee’s religious garb, let alone a small cross necklace, had ever detracted from the company’s

208. *Id.* at para. 99.

209. *Id.* at para. 98.

210. *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881> (last visited Aug. 13, 2015).

211. *Id.* at paras. 9-17.

212. *Id.* at para. 94.

professional brand image.²¹³ Furthermore, the ECtHR pointed out that the company had amended its rules to allow for visible religious jewellery after the complaint had been lodged, thus demonstrating that the earlier prohibition “was not of crucial importance.”²¹⁴

More recently, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court held that a company’s concern with its image did not suffice to justify its refusal to hire a woman wearing a hijab.²¹⁵ In that case, a Muslim woman charged Abercrombie & Fitch with discriminating on the basis of religion after it refused to hire her because her hijab conflicted with the company’s Look Policy.²¹⁶ The company maintained that it should not be held liable for religious discrimination because the woman had never informed it that she wore her hijab for religious reasons.²¹⁷ The Court rejected this argument, holding that a company may be 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” that she needed such an accommodation.²¹⁸

“[C]ourts should not involve themselves in determining the objective centrality of practices.”

The decisions in these cases are consistent with a related line of cases, which have held that commercial and economic interests did not justify racial, gender-based, or other forms of discrimination. In Canada, for example, courts and tribunals have held that businesses may not discriminate against a female applicant because customers prefer to be served by a man; landlords may not refuse tenants because of the prejudices of other tenants; and a restaurant may not deny entry to a person with a disability for fear that business will suffer because of other customers’ reactions.²¹⁹ Looking to INCLC’s principle, the courts in *Eweida* and *Abercrombie & Fitch* were correct in rejecting the argument that business interests should be given more weight than the individuals’ religious rights, particularly given the harm that such discrimination can cause those who otherwise have to choose between their religious beliefs and their employment.

213. *Id.* The evidence in the case established that British Airways had authorised male Sikh employees to wear a turban and female Muslim ground staff to wear hijabs in British Airways-approved colours, for example. *Id.* at para. 11.

214. *Id.* at para. 94.

215. 135 S. Ct. 2028 (2015).

216. *Id.* at 2031.

217. *Id.* at 2032.

218. *Id.* at 2032-33.

219. *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) paras. 72-77, available at <http://canlii.ca/t/1vgzm> (last visited Aug. 13, 2015) [collecting cases].

IV. Conclusion and Recommendations

As the preceding analysis shows, prominent decisions on religious appearance have at times adhered to, and at other times rejected, the principles that INCLC believes should guide cases where religious freedom and equal treatment are at stake: that religious freedom can be restricted only if its manifestation harms others. While the decisions vary in terms of their adherence to this principle, several positive aspects bear noting:

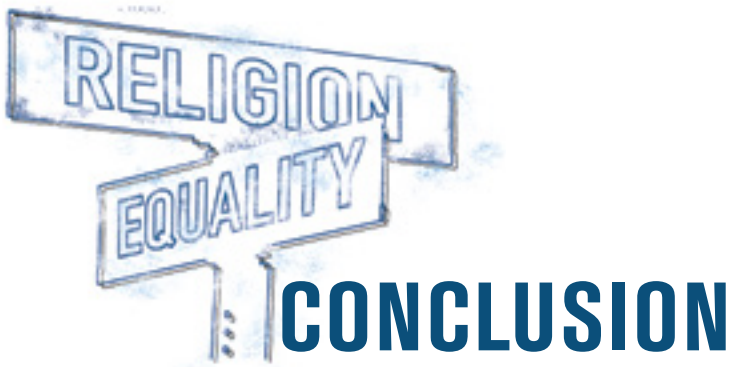
- The courts quite uniformly recognise that they should not be in the practice of inquiring whether a particular faith requires the manifestation at issue, be it a beard, a nose ring, or a headscarf. The South African Constitutional Court appreciated, for example, that people who subscribe to the same faith can be expected to manifest their personal faith in individual and diverse ways. It emphasised: “[C]ourts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes.”²²⁰
- Many courts recognised the harm these restrictions impose, even if they proceeded to uphold the restrictions. The consequences of restrictions for people of faith are significant, whether they involve appearance or expressions of faith addressed in the earlier sections of this report. In the latter contexts, however, there are harms to others as a result of those actions.

Consistent with the framework that animates this report, what ultimately matters is whether manifestations of religious freedom cause harm to others. Burdens on religious appearance, if they are to stand, must be justified by harm, in the same way that burdens on religious freedom are only acceptable in the context of provision of goods and services, including health care, because of the harms they cause LGBT individuals and women.

220. *KwaZulu Natal*, *supra* n. 193, at para. 87.

Going forward, INCLC offers the following recommendations for resolutions of competing claims concerning religious appearance:

- Recognise that faith and religious observance are deeply personal matters. Claims of religious freedom must be assessed based not on the content of the belief or competing religious interpretations, but on the sincerity of the belief.
- Affirm the principle that religious freedom as manifested in religious appearance should not be restricted if its exercise would not result in harm to others.
- Scrutinise interests asserted by the state aimed at justifying restrictions on religious appearance – whether those interests sound in secularism or in health or other interests, broad or specific.
- Ensure that justifications for restrictions on religious appearance do not rely on stereotypes or discriminatory motives.



Freedom of religion and equality are fundamental rights, both enshrined in human rights laws and constitutions, and both protected vigorously by INCLC members around the world. This report, *Drawing the Line: Tackling Tensions Between Religious Freedom and Equality*, examines three interrelated aspects of these rights: religious freedom and equality for LGBT individuals, religious freedom and reproductive rights, and religious freedom as expressed through attire, hair, or other forms of religious appearance. These issues are just a sampling of the ways in which religion and equality interact, and sometimes clash, in different societies today. Nevertheless, in our opinion, these issues represent an important lens through which we should begin to understand how to address the interplay of religious freedom and equality in any context.

As civil liberties and human rights organisations, INCLC members have engaged in public debate, advocacy, and litigation on these matters, including direct involvement in some of the cases discussed in the report. While valuing equality, we take full account of the position of individuals who believe their faith constrains them from participating in certain activities or requires that they engage in particular practices. While valuing religious freedom, we appreciate the real harms caused when people are deprived of certain services and of their right to dignity simply because of who they are.

Ultimately, as set forth in the introduction to this report, we adhere to the principle that religious freedom means the right to our beliefs, but that religious freedom does not give us the right to impose our views on others, including by discriminating against or otherwise harming them. It is that principle that animates this report and our work.

It is our hope that policymakers, advocates, and others may benefit from our experience, perspective, and knowledge of these issues and the interplay between them in multiple contexts.

Your opinion matters!

Please [click here to let us know your thoughts on this report.](#)