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GERMANY

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Introduction

1. ADF International is a global alliance-building legal organization that advocates for religious freedom, life, and marriage and family before national and international institutions. As well as having ECOSOC consultative status with the United Nations (registered name “Alliance Defending Freedom”), ADF International has accreditation with the European Commission and Parliament, the Organization for Security and Cooperation in Europe, and the Organization of American States, and is a participant in the FRA Fundamental Rights Platform.
2. This report explains why Germany must take urgent steps to protect freedom of conscience, expression, and religion, as well as the rights of parents to raise and educate their children in accordance with their moral and religious convictions.

(a) Freedom of Conscience, Expression, and Religion

3. On 30th June 2017, the German Bundestag adopted a bill redefining marriage as the union of two persons without regard to their sex. The bill was subsequently passed by the Bundesrat on 7th July and signed by the president on 20th July, and came into effect on 1st October 2017. Germany had already allowed registered life partnerships for same-sex couples since 1st August 2001.
4. Concerns exist with respect to the erosion of other fundamental freedoms and rights as a result of redefining marriage and the family, especially given that laws have been passed in Germany which prohibit so-called “discrimination” and “hate speech” on the grounds of sexual orientation and gender identity. In other jurisdictions in which same-sex marriage has been legalized or in which future legalisation is all but inevitable, so-called “hate speech” laws have been utilized against the faithful and the clergy of religious denominations for speaking on the issues of homosexuality and/or the definition of marriage according to traditional religious teaching.¹
5. Even if one disagrees with these sentiments or acts, the rights to freedom of opinion and expression under Article 19 of the ICCPR should not be unnecessarily infringed for the sake of sparing hurt feelings where actual incitement to violence or gross mistreatment does not occur.
6. Similarly, people of faith who personally run businesses serving the public, and who have no objection to serving any individual per se, have been fined, subjected to re-education orders, and in some cases forced to shut down as a result of not being able to creatively participate in good conscience in same-sex marriage advocacy or a same-

¹ Erik W. Stanley, *ADF Legal*, “Approval of Same-Sex ‘Marriage’ Leads to Censorship of Speech,” 15th January 2013, available at: <https://www.adflegal.org/detailspages/blog-details/allianceedge/2013/01/15/approval-of-same-sex-marriage-leads-to-censorship-of-speech>; ABC News Australia, “Anti-discrimination complaint ‘an attempt to silence’ the Church over same-sex marriage, Hobart Archbishop says,” 28th September 2015, available at: <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>; Catholic Herald, “Spanish cardinal reported over ‘hate crime,’” 7th June 2016, available at: <http://www.catholicherald.co.uk/news/2016/06/07/spanish-cardinal-reported-over-hate-crime>.

sex wedding due to their sincere and deeply-held religious or moral beliefs regarding the nature of marriage.²

7. These are violations of the right to freedom of thought, conscience, and religion under Article 18 of the ICCPR, and all countries that have redefined marriage or are seeking to do so must take this into account when it comes to fulfilling their obligations to protect these rights. For this reason, Germany must ensure that it has strong legislative protections for freedom of conscience, in order that nobody has to creatively participate or be involved in events relating to same-sex marriage or the promotion of it.
8. With regard to so-called “hate speech” in particular, Germany has a well-entrenched legal concept of *Volksverhetzung* (literally “incitement of the masses/people,” but often officially translated as “incitement to hatred”).
9. Article 5 of the German constitution provides that “every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources ... There shall be no censorship.” It also provides that “these rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.”
10. Nevertheless, section 130(1) of the Criminal Code criminalizes “disturbing the public peace” by “incit[ing] hatred or call[ing] for violence or arbitrary measures against persons based on their nationality, race, religion, ethnic origin or any other well-defined group,” as well as “assault[ing] the human dignity of others by insulting, maliciously maligning, or defaming an aforementioned group” and imposes a term of imprisonment from three months to five years. Section 130(2) also criminalizes producing, supplying, displaying, or disseminating written materials which cause “incitement to hatred” and imposes a maximum of three years’ imprisonment.
11. Furthermore, section 166 forbids defamation of religion or ideology “in a manner that is capable of disturbing the public peace” under threat of three years’ imprisonment. Section 185 provides that “an insult” shall be punished with a maximum of one year’s imprisonment, and that such an “insult” committed by means of an assault is subject

² Marissa Mayer, *ADF Legal*, “3 Common Myths Used Against Christian Bakers like Aaron and Melissa Klein and Jack Phillips,” 7th April 2016, available at: <https://www.adflegal.org/detailspages/blog-details/allianceedge/2016/04/07/3-common-myths-used-against-christian-bakers-like-aaron-and-melissa-klein-and-jack-phillips>; Alan Erwin, *Belfast Telegraph*, “Forcing Ashers bakery to make pro-gay marriage cake could amount to cruelty, appeal hears,” 12th May 2016, available at: <http://www.belfasttelegraph.co.uk/news/northern-ireland/forcing-ashers-bakery-to-make-progay-marriage-cake-could-amount-to-cruelty-appeal-hears-34709014.html>; ADF Legal, “Arlene’s Flowers v. State of Washington | Arlene’s Flowers v. Ingersoll,” last accessed 5th October 2017, available at: <http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman>; ADF Legal, “Brush & Nib Studio v. City of Phoenix,” last accessed 5th October 2017, available at: <https://www.adflegal.org/detailspages/case-details/brush-nib-studio-v.-city-of-phoenix>; ADF Legal, “Elane Photography v. Willock,” last accessed 5th October 2017, available at: <https://www.adflegal.org/detailspages/case-details/elane-photography-v.-willock>; ADF Legal, “Masterpiece Cakeshop v. Colorado Civil Rights Commission,” last accessed 5th October 2017, available at: <https://www.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig>.

to a maximum of two years' imprisonment. Section 192 further provides that proving that the "insult" is true does not exclude punishment "if the insult results from the form of the assertion or dissemination or the circumstances under which it was made."

12. Given Germany's history during the early to mid-twentieth century, this is understandably motivated by a desire to prohibit public denial of the Holocaust and to avoid racial vilification and persecution of the sort which occurred under the Third Reich. Nevertheless, the manner in which this law has been developed and implemented has grave implications for the fundamental human right to freedom of opinion and expression.
13. There are concerns that such laws go beyond the scope of avoiding a repeat of the genocidal and racially-motivated crimes against humanity of the German authorities in the 1930s and 1940s, and instead are used to shut down legitimate debate regarding national security, as well as cultural and religious identity and national sovereignty, especially in the context of the recent migrant crisis, as being "racist," "Islamophobic," or "neo-Nazi."³
14. On the same day as it adopted same-sex marriage, the German legislature also passed a law requiring social media companies which operate in Germany, such as Facebook, Google, and Twitter, to remove so-called "hate speech" and "extremism" from their platforms in order to avoid fines and other legal sanctions. Fears expressed by human rights groups and the companies themselves include those concerning the vague and fine line between addressing "hate speech" and unjustifiably limiting freedom of expression. The concern is that this policy represents attempts to silence the German government's immigration policy and to bring regulation of the internet and content shared on it under State control even further than it already is.⁴
15. There is certainly a need to regulate forms of communication that can credibly and reasonably be said to constitute incitement to violence, whether against an individual or a group. The concern, however, is that so-called "hate speech" laws are on the whole vaguely worded and largely subjective, do not necessarily require falsehood, rarely require a victim, often only protect certain people, are arbitrarily enforced, and are often criminal rather than civil in nature.⁵
16. It is on these grounds that laws ostensibly protecting specific "vulnerable classes" could be used to silence legitimate speech involving no actual incitement to violence, in violation of the right protected under Article 19 of both the Universal Declaration of

³ Manasi Gopalakrishnan, *DW*, "Germany treads thin line between hate speech and free expression," 19th April 2016, available at: <http://www.dw.com/en/germany-treads-thin-line-between-hate-speech-and-free-expression/a-19199024>; Patrick Evans, *BBC News*, "Will Germany's new law kill free speech online?" 18th September 2017, available at: <http://www.bbc.com/news/blogs-trending-41042266>.

⁴ Melissa Eddy & Mark Scott, *The New York Times*, "Delete hate speech or pay up, Germany tells social media companies," 30th June 2017, available at: <https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html>.

⁵ Paul Coleman, *Censored: How European "Hate Speech" Laws are Threatening Freedom of Speech*, Kairos Publications, 2016, 8-10.

Human Rights and the International Covenant on Civil and Political Rights, as well Article 10 of the European Convention on Human Rights.

(b) Parental Rights and the Right to Education

17. Article 18(4) of the International Covenant on Civil and Political Rights recognizes “the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” Article 26(3) of the Universal Declaration of Human Rights also states that “parents have a prior right to choose the kind of education that shall be given to their children.”

18. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights is equally explicit in guaranteeing the right to alternative forms of education, reading:

The States Parties [...] undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

19. Nevertheless, German exemptions from conventional schooling are extremely rare, and home education is illegal in most cases. With the exception of a few families due to serious illness or other extreme circumstances, most of the several hundred families who home-educate their children, mostly due to having religious beliefs and values with which state curricula conflict, do so on an underground and illegal basis.⁶

20. Sanctions levelled against parents for refusing to allow the state to dictate their children’s education have included heavy fines, removal of custody, and imprisonment. Attempts to have oppressive anti-homeschooling laws nullified under international law have failed, with the European Court of Human Rights having ruled, despite Article 2 of the European Convention on Human Rights also guaranteeing the right of parents to ensure ... education and training in conformity with their own religious and philosophical convictions,” that “schools represent society, and it is in the children’s interests to become part of that society” and that “the parents’ right to educate does not go as far as to deprive their children of that experience.”⁷

21. The Court agreed with German courts that these restrictions of parental rights were proportionate and justified by “the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions” and that not only should minorities with separate religious or philosophical views be excluded but that they also should not be permitted to exclude themselves.⁸ It is difficult to understand, however, what the right of parents to educate their children in conformity with their own

⁶ Home School Legal Defense Association, “Germany,” last accessed 5th October 2017, available at: <https://www.hslda.org/hs/international/Germany/default.asp>.

⁷ Konrad and Others v. Germany (application 35504/03), European Court of Human Rights, hosted on Home School Legal Defense Association, last accessed 5th October 2017, available at: https://www.hslda.org/hs/international/Germany/KONRAD_Decision.pdf, 3.

⁸ Ibid, 4.

religious and philosophical convictions can possibly mean if that right can be justifiably undermined in order to stop those religious and philosophical convictions being properly taught and internalized by the child.

22. In 2006, the Wunderlich family was fined several hundred euros due to homeschooling their children, and in 2008 they moved to France to continue homeschooling there. French officials removed their children from them in September 2009, but returned them a number of days later. In 2012, however, the family went back to Germany due to an inability to secure employment, and in October of that year, the German authorities made social services the legal custodians of the children.⁹
23. Following this, 20 police officers and social workers raided the family home and physically removed the children on 29th August 2013, a court only ordering their return on 19th September under the condition that the children's passports be confiscated, in order to prevent them from moving again, and that they be sent to public school. Full legal custody and passports were returned to the parents in August 2014, but the family continued to homeschool, and in August 2016 the European Court of Human Rights agreed to hear *Wunderlich v. Germany* on application from the Home School Legal Defense Association (HSLDA) and ADF International, which in April 2017 filed reply to Germany's arguments, which included the ironic claim that the seizure of the children and their forced attendance at the local school was necessary so that they would "learn to deal with those who think differently."¹⁰
24. The Romeike family were also fined for home educating their children, and in 2008 sought asylum in the United States due to "their legitimate fear of persecution" and to avoid further sanction from the German authorities, which they were granted in 2010 with the aid of HSLDA. In 2013, it appeared that the Obama administration would seek to cancel this asylum status and deport the family back to Germany where they could potentially face prosecution if they continued homeschooling, but this ultimately did not eventuate.¹¹ Other homeschooling families have also been forced to relocate from Germany to other countries in order to safeguard their families and avoid punishment.¹²
25. Unfortunately, some have not been fortunate enough to maintain even this living situation, including Petra Albrecht, who had brought her son Jayson to the United States in order to home educate him without government interference. She was detained in 2014 by immigration authorities due to having stayed longer in the United States than legally permitted, but her son was deported alone back to Germany where he now lives in a Berlin orphanage and is likely attending public school. Her desire had been to home educate him due to anti-Semitic bullying he had experienced in school,

⁹ ADF International, "Wunderlich v. Germany," last accessed 5th October 2017, available at: <https://adfinternational.org/detailspages/case-details/wunderlich-v.-germany>; Home School Legal Defense Association, "German Family Pleads for Help from European Court of Human Rights," last accessed 5th October 2017, available at: <https://www.hslda.org/LandingPages/Wunderlich>.

¹⁰ Ibid.

¹¹ J. Michael Smith, *Home School Legal Defense Association*, "Romeike Family Can Stay in U.S.," 2nd March 2015, available at: <https://www.hslda.org/legal/cases/romeike.asp>.

¹² Isa Hauck, *Home School Legal Defense Association*, "German parent flees, gives testimony," February 2016, available at: <https://www.hslda.org/hs/international/germany/201602120.asp>.

and was only forced to uproot her family and seek asylum overseas in the first place due to Germany having terminated her custody of him in response to her refusing to send him to public school.¹³

26. All of these cases are clear and obvious human rights violations under international law, not just the right of parents to educate their children in accordance with their convictions, but also the right to freedom of religion and the right to freedom of conscience under Article 18 of the ICCPR, as well as the duty and obligation of society and the State to protect the family as the natural and fundamental group unit of society under Article 23 of the same Covenant, which by its very nature necessarily requires not arbitrarily breaking up families in the pursuit of committing other human rights violations.

(c) Recommendations

27. In light of the aforementioned, ADF International suggests the following recommendations be made to Germany:

- a. Guarantee the rights to freedom of religion, conscience, and expression in light of the recent decision by the German legislature to redefine marriage, and ensure that no minister of religion is ever legally forced to perform a same-sex wedding, that individuals of faith are not forced to use their businesses and creative skills to promote same-sex marriage, and that “hate speech” laws are not cynically and arbitrarily deployed against defenders of traditional values and natural marriage;
- b. Refrain from applying criminal laws restricting freedom of expression in such a way that legitimate debate on policy issues is silenced and shut down, and limit the right to freedom of expression only insofar as that expression constitutes a direct and credible incitement to violence and not so-called “incitement to hatred”;
- c. Ensure that the rights to freedom of conscience and expression are fully protected, and in doing so repeal all legislation and regulations which criminalize or otherwise prohibit so-called “hate speech,” guaranteeing that freedom of speech can flourish wherever it does not constitute incitement to violence;
- d. Respect the right guaranteed under international law of parents to raise and educate their children in accordance with their moral and religious convictions, and repeal all laws which threaten to arbitrarily and unjustly deprive individuals of their parental rights and the integrity of their families on ideological grounds; and

¹³ Home School Legal Defense Association, “German (and U.S.) Federal Policy Claims Another Homeschool Family Victim,” 28th August 2015, available at: <https://www.hslda.org/hs/international/Germany/201508280.asp>; Christina Fialho, *Huffington Post*, “President Obama: Release Jewish Homeschooling Family Imprisoned in the United States,” 18th August 2016, available at: https://www.huffingtonpost.com/christina-fialho/president-obama-release-j_b_8001666.html.

- e. Recognize that the State has no legitimate authority under international law to mandatorily prescribe conventional education for all children, that individuals have the right to seek alternative forms of education, and that the prohibition and criminalisation of home education is a violation of international human rights law.



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