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## Introduction

1. ADF International is a global alliance-building legal organization that advocates for the right of people to freely live out their faith. 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 Fundamental Rights Agency of the European Union, and the Organization for Security and Co-operation in Europe.
2. This report has three main recommendations:
  - (a) Continue to recognize the harmful impact that “sexual orientation and gender identity” non-discrimination legislation has on freedom of religion and freedom of conscience
  - (b) Remove severe restrictions on the freedom of speech by repealing sections 188 and 283(2) of the Austrian Criminal Code.
  - (c) Ensure the free practice of religion for religious communities, without encroachment by the state.

### **(a) Protection of religious freedom in the provision of goods and services**

#### *Extension of anti-discrimination legislation*

3. In 2012, a draft proposal for an equal treatment bill was withdrawn after debate and strong opposition from Austrian entrepreneurs, civil groups, and the Catholic Church.<sup>1</sup> The bill would have prohibited unequal treatment due to “religion and belief, age or sexual orientation” in the provision of goods and services, such as housing, extending further already existing unequal treatment laws.
4. This legislation is similar to the proposed Fifth Equal Treatment Directive, which has been rejected at the European Union level since 2008 due to its controversial and far-reaching provisions.<sup>2</sup>

#### *Analysis*

5. Austria should be praised for refusing to enact legislation that forces business owners to choose between operating their business or following their conscience.
6. Legislation that prohibits unequal treatment due to religion and belief, age or sexual orientation violates freedom of religion and freedom of conscience. People do not leave their religion at home when they operate their business. They should not be forced to provide services in a manner that goes against their religious beliefs.

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<sup>1</sup> Gudrun Kugler, *Zero Tolerance in the Name of Tolerance: Non-Discrimination Legislation as a Shift from Equality to Privilege*, THE FAMILY IN AMERICA 243 (2013).

<sup>2</sup> See *id.*

7. Given experience in other countries,<sup>3</sup> enforcement of equal treatment legislation in Austria would likely be targeted at Christians, such as the Christian baker who does not want to bake a cake for a same-sex ceremony or a Christian inn owner who does not want to provide a room to unmarried couples.<sup>4</sup>

*Recommendation to the Council for the Government of Austria*

8. Continue to recognize the harmful impact that “sexual orientation and gender identity” non-discrimination legislation has on freedom of religion and freedom of conscience when such legislation is extended to the provision of the provision of goods and services.

**(b) Severe restrictions on speech**

*Speech laws*

9. Austria has restrictive speech laws. Of particular concern is a “religious insult” law in Section 188 of the Austrian Criminal Code. It states:

Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.

10. Section 283(1) of the Criminal Code prohibits:

...publicly, in a manner qualified to jeopardize public order or perceivable to the broad public, solicit[ing] or excit[ing] violence against a church, a religious society, another group of people defined by criteria of race, skin colour, language, religion or ideology, nationality, descent or national or ethnic origin, sex, disability, age or sexual orientation, or a member of such a group explicitly because of his/her membership to that group.

11. Section 283(2), effective 1 January 2012, further criminalizes public agitation against or harassment of a group listed in section (1) “in a manner that infringes human dignity and thereby tries to disparage it.”

12. Section 115(1) of the Criminal Code provides for imprisonment for a term of up to three months or a fine of up to 180 daily rates for publicly insulting or mocking someone.

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<sup>3</sup> See, e.g., Paul Coleman & Roger Kiska, *The proposed EU “equal treatment” directive How the UK gives other EU member states a glimpse of the future*, 5 URF 113 (2012).

<sup>4</sup> See *Bull & Anor v Hall & Anor* [2013] UKSC 73, <http://www.bailii.org/uk/cases/UKSC/2013/73.html>.

## Examples

13. In 2009, Austrian Member of Parliament Susanne Winter was convicted for saying that Mohammed would be considered a “child molester” today because of his marriage to Aisha.<sup>5</sup> She also was convicted of “incitement” because of comments on Muslim immigration. She received a suspended three-month prison sentence and had to pay a fine of €24,000.
14. Similarly, in February 2011, Elisabeth Sabaditsch-Wolff was fined for “denigration of religious doctrines.”<sup>6</sup> In late 2009, Sabaditsch-Wolff gave a series of three seminars about the dangers of radical Islam. An undercover journalist from a socialist newspaper recorded two of the seminars and gave the recording to the authorities. On the recording, she characterized the Islamic prophet Muhammad as a pedophile because he had intercourse with his nine-year-old wife, Aisha.
15. In September 2010, she was charged with “hate speech” in contravention of Criminal Code section 283. However, her charge was later changed to “denigrating religious symbols of a legally recognized religious group” under Criminal Code section 188 because there was little evidence that her statements were meant to be provocative.
16. On 15 February 2011, a judge in the Vienna Regional Court sentenced her to a €480 fine and payment of costs of the trial. Her fine would have been higher had she had an income and not been a housewife. In December 2011, an appellate court upheld the verdict. In December 2013, the Austrian Supreme Court upheld the verdict.<sup>7</sup> Sabaditsch-Wolff appealed the judgement to the European Court of Human Rights.
17. In December 2010, Helmut Griese was fined under section 188 for yodelling in his garden.<sup>8</sup> Griese’s Muslim neighbours said he was mocking the muezzin’s call to prayer, but Griese said he had no intention to insult them but was yodelling because he was in a good mood. To avoid a legal battle, Griese paid the fine.

## Analysis

18. Austria’s religious insult law under Criminal Code section 188 is in clear conflict with its international commitments to guarantee freedom of religion and freedom of expression, as found in articles 18 and 19 of the International Covenant on Civil and Political Rights and articles 18 and 19 of the Universal Declaration of Human Rights. Religions do not have a right not to be insulted or criticized, and believers do not have a right for their religions not to be insulted or criticized.

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<sup>5</sup> Kern, *supra* note 4.

<sup>6</sup> Soeren Kern, *A Black Day for Austria*, Gatestone Institute, 26 Dec. 2011, <http://www.gatestoneinstitute.org/2702/sabaditsch-wolff-appeal>.

<sup>7</sup> Baron Bodissey, *Elisabeth’s Voice: The final push to the ECHR*, GATES OF VIENNA, 8 Apr. 2014, <http://gatesofvienna.net/2014/04/elisabeths-voice-the-final-push-to-the-echr/>.

<sup>8</sup> Allan Hall, *Austrian, 63, fined 700 after Muslim neighbours claimed his yodelling mocked call to prayer*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-1339150/Helmut-Griese-fined-700-Muslim-neighbours-claim-yodelling-mocks-prayer.html>

19. The Human Rights Committee, the treaty-monitoring body for the ICCPR, states in paragraph 48 of its General comment No. 34, Article 19: Freedoms of opinion and expression,

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. [ . . . ] [It would not] be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

20. Section 188 does exactly that. It punishes people for making statements that criticize certain religious leaders or beliefs, as evidenced in the Sabaditsch-Wolff and Winter cases. Further, in 2006, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance issued a report stating, “Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.”
21. Section 188 effectively gives believers the right to have their religion protected from all adverse comment. The religious insult law has a chilling effect on speech also because it is unclear what speech will be prosecuted under the law. What constitutes a violation of the law is subjective. People will therefore refrain from criticizing religious views or speaking on social matters that have religious elements. It also infringes their right to exercise their freedom of religion, which necessarily includes discussion and criticism of other religions.
22. Section 283(2) is problematic for the same reasons. It is unclear what constitutes an infringement on human dignity; one cannot know when his speech is likely to result in prosecution and conviction under this law. What infringes human dignity is also an entirely subjective determination.

*Recommendations to the Council for the Government of Austria*

23. Protect and guarantee the right to freedom of expression and freedom of religion to the broadest extent provided for under international law by repeal sections 188 and 283(2) of the Austrian Criminal Code.

**(c) State Encroachment on the Free Practice of Religion**

*Background*

24. On 25 February 2015, the Austrian Parliament approved changes to the 1912 “Law on Islam.”<sup>9</sup> The law bans foreign funding of mosques, imams, and Muslim

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<sup>9</sup> Shadia Nasralla, *Austria passes ‘Law on Islam’ banning foreign money for Muslim groups*, REUTERS, 25 Feb. 2015, <http://www.reuters.com/article/2015/02/25/us-austria-muslims-idUSKBN0LT28420150225>.

organizations. It also requires the use of a standardized German-language version of the Quran and requires imams to be able to speak German.

### *Analysis*

25. The new law is a severe encroachment by the state on the affairs of religious communities and sets a dangerous precedent that could affect all religions and denominations in Austria, especially those that are not widely practiced. When the government decides it should be the one to determine standards for one religion, it may decide to determine standards for others.
26. The law violates the autonomy of religious communities and hinders the free practice of religion, in contravention of article 18 of the International Covenant on Civil and Political Rights. Freedom of religion is not just for individuals, but also for communities. Article 18(1) guarantees freedom to manifest one's religion or belief, "either individually or *in community with others* and in public or private [ . . . ] in worship, observance, practice and teaching."
27. Religious freedom is impaired when the government mandates how religious communities should operate. In this case, the government is mandating how worship, observance, practice, and teaching should look for religious communities in Austria by dictating that there will be one accepted standard translation of a religious text.
28. The government should not be the arbiter of truth when it comes to translation of religious texts. Houses of worship and religious communities should be able to determine for themselves which versions of religious texts are true and accurate. Often the very question of translation and interpretation of religious texts causes disagreement among religious groups and distinguishes one group from another. The government cannot decide which group has the correct understanding of a religion.
29. While the government can and should encourage fiscal transparency, a ban on foreign funding is extreme. Religious communities should be able to worship freely with their fellow communities in other countries, which often involves financial support and sending clergy to other countries.

### *Recommendation to the Council for the Government of Austria*

30. Ensure the free practice of religion for religious communities, including the right to decide for themselves their own translations of religious texts and to receive funding from fellow believers in other countries.