

Presentation: *E.S. v. Austria* and its Implications for Article 10 Jurisprudence

By Roger Kiska  
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It is a pleasure to be in Strasbourg with you to discuss the issue of freedom of expression, disparagement of religious doctrines and the *E.S.* judgment from 25 October 2018.

The facts are fairly straightforward. The applicant, whom the Court anonymised as *E.S.*, was giving several seminars from January 2008. In October 2009 she held two seminars at the Freedom Party Education Institute. While the Court notes that the seminar was advertised to the general public, it also notes that the venue and the host were widely known for what the Court labels as ‘right-wing’ views. Therefore, it would have been no surprise to anyone attending the seminar that the opinions about Islam would likely be very critical. This is evidenced by the fact that an undercover journalist attended the event hoping to find some controversy.

The comments which the Court determined to disparage Mohamed, a figure which the Austrian domestic courts and the European Court held worthy of reverence, consisted of remarks which implied that because Mohamed consummated a relationship with a 9 year-old-girl, Aisha, whom he had married at the age of 6, that this meant that he was a paedophile. The lower court went to great lengths to assess the truth of the statements, even quoting the World Health Organisation’s definition of paedophilia as the gold standard of how the term should be used.

In summary, the lower court found the Applicant guilty of defaming a figure of religious veneration on the grounds that her comments, within the context of a seminar, were not academic enough and therefore should be considered as value judgments, rather than statements of fact. The comments were deemed to unnecessarily disparate Mohamed. The lower court further held that because the seminar was open to the public, it could have led to religious disharmony. And finally, that because child-marriages were common at that time, that Mohamed’s actions could not have amounted to paedophilia.

The Fifth Section of the Court provided little analysis or guidance in determining that the Applicant’s Article 10 rights were not interfered with by the criminal conviction; in essence holding that the judgment fit within Austria’s margin of appreciation and that the criminal fine was fairly moderate.

Before discussing the ruling further, it is first worth considering what ‘hate’ speech actually is. It seems nowadays, everyone is accusing everyone else of being guilty of ‘hate’ speech.

But the fact is, nobody knows what it is. And that is a large part of the problem. At a minimum, I would call ‘hate’ speech a form of weaponised political correctness with criminal consequences.

‘Hate’ speech appears to mean just what people choose it to mean – neither more nor less. A factsheet produced by the European Court of Human Rights admits that there: “*is no universally accepted definition of ‘hate’ speech*” and a previous fact sheet observed that: “*The identification of expressions...[of] ‘hate’ speech is sometimes difficult because this kind of*

*speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal.”*

So, according to fact sheets from the highest human rights Court in Europe intended to simplify and explain the law, ‘hate’ speech is (a) without definition, (b) difficult to identify and (c) can sometimes appear rational and normal. Is this really what we want to criminalize?

In the recent case of *Vejdeland v. Sweden*, the European Court held that while the particular speech in question “*did not directly recommend individuals to commit hateful acts,*” the comments were nevertheless “*serious and prejudicial allegations*”. The Court further stated that “[*a*ttacks on persons” can be committed by “*insulting, holding up to ridicule or slandering specific groups of the population*” and that speech used in an “*irresponsible manner*” may not be worthy of protection.

However, for decades the Court has held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. It has time and time again held that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that “*offend, shock or disturb*”.

And so I ask, who here in this room would be confident of placing certain expressions in the ‘protected category’, on the basis that there is a fundamental right to use speech which “*offends and shocks*”, and place other expressions in the ‘criminal category’, on the basis that such speech is “*serious and prejudicial*”? What is the difference between protected “*offensive and shocking*” speech on the one hand and criminal “*serious and prejudicial*” speech on the other hand? The answer is that nobody knows, and it is increasingly clear that whichever group shouts the loudest gets to decide what is and what is not criminal speech; and that is bad for fundamental freedoms and bad for the principles of legal certainty and for the rule of law.

The result of such ‘hate’ speech provisions is a reduction in the fundamental right to freedom of speech. Instead of being free to disagree with one another and having robust debate and a free exchange of ideas, ‘hate’ speech laws shut down debate and create a heckler’s veto. In the end, a chilling effect is created that leads to self-censorship and an overly sensitive society.

Let me be clear, the right to question whether or not Mohamed was a figure worthy of veneration should fall squarely within the realm of protected speech. Whether child marriages were commonplace at the time is irrelevant. I would suggest that the whole notion that Mohamed is held up as a figure worthy of veneration means that as a matter of public debate, we can question his moral character. While others were engaged in child bride marriages, none of those individuals are being held out as holy figures. This is an important distinction. If Mohamed is being held out as a figure who should be emulated, we should be able to discuss all of his moral choices and hold him to a higher moral standard than others. The academic study of history demands as much.

History points out unsavoury facts about national and religious heroes all of the time. American President Thomas Jefferson was a slave-owner. Ghandi is widely rumoured to have been an adulterer. Aristotle approved of pederasty.

I think the margin of appreciation argument fails on two grounds. First, Austria is a country of religious tolerance. The conflicts you see among different religious communities in other parts of Europe simply do not happen in Austria. The idea that one seminar questioning the morality of Mohamed can seed religious discord I think is grossly exaggerated. Using the Court's own standard, I think it clear that the interference with the Applicant's article 10 rights was therefore not necessary in a democratic society and lacked proportionality.

Second, I would suggest that there is a significant double standard being used by the Austrian courts in its application of Article 188. Case in point, the famous Life Ball in Austria, an annual event raising money for HIV/AIDS a few years ago ran a controversial billboard campaign around Vienna showing a nude transgender model with both male and female genital exposed. The backdrop of the photo is the Garden of Eden and reference is made to Adam and Eve. The story of the Garden of Eden is a Biblical event from the Book of Genesis held in common by Jews, Christians and Muslims. The posters were in full view of everyone who passed them on the streets, including the religiously sensitive and children.

I would suggest that these posters represented a far more egregious disparagement of religious doctrine, in that they were incredibly graphic in nature and viewed by potentially millions of people, then compared to the statements made to 30 people in a seminar who's target audience would have been supporters of the Freedom Party. It is this inconsistency... this self-selection of what is and what is not 'hate' speech which makes 'hate' speech such an insidious and controversial subject. And bad case-law, particularly at the level of the European Court, has consequences which are far-reaching.

I would note that The Evening Standard, a national newspaper in the United Kingdom, has recently reported that girls as young as 10 are among hundreds of suspected forced marriages and honour crime victims in London. I would therefore suggest that the ability to question, or even disparage Mohamed for having had a child-bride, particularly when there is evidence that these types of forced relationships are still happening is a matter of public debate. The fact that it was once common practice does not mean that it should not be the subject of public scrutiny today. Slavery was once common practice. Yet we still criticise historical figures who owned slaves, and rightly so.

The Casey Review, a year-long Parliamentary study of community cohesion in the United Kingdom, observed that: "too many public institutions, national and local, state and non-state, have gone so far to accommodate diversity and freedom of expression that they have ignored or even condoned regressive, divisive and harmful cultural and religious practices, for fear of being branded racist or Islamophobic."

While the United Kingdom presents an interesting case study of its own in relation to 'hate' because of the increasing censorship of speech (particularly on university campuses and in the media), the same speech used in the *E.S. v. Austria* case would not have led to any sanction in Britain. This is because of two important amendments added to the Public Order Act: Section 29J and Section 29 JA, which allow for the criticism of other religions and religious figures, as well as speech relating to sensitive sexual matters.

The case of *Redmond-Bate v. Director of Public Prosecutions* dealt with the issue of street preachers and religious doctrines which might cause offense. Lord Justice Sedley, delivering the majority opinion wisely noted that: "*If the threat of disorder or violence was*

*coming from passers-by who were taking the opportunity to react so as to cause trouble, then it was they and not the preachers who should be asked to desist and arrested if they would not.”*

This I believe to be the proper standard. In a democratic society, we cannot censor speech simply because it may offend some and lead to disharmony. We have seen all too well with the censorship of cartoons depicting Mohamed, that this is a slippery slope. If we are to censor speech which may trigger violence or discord among a certain radical segment of the population; then the question is how many of our freedoms are we to discard to appease those who want nothing more than to bring an end to our culture and values. I think Justice Sedley provides the better response; that being that those who disproportionately respond to otherwise lawful activity or speech should be the one's punished for their unlawful behaviour, and not the speaker.

The issue we are finding, particularly in Western Europe, is not necessarily the criminal punishment of speech deemed to be offensive or hateful. It is that society has become over-sensitive to certain forms of speech critical of things like religion, sexual orientation or anything which enters the realm of identity politics. The result has been felt in the areas of employment and on university campuses. Examples abound in the United Kingdom where students have been removed from courses or denied professional accreditation because they hold views which conflict with the current cultural *zeitgeist*. Others have been sacked from their jobs for sharing their views, including on social media platforms outside of their work environment.

The problem with imputing hateful motives or suggesting that truth is not a defence to offensive speech is that it has the potential to create a chilling effect on anyone making a statement which may attract controversy. This chilling effect could massively outweigh any public benefit to protecting some people from offense. The impact could be far-reaching and could severely stifle academic freedom for example.

The *E.S.* court goes to great pains to separate fact and value judgment. I would counter that by noting that the vast majority of academics, apart from math and some of the sciences, deals with value judgments. History, philosophy, psychology, sociology and so on, and so forth, all deal with value judgements being held out as facts.

To conclude, I will only say that I think the Court is on very shaky ground with the *E.S.* judgment. I think this is a case of tremendous importance, and one which should be taken up by the Grand Chamber. The lines of what is and what is not permissible speech have become far too blurred. And in the case of *E.S. v. Austria*, the stakes are too high for the Court not to address this issue.