Banning Speech in the Public Space: Grand Chamber Agrees

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In January 2011, the First Section of the European Court of Human Rights held in Mouvement Raëlien Suisse v. Switzerland that there had been no violation of the right to freedom of expression where Swiss police authorities had banned a poster campaign by a quasi-religious association. Two section presidents dissented, and in a previous post I pointed to the strong likelihood of the judgment being reconsidered by the Grand Chamber, given the important principles involved. Fast forward to July 2012, and the Grand Chamber has affirmed the chamber judgment by the narrowest of margins, a 9-8 vote.

Facts

The applicant association was the Swiss branch of the Raëlien Movement, an international association whose members believe life on earth was created by extraterrestrials. The association sought to conduct a poster campaign, with the posters featuring extraterrestrials, flying saucers, and the words “The message from the extraterrestrials. At last science replaces religion”. The poster also included the website address of the Raëlien Movement.

The police authorities refused permission for the poster campaign on the grounds of public order and morals, and the domestic courts upheld this decision. The Swiss courts held that although the poster itself was not objectionable, because the Raëlien website address was included, the Court had to have regard to documents published on the website. The courts held the poster campaign could be banned on the basis that: (a) there was a link on the website to a company proposing cloning services; (b) the association advocated “geniocracy” i.e. government by those with a higher intelligence; and (c) there had been allegations of sexual offences against some members of the association.

Chamber Judgment

The association made an application to the European Court arguing that the ban on its poster campaign violated its right to freedom of expression under Article 10. The First Section held by five votes to two that there had been no violation of Article 10. The crux of the First Section’s judgment was the holding that domestic authorities have a wide margin of appreciation where the authorities wish to regulate use of the public space, accepting the Swiss government’s argument that allowing the poster campaign might have implied that the authorities endorsed or tolerated the views of the Raelien Movement. This “implied state endorsement” argument created a consequent wide margin of appreciation, allowing the Court subject the reasons given by the Swiss courts to minimum scrutiny, with the Court concluding that the reasons for the ban were relevant and sufficient.

Grand Chamber

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The Grand Chamber accepted a request for referral, and by nine votes to eight, also concluded that the refusal to permit the posters was not a violation of Article 10. However, while the Grand Chamber comes to the same conclusion as the First Section in finding no violation, the majority opinion takes a markedly different route to this conclusion. The Court reasoned that because the main aim of the poster and website was to merely draw people to the cause of the Râelien Movement, the speech at issue was to be categorised as somewhere between commercial speech and proselytising speech. States were granted a wide margin of appreciation when regulating such categories of speech, and therefore, the Court would only substitute its own assessment of the reasons for the poster ban in very limited circumstances.

The majority concluded that the Swiss courts were reasonably entitled to consider that (a) the website link to a company proposing cloning services; (b) advocacy of “geniocracy”; and (c) allegations of sexual offences, when taken together justified the poster ban. Thus, there had been no violation of Article 10.

Comment

There has already been a good deal of criticism of the majority opinion (see here and here), and throughout the 37 pages of dissenting opinions. However, it is important to highlight a possible silver lining to the majority opinion when we consider it in the light of the First Section judgment:

The most objectionable part of the First Section’s reasoning was its conclusion that the domestic authorities enjoy a wide margin of appreciation in regulating the public space on the basis that the city authority did not want to create the inference that it supported or tolerated the views of the Râelien Movement. The entire judgment hinged upon this holding, as the consequent wide margin of appreciation allowed the Court subject the reasons for the ban to minimum scrutiny.

In a previous post I pointed out that this “implied state endorsement” argument was the most dangerous aspect of the judgment, as it arguably granted domestic authorities greater discretion to prohibit speech in the public space because they disagree with the content of the speech or the views of the speaker, as opposed to content-neutral considerations such as space or aesthetics; and could be applied to political groups wishing to use the public space.

However, a close reading of the Grand Chamber majority opinion reveals that the Court abandoned this “implied state endorsement” rationale upon which the First Section judgment was premised. Indeed, in its summary of the chamber judgment, the Grand Chamber deliberately omits this crucial aspect of the First Section’s reasoning. Instead, the majority opinion created a new rationale for granting a wide margin of appreciation to the Swiss authorities, namely the categorisation of the speech involved.

The abandonment of the “implied state endorsement” rationale can only be welcomed, and the Grand Chamber majority must be commended for this approach. Although the categorisation argument is not flawless, it means that the broader application of the Mouvement Râelien judgment is radically curtailed, and arguably removes the threat to political groups and political speech in the public space.