Adalah Briefing Paper
The Legality of the Promotion of Boycotts in Comparative Law
July 2011

In light of the passage of what has become known as the "Boycott Law"[1] in Israel this month, this brief paper will examine the legality of promoting boycotts in comparative law. This paper surveys some principal rulings handed down in the United States, Germany and Canada in cases in which courts were asked to award compensatory damages against parties calling for boycotts. Several of these rulings were delivered in response to situations astoundingly similar to the political situation in Israel, where these decisions discussed the legality of boycotts promoted by parties against institutions that they perceived to be racist or discriminatory. These rulings deal with the special relationships regarding those who call for boycotts and corporations, between African-Americans and Whites who practice discrimination; between indigenous tribes and institutions or corporations which operate to exploit their natural resources; between women's organizations and institutions which discriminate against women based on their gender; and between Jews and racist groups.

1. **United States**.

1.1 The US courts explicitly determined that the right to freedom of expression protects non-verbal communications regarding public issues in the form of political boycotts.[2] The US Supreme Court protects economic boycotts motivated by political considerations, but upholds liability for violent action.[3] The protection stems from the view that a call for political boycotts is part of the right to political freedom of expression anchored in the US Constitution. As US Supreme Court Justice Brennan stated:

> "Like soapbox oratory in the streets and parks, political boycotts are a traditional means of "communicating thoughts between citizens" and "discussing public questions."[4]

[1] *See Israeli Human Rights Groups: The Anti-boycott Law Harms Freedom of Expression and Targets Nonviolent Political Opposition to the Occupation*, ADALAH.ORG (12 July 2011), http://www.adalah.org/upfiles/2011/12_July_2011_antiboycott.pdf

[2] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982) (holding that a political consumer boycott is free speech under the First Amendment and protected against common law tort liability for business interference). See also *Kids Against Pollution v. California Dental Association*, 108 Cal. App. 4th 1003, 1024 (Cal. Ct. App. 2003).

[3] *Id.* ("We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. . . The First Amendment does not protect violence.").

[4] *Id.* at 448 (Brennan, J.) (1990) (quoting *Blague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

1.2 In the case of *National Association for the Advancement of Colored People (NAACP) v. Claiborne Hardware Co. (1982),*[5] concerning the NAACP (the oldest and largest American civil rights of organization formed to fight for the civil rights of African-Americans) the US Supreme Court determined that economic damages caused by a political boycott are not grounds for compensation in a civil suit brought by businesses, if they were caused by nonviolent behavior. This case began with an NAACP call for boycott on white merchants in Claiborne County, Mississippi. The aim of the boycott was to cause white political leaders to ensure equal rights and racial integration for African-American residents of the county. In response to financial losses caused by the boycott, the businesses sued the NAACP for damages and sought compensation for business owners. The case reached the US Supreme Court, which ruled that the boycotters could not be held liable for the boycotted businesses' financial losses. The US Supreme Court noted the boycott's nonviolent character to underscore that the boycott did not fall outside political expression protected by the US Constitution. The Court held that under the rubric of the boycott only damages caused by violence would be liable for compensation. The Court determined that the petitioners sought to bring about political, social, and economic change through exercising their freedom of expression. The Court stated:

> "[T]he boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable...Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens. . . . While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."[6]

1.3 In another case, *NAACP v. Alabama ex rel. Flowers (1964),*[7] the NAACP was sued by the State of Alabama for alleged illegal activities for its noncompliance with permit requirements for organizations in the State. Among other reasons, the State claimed that it did not grant a permit to the organization to conduct activities because of its involvement in the support and financing of an illegal boycott on the transportation system in Montgomery. This boycott was imposed by the organization as a means of bringing about change in the State's racist policy towards its African-American residents. The Court held that it is unconstitutional to infringe upon the right to freedom of association. The Court also determined that even if one were to accept the State's dubious assertion that struggle against state policy by organized refusal to use public transportation violates state law, this violation cannot constitute a legal ground for the infringement of the organization's right to associate. Freedom of association to realize ideas and beliefs is inseparable from the right to free speech. In the words of the court:

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[5] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
[6] *Id.* at 911-13 (citations omitted).
[7] 377 U.S. 288 (1964).

> "Even if we were to indulge the doubtful assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law, such a violation could not constitutionally be the basis for a permanent denial of the right to associate for the advocacy of ideas by lawful means. As we said at a prior stage in this litigation: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[8]

1.4 The United States 8th Circuit Court of Appeals, in the matter of the National Organization for Women (NOW)[9] also protected the promotion of and participation in a political boycott that caused financial losses to businesses in the State of Missouri, emphasizing that freedom of expression protected boycotts directed at influencing state legislatures. In this case, NOW had organized a boycott campaign against states that had not ratified the Equal Rights Amendment. The boycott included refraining from holding conferences in these states, causing financial harm to hotels and restaurants that could have provided services for these conferences. The state claimed that this boycott involved a conspiracy and collusion thus violating the antitrust laws and resulting in unjustified financial damages. The state's claims were rejected by the 8th Circuit that determined the campaign was not illegal and that the organization's activities were protected by the First Amendment of the US Constitution.

2. **Canada**.

The Ontario Court of Justice granted constitutional protection to a boycott by the Friends of the Lubicon Tribe, which is active in the advancement and realization of the rights of the Lubicon Indian Tribe in the Canadian province of Alberta.[10] In this matter, the organization called for a boycott of a business that was building a wood mill that would process trees cut down in the tribe's territory and contribute to environmental damage of the tribe's lands. The company targeted by the boycott sued the organization but the Ontario Court rejected its claims. The court determined that although the boycott imposed by the defendants had severe financial consequences, the organization sought to raise a public issue and highlight the business's contribution to the infringement of the tribe members' rights. In addition, the boycott attempted to change the plaintiff's position. The Canadian court concluded that political boycotts and picketing to expose those continuing to carry out business with the offending company are legal in a democratic society that values freedom of expression. In the words of the court:

> "In summary … I concluded that the Friends' boycott and picketing activities were lawful in a democratic society which places a high value on free speech. I also concluded that the manner in which the Friends conducted their activities was fair (for example, they scrupulously included Daishowa's materials in the packages they sent to consumers) and properly respectful of

[8] *Id.* at 307 (quoting 357 U.S., at 460, 78 S. Ct., at 1171).
[9] *State of Mo. v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980)
[10] *Daishowa Inc. v. Friends of the Lubicon*, 39 O.R. (3d) 620 (Ont. Rep. 1998).

> the rights of others (for example, during picketing activities they made no attempt to prevent people from entering a store)."[11]

3. **Germany**.

In Germany, the Constitutional Court deliberated the petition of Lüth, who was an activist in an association promoting reconciliation between Christians and Jews in the wake of the Holocaust. The case began after Harlan, a film director infamous for his anti-Semitic Nazi propaganda films, directed a new film. Lüth, who was also president of the Hamburg Press Club, spoke before film distributors and producers and called for a boycott of Harlan's new film. The call for a boycott was motivated by Lüth's desire to show the world that the film industry of post-war Germany was free of the influence of the Nazi period. Lüth believed that the director's Nazi past would draw criticism of Germany from outside the country and from within. As a result of the boycott called by Lüth, the film's producer petitioned a civil court demanding that Lüth be prevented from calling for the boycott of the film. The civil court granted the requested order and determined that Lüth violated Germany's Civil Law Article 826 obligating a person who intentionally harms another to compensate him. Lüth appealed to the Constitutional Court which accepted his petition and reversed the order, determining that his constitutional right to freedom of expression had been violated. The Constitutional Court defended Luth's call for a boycott as part of an open public discourse on subjects relating to public life in the country. The German Constitutional Court stated:

> "The relationship between basic rights and the private legal order must be calibrated as follows: general statutes must be interpreted in light of the important limiting effect of basic rights, so that a specific content of the basic rights carries over into all areas of law out of recognition of the fundamental importance of free discussion to a free democratic order. This leads to a presumption that free discussion is protected, and must be preserved especially concerning matters of public life. The mutual relationship between basic rights and general statutes is thus not a one-sided limitation of the effect of basic rights through 'general statutes' but must be interpreted in light of recognition of the value-establishing significance of basic rights for a free democratic state so that the basic right itself establishes a limitation on general statutes."[12]

[11] *Id.* at 143.
[12] BVerfGE 7, 198 (1958); Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, n.75 (1997) (quoting 7 BVerfGE 198 (208-09)).