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The right to boycott: BDS, law, and politics in a global context

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ABSTRACT

This article discusses the global campaigns for boycott, divestment, and sanctions (BDS) against Israel, which frame their objectives primarily in legal terms, as well as the transnational strategy to suppress BDS campaigns by means of the law. After arguing that the strategy to suppress BDS campaigns by means of the law exemplifies an instrumentalisation of law that is fundamentally at odds with the rule of law, I discuss two landmark judgments that recognised a right to boycott, and demonstrate that what is ultimately at stake in these judgments is the right to participate in politics. I then analyse the various concepts of politics exemplified by the campaigns for BDS. Reflecting on the relationship between BDS, law, and politics in a global context, I pose the question how law might facilitate emancipatory and transformative politics across the boundaries of the nation-state.

KEYWORDS Right to boycott; BDS; law and politics; global solidarity activism; fundamental rights

On 9 July 2005, the first anniversary of the International Court of Justice's Advisory Opinion that found the construction of a separation wall in the Occupied Palestinian Territories to be a violation of international law,[1] 171 Palestinian civil society organisations, political parties, and unions issued the following call:

> We, representatives of Palestinian civil society, call upon international civil society organizations and people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era. We appeal to you to pressure your respective states to impose embargoes and sanctions against Israel. We also invite conscientious Israelis to support this Call, for the sake of justice and genuine peace.

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[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004, [136], online: <www.icj-cij.org/en/case/131>.

> These non-violent punitive measures should be maintained until Israel meets its obligation to recognize the Palestinian people's inalienable right to self-determination and fully complies with the precepts of international law by:
>
> 1. Ending its occupation and colonization of all Arab lands and dismantling the Wall
> 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
> 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.[2]

Individuals and organisations from all over the world have responded to this call, including student groups, churches, professional organisations, city councils, and activist groups in countries such as the United States, Canada, India, South-Africa, Ireland, the United Kingdom, France, Spain, Italy, Germany, the Netherlands, and, indeed, Israel itself.[3]

The myriad campaigns for boycott, divestment, and sanctions (BDS) against Israel have provoked the Israeli government, and NGOs affiliated with the Israeli government, to implement a transnational strategy to suppress BDS. This strategy intensified after the 2009 publication of the UN fact-finding mission report on the 2008–09 Gaza war, authored by South African human rights lawyer Richard Goldstone, which discovered 'numerous instances of deliberate attacks on civilians and civilian objects'; concluded that some attacks were 'launched with the intention of spreading terror among the civilian population'; and found that the Israeli army arbitrarily withheld access to the wounded for medical relief.[4] Because the report was considered highly damaging to Israel's international reputation, Israeli prime minister Benjamin Netanyahu declared what he called the 'delegitimisation' of the Israeli state to be a critical threat to Israeli security. Therefore, the Israeli government began to impose various restrictions on human rights organisations that exposed human rights violations by the Israeli state, including Amnesty International and Human Rights Watch.[5] The global campaigns for BDS were also cast as a major security threat. Systematic attempts to suppress them were not only made by the Israeli government, but also by NGO's closely affiliated with it, such as Im Tirtzu and NGO Monitor, whose tactics of discrediting human rights organisations and BDS activists both within Israel and around the world have been well-documented.[6]

[2] 'Palestinian Civil Society Call for BDS' *BDS Movement* (9 July 2015), online: <https://bdsmovement.net/call>.
[3] See, for instance, Nathan Thrall, 'BDS: How a Controversial Non-violent Movement Has Transformed the Israeli-Palestinian Debate' *The Guardian* (14 August 2018), online: <www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate>.
[4] UNCHR, 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (15 December 2009) UN Doc A/HRC/12/48, 414.
[5] For a critical analysis of this development, see Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (Oxford University Press 2015).
[6] See, in particular, 'Shrinking Space: NGO Monitor: Defaming Human Rights Organizations that Criticize the Israeli Occupation' a report by the Policy Working Group (September 2018). A link to the report can

Apart from intense lobbying and propaganda campaigns, the attempts to suppress BDS prominently include a transnational strategy to censor it by means of an instrumentalisation of the law.[7] For instance, in 2013, fourteen French activists were sentenced to fines of 1000 euros each and to pay a total of 28,000 euros in damages for discrimination, because they had entered a supermarket wearing t-shirts with the slogan, '*Palestine vivra* [long live Palestine], boycott Israel', and handed out flyers with the text, 'Boycott products from Israel, to buy Israeli products means legitimating the crimes committed in Gaza, and supporting the politics of the Israeli government'.[8] At the time of writing, the case was still pending before the European Court of Human Rights,[9] but in its 2009 judgment of *Willem c. France*, the court did not find a violation of the right to freedom of speech of a French mayor who had been criminally convicted for asking the city hall's caterer to boycott Israeli fruit juice in order to protest Israel's 'anti-democratic politics'.[10]

In the United States, more than a hundred measures targeting boycotts and Palestinian rights activism have been introduced in local, state, and federal legislatures since 2014, and so far, twenty-seven states have adopted anti-BDS laws, including five executive orders issued by state governors.[11] For instance, in 2017, a federal 'Israel Anti-Boycott Act' was introduced, which was aimed at criminalising participation in boycott activities under penalty of heavy fines and even prison sentences. This bill did not pass, but an updated version was introduced in 2018, and in 2019, the Senate passed a 'Combating BDS Act', which seeks to authorise state and local governments to pass laws prohibiting the state from contracting with or investing in entities that boycott Israel.[12] States have passed prohibitions of state pension funds investing in companies that boycott Israel or the illegal Jewish-only settlements in the Occupied Palestinian Territories, and laws that prohibit BDS as a condition of public employment or receiving government benefits, for instance in the case of Hurricane Harvey victims.[13] Courts have found

be found at online: <www.middleeastmonitor.com/20181001-new-israel-report-exposes-role-of-ngo-monitor-in-defaming-rights-activists/>. See also Amal Jamal, 'The Rise of "Bad" Civil Society in Israel: Nationalist Civil Society Organizations and the Politics of Delegitimation' (Stiftung Wissenschaft und Politik 2018), online: <https://www.swp-berlin.org/en/publication/israel-the-rise-of-bad-civil-society/>.

[7] Jeff Handmaker has described this instrumentalisation of the law as a form of 'lawfare'. Jeff Handmaker, 'Ending Impunity Using a Human Face: BDS as Legal Mobilization' (draft, submitted for publication, 31 March 2019). For a genealogy of the term 'lawfare', see also Perugini and Gordon (n 5) 59.

[8] Cass. Crim., 20 October 2015, n 14-80021, ECLI:FR:CCASS:2015:CR04238 (rejet pourvoi c/CA Colmar, 27 nov. 2013), M.Guérin, prés. ; M[e] Carbonnier, SCP Lyon-Caen et Thiriez SCO Waquet, Farge et Hazan, av.

[9] 'Call for Boycott: ECHR Requests Explanations from France' *Association France Palestine Solidarité Press Release* (15 April 2017), online: <www.france-palestine.org/Call-for-Boycott-ECHR-requests-explanations-from-France>.

[10] *Willem c France* App No 10883/05 (EHRM, 16 July 2009). I will discuss these judgments in section I.

[11] 'Anti-Boycott Legislation Around the Country' *Palestine Legal* (10 April 2019), online: <https://palestinelegal.org/righttoboycott>.

[12] 'Federal Legislation' *Palestine Legal* (8 August 2019), online: <https://palestinelegal.org/federal>.

[13] See also: 'Recent Legislation' (2016) 129 *Harvard Law Review* 2029.

some of these laws to be in blatant violation of the Constitution, arguing that BDS is protected by the First Amendment.[14]

In 2016, the British Secretary of State for Communities and Local Government issued a statutory guidance prohibiting local governments to use decisions on pension investments 'to pursue boycotts, divestment and sanctions ["BDS"] against foreign nations and UK defence industries … other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government'.[15] In 2017, the High Court of Justice found that this statutory guidance fell outside of the Secretary's competence and was therefore unlawful, but in 2018, the Court of Appeal overturned this ruling arguing that the government's prohibition 'fell within the powers conferred by the legislation'.[16]

In 2016, the Toulouse City Council refused to allow a support committee for four criminally prosecuted BDS activists to make use of a room that was owned or subsidised by the City.[17] The administrative court determined that this refusal was a severe and manifestly illegal attack on the freedom of assembly.[18] In 2017, the mayor of Frankfurt similarly decided to refuse a BDS committee's request to make use of meeting spaces owned by the city, and called on private owners of meeting spaces to do the same.[19] In 2016, the City of Oldenburg, Germany, cancelled a rental contract for a BDS event in the city-owned cultural centre over alleged anti-Semitism. Oddly, the Oldenburg Administrative Court argued that the BDS activists did not sufficiently prove that their campaign was *not* anti-Semitic, but the Higher Administrative Court argued that there was no evidence that the campaign violated the fundamental principles of the liberal-democratic order.[20] In 2019, the Administrative Court of Cadiz, Spain, declared the City Council's 2016 'Israeli

[14] For a recent example, see *Bahia Amawi v Pflugerville Independent School District*, U.S. District Court for the Western District of Texas, Austin Division, 25 April 2019, Case 1:18-cv-01091-RP. See also, Ryan Grim and Glen Greenwald, 'U.S. Senate's first bill, in the midst of the shutdown, is a bipartisan defense of the Israeli Government from boycotts' *The Intercept* (5 January 2019), online: <https://theintercept.com/2019/01/05/u-s-senatesfirst-bill-in-midst-of-shutdown-is-a-bipartisan-defense-of-the-israeli-government-from-boycotts/>.

[15] See *Palestine solidarity committee and Lewis v SSCLG* [2017] EWHC 1502, [1]

[16] *Ibid*, and Ben White, 'Legal Battle Between PSC and UK over Pension Fund Divestment' *Alijazeera* (17 June 2018), online: <www.aljazeera.com/news/2018/06/pensions-bds-palestine-solidarity-group-court-uk-180627142104543.html>.

[17] 'Letter of the Mairie de Toulouse to the vice president of Attac Toulouse' (26 May 2016), online: <www.facebook.com/soutieninculpesBDStoulousains/photos/pb.906976572691602.-2207520000.1464726127./1025182987537626/?type=1&theater>. See also the statement of the Ligue des droits de l'homme, 'L'appel au boycott des produits israéliens: une expression citoyenne qui doit rester libre' *Ligue de droit de l'Homme* (30 May 2016), online: <www.ldh-france.org/lappel-au-boycott-produits-israeliens-expression-citoyenne-rester-libre/>.

[18] Cited on 'Victoire contre le maire de Toulouse!' *BDSFrance* (31 May 2016), online: <www.bdsfrance.org/victoire-contre-le-maire-de-toulouse/>.

[19] 'Antisemitismus keinen Raum geben' *Frankfurt.de* (25 August 2017), online: <www.frankfurt.de/sixcms/detail.php?id=8653&_ffmpar%5B_id_inhalt%5D=32696215>.

[20] Riry Hilton, 'Big BDS Legal Win Germany' *Electronic Intifada* (17 October 2018), online: <https://electronicintifada.net/content/big-bds-legal-win-germany/25741>.

Apartheid Free Space' resolution null and void, arguing that the City Council was acting *ultra vires* in the field of international relations.[21]

Israel itself adopted a law in 2011 that prohibits Israeli citizens to publicly support a boycott, even a boycott that only targets products from the settlements.[22] In 2017, the Israeli parliament adopted a law that allows the government to refuse foreigners who spoke out for a boycott from entering the country, which means that they can no longer access the Occupied Palestinian Territories.[23]

This article takes all these attempts to suppress BDS campaigns by means of the law, as well as the fact that the call for global BDS frames its objectives primarily in legal terms, as an occasion to reflect on the relation between BDS, law, and politics in a global context. In the first section, I discuss the claim that campaigns for BDS are discriminatory or violate anti-discrimination law. I argue that although this claim is completely baseless, the political and legal traction that it has received requires some scholarly attention, because this traction is symptomatic of an instrumentalisation of law that undermines the rule of law in countries around the world, particularly in North America and Europe.

In section II, I discuss two landmark judgments that recognised a right to boycott: the 1958 *Lüth* judgment of the German Federal Constitutional Court, and the 1982 *NAACP v Claiborne Hardware* opinion of the Supreme Court of the United States. I demonstrate that what is ultimately at stake in these judgments is the right to participate in politics.

In section III, I continue my exploration of the relation between BDS, law, and politics by developing a critique of an article by legal scholar Itamar Mann, which considers the campaigns for BDS to be fundamentally apolitical because of their emphasis on the enforcement of international law.[24] I will argue that Mann's article reflects a view of the relation between law and politics that fails to recognise the transformative potential of law, as well as the political nature of transnational or global solidarity activism. Against Mann's strong opposition of politics to law, and against his reductive understanding of boycotts, I will show that BDS campaigns in fact exemplify all three concepts of politics distinguished by political philosopher Étienne Balibar: emancipation, transformation, and civility.

[21] European Legal Support Center Legal Memo for the case: City Council of Cadiz (ESP) and the Association for Human Rights in Andalusia vs. the Legal Committee for the Fight Against Discrimination.

[22] For a critical discussion of this law see, Lior A. Brinn, 'The Israeli Anti-Boycott Law: Balancing the Needs for National Legitimacy Against the Rights of Dissenting Individuals' (2012) 38 *Brooklyn Journal of International Law* 345.

[23] Laurie Goodstein, 'New Israeli Law Bars Foreign Critics from Entering the Country' *The New York Times* (7 March 2017), online: <www.nytimes.com/2017/03/07/world/middleeast/israel-knesset-vote-boycott-bds-reform-judaism.html>.

[24] Itamar Mann, 'Against the Day: On the Law, Politics, and Ethics of BDS' (2015) 114(3) *The South Atlantic Quarterly* 670.

In the final section, I discuss the ways in which boycotts challenge understandings of fundamental political rights that rely on a strict distinction between the 'public' and the 'private' sphere. And while *Lüth* and *NAACP v Claiborne Hardware* concerned boycotts that were national in scope, the global aspiration of the campaigns for BDS raises the question of how law might facilitate emancipatory and transformative politics across the boundaries of the nation-state. This question is particularly urgent in light of the transnational attempts to suppress these campaigns through an instrumentalisation of law.

I. Instrumentalising law: the attempts to frame BDS as discriminatory

On 15 May 2019, the German parliament adopted a symbolic resolution designating BDS campaigns as anti-Semitic. Without providing any evidence, the resolution declared:

> The model of argumentation and the methods of the BDS movement are anti-Semitic. Moreover, the calls for campaigning for a boycott of Israeli artists, as well as the stickers on Israeli trade products that are supposed to deter people from buying them, recall the most terrible phase of German history. 'Don't Buy' [*sic*] stickers of the BDS movement on Israeli products inevitably awake [*wecken unweigerlich*] associations with the Nazi slogan, 'Don't buy from Jews!' and similar graffiti's on storefronts and shop windows.[25]

The accusation of anti-Semitism thus hinges on the alleged inevitable awakening of associations. However, the Nazi boycott of Jewish businesses was organised by a national government discriminating against a minority group, whereas BDS campaigns are civil society campaigns struggling against domination and discrimination by a national government. This makes the campaigns for BDS much more typical of the modern history of boycotting, which is primarily—though of course not exclusively—a history of grassroots movements contesting domination, often against or beyond the boundaries set by national governments.[26] For instance, the five most famous boycotts in modern history were boycotts by grassroots organisations struggling against regimes of domination maintained by the British government or its postcolonial successors, namely, the boycotts of British imports by American

[25] 'Der BDS-Bewegung entschlossen entgegentreten—Antisemitismus bekämpfen: Antrag der Fraktionene CDU/CSU, SPD, FDP und Bündnis 90/Die Grünen', Deutscher Bundestag, 19. Wahlperiode, 15 May 2019. Trans. Michiel Bot.

[26] Good comparative introductions to the history of boycotts are, Ingrid Nyström and Patricia Vendramin, *Le boycott* (Presses de Sciences Po 2015) and Richard A. Hawkins, 'Boycotts, Buycotts and Consumer Activism in a Global Context: An Overview' (2010) 5(2) *Management & Organizational History* 123. Two important studies that focus on the United States are Monroe Friedman, *Consumer Boycotts: Effecting Change Through the Marketplace and the Media* (Routledge 1999), and Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* (University of Chicago Press 2009).

merchants during the Revolutionary Period;[27] the Irish National Land League's 1880 campaign against the eponymous land agent Charles Boycott; Gandhi's boycotts of British taxes, merchandise, and (legal) institutions; the Montgomery bus boycott and other consumer boycotts during the US Civil Rights Movement; and the global boycott of the South African apartheid regime.

Indeed, what the German parliament's resolution fails to mention is that although there had been Nazi boycotts of Jewish stores before, the most notorious Nazi boycott of Jewish businesses on 1 April 1933 was a reaction against a transnational anti-Nazi boycott of German merchandise to protest Nazi anti-Semitism.[28] In the United States, the first group to declare an anti-Nazi boycott was the Jewish War Veterans in March 1933; the American League for the Defense of Jewish Rights joined in May, and the American Jewish Congress in the summer of 1933. In October 1933, a major non-Jewish group joined the boycott as well, the American Federation of Labor.[29] The boycott lasted until October 1941.[30] Although the anti-Nazi boycott movement was strongest in the United States, it also included Jewish organisations in England, France, Romania, Greece, Latvia, Yugoslavia, Egypt, Palestine, Morocco, and various countries in South America.[31] Some historians have argued that this transnational boycott movement remained very limited, but the Nazis repeatedly claimed that it was hurting their economic interests.[32] Hitler himself still criticised the boycott in a 1939 address to the Reichstag:

> It is likewise an unbearable burden for world economic relations that it should be possible in some countries for some ideological reason or other to let loose a wild boycott of agitation against other countries and their goods and so practically to eliminate them from the market.[33]

To declare, therefore, that BDS campaigns 'inevitably awake associations' with the Nazi boycott, or to argue that 'historically, [a boycott] has a completely different resonance' in Germany than it does in other countries,[34] is to disavow the transnational history of this political practice. That this disavowal has now been fixed or determined (*festgestellt*) by the German parliament, in a resolution that also 'welcomes (*begrüßt*) the fact that countless municipalities

[27] Friedman (n 26) 3–4.
[28] 'Boycott advocated to curb Hitlerism; W.W. Cohen says any Jew who buys goods made in Germany is a traitor' *The New York Times* (21 March 1933).
[29] Friedman (n 26) 134–5.
[30] Moshe Gottlieb, 'The Anti-Nazi Boycott in the United States: An Ideological and Sociological Appreciation' (July–October 1973) 35(3/4) *Jewish Social Studies* 198.
[31] Friedman (n 26) 133.
[32] Hawkins (n 26).
[33] 28 April 1939. Cited in Friedman (n 26) 137.
[34] Stefanie Schüler-Springorum, director of the Center for Research on Anti-Semitism at the Technical University in Berlin, cited in Melissa Eddy and Alex Marshall, 'Unwelcome Sound on Germany's Stages: Musicians Who Boycott Israel' *The New York Times* (1 July 2018).

have already decided to refuse the BDS movement … financial support and the allocation of communal spaces', is extremely worrisome.[35]

The French government, and some French judges, have also framed campaigns for BDS as discriminatory, though not against Jews but against Israeli nationals. In 2013, fourteen French activists were fined 1000 euro per person and a total damages of 28,000 euro, because they had entered a supermarket wearing T-shirts with the slogan, '*Palestine vivra* [Palestine shall live], boycott Israel', and were handing out flyers with the text, 'Boycott products from Israel, to buy Israeli products is to legitimate the crimes in Gaza, to support the politics of the Israeli government'.[36] This action took place in 2009; the activists were first prosecuted in 2011, after French Minister of Justice Michèle Alliot-Marie had issued a memo commanding prosecutors to prosecute citizens who call for a boycott of Israeli products.[37] The fourteen activists were acquitted in the first instance, but a Court of Appeal convicted them based on the Law on Freedom of the Press, which prohibits 'inciting [provocation] discrimination, hatred, or violence against a group of persons because of their origin or belonging to an ethnicity, race, religion, or certain nation'.[38] Although the activists had called for a boycott of Israeli *products*, the Court of Appeal held that they had incited discrimination of Israeli *producers,* because of their belonging to the Israeli nation. Therefore, the Court found that the activists could not claim their right to freedom of expression. The Court of Cassation upheld the conviction, and the case is currently still pending before the European Court of Human Rights, where the applicants have argued that the state's interference in their fundamental right to freedom of expression was not 'prescribed by law' (one of the conditions for legitimate interference) because it was based on the Minister's memo, which did not meet the quality of law standards of the European Court of Human Rights.[39]

The European Court of Human Rights had already ruled on a French criminal court conviction of a person who had called for a boycott of Israeli products. This judgment, *Willem c. France*, was about a mayor of a small town who had been fined 1000 euros because he had announced during a municipal council meeting that he had asked the municipal caterer to boycott Israeli fruit juice, in order to protest Israel's antidemocratic politics.[40] The mayor had explained his motivations in an open letter published on the town's

[35] 'Der BDS-Bewegung entschlossen entgegentreten' (n 25).
[36] Cass. Crim., 20 oct, 2015, n 14-80021, ECLI:FR:CCASS:2015:CR04238 (rejet pourvoi c/CA Colmar, 27 nov. 2013), M.Guérin, prés.; M[e] Carbonnier, SCP Lyon-Caen et Thiriez SCO Waquet, Farge et Hazan, av.
[37] Circulaire du 12 février 2010, CRIM-AP, n 09-900-A4. Cited in Robin Médard Inghilterra, 'Provocation à la discrimination et appel au boycott de produits étrangers: La Cour de cassation tranche le débat' (2015) *La Revue des droit de l'homme*, online: <https://journals.openedition.org/revdh/1750>, [3].
[38] Loi du 19 juillet 1881, article 24, alinéa 9.
[39] François Dubuisson, 'La repression de l'appel au boycott des produits israéliens est-elle conforme au droit à la liberté de l'expression?' (2012) 2012(1) *Revue Belge de droit international* 180.
[40] *Willem c France* App No 10883/05 (EHRM, 16 July 2009), [7]. trans. Michiel Bot.

website: a 'refusal to contribute economically to the military power of [then Israeli prime-minister] Sharon in his practice of repression, invasion, and military occupation'.[41] In its judgment, the European Court mentioned the importance of freedom of speech for democracy: 'The Court attaches the utmost importance to freedom of expression in the context of political debate and considers that political discourse may only be constrained for urgent reasons'.[42] However, the Court argued that such urgent reasons existed in this case, namely, the protection of the rights of producers and suppliers to be free from discrimination because of their Israeli nationality.[43]

In his highly critical dissenting opinion, Judge Jungwiert compared the French mayor's call for a boycott of Israeli products to calls to boycott products from the United States to protest the war in Iraq; calls to boycott Russian products to protest the conflict in Chechnya; or calls to boycott Chinese products to support Tibet. Judge Jungwiert held that a democratic society should not only tolerate such a 'debate or incitement to action', but should *instigate* [*susciter*] it. In his view, the call for a boycott should be considered as the 'expression of an opinion or of a political position of an elected [official] on a question of international urgency', which, moreover, took place during a council meeting, 'a privileged place for public debate'.[44]

The purpose of anti-discrimination law—and ultimately, arguably, of law in general[45]—is to protect people from being treated differently because of who they *are*—female, transgender, gay, black, Rohingya, Muslim, deaf—instead of being judged based on what they choose to *do*. BDS campaigns have made it very explicit that they do not discriminate against people because they have the Israeli nationality, let alone because they are Jewish.[46] The call for BDS is essentially inclusive: it invites *everybody* to join its political campaigns against a discriminatory regime and the institutions that support it. The call explicitly invites 'conscientious Israelis' to join, and some Israelis *have* joined.[47] Like the German parliamentary resolution, the French minister's memo, and the prosecutions and criminal convictions of BDS activists in French courts, reflect an instrumentalisation of law that is fundamentally at odds with the rule of law, for they turn the law into a political tool.[48]

[41] *Ibid*, [8].
[42] *Ibid*, [33].
[43] *Ibid*, [38].
[44] *Ibid*, opinion dissidente du Juge Jungwiert.
[45] This insight is central to the work of Hannah Arendt. For an early formulation, see Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1976), 294–6.
[46] See for instance, Omar Barghouti, *BDS: Boycott, Divestment, Sanctions: The Global Struggle for Palestinian Rights* (Haymarket 2011).
[47] For instance, the organization Boycott from Within. See online: <http://boycottisrael.info/>.
[48] Handmaker (n 7) 4–5.

II. The right to boycott: *Lüth* and *NAACP v Claiborne Hardware*

A. The right to call for a boycott as a corollary of the freedom of speech: the Lüth judgment of the German Federal Constitutional Court

In 1950, Veit Harlan, the writer and director of the infamous 1940 Nazi propaganda film *Jud Süß*, attempted to make a comeback with a new film, *Unsterbliche Geliebte* [Immortal Beloved], after a criminal court had exculpated him on the grounds that he may not have been able to refuse Nazi propaganda minister Goebbels' order to collaborate, without endangering himself.[49] At the opening of the German Film Week held in Hamburg in 1950, writer and film director Erich Lüth called on film distributors and producers to boycott Harlan. A week later, Lüth published an open letter urging that 'decent Germans' did not just have the right but the duty to boycott this 'unworthy representative of German film'.[50] The production company and the distribution company of Harlan's new film sued Lüth before the Hamburg district court, which issued an injunction that forbade him to call for a boycott, based on the prohibition of immoral deliberate damage in the civil code. According to the district court, calling for a boycott was immoral because Harlan had been acquitted in a criminal trial, and because the denazification procedures had no longer imposed any restrictions on Harlan exercising his profession. The district court noted that it did not convict Lüth for expressing his opinion, but for calling on the public [*die Öffentlichkeit*] to prevent, by means of a 'certain behaviour', the screening of Harlan's films and thereby to prevent Harlan's comeback as a director, which also caused economic loss for the production and distribution companies.[51] Lüth ultimately took the case to the, then still very young, Federal Constitutional Court, which ruled that Lüth's call for a boycott was constitutionally protected speech.

The *Lüth* judgment is considered foundational for post-World War II constitutional thinking around the world because of its decision that fundamental rights apply, not only in the relation between an individual and the state, but also between individuals.[52] The Court recalled that fundamental rights are primarily 'defensive rights of citizens against the state' that secure a sphere of freedom from interference by public authority,[53] however, the Court continued, in its section on fundamental rights, that the Basic Law has set up an 'objective order of values', which 'finds its center in the human personality

[49] *Lüth,* 1 BvR 400/51 (15 January 1958).
[50] *Ibid,* [4].
[51] *Ibid,* [14].
[52] Jacco Bomhoff, '*Lüth*'s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing' (2008) 9(2) *German Law Journal* 121.
[53] *Lüth,* 1 BvR 400/51 (15 January 1958), [24].

unfolding itself freely within the social community and in the dignity of this personality'.[54] This system of values 'must apply, as a constitutional basic decision, to all domains of the law', including private law, which 'must be interpreted in its spirit'.[55]

The Court rejected the lower court's judgment that the right to freedom of speech only protects the expression of an opinion, and not its effect or impact (*Wirkung*). The Court argued: 'The significance of expressing an opinion is precisely to let that opinion make an "intellectual impact on one's environment"', to 'affect the totality by shaping opinions and by persuading'.[56] Therefore, 'it would be absurd to separate (protected) expression from the (unprotected) effect of an expression'.[57] However, the Court continued, the right to freedom of speech is not absolute: 'the right to freedom of expression must take a step back when the expression harms another person's interests that are worthy of protection and that weigh more heavily'.[58] In this case, the protection of the private interests of Harlan, and the film companies, is outweighed by Lüth's freedom of speech, for the following reason:

> The protection of a private legal good can and must step back, the more the expression does not target this legal good immediately in the private sphere, namely in economic exchange and in the pursuit of self-interested purposes, but contributes to the intellectual struggle of opinions on a question that essentially affects the public and is made by someone who is authorized to do so; here speaks the assumption of the permissibility of free speech.[59]

The Court noted that Lüth's expressions indeed concerned a question of essential public concern: 'the German people's moral attitude and its standing in the world that depends on this attitude'.[60] The Court further found that the call to boycott films by Harlan 'followed virtually automatically from his negative value judgment on Harlan's comeback'[61]; and noted that 'Harlan appears here as a personal exponent of a specific cultural political development rejected by the appellant'.[62] Therefore, Lüth's 'permissible attack against this development led with a certain necessity to an interference in Harlan's personal legal sphere'.[63] The Court found that Lüth was 'authorised' [*legitimiert*] to state his opinion publicly because of his 'particularly close relation to everything that concerned the German-Jewish relation'.[64] The

[54] *Ibid,* [25].
[55] *Ibid,* [25].
[56] *Ibid,* [36].
[57] *Ibid,* [36].
[58] *Ibid,* [37].
[59] *Ibid,* [39].
[60] *Ibid,* [50].
[61] *Ibid,* [52].
[62] *Ibid,* [52].
[63] *Ibid,* [52].
[64] *Ibid,* [53].

Court finally struck down the argument of the lower court that because the state did not have the right to take certain measures against Harlan, individual citizens did not have this right either.[65]

Thus, for the Federal Constitutional Court, the right to call for a boycott follows from the fundamental right to freedom of speech, which is not just a right to express one's personal opinion without interference (a 'negative' freedom), but a *political* right to aim to affect and shape public opinion as a totality (a 'positive' freedom), which outweighs private rights when the expression is not aimed at private but at public purposes.

B. The right to participate in a political boycott as a corollary of the freedom of speech and the freedom of assembly: NAACP v Claiborne Hardware

NAACP v Claiborne Hardware (1982) was a case about the years-long boycott by hundreds of black people of white-owned stores in Claiborne County, Mississippi, organised in 1966 by the National Association for the Advancement of Colored People.[66] The purpose of the boycott was to compel political leaders to meet a list of twenty-one demands for racial equality and integration: 'the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus station so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers'.[67] The list also included a demand addressed to private businesses, namely, that 'all stores must employ Negro clerks and cashiers'.[68] However, it is difficult to separate the public from the private in this case, because many of the merchants targeted by the boycotters were also civic leaders, including two aldermen, a representative in the Mississippi House of Representatives, a member of the school board, and a member of the Democratic Committee.[69]

NAACP v Claiborne Hardware began with the idea of 'concerted action', which 'encompasses unlawful conspiracies and constitutionally protected assemblies'.[70] The Court repeated its earlier judgment that 'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process'.[71] Therefore, the Court emphasised the 'close nexus between the freedoms of speech and assembly',[72] for 'by collective effort, individuals can make

[65] *Ibid,* [55].
[66] *NAACP v Claiborne Hardware,* 458 U.S. at 886 (1982).
[67] *Ibid,* 899.
[68] *Ibid,* 900.
[69] *Ibid,* footnote 3.
[70] *Ibid,* 888.
[71] *Ibid,* 907.
[72] *Ibid,* 908.

their views known when, individually, their voices would be faint or lost'.[73]

According to the Court, speech cannot be sharply distinguished from action. It recalled its decision in *Thomas v Collins,* that the First Amendment

> extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.[74]

The Court held that 'coercive' speech was also protected by the First Amendment, citing *Organization for a Better Austin v Keefe* (1971), which allowed a racially integrated Chicago community organisation to distribute leaflets near the home of a real estate broker in order to try to get him not to solicit property in their community.[75] The broker had been trying to get white residents to sell their homes by arousing fear that black people were moving into the area. One leaflet distributed by the organisation read: 'When he [the broker] signs the agreement [to stop soliciting property in the Austin neighborhood], we stop coming to Westchester [the suburb where the broker lived]'.[76] Another leaflet asked the public to call the broker at his home phone and urge him to sign the no-solicitation agreement. The Supreme Court held: 'The claim that the expressions were intended to exercise a coercive impact on [the broker] does not remove them from the reach of the First Amendment'.[77]

The Court ultimately decided *NAACP v Claiborne Hardware* by returning to the standard it had set in *United States v O'Brien* (1968), which ruled that a criminal prohibition of burning draft cards did not violate the First Amendment. In that decision, the Court had argued that 'governmental regulation that has an incidental effect on First Amendment freedoms may be justified', if 'it furthers an important or substantial governmental interest [that] is unrelated to the suppression of free expression'.[78] According to the Court, the government had, in criminalising draft card burning, not sought to suppress a politically unpopular message, but had been motivated by its 'substantial interest in ensuring the continuing availability of issued Selective Service certificates', and had condemned only the 'independent noncommunicative impact of conduct'.[79]

Similarly, in the case of the boycott, the Court recognised 'the strong governmental interest in certain forms of economic regulation, even though such

[73] *Ibid*, 908–9.
[74] *Ibid,* 910.
[75] *Organization for a Better Austin v Keefe*, 402 U.S. 415 (1971)
[76] *Organization for a Better Austin v Keefe*, 402 U.S. 417.
[77] *NAACP v Claiborne Hardware*, 458 U.S. at 911.
[78] *United States v O'Brien*, 391 U.S. 377.
[79] *Ibid.* I will leave aside that the Court's application of the standard in this particular case is not very convincing.

regulation may have an incidental effect on rights of speech and association'.[80] For instance, the Court argued, 'the right of business entities to "associate" to suppress competition may be curtailed'.[81] However, a political boycott was an entirely different matter for the Court: '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'.[82] It was only the seemingly isolated incidents of violence, when someone who did not support the boycott had his tires slashed or when shots had been fired at the house of someone breaking the boycott, that could be suppressed by the state.

Both *Lüth* and *Claiborne Hardware v NAACP* recognise a right to boycott as a political right that outweighs economic rights. The right to boycott presupposes the recognition of the purpose of the boycott as political, rather than furthering private economic interests or discrimination. In the *Lüth* judgment, this recognition appears in the consideration that the boycott concerned a matter of important public interest ('the German people's moral attitude and its standing in the world'), and in the fact that Lüth had a 'particularly close relation to everything that concerned the German-Jewish relation'. In *Claiborne Hardware v NAACP*, the recognition of the boycott as political appears, for instance, in the recognition that the purpose of the boycott was '[t]o challenge a political and economic system that had denied [the boycotters] the basic rights of dignity and equality that this country had fought a Civil War to secure'.[83]

In his book, *Boycott in America: How Imagination and Ideology Shape the Legal Mind*, Gary Minda criticises *Claiborne Hardware v NAACP* precisely for recognising a right to boycott as a political right.[84] Minda's main concern is that 'consumer boycotts, like all boycotts, get defined in light of background assumptions about the meaning of the boycott'.[85] Such background assumptions, Minda argues, are 'imaginatively constructed from a highly ideological context'.[86] For instance, in the case of the boycott of Korean grocery stores by African-Americans in Brooklyn in 1990–1991 (the 'Family Red Apple Boycott'), 'African-Americans understood their boycott in terms of background assumptions about discriminatory pricing practices of Korean-American-owned grocery stores in their neighborhood, and Korean-Americans probably understood their position in light of background assumptions about discrimination they felt from the African-American

[80] *NAACP v Claiborne Hardware*, 458 U.S. at 912.
[81] *Ibid.*
[82] *Ibid,* 913.
[83] *Ibid,* 919.
[84] Gary Minda, *Boycott in America: How Imagination and Ideology Shape the Legal Mind* (Southern Illinois University Press 1999) 166–70.
[85] *Ibid,* 168–9.
[86] *Ibid,* 169.

community'.[87] However, these complexities cannot be used as arguments against recognising a right to a political boycott. On the contrary, they are arguments *in favour* of such a recognition, because politics is also precisely a struggle over what Minda calls the imaginative construction of the ideological context.[88] Furthermore, the fact that the Civil Rights Commission found the Family Red Apple Boycott to be racially motivated demonstrates that it is entirely possible to set legal limits to a right to a political boycott by prohibiting racially motivated speech and action.

III. The politics of BDS: emancipation, transformation, civility

In his article, 'Against the Day: On the Law, Politics, and Ethics of BDS', Itamar Mann, professor of law at the University of Haifa, explores whether Israeli Jews should respond to the call to join BDS.[89] He considers: 'When members of a political community consistently choose to employ their sovereignty to oppress and dominate a particular group, dissenters may only have one choice. They may be obligated to step back from the social contract, rescind their implied consent, and fall back on a more basic belongingness to the 'international community' and the human species'.[90] However, Mann argues, this choice 'assumes a readily available category of "international community" or human species'.[91] According to Mann, choosing to join BDS is saying, 'with mainstream human rights scholars, that the enforcement of human rights stems from a global civil society'.[92] Mann also criticises boycotting as an instrument of coercion, pressure, and force, not of addressing, deliberating, and convincing.[93]

Mann's critique of campaigns for BDS is thus that these campaigns are apolitical, both in their objectives and in the way they attempt to accomplish those objectives. According to Mann, campaigns for BDS are apolitical because they mean stepping back from the social contract of the concrete political community and falling back on abstractions promoted by 'mainstream human rights scholars': international law, the international community, global civil society, or even the human species. In addition, Mann sees boycotting as apolitical because he considers it to be nothing but an instrument of coercion.

[87] *Ibid,* 169.
[88] This dimension of politics is highlighted in the work of Jacques Rancière, who argues that politics is a contestation of a given 'distribution of the sensible' by people asserting themselves as political equals. Jacques Rancière, *Disagreement: Politics and Philosophy* (Julie Rose tr, University of Minnesota Press 1999), and Jacques Rancière, 'Ten Theses on Politics' in *Dissensus: On Politics and Aesthetics* (Steven Corcoran tr Continuum 2010) 27–44.
[89] Mann (n 24) 670.
[90] *Ibid,* 676.
[91] *Ibid,* 676.
[92] *Ibid,* 676.
[93] *Ibid,* 674–5.

Against Mann's critique of the BDS campaigns as apolitical, I will argue, in this section, that these campaigns are in fact eminently political, both in their objectives and in the practice of boycotting itself. The fact that the call for BDS is formulated in legal terms is understandable given the dominance of human rights discourse on the global political scene, especially since the end of the Cold War.[94] However, an exclusively juridical interpretation of the campaigns for BDS, either by BDS sceptics such as Mann, or by some BDS activists themselves, relies on an untenable separation between law and politics that misses the radical political nature of these campaigns. In order to demonstrate the political nature of the campaigns for BDS, I will borrow Étienne Balibar's distinction of three concepts of politics: emancipation, transformation, and civility.

Balibar defines a politics of emancipation as 'an unfolding of the self-determination of the people [*demos*] (if we give this generic name to the body of citizens "free and equal in rights"), which constitutes itself in and by the establishment of its rights'.[95] For Balibar, the politics of emancipation is 'not so much a question of removing an oppressive external power as of *suppressing that which separates the people from itself*'.[96] A politics of emancipation, Balibar argues, is an '*appeal against a* de facto *discrimination to a* de jure *equality*'.[97] The struggle for emancipation, he maintains, is a 'struggle to enjoy rights which have already been declared'.[98]

Can the second demand of the call for BDS, the demand for the recognition of 'the fundamental rights of the Arab-Palestinian citizens of Israel to full equality', be considered an instance of what Balibar calls a politics of emancipation? An affirmative answer to this question presupposes that these rights have already been declared, at least in principle, however, 'Arab-Palestinian citizens' of Israel, who comprise more than twenty percent of Israeli citizens, are not only discriminated against in practice, they are also not fully equal under Israeli law, as scholars like Shourideh Molavi have demonstrated, and as the recent 'Basic Law: Israel as the Nation-State of the Jewish People' confirms.[99] Nevertheless, the second demand seems at least oriented towards a politics of emancipation that might find support in some legal rules within the Israeli constitutional order.

Whereas a politics of emancipation refers to the autonomy of politics, a politics of transformation, Balibar argues, refers to the *heteronomy* of politics. Balibar's primary instance of a politics of transformation is Marxian. According to Balibar, a Marxian politics of transformation does not *presuppose* the

[94] On this dominance, see Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2012).
[95] Étienne Balibar, 'Three Concepts of Politics' in Étienne Balibar, *Politics and the Other Scene* (Chris Turner tr, Verso 2002) 1–39, 3.
[96] *Ibid,* 3.
[97] *Ibid,* 7.
[98] *Ibid,* 6.
[99] Shourideh C. Molavi, *Stateless Citizenship: The Palestinian-Arab Citizens of Israel* (Haymarket 2013).

autonomy of the political subjects, rather, this autonomy is considered to be the aim of politics that is *produced in the movement of transformation*. Balibar writes:

> Whereas the proposition of equal liberty presupposes the universality of rights, always referring these back to an ever-available transcendental origin, Marxian political practice is an internal transformation of conditions, which produces as its outcome (and quite simply produces, in so far as it is put into practice—that is, produces 'in struggle') the need for freedom and the autonomy of the people.[100]

Insofar as the BDS movement aims at ending the occupation and colonisation of all Arab lands and dismantling the wall (the first demand), and at the recognition of the right of return of Palestinian refugees (the third demand), it can be considered to enact a politics of transformation.[101] The Reut Institute, an Israeli lobby organisation that has been fighting BDS campaigns, has argued that the demands of the call for BDS suggest a framework for 'the resolution of the Israeli-Palestinian conflict that calls for establishing one binational state in the former area of Mandatory Palestine, where all resident Jews and Palestinians would share political power on the basis of the principle of "one person, one vote"'.[102] According to the Reut Institute, such a framework 'requires the dissolution of Israel as the expression of the Jewish people's right for self-determination'.[103] However, what the Reut Institute calls a dissolution is more obviously described as a *transformation* of the Israeli constitutional order, a transformation that would produce freedom and autonomy for all resident Jews and Palestinians, including returning Palestinians.

From the perspective of the current Israeli constitutional order, the demand for ending the occupation and colonisation, and the demand for recognition of the right of return of Palestinian refugees appear as, what legal philosopher Hans Lindahl has called, a-legal. Lindahl distinguishes a-legality from both legality and illegality:

> [T]he 'a' of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organizes the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behaviour.[104]

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[100] Balibar (n 95) 10.

[101] It is also worth noting that BDS campaigns deploy 'human rights alongside discourse alongside discourses of antiracist, anticolonial, and antiapartheid popular inclusion'. Perugini and Gordon (n 5) 138.

[102] 'Building a Political Firewall: Against Israel's Delegitimization (Conceptual Framework)' (*The Reut Institute*, 2010), online: <www.reut-institute.org>.

[103] *Ibid*.

[104] Hans Lindahl, 'Inside and Outside Global Law: Julius Stone Address' (2019) 41(1) *Sydney Law Review* 1, 8-9.

In Lindahl's language, the emergent normative order intimated by the first and third demand of the call for BDS, which could be a democratic order where all resident Jews and Palestinians might share political power on the basis of the principle of 'one person, one vote', poses a fundamental challenge to the current Israeli order, an order that has been exercising ultimate state power over the former area of Mandatory Palestine for over fifty years while excluding much of its population from political participation because they are not Jewish. The normative order intimated by the first and third demand challenges the spatial boundaries of the Israeli order in many ways, for instance the exclusion of Palestinians from Jewish-only settlements and settler roads. Furthermore, it challenges the temporal boundaries of the Israeli order by questioning claims to land based on sacred history, as well as the idea of the transcendental origin of the founding moment of the Israeli state.

Apart from emancipation and transformation, Balibar distinguishes a third form of politics, which he calls a politics of civility. According to Balibar, a politics of civility is a politics in conditions where 'extreme' violence stands in the way of both transformation and emancipation. A politics of civility seeks to establish the conditions for transformation and emancipation. This is why Balibar refers to civility as a 'heteronomy of heteronomy': it is heteronomous to transformation, which is itself heteronomous to emancipation.[105] Balibar writes: 'Civility … is certainly not a politics which suppresses all violence; but it excludes extremes of violence, so as to *create a* (public, private) *space* for politics (emancipation, transformation), and enable violence itself to be historicized'.[106]

According to Balibar, not all violence necessitates a politics of civility, because not all violence blocks transformation and emancipation. A politics of civility is necessary under conditions of 'extreme' violence, which Balibar distinguishes from 'structural' violence. Structural violence is 'an oppression inherent in social relations which … breaks down that resistance which is incompatible with the reproduction of a system'.[107] Structural violence has a certain functionality that is rational in the terms of the system itself, even though it may be irrational in absolute terms. Examples include forms of social domination and exploitation such as slavery, patriarchy, or capital. By contrast, extreme violence lacks such a functionality. Balibar associates extreme violence with a 'forced disaffiliation from the other and from oneself—not just from belonging to the community and the political unit, but from the human condition'.[108] Balibar describes this disaffiliation from

[105] Balibar (n 95) 26.
[106] *Ibid*, 29–30.
[107] *Ibid*, 24.
[108] *Ibid*, 25.

the human condition as 'ultra-subjective'[109] because it is intentional and has a determined goal, although it is ultimately:

> [t]he expression of a 'thing' (to use Freud's term, picked up on by Lacan) of which the subject is the mere instrument: of that identity which is (which he 'believes' to be) in him, an identity totally exclusive of any other, one which imperiously commands its self-realization through the elimination of any trace of otherness in the 'we' and in the 'self'.[110]

Balibar's concept of extreme violence helps to recognise those forms of Israeli violence that go beyond the 'functionalist' domination and exploitation of Palestinians, violence motivated by hatred and the desire for ethnic cleansing.[111] This recognition is important because a politics of emancipation or a politics of transformation is not possible under these conditions. Instead, these conditions call for a politics of civility, a politics of anti-violence that restrains extreme violence and attempts to create a space where politics becomes possible again.

At the end of his article exploring whether Israeli Jews should heed to call for BDS, Itamar Mann concludes:

> For Israeli Jews, boycotting Israel may not be the most productive strategy for challenging the status quo. It is more important now to put into practice a counterfactual form of citizenship—an egalitarian citizenship that may only fully be realized after the boycott movement has played its role. We, Jewish Israelis, are responsible for the unacceptable conditions that prevail in Israel-Palestine. Recognizing such a responsibility does not mean assuming a duty to undo bonds with existing society, or harboring hopes that a wave will wash it away.[112]

The problem with this argument is, first, that putting into practice a 'counterfactual form of citizenship' requires a *transformation* of the 'bonds with existing society'. The society that exists would need to be transformed into a society that *does not yet exist*, and the bonds with the existing society would need to be transformed into bonds that also include many people who are excluded by the existing society. Putting into practice a 'counterfactual' form of citizenship thus cannot *maintain* the 'bonds with existing society', but neither does it simply require an 'undoing' or a 'stepping back'. Instead, practicing a counterfactual form of citizenship requires a fundamental transformation of (the terms of) the social contract and of (the political subjectivities of) the contracting parties. Such a transformation is not at all a retreat from concrete politics and a flight into apolitical abstraction. On the contrary, it is political par excellence.

[109] According to Balibar, extreme violence can also be 'ultra-objective': this describes 'the totally non-functional elimination of millions of disposable people' which 'figures in precise terms in the planning schedules of the world-economy' yet has no 'rational' function in the system. *Ibid,* 24.
[110] *Ibid,* 25–6.
[111] Ilan Pappe, *The Ethnic Cleansing of Palestine* (Oneworld 2006).
[112] Mann (n 24), 677–8.

A second problem with Mann's argument is that any political action (emancipation, transformation) is impossible under conditions of extreme violence. Under such conditions, what is necessary is a politics of civility, a politics of anti-violence that can exclude extremes of violence in order to establish a space for politics. According to Balibar, a politics of civility cannot be reduced to an insistence on international law, although he recognises that international law is 'a decisive element of democracy on a world scale'.[113] Critiquing the work of Jürgen Habermas, Balibar argues that 'the gates of "communication" sometimes have to be opened by force, sometimes in a violent manner, or they will remain locked forever'.[114] Importantly, however, Balibar argues that in order to put a stop to extreme violence, the force or violence that is sometimes necessary to establish conditions for politics (emancipation, transformation) *itself* needs to be civilised as well: 'It is not only the state or the economy that needs to be "civilized" or to become "civil", but also revolution itself'.[115]

Insofar as BDS campaigns not only aim to limit Israeli extreme violence, but also set limits to the force that they themselves use to achieve this aim, they can be considered to enact a politics of civility. BDS is not a random means to try to achieve the end of establishing conditions for transformation and emancipation, ends that might also be reached in other ways, including unrestrained violence. Instead, the 'means'—non-violent, yet punitive—and the 'end' of BDS are intimately connected. Thus, the political nature of BDS also appears in the act of boycotting itself, as boycott activists exert collective force while restraining impulses of violence in order to create conditions for, and in order to practice, transformation and emancipation.

Ironically, BDS has frequently been framed as a politics of *in*civility, and boycotting as an *un*civil tactic that violates the norms of civil democratic conversation. For instance, in his 2019 *Israel Studies* article, 'Uncivil Society: Tracking the Funders and Enablers of the Demonization of Israel', Gerald M. Steinberg, the founder and president of NGO Monitor, frames BDS and other 'campaigns seeking to harm Israel's standing internationally' as 'uncivil', and, indeed, as forms of 'soft-power warfare'.[116] Attempts to frame critiques of Israel as uncivil have been particularly prominent at universities in the United States.[117] Think, for instance, of the revocation of Steven Salaita's 2014 appointment as Associate Professor in the American Indian and Indigenous Studies programme at the University of Illinois at Urbana-

[113] Étienne Balibar, 'Outline of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' in Étienne Balibar (ed), *We, the People of Europe: Reflections on Transnational Citizenship* (Princeton University Press 2004) 115, 131.
[114] *Ibid,* 131.
[115] *Ibid,* 131.
[116] Gerald M. Steinberg, 'Uncivil Society: Tracking the Funders and Enablers of the Demonization of Israel' (2019) 24(2) *Israel Studies* 182.
[117] See Joan Wallach Scott, 'Civility, Affect, and Academic Freedom', in Joan Wallach Scott (ed), *Knowledge, Power, and Academic Freedom* (Columbia University Press 2019) 69–93.

Champaign because of a series of tweets about Israel's military attack on Gaza that were deemed 'uncivil', after donors threatened to withhold funding from the university.[118] The demand for civility as a condition of employment was widely criticised—for instance, the university was censured by the American Association of University Professors—but Salaita never got his job back. In his reflections on the case, *Uncivil Rites: Palestine and the Limits of Academic Freedom*, Salaita points out that a judgment on what counts as civil or uncivil can never be made in an ideological vacuum: 'Civility and incivility make sense only in frameworks influenced by countless social and cultural valuations, often assisted by misreading and distortions'.[119] Indeed, Salaita recalls dismissing critiques of colonialism and imperialism as uncivil has a long, racialised history: 'In colonial landscapes, civility is inherently violent. You simply have to learn to discuss violence the right way'.[120] In light of the recent attempts to dismiss BDS as uncivil, it is crucial to interpret BDS not in an abstract context of some presumed ideal speech situation, but to situate it within the concrete context of (extreme) anti-Palestinian violence, and, also, to think of BDS as a politics of civility, along the lines of Balibar's conceptualisation of civility as a politics that seeks to establish the conditions for politics where extreme violence is preventing communication, emancipation, and transformation.

IV. The right to boycott beyond the public/private divide and beyond the nation-state

According to public sphere theory, fundamental rights such as the right to freedom of expression and the right to freedom of assembly are primarily rights to publicness, they guarantee that people can freely discuss matters of public concern, in the public sphere, as members of the public. Public sphere theory maintains that these fundamental rights have a crucial democratic function, because it is the political efficacy of a freely constituted public opinion that makes a democracy democratic. A democratic state is a state that guarantees the free formation of public opinion and bases its exercise of power on public opinion.

In *The Structural Transformation of the Public Sphere* (1962), Jürgen Habermas showed that the public sphere, as it was conceived in the eighteenth century, was a sphere within the private realm that was strictly separated from the public realm, the realm of the state.[121] The idea of the public sphere,

[118] Mark Guarino, 'Professor Fired for Israel Criticism Urges University of Illinois to Reinstate Him' *The Guardian* (9 September 2014), online: <www.theguardian.com/education/2014/sep/09/professor-israel-criticism-twitter-university-illinois>.

[119] Steven Salaita, *Uncivil Rites: Palestine and the Limits of Academic Freedom* (Haymarket 2015).

[120] *Ibid*.

[121] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger tr, MIT Press 1989) 30. In Habermas' analysis, the private realm comprised both 'civil society' and the public sphere.

Habermas argued, was that power was exercised exclusively in the public realm, by the public authorities. By contrast, no power was exercised in the private realm, where private citizens exchanged commodities and social labour, and engaged in public discussion free from interference by the state.

However, the subtitle of Habermas's book, *An Inquiry Into a Category of Bourgeois Society*, demonstrates the ideological nature of the idea of the public sphere. The rationality of public opinion was supposed to be guaranteed by the fact that power played no role in the formation of public opinion, other than the rhetorical force of persuasion through rational argumentation. However, Habermas points out that this conception of rationality was only possible because all members of the public ultimately shared the same interest: an interest in optimising a system of economic liberalism. According to Habermas, the possibility that public discussion would ultimately lead to a consensus about what constituted the general interest was premised on the exclusion of the working classes. When the working classes began to demand access to the public sphere in the nineteenth century, Habermas argues, the idea of the public sphere was thrown into crisis, because these workers did not share the interests of the bourgeoisie.[122]

The reason why I am recalling Habermas's genealogy of the public sphere is that boycotts are sometimes described as politicisations of economic relations that would otherwise be non-political, and as exercises of power in the private realm that would otherwise be a realm of free trade and free speech in which power plays no role. However, as Habermas's genealogy shows, the idea of the private realm as a space free from power is an ideological fiction. By re-politicising relations that had been depoliticised, boycotts can appear as scandalous because they reveal the ideological nature of this fiction. Boycotts do not instrumentalise 'private' economic relations for 'public' purposes that are essentially separate from these relations. Instead, boycotts seek to reclaim the power inherent in economic relations by disrupting the fiction that these relations are not political. Thus, Lüth was not trying to get the German authorities to take action against Harlan by instrumentalising economic and cultural relations that were otherwise free from power, he was challenging the economic and cultural power of the film to rehabilitate the career of a Nazi director by reclaiming this power as political. In *Claiborne Hardware v NAACP*, the 'private' cannot be neatly separated from the 'public' either, the Supreme Court recognised that the purpose of the boycott was '[t]o challenge a political *and economic* system that had denied [the boycotters] the basic rights of dignity and equality that this country had fought a Civil War to secure'.[123] Thus, the Supreme Court recognises that the economic system

[122] *Ibid,* 122–40. This early text of Habermas was still inspired by the Marxian origins of critical theory. For Marx, the interests of the bourgeoisie conflict radically with the interests of the workers, and 'the general interest' can only be imagined beyond the class struggle, in a future communist society.

[123] *NAACP v Claiborne Hardware*, 458 U.S. at 913 (emphasis added).

was already political. Finally, BDS campaigns insist on the political nature of buying Israeli products. The argument of the convicted French BDS activists was that 'to buy Israeli products means legitimating the crimes committed in Gaza, and to support the politics of the Israeli government'.[124]

Boycotts such as those of the campaigns for BDS challenge public sphere theory in another way as well. Modern fundamental rights, and the idea of the public sphere, emerged within nation-states. These rights were claimed and institutionalised by national publics in order to delineate a national public sphere in which the national government could not interfere, in order to form a national public opinion on what constituted the national interest. This national public opinion was able to influence the politics of the nation because the national government derived its legitimacy from its responsiveness to national public opinion. However, thinking of democracy exclusively in national terms has of course become untenable. The transnational nature of the campaigns for BDS raises the question of how law might facilitate politics across the boundaries of the nation-state, that is, how law might recognise a right to participate not just in local and national, but also in transnational and global politics.

In her 2007 article, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World', Nancy Fraser notes how common it has become to speak of 'transnational public spheres'.[125] Even though this phrase might have some descriptive value for understanding communication flows, she observes, this phrase seems to be an oxymoron from the perspective of public sphere theory. If a national public opinion was politically efficacious because it was able to influence the politics of national governments, Fraser writes, it is unclear what the political power is that could make a transnational public opinion politically efficacious.[126]

However, when it comes to Israel/Palestine, there already exists a hegemonic transnational public opinion that has been very politically efficacious: a discourse that portrays Israel as 'the only democracy in the Middle-East' and that frames the colonisation and ethnic cleansing of Palestine as a 'conflict' between two symmetrical parties.[127] This transnational discourse has been the ideological underpinning for the unprecedented transnational political, economic, and military support for the Israeli state. Because of the transnational nature of this hegemonic discourse, that has condoned and normalised anti-Palestinian violence, contesting its hegemony also needs to happen transnationally.

[124] Cass. Crim., 20 Oct 2015, n 14-80021, ECLI:FR:CCASS:2015:CR04238 (rejet pourvoi c/CA Colmar, 27 nov. 2013), M.Guérin, prés; M[e] Carbonnier, SCP Lyon-Caen et Thiriez SCO Waquet, Farge et Hazan, av.

[125] Nancy Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World', republished in Nancy Fraser et al., *Transnationalizing the Public Sphere* (Kate Nash ed, Polity 2014) 8.

[126] *Ibid*, 9.

[127] Pappe (n 111).

Moreover, if BDS campaigns aim for a 'global struggle for Palestinian rights',[128] their conception of the global is not an abstraction. On the contrary, this global struggle takes place on, and forges connections between many concrete stages for political action: local, national, European, United Nations, but also the level of multinational corporations (Veolia, HP, Airbnb, etc). These connections prominently include transnational connections between local activists. Thus, the question how law might facilitate politics across the boundaries of the nation-state is particularly urgent.

I will conclude on a couple of hopeful notes. First, the protection of the right to boycott in the European Union. On 15 September 2016, Vice-President of the European Commission Federica Mogherini responded to the questions of a Member of the European Parliament about the call of Israeli Minister Yisrael Katz to engage in 'targeted civil eliminations' of BDS leaders, which was strongly condemned by Amnesty International.[129] Mogherini said: 'The EU stands firm in protecting freedom of expression and freedom of association in line with the Charter of Fundamental Rights of the European Union, which is applicable on EU Member States' territory, including with regard to BDS actions carried out on its territory'.[130]

A second hopeful note are the court rulings in the United States that have affirmed the right to boycott for BDS activists. For instance, in *Bahia Amawi v Pflugerville Independent School District* (2019), the US District Court in Austin, Texas, decided that under *NAACP v Claiborne*, BDS boycotts, 'as a form of political expression, rest on "the highest rung of the hierarchy of First Amendment values"'.[131] The case was brought by a speech pathologist who had been fired because she had refused to sign an addendum in her renewal contract requiring her to certify that she would not boycott Israel during the term of her employment. Against the defendant's argument that *NAACP v Claiborne* does not apply to BDS because it 'does not address boycotts directed at a foreign nation', the court argued: 'There is no authority to support the notion that speech must be concerned with domestic affairs to enjoy constitutional protection; indeed the Supreme Court has held just the opposite'.[132] These developments can inspire legal scholars to theorise

[128] This is the subtitle of Barghouti, *BDS: Boycott, Divestment, Sanctions* (n 46).

[129] 'Israeli Government Must Cease Intimidation of Human Rights Defenders, Protect Them from Attacks' *Amnesty International USA* (4 December 2016), online: <www.amnestyusa.org/press-releases/israeli-government-must-cease-intimidation-of-human-rights-defenders-protect-them-from-attacks/>.

[130] 'Answer given by Vice-President Mogherini on behalf of the Commission' *European Parliament* (15 September 2016), online: <www.europarl.europa.eu/doceo/document/E-8-2016-005122-ASW_EN.html?redirect>. Mogherini did add that the European Union itself was opposed to the boycott. A cynical reading of her defence of the right to boycott was that it exemplified what Herbert Marcuse called repressive tolerance', an ingenious way of maintaining the status quo by neutralizing the critical angle of dissent. Herbert Marcuse, 'Repressive Tolerance', in Marcuse, Moore, and Wolf (eds), *A Critique of Pure Tolerance* (Beacon Press 1965) 81.

[131] *Bahia Amawi v Pflugerville Independent School District*, 26.

[132] *Ibid,* 29.

fundamental political rights beyond the public/private divide and beyond the nation-state.

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