HCJ 5239/11
HCJ 5392/11
HCJ 5549/11
HCJ 2072/12

Avneri v. The Knesset

The Supreme Court sitting as the High Court of Justice
[15 April 2015]

Before President (Emeritus) A. Grunis, President M. Naor, Deputy President A. Rubinstein, and Justices S. Joubran, H. Melcer, Y. Danziger, N. Hendel, U. Fogelman, and Y. Amit

Summary

Translated by Orly Rachmilovitz

This was a petition to strike down the Law for Prevention of Damage to the State of Israel through Boycott, 2001 ("Boycott Law", "law"). The law establishes tort liability and sets administrative restrictions on anyone who knowingly and publicly publishes calls for a boycott on Israel. The petitioners claimed that the Boycott Law is unconstitutional because it infringes on various constitutional rights, including free expression, equality and freedom of occupation, and because it does not pass the tests articulated in the limitations clauses of Basic Law: Human Dignity and Liberty and in Basic Law: Freedom of Occupation.

The High Court of Justice upheld most of the provisions in the law both in terms of the civil tort and the administrative sanction. Regarding the civil tort, the majority decided to dismiss the petitions targeting sections 2(a) and 2(b) while adopting the narrow interpretive position articulated by Justice Melcer. In an extended panel of nine, the Court ruled unanimously to strike down section 2(c) of the Boycott Law, which addresses compensation without proof of damage, for being disproportional, but to dismiss the petitions as far as sections 3 and 4. The majority (written by Justice Melcer, with former President Grunis, current President Naor, Deputy President Rubinstein and Justice Amit joining) decided to dismiss the petitions in terms of sections 2(a) and 2(b), against the dissents by Justice Danziger (with Justice Joubran concurring), by Justice Hendel and by Justice Vogelman.

Justice Melcer found that according to the language of the law, knowingly publishing calls for boycott on Israel could be considered a tort. Additionally, the State may limit participation in tenders by people publishing calls for boycott, and may prevent publishers from receiving different financial benefits, such as government grants, tax exemptions and the like. Therefore most of the sanctions under the Boycott Law target the time of speech and thus the statute infringes upon free expression and is inconsistent with the constitutional right to human dignity. That said, though political speech is at

stake, Justice Melcer does not believe this infringement reaches the core of the right to free expression because the limit is relatively narrow and applies only to calls for boycotts against Israel, as defined in the statute, or to anyone who has committed to participate in such a boycott, which is legal action that goes beyond speech.

Additionally, this constitutional right, like other constitutional rights in Israel, is not absolute and may be limited if the infringement passes the tests of the limitation clause. The limitation clause includes four prongs: (1) that limits on constitutional rights are made in statutes or according to statutes; (2) that the limitation fits the values of the State of Israel as a Jewish and democratic state; (3) that the limitation is for a worthy propose; and (4) that the limitation is the least restrictive means necessary. The last prong includes three sub-prongs, which are the rational connection test, the least restrictive means test, and a "narrow" proportionality test. For his analysis here, Justice Melcer relies, among others, on comparative law.

In terms of the first prong, there is no doubt it is met. As for the others, Justice Melcer found that the statute is designed to prevent harm to Israel through economic, cultural or academic boycotts on Israel, anyone else vis-à-vis their relationship to Israel, an agency or institute of the State, or a territory controlled by it. Thus the Boycott Law falls under the "defensive state" doctrine and promotes preservation of the State and its values including equality and liberty. The law then has a worthy purpose and fits the values of the State of Israel as a Jewish and democratic state. Justice Melcer wrote that "calls for a boycott on Israel, as defined in the Boycott Law, do not fall under the classic purposes of free speech." This approach stems from Justice Melcer's distinction between speech that is meant to be persuasive and speech that works as a compelling force. In his view, a call for boycott is compelling speech, and therefore should be less protected than other political speech.

However, in terms of the Boycott Law's proportionality, and applying a narrow interpretive approach, Justice Melcer concluded that sections 2(a), 2(b), 3 and 4 pass the proportionality test. Section 2(c), however, does not because it does not employ the least restrictive means. In this context, Justice Melcer considered the chilling effect doctrine, and suggested reducing the chilling effect through narrow interpretation of what constitutes a tort under section 2(a). Justice Melcer proposed that this "boycott tort" be contingent upon existence of harm and causation between the tort and the harm. Still, merely a potential causation would be insufficient. Awareness of the reasonable probability that the contents of the call and the circumstances of its publication will cause the boycott should be necessary. A further requirement should be that only one directly harmed by the tort may have standing to sue.

This interpretation cures section 2(b) as well. Here, the Court ruled that anyone interested in recovering compensation under section 2(b) would be required to prove – in addition to the element of calling for a boycott – the elements of causing a breach under section 62(A) of the Torts Ordinance, a breach, causation between the call for boycott and the breach, awareness, and monetary harm.

On the other hand, Justice Melcer does not find section 2(c), which deals with compensation that is not contingent upon harm ("punitive damages") and is not limited in amount, to pass the second sub-test of a least restrictive means. It should therefore be struck down. Under this approach, even if the caller for a boycott has been found liable in torts, the compensation awarded would not exceed the actual harm caused.

As for sections 3-4, Justice Melcer finds that the administrative sanction – limiting participation in tenders and limiting benefits – is only a secondary infringement of free speech. He views these sanctions to be proportional, this in light of the procedure required to place these sanctions and considering the State's power to withhold benefits from those who use them against it. Justice Melcer equated a boycott on the State and a boycott on a territory. He left the discussion on the constitutionality of sections 3 and 4 and wait until specific petitions against a concrete decision by the Minister of the Treasury based on a concrete set of facts.

Finally, Justice Melcer presents additional approaches supporting his proposal: (1) that an interpretation that maintains a statute's constitutionality is preferable to striking the statute down; (2) that the Court should show deference to the legislature; (3) the margin of appreciation doctrine; (4) that under a theory of ripeness, arguments by potential parties must be examined beyond the striking down of sections 2(c).

Former President Grunis, President Naor, Deputy President Rubinstein and Justice Amit join Justice Melcer and offer comments.

In his dissent, Justice Danziger found the Boycott Law to materially violate free speech. It is a violation of political speech, which is at the core of the constitutional right to free expression, encompassed in the constitutional right to human dignity. This violation, in his view, does not pass the tests of the limitations clause in section 8 of Basic Law: Human Dignity and Liberty. In his view, the Boycott Law does not pass the third sub-prong of the proportionality test, the "narrow" proportionality prong, because calls for boycotts are clearly within legitimate democratic discourse. He opposes Justice Melcer's proposal for narrow interpretation as insufficient.

Despite his conclusion, Justice Danziger believes the harsh outcome of striking down the law as unconstitutional may be avoided through interpretation, thus significantly reducing the extent of the Boycott Law's infringement upon rights and allowing it to pass constitutional muster. He suggest interpreting section 1, which is the gateway to the law, to mean that only a boycott on an "institution" or an "area" vis-à-vis their association with the State and that effectively constitutes a boycott on Israel as a whole would be considered a boycott for the purposes of the statute.

Justice Hendel accepted Justice Melcer's proposal as legitimate interpretation. However, to him section 2 as a whole should be struck down. Section 2(a) as a tort and section 2(b) in terms of a sufficient justification for causing a breach of contract and section 2(c) in terms of compensation without proof of damage do not pass the third sub-prong of the

proportionality test. Therefore, Justice Hendel would strike down the entire section for being disproportional, but for the time being he supports curing sections 3 and 4.

Justice Vogelman joins the interpretation by Justice Danziger, but believes redrafting is more suited relief in this case, and therefore proposes to delete the phrase "an area in its control" from section 1. Still, he believes section 2(c) should be struck down and sections 3 and 4 should be upheld. Additionally, in his view, maintaining the Boycott Law's validity requires interpreting it to apply only in cases where the singly justification to call for "refraining purposefully from economic, cultural or academic connections with a person or other entity" is that person or entity's relationship to the State of Israel or any of its institutions.

Justice Joubran finds that section 2(c) should be struck down and that section 1 should be interpreted according to Justice Danziger's proposal regarding the areas in the State's control. Additionally, he joins Justices Danziger and Vogelman in distinguishing a call for boycott on a person because of their relationship to the State of Israel or one of its institutions and a call for boycott on a person because of their relationship to an area controlled by the State.