Call for the Boycott of Israeli Products: Incitement to Economic Discrimination or Freedom of Expression?

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Freedom of expression is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in Article 10, paragraph 1. Paragraph 2 provides for the possibility of limiting the exercise of this right, where such "restrictions or penalties prescribed by law (...) constitute measures necessary in a democratic society (...) for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others (...)." According to the European Court of Human Rights ("the Court"), matters which affect the public to such an extent that it can legitimately take an interest in them, or which arouse its attention or give rise to substantial concern, because they relate to the well-being of citizens or the life of the community, are matters of general interest. This is also the case for issues that are likely to be highly controversial, that deal with an important social theme, or that relate to an issue about which the public has an interest in being informed.[1]

The case of *Baldassi and others v. France* gave the Court the opportunity to rule on the relationship between freedom of expression as enshrined in the Convention and calls for a boycott.[2] An international campaign, "Boycott, Divestment and Sanctions" ("BDS"), was indeed initiated on July 9, 2005 by an appeal from Palestinian non-governmental organizations, one year after the International Court of Justice stated that "The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law."[3] In 2009 and 2010, members of this collective initiative participated in operations in France calling for a boycott of products from Israel. In 2015, the French Court of Cassation upheld the conviction of these participants for incitement to economic discrimination based on their belonging to a particular nation; but in its *Baldassi* judgment of June 11, 2020, the European Court of Human Rights unanimously held that this conviction constituted a violation of Article 10 of the convention on the freedom of expression.

In order not to misunderstand the meaning of this decision, it is worth recalling how the call for a boycott of products from Israel is construed under French law. With this background in mind, the scope of the *Baldassi* ruling will then be explained, as well as its reception by the French public authorities.

The French legal treatment of the call for a boycott of products imported from Israel

In France, as stated by the Human Rights Defender (*Défenseur des droits*),[4] the call for a boycott of Israeli products is likely to be qualified as illegal discrimination under two French criminal laws. On the one hand, "hindering the normal exercise of any economic activity" based on actual or supposed membership of a nation is prohibited by Article 225-2, 2 of the French Criminal Code. Through this offense resulting from Law No. 77-574 of June 4, 1977, the legislator intended to combat economic boycott practices in international trade as inspired by political reasons. Since the text does not refer to any specific behavior, the offense of hindering the normal exercise of any economic activity must be

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1. Satakunnan Markkinapörssi Oy et Satamedia Oy v. Finland, no. 931/13, ECtHR [GC], § 171, June 27, 2017.
2. Baldassi and others v. France, no. 15271/16, 15280/16, 15282/16, 15286/16, 15724/16, 15842/16 and 16207/16, ECtHR, June 11, 2020.
3. Legal Consequences of a Wall in the Occupied Palestinian Territory, I.C.J., Advisory Opinion, Reports 2004, p. 136, § 163, July 9, 2004.
4. Human Rights Defender, deliberation no. 2009-384 of Nov. 30, 2009.

understood as "the fact not of preventing, but of making it more difficult for a professional to carry out an activity contributing to the production, distribution or consumption of wealth by means of a particular denigration or various pressures on potential clients."[5] This analysis is identical to that made by the Criminal Chamber of the Court of Cassation in its decision of September 28, 2004.[6]

On the other hand, the call for a boycott of products imported from a country is prohibited by Articles 23 and 24 of the Law of July 29, 1881, on the freedom of the press, which makes it a criminal offense to provoke discrimination based on belonging to a nation. Article 24(8) provides that "Those who (…) have provoked discrimination (...) against a person or group of persons on the grounds (...) of their membership (...) of a particular nation (…), shall be punished by one year's imprisonment and a fine of 45,000 euros, or by one of these two penalties only." Although this law has been amended several times since its enactment, it remains in force to the present day.

In addition to this body of law, French justice ministers have instructed prosecutors since 2010 to use anti-discrimination laws to prosecute BDS activists. In a circular dated February 12, 2010,[7] the Minister of Justice, Mrs. Michèle Alliot-Marie, indicated that any call for a boycott of a state's products was likely to constitute an offense of "public provocation to discrimination" and asked public prosecutors to ensure "firm and consistent" repression of such actions. She called on prosecutors to systematically and specifically prosecute calls to boycott Israeli products. This circular was completed and clarified by a circular from her successor, Mr. Michel Mercier, dated May 15, 2012.[8]

In doing so, the French public authorities have been a forerunner in the criminalization of BDS activists: other countries have adopted similar measures, mostly with a purely declarative and non-normative scope, such as in Germany in 2019, where the Parliament adopted a resolution qualifying the BDS movement as antisemitic; as well as in Spain and the UK.

Call for a boycott as a "means of expressing protesting opinions," according to the European Court of Human Rights

In the *Baldassi* case, the applicants were part of the "Collectif Palestine 68," which had implemented the BDS campaign locally. In 2009 and May 2010, they filled up three shopping carts with products which they believed to originate from Israel, displayed them in a hypermarket in full view of customers, and distributed leaflets. In 2010, they also presented a petition for the signature of the hypermarket's customers, urging it to stop selling products imported from Israel.

The Colmar public prosecutor brought the applicants to the Mulhouse criminal court, in particular for having provoked discrimination based on the origin and membership of a group of people, an offense provided for in Article 24(8) of the Law of July 29, 1881. In two judgments of December 15, 2011, the Mulhouse criminal court discharged the applicants. But in 2013, the Colmar Court of Appeal overturned these acquittals and declared the applicants guilty of the criminal offense of provocation to discrimination.[9] Based on a recent ruling of the French Supreme Court ("Court of Cassation"),[10] the Court of Appeal considered that, by their action, the applicants had caused discrimination against products coming from Israel. They incited customers not to buy goods because of the origin of the producers and suppliers from a specific nation, Israel, and this

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5. Paris Court of Appeal, June 16, 2008.
6. Cass. Crim. Sept. 28, 2004, no. 03-87.450: Mr. Willem, mayor of the municipality of Séclin, had announced his intention to ask the municipality's catering services to stop buying products from the State of Israel. In so doing, according to the French courts, he encouraged them to take account of the origin of these products and, consequently, to hinder the economic activity of Israeli producers, calling for a boycott to be imposed because of their association with the State of Israel. This case was referred to the European Court of Human Rights, which found that such a sentence was compatible with Article 10 of Convention (Willem v. France, no. 10883/05, ECtHR, July 16, 2009).
7. Circular of the Ministry of Justice of Feb. 12, 2010, addressed to the public prosecutors at the courts of appeal, CRIM-AP no. 09-900-A4.
8. Circular of the Ministry of Justice of May 15, 2012, CRIM-AP no. 2012-034-A4.
9. Colmar Court of Appeal, Nov. 27, 2013, no. 01122 and 01129 (two judgments).
10. Cass. Crim. May 22, 2012, no. 10-88.315: according to the Court of Cassation, the dissemination of statements urging people to stop buying products from the State of Israel in order to protest against the policy of the government of that country against the Palestinian people, incites people to take account of the origin of these products and, consequently, constitutes the offense of incitement to racial discrimination punishable by Article 24(8) of the Law of July 29, 1881 on freedom of the press.

constitutes a nation within the meaning of the applicable legal indictment provisions and of international law. Moreover, according to the Court of Appeal, incitement to discrimination does not fall within the right to freedom of opinion and expression when it constitutes a positive act of rejection, manifested by incitement to differential treatment of a category of persons – in this case, the producers of goods in Israel.

In two rulings of October 20, 2015,[11] the Criminal Chamber of the Court of Cassation upheld the analysis of the Court of Appeal, which had "correctly" noted that the legal conditions of the offense provided for in Article 24(8) of the Law of July 29, 1881 were met and that the exercise of freedom of expression, proclaimed by Article 10 of the Convention, could be subject, pursuant to the second paragraph of that text, to restrictions or sanctions constituting, as in the present case, measures necessary in a democratic society for the preservation of order and the protection of the rights of others.

The applicants then referred their case to the European Court of Human Rights. Up until then, the Court only rarely had occasion to examine the question of the compliance of a call to boycott with Article 10 of the Convention, notably in the *Willem v. France* case. The *Baldassi* ruling is a first precedent, as the Court qualified the boycott as a "means of expressing protesting opinions," while recalling the limits not to be exceeded in the context of Article 10. In its analysis of whether the interference (here constituted by the conviction of the applicants) was justified, the Court proceeded in three stages.

i) The Court rejected the precedent-setting nature of the *Willem* judgment, in which it had found that there had been no violation of Article 10 of the Convention, after noting that the applicant had not been convicted for his political opinions but for incitement to a discriminatory act. In the *Baldassi* case, on the other hand, the applicants were private citizens who are not subject to the duties and responsibilities of a mayor's office, and whose influence on consumers is not comparable to that of a mayor in the services of his municipality; and the Court considered that the applicants had clearly carried out the boycott actions with a view to provoke or stimulate debate among consumers of supermarkets, which led to the proceedings which they were complaining about before the Court.

(ii) After stating that Article 10 of the Convention "leaves little room for restrictions on freedom of expression in the field of political discourse or matters of public interest.[12] Political discourse is by nature often virulent and controversial. It is nevertheless in the public interest, unless it degenerates into a call for violence, hatred or intolerance," the Court emphasized that the applicants had not been convicted of making racist or antisemitic statements or of inciting hatred or violence, nor of being violent or causing damage. Thus, according to the Court, the call for a boycott of products, in this case from the State of Israel, can only constitute an offense if there is evidence of racist, antisemitic or violent acts or statements that would "degenerate" into the call to boycott.[13] In France, racist or antisemitic statements constitute offenses which are prohibited by criminal law and punished according to their seriousness;[14] when such statements are publicly held, the penalties are more severe.[15] Article 132-76 of the Criminal Code defines the aggravating circumstance of racism or antisemitism: "The penalties incurred for a crime or offense are increased when the offense is committed because of the victim's actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion." More specifically, the Law of July 29, 1881, on the freedom of the press, defines several offenses against racist or antisemitic speech.

(iii) Without calling into question the interpretation of the law on which the applicants' conviction was based, namely incitement to economic discrimination, the Court finally examined the grounds on which the French courts had convicted the applicants. It noted that, as interpreted and applied in this case, French law prohibits any call for a boycott of products based on their geographical origin, regardless of the content of such a call, its

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11. Cass. Crim. Oct. 20, 2015, no. 14-80.020 and 14-80.021 (two judgments).
12. Castells v. Spain, ECtHR, §43, April 23, 1992; Wingrove v. UK, ECtHR, §58, Nov. 25, 1996.
13. This position was already taken by the highest courts in the U.S., Great Britain and Germany, which have recognized the right of citizens to promote and practice boycotts of products originating from a state or group of persons whose policies or practices are criticized in the name of human rights or international law.
14. Art. R. 625-7 of the French Criminal Code: Non-public incitement to discrimination, hatred or violence against a person or a group of persons because of their origin or their membership or non-membership, real or assumed, of a specific ethnic group, nation, alleged race or religion is punishable by a fine of 1,500 euros.
15. Law on Freedom of the Press, July 29, 1881, Art. 24(8): one year's imprisonment and a fine of 45,000 euros.

motivation, and the circumstances in which it is made. However, the Court considered that, in ruling on this legal basis, the local court did not provide a detailed statement of reasons, which was even more essential in the present case because Article 10 of the Convention requires a high level of protection of the right to freedom of expression (§78). Indeed, on the one hand, "the actions and statements of which the applicants were accused concerned a subject of general interest, namely respect for public international law by the State of Israel and the human rights situation in the occupied Palestinian territories, and were part of a contemporary debate that was open in France and throughout the international community;"[16] on the other hand, these actions and words "were political and militant expression."[17] The Court concluded that the applicants' conviction was not based on relevant and sufficient grounds, by applying the rules in accordance with the principles enshrined in Article 10 and based on an acceptable assessment of the facts. It concluded that there had been a violation of Article 10 of the Convention.

In summary, the European Court held in its *Baldassi* judgment that the call to boycott belongs to political and activist speech discourse and that the judge must carry out a rigorous review of the necessity of the interference by demonstrating, in the light of the context, how the permissible limits of freedom of expression have been crossed.

It is in application of this precedent that the circular of October 20, 2020, by the current French Minister of Justice, Mr. Eric Dupont-Moretti, relating to the repression of discriminatory calls for the boycott of Israeli products, was issued.[18] According to the Minister, the decision of the European Court of Human Rights, "which is protective of freedom of militant expression in that it authorizes the call for a political boycott, does not, however, call into question the legal foundations of the repression as long as a call for discrimination is characterized." Drawing the consequences of the judgment of June 11, 2020, the Minister of Justice insisted on "the need for rigor in the characterization of the facts in question. Prosecutors should only prosecute when the facts, considered *in concreto*, characterize an appeal to hatred or discrimination and not a simple political action." "It will be necessary to verify in each case how, from a material and intentional point of view, the content of the call to boycott in question, its motives and the circumstances in which it took place, characterize the offense of public provocation to discrimination and thus justify the infringement of the freedom of political and activist expression," the Minister said. Finally, the Minister explained that "The antisemitic character of the call to boycott may be directly derived from the words, gestures and writings of the respondent. It may also be inferred from the context. The representative of the public prosecutor should insist on the requirements of the European Court and the meeting of all these criteria during his or her submissions at the hearing." This analysis was reiterated by the Ministry of Justice in a written reply of March 16, 2021, to a question from a member of Parliament on this point, on which occasion the Ministry confirmed the validity of the circulars of 2010 and 2012.[19]

Some commentators, based on a quick reading of this circular, saw in it the French authorities' pure and simple refusal to comply with the solution rendered by the European Court, by upholding at all costs the French legal basis for the repression of the call of the boycott of Israeli products. In our view, however, the Ministry of Justice has fully grasped the scope of the *Baldassi* judgment, which authorizes the French authorities to condemn calls for boycots on the basis of Article 24(8) of the Law of July 29, 1881, as long as the local judge has given sufficient reasons for his or her decision, i.e. she or he has explained how the specific circumstances of the case in question allow him or her to restrict freedom of expression by sanctioning the call for a boycott on the basis of the Law of 1881.

Conclusion

It follows from the *Baldassi* ruling, the application of which was clarified by the circular of the Minister of

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16. *See* Mamère v. France, ECtHR, no. 12697/03, § 20, Nov. 7, 2006.
17. In this regard, the Court quotes the UN Special Rapporteur on freedom of religion or belief, who recalled at the UN General Assembly of Sept. 20, 2019 (A/74/358) that "international law recognizes boycotts as legitimate forms of political expression and that non-violent expressions of support for boycotts are, as a general matter, legitimate speech that should be protected."
18. Circular of the Ministry of Justice of Oct. 20, 2020, on the repression of discriminatory calls for a boycott of Israeli products, reference: DP 2020/0065/A4BIS.
19. Answer published in the Official Journal of the National Assembly of March 16, 2021, on written question no. 35917 by Mr. Pierre Dharréville published in the same Official Journal on Feb. 2, 2021.

Justice of October 20, 2020, that French judges are obliged, when they intend to act on the offense provided for and punished in Article 24(8) of the Law of July 29, 1881 of incitement to discrimination against a person or a group of persons on the basis of their membership in a nation, to give very precise reasons for their judgments in order to justify the interference that the criminal sanction they pronounce constitutes with the freedom of expression guaranteed to the respondent by Article 10 of the Convention. Prosecutors and judges must therefore verify, on the one hand, that the facts characterize a call to hatred or discrimination and not a simple political action, and on the other hand, that the antisemitic nature of the call to boycott is apparent or can be deduced from the words, gestures, and writings of the respondent in each context.

The interactions between the French courts and authorities and the European Court of Human Rights finally illustrate the difference in legal understanding of freedom of expression between Paris and Strasbourg.[20] Although it serves "a major political function,"[21] "freedom of expression is rarely presented as a freedom of the citizen in public life."[22] This is true under French public law, where freedom of expression is studied through the prism of individual freedom or individual freedom exercised collectively.[23] This attachment to the lexicon of individual freedoms has led the French administrative judge never to equate freedom of expression with political freedom, even though the latter showed a particularly revealing concern to protect freedom of expression.[24] As we have seen, the European Court of Human Rights has been more explicit in clearly recognizing that freedom of expression is a political freedom, insofar as the degree of protection of public expression is more or less conditional on its participation in a debate of general interest.

Unlike the French administrative courts, the European Court of Human Rights treats freedom of expression on a substantive level, in terms of the political or public interest purposes it pursues, and not on the formal level attributed to it by the administrative courts, i.e., the existence of expression and a collective character. To build its case law, the European Court dissociates the individual according to whether he is a human or a citizen. It is not so much by means of the message itself, but the debate in which it is part of, that the Court retains a character of general interest.

In this context, the circular of October 20, 2020 can be interpreted as a manifestation of the rigorous application of international treaty law by a state that does not, however, renounce its objective of combating provocation to economic discrimination, particularly regarding Israeli products. Thanks to the *Baldassi* judgment and its reception by the French authorities, the difference in understanding of freedom of expression between Paris and Strasbourg is thus blurred and allows for a consistent and above all efficient synthesis between these two approaches. ■

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20. I am grateful to Professor David Rivière for this analysis ("Les rapports entre liberté politique et liberté d'expression. Enjeu de l'introduction du principe de proportionnalité dans la mise en œuvre de l'ordre public immatériel," Droit et société, 2016/3 (no. 94), p. 581-602).
21. Jacques Petit, "Les ordonnances Dieudonné: séparer le bon grain de l'ivraie," Actualité juridique du Droit administratif (AJDA), 15, 2014, p. 866. In the same way, according to the French constitutionalist Guy Carcassonne, "freedom of expression is all about politics" (in "Les interdits et la liberté d'expression," Les Nouveaux Cahiers du Conseil constitutionnel, 3, 2012).
22. Michel Verpeaux, "La liberté d'expression dans la jurisprudence constitutionnelle," Les Nouveaux Cahiers du Conseil constitutionnel (June 2012), available *at* https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-liberte-d-expression-dans-les-jurisprudences-constitutionnelles. This dissonance is old, as it already appears in the wording of Article 11 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789: "the free communication of thoughts and opinions is one of the most precious rights of Man" and "every citizen may speak, write or print freely."
23. Boris Bernabé, "Quelle(s) liberté(s) d'expression avant 1881?" RDP, 3, 2012. This lexical unification around individual liberties was then confirmed by the emergence of this unique sphere of public liberties, which in fact prohibits any conceptual opposition between individual liberties and political liberties. Olivier Beaud thus recalls that, from the point of view of public liberties, freedom of expression "has in principle no relevance in an analysis of citizenship" ("La liberté d'expression, face méconnue de la citoyenneté en démocratie," in "La démocratie, du crépuscule à l'aube?" symposium, June 2013, Nanterre).
24. *See* Bernard Stirn, "Le juge administratif et les restrictions à la liberté d'expression," *Revue française de droit administratif (RFDA)*, 6, 2003.