The Supreme Court sitting as a High Court of Justice

HCJ 5239/11Uri Avnery *et al* v. The Knesset *et al*

In the matter of the legality of the Law for Prevention of Harm to the State of Israel through Boycott, 5771-2011

Abstract of Judgment

On April 15, 2015, an enlarged bench of nine Supreme Court Justices gave a judgment on petitions which sought to challenge the constitutionality of the Law for Prevention of Harm to the State of Israel through Boycott, 5771-2011 (hereinafter: "the Boycott Law" or "the Law").

The Law, which was passed by the Knesset on July 11, 2011, makes it a tort for a person who knowingly publishes a public call to impose a boycott against the State of Israel, that is to "deliberately refrain from economic, cultural or academic ties with a person or other entity, merely because of his or its affiliation to the State of Israel, one of its institutions or an area under its control which may harm that person or entity economically, culturally or academically" (hereinafter: "a call to impose a boycott against the State of Israel"). The Law likewise empowers the Minister of Finance to institute rules restricting the participation in State tenders of a person who calls to impose a boycott as aforesaid and to deny him the various benefits which are granted by the State.

The Petitioners sought to challenge the constitutionality of the Law on the grounds that it infringes various constitutional rights (the main ones being: freedom of political expression, the right to equality and the right to freedom of occupation), without satisfying the conditions included for this purpose in "the limitation clause" specified in the Basic Law: Human Dignity and Liberty and in the Basic Law: Freedom of Occupation. According to them the Law imposes disproportionate civil and administrative sanctions which also contravene the accepted legal principles regarding political expression with the aim of silencing protest against the government's policy in the areas under its control (hereinafter: "the Area") and by so doing it

unconstitutionally restrict the democratic tools available to the minority to express its opposition to that policy.

The Respondents argued that the purpose of the Law is to protect the State, its institutions and various entities within it against the imposition of a boycott which is likely to harm them merely because of their affiliation to the State, one of its institutions or an area under its control. This is a worthy purpose since it expresses the State's obligation to protect the individuals, the institutions and the elements affiliated to it and to prevent the illegitimate discrimination against its citizens. Furthermore, it is claimed that the Law is intended to prevent damage to Israel's status in the world, or its relations with other states and its foreign relations - and this too is a worthy purpose, and that because of the "minimizing aspects" built in to the Law which limit the infringement of constitutional rights which might result from the sanctions it imposes, the Law passes the constitutional "proportionality criteria".

In the judgment it was unanimously decided to deny the petitions in so far as they related to Sections 3 and 4 of the Law, which empower the Minister of Finance to impose administrative sanctions against person who publicizes a call to boycott the State of Israel or a person who undertakes to join such a boycott, but on the other hand to annul Section 2(c) of the Law, which authorizes the Court to order someone who with malice aforethought calls for a boycott of the State of Israel to pay exemplary damages of an unlimited amount. It was likewise decided by the majority verdict of (Retired) President A. Grunis, President M. Naor, Deputy President E. Rubinstein and Justices H. Melcer and I. Amit, to deny the Petitions relating to Sections 2(a) and 2(b) of the Law, which define the tortious wrongdoing, against the dissenting opinions of Justices: S. Joubran, Y. Danziger and U. Vogelman and the separate opinion of Justice N. Hendel.

There follows a précis of the opinions of the Justices who sat on the bench, in the order in which they appeared in the judgment:

Summary of Opinion of Justice H. Melcer

Justice H. Melcer wrote the main opinion in the majority verdict. Justice H. Melcer reviewed the process of and background to the Law's enactment and its various "pulleys" until its final version was formulated. In doing so, Justice H. Melcer mentioned how the State of Israel had been delivered from the Arab economic boycott, which had in its day been imposed upon it and which had caused massive damage to the State, by, inter alia, American and European legislation, which is still in force and which specifically outlawed participation in or submission to the boycott. In Justice H. Melcer's opinion, while it is difficult to deny that it does indeed infringe freedom of expression, the Law does not undermine the "core component of freedom of expression" and the infringement is proportional, is designed to achieve a worthy purpose, the legality of which may be recognized, subject to interpretation of the provisions of the law (and its partial annulment), in a similar way to other enactments which are recognized as valid despite such an infringement upon freedom of expression.

Justice H. Melcer explained that the law had been ambivalent in its treatment of the boycott, sometimes tolerating it and other times prohibiting it and that it was from this perception that the "call to boycott" rule was derived, which was also affiliation-dependent. Thus, a boycott for consumer objectives, for example, would probably be permissible (although an "advertising boycott" which undermined freedom of the press was generally regarded as prohibited), while a boycott for political goals would in certain circumstances be prohibited. As far as Justice H. Melcer was concerned, the Law answered the State's need to protect itself against those rising up to destroy it, or to alter its character, through various aggressive measures, including a boycott, and it is a tool which "defensive democracy", a concept which has gained currency within the Israeli legal system and throughout the world, recognized may be used.

According to Justice H. Melcer's approach, the Law imposes sanctions on calls to boycott the State of Israel, which aim to force positions on others through economic and other measures and thus they deviate from pure freedom of expression and its classic purpose: to inspire public debate and present even controversial positions in order to ensure that political decisions are taken in society in a free and educated way,

through persuasion, with tolerance and respect for the autonomy of others. In Justice H. Melcer's opinion, when freedom of expression is used as a tool to undermine the right of an individual to choose his political direction according to his ideas and beliefs without thereby being damaged, the degree of protection given to the absolute freedom of expression may be slightly reduced. In this context, Justice H. Melcer pointed out that the calling for and participation in a boycott sometimes even entails "political terrorism", justifying a restriction of the rights of a person who wishes to take part in it, a restriction which he maintains should particularly be imposed when the object of the boycott is the academic community in Israel, since a call of this nature undermines academic freedom itself and prevents research and instruction which are intended, inter alia, to seek out the truth. According to Justice H. Melcer's approach, which is based upon the words of scholars: "This is in fact a boycott of intellectualism itself, since such a boycott silences the dialogue".

In addition, Justice H. Melcer points out that the Law, which seeks to prohibit a call to deliberately avoid forging economic, cultural or academic ties with a person or other entity "purely because of his or its affiliation to the State of Israel, one of its institutions or an area under its control" - also promotes the values of equality and prohibiting discrimination. According to Justice H. Melcer's approach, the basis of the boycott, the call for which constitutes a civil wrong under the Law, is: "an affiliation to the State of Israel", which is very similar to the prohibition of discrimination based on "country of origin" that is recognized in the Prohibition of Discrimination in Products, Services and Entrance to Places of Entertainment and Public Places Law, 5761-2000 (and in the laws of other states in the world) as a ground justifying the imposition of tortious liability. In this context, Justice H. Melcer pointed out that discrimination on the basis of affiliation to a country of origin detrimentally affects an individual for actions and conduct which are beyond his control and which constitute a form of inappropriate "collective punishment".

Moreover, according to Justice H. Melcer's approach: "The administrative restrictions against those calling for a boycott have their own kind of internal logic, since how can they ask for assistance from the very sources which according to them should be boycotted? In this respect, the Law applies to those calling for a boycott the standard which they themselves are proposing".

Justice H. Melcer subsequently held, amongst other things after reviewing the case law in other states in the world concerning issues similar to those raised by the Law, that Sections 2(a), 2(b), 3 and 4 of the Law passed the "proportionality criteria" entrenched in the "limitation clauses" in the ethical Basic Laws and are within the parameters of "legislative latitude". In this context Justice H. Melcer stressed that the Law does not impose a criminal sanction on political expressions and that the tort which it establishes only concerns calling for the imposition of a boycott but the Law does not charge a person with tortious liability for expressing the political ideas on which the call for the boycott is based. Moreover, the statutory infringement which is caused to the person calling for the boycott is relatively limited. In Justice H. Melcer's view a conservative approach may be taken when interpreting the aforementioned provisions of the Law which gives them constitutional legitimacy and that in the present case this approach is to be preferred. According to Justice H. Melcer's interpretive approach, in order for a cause of action to arise enabling a damages claim for commission of the tort defined in the Law, it is necessary to prove: the existence of damage, a causative connection between the commission of the tort and the damage, and awareness of a reasonable possibility that the damage could be caused. In addition a claim based on the tort created by the Law is subject to the defenses specified in the Civil Wrongs Ordinance and the provisions which delineate the quantum of damages which may be awarded having regard to the extent of the harm which directly emanated from the tortious act.

According to the finding of Justice H. Melcer, having regard to the broad discretion granted to the government when it comes to providing benefits and grants on the one hand, and the procedure which must be followed to approve them under the Law, which requires the involvement of government and parliamentary supervisors, on the other, the administrative restrictions which are imposed on a person calling for a boycott under Section 3 and 4 of the Law are also proportional. In this context Justice H. Melcer also stressed that the underlying purpose of the administrative restrictions is: "The interest in denying funding to entities or persons who call for a boycott against the State of Israel, in a way that, helped by forceful measures, discriminates against citizens of the State and which in effect harms the free market of ideas and seeks to coerce those damaged by the boycott into accepting the positions of the

boycotters. Moreover, the administrative restrictions seek to prevent a situation in which a person or body shall 'bite the hand which they wish to be fed from' and act in any ungrateful manner in advance while seeking to exploit the benefits being received so as to expand their activities against the party which is granting them those benefits". According to Justice H. Melcer's thinking: "granting the benefits to the entity calling for a boycott means transferring the State's resources to those seeking to harm it and promoted discrimination between its citizens . This is also recognized as a separate category under comparative law and permits the authorities to define in advance situations of expected ingratitude and to therefore deny granting the benefits to it from the outset".

However, Justice H. Melcer held that the unbridled "punitive damages" regime created by Section 2(c) of the Law exceeded the confines of the "proportionality zone" and noted in this context that: "Where a delicate balance must still be struck in order to minimally infringe upon the fundamental right to freedom of expression, and to refrain so far as possible from going beyond what is required by creating a 'cooling effect' for political expressions and lively social discourse - exceptional civil law tools should not be used and there should be no deviation from the classic damages claim which is generally a condition for civil liability and one of the main justifications in jurisprudence for approving the State's involvement in the private lives of its citizens".

Justice H. Melcer concludes his opinion with the following sentence:

" In my concluding I would say - beyond the result which I have arrived at - that, as a rule, the historical approach which saw fit to circumscribe boycotts in their various manifestations, at home and abroad, is to be preferred, except in relation to a limited number of exceptions (the call for a boycott against the State of Israel, as defined by the Law, not being one of them). A boycott is in most cases a bad thing for any state (including the Jewish State), as it also is for democracy and society".

Summary of opinion of Justice Y. Danziger

Justice Y. Danziger held that while the Boycott Law materially infringed the right to freedom of expression and that this infringement did not satisfy the limitation clause criteria in Section 8 of the Basic Law: Human Dignity and Liberty, the magnitude of the infringement posed by the Law could be substantially reduced through interpretation, in a way that would enable the Law to pass the constitutional tests. He therefore held the fitting interpretation of the Law, which was consistent with the fundamental values of our legal system, is that only a boycott of an "institution" or "area" which is a boycott against the State of Israel and results from their affiliation to the State shall come within with provisions of the Boycott Law, while the boycotting of an "institution" or "area" which is not part of a boycott against the State of Israel shall not do.

In contrast to the position taken by the majority of the bench, Justice Danziger felt that the Boycott Law infringed upon the core component of freedom of expression, which is a supreme constitutional right in our legal system. The call for a political boycott is a tool for achieving political objectives in a peaceful way and it enables every person to express his political positions, to influence his future and to decide which values ought to be advanced through his resources. The way is which the term "boycott on the State of Israel" has been defined in the Law, means that its provisions also apply where the boycott applies to the Areas of Judea and Samaria (hereinafter: "the Area"), even when it is not accompanied by a boycott of the entire State. Since the fate of the Area and the settlements located in it is a matter of profound political and public disagreement in Israel, Justice Danziger took the view that those wishing to express their discontent with the government's policy regarding the Area and to call others to oppose that policy, are entitled to the full protection granted in our constitutional regime to political expression.

Justice Danziger held that the Boycott Law violated political freedom of expression in a direct and extremely severe way, since that violation is based on the content of the political expression, and that the administrative sanction in the Boycott Law, in the guise of preventing participation in a tender and restricting the receipt of benefits constituted a material infringement of the freedom of political expression and the principle of equality. Justice Danziger added that the general authorization given to

the Minister of Finance in Section 4 of the Law, to withhold support from any entity calling for the imposition of a boycott on the State of Israel, including from an entity calling to impose a boycott on a person due to his affiliation to the Area, allows the possibility of consideration being given to the political positions of the entity being supported, as distinct from the specific purpose of the support, while undermining the political freedom of expression of the supported entity and the principles of pluralism and equality.

Justice Danziger held that in order to justify these violations of the constitutional right to political freedom the social benefit created by the Law would have to outweigh the damage which it caused and stressed that while the Law did indeed advance several important public interests, the public benefit generated by the Law varied according to the character of the boycott in question. Thus, while preventing a boycott against the State of Israel was consistent with the right of the State to protect itself against those seeking to harm it, this would not be the case regarding, for example, a boycott directed against the Area only. A boycott of this kind addresses an internal Israeli political issue and cannot be regarded as an expression of protest against the existence of the State per se.

In order to avoid the draconian step of annulling the Law in the light of its illegality or use of "the blue pencil" doctrine, by which the Court delineates outside the Law those provisions marred by constitutional irregularity, while leaving the rest of the provisions in force, in a similar way to judicial legislation, Justice Danziger held that a similar object may be achieved through interpretation, and without ordering the annulment of any of the Law's provisions. Judge Danziger stressed that the interpretative solution was a proportionate solution which limited the degree of judicial interference in the Knesset's enactments, and gave the appropriate weight to the principle of division of powers between the authorities.

Justice Danziger therefore suggested that Section 1 of the Boycott Law, which constitutes the entrance to the Law and outlines the scope of its application, be given a narrow interpretation in a way that would enable only a certain type of boycott to cross the threshold of the Law - a complete boycott against the State of Israel per se. Thus, not every boycott of an institution or area physically "belonging" to the State

would come within the definition of the Law, but only a boycott of an institution or an area within the framework of a boycott of the entire State. Justice Danziger held that this interpretation was also consistent with the reason why the institutions and areas were mentioned in Section 1 of the Law, which was intended to broaden the arrangement relating to the type of boycott which the Law was designed to contend with - a boycott of the State of Israel. In order to realize this purpose without at the same time expanding the application of the Law beyond what was required, Justice Danziger held that the connection between the "institution" and the "Area" and the State of Israel had to be interpreted in a practical sense, so that a call to boycott an institution of the State or call to boycott areas which are under the control of the State, unless accompanied by a call for an overall boycott of the State, shall not come within the ambit of the Law.

Nevertheless, having regard to the fact that his interpretation position was not accepted, Justice Danziger concurred with the position adopted by the majority of the bench's members, according to which Section 2(c) of the Boycott Law - which enables the imposition of punitive damages in response to the commission of the tort - deviated from the fundamental principles of civil law and had the appearance of a criminal fine and therefore should be annulled for unconstitutionality.

Summary of opinion of Justice N. Hendel

According to the approach of Justice N. Hendel, the petition pits the freedom of political expression on the one hand against the desire of Israeli society to defend itself against harsh and damaging actions on the other. In Justice Hendel's view, striking a balance between the various rights and interests requires ordering the annulment of Section 2 of the Law - the tort, and leaving in place Sections 3 and 4 of the Law - participation in tenders and the denial of benefits.

Freedom of expression is the lifeblood of democracy, and is what distinguishes a democratic from a non-democratic society. The starting point of the discussion as a whole is that calling for a boycott constitutes the expression of an opinion - a political statement. Freedom of political expression has special importance. At the democratic society level, freedom of political expression assists in the exchange of ideas in the

arena in which the most vital normative arrangements in the life of the community are determined. It helps realize the democratic component of majority rule, and constitutes a method of supervising administrative decisions. In terms of human dignity, calling for a boycott is, on occasion, a call to a person to behave in a manner dictated by his conscience and which realizes his values. Against this background, Judge Hendel examined the three types of sanctions which appear in the Law.

Under Section 2 of the Law a tort claim may be filed against a person who calls for a boycott. In Justice Hendel's opinion, this Section does not pass the constitutionality test and "privatization" of the opportunity to protect the public interest by putting it in the hands of the individual could create a significant chilling effect against political freedom of expression. Numerous claims would become a device for political battering, which would be activated between the walls of the court with the aim of forging a new and harsh reality. The damage in this reality would be done even if the claim did not succeed. Implementation of Section 2 of the Law would even require the courts to delve into complex political issues, and to contend with the built in ambiguity from which the Boycott Law suffers. It would be better if this job was not carried out within the walls of the trial courts.

Section 3 of the Law is designed to prevent a person who calls for a boycott from participating in a tender. In Justice Hendel's opinion, this section does stand up to constitutional scrutiny, the idea here being to restrict participation in a public tender and not the creation of a new civil wrong. The sanction is exercised by a public authority in accordance with public and administrative law criteria and the provisions which shall be stipulated with the concurrence of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee. At the same time, Justice Hendel stressed that it must be verified that the section is being used in a rational way. For example, take a situation in which the owner of a transportation company who called for a boycott of the Areas of Judea and Samaria participates in a tender to transport schoolchildren in Ariel, compared to a case in which he participates in a similar tender to transport schoolchildren in Tel Aviv. It would appear to be easier to justify denying his participation in the first tender than it would be to deny his participation in the second tender.

Section 4 of the Law concerns the denial of various benefits, such as tax breaks. This section too stands up to constitutional scrutiny, mainly for the reasons that were explained in relation to Section 3 of the Law. Justice Hendel added that in his opinion it would be wise not to exercise the authority granted by Section 4 until regulations have been enacted or at least until directions or practice guidelines have been issued, since otherwise the Minister of Finance would be able to impose sanctions with regard to this sensitive subject in his sole discretion.

Justice Hendel reviewed at length the relevant legislation and case law from other parts of the world and especially from the United States, which showed a complete absence of any tort claims in response to boycott calls and it seems that in the relevant jurisdictions an individual may not sue another individual with respect to such a call. The power to combat the boycott phenomenon is kept in the hands of the State, through applying administrative sanctions. The State and not the individual is subject to administrative law, which obligates reasonable, fair and impartial enforcement. Moreover, the main arrangements throughout the world concern the prohibition of joining boycotts, rather than the calling for them, which constitutes political expression. In Justice Hendel's view, this situation fits together with the operative result being proposed - the annulment of Section 2 only, and with the main rationale behind it: the dichotomy between a State-imposed, proportionate administrative sanction and the establishment of a new tort, with respect to which litigation may be initiated at the whim of any individual. In this way the balance shall be maintained between the right of the State to delineate policy regarding the boycott and the preservation of free political expression - the jewel in the crown of freedom of expression. It may be said that this result creates democracy which is protecting itself against those rising against it and even the democratic character of society and the ideal of freedom of expression. This is an important component which distinguishes between a state which is democratic and one which is not.

Summary of Opinion of Deputy President E. Rubinstein

Deputy President E. Rubinstein concurred with the position taken by Justice H. Melcer, that the Boycott Law should be approved subject to the invalidation of Section 2(c) of the Law. As far as Deputy President Rubinstein was concerned, the Court had to be doubly cautious when interfering in blatantly political issues, just as it had been dissuaded from doing in the Disengagement case (HCJ 1661/05 Gaza Coast Regional Council v. Israeli Knesset, IsrSC 59(2)481), with regard to the engagement decision itself. The Deputy President further pointed out, that with the matter should be examined through the prism of the singular historical, policy and political experience of the State of Israel, which has been exposed to the Arab boycott ever since it was founded and which is nowadays exposed to calls for boycotts against it by various organizations, chief amongst them the BDS movement, which in every generation rise up to destroy us. Thus, even if the Law does to some degree infringe upon the freedom of expression given to the Petitioners and other organizations, that infringement is by and large proportionate and passes the limitation clause criteria.

In the Deputy President's view, the call to boycott is not in the same category as the rest of the expressions protected under the broad banner of freedom of expression; thus, unlike the making of a persuasive argument, the call for a boycott by its nature and character undermines the freedom of expression of others and silences the dialogue, while enforcing the views of its sponsors on those who would oppose them. He also reviewed the American law on this subject and concluded that even though the American legal system gave the broadest protection to freedom of expression, in the case of political boycotts it did so where the boycott was a protest against the undermining of constitutionally or legally protected values, such as non-discrimination and racial equality, as opposed to other kinds of political boycotts, like the one upon which the current petition is predicated.

The Deputy President further believed that a distinction should be drawn between the call for a boycott and the boycott itself, since while the former acts in the private domain, the latter acts by calling upon others to take action, which is the boycott, in the public domain. Therefore, when an individual for his own reasons boycotts a

person or company, he is acting in the private domain and the State cannot interfere in his reasons. On the other hand, however, when an individual calls to boycott the products of others, he moves out of the private and into the public sphere, making it not unreasonable, in the Deputy President's opinion, for him to be exposed to greater obligations as a result, as the legislator had imposed in the past when it enacted the Prohibition of Discrimination in Products, Services and Entrance to Places of Entertainment and Public Places Law, 5761-2000, and as it did in the legislation before us by imposing a tortious sanction in cases where the boycott is based only on the place of residence or on the activities of the party against whom the boycott is directed. For these reasons, the Deputy President found that the tortious sanction created by Section 2(a) and Section 2(b) of the Law stood up to constitutional scrutiny.

The Deputy President came to a similar conclusion with regard to the administrative sanctions introduced by Sections 3 and 4 of the Law. In his mind, in so far as these sections were concerned the petitions were not yet ripe for adjudication, since the Minister of Finance had yet to issue relevant provisions and regulations, and therefore there were no grounds for the exceptional interference of this Court in the overturning of laws while the intensity of the infringement on the Petitioners' freedom of expression, if there was one, in this context, remained unknown. Regarding the substantive issues, he was of the opinion that the State had the right to decide not to enter into agreements with private entities acting to overturn its policies and in fact against the State itself; and in his words: "A state which is foolish enough to provide financial benefits to private entities or to enter into contracts with private entities, which call for the boycotting of individuals or companies purely because of their affiliation to it, one of its institutions or an area under its control, is like a person who comes to strike another person and the latter equips him with a club so that he can deal him a powerful blow." Therefore there is no reason to interfere in these sections. However, the Deputy President remarked that while Section 4(b) of the Law enables the Minister of Finance to restrict the granting of benefits to a person calling for a boycott, even without the enactment of the relevant regulations, the enactment of the regulations in question should nevertheless be expedited for the sake of good order.

However, in the Deputy President's opinion the punitive damages provision in Section 2(c) of the Law was too draconian a measure. The award of exemplary damages in tort cases is an exceptional occurrence, the object of such damages being to express society's revulsion at the acts of the tortfeasor in serious cases and to deter him and others like him from committing such civil wrongs in the future, notwithstanding that nobody was damaged by his deeds or at least the existence or extent of the damage was not proved. But this is not the case in relation to Section 2(c) of the Law in question, the prime, albeit not the only purpose of which, is to protect the residents of Judea and Samaria from the damage caused to them by the activities of those calling to boycott them, a matter which is a controversial subject amongst the Israeli public. In order to achieve the said purpose, Sections 2(a) and (b) of the Law, which do not cause greater harm than necessary, as aforesaid, to the Petitioners' freedom of expression, would have been sufficient, since they impose an obligation to compensate the victims for the damage that was caused to them. Section 2(c), however, in the opinion of the Deputy President breaches this delicate balance; it substantially restricts the Petitioners' freedom of expression by creating an intense, chilling effect and on the other hand protects those against whom the boycott call was made even when they sustained no damage. There therefore appears to be another method which can serve the object which the Law seeks to achieve and which is less detrimental to the Petitioners' freedom of expression - proof of damage, and this is sufficient to determine that Section 2(c) of the Law is unconstitutional.

Summary of Opinion of Justice I. Amit

Justice I. Amit concurred with the opinion of Justice H. Melcer that, with the exception of Subsection 2(c) of the Law relating to punitive damages, the Law passes the proportionality criterion, albeit with great difficulty.

Justice Amit held that the Law infringes upon the freedom of political expression which lies at the heart of the right to freedom of expression. Justice Amir emphasized however that contrary to the impression which could emerge from the petitions, the Law does not apply to a person who boycotts the State of Israel, an area under its control or an entity affiliated thereto, and does not prevent any person or entity from expressing their opinion regarding the issue of continued Israeli control of the Area.

The Law only prohibits issuing a public call to impose a boycott. Justice Amit held that the call for a boycott, inasmuch as it is meant to induce action, is not an ordinary form of expression, rather falls between simple expression and actual conduct. Accordingly, even though the Law indeed infringes upon some of the rationales underlying the freedom of expression, the intensity of the infringement is diminished. Justice Amit further held that a public call to impose a secondary boycott on a person purely because of his affiliation with the State of Israel infringes upon the hard core of that person's human dignity, because it turns that person into a means for achieving a political objective, through no fault of his own. As such, a call for a secondary boycott should not be counted amongst those expressions which justify the strongest protection of the free of expression.

In addressing the tort anchored in Section 2 of the Law, Justice Amit emphasized that the Law's wording leads to ambiguity inter alia with respect to the question of causation, the definition of damage, the Law's requirement of *mens rea*, the relationship between this tort and general tort law, the defendant's possible defenses and the reliefs available to the plaintiff. Despite this ambiguity, in light of the moderating interpretive solutions that were suggested, Justice Amit concurred with the opinion of Justice Melcer and agreed that the section's shortcomings did not justify invalidation of the Law. However, Justice Amit held with respect to Section 2(c) of the Law, which addresses exemplary damages, that at issue are punitive damages which could have a real "chilling effect" on freedom of expression. This chilling effect is compounded by the combination of ambiguity regarding the scope of the tort on the one hand, and the absence of any maximum sum of punitive damages to be awarded or criteria for awarding them on the other. This situation which could create excessive deterrence leads to Subsection 2(c) of the Law excessively infringing upon the freedom of expression.

Summary of Opinion of Justice U. Vogelman

In Justice U. Vogelman's opinion the constitutional relief which should be granted is a declaration of the annulment of Section 2(c) of the Law and deletion of the words "or area under its control" in Section 1 of the Boycott Law. Justice Vogelman also held that the continued existence of the Law was dependent upon interpreting it such that it

shall only apply in those cases in which the sole purpose of the call to "deliberately refrain from economic, cultural or academic ties with a person or other entity" is their link to the State of Israel or one of its institutions (that is, a critical position in relation to the policy of the State of Israel, including in relation to its holding of the Area of Judea and Samaria (hereinafter: the Area) shall not be included within the prohibition on calling for a boycott).

Justice Vogelman noted that a call to boycott the Area is an unmistakably political expression which the Law is likely to silence. It was held that the infringement upon the freedom of expression was done by hampering the possibility of expressing a view since by calling for a boycott a person could be found liable in tort and even risks being denied the opportunity to participate in a tender or to receive various benefits bestowed by the State. It was further pointed out, that the fact that the legislator had chosen to create particular arrangements in relation to the aforementioned expressions infringes upon freedom of expression because most law abiding citizens would choose to behave in a manner consistent with their provisions.

In Justice Vogelman's opinion, the restrictions imposed by the Law on calling for a boycott on the Area undermined each and every one of the purposes of freedom of expression: they prevent public debate and fair competition between various ideological positions; they undermine the democratic process since the Law hampers a person's ability to disseminate and voice his positions to others, including positions which contradict the position of the regime, and the opportunity for others to respond and decide how they wish to act; and they prejudice the ability of the individual, both listener and speaker alike, to realize his autonomy, which is his ability to tell his life's story.

For all of these reasons, Justice Vogelman concurred with Justice Danziger's conclusion that with regard to expressions concerning the Area, the infringement upon freedom of expression does not satisfy the criteria in the limitation clause. Nonetheless, according to his approach, given the absence of sufficient linguistic anchorage, it was not possible to solve this problem through interpretation, and the only suitable relief was to delete the words "or area under its control" from the

Boycott Law in a way which distinguished between the invalid part and the valid and fitting parts of the said Law.

Later in his judgment, Justice Vogelman pointed out that an interpretive solution could be found which would enable the Law (reworded to reflect the constitutional relief being proposed by him) to remain in force, which is preferable to declaring its annulment. This interpretation, it was held, would mean that only a boycott against the State of Israel or one of its institutions as such "would be caught" by the Boycott Law. Accordingly, a "mixed" expression which was critical of the policy of the State of Israel (or of one of its institutions) in a particular area would not be covered by the prohibition specified in the Boycott Law; whereas a critical expression relating to the very existence of the State of Israel would be "caught" by it. For example, a call which read "Please don't buy Israeli manufactured products; Israel's policy regarding the Area of Judea and Samaria is unacceptable" would not be covered by the Boycott Law because this call expressed opposition to the State's conduct.

Subject to the annulment of Section 2(c) of the Law, deletion of the words "or area under its control" and an interpretation according to which the Boycott Law shall only apply where the sole reason for the call to "deliberately refrain from economic, cultural or academic ties with a person or with another entity" is their affiliation with the State of Israel or one of its institutions, Justice Vogelman did not find cause to declare as void the entire Law on which the present discussion is predicated.

Summary of Opinion of President M. Naor

President M. Naor concurred with the opinion of Justice H. Melcer, according to which, apart from Section 2(c), the Law provides for a proportionate arrangement. In the President's view, while a call for boycott enters the scope of freedom of political expression, the restriction of this freedom is possible under the conditions of the limitation clause. Regarding the purpose of the Law, President Naor stated that the State of Israel finds itself defending itself against boycotts in the international arena, and that its attempt to defend itself against the various damages which could result from them is a worthy purpose. The President further held that it falls in the legislator's margin of discretion not to distinguish in this matter between a call for

boycott against the State of Israel and a call for boycott against what the Law refers to as "an area under its control". Therefore, it is inappropriate for the Court to intervene in the legislator's decision to defend itself against boycott which is not only directed against the State itself but also against factories and institutions that were established in the Area with the consent, and sometimes at the encouragement, of the State. Regarding the proportionality of the law, President Naor concurred with the other Justices who held that Sections 3 and 4 of the law provide for a proportionate arrangement, while clarifying that it will be possible in the future to challenge the arrangements that may be enacted under these sections, if any. Regarding Section 2(c) of the Law, President Naor shared the opinion of the other Justices who held that this section does not pass the proportionality criteria. Before concluding, President Naor noted that she had doubts regarding the remaining provisions of Section 2 of the Law, mainly because of the question raised by Justice N. Hendel regarding leaving enforcement in the hands of individuals rather than the State. However, in the President's view, Justice H. Melcer's interpretation of this section restricted its scope to the minimum and this interpretation is preferable to an annulment of the law. Therefore, as aforesaid, President M. Naor concurred with the opinion of Justice H. Melcer and the other Justices who concurred with him.

Summary of Opinion of President (Retired) A. Grunis

President (Retired) A. Grunis concurred with the opinion of Justice H. Melcer.

Summary of Opinion of Justice S. Joubran

In Justice S. **Joubran**'s opinion Section 2(c) should be annulled and the interpretative approach of Justice Y. Danziger regarding the call for a boycott of a person because of his affiliation to an area under the State's control, should be adhered to. As regards Sections 3 and 4 of the Law, according to his approach they satisfied the conditions of the limitation clause and there was accordingly no reason to abrogate them.