

Whose human rights? The criminalization of the French Boycott, Divestment and Sanction (BDS) campaign, the marginalisation of dissent in France

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The use of human rights to criminalize the French Boycott, Divestment and Sanction (BDS) campaign sends out a warning alert.

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Human rights' ideals have inspired the mobilization of many people worldwide. Human rights defenders conceive human rights as a tool to oppose unfair policies and to hold political leaders accountable for their decisions. However, as they are politically ambivalent and socially constructed, human rights can also be a tool for governments to oppress social movements.

Human rights can indeed serve the purpose of either emancipating the powerless or maintaining structural inequalities. The latter happens for example in areas where international human rights law is restrictive. For example, governments often resort to the exclusive definition of "refugee" provided by international law to deny rights to people who do not fit it and to return them to their countries.

The ambivalence of human rights is a slap in the face when authorities criminalize, prosecute and silence peaceful activists by applying laws whose aim is, on the contrary, to protect human rights.

The prosecutions against the peaceful activists involved in the Boycott, Divestment and Sanction (BDS) campaign in France are glaring in that respect. These campaigners engage in peaceful actions to put pressure on the state of Israel to respect the human rights of Palestinians. French authorities prosecute them, arguing that they discriminate against a group of people, i.e. Israeli producers, on the basis of their nationality.

The ambivalence of human rights strikingly manifests here. Both BDS campaigners and authorities frame their actions by referring to human rights. One can argue that it is just a matter of perspective and that prosecuting BDS activists is a genuine attempt to combat discrimination. However, a closer look into these cases raises several concerns regarding the instrumental use of anti-discrimination laws to prosecute peaceful activists.

The BDS campaign in France

In July 2005, the Palestinian civil society launched the campaign Boycott, Divestment and Sanctions (BDS) calling on international civil society organizations and individuals to put in place boycott and divestment initiatives. The campaign aims to put pressure on Israel to end the occupation of Palestine, to ensure the equality of Palestinians living in Israel and to respect the rights of Palestinian refugees to return to their homes. One year earlier, the International Court of Justice (ICJ) had advised that the wall built by Israel in the Occupied Palestinian Territories was against international law.

In June 2009, the BDS campaign was launched in France. Imen, one of the coordinators of the French campaign, refers to it as a human rights initiative, “because its objectives are in line with international law and because it is an anti-racist campaign that rejects any form of racism. It is inspired by the struggle against the apartheid regime in South Africa”. BDS activists in France and abroad see the campaign as a necessary tool to end a “regime of apartheid” enforced by Israel and resulting in the racial segregation of Palestinians.

BDS activists often call on people not to buy Israeli products by organizing peaceful actions in front of retailers. They also call on companies to divest from Israel and on artists not to stage concerts or performances in Israel.

The BDS campaign is far from being the only campaign promoting commercial boycotts targeting a specific country or company. In recent years, campaigners have for instance launched boycott actions targeting China because of its poor human rights record in Tibet or Burma for the atrocities committed by the military junta.



Graffiti prompted by BDS campaign against Veolia.

Boycott campaigns against specific companies deemed responsible for facilitating human rights violations have also been promoted. These included for example the campaign against the French company Veolia that sold off all its Israeli operations in 2015, after having been a target of the BDS campaign.

The BDS campaign is a powerful tool to exercise pressure insofar as it results in substantial economic losses. The Israeli Minister of Finance has estimated that these amount to USD 3.2 billion a year, or 1% of Israel's Gross Domestic Product (GDP). The policy think-tank RAND Corporation has found that the economic losses inflicted by the campaign comprise between 1% and 2% of the Israel's annual GDP.

Legal anomalies

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In February 2010, a few months after the launch of the BDS campaigns in France, Michèle Alliot-Marie, the then Minister of Justice, adopted a document containing instructions addressed to prosecutors (a Circular).

The Circular exclusively tackled the calls for boycott formulated within the BDS campaign. The document took stock of the several prosecutions launched against BDS campaigners for incitement to discrimination. It reiterated the need to ensure a “coordinated and strong response” against BDS-inspired actions. In 2012, Michel Mercier, the then Minister of Justice, adopted a new Circular specifying that BDS calls for boycott discriminated against Israeli producers because they hindered their economic activity on the basis of their nationality.

The prosecutions against BDS activists are based on two laws. The first one is the 1881 Law on the Freedom of the Press. Article 24.8 of the law punishes incitement to discrimination, hatred and violence on grounds of origin, race, ethnicity, religion or nationality. This article was included into the Criminal Code in 1972 with the aim of complying with the 1965 UN International Convention against all Forms of Racial Discrimination.

The second provision is article 225.2 of the Criminal Code, which punishes discrimination in specific instances, including when it results in hindering the normal exercise of an economic activity. In 1977, the French legislator introduced the reference to the hindrance of an economic activity into the Criminal Code to overcome the boycott of Israel adopted by the Arab League. The provision provided a legal tool for those French companies that maintained business ties with Israel when trading with countries of the Arab League.

However, resorting to those two laws to prosecute BDS activists clashes with the aims for which they were adopted. It is also at odds with the existing interpretation of the notion of discrimination in international human rights law. In particular, some differences of treatment may be justified and thus do not constitute discrimination. This is for instance the case when it comes to differences of treatment that protect safety and security, public health or the human rights of other people. The calls for boycott framed within the BDS campaign have the purpose of exercising pressure on Israel with the view to improving the rights of Palestinians.

Moreover, any incitement to discrimination, hatred and violence must reach quite a high threshold to become punishable. In particular, judicial authorities should consider the intent to incite and the likelihood that this incitement causes actual hatred, violence or discrimination as constitutive elements of the offence. For example, the French provision punishing incitement to discrimination has been used to prosecute leaders of the French far-right, in particular the founder of the National Front, Jean-Marie Le Pen. In 2005, he was convicted and fined for his statement about Muslims in an interview with the daily Le Monde. He said “When the day comes that we will have 25 million Muslims instead of 5 million in France, they will rule”. The conviction was subsequently confirmed by a second instance Court and then by the Court of Cassation. BDS calls for boycott are promoted by activists without exercising any coercion on clients or those retailers selling goods imported from Israel. Campaigners limit themselves to calling on consumers to exercise their conscious and informed choices. It is a stretch to consider those calls as constituting incitement to discrimination.

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French authorities have specifically instructed prosecutors to use those laws against BDS campaigners. None of the activists whose boycott actions target either other countries than Israel or

specific companies have been the target of such criminal prosecutions. The prosecutions against BDS activists are often initiated in the aftermath of legal actions launched by civil society organizations opposing anti-Semitism. They include, for example, the National Board for Vigilance against anti-Semitism (BNVCA), which considers the combat against the BDS campaign and against the “delegitimization of Israel” an “absolute priority”. None of the retailers targeted by the actions mentioned earlier has filed a complaint against the activists.

In sum, laws adopted with the aim of punishing discriminatory speech or actions are being used to prosecute peaceful human rights defenders.

Cases against BDS activists

A case concerning the conviction of BDS activists for inciting discrimination is currently pending before the European Court of Human Rights. Seven activists brought the case to court following the rulings of the French Court of Cassation confirming their convictions.

On 22 May, 2010, they organized a peaceful action in front of a supermarket in the town of Illzach, near Mulhouse (Eastern France). They distributed flyers aimed at raising public awareness on the BDS campaigns and calling on clients not to buy Israeli products. The flyers argued that boycotting Israeli products was an effective strategy to contribute to ending human rights violations committed by Israel. For example, one of the flyers stated: “You can constrain Israel to respect human rights. Boycott products imported from Israel”. Another flyer referred to a citation of Archbishop Desmond Tutu regarding the BDS campaign. It read: “If apartheid in South Africa came to an end, then this occupation [of the OPT] can also be stopped. However, international and moral pressures should be fair and strict. Divesting is the first step towards that direction”.

In 2013, a second instance Court convicted the activists to a fine for inciting discrimination on the basis of nationality and disconfirmed the ruling of the first instance Court, which had acquitted them. The Court argued that calling on clients to boycott the products imported from Israel constituted incitement to discrimination against a group of people, i.e. Israeli producers, because of their nationality. In November 2015, the Court of Cassation confirmed the convictions. The Court argued that the right to freedom of expression can be restricted in a democratic society to protect public order and the rights of others, i.e. the rights of Israeli producers. The Court did not mention any specific elements demonstrating that the peaceful actions organized by the activists may have endangered public order. Nor, did it take into account the objective of the BDS action, i.e. the improvement of human rights in Israel and the OPT.

On 14 November 2016, a Court in Toulouse (Southern France) convicted four BDS activists to a suspended fine. In December 2014 and February 2015, they had organized similar peaceful actions. By drawing on articles 225.1 and 225.2 of the Criminal Code, the Court ruled that they had committed a discriminatory offence aimed at hindering an economic activity. The Court also warned the activists against committing another similar offence as this may entail a new conviction.

Jean-Pierre, one of the activists convicted in Toulouse, believes that the prosecutions and convictions against the BDS campaign, which are often extensively covered by mainstream media, are designed to spread the idea that the campaign is illegal in France, which refrains new activists from mobilizing.

Both Palestinian rights' groups and Jewish settlers' organizations in Israel and the OPT frame their diametrically opposed discourses through human rights.

BDS activists consider France as a laboratory for the criminalization of the campaign and are concerned about the chilling effect of these prosecutions as well as the “internationalization” of this criminalizing trend. France is indeed one of the first countries in Europe where prosecutions against BDS campaigners have been launched. Similar efforts are currently flourishing in the United States, the United Kingdom and Israel, which had already passed a law against the BDS campaign in 2011.

Nicola Perugini and Neve Gordon convincingly argue that both dominant and oppressed groups can rely on human rights either to challenge oppression or to justify it. They point out that both Palestinian rights’ groups and Jewish settlers’ organizations in Israel and the OPT frame their diametrically opposed discourses through human rights.

Several parallels can be observed between that context and the battle for human rights around the BDS campaign in France. As described above, BDS campaigners refer to, and frame their calls and actions within, human rights. French authorities equally resort to human rights, and the principle of non-discrimination protected by domestic law, to prosecute those campaigners. By doing so, they hijack the purpose of anti-discrimination laws, using them to contain a human rights campaign rather than to protect the rights of oppressed groups.

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P.S.

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