

## Part IV. Ostracism, Formal Laws and Politics

### **Refusal of Social Cooperation as a Legal Problem: On the Legal Institutions of Ostracism and Boycott**

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*In ancient Greece ostracism was a political weapon. It was used to exclude the party leader from the state. Early democracy could not integrate the continuous action of opposition parties into the political process and solved party conflicts by banning the leader of the opposition. In modern Western society another form of exclusion, boycott, is used in conflicts between different interest groups as bargaining strategy in the economic arena. A boycott involves an attempt of one group to enlist the aid of third parties in cutting off normal social interaction with a target individual or group. Unlike strikes, in which two parties enter directly into conflict, here the controversy requires that third parties align themselves with the individual or group calling for a boycott. Although ostracism or shunning may be based on arbitrary or unstated prejudices (see the story by Franz Kafka, entitled "Gemeinschaft"), boycotts are based on stated reasons and have the function of contributing to the solution of social conflict. The boycott is an object of legal deliberation that reaches beyond the realm of private autonomy, because the call for a boycott causes third parties to enter into the conflict.*

#### **EXCLUSION AND SHUNNING AS RIGHTS OF FREEDOM**

In the Federal Republic of Germany, the slogan "more democracy or more freedom?" was coined for the political election campaign by people who wanted more freedom, and who thus wanted to free themselves from the sociopolitical values of the democratic majority. Their goal was the withdrawal of the state from the structuring of society and the restoration of private autonomy, thereby assuring the freedom of individuals and groups to set their own laws ("deregulation").

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The reduction of regulation to a minimum for the society as a whole and the retreat to the self-determination of smaller social units is a process of social disintegration. This process has its foundation in human nature as much as the process of social integration. To be sure, man is a *zoon politikon*. But he has invoked his retreat into privacy and his refusal of social relationships as a fundamental human right. The statement, 'My home is my castle', acknowledges the fact that a human being has a fundamental need to be left alone and that there are people who cannot tolerate one another. Frequently it is completely impossible to justify rationally why one engages in social relations with one person but not with another. No one grasped this more fully than the author of the absurd, Franz Kafka, whose sketch entitled "*Gemeinschaft*" ("Community") characterizes this so accurately that I would like to reproduce it here in its entirety:

*We are five friends. Once we came out of a house one after the other; first one came and stood next to the gate, then the second came - or rather slipped as easily as a droplet of quicksilver - out of the gate, and stood not far from the first, then the third, then the fourth, then the fifth. Finally we all stood in a row. People began to notice us, pointed to us, and said: Those five just came out of that house. Since then we have lived together. It would be a peaceful life if a sixth one were not always trying to mix in. He does nothing to us, but he gets on our nerves, that is enough. Why does he butt in where he's not wanted. We don't know him and don't want to accept him. To be sure, we five also did not know each other before, and if you will, we don't really know each other now either; but what is possible and tolerated with the five of us is not possible and not tolerated with that sixth one. Moreover, we are five and we don't want to be six. And what's the point of this continual being together, anyway. Even with the five of us it doesn't have any point, but now we're together, after all, and we will stay that way, but we don't want a new association, indeed because of our experience. But how are we supposed to make all that clear to the sixth one? Long explanations already would almost signify an acceptance in our group. It is better to explain nothing and not accept him. Let him put out as much as he likes, we will elbow him away; but how ever much we shove him away, he comes back (Kafka 1936).*

For the individual who is rejected from the community in the name of the right of self-determination, society is not just an "annoying fact," as Ralf Dahrendorf writes in his *Homo sociologicus* (Dahrendorf 1973, p. 17), but is primarily a cruel fact. Each legal system therefore must declare where the limits of private autonomy as a right of freedom lie, within the protective bounds of which one can refuse or end social relationships without giving reasons, and where the duty of social cooperation begins. Exclusion and shunning, however, are too extensive as legal problems for an exhaustive treatment in a single article. I therefore restrict myself to a closer examination of two legal practices, namely ostracism as a legally regulated and therefore limited form of social exclusion, and boycott as a legally regulated and therefore limited form of social shunning.

### OSTRACISM AS A LIMITATION OF MAJORITY RULE IN ATTIC DEMOCRACY BY EXCLUSION OF THE LOSING PARTY LEADER FROM THE STATE

Freedom thrives on the tension between integration and disintegration (Rehbinder 1977, p. 152); it assumes a security that is guaranteed only by a certain social integration, and it manifests itself in the latitude for deviations left to the individual by the integrated social whole. However, not every social integration finds its meaning in the need for security. As Kafka shows, often no meaning can be found. It merely is reflected in the exclusion of others. The "we-feeling," the "groupness of a group" (Llewellyn 1962, p. 357), consists essentially of the exclusion of others, a circumstance that politicians of all countries and periods from time immemorial have known how to exploit. The term often used today for exclusion from a group – ostracism – is also the term for a political weapon, the legal practice of Attic democracy.

This practice was introduced by statute in Athens in 496 B.C., under Kleisthenes, and served as a means for clearing away partisan conflicts. Unlike outlawry or proscription (*atimia*), this didn't involve a sanction for grave criminal acts but was rather a temporally limited (usually to 10 years) removal of a person whose presence in the state was considered politically dangerous or undesirable" (Pauly 1942, p. 1674). It did not bring shame upon the person concerned, "but rather honor" (Lugebil 1960, p. 133). He retained his property, and after his return his personal status was unaffected (cf. Zippelius, this issue). Each year, the voting citizens were represented in a preliminary vote with the question of whether or not a vote on the substantive issue (*ostrakophoria*) should be taken. If this obtained support, at least 6000 qualified voters had to participate in the substantive vote and scratch onto a clay shard the name of a party leader to be banned (hence – the name *ostrakismos* – "shard judgment"). There was neither an accusation nor the possibility of defense appeal. Moreover, the vote was not secret. Contrary to widely held conceptions, the purpose of the procedure was not to prevent the exclusive rule by eminent statesmen, i.e., a self-protection of democracy against tyranny, but rather – as the ostracism of Thucydides shows – a choice between two party leaders and their politics. (Early democracy could not yet integrate the continuous action of opposition parties into the political process and solved party conflicts by banning the leader of the opposition (Lugebil 1960, pp. 154, 158ff). The limitation of banning only the leader prevented an intrinsically possible further oppression of the losing party (Lugebil 1960, p. 160). As democracy became stronger and it was learned how to resolve party conflicts without relying on banishment, the practice was abandoned in approximately 418 – 417 B.C. (see, Zippelius, this issue).

If one realizes that ostracism – as an honorable measure of partisan conflict in the early days of democracy stood from the very beginning side by side with *atimia* (the proscriptive criminal punishment for grave offenses

against the legal order), then it becomes clear that the application of the term ostracism today to any form of social exclusion is unfortunate. The only affected persons in those days were high party leaders, who lost their civic rights for a certain period of time. An honorable, time-limited exclusion from the state no longer exists. To be sure, at present, totalitarian states still exclude certain citizens, but only as a sanction for acts that are designated as criminal. It also appears to the author that there is little point in using the term ostracism in a new, expanded sense of the word. First, the actual meaning of "ostracism" hardly is known because of the general unfamiliarity with classical Greek, and more understandable expressions could be found. Second, in view of a strictly delineated significance of the term as a practice in legal history, one would always have to add "in the broader sense" or "in the current sense," which is unnecessarily complicated. Therefore, I would argue for using the word "ostracism" only when "condemnation of a policy" is concerned; for example, when a party—in the aftermath of an election defeat or some other association in a time of self-examination—"sits in judgment" on its internal politics.

### **BOYCOTT AS SETTLEMENT OF CONFLICTS THROUGH SHUNNING BY THIRD PARTIES**

Even though only the historical origin of the term boycott can be exactly determined, its manifestations at an earlier time can be proved. The name can be traced back to the English estate administrator Charles Boycott, who was forced by the Irish Land League to emigrate in 1879 because of his inhuman harshness to Irish small tenants. By public appeals the League made it impossible for him to obtain either goods or labor, and all social intercourse with him was broken off (Juda 1927, p. ff). But manifestations of boycotting appear as early as the medieval guilds, which—by placing guild members who were disliked on so-called blacklists—excluded them from the possibility of getting work with other guild members, and in which groups of journeymen used such a form of proscription as a means of pressure to obtain more favorable working conditions from their masters (von Heckel 1895, pp. 481, 482 ff). These are early forms of labor disputes.

Manifestations of boycott can be distinguished by such features as where the boycott measures exert pressure and whether they take place on the labor market and thus within relationships between the opponents (withdrawal of workers or hiring blocks) or on the market for goods and services and thus in outside contacts of the opponents (blocking of sales or customers) (Binkert 1981, pp. 24–26). If the internal relations of the opponents are involved, the pressure consists of withdrawing labor or—conversely—of refusing to hire certain employees. The withdrawal of labor occurs by preventing new labor contracts (blocking of new hiring) or by causing previous

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employees to terminate their labor relationship. <sup>1</sup>Blocking of new hiring as a method of excluding the boycotted employer from the labor market is mostly a collateral measure in strikes, because a strike collapses easily if the employer can continue operations with other labor. Blocking of hiring as a weapon on the employer's side occurs with the aid of blacklists or labeling of dismissal papers, and, particularly at the start of the labor movement, it served the purpose of excluding from any activity labor leaders or unionized workers who demanded contractual wages. Collective measures of this kind also exist, however, when an employers' association decides that employees dismissed under certain conditions by association members may not be hired by other association members, or when an employers' association or an individual employer warns in circulars against the hiring of certain employees. Planned utilization of "personnel information bureaus," as operate currently in Switzerland, can lead to boycott measures in the form of a block on hiring certain individuals. Furthermore, the cases involving impacts on internal relations include situations in which the employee is forced out of the workplace as a result of internal arguments on the side of labor. In this instance, pressure is exerted on the employer to dismiss certain employees, often for reasons of organization politics (formation of a closed shop). On the other hand, if the boycott measures concern the opponent in his external relations, i.e., in the market for goods or services, then third parties are called upon not to enter into any business relations with the boycott opponent, either by withholding purchase in the market of goods (so-called buyer's strike) or by refusing cooperation in the services area. As a rule, these are collateral tactics. They are effective only if it is possible to create solidarity among broader consumer circles in favor of the goals of the boycott organizers.

Accordingly, two features are typical of the boycott: settlement of conflicts by forcing a change of mind, and the inclusion of third parties in the conflict process (Binkert 1981, pp. 26-34). The boycott is a weapon directed against the economic behavior of the opponent. <sup>2</sup>The combat is conducted by an appeal to break off or not enter into economically relevant relations. The fundamental conflict of interests, on the other hand, may be noneconomic in nature, e.g., political or religious. <sup>3</sup>With the aid of boycott measures, it is expected that the opponent will yield and that the goals at which the boycott is aiming thus will be achieved. There is no need for inflicting harm on the boycotted party, since capitulation without damage solely on the basis of the exhortation to boycott is possible and sufficient for the purposes of the boycott organizer. It is debatable, however, whether the boycott as a weapon is character-

1. If a subsequent resumption of the labor relationship is intended, it is a case of a strike.
2. So-called social boycotts also occur with the goal of hindering social contacts of the boycotted party, but these are not the subject of legal judgments.
3. Examples of this from German jurisprudence in the Blinktuer case (BGH NJW 64, 29) or the Constanze case (BGH 23, 270).

terized by an appeal to third parties to boycott, so that a boycott involves a three-party relationship, or that it can rely on the course the process takes between the boycott opponents alone (cf. evidence in Binkert 1981, p. 30). General usage applies the term boycott even to situations in which no third parties are involved, such as those in which advertisers avoid certain publications (advertiser's boycott) or the voters shun the polls (election boycott). But the term strike also is applied to phenomena that have nothing to do with the strike in its legal meaning, such as the aforementioned buyer's strike, filling station strikes, hunger strikes, tax strikes, student strikes against lectures, or tenants' strikes. Not all collective refusals to perform are strikes in the legal sense but only those that apply to the field of labor law (cf. Rehbinder 1980, p. 16). Likewise, the boycott is an object of legal deliberation that reaches beyond the realm of private autonomy, because the call for a boycott or blacklisting causes third parties to enter into the conflict. For this reason, the predominant opinion in the Federal Republic of Germany is that the involvement of third parties is a specific characteristic of a boycott. Such third parties must have an independent and autonomous status. The blacklister and the addressee of the blacklist, therefore, may not form a legal or economic unit such as a parent company and a subsidiary (cf. BGH 2 19, 72 [77]). A crucial point in contractual relationships including an authority to issue directives is whether or not the specific call to boycott is covered by the authority to issue directives. If an employer calls upon his employees to boycott certain businesses, autonomous third parties are involved. Finally, it is a precondition that the addressee of the call to boycott will block or reject the boycott opponent under the impact of the boycott call and not on the basis of independent motives (notion of causality).

Boycott thus is a conflict of interests in which "a social conflict is settled by economic measures, with the goal of eliciting a certain behavior by the opponent, ... influencing the opinion of autonomous third parties ... in such manner that they shun the opponent and thus block him or turn away from him" (Binkert 1981, p. 34). Accordingly, as a legal phenomenon boycott means the involvement of third parties. American labor law makes this clear, in that it always speaks of a secondary boycott without using the term "primary boycott" (Leslie 1979, pp. 129ff). It would lead us too far afield to discuss in detail here how the legal system evaluates boycott in each case, i.e., when it views boycott as an allowable exercise of private autonomy and when it considers it an unallowable intervention in the legal position of the boycotted party. I only would like to argue here that the term boycott should be reserved solely for those cases of exclusion or shunning in which independent third parties are brought into the conflict of interests. The sixth person excluded from Kafka's group is thus neither a victim of ostracism nor a victim of boycott, yet indeed he is a victim of a refusal of social cooperation that is arbitrary but nevertheless legal insofar as the law gives the other five a free right to privacy or to choose with whom they wish to associate.

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