

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL USA 2/2019

14 February 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolutions 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information we have received concerning the proposed law "S.1—Strengthening America's Security in the Middle East Act of 2019" ("S.1"), specifically "Title IV—Combating BDS Act of 2019" ("Title IV"). The law raises serious concerns with respect to U.S. obligations to protect and promote freedom of expression and would, if adopted, codify a worrying trend of suppressing political expression in the country.

According to the information received:

Over two dozen states in the U.S. have enacted some form of anti-boycott, divestment and sanctions ("anti-BDS") laws and regulations, designed to prohibit individuals and entities from engaging in boycott, divestment or sanctions activities directed against Israel. While the laws may vary in focus, states that have adopted what may be described as anti-BDS laws are: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin. Anti-BDS legislation is also reportedly pending in fifteen states.

Examples of individual state laws include the following:

Arizona: [HB 2617](#) was signed into law on 17 March 2016 and mandates that "a public entity may not enter into a contract with a company...unless the contract includes a written certification that the...company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel." Further, the State Board of Investment is tasked with "prepar[ing] a list of restricted companies and shall distribute the list to the state Treasurer..." In 2018, a federal district court ruled HB 2617 unconstitutional. That case is currently pending on appeal.

Kansas: [HB 2409](#) was passed on 16 June 2017. The law prohibits contracting "to acquire or dispose of services, supplies, information technology or construction, unless such individual or company submits a written certification that such individual or company is not currently engaged in a boycott of Israel." In 2018, a

federal judge issued a preliminary injunction blocking Kansas from enforcing HB 2409. In response, legislators amended HB 2409 to apply only to contracts worth more than \$100,000.

Maryland: Governor Lawrence Hogan, Jr. signed [Executive Order 01.01.2017.25](#) on 23 October 2017, which prohibits any executive agency from engaging in “a procurement contract with a business entity unless it certifies...it is not engaging in a boycott of Israel[,] and it will, for the duration of its contractual obligations, refrain from a boycott of Israel.” All contract proposals must contain a written oath stating the contract bidder has not taken “actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories.”

New York: On 5 June 2016, Governor Andrew Cuomo signed [Executive Order 157](#). The law directs “[a]ll Affected State Entities to divest their money and assets from any investment in any institution or company that is included on the Commissioner’s list”, specifically “institutions and companies...participat[ing] in boycott, divestment, or sanctions activity targeting Israel”. This Executive Order does not target individuals; however, there is currently pending legislation in the New York Legislature that would penalize individuals and student groups for boycotting Israel (see [SB 6086](#); [SB 8017](#)).

Texas: [HB 89](#), signed into law on 2 May 2017, prohibits any governmental entity from “enter[ing] into a contract with a company for goods or services unless the contract contains a written verification from the company that it...does not boycott Israel[,] and...will not boycott Israel during the term of the contract.”

On 3 January 2019, Senator Marco Rubio introduced S.1, Title IV of which would authorize and endorse state anti-BDS laws and regulations. On 5 February 2019, the Senate passed S.1 and transmitted the bill to the House of Representatives for further action.

Title IV would allow and encourage individual states to pass anti-BDS legislation. Section 402(a) would allow states to prohibit the investment of state funds in businesses engaged in boycotting Israel and also to restrict contracting with any entity who takes part in the activities of the BDS Movement. Section 402(b) defines such activities as any action “intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel...for purposes of coercing political action by, or imposing policy positions on, the Government of Israel.”

Further, Section 402(c)(4) would condone state laws that require a “prospective contractor or any entity related to the prospective contractor” to swear or sign an oath promising not to participate in boycotts of Israel. Title IV would appear to condone state penalties, such as termination of employment or state contracts, upon an individual or entity’s failure to sign such a promise. Title IV would not expressly prohibit boycotting, but it would allow states to penalize those who do.

Section 402(c)(1) would require states to provide written notice to any entity subject to anti-BDS legal requirements. Section 402(c)(5) provides that governments should not subject entities to their anti-BDS laws unless the state has “made every effort to avoid erroneously targeting the entity and has verified that the entity engages in an activity described [in the law].”

Concerns about Title IV’s effects have been expressed by numerous civil society organizations that claim Title IV violates the rights guaranteed by the First Amendment to the United States Constitution as well as international human rights law.

Apart from U.S. Constitutional guarantees of free speech, human rights obligations also apply to American legislation such as Title IV of S.1. Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”), ratified by the United States on 8 June 1992, protects every person’s right to maintain opinions without interference and to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and through any medium. The United States has long been among the chief advocates worldwide of the protections guaranteed under Article 19. Article 19(2) of the ICCPR “protects all forms of expression and the means of their dissemination”, including all forms of political debate, such as boycott (CCRP/C/GC/34).

Any restriction on the right to freedom of expression must comply with Article 19(3) of the ICCPR, which establishes a three-part test for legitimate restrictions on the freedom of expression. First, restrictions must be “provided by law”. It is not enough that a law is sanctioned by the government. Second, restrictions on expression must be necessary to protect legitimate aims. Restrictions must be the “least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/27). In order for a restriction on expression to be legitimate, a state “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat” (CCPR/C/GC/34). Necessity also implies an assessment of the proportionality of the restriction, with the aim of ensuring restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons” (A/HRC/29/32). Restrictions cannot be overbroad; the ensuing interference with third parties’ rights must also be limited and justified in comparison to the interest supported by the intrusion.

Third, restrictions must only be imposed to protect legitimate aims, which are limited to those specified under Article 19(3)(a) or 19(3)(b). The term “rights or reputations of others” includes “human rights as recognized in the Covenant and more generally in international human rights law” (CCPR/C/GC/34). Legitimate restrictions on the freedom of expression may also include those “for the protection of national security or of public order (ordre public), or of public health or morals.” The Human Rights Committee of the ICCPR has emphasized in detail how Article 19 is especially protective of political speech. *Id.*

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

In light of these international human rights standards, I would emphasize the following observations and concerns raised by Title IV of S.1:

Title IV, in conjunction with individual states' legislation, appears clearly aimed at combatting political expression advocating boycott, divestment or sanctions against Israel. Boycott, however, has long been understood as a legitimate form of expression, protected under Article 19(2) of the ICCPR. While Title IV would not expressly prohibit BDS activities against Israel, it would authorize economic penalties designed to suppress a particular political viewpoint. Putting aside issues related to BDS activities themselves, I am concerned that Title IV would not meet the three-part test of Article 19(3) of the ICCPR.

While Title IV of S.1 contains a number of problematic elements, I am most concerned about its effort to restrict political expression. One of the fundamental goals of Article 19 is to protect and promote robust political debate, which may include speech and activities that are offensive to some people or inconsistent with the preferences of political leaders. Indeed, it is precisely this kind of speech that deserves the most rigorous protection. American law, in addition to international human rights law, has long understood that political speech must be protected even at the cost of offense.

The heightened importance to political speech that has long been a part of human rights law requires that we examine restrictions on it with the most serious scrutiny. Article 19(3)'s three-part test provides us with the kind of lens to evaluate restrictions such as those in S.1. Reviewing those standards, I am most concerned that Title IV of S.1 appears not to concern any legitimate aim provided under Article 19(3)(a) or 19(3)(b) of the ICCPR. The legislation does not propose to explain how restricting and penalizing BDS advocacy protects any of the legitimate grounds for restriction, such as the rights or reputations of others, national security, public order, or public health or morals. While the U.S. Government has a legitimate interest in standing with other governments politically, as it sees fit, this interest alone is not tantamount to permitting restrictions on the basis of national security or public order.

Moreover, even if it were plausible to identify a legitimate aim of such legislation, the penalties condoned or mandated by federal and state law appear substantially disproportionate and fail to meet the necessity prong of the three-part test. Economic penalties present individuals and entities with an untenable choice: stay silent and avoid BDS advocacy, or expect serious negative economic impact. Imposing such penalties on individuals or groups who boycott for political reasons will chill political expression and protest, potentially well beyond the strict definition of BDS.

The breadth of the permissions under S.1 for states to carry out or adopt anti-BDS laws may fail the "provided by law" requirement, much as it leaves open exactly how

states may regulate political speech in the future. Such uncertainty would itself undermine the ability of individuals to understand the limits on their speech.

In view of these observations and concerns, I urge the U.S. Government and all state governments to reconsider anti-BDS state laws, to avoid adoption of Title IV of S.1, and to ensure the compliance of any U.S. legislation with American obligations under international human rights law.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression