

COMPARATIVE ANALYSIS OF US BOYCOTT-BANNING LEGISLATION AND THE ISRAELI BOYCOTT BILL

The Association for Civil Rights in Israel (ACRI) July 2011

In recent weeks, Israeli parliamentarians promoting the "Boycott Bill" – which passed last night in a 47-38 vote in the Knesset – have frequently referred to US boycott-banning legislation in an attempt to green-light the Israeli bill. The Association for Civil Rights in Israel (ACRI) has examined this analogy and determined that while there are clear similarities, the legislations differ in critical ways. While both legislations acknowledge that calls for boycott can touch upon foreign policy issues, the US legislation restricts its ban to, participation in boycott initiated by foreign governments only; while the Israeli legislation aggressively limits the free speech also of individuals and civil society who call for boycott of their own conscience.

The major differences can be summarized in five points:

1. US legislation bans only participation in boycott, the Israeli legislation bans also calls for boycott.
2. US legislation only restricts participation in a boycott initiated by a foreign government; Israeli legislation restricts all boycotts of Israel and the settlements.,
3. In the US, the federal government is the sole body charged with enforcing the law, and there is no opening for the intervening action of private bodies.
4. US law grants special protection to the boycott as an expression of conscience; the Israeli law not only does not protect it as an expression, but now formally says that boycott is a non-legitimate expression (only when it is a call for boycott of Israel or a territory under the control of Israel) .
5. The wording of the Israeli law is so vague that it could apply to any boycott of any Israeli citizen or body for almost any reason. And as such causes a "chilling effect" on all boycotts, and on freedom of speech.

Regarding the Israeli law:

The Israeli legislation is broader and more comprehensive than its US counterpart in several key aspects:

The most important is that the EAA is limited – it makes it unlawful for an American citizen to knowingly and intentionally support or participate in a boycott of Israel, only when “pursuant to an agreement with, a requirement of, or a request from or on behalf of the [foreign] **boycotting country.**”¹

There is historical background to the EAA and its prohibition of boycotts initiated by foreign countries. The act was legislated as a means of counteracting the Arab League's organized boycott of Israel. It is clear from the legislative history that Congress wanted to prevent a coordinated attempt to limit American companies and individuals from doing business with Israel. It was never their intent to limit American citizens and businesses from acting upon their conscience.

In America, boycotts have especially protected status – they are considered expressive activity and thus enjoy the protections of free speech that are enshrined in US legislation. Any attempt to limit what citizens are allowed to buy, what they can convince others to purchase or call on them not to purchase, is viewed as an attack on the very heart of freedom of speech. Participation in a boycott initiated by a foreign country, however, is perceived as less of a pure speech issue and more of what is nicknamed “speech plus.”

¹see: http://www.law.cornell.edu/uscode/html/uscode50a/usc_sec_50a_00002407----000-.html
also: <http://cfr.vlex.com/vid/supplement-1-part-760-interpretations-19634687>

As such, it is liable to greater regulation under US law.

The Israeli law makes no such distinction between boycotting Israel or Israeli companies as a matter of conscience, and boycotting Israel as part of the organized efforts of the Arab League, foreign states, and/or international organizations calling for the economic isolation of Israel. The law indiscriminately prohibits any boycott on Israel, any part of Israel, or any Israeli companies, even if the boycott is held, for example, in protest of Israeli policies wholly unrelated to the Occupation.

The law draws a comparison between Israeli companies, Israeli artists, Israeli academics, etc. to the State of Israel itself. Under its definition, any boycott called upon any Israeli for any reason, would be subject to the provisions of this law.

Another major problem is that Israeli law creates a right to private action, the ability of direct and indirect victims of the boycott to sue for damages, and offers a 30,000 NIS compensation even in cases in which no actual financial damage has been shown. In the United States, the Department of Commerce, a federal agency of the U.S. Government, is the sole body that can enforce the EAA. There is no possibility for private action. As far as I know (after extensive searches and discussions with individuals and organizations that are experts in the field) the US federal government has never attempted to enforce the EAA against individual American citizens for participating in the boycotts.

General comments:

The Export Administration Act (EAA) expired in August 2001, and as such the continued regulation of US exports has relied on an Executive Order of the President (the authority granted to him through emergency economic legislation known as the International Emergency Economic Powers Act.) This executive order of the President does not require the approval of Congress. There is currently a public, legal debate about whether the President's authority includes the extension of the provisions of the EAA that prohibit participation in the boycott.

The US Department of Commerce, responsible for enforcing compliance with the EAA's boycott provisions, has not targeted US citizens calling for a boycott of Israel, despite the fact that there are extensive and increasing calls of this sort in America. Among the reasons for this non-enforcement is that the department recognizes the shaky legal footing of the presidential executive order.