Political Immunity, Freedom, and the case of Azmi Bishara

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On October-November 2001 Dr. Azmi Bishara was formally accused by Israel Attorney General of organizing a delegation to visit in Syria, an enemy state, and calling in his speech to spur a violent conflict against the Israel government. Indeed, Bishara had organized such a delegation, and indeed he had called for a conflict (not necessarily a violent one) against Israel. In analyzing the political and legal aspects of lifting his immunity, I argue below that lifting immunity for the first time in Israel history because of political expression is a dangerous and unjustified act of censorship.

Bishara is a well-known Arab-Palestinian vigorous intellectual, citizen of Israel and a member of its legislature (the Knesset). He was elected as a secular Palestinian public figure. In his numerous writings, speeches, and missives, he protests against the Jewish state, condemns its definition as "Jewish and Democratic" as unrealistic and discriminatory and calls for a bi-national setting entitled as a 'state of all its citizens'. As such, Dr. Bishara has articulated and mobilized a significant support among his electoral constituency- the Arab-Palestinian minority that has for generations been economically and socially discriminated. Bishara has never asserted that he is part of the consensus, and he has professed, openly and vigorously, to a direct political conflict between the Jewish majority and the Palestinian minority over the definition of nationality in Israel/Palestine. He articulates and generates a certain trend among the Arab-Palestinian minority that poses the political demand to acquire

socioeconomic and political equality not only in formal law, but based on privatization of nationality and reducing Israel to the level of communities tied to each other according to an equal civic citizenship. Hence, Bishara is a likely target of hatred by the Jewish majority, almost invariably, that conceives him as a peril to the 'state'.

Parliamentary immunity and political immunity in general, which are granted to elected representatives, should be entrenched constitutional fundamentals in democracies. Following the collapse of the Weimar republic due to arrest of its parliament members and the destruction of its legislature by the Nazi political party in the 1930s, political immunity is even further important to plurality of political practices including extreme and critical practices. Without such immunity, however controversial practices are, political representatives might be paralyzed, since any political opposition might be severely curtailed by sanctioning dissent and protest against the government. Hence the importance of political immunity in democracy despite its origins in ancient politics and in spite of it being a possible shelter for dangerous attitudes.

As political theories from liberal to critical prisms, invariably underscore, a democracy without vibrant opposition cannot exist as an open fabric. Whilst in democracy the majority rules, or a coalition of minorities rules, the non-ruling minority should enjoy special privileges of protections and political immunity. Since the majority rules, the minority is left with no option but to dissent and oppose the central government, to challenge its policies, and seriously question state ideology and its ramifications on public policy. The representatives of the minority should

relish immunity as a source of political empowerment in their possibly unrewarding struggles against the majority, especially under conditions in which the minority conceives itself as being systematically discriminated. However, absolute political immunity like absolute power may corrupt, power under conditions of immunity may be abused. Therefore, the issue of democratic limits and tolerance toward very controversial practices protected by political immunity is crucial to freedom in multicultural societies.

Israeli law grants the basic right of immunity to all members of the Knesset, without any distinction between political affiliations. The immunity concerning political attitudes and political activities due to the functioning as MK is for life. The all-purpose of that constitutional apparatus, traditionally under criticism as being too spacious, is to protect the MK from tyranny of the majority and from dangerous political intolerance. Originally this constitutional arrangement was justified in Israel when the dominant political party of Mapai ruled in Israel and endangered various minorities in a country where no entrenched bill of civil rights was in existence. Nowadays, in a much more fragmented setting it is still a crucial arrangement due to the predicament of the Palestinian minority in the Jewish state.

Since the second Intifada and the breakdown of the Oslo agreement in 2000 the Arab-Palestinian minority in Israel is under heavy political pressure. Many among the Jewish majority have considered it as loyal to the Palestinian leadership of Yasir Araft. The October 1999 civil revolt of the minority has been perceived my many Jews as evidence to the dangerous Palestinization of the minority in ways that

endanger Israel national security. The minority large abstention from participating in the national election for Prime Ministership in 2000 has symbolized the increasing polarization between Jews and Arab-Palestinians citizens of Israel. Ariel Sharon's rise to power in October 2000, supported by unprecedented voting, and the defeat of Ehud Barak have encourage right wing Jewish ultra-nationalistic secular and religious forces, which have marked Arab-Palestinian Mks as potential enemies of the state. Many expressions in the Knesset and outside it symphatizing with the Palestinians in the occupied territories were stigmatized as acts of treason. Several Mks, like Muhammad Barake, were invited to the police and questions about their political assertions. The police and the attorney general guided by state ideology and its legal ideology have watched the behavior of the leadership of the Arab-Palestinian minority.

Should Bishara, one of the main Palestinian political figures in Israel and a prominent intellectual enjoy immunity even concerning his speech that allegedly had called for a struggle against Israel? And is he protected under the veil of immunity whilst asserting such a struggle in his appearance in an enemy state, Syria? Presuming that Bishara had indeed called for a struggle against Israel, focusing on its government, and not excluding a military campaign against it, the dilemma might be seen redundant. Why should a democracy not defend itself, conventional wisdom might point. Yet, based on normative and utilitarian arguments as well, the decision of the Israeli Knesset to strip Biahara of his immunity was a wrong resolution, justly criticized by several leading Israeli legal scholars, including scholars who define themselves as Zionist in their worldview.

Bishara speech in Syria was extreme and it has severely criticized the Israeli governmental policy concerning the occupied territories of the West Bank, Golan, and Gaza Strip. The occupation is under fervent contention among the Jewish majority as well, but Bishara has called to a conflict that may include violent means. But as a political representative of a national minority he has articulated a significant trend that conceives civil disobedience and even violence as a tactical means against an oppressive majority rule. Israeli law of parliamentary immunity is very broad, broader than the general western conception, and it grants almost an absolute immunity to political expressions that were made by a member of parliament as part of her/his political role in the Knesset. In most countries the immunity is valid as long as the MP is in office, while her/his immunity in Israel is for life. Has Bishara deviated from that rule and role since he apparently had called for violence against the state?

It would be hardly conceivable to seriously point how Bishara's speech has endangered Israel national security, and how it might have spurred public violence against the state. The reason why Bishara's immunity was canceled was neither pure legal nor constitutional. But rather, the proclivity of the Jewish public and most of the ruling elite has been to censor critical and radical attitudes of the Palestinian minority as a national community. Stripping Bishara of his immunity was an act of censorship and not an act of prevention. It was an act of sanction against expressions of a very radical viewpoint, but not a prevention of a tangible peril to state's existence or to its national security. Therefore, stripping Bishara of his immunity was illegal from any normative conception of democracy as a fabric that should encourage plurality of practices.

True, western democratic regimes would have reacted similarly to Israel. So have done the English during the Second World War, and the USA during the Cold war. But the practice in Western democracies, however rather consensual, is not necessarily the criterion for a normative good and evil order in democracy. Democracies tend to be intolerant in times of warfare and other national security crises. Yet, the essence of freedom, from the 18th century onwards has been to enable us to express our thoughts, aspirations, and interests in various practices that might collide with the state and its ideology as to the normative order. Censorship over critical attitudes and controversial practices cannot be and should not be the means to practice freedom. Freedom of speech of Members of Parliament should be absolute unless the danger to state security is immediate and undoubtful.

Most jurists in Israel were fearful that criminal procedures against a politician due to her/his expressions might pave the way to similar procedures against other opposition public figures. The fact that Bishara was the first MK in Israel to face criminal charges based on his political outlooks and not due to personal or partisan corruption might indeed have such negative ramifications on the very basic democratic tenets. Bishara affair has pointed that the limits of intolerance in Israel have become more fragile, and the space for opposition that questions state ideology and even its public policy has become more confined. It is a dangerous development for democracy in Israel.

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