

## **“Expanding the Space(s)”: Thoughts on Law, Nationalism and Humanism – Following the Bishara Case<sup>1</sup>**

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In February 2006, the Supreme Court of Israel ruled that Azmi Bishara, a former Member of Knesset (MK), should not be criminally prosecuted for speeches he made several years ago in which he praised Hezbollah for its success in the fight against the Israeli military in southern Lebanon and expressed support for the “resistance” to the Occupation. The Supreme Court determined that MK Bishara’s remarks fell within the immunity accorded to MKs with regard to “expressing a view ... in fulfilling his role.” The case against MK Bishara was the first in which an indictment was filed against an MK for expressing a political view, and therefore the ruling was very important for determining both the scope of the material immunity enjoyed by MKs and the protection of free speech in general.

In this short article, we seek to discuss several aspects of the decision, including a political issue of particular importance and sensitivity: the space allowed by Israeli law for the Palestinian Arab minority to act in the Palestinian-Israeli conflict and the Arab-Israeli conflict.<sup>2</sup>

### **Like an Acrobat on a Thin Wire: The Palestinian Arab Minority and the Israeli-Palestinian Reality**

An examination of the current state of affairs reveals that a longstanding choice has been made by the Palestinian Arab minority in Israel: to assist its people without joining the armed struggle against its state.<sup>3</sup> Collaboration by Arab citizens of Israel with the armed struggle in its various forms remains a very marginal phenomenon that is met with serious internal condemnation. The overwhelming

majority of members of the Arab minority limits the assistance it tries to extend to its people to the methods permitted by Israeli law: parliamentary, legal and civil-political struggle, participation in the public discourses (the Israeli, the Palestinian, the pan-Arab and the global), material contributions to the needy and so forth. Nonetheless, within the Palestinian Arab minority there exists a range of views pertaining to questions that lie at the heart of the conflict: What are the goals of the Palestinian people’s struggle? And what are the legitimate means of attaining these goals? First, should the “two-state solution” be adopted and settled for? Or should there also be an assertive aspiration for a comprehensive realization of the right of return of the 1948 refugees and their decedents? Or, even further, should the goal be a bi-national state in all of the territory of Mandatory Palestine? Or perhaps a *Shari’a* [Islamic] state in the whole of Palestine should be established? Secondly, there is a profound disagreement among the Arab minority on the question of both the moral legitimacy and the effectiveness of various means, especially terrorism and armed struggle, employed in Palestinian endeavors to attain these or other goals. Thirdly, opinions are also divided over the type of future ties which should develop between the minority and the state of Israel, assuming that the latter deserves to continue to exist.<sup>4</sup>

Here arises the main question we seek to address: What is the space for expression permitted by Israel to its Arab citizens, with all of their diversity of opinion, regarding the goals and the methods of struggle adopted by their people toward their state?

At the heart of the *Bishara* case lies the issue of the extent of various spaces for activity. Firstly, it focuses on a call (by an Arab MK) for expanding the space for resistance to Israel's policies by the Palestinians and the Arab states and organized groups like the Hezbollah. Secondly, the ruling liberally outlines the space for political activity by the Palestinian Arab minority and its representatives with regard to the Palestinian-Israeli and Arab-Israeli conflicts. Thirdly, the ruling reflects an additional space, at the margins of liberty, that (still) exists for the Israeli Supreme Court in which to uphold fundamental liberal ideals of toleration, albeit the emergency situation.

30  
Creating "spaces" is indeed a vital need in the current reality. Each side in the Israeli-Palestinian conflict wallows in its pain, entrenches itself in self-righteousness, focuses on and is driven by its fears, and aspires to an outcome that will put a definitive end ("once and for all") to its suffering. The Palestinian-Israeli reality is all the more difficult because it carries a bewildering package of acute but necessary decisions together with demands for decisions that would be destructive if tackled acutely. The moods among us are colored in black and white, and ignore the complexity of the issues, narrowing the spaces and burning bridges which may provide us with a way out of the current reality. One example is the demand from the Arab minority in Israel of a sharp and decisive response to a paralyzing question: "Are you with us or against us?" This question is mainly asked by members of the Jewish-Israeli majority, but is sometimes heard coming from the other direction, that of the Palestinian national sentiment.

This demand is profoundly present in our shared lives. It stands, *inter alia*, at the basis of the demand from Arab citizens of the state to perform civic or national service. For the

majority, this demand constitutes a type of "litmus test" of loyalty. Jewish-Israelis say: "If you want real equality, accept equal obligations. This is the mark of your citizenship, a condition for your full integration." Arab citizens reply: "Make us feel truly equal and then we might be ready to contribute something like civic service." Each side is waiting for the fundamental change to occur (first, of course) on the other side. However, these assertions, of both sides, are insincere and, in any case, incomplete. Part of the tragic root of our current situation is the fact that the Palestinian Arab minority can never promise full loyalty towards or complete acceptance of the state of Israel until its people is liberated from Israel's Occupation. How can self-respecting people compromise on a "bilateral deal" that ignores a central third side: the weak, humiliated and occupied Palestinian people? Who is supposed to agree and declare that she agrees to a deal for a "flesh pot" in exchange for surrendering her solidarity with her people, which for two generations has been under occupation by her state? A similar example is the demand from the Arab minority to take on the role of the *avant-garde* in relinquishing the realization of the Palestinian refugees' "right of return" to Israel proper. Indeed, we believe that this concession is an essential component of an accord between the two peoples. However, it would be insensitive to fail to see why it is so hard for the Palestinian Arab minority in Israel to take such a role upon itself. This minority, which escaped the fate of becoming stateless refugees, finds it very difficult to spearhead the call to the unfortunate refugees to accept the fact that what transpired in 1948 is irreversible.

These are only two examples of strenuous demands currently presented to the Arab minority. Of course, not every unequivocal

demand is invalid. We believe there is at least one demand that the minority should closely heed. Palestinian Arab citizens of Israel, like other human beings, are obliged to fully respect the prohibition that morality and law impose on the use of terrorism. Similarly, as long as Israel does not degenerate into a murderous dictatorship, citizens should abide by the restrictions imposed by the internal social covenant; that is, not to participate in an armed struggle against the state.

However, there is an important moral distinction between a call to the minority to refrain from taking part in the armed struggle, and a sweeping demand from it to surrender its solidarity with the struggle of its people. Such a demand seeks to narrow not only the minority's freedom of action, but also its freedom of expression on an issue very close to its heart. Thus, such a measure carries the potential for great damage, and might exacerbate the crisis of legitimacy of "the Jewish and democratic state" in the eyes of the national minority. Such a sharp rupture in Israel's legitimacy in the eyes of the minority is a step on the road to its participation in the violent struggle. If this were to occur, the national confrontation in the Land of Israel/Palestine would undergo a fundamental transformation. The sides to the conflict, the possibilities for its resolution and the associated cost would immediately change. The three parties to the national divide (the Jewish majority, the Palestinian minority and the Palestinian people) would be reduced to two, and since Arabs and Jews in Israel are spatially mixed, the partition option (the two-state-solution) would die. Each side would then be perceived by the other as fighting to attain hegemony in the one and single entity/territory. In short, the national struggle would take on a terrifying "all or nothing" character.

Nevertheless, a substantial majority within the Jewish community in Israel insists on imposing such restrictions on expressions of sympathy with the Palestinian people's struggle against the state of Israel. Broad sections of the Jewish majority try to pressure the Arab minority to side with the interests of the Jewish state, or at least to avoid an explicit endorsement of its people's current struggle. This position was incorporated into legislation. Three main measures crystallized in the form of new amendments to laws passed in 2002, about a year and a half after the outbreak of the second Intifada:

**1. Section 7A of the Basic Law: The Knesset**, which deals with restricting the ability of individuals and political party lists to participate in Knesset elections, now stipulates the following instructions:

A candidates' list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset if the goals or actions of the list or the actions of the person, expressly or by implication, include one of the following:

- (1) negation of the existence of the State of Israel as a Jewish and democratic state;
- (2) incitement to racism;
- (3) support for armed struggle by a hostile state or a terrorist organization against the State of Israel.

The main amendment passed in 2002 is the addition of subparagraph 3.

**2. Knesset Members' Immunity, Rights and Duties Law, 1951**, [hereinafter: the Immunity Law] which is the focus of discussion in the *Bishara* ruling, was amended regarding the material immunity accorded to MKs. Paragraph 1 of the law now stipulates that:

1. (A) An MK will not bear criminal or civil

responsibility and will be immune to any legal action resulting from a vote or an expression of opinion, orally or in writing, or due to an action he took in the Knesset or outside of it, if the vote, expression of opinion or action were in fulfillment of his role or in order to fulfill his role as an MK.

(1A) To remove any doubt, an action, including an expression of opinion, by an MK, which is not be accidental, and that includes one of the following, is not considered, for the purpose of this paragraph, to be an expression of opinion or an action performed in the fulfillment of his role or in order to fulfill his role as an MK:

[...](4) support for an armed struggle of a hostile state or acts of terror against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad.

3. The third measure is the addition of **Paragraph 144D2 of the Penal Law, 1977** (in parallel to deleting a paragraph from the Prevention of Terrorism Ordinance).<sup>5</sup>

The paragraph stipulates that:

If a person publishes a call to commit an act of violence or terror, or praise, or words of approval of, encouragement for, support for or identification with an act of violence or terror (in this section: inciting publication) and if—because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years imprisonment.

And behold, in a move the importance of which is difficult to overestimate, the Supreme Court tempered the aforementioned legislative measures by interpreting them in a way that preserves "space" for significant political activity by the Palestinian Arab minority. We will illustrate this via the *Bishara* ruling, which is one of several rulings that follow the liberal, bridging path the Court has laid down on a

significant number of occasions.<sup>6</sup> Still, we will hasten to add that it is difficult to count solely on the Supreme Court to block the collapse of red lines in the political culture of Israel. Recently, for example, it failed in a major test. In a majority opinion of six justices to five, it upheld the Citizenship and Entry to Israel Law (Temporary Order) 2003, which imposes sweeping restrictions on family unification by citizens of the state with their Palestinian spouses who are residents of the Occupied Territories. The alleged justification for the Law was national security, but the measure chosen to accommodate the security risk has been seriously disproportionate.<sup>7</sup>

### The Bishara Ruling

Former MK Dr. Azmi Bishara was quoted as expressing support, on two different occasions, for the struggle of Hezbollah against the Israeli occupation of southern Lebanon. It was claimed that in a speech he made in June 2000 in Umm al-Fahem, Israel, MK Bishara declared, among other things, that:

Hezbollah won and, for the first time since 1967, we have tasted the flavor of victory. Hezbollah has the right to be proud of its achievements and to humiliate Israel.<sup>8</sup>

In addition, it was claimed that in a speech he made in Syria about a year later, Bishara expressed support for the "resistance option":

It is impossible to continue without expanding the space between the possibility of all-out war and the fact that surrender is impossible ... the Israeli government is trying to narrow this space to pose a choice like this: either accept Israel's conditions or face all-out war. Thus it will be impossible to continue with a third option, the option of 'resistance,' except by re-expanding this space so that people can conduct a struggle and 'resistance.' This space can only be expanded through an

effective and united Arab political stance in the international arena, and the time has indeed come for this.

These statements generated two legal responses. First, based on these two statements, the Attorney General decided in September 2001 to indict MK Bishara for the crime of supporting a terrorist organization, in accordance with the Prevention of Terrorism Ordinance, 1948. To pursue this indictment, the Knesset was requested to strip MK Bishara of his immunity. The request was approved in November 2001 and, as a result, an indictment was filed against him. In this context, it should be noted that only in June 2002 the Knesset enacted the amendment to the Immunity Law, as noted above, which added Paragraph 1(1A) to the law, stipulating that immunity does not apply, *inter alia*, to "support for an armed struggle of a hostile state or acts of terror against the State of Israel." Secondly, it was decided to take action to deny MK Bishara's right to run in the Knesset elections. To this end, in June 2002 the Knesset passed the abovementioned amendment to Paragraph 7A of the Basic Law: The Knesset, which stipulates, *inter alia*, that, "a person shall not be a candidate for election to the Knesset, if ... the actions of the person, expressly or by implication, include ... support for armed struggle by a hostile state or a terrorist organization against the State of Israel." Based on this provision, and at the request of the Attorney General, the Central Elections Committee for the 16th Knesset decided in January 2003 not to approve the candidacy of MK Bishara (and the Balad Party) for the Knesset elections. This decision was mainly taken in light of the abovementioned statements attributed to him.

In the ruling handed down in January

2003, the Supreme Court blocked the Attorney General's request and the Central Elections Committee's decision and determined, by a majority of seven justices to four, that MK Bishara is entitled to participate in the Knesset elections (the case is known as the *Tibi* case).<sup>9</sup> The ruling states that the remarks attributed to MK Bishara do indeed express support for a terrorist organization, but that it was not sufficiently demonstrated that he supports an armed struggle or "violent resistance" by this organization, and therefore his right to be a candidate in the Knesset elections should not be revoked. In the decision that is the subject of our discussion (the *Bishara* ruling), the Supreme Court blocked the other proceeding – a criminal indictment for "supporting a terror organization" – and determined by a majority of two justices (Chief Justice Barak and Justice Rivlin) versus one (Justice Hayut) that MK Bishara has immunity from indictment for the statements attributed to him.

The decision rests on the following moves:

A. Chief Justice Barak accepted the view presented by the minority Justice, according to whom the amendment to the Immunity Law should be regarded as a "clarifying amendment," or a declarative amendment, which therefore applies even to statements or actions made prior to its enactment. We doubt the correctness of this interpretation, but for reasons of space will not discuss it here.<sup>10</sup> Thus, Chief Justice Barak examined whether the limitation of material immunity enacted in this amendment applies to the statements attributed to Bishara. As indicated, this limitation stipulates that a statement by an MK will not find refuge in the shadow of material immunity if it constitutes "support for an armed struggle of a hostile state," or support for "acts of terror." Similar to the position of

the majority in the *Tibi* case (rejecting the disqualification motions), here too the majority's position distinguished between support for armed struggle or terrorism and "support for a terrorist organization." Support ("general") can be for the aims of an organization as opposed to its methods, or for the non-violent part of the arsenal of methods adopted by an organization.

Chief Justice Barak stipulated that an examination of the question of whether Bishara's statements constitute support for an armed struggle should be conducted, in principle, based on the assumption that the facts argued in the indictment are accurate; that is, without addressing, at this stage, the factual disputes over the content of the speeches or their circumstances. However, a certain lack of clarity on this point appears in the ruling of Chief Justice Barak, because he adopts the conclusion of the majority in the *Tibi* case, which was formulated not only on the basis of the statements attributed to Bishara, but also on the basis of explanations and additions that MK Bishara provided to the Central Elections Committee and elsewhere, as well as on an assessment of the persuasive power of the evidence presented to the Court, which together produced the following finding:

Did MK Bishara support an armed struggle of a hostile state or of a terrorist organization against the State of Israel? Note well, the question before us is not whether MK Bishara supports a terrorist organization. [...] as we have seen, the argument of MK Bishara is that opposition to violence and armed struggle derives from his liberal-democratic approach. According to his perspective, it is possible to oppose what he calls "occupation" without taking up an armed struggle. Thus, he opposes all attacks on civilians.<sup>11</sup>

We believe that we were not presented with evidence the weight and strength of which meet the

required test ... We were not persuaded that we were presented with convincing, clear and unequivocal evidence that MK Bishara supports an armed struggle against the State of Israel.<sup>12</sup>

B. A central disagreement between the majority and minority in the *Bishara* ruling was the question of whether the judicial decision in the *Tibi* case, according to which former MK Bishara's statements should not be regarded as "support for armed struggle by a hostile state or a terrorist organization against the State of Israel" with regard to the right to participate in the elections, mandates the conclusion that the same statements do not constitute "support for an armed struggle of a hostile state or acts of terror against the State of Israel" under Paragraph 1(1A) of the Immunity Law.

Justice Hayut decided that a distinction should be made between the two judgments. In her view, "there is a fundamental difference" between the arrangement pertaining to material immunity and the negation of the right to be elected: "Preventing a list or preventing one of its candidates from running in elections irrevocably harms the individual's basic rights," while "not granting material immunity is a decision that is naturally limited to the circumstances of a concrete case about which the question of immunity arises, and it does not sweepingly strip the MK of his rights and of the possibilities for action and expression available to him in the framework of his position."<sup>13</sup> Therefore, in her view, in the case of the limitation on the application of immunity, there is no reason to apply the strict tests established in the ruling on the restriction of the right to be elected. In particular, Justice Hayut decided that in light of the fact that the speeches of Bishara "include a song of praise and glorification for the Hezbollah organization," and in light of the

declaration of this organization as a terrorist organization, "it would be hard not to view the statements of the petitioner as support for an armed struggle of a terrorist organization."<sup>14</sup>

The majority took a different approach. Underlying the majority's opinion is the recognition that, even though the contexts are not identical, the considerations of policy at their core are similar: the aspiration to protect basic political freedoms. As Justice Rivlin emphasized, the decision over the scope of applying the limitation on immunity derives from "a principled conception of the best way for a democratic society and for Israeli society in particular to cope with statements of the type uttered by the petitioner."<sup>15</sup> This conception is clearly expressed in the ruling on the right to be elected and it should also be applied in the context under discussion here. The majority justices determined that in order to apply the limitation on immunity, "convincing, clear and unequivocal evidence" is required that the MK expressed support for an armed struggle of a terrorist organization. In light of the fact that in the criminal proceedings no new evidence was presented (in addition to the evidence on which the decision over the restriction of the right to be elected was made), the conclusion is identical.

C. The discussion does not end here. Former MK Bishara was accused of the crime of "support for a terrorist organization" (Paragraph 4(B) of the Prevention of Terrorism Ordinance, as distinguished from incitement to an armed struggle or acts of terrorism), and the question is: Does material immunity apply *a priori* to this offence? I.e., do Bishara's attributed statements fall, in the first place, within the realm of "expressing an opinion ... in fulfillment of his role or in order to fulfill his role as an MK?"

According to the prevailing precedent, the *Pinhasi* case, the immunity involves illegal activities that fall within "*the natural range of risk*" of fulfilling the role of an MK:

Surrounding the lawful [fulfillment] of the MK's role, there is a range of behavior, encompassing all of the prohibited actions – which are not part of the role of an MK – but the expedited performance of the role creates a risk that is natural for the role ... [this entails] actions that are so tied to and entwined in his roles that a fear exists that, were the MK asked to provide an account of these illegal activities, it would directly influence and limit his ability to perform his [legitimate] role.<sup>16</sup>

Do the statements attributed to Bishara fall within the natural range of risk? The majority opinion responds affirmatively to this question, while formulating an important development in the natural range of risk test. It expands the test beyond the formula in the *Pinhasi* case. In the words of Dr. Ben-Shemesh:

It is now clear ... that the test of natural risk is not dependent on the cognitive condition of the speaker. A "slip of the tongue" is not required in the sense of a lack of attentiveness or something of the sort. The test of natural risk will also apply if the words are said intentionally and with forethought. Still, the prohibited remarks must not comprise the core of what is said and there cannot be an attempt to 'abuse' the institution of immunity. The argument for expansion: This is an expression that lies at the very heart of parliamentary activity. In addition, violations of speech are formulated in a very broad way. Thus, there is a need to protect material immunity in order to avoid weighing too heavily upon MKs in fulfilling their role (which is, as stated, primarily to express themselves in speeches, articles, lectures, etc.).<sup>17</sup>

Indeed, the majority opinion emphasizes the inherent ambiguity associated with speech

crimes relating to a call to violence in the divided society of Israel. It hints of special dangers that are likely to result from the coerced silencing of a discussion of issues and claims that are critical for a society that is searching for its way. Chief Justice Barak chooses to cite here the illuminating words of Prof. Kremnitzer:

The difficulty is that the expressions "praise," "encouragement," and "sympathy" are extremely broad ... Doesn't the statement 'If not for the Intifada, the Oslo Accords would not have been signed' express sympathy for acts of violence? Doesn't a description of the deprivation of the Arab minority and the difficulty or impossibility of generating significant change on this issue encourage violence? Doesn't a severely critical description of the means of oppression implemented in the [Occupied] Territories constitute such encouragement? Doesn't [quoting] historical research indicating that in certain situations it is impossible to draw the attention of the majority to the distress of the minority except through the use of violence serve to encourage violence? Doesn't addressing the connection between the government's actions and acts of terrorism encourage terrorism? We are talking here of things that lie at the heart of the realm protected by the freedom of speech.<sup>18</sup>

D. The ruling of the second majority justice, Justice Rivlin, adds important reasons for protecting the freedom of expression and material immunity of Arab MKs in particular. He makes an implied reference to the mediating rationale of the Court's rulings, as indicated earlier in this article:

The expansive conception, which aspires to maintain basic freedoms as much as possible, does not necessarily clash with the defensive democratic conception. On the contrary, it emerges from within the same ideological platform. Restricting

the possibility to vote and be elected to the Knesset and in this way express opinions and views was not designed to repress views and positions, and certainly not to invalidate them. On the contrary, partnership in the democratic process is often a barrier to anti-democratic activity. And freedom of expression, which is a main tool for the work of an MK in fulfilling his mission, is often the reverse side of the coin of violence, the eruption of enmity, or the feeling of persecution and discrimination.<sup>19</sup>

[...] and with regard to our case not just any expression, but a political expression; and not just any political expression, but political expression by an MK; and not just any MK, but a representative of a minority group. Material immunity is designed first and foremost to ensure effective representation of the various population groups in the Knesset, so that their voice will be heard and not excluded (as far as possible under the limitations of a democratic society) from the public discourse in the State of Israel; [...].<sup>20</sup>

### **Three Thoughts on Law, Jewish Nationalist Chauvinism, Palestinian Nationalist Chauvinism, and Humanism**

1. The *Bishara* decision joins the *Bakri* ruling (regarding the screening of the film *Jenin, Jenin*)<sup>21</sup> in that both force an expansion of the narrow and often self-righteous prism through which Jewish-Israeli society views the bloody conflict with its neighbors. In other words, these rulings pierce (slightly) the Jewish-Israeli "bubble." This bubble is rigid, all-encompassing and multilayered in that it derives from at least two interrelated foundations that are difficult to alter. First, the majority Jewish-Israeli society is monolingual and therefore has no unmediated contact with the neighbors' views. Its perception of the views of "the Other" comes via the information intermediaries who speak the language of this



community (primarily journalists, "experts" in Middle Eastern affairs, and security and intelligence personnel). Secondly, the Jewish majority has tools – which it indeed chooses to use – to impose a near-complete monopoly of its narrative. The curriculum for its children (and for the children of the Palestinian-Arab minority) is under its complete control and it also exercises considerable control over the mass media. In the state-owned media Arab editors and spokespersons are almost completely absent and the private Hebrew-speaking electronic media are controlled by Jewish plutocrats and editors.<sup>22</sup>

The aforementioned rulings, among which the *Bishara* decision has an important place, enable "other voices" to penetrate the public discourse in Israel. These voices include those of diverse and eloquent representatives of the Palestinian-Arab minority, who seek to point out inconsistencies and exaggerations in the conventional stories the majority tells itself. These voices make it possible to identify openings in what others see or describe as "a dead end", and they therefore contain a potential for productive power that is difficult to overstate.

2. The talk about the "potential" for productive power is intended to draw the attention of spokespersons for the minority itself. In this context, we wish to express the criticism that we harbor of Bishara's stance.

Former MK Bishara's stance is not presented in its full complexity and difficulty in the ruling of the majority justices. An examination of his petition to the Supreme Court, on which the ruling was based, enables a better understanding of the components of his position towards Hezbollah. Bishara actually declares support not only for Hezbollah, but also for its methods as "guerrilla

warfare," aimed at winning liberation from occupation.

Note the following in paragraph 74 of the petition:

The petitioner [Former MK Bishara] will argue that the speech attributed to [him] in Umm al-Fahem is essentially similar to the speech he delivered several days earlier in the Knesset plenum, though the speech in the Knesset on 31 May 2000 was even more resolute, intense and acerbic than the speech attributed to him in Umm al-Fahem:

Honorable chairman, Members of Knesset – the government of Israel can portray its withdrawal from Lebanon as the implementation of Security Council Resolution 425. But the Lebanese resistance to the Israeli occupation also can rightly portray it as a victory over the Israeli occupation, not in the sense of a regular army and not in the sense of a classical army, but in the sense of a guerrilla war [...] Without a doubt, there is a victory here of the Lebanese resistance in every sense. The Lebanese resistance demonstrated a capability for consistency, steadfastness and persistence.

After all, Israel occupied Lebanon in an attempt to destroy the PLO, not Hezbollah, because there was no Hezbollah; the Israeli occupation is what created Hezbollah. I have never thought of Hezbollah as a terrorist organization. I have always thought that it is a legitimate resistance organization ... It did not defeat Israel and did not destroy Israel and did not annihilate Israel. It defeated the Israeli occupation in Lebanon...<sup>23</sup>

At the Central Elections Committee prior to the 2003 elections, Bishara blurred his support for Hezbollah's armed struggle. This is how Chief Justice Barak understood these statements in his ruling in the *Tibi* case:<sup>24</sup>

With regard to Lebanon, he [Bishara] regards the

IDF's presence there as occupation and he recognized the legality of the Lebanese resistance against the occupation. At the same time, support for resistance does not mean support for violent resistance... MK Bishara goes on to note that it is not the role of a political party operating in Israel to give instructions on methods of resistance to occupation to those living under occupation. He does not regard Hezbollah as a terrorist organization, but rather as a guerrilla organization fighting for its land under occupation. As regards the [Occupied] Territories, he also regards the Israeli presence there as occupation. However, he opposes the use of violence against civilians – whether in Israel or the Territories. He opposes Palestinian suicide bombers and blames Israel for the creation of this phenomenon. In speaking before the Elections Committee, he noted that 'attacking innocent civilians is not acceptable to me ... wherever they are.'

The majority opinion in the *Bishara* case saw this ambiguity as a basis for not applying the limitation of material immunity stipulated in paragraph 1(A1) of the Immunity Law.<sup>25</sup> However, here is precisely where we wish to voice our main criticism of former MK Bishara himself. This criticism stands on a moral rather than a legal ground.

Bishara speaks a great deal about "expanding the space." However, here the truly important space is that aimed at increasing possibilities for compromise between the parties to the conflict: the possibilities for ending the bloodbath. The contribution of leaders is judged by the question of how much they contributed to breaking the loathsomely familiar cycle of killing, killing in retaliation, and self-righteousness. If we are tired of this cycle, then what we need is not more nationalist sentimentality. What we need is the waning emotion of humaneness. This emotion

primarily focuses on the value of human life. It resolutely rejects the harming of innocents, and it looks for and is also prepared for compromise in order to attain this. Bishara is becoming increasingly ambivalent in this regard over time. Besides pointing to the main root of the violence – the Occupation and associated dispossession – he remains vague about his ideological position towards Hezbollah's activity directed against Israeli citizens in Kiryat Shmona or other Galilee towns and villages.

Moreover, regarding willingness to compromise, Bishara's vision for the Israelis and the Palestinians does not contain real room for compromise. It is "phased", and it appears that Bishara aspires ultimately to establish a single, bi-national state in Mandatory Palestine (the Land of Israel) – a liberal state with power-sharing arrangements.<sup>26</sup> This is an ethical vision the defectiveness of which does not lie in the realm of principle, but rather in the practical realm of the Israeli-Palestinian reality. In the aftermath of the Holocaust in Europe, after long years of living in a hostile region, and following the breakdown of the Oslo process and the outbreak of the second Intifada, very few Jewish Israelis are prepared to retreat from at least two red lines: Jewish control of the gates of immigration to Israel and Jewish control of the army and security forces to ensure their protection. A bi-national framework substantially diminishes Jewish control in these critical areas and thus arouses strong (and, in our view, justified) opposition. Thus Bishara's seeming ambivalence toward violence and his bi-national vision do not break our tragic cycle. The space for compromise that comes with them is very narrow or non-existent. They are likely to close rather than open dialogue.

Here the following counter-argument can be made: "Why shouldn't you, the Israeli Jews,

compromise more. The violent cycle can be expected to continue until we all accept the bi-national option. This is because the 'two state' option does not really offer a solution to the conflict. It does not provide a sufficient answer for the Palestinian sense of justice and it therefore leaves behind significant forces which will continue to violently oppose it." In response, we agree that the choice between the two competing options is not a principled, *a priori* one, but is rather contingent, dependent on circumstances. Both the bi-national state and two-state options are plausible, and certainly should not be dismissed out of hand. The choice between them should primarily be determined by an assessment of the projected cost of trying to realize each of them in the current and foreseeable circumstances. The following evaluations of this cost support, in our view, the two-state solution: It is a solution that is possible to reach within a relatively short period of time, and it has some clear and decisive consequences, including an end to the Occupation and the removal of the great majority of the two peoples from the cycle of bloodshed. On the other hand, it is far from clear that the bi-national state solution, if implemented, would indeed promise both peoples existential security and fairness. Why would this solution not collapse in violence after a relatively short time (as it did in Cyprus in the 1960s and 1970s and in the former Yugoslavia)? Moreover, this solution is not likely to be implemented in the foreseeable future and its chances of being realized almost certainly depend on the presence of an external foreign power capable of pushing the two peoples towards this type of "Siamese twins" solution (and capable of protecting this solution from a violent collapse). It should be admitted that it is very hard to see or foresee many such

benevolent foreign powers waiting in line. In the meantime, while awaiting this solution, further generations of Palestinians and Jewish Israelis will continue to shed each other's and their own blood.

Despite all this, it should be made clear that our reservations over some of MK Bishara's views do not constitute a cause to limit his freedom of expression. His – and our – freedom of expression is at the root of the mutual possibility to listen and be heard, to partly criticize and perhaps become convinced to some extent.

3. A final comment addresses the argument that the result in the *Bishara* ruling is inconsistent with the intention of the Knesset in amending the Immunity Law.

The legislation was approved by the Knesset in 2002 largely in reaction to statements made by former MK Bishara. The clear objective of the various sponsors of the amendments was that an MK who makes such statements would be denied of the right to be elected in circumstances similar to those of this case (by way of an amendment to paragraph 7A of the Basic Law: The Knesset), and that the MK would face criminal indictment (by way of an amendment to the Immunity Law). The Supreme Court's decision in the *Bishara* case, in conjunction with the decision in the *Tibi* case, significantly narrows the possibility of generating any legal response to statements by an MK that come dangerously close to supporting the armed struggle of a hostile country or terrorist organization against the state of Israel. Thus, criticism can be made on both the institutional level (*vis-à-vis* the court, to respect the will of the legislature) and on the substantive level (the claim that it is not suitable to adopt such a tolerant attitude toward the statements of Bishara).

The answer to the institutional argument is twofold. First, interpretation of the legislation is based on the assumption that, alongside the specific purpose of the legislation, it also has a "general purpose" of advancing the basic values of the Israeli legal system.<sup>27</sup> Respecting freedom of expression in general, and that of MKs in particular, is one of the basic values of the system, and the interpretation of the provisions of the Immunity Law are based on the presumption that the prescribed arrangement provides appropriate protection for these values. This has special importance with regard to protecting the liberties of elected officials who represent a minority group. Secondly, it should be remembered that a relatively simple "constitutional dialogue" exists in Israel's current constitutional regime: the court is not the "final arbiter" in Israeli society. Its errors, or those which are perceived as such, can be rectified via actions of the Knesset, in a rather simple way.<sup>28</sup>

The substantive argument is directed at the proper limits of tolerance for expressions of the sort attributed to Bishara. The expression of support for actions which kill Israeli soldiers and ambivalence toward attacks against civilians are infuriating. Nonetheless, according to the conventional way of thinking in a democratic society, this is not a sufficient basis for imposing a legal prohibition, backed by a threat of criminal sanctions, on such expressions by MKs. Recognition of the great importance of ensuring freedom of expression in general, and freedom of expression for MKs in particular, necessitates the adoption of a tolerant attitude toward statements by MKs on political subjects. And behold, the usual protections of free speech (including the requirement that there be a real possibility of damage resulting from the expression) are often

insufficient; they do not provide a sufficient shield for the most likely objects of the majority's fury in volatile times – the minority representatives. Special vulnerability should be countered by enhanced protection. Thus, the protection for the freedom of action of MKs should be broadened through generous interpretation of the material immunity granted to them.

### **Conclusion**

One of the most difficult dilemmas facing the Palestinian public in Israel pertains to the struggle of the Palestinian people against the Israeli Occupation in the Territories. On the one hand, the occupying regime severely damages the Palestinian inhabitants of the Occupied Territories, including profound and ongoing damage to their basic rights and living conditions. On the other hand, part of the struggle against the Occupation is conducted in a violent and cruel way, which causes injury to innocent Israeli civilians. Ostensibly, the complex identity of Palestinian citizens of Israel should not be significant in their taking a stance on this issue. Universal morality – and not the Palestinian national identity – mandates opposition to occupation; universal morality – and not Israeli civic identity – also mandates opposition to terrorism, even if the terrorism is aimed at bringing an end to occupation.

The dilemma of the Palestinian citizens of Israel entails the fact that in many contexts morality does not provide unequivocal answers. This is the case with regard to the question: What is the legitimate scope of resistance an occupied population can employ against an occupying regime? It is also the case with the question: Which military and other actions designed to prevent acts of terrorism are legitimate? The decisions on many concrete

issues in these contexts require complex assessments of the scope of absolute moral prohibitions, chances and risks, operational alternatives, and the proper balance between conflicting interests. The result is that legitimate differences of opinion are possible in the case of many central issues.

When an Israeli citizen expresses a view that favors the (narrow) interests of Israel (for example, supporting the policy of targeted killings of terror suspects), he is liable to be accused that his stance does not derive solely from a neutral and fair assessment of the relevant interests, but also (or perhaps primarily) from excessive identification with the interests of the majority in Israel. This is an accusation of intellectual dishonesty, immorality, and in some cases a lack of political astuteness, but the negative social ramifications are quite limited. On the other hand, when an Israeli citizen expresses a stance opposed to the (narrow) interests of Israel, he is liable to face accusations that his stance also derives (or perhaps primarily) from identification with Israel's enemies. In this case, the accusation is no longer limited to intellectual dishonesty, but expands to express a profound lack of faith in this type of citizen. This is liable to be used as justification for taking harsh measures to defend oneself from this type of citizen, even going as far as to deny his or her right to participate in making political decisions.

Against this background, the importance of the case at hand is clear: a legal response to statements by Arab citizens expressing support for "resistance" can be expected not only to have a direct impact – to deter, and conversely, to encourage expression. The legal response to such expressions also has an impact on the way in which the Jewish public views the speaker and the Arab public in general. Indictment for treason, aiding and abetting

terrorism and the like, as well as revoking the right to participate in elections, can be expected to intensify the impact of expressions of lack of trust toward the Arab public among the Jewish public. At the same time, they also affect the readiness of spokespersons for the minority to participate in the public discourse in Israel in an attempt to shape from within the society in which our lives are intertwined.<sup>29</sup>

Thus, the *Bishara* ruling is a courageous ruling. It makes a liberal decision over the space that Israel must leave for action and expression by its Arab citizens towards the violent conflict between the state of their citizenship and their people, which is occupied by their state (and between their state and parts of the Arab nation). This is a brave ruling as it was written "under fire," the fire that has been consuming us, all of us, for many long years. There is no simple way of extinguishing the fire, and the correct way is certainly not to impose a comprehensive silence on those hurt by it or those who feel solidarity with others hurt by it. The majority opinion recognized this and found a legal way (which rests upon a long interpretative tradition in favor of freedom of expression and protection for the minority) to narrow as much as possible the scope of the imposed silence. Indeed, in this way, it also allows the inappropriate part of MK Bishara's remarks, but this is an unavoidable price to be paid in service of a redeeming act of the utmost importance: the act of expanding the correct "space": that in which humaneness and human rights balance, in an open debate, the excessive power of chauvinistic sentiments. This might be the space which will help us end our human sacrifices to Moloch, the Moloch of our exaggerated fears, of our quest for absolute security or for absolute justice.

End Notes

- 1 H.C. 11225/03, *Bishara v. The Attorney General* (not yet published); the ruling was delivered on 1 February 2006 [Hereinafter: the *Bishara* ruling or the *Bishara* case]. Former MK Bishara was represented by Adalah.
- 2 Elsewhere, we have discussed the quite complicated legal aspects of the ruling. These aspects arose from the disagreement between the majority justices (Chief Justice Barak and Justice Rivlin) and the minority justice (Justice Hayut). See, Barak Medina and Ilan Saban, "'To Expand the Space?' On the Scope of a Member of Knesset's Right to Express Support for 'the Resistance' to Israel's Occupation (following H.C. 11225/03, *Bishara v. The Attorney General*)," 37 *Mishpatim* 219 (2007) (Hebrew). Here we discuss only some of the legal aspects of the ruling.
- 3 Compare, *The Report of the State Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000* (2003) [The Or Report] at Section 1, Chapter A, paragraph 9 (Hebrew).
- 4 For a comprehensive survey of views among Arabs and Jews in Israel, and for its lucid analysis, see, Sami Smooha, *Index of Arab-Jewish Relations 2004* (Haifa: The Arab-Jewish Center, Haifa University; Jerusalem: The Forum for Civic Agreement; Tel Aviv: Friedrich Ebert Foundation, 2005).
- 5 Paragraph 4(A) of the Prevention of Terrorism Ordinance, 1948.
- 6 For a discussion of various examples, see Ilan Saban, "After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000," 14(4) *Israel Affairs* 623 (October 2008). This article also refers to complementary criticism regarding the failures of the court in protecting the minority on other occasions.
- 7 H.C. 7052/03, *Adalah v. The Interior Minister* (not yet published; the ruling was delivered on 14 May 2006). For a harsh critique of the law, see, Guy Davidov, Yonatan Yuval, Ilan Saban, and Amnon Reichman, "State or Family? Citizenship and Entry to Israel Law (Emergency Order) 2003," 8 *Mishpat U'Memshal* 643 (2005) (Hebrew). For a harsh critique of the Court's ruling, see, Yaakov Ben-Shemesh, "Constitutional Rights, Immigration and Demography," 10 *Mishpat U'Memshal* 47 (2006) (Hebrew).
- 8 It is worth noting that former MK Bishara disputed the allegations made in the indictment. MK Bishara argued, for instance, that the quotations attributed to him are rife with inaccuracies. To support his claim, he presented his correspondence with the editor of the *Ma'ariv* newspaper, which published an article that served as the exclusive basis for one of the charges, as well as an admission by a representative of the newspaper that the article had been revised. See, in particular, paragraph 74 of the petition.
- 9 A.B. [Election Confirmation] 11280/02, *The Central Elections Committee for the 16th Knesset v. Tibi*, P.D. 57(4) 1.
- 10 See Medina and Saban, *supra* note 2.
- 11 *Tibi* case, at 42.
- 12 *Id.* at 43.
- 13 The *Bishara* ruling, at paragraph 15 of Justice Hayat's ruling.
- 14 *Id.* at paragraph 12 of Justice Hayat's ruling.
- 15 *Id.* at paragraph 1 of Justice Rivlin's ruling.
- 16 H.C. 1843/93, *Pinhasi v. Knesset of Israel*, P.D. 49(1) 661, 685-686.
- 17 Dr. Ya'akov Ben-Shemesh, a seminar presented at the "Professors Forum for Public Law," The Association for Public Law (Tel Aviv University, 31 March 2006).
- 18 Mordechai Kremnitzer, "The Alba Case: Clarifying the Laws of Incitement to Racism," 30 *Mishpatim* 105, 142 (1999) (Hebrew).
- 19 Paragraph 4 of Justice Rivlin's ruling.
- 20 *Id.* at paragraph 10. For a similar point, see also paragraph 8 of Chief Justice Barak's ruling.
- 21 H.C. 316/03, *Bakri v. The Israel Film Council*, P.D. 58(1) 249 (2003).
- 22 For a discussion of the exclusion of Arab citizens from the map of electronic media in Israel, see, *inter alia*, Amal Jamal, *The Culture of Media Consumption among National Minorities: The Arabs in Israel* (Nazareth: I'lam Center, 2006), in particular chapters 6 and 14; Amit Shechter, 'And the Stranger in your Midst' - *Media Legislation and the Rights of the Palestinian Arab Minority in Israel, a Critical Look*, available at: <http://www.personal.psu.edu/ams37/the%20stranger%20full%20version.htm>. The key points of this essay were presented at a conference entitled, "Media Rights as Collective, Political and Cultural Rights" (Nazareth: I'lam Center, 2005.)
- 23 Protocol of the Knesset debate on 31 May 2000, at 29-31.

- 24 *Id.* at paragraph 35.
- 25 In our view, another legal direction could have been pursued. Paragraph 1(A1)(4) of the Immunity Law stipulates that the "support" required for excluding the application of material immunity entails, "support for an armed struggle of a hostile state or acts of terror against the State of Israel or against Jews or Arabs because they are Jews or Arabs." Thus, former MK Bishara could argue that the limitation on immunity does not apply to his statements because he supports neither an armed struggle of a "state" nor "acts of terror." He supported an armed struggle of an organization that is carrying out a guerrilla war for liberation from occupation.
- 26 See Amal Jamal, "The Vision of a Nation State and the Challenge of a State of all its Citizens: Studies of the Writings of Azmi Bishara," 30 *Alpayim* 71 (2006) (Hebrew).
- 27 This is an old and well-known interpretative theory that can be found in all layers of Israeli law; it also appears in various sources of comparative law. See, e.g., Aharon Barak, *Interpretation in Law: Interpretation of Legislation* (1992) at 250-251, 417-475 (Hebrew); and H.C. 953/87, *Poraz v. Mayor of Tel Aviv-Jaffa*, P.D. 42(2) 309 at 329-330.
- 28 The constitutional powers in Israel lie with the Knesset, which carries two hats, or works in two guises, functioning as the Constitutional Assembly and as the Legislator. In most cases, a special procedure is not required for purposes of enacting, annulling, or amending the Basic Laws. Therefore, the difference between procedures of constitutional amendment in Israel and those of most other democratic countries is significant. The Basic Law: Freedom of Occupation, for example, has already been amended three times since its passage in 1992. See Yoav Dotan, "A Constitution for the State of Israel? The Constitutional Dialogue after the 'Constitutional Revolution,'" 28 *Mishpatim* 149 (1996) (Hebrew). A similar point was addressed in the following article: Ilan Saban, "Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel," 36 *New York University Journal of International Law & Politics* 885 (2004) at 973-974.
- 29 Notable here is the request MK Erdan submitted to the Interior Minister to consider stripping the citizenship(!) of MK Taha because of statements he wrote during the Second Lebanon War. The Interior Minister did not reject this request outright, and instead sought the opinion of the Attorney General. It is worth quoting part of the Attorney General's response to the Interior Minister, which clearly reflects the influence of the *Bishara* ruling: "I believe that there

is no room, as a rule, to make use of the authority to cancel citizenship due to breach of trust, in its current formulation, and certainly there is no room for this when the rationale is self-expression, as difficult and wretched as it might be. It should be added that in our case we are dealing with the self-expression of a Member of Knesset, who, naturally, and in accordance with Supreme Court rulings, is accorded a very broad right to freedom of expression, even beyond that of a regular citizen. This case, according to any criterion, is not appropriate and does not substantiate a reason to deny citizenship." Letter dated 6 August 2006. Its contents were attached to a statement by the Justice Ministry's spokesperson (on file with the authors).

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