H.C.J 1601/90

H.C.J 1602/90

H.C.J 1603/90

H.C.J 1604/90

Advocate Meshulam Shalit

v.

M.K. Shimon Peres & Others

H.C.J 1601/90

Advocate Yitschak Ben-Israel

v.

Labour Alignment Knesset Faction & 9 Others

H.C. 1602/90

Eliad Shraga

v.

Knesset Speaker & 18 Others

H.C. 1603/90

Ronen Bar Shira

v.

M.K. Shimon Peres & 15 Others

H.C. 1604/90

In the Supreme Court Sitting as High Court of Justice
[8 may1990]
Before The President (Justice M. Shamgar), A. Barak J. and E. Goldberg J.

Editor's Summary

The combined petitions in this case raise a single issue, i.e., whether agreements concluded between Knesset factions with a view to the establishment of a coalition government (referred to hereafter as "coalition agreements") are required to be brought to the attention of the public.

In view of Israel's electoral system, resulting invariably in the representation in the Knesset of a large number of factions and the consequent need to establish coalition governments, the question is of considerable practical importance, and coalition agreements are indeed a regular feature in the process of formation of governments.

Attorney for the Likud faction argued for the existence of a legal duty to publish coalition agreements, requesting the Court to define the parameters of such duty and submitting the agreements it had reached with other factions. The Labour Alignment asked the Court to give a ruling on the question whether a duty of disclosure exists or, in the alternative, to satisfy itself with the Alignment's willingness to publish its agreements. The United Torah Judaism - Agudat Yisrael faction submitted that the Court should recommend the legislature to enact appropriate legislation on the subject, or, alternatively, a way should be found to require disclosure of the agreements by all factions simultaneously.

The Attorney General's response was that existence of a duty under public law to disclose coalition agreements was indisputable. Publication should coincide with presentation of the Government before the Knesset when it informs the Knesset of its basic political platform, and this has indeed become standard parliamentary practice.

The High Court held as follows:

1. Coalition agreements are an integral part of the Israeli governmental structure and electoral system.

2. Such agreements are drawn up by persons holding public office who are elected by the public, and are therefore trustees of the public interest. Such position of trust, as well as a general duty to act in a fair manner, require them to make a full public disclosure of information at their disposal.

3. The democratic process requires ongoing communication between electors and elected, which is not confined merely to election times and for this to be effective, the public as well as each individual

voter, have right of access to full information to enable them to make the appropriate choice when elections take place. Hence the necessity for full disclosure of coalition agreements.

4. Knesset members also have the same right of access to information as to the content of coalition agreements, so as to enable them to exercise their choice where a new government is presented before the Knesset for a vote of confidence.

5. Disclosure of coalition agreements is also required in the interest of effective public scrutiny of their contents, thus ensuring their conformity with the law and enhancing public confidence in government administration.

6. The duty to disclose coalition agreements is not an absolute one. Other interests, as for example those relating to security or foreign relations, or the need at times for political negotiations to be held away from the full glare of publicity may, in certain cases, require non-disclosure.

7. The same principles apply to disclosure of agreements concluded between opposition factions, as to these concluded between coalition partners.

8. On principle, there is nothing to prevent the Court from laying down specific rules with regard to disclosure of coalition agreements, to be derived from basic constitutional principles. The Court would thereby act in a creative, rather than an interpretative capacity, in the common law tradition, which has also been adopted by the Israeli legal system, especially in the field of administrative law.

9. Nevertheless, the Court recommended that the whole field of political agreements be the subject of appropriate legislation by the Knesset, which should regulate, *inter alia*, the scrutiny of the contents of such agreements and details relating to their disclosure, these being matters which cannot be effectively dealt with by the courts.

   The Court therefore confined itself to laying down the general principle that political agreements must be disclosed, and the broad rules relating thereto, such as the timing of thereof, i.e. no later than presentation of the Government before the Knesset.

10. The Court also dismissed the argument that section 15 of the Basic Law: The Government refers explicitly only to publication of the Government's political platform and therefore, *ex silentio*, coalition agreements do not require publication. The positive requirement to disclose such agreements should be derived from basic constitutional principles, as explained above.

Israel Suprement Court Cases Cited:

[1] H.C. 133, 143 79 *"Advocates in the Central District" List v. Election Committee,* 33(3) P.D. 729.

[2] H.C. 910/86 *Ressler v. Minister of Defence,* 42(2) P.D. 443.

[3] H.C. 501/80 *Zu'abi v. Abu Rabiah,* 35(2) P.D. 262.

[4] H.C. 669/86, 451, 456/86 *Rubin v. Berger,* 41(1) P.D. 73.

[5] H.C. 262/62 *Peretz v. Kfar Shmaryahu Local Council* 16 P.D. 2101.

[6] H.C. 142/70 *Shapira v. Jerusalem District Committee of the Israel Bar,* 25(1) P.D. 325.

[7] H.C. 840/79 Motion 830, 860/79 *Contractors and Builders Central Committee v. Government of Israel,* 34(3) P.D. 729.

[8] H.C. 1523, 1540/90 *Levi v. Prime Minister of Israel; Mintzer v. Modai,* 44(2) P.D. 213.

[9] H.C. 680/88 *Schnitzer v. Chief Military Censor.* 42(4) P.D. 617. (also reported in 9 Selected Judgments, 77)

[10] H.C. 372/84 *Klopfer-Naveh v. Minister of Education and Culture,* 38(3) P.D. 233.

[11] H.C. 620/85 *Mi'ari v. Knesset Speaker,* 41(4) P.D. 169.

[12] Cr. A. 71/83 *Flatto-Sharon* v. *State of Israel* and Counter appeal, 38(2) P.D. 757.

[13] H.C. 1/81 *Shiran v. Broadcasting Authority,* 41(3) P.D. 255.

[14] H.C. 399/85 *Kahana v. Executive Committee of the Broadcasting Authority,* 41(3) P.D. 255.

[15] H.C. 531/79 *Likud Faction in Petach Tikvah Municipality v. Petach Tikvah Municipal Council,* 34(2) P.D. 566.

[16] H.C. 143/56 *Achjiji v. Traffic Controller, 11*P.D. 370.

[17] H.C. 73.87/*53 "Kol Ha'am" Ltd. v. Minister of the Interior, 7* P.D. 871.

[18] F.H. 9/77 *Israel Electric Corporation and Haaretz Newspaper Publication Ltd.,* 32(3) P.D. 337 (also reported in 9 Selected Judgments, 295).

[19] Cr. A. 95, 99/51 *Fumdenski v. Attorney General,* 6 P.D. 341.

[20] H.C. 243/82 *Zichroni v. Executive Committee of the Broadcasting Authority,* 37(1) P.D. 757.

[21] H.C. 428, 429, 431, 446, 448, 463/86, 320/86 *Brazilai vs. Government of Israel,* 40(3) P.D. 505.

[22] Election Appeal 1/65 *Yarador v. Chairman of Central Elections Committee for Sixth Knesset*, 19(3) P.D. 365.

[23] *Election Appeal 2/84 Neimann v. Chairman of Central Elections Committee for Eleventh Knesset; Avni v. ditto*, 39(2) P.D. 225. (also reported in 8 Selected Judgments, 83).

[24] H.C. 1/49 *Bejarano v. Minister of Police*, *2* P.D. 80.

[25] H.C. 337/81 *Mitrani v. Minister of Transport*, 37(3) P.D. 337.

[26] F.H. 29, 30/84 *Kosoi v. Bank Feuchtwanger Ltd.; Philico Finance and Investment Co. v. ditto*, 38(4) P.D. 505.

English Cases Cited:

[29] *Scruttons v. Midland Silicones* [1962] 1 All E.R. 1 (H.L.)

Objection to Order Nisi. Petitions allowed and Order Nisi made Absolute.

The petitioner in H.C. 1601/90 appeared on his own behalf.

Advocates H. Meltzer and O. Kariv appeared on behalf of the first respondent in H.C. 1601/90, the first and second respondents in H.C. 1601/90, the first and second respondents in H.C. 1602/90, the third respondent in H.C. 1603/90 and the tenth respondent in H.C. 1604/90.

Advocate E. Haberman appeared for the second respondent in H.C. 1601/90, for respondents 2-6 and 8-10 in H.C. 1602/90, respondents 4 and 19 in H.C. 1603/90, and respondents 1-7 and 9 in H.C. 1604/90.

The petitioner in H.C. 1902/90 appeared on his own behalf.

Advocate A. Palas appeared for the seventh respondent in H.C. 1602/90, and respondents 11-14 in H.C. 1604/90.

Advocate M. Corinaldi appeared for the petitioner in H.C. 1603/90.

Advocate N. Arad, Director of the High Court Division in the State Attorney's Office, appeared for the first and second respondents in H.C. 1603/90 and the sixteenth respondent in H.C. 1604/90.

Advocates H. Cohen and S. Moran appeared for the petitioner in H.C. 1604/90.

JUDGMENT

SHAMGAR P:

1. The proceedings in all the petitions before us were concerned with one question only: whether Knesset factions which conclude coalition agreements among themselves prior to the formation of a government are obliged to publish those agreements. On this we based our order nisi in this matter whereby the respondents were required to show cause "why agreements which were, and are, concluded in connection with, and prior to, a vote on the formation of a government under section 15 of the Basic Law: The Government, should not be published".

2. The various respondents' replies to the order nisi were not uniform. Learned counsel for the Likud faction, Advocate Eitan Haberman, advocated the view that the court should recognise the existence of such an obligation and should outline its main elements. That respondent also submitted arrangements in writing which it had reached with various factions, namely:

(a) Memorandum of a meeting between the Likud faction and the Degel Hatorah faction, on 18.3.90.

(b) An agreement between the Likud faction and the Promotion of Zionism in Israel faction of 11.4.90, and an announcement by the Prime Minister published following thereon.

(c) A document outlining cooperation between the Likud faction and the Shas faction.

The Labour Alignment faction did not attach the agreements which they had reached to their reply; but declared that they would be prepared to publish them voluntarily. They asked that the court first give them directions, if it saw fit to do so, concerning the actual obligation to publish agreements, the manner in which they should be published and the practice relating there to while taking into account, inter alia, those legal rules and considerations presented to us by their learned counsel, Advocate Hanan Meltzer. And these are the questions to be considered:

(a) The effects of the obligation to disclose on the Knesset Members (Immunity, Rights and Duties) Law, 1951.

(b) Harmonisation between any possible ruling and the provisions of section 15 of the Basic Law: The Government.

(c) The question of whether it would be right for the court to lay down principles instead of the Knesset formulating its position by way of legislation, as was done, for example, in the case of the Political Parties (Financing) Law, 1973.

In sum, the court was asked:

> "To determine whether there is room for a general ruling concerning disclosure of the agreements referred to in the order nisi, or to be satisfied - to the extent to which it deems this to be fit and just - with readiness to disclose them, without laying down any hard and fast judicial rules, leaving the constitutional questions presented and connected with the matter for further consideration, while bringing them to the notice of the legislature for its consideration.
>
> In any event the honourable court is requested - if it should decide that there is room for publishing the agreements, in the light of the opinions of the parties before it - to give appropriate directions as to the manner of publication, its timing, the consents required for this purpose, and

guarantee of mutuality and concurrence with the other factions and factors connected with the said agreements."

The United Torah Judaism - Agudat Israel faction concurred with the arguments of learned counsel for the Labour Alignment faction. The following is the gist of the arguments presented by their counsel, Advocate Eiran Peles:

"In consideration of the special nature of coalition agreements and of the effects of an obligation to disclose them on the substantive immunity of Members of the Knesset and their rights, Agudat Israel will submit that the honourable court should recommend to the Knesset that they enact 'primary legislation' which should take account of the special requirements of a coalition agreement which is part of the agreements which come within the province of public law.

As the reference is to one of the agreements within the province of public law, Agudat Israel will submit in the alternative, that the court should determine the manner in which coalition agreements should be published simultaneously by all the factions and the form and method of publication in such a way as to prevent exploitation of such agreements by political elements, to ensure that the special character of the agreements be preserved and in such a way and timing as not to interfere with the ongoing conduct of negotiations for the formation of a government."

Mrs. Nili Arad, Director of the High Court Applications Division of the State Attorney's Office, submitted the response of the Attorney General to the effect that "there is no disputing the existence of obligation to give publicity to agreements" which come within the province of public law.

In so far as the timing of the publication is concerned, there is a recommendation in the above response that the publication coincide with the Government's presentation of itself before the Knesset, under section 15 of the Basic Law: The Government, in the

course of which notice of the basic lines of its policy is announced since in any case according to the practice which has developed since the seventh Knesset the coalition agreements which have been concluded are tabled before the Knesset at this stage. The said response also referred to the significant question of legal validity of the agreements, in the light of their content, but we saw no cause for dealing with this question, because of the limits we outlined in our formulation of the order nisi.

3. The political agreement as expressed in the coalition arrangements between Knesset factions prior to the formation of a government, is to a great extent the outcome of the structure of our political regime and of our system of elections.

The Government functions by virtue of the Knesset's confidence. When a new government has to be formed, after elections or after a vote of no-confidence in the Government, and a member of the Knesset, who has been entrusted with this task, succeeds in doing so, the Government presents itself to the Knesset in order to receive a vote of confidence. At that stage its future policy is outlined.

For many reasons, including the system of proportional representation, under section 4 of the Basic Law: The Knesset (see also section 81 (a) of the Knesset Elections Law, 1969, and H.C. 143, 133/79 [1] at p. 732) and the multiplicity of party factions in all the Knessets, from the first till the present one, it is generally necessary for the purpose of forming a government to obtain the prior consent of several factions to support the projected government. Till now there has never been a government consisting of only one party.

The result of this need to receive the consent of several factions is inter alia, that an agreement, or several agreements, must be concluded between Knesset factions. In these agreements the subjects forming to the outlined future policy of the Government are regulated, as are additional questions concerning the composition of the Government and the scope of its functions.

The coalition agreement is, thus, an accepted device in Israel, as it constitutes a framework for political consensus among parties (H.C. 910/86 [2] p. 507), a means for

filling posts in the Government and the executive authorities as an early stage, and similar matters. Even an agreement on the staggering of office amongst several candidates on the same list was brought before this court on one occasion (see H.C. 501/80 [3] with a view to obtaining its aid in enforcing it. This of course does not exhaust the subjects which can be regulated in such agreements.

4. Is there an obligation to bring such agreements between factions, or between a faction and a member of the Knesset, to the notice of the public? The answer to this question lies in the nature of the sphere within which it falls and in the sources from which the agreement derives its values.

Such an agreement falls within the scope of public law (according to my distinguished colleague, Justice Barak, in H.C. 669/ 86 [4].

An agreement within the bounds of public law which deals with elections - to the Knesset, to a local authority or to a statutory public body - is not necessarily subject to the general laws of contract, but that does not mean that it is exempt from judicial review of its terms. As noted in the above judgment (at p. 78):

> "we are concerned here with many and varied agreements covering several areas (political, social, economic) of public life. These agreements - so we assume - are made in all seriousness and with the intention of honouring them. It is mete not to remove these agreements from t he preserves of legal regulation and judicial review."

These agreements are concluded by public functionaries chosen by the electors to carry out legislative and government functions. Thus the agreements are not intended for the purpose of arranging matters of private or personal interest:

> "A public personality acts as a trustee on behalf of the public: He does not act on his own behalf but in the public interest. It is only natural, therefore, that agreements and promises made by him should be examined in accordance with the standards of public law..." (above).

> See also H.C. 262/62[5] p. 2115; H.C. 142/70 [6] p. 331, and H.C. 840/79 [7].

In this context we held recently in H.C. 1523/80 [8] p. 214, that:

> "...Statutory discretion must always favour the welfare of the public, and must be subject to the desire to forward the general good. Thus even in extreme and crucial instances, when there is a conflict of interests, the public interest always predominates."

5. The nature of the arrangements, which are the subject of these proceedings, being public agreements, have direct repercussions on the following:

(a) The norms which ought to be applied to the formulation and implementation of such agreements;

(b) The function of the courts in respect thereof.

The democratic process can only function on condition that it is possible to clarify openly all problems on the agenda of the State and exchange opinions about them freely. The continuity of the relationship between the elected and the elector loses, it is true, some of its direct nature and intensivity after the elections, but election does not sever the bond between the public and its elected representatives until the next elections. The whole political process is closely watched by the general public, which follows events attentively in order to be able to express ongoing opinions and in order to reach conclusions concerning the present and the future. Freedom of public opinion and knowledge of what is happening in the channels of government are an integral part of a democratic regime, which is structured on the constant sharing of information about what is happening in public life with the public itself. Withholding of information is justifiable only in exceptional cases where security of the State or foreign relations may be impaired or when there is a risk of harming some vital public interest (within the meaning of sections 44 and 45 of the Evidence Ordinance [New Version], 1971).

Amongst those aims which a public agreement is designed to serve must performance be included the good of the public and preservation of the rules of fairness and integrity insofar as the functions contemplated by the agreement are concerned. The existence of such aims provides the foundation for the public's confidence in the system of government which they chose for themselves and provides one or other public figure with the opportunity of formulating ideas for the future. This applies not only to the general public but also to the individual member of the Knesset who is called upon to take a stand on the question of a motion of confidence in the Government as pronaed under section 15 of the Basic Law: The Government, or in the course of his parliamentary life.

However, it is impossible for the public's confidence to be based on what is concealed, in the absence of the exceptional circumstances (referred to above) which are also the product of public interest, pure and simple, of a different kind. The guidelines with respect to the creation of a proper balance in exceptional circumstances, where the choice of one of the conflicting public interests may lead to the exclusion of the interest in free and full publication of information, where designated recently in H.C. 680/80 [9].

But what is usual and accepted is that the preservation of the normative framework is ensured, first and foremost, by publication, and disclosure to the electorate in general and members of the Knesset in particular, of information concerning the governmented set-up, the actions of its components and the functioning of the elected representatives, in order to enable the public to see, know and judge.

Denial of publication can water down the ability of the public to participate in political life (for a similar issue, see H.C. 372/84 [10] p. 238).

Everything stated above concerning information about the parliamentary set-up and the executive applies, mutatis mutandis, to the public and normative characteristics of agreements such as those on which the petitions before us are based. Preservation of the character of an agreement in accordance with the standards consistent with its aims is dependent, to no small an extent, on its being brought to the notice of the public. The element of disclosure is the natural consequence of the confinement of the content of the agreement to matters of public interest for the general good.

Public scrutiny is not only an expression of the right to know, but it is also an expression of the right to control.

From this follows, also, the answer to the second question referred to above: that is the place, within this framework, of the courts. In the absence of judicial review there is no effective and immediate way of examining and enforcing the obligations imposed by public law. The existence of public law norms in general and review by the courts are interdependent and intertwined.

6. It was argued before us that publication could be repugnant to the provisions of the Knesset Members (Immunity, Rights and Duties) Law and in particular to section 1 of that Law. I could find no basis for such concern. The statutory status of Knesset factions is not regulated in that Law but in the various statutes dealing with Knesset elections, and there is nothing in section 1 of the said Law or in any of its other provisions which affects the legal rights and duties of a Knesset faction.

But, above all, there is nothing in the said Law to impete a normative definition of rules applicable to an agreement anchored in public law. The question of what, in the light of the provisions of section 1 of the above Law, are the possibilities for legal action, in the event that a member of the Knesset does not fulfil his obligation to disclose to the public the existence of a public agreement, is not an issue before us. In any event, such a question has no bearing on the very creation and existence of basic norm governing such agreements and the necessity of defining and declaring it. In other words, a member of the Knesset who chooses not to publish an agreement with a faction or with another member of the Knesset, will be entitled to immunity, but the definition of his omission as contravening desirable and correct norms of conduct, will remain.

Mr. Meltzer argued, further, that a "negative" regulation can be derived from section 15 of the Basic Law: The Government that section mentions the publication of policy lines but at the same time makes no mention of coalition agreements, from which one can derive a negative by implication. I cannot accept this interpretation. One cannot learn from section 15 that the intention was to block the way to, or deny the existence of, other

additional public obligations which are inherent in our democratic regime. Disclosure of information concerning agreements is not only an integral part of our basic conceptions, as explained above, but is a principle of democrat positive commands which must be observed in practice. Section 15 defines and summarises only those matters which are to the act of presenting a government, and there was no intention of making it cover all parliamentary proceedings prior to the presentation of a government. Proof of this can be found in the fact that coalition agreements have been tabled in the Knesset since the Seventh Knesset, without this being regulated in the above section 15.

7. Learned consel for the Labour Alignment faction argued, as mentioned above, that it was preferable for the matter of publication of agreements to be regulated by primary legislation.

We, too, are of the opinion that the matter deserves legislative regulation. Furthermore, in the present legal and constitutional situation every legislative enactment is preferable to an arrangement based only on judicial construction of constitutional concepts.

However, once the matter has been brought before us on the initiative of the petitioners, we do not intend to leave the matter open without pronouncing upon it. As long as there is no enactment, it is only proper for this court, which maintains judicial control within the bounds laid down in section 15 of the Basic Law: The Judicature and on the basis of the basic constitutional precepts which are part and parcel of our law, to have its say and to lay down rules which should be applied in the absence of legislation.

8. It is our view, therefore, that agreements between factions, or between a faction and a member of the Knesset, or between individual members of the Knesset, concluded in anticipation of the formation of a government, ought to be published, if they deal with the functions of the legislative or executive authorities.

In this respect there is no substantive difference, in our opinion, where an agreement concluded prior to the formation of a government is concerned between a situation where a government has been successfully formed and one where an attempts to do so has failed .

The timing of the publication should rightly be not later than the date of the anticipated presentation of the Government before the Knesset, under section 15 of the Basic Law: The Government, and the desirable place of publication, is that where the said functions take place, the Knesset. But, of course, the Knesset can lay down, in its Constitution, additional technical regulations with respect to the tabling and publication of the agreements.

9. We hold, therefore, that the order nisi be made absolute and that the agreements, which are the subject-matter of the petitions, be made public.

BARAK, J.:

I concur with the judgment of my colleague, President Shamgar. In view of the importance of the matter I wish to add several comments concerning the legal source of the obligation to disclose political agreements prior to votes of confidence, and the role of this Court in formulating it. The subject of my comments is the political agreement concluded between factions or between individual members of the Knesset in anticipation of a vote of confidence in the Government. An agreement of this nature can be between factions and members of the Knesset, who support the Government ("a coalition agreement"), or between factions and members of the Knesset who oppose the Government or abstain from voting ("an opposition agreement")

The Source of the Obligation

1. Israel is a parliamentary democracy. The people elect parties or lists whose candidates are elected to the Knesset. "The Knesset is the parliament of the State" (section 1 of the Basic Law: The Knesset). The Knesset is the legislative authority. (both constituent and ordinary). It creates and topples governments. "The Government is the executive authority of the State" (section 1 of the Basic Law: The Government). It functions by virtue of the Knesset's confidence. The Knesset and the Government are two organs of the State which together with the courts make up the three central authorities of the State, exercising a process of mutual checks and balances (see C. Klein, "On the Legal Definition of a Parliamentary Regime and on Parliamentarism in Israel", Mishpatim 5/308).

2. At the basis of this system of government is the right to vote vested in the citizens of the State, who elect the parliament, either by way of lists or parties. There is '"a competitive struggle for power, in the course of which a few individuals are elected as political leaders..."(Justice D. Levin, in Cr. A. 71/83 [12] p. 787). The political parties are the constitutional instruments through which the political will of the people is realised. Accompanying our system of elections we have a multi-party regime, which is based, by its very nature, on the formation of government coalitions. Political agreements become, therefore, a vital legal-political instrument, which in our constitutional regime is of great importance for the purpose of ordering political dealings. It is thus only natural that, citizens, by whose votes the governing organs (the Knesset) are constituted should be aware of the content of such agreements. So that just as citizens should know about the platforms of the parties, so should they know about the content of political agreements, which very often contain diversions from, or addena to, the political platforms.

In the case of a political struggle between parties it is therefore obligatory that citizens be informed about the subjects and personalities connected with the political process. President Shamgar emphasised this in H.C. 1/81 [13], p, 378, when he said:

> "The system of democratic government draws sustenance from - and is even dependent on - a free flow of information, to and from the public, regarding prominent matters which affect the lives of people in general and of the individual in particular. Thus the free flow of information is often regarded as a kind of key to the operation of the whole democratic system..."

And I, too, stressed this on another occasion (in H.C. 399/85 [14] p. 274) when I noted that:

> "Free exchange of information, opinions and views, not imposed by the authorities, in an attempt at mutual persuasion, is sine qua non for the existence of a democratic regime, based on the rule of the people, by the people, for the people. Only in this way can it be ensured that every

> individual receives the maximum information he requires in order to reach a decision on matters of regime and government. A free flow of opinions allows for order by change in the balance of formces controlling government. Without freedom of expression democracy loses its spirit".

Such information, which is vital for the existence of a proper democratic regime, also comprises data about political agreements. On the basis of this information the public can make a decision with respect to its representatives and their political attitudes and manner of functioning in the Knesset. Only with his information as a background can the public decide, on election day, one way or the other, and only on the basis of this information can there be a free exchange of opinions in the interval between elections.

3. The obligation to disclose political agreements is grounded not only on the citizen's need to take up a political stand. There is another, immediate requirement connected with the formation of the Government itself. The Government is constituted when the Knesset has expressed confidence in it (section 15 of the Basic Law: The Government). Knesset members who participate in the vote of confidence must know what obligations the coalition partners forming the Government have taken upon themselves. If indeed the purpose of the political agreement is to direct future conduct, it is essential that information about the future influence of the agreement be available to members of the Knesset who vote on the formation of the Government. Indeed, we learnt from the Attorney General's response that in practice coalition agreements are tabled in the Knesset before a vote of confidence takes place.

4. The obligation to disclose, as I have already noted, follows upon the need for the citizen, in general, and the member of the Knesset, in particular, to receive information which is vital for the purpose of making political decisions. This obligation has an additional aspect. If the parties to the agreement are curane that it will be exposed to public scrutiny and criticism, this will affect its actual content. It has rightly been pointed out that sunlight is the best of and elected light disinfectents the most effourt policeman (L. Brandeis, *Other People's Money and How the Bantees use it* (1914) ch. 5 p. 92. Indeed, exposure of political agreements will influence the legality of their contents. It will enable

public review, increase the public's confidence in the governing authorities and strengthen the structure of the regime and the government.

5. Till now I have concentrated on the relationship between the obligation to disclose political agreements and the system of government. I now wish to draw attention to an additional source for the obligation to disclose. This derives from the public function of the parties to such an agreement. A Knesset faction is a constitutional unit. A political party which participates in elections to the Knesset fulfils a constitutional function. The faction and the member of the Knesset have public functions based on law. They are not merely entities operating under public law. A parliamentary faction which, or members of the Knesset who, sign a political agreement do not act on their own behalf. They are trustees for the public. I pointed this out in H.C. 669/89 [4] at p. 78:

> "...A public personality is a trustee of the public. He does not act for himself only, but does not in the interest of the public. So that it is only natural that agreements and promises made by him are examined by criteria of public law..."

Because of the duty of trust which a public personality carries it follows that he has several obligations, including that of refraining from a conflict of interests (see H.C. 531/79 [15]), acting in accordance with public ethics (see I. Zamir, Ethics in Politics, *Mishpatim* 17, pp. 250, 261), or being under an obligation to disclose. A private person who has information may keep it to himself, and is under no obligation to disclose it save if the demands of good faith require him to do so (by virtue of section 39 of the Contracts (General Part) Law, 1973). This does not apply to a public personality. Information in this possession is not his private "property". It is "property" which belongs to the public, and he must bring it to the notice of the public. Justice H. Cohen commented on this as follows (in H.C. 142/79 [6] p. 331):

> "The argument that in the absence of any legal obligation to disclose I am entitled to conceal and not reveal, can be proffered by a private individual or body... but it is not available to an authority which fulfils a function by law. A private authority differs from a public authority in

> that it acts in its own capacity, can import or withhold information at will, whereas a public authority is created solely to serve the community and has no interests of its own. Everything it has it holds as a trustee and has no additional, different or separate rights or duties of own, over and above those which derive from its position of trust or are vested or imposed on it by virtue of nacted provisions."

Thus, duty to disclose emanates from the obligations of trust. But beyond this, the parliamentary faction which, or the individual member of the Knesset who, fulfils a public function of a constitutional nature, is under an obligation to act fairly. This obligation, too, emanates from the public nature of their functions. Just as the duty to provide reasons derived from the duty to act fairly (see H.C. 143/56 [16], so does the duty to disclose. It follows, therefore, that in order to ensure that public conduct be fair it should be exposed to the light of day, thus allowing it to be stratimised and clarified.

6. Till now I have discussed two legal sources for the obligation to disclose: the nature of the regime and the public character of the agreement. There is a third source, which is entrenched in the public's right to know (see Z. Segal, "The Right of the Citizen to Receive Information about Public Matters", *Iyunei Mishpat* 625). It has been her that freedom of expression is one of the basic principles of our system of law (see H.C. 87, 73/53 [17]). Freedom of expression is a complex value, at the crux of which is the freedom "to express one's thoughts and to hear what others have to say.."(President Landau in F.H. 9/77 [18] p. 343). In order to realise this freedom the law vests the holder thereof with additional rights derived from the freedom of expression (see Cr. A. 99, 95/51 [19] p. 355). Among these additional rights it the "right to receive information" (H.C. 399/85 [14] p. 267). As against the individual's right to receive information is the governing body's study to provide that information (H.C. 243/82, [20]).

From this comes the duty of public functionaries to inform the public. So that the obligation to disclose, which derives from the freedom of expression, is connected not only to the nature of the democratic regime but also - like the very freedom of expression itself - to the right of the individual in society to know that truth and be given the opportunity for

self-fulfillment. The right to know is not only a right belonging to the public in general, but it is also the right of the individual.

7. I have discussed the obligation to disclose political agreements. This obligation is not absolute. There are certain very important considerations in favour of restricting this obligation, namely security and foreign, economic and social relations, which can justify applying limitations on the obligation to disclose. So that just as every constitutional right is not absolute, so is the right to receive information not absolute. It must give way to certain other rights and to the need to take other interests and values into consideration. It is in the public interest that political negotiations be not conducted in the glare of publicity, and that the parties to those negotiations be given the means for their proper and efficient conduct. For this purpose secrecy is sometimes necessary. Often damage will be wrought to both public and private interests if political agreements are disclosed.

We must therefore strike a balance between the various considerations against the background of our constitutional concepts. It follows from this balancing process that a political agreement does not have to be disclosed if it almost certainly would be to the detriment of the public interest in general - that is the interest of the State - to do so. So that, for example, a public agreement the exposure of which would almost certainly harm the security of the State or foreign relations should not be disclosed.

8. The obligation to disclose, in the areas in which it operates, covers every political agreement connected with a vote of confidence. It therefore applies both to a coalition agreement and to an agreement between opposition factions. It is not logical, from the viewpoint of the obligation to disclose, to limit it only to coalition agreements. As to the timing of the disclosure, the leading principle should be that this should take place with the signing of the agreement. However, there could be appropriate considerations justifying postponement of the disclosure. The final date for disclosure should be immediately prior to the Government being presented before the Knesset and the holding of a vote of confidence.

The Function of the Court

9. In his arguments before us Mr. Meltzer contended that the obligation to disclose political agreements should be laid down by the legislative body and not by the courts. He noted that he was not disputing the competence of the power of the courts to rule on the obligation to disclose or the legitimacy of this function. But he maintained that it would be wiser for this obligation to be laid down in primary legislation, which would also regulate the relationship between the obligation to disclose and the immunity of Knesset members. I, too, am of the opinion that there is no formal problem about our recognising the obligation to disclose. This is a matter which has not yet been regulated specifically by public law and has been left to the autonomy of the private will.

The demands of life call for regulation, but this does not come about in a vacuum. We derive a from well-known and accepted basic principles. On more than one occasion we have carved out a specific legal tule from basic constitutional concepts, such as, for example, the law applicable to amnesty (see H.C. 428/86 [21]), the election laws, based on "constitutional data" concerning the existence of the State and its democratic character (E.A. 1/65 [22] p. 384; E.A. 2/84 [23]), and the rights of man, in general, based on the fact that our country is a freedom-loving democratic State (see H.C. 1/49 [24]; H.C. 337/81 [25]). We have often derived specific legal rules from basic principles, such as, for example, the principle of freedom of expression (see H.C. 73/53 [17] H.C. 680/88 [9]) or from the criteria of the trust obligation (see H.C. 531/79 [15]) or the fairness obligation (H.C. 840/79 [7]). This is not a judicial interpretative function. It is also not a judicial function aimed at filling a lacuna. It is a judicial function whose object is development of the law.

The history of the common law is a history of development of the law by judges. The history of broad areas of our law - characterised by mixed system of law - is a history of judicial creativeness. Most of our administrative law is judicial law. The law of tenders, the rules of natural justice, the rules against conflict of interests, the code of administrative discretion, are all judicial creations aimed at development of the law. This court has operated in a similar matter in the field of private law. My colleague, President Shamgar, referred to this when he pointed out (in F.H. 30,29/84, [26] p. 511) that:

> "Just as the common law, which did not consist only of the interpretation of expressions, was created in England, so has the independent possibility of developing a common law, not necessarily through the merl interpretation of expressions, been brought about here."

And Justice Witkon expressed a similar idea (in H.C. 29/62 [27] p. 1027), when he said:

> "More than once has this court recognised rights which do not appear in any legal provision, and these rights, having received judicial approval, have taken shape and crystallised into rights recognised by law. Matters in common practice and within the concepts of natural justice which only yesterday were still featureless and underined have in this manner been given an impetus and awarded the status of rights. That is judicial development, which occurs side by side with the legislative function but does not trespass on its territory, and I would not wish to implide its development such a polver provides guarantee.

See also A. Witkon, "The Material Right in Administrative law" (1983) 9 *Iyunei Mishpat, 5.*

This judicial function is usually performed in reliance on the basic principles of the legal system, and thereby new rights and duties come into being. In that way a link between reality and the law is created. Thus the law progresses and develops in a natural manner together with the judicial process (see O. Dixon, "Concerning Judicial Method" *Austl. L.J.* (1955-6) 468). Therein lies the "genius" of development by judicial precedent (in the language of Simonds J. in Scruttons v. Midland Silicones [29]). The new legal plant grows in the soil of the old law. Such growth allows for change coupled with stability, movement coupled with marking time, creativity coupled with continuity.

10 The judicial function of developing the law is limited. The judge may not act contrary to enacted law and must remain within its framework. He must operate with the

interstics of the law. According to Justice Landau (in "Rule and Discretion in the Administration of Justice" *Mishpatim,* 292, 297: (1968)

> "As the field of enacted law widens, the judge's use of discretion is confined to the limits of the law; and the area open to the use of discretion by the judge through independent judicial legislation becomes more limited. But even after such enactments the courts return to weaving anew man the their interpretative around the provisions of the enacted law, or interstitially, in the famous words of Justice Holmes."

Within the framework of this "weaving" the court must weigh up whether it would not be preferable, in the specific case before it, to refrain from all creative action and leave the task of developing the law to the legislature (see C.A. 518/82 [28] p. 120).

There are fields in which judicial activity is possible but not desirable. I do not think that the matter before us comes within this field. As already stated, we have founded the obligation to disclose on well-known basic principles. This activity of ours it no different from similar operations in the past, such as imposing the duty to give reasons (before the law on this subject was enacted), the imposition of the rules of natural justice, the imposition of the duty to refrain from a conflict of interests, and of other duties incumbent on government authorities.

In reaching this conclusion I was encouraged by the position of the Attorney General, who stated that in his opinion there is an obligation under case law to disclose political agreements even without any statutory provision. I was also helped considerably by the attitude of the Likud faction, one of the largest factions in the Knesset, which was also of the opinion that actions and members of the Knesset are obliged to make public political agreements concluded amongst themselves prior to the formation of a new government.

12. Nevertheless, it is advisable for the legislature to consider the subject of political agreements. As judges we can lay down general principles. We cannot rule on specific arrangements. We cannot impose the task of examining the content of agreements on a

competent authority (such as the Knesset Speaker or the State Controller) nor can we create a "registry of political agreements or lay down details concerning methods of disclosure.

All these matters demand legislation, which will take into account all the possible problems which can arise. But as long as the legislature has not had its say, we have not alternative but to give expression to the basic principles contained in our system of law. And this we have done.

E. GOLDBERG J.:

None of the parties before us challenged the competence of this court to lay down an obligation to disclose coalition agreements and between opposition factions agreements. The legal principles on which my distinguished colleagues based the obligation to disclose are also acceptable to me. I had some doubts about whether to exercise our competence since all the parties were ready to disclose the agreements they had concluded, even in the absence of any obligation to do so. The "natural" authority which should provide the framework and content for a constitutional matter of the first degree, such as the one with which we are dealing here, is not the judicial authority, but the legislative one. I am of the opinion that even when norms of administrative law are lacking, it is not always the duty of this court to develop them by way of judicial legislation, when it is the duty of the Knesset to legislate. If I finally decided to concur with my colleagues it is because I think that if the matter is left completely open until there is statutory action, and if the matter of disclosure is left to the good will of those who conclude the agreements, then we will not have avoided the risk of damaging the fabric of our public life, with all the implications thereof.

I therefore concur with my colleagues' opinion.

Decision in accordance with the President's judgment.

Judgment given on 8.5.1990.