

Information Commission in India orders disclosure of letters of support given by political parties

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Dear Friends,

The media and RTI discussion groups in India reported an important landmark decision from the Central Information Commission (CIC) earlier this week. In the matter of *T Asaf Ali v The President's Secretariat* (Appeal No.CIC/WB/A/2007/00725 decision dated 30th June 2009) the CIC ruled that letters of support provide by various parties in favour of the United Progressive Alliance to the President of India could be disclosed under the Right to Information Act (RTI Act). This decision, unless challenged before a High Court, will open up to some extent a dark and murky aspect of government formation in the era of coalitions in India.

Brief facts of the case:

Mr. Asaf Ali of the People's Council for Civil Rights, Kerala, had sought from the President's Secretariat copies of the letters of support provided by various political parties in favour of the United Progressive Alliance's claim to form the Government at the Union level in 2004. The application made in July 2007 was rejected by the Public Information Officer stating that the letters were exempt from disclosure under section 8(1)(e) as they were given to the President in a fiduciary capacity. The first appellate authority upheld this view. Mr. Asaf Ali challenged these orders before the CIC.

The CIC held that there was no pre-existing relationship between the President and political parties. They have no official dealing with the President of India nor do they interact with the President or the President interact with them in the decision making process. The decision to support a particular party or group has been arrived at by the concerned political parties on their own. 'Relationship' denotes a pre-existing connection or an association. It may signify a fact or state of being related to one another. It signifies a condition or a character due to being related. The relationship can be either by blood or by affinity. It could also be as a result of allegiance as described by Lexicographers. A relationship could also be given a wider meaning so as to include even a working relationship. Examples of such relationship are and maybe the relationship existing between a lawyer and a client, a company and its directors, a Company and its employees or even the Government and its employees. It could also be *inter-se* relationship between members of a society and the society. In the light of this, the argument that the letters were written to Hon'ble the President in a fiduciary capacity that exists between the authors of the letters and the President seems far fetched. To come within the ambit of 'Fiduciary Relationship', trust becomes an inalienable component. Viewed in this context, the information provided to the President by various political parties cannot be treated as one emanating from Fiduciary Relationship and that makes section 8(1)(e) inapplicable to the facts and circumstances of this case. The CIC ordered disclosure of the letters within 15 working days.

M. Shalit et. al. versus Shimon Peres M K et.al case from Israel:

The CIC's decision reported above brings to mind a similar case that was decided by the Supreme Court of Israel in 1990. In four instances advocates sought disclosure of agreements entered into by various parliamentary parties in the Knesset- Israel's Parliament. There was no statutory requirement to disclose such agreements which are deposited with the secretariat of Knesset. Israel has a history of coalition governments much older than that of India. The requestors wanted to know the conditions which formed part of the agreements between various Knesset factions. Hence the demand for disclosure of the text of the agreements. Interestingly none of the political parties refused disclosure *per se* but wanted the Supreme Court to make a declaration as to the existence of the public's right to know the contents of such agreements.

A summary of the main points that form the basis of the judgement is given below.

(for the complete text of the judgement click on:
http://elyon1.court.gov.il/files_eng/90/010/016/Z01/90016010.z01.pdf)

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.

This decision contains the first unequivocal pronouncement of the citizen's fundamental right to receive information from the Israeli government. It also emphasised the right of MPs to know the contents of agreements entered into by other Knesset factions. Two principles are important to note in this decision:

- 1) That all agreements made under public law are open to disclosure unless some other public interests such as security and foreign relations are better served by non-disclosure. **This principle implies that agreements such as public-private partnerships entered into by our own governments for the purpose of developmental activities must be in the public domain. Our public authorities have been most reluctant to make such agreements public.**
- 2) Members of Parliament (MPs) and Legislators (MLAs) being public functionaries have a duty to be transparent about the information they hold or create as they hold positions of trust. Barak, J., observed: "*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."

The Central Information Commission had constituted a full bench in October 2008 to determine whether or not MPs and MLAs have direct obligations to disclose information under the Indian RTI Act. That matter has not been decided yet. The Shalit case recognises the direct obligation of Israeli MPs to be transparent about their actions undertaken in the course of their official duties. It is important that this principle is recognised in the South Asian context also. Coalition governments are not new to Pakistan, Nepal and India. Voters have the right to know what agreement political parties conclude in order to form governments.

All said, this is an important case whose principles will be of use to RTI advocates in any country.

Thanks,

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