

Discussion Paper on

**Transparency Guarantees  
in Amartya Sen's *Development as Freedom***

for the National Seminar on Development as Freedom  
July 31-August 1  
New Delhi

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Among the five substantive freedoms, transparency guarantees receive the least amount of space in the book.<sup>1</sup> The definition of transparency guarantees is on pages 39-40, and then an illustration of its significance on pages 184-86, where the link between transparency guarantees (rather their absence) and the East and South East Asian financial crisis of the late 1990s is established.<sup>2</sup> This brevity of treatment in the book gives an opportunity to expand on it at this Seminar and I look forward to Professor Sen's further thoughts on this freedom.

The task of writing a background paper for discussion, in this circumstance, is likely to have me reading between the lines and probably off the page. I shall attend to the duty nonetheless.

### **The Definition and an Example**

In social interactions, individuals deal with one another on the basis of some presumption of what they are being offered and what they can expect to get. In this sense, the society operates on some basic presumption of trust.

Transparency guarantees deal with the need for openness that people can expect: the freedom to deal with one another under guarantees of disclosure and lucidity. When that trust is seriously violated, the lives of many people—both direct parties and third parties—may be adversely affected by the lack of openness. Transparency guarantees (including the right to disclosure) can thus be an important category of instrumental freedom. These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility, and underhand dealings (pp 39-40).

Professor Sen illustrates this definition with an example of the financial crisis in the East and South East Asia in the late 1990s. I am unlikely to explain this any better, so I quote extensively. "The development of the financial crisis in some of these economies has been closely linked with the lack of transparency in business, in particular the lack of public participation in reviewing financial and business arrangements... The opportunity that would have been provided by democratic processes to challenge the hold of selected families or groups could have made a big difference." The portfolio investments and commercial transactions, and government policies remained nontransparent. The economic as well as political agents had little incentive to look into the transactions more closely. "The unchallenged power of governance was easily translated into an unquestioned acceptance of nonaccountability and nontransparency, often reinforced by strong family links between the government and the financial bosses" (pp 185-86).

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<sup>1</sup> The other four freedoms in Sen's list are: economic facilities, social opportunities, political freedoms, and protective security.

<sup>2</sup> All page references are to Amartya Sen, *Development as Freedom*, New Delhi: Oxford University Press (Paperback), 2000, unless otherwise noted.

### Reading between the Lines and off the Page

The recent SARS epidemic provides another example. China's non-democratic system allowed the government to hide and then to lie to its citizens about the existence and spread of the virus. Unfortunately for the Chinese government, virus can't be crushed with tanks. The best course was to be transparent and open—inform all citizens as quickly and fully as possible, and prepare medical personnel and facilities to deal with the virus as and when they had the encounter. Centralisation of information and treatment, like central economic planning, is a recipe for disaster. As Friedrich Hayek has shown, the most efficient way to deal with the 'economic problem' is to enable each economic agent to use her local knowledge—the knowledge of time and circumstance. Medical or even social problems are no different, in this sense, from economic problems. China, and the other countries that suffered because of its secrecy, finally contained the virus with full information and disclosure, and with decentralised treatment. More importantly, it wisely allowed international agencies, particularly WHO, to bridge the credibility gap. People would otherwise have had difficulty trusting the now transparent China. For the problems created by nontransparency—information asymmetry—third party mediation is generally necessary.

A democratic governance is however no guarantee of transparency. After six months, the people of India learned about six workers' exposure to a heavy dose of radiation on 21 January 2003 at the Kalpakkam Reprocessing Plant near Chennai (*Outlook*, 28 July 2003, pp 18-20). The Plant produces plutonium that is used for India's nuclear program. National security concerns rationalised the cover-up. The information leaked because the authorities failed to respond to demands for safety improvement by the employees' association. "The incidence became public only because of the insensitivity of the authorities to the legitimate health and safety concerns of the workers," said an office-bearer of the association (p 20). Nontransparency creates room for opportunistic game playing.

The issue of transparency pertains to all aspects of a society. Though more often it is applied primarily to the government and seen as a critical component of good governance. Transparency in other parts of the society is at least as important as in the government. There are many ways to conceptualise the many parts/ dimensions of a society. One that seems useful for the purpose at hand is the following:

- Political system
- Economic system
- Communication/ information system
- Social system
- Ecological system
- Ethical system

The political system includes the government with its legislative, executive, and judicial branches, political parties, candidates for public offices (representatives,

administrators, judges, and other civil servants), and citizen-voters. In the political system, we seek transparency about resources and expenditures, decision-making processes, implementation, and final results of the programs. What means could guarantee transparency in these areas?

The right to information (RTI) or freedom of information act is widely used to increase transparency of the executive, with the attendant departments, agencies, and corporations. The Mazdoor Kissan Shakti Sangathan (MKSS) in Rajasthan has pioneered the movement for RTI in India. Today, Tamil Nadu (1997), Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), and Maharashtra (2002) have a RTI act.

Many issues remain to be resolved for the effective working of RTI acts. The money cost of acquiring information include application fees that go as high as Rs 500 per application, plus per page charge that varies from Rs 2 to 5. It is unclear how much information one can ask about a department in a single application. The Official Secrets Act, 1923; Evidence Act 1872; and Conduct of Civil Servants Rules provide more than enough reasons to deny a request. Most states do not have any penalty for officers who delay or deny requests under false pretext. And many do not include clear procedures to appeal the decisions of government officers.<sup>3</sup> These uncertainties and lacunae increase manifold the full cost of getting information. Nonetheless, *Lok Sunvayis*, where officers and elected representatives are grilled about expenditures and results of various projects, have demonstrated the tremendous power of even the severely restricted right to information.

In addition to the right to information, a whistleblower protection and reward system can throw light on many corrupt deeds. Any employee of the government should be able to come forward with information without any fear of persecution.<sup>4</sup> (This should also apply to the private sector, as discussed later.)

The research on the workings of the recent right to information acts does not make one optimistic. Given the culture of secrecy and fear in the government, a better approach may be to have 'Duty to Make Public All Information Act.' Governments should put in public domain all information except that which is permitted to be kept secret by the law. This will change the debate, among other things, from what government should reveal to what it can keep secret. For implementation of this Act,

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<sup>3</sup> In our study of Delhi RTI Act, which allows appeal to the Public Grievances Commission, we have found that a large number of requests that were denied by departments were approved by PGC and the departments were required to fulfil the requests. Delhi's experience suggests that the appeal process should be an integral part of any RTI act.

<sup>4</sup> In many instances officers give the information requested for research studies but with a request that their name should not be mentioned. This general atmosphere of secrecy and fear at times leads to rather strange behaviour: The office of the Registrar of Cooperative Societies, Delhi refused to give us a copy of its Citizens' Charter!

it would mean that no information can be denied by any government officer except which is explicitly authorised to be kept secret.

For the legislative and judicial branches, full recording and reporting of their deliberations would act as disinfectant. The final decisions of these bodies are public knowledge, but the processes that take them to those decisions are generally under clouds. Televised broadcasting of the proceedings of the parliament/ legislatures, hearings of standing committees should become more common. However the benefits of broadcasting court trials still await consensus. Leaving the decision to presiding judges may be the first step in that experimentation.

As part of e-governance, all the laws, acts, rules, court decrees, budgets, licensing procedures, attendance of the legislative and judicial branch, voting records should be available on the net. Information about the services that governments provide should be available on the net, including complaint and redressal procedures, certificates and licenses, property titles.

One of the most critical functions of a government is to prepare and ratify the annual budget. The secrecy surrounding the budget process at the central and state level would be comical if the process was not so critical. The budget making process should be completely open and transparent. This transparency would help the government to loosen the stronghold of special interest groups, which would reduce the number of actions that are routinely reversed after the budget.

Make public all the documents related to the budget including the demand for grants, allocation of plan & non-plan funds by functions, departments, agencies, corporations, & schemes or programs. It should be easy to find out the amount of money the government spends on garbage collection, fire services, primary education. This transparency is critical for open and informed debate about the proper functions of government and how best to carry them out, not to mention taxpayers' right to know in full detail how the tax money is utilised.

The political parties must disclose their sources of funds and expenditures on elections and other activities, names and contacts of the office bearers, and the list of members. The laws that do exist in this regard are openly violated, and the violations go unpunished.

People should have adequate information on the candidates for public offices—those who are directly elected (members of Lok Sabha and state assemblies, mayors, councillors, sarpanchs) as well as those who are elected appointed by the elected representatives (members of the Rajya Sabha and state councils, judges and

justices, heads of agencies and corporations).<sup>5</sup> The recent Supreme Court rulings and the Election Commission's directives have established disclosure norms for candidates for the Lower House and legislatures. But the rest, and particularly those appointed by the elected representatives, are outside the bounds of these norms. For the appointed people, some sort of publicised confirmation process seems necessary. It will allow open discussions on the background, abilities, and the vision of the nominated candidates.

The first-past-the-post electoral system is nontransparent in reflecting preferences of a majority of voters. It is susceptible to vote-bank politics, as the Indian experience amply demonstrates. We need to think of a system where voters' preferences are more accurately echoed in the elected candidates.

In the economic system, the socialist legacy has given us enterprises that are private as well as governmental. Private enterprises are required to publish audited financial statements and annual reports, though recent accounting scandals suggest that the signatories should be liable for any and all misrepresentations in these documents. Private companies abide by several other disclosure rules, safety and labelling requirements, consumer and environment protection laws. All government entities that produce or sell a product or a service must also meet all the rules and laws that private suppliers are required to follow. This equal treatment of private and government companies would be a good first step in the direction of transparency.<sup>6</sup>

Experience suggests that in practice government enterprises are exempt from most of the norms and laws. Many PSUs fail to submit their annual accounts to CAG, at times for several years in a row. The Parliamentary Accounts Committee is typically unable to find time even to look into the cases raised by the CAG, let alone take any action on defaulting PSUs. Government departments or agencies are rarely punished for non-publication of proper budgets or even of the number and type of their employees.<sup>7</sup> Even allegedly independent regulators help maintain the systems

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<sup>5</sup> All members of the Upper House should be elected. The current practice of government appointing some members is a useless throwback to the colonial times. And why do we still need separate representation in the Parliament for Anglo-Indians?

<sup>6</sup> The current debate over fees for admission to private professional colleges has brought in the Supreme Court to review fees and admission norms. The Court has gone back and forth on the issue of whether to allow private colleges to have 'surplus,' it can't bring itself to use the 'P word,' and if yes, then how much. Commonsense tells us that this is a folly. Instead, take away the subsidies to private colleges, particularly cheap land, remove entry barriers, allow them to make profit openly and not in a disguised form, and enable them to compete not just on fees but also on curricula and pedagogy. To wit, treat them as any other economic enterprise and impose all the rules and laws that apply to a forprofit company.

<sup>7</sup> If you have a doubt, please try getting information on the detailed budget or manpower of Delhi Transport Corporation or Delhi Energy Development Agency.

that cover-up inefficiencies and corruption. The RBI, for example, opposes outside audit or independent credit rating of nationalised banks.

A great deal of nontransparency in the economic system comes from government entities. Most government services have been or are monopolies. The impunity from the pressures of competition and almost unlimited access to the treasury allows government enterprises to take their consumers for granted. When I shifted residence, MTNL won't tell me the cost of transferring the phone. I must pay whatever amount appears on the next bill, or else... Moreover, these service monopolies are mostly exempted from liability due to breach of contract, non-performance, or negligence.

The other major source of economic nontransparency is the bans, restrictions, and license requirements for natural and normal economic activities. The ban on discotheques and commercial activities at night (including the roadside *dhaba*), restrictions on the interstate and interdistrict trade, fewer licenses to ply a cycle rickshaw or sell vegetables on the roadside make normal economic activities illegal. And an illegal activity cannot be transparent. Among various costs of bans, restrictions, and licenses, the harms caused by decreased transparency in the concerned area must also be given due weight.

My personal assessment is that instead of passing more rules and laws, by no count we are behind anyone in this area, we need to make our judiciary work. In particular, for disclosure, safety, and liability, a well-developed and effective tort system is paramount. A well functioning tort system can obviate the need for many of the disparate rules and laws. It will also protect us in areas where we have not yet put in place any laws because those areas are so new or the government has been so slow.

A good tort system and equal treatment of private and governmental entities<sup>8</sup> in an increasingly competitive environment<sup>9</sup> would achieve the kind of transparency we seek in our economy. The competition should be not only in commodities but also in certification, accreditation, and standards-formation.

The communication/ information system—the media—plays a critical role in expanding transparency. The competition within and between media throws light on many corners that had been dark so far. The citizenship requirement, restrictions on foreign institutional holdings, limitations on cross-holdings are some of the commonly used means to maintain competition in the media. During the Iraq

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<sup>8</sup> It would be useful to evaluate the limited liability status that is generally given to corporations. Similarly rethink the presumption of sovereign immunity.

<sup>9</sup> I agree with Sudhir Mulji on the issue of whether a Competition Commission is needed to maintain a competitive economy. Withdrawal of the government from business activities and increased transparency in the political system (as discussed earlier) should be sufficient at this stage.

War II, impotency of these rules became evident in the US when all the major media outlets toed the same line. That War also brought to surface many alternative sources of information, from Al Jazeera to Andrew Sullivan's blog. Some of these sources have remained rather popular even after the War. To meet this new competition, CNN has started 'The Daily Show: Global Edition.' CNN is trying to regain its credibility through this comedy show that portrays Bush hawks as fumbling idiots.

In this networked world, it is easier to replace one source of information packets with multitude of other sources.<sup>10</sup> The anti-globalisers at Seattle ran their own radio and TV channels, and put up alternative live broadcast on the internet. The competition in the media—like that in auto, textile, or book publishing markets—is no longer constrained by geographical boundaries.

On the other hand, the treatment of Tarun Tejpal and the financiers of Tehelka have sent barbed warnings to investigative journalists not to become too aggressive on the government. The rule of law or the due process is scant consolation against the wrath of the government. Inquiry commissions have become convenient tools to postpone difficult decisions or to harass difficult opponents. What transparency norms would bell this cat?

Those who are concerned about the impact on the culture due to unfettered media competition should read Sen's cogent case for allowing people to decide their culture and what to alter or keep: "[W]hat traditions to observe cannot be ruled...by the national or local 'guardians'—neither by the ayatollahs (or other religious authorities), nor by political rulers (or governmental dictators), nor by cultural 'experts' (domestic or foreign)" (p 32).

In the social system, I focus on nonprofit voluntary associations—those that stand between the family and the state. These civil society institutions perform myriad tasks, from research to delivery of services to advocacy. As their role, scope, and the magnitude increases, transparency in their resources, decision making, implementation, and results becomes increasingly important. They are accountable to the donors, who require audited accounts, progress reports, feedback from the beneficiaries, and ask for ways to further improve the projects to continue the support. However, the self-financing trusts and societies (dependent on funds only of the founder) need to meet only the government requirements of financial statements, regular meetings and elections.

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<sup>10</sup> The dominance of TV in India is partly due to high license fees for a very limited number of FM channels auctioned out only in the metros and due to complete ban on private short wave radio. Opening up the radio spectrum, for both FM and SW, is the easiest way to deal with local problems through community radio.

The types of institutions in the nonprofit sector parallel those in the forprofit sector, which has proprietorships, partnerships as well as publicly listed firms. The latter are accountable to their stockholders, similar in a way to nonprofit trusts and societies that receive substantial support from the outside. The best way to help maintain transparency in the civil society institutions is to apply to them the same rules and laws under which the institutions of the economic system operate. (These rules and laws were discussed earlier.)

One major concern of the nonprofit sector in India is government mistreatment when their activities and campaigns make the government unhappy and angry. This is a particular concern of the groups that receive funds from foreign sources, which have to be approved by the Ministry of Home Affairs. The private firms that receive foreign funds or have foreign partners are not treated very differently in terms of the legal requirements for internal operations. The same should be true of nonprofits. To the extent that private firms with foreign hand are treated differently, they and the nonprofits should fight a common battle to remove the differential norms and rules.

It should be kept in mind however that operations of private firms, even those with foreign hand, do not directly work against the government. But activities of many nonprofits are perceived by the government or its personnel as directed against them. This perception does make nonprofits more vulnerable. However, all entities in the society are open to mistreatment at the hands of a determined government. Only protection against such abuse is to first reduce the number of laws and arbitrary powers and then rely on the increased transparency, the rule of law, and democratic processes to keep the government on the right path.

It is critical that management of the ecological system becomes completely transparent. The commonly used term 'natural resource' is an oxymoron—that which is in nature is not a resource and that which is a resource is no longer natural. It is preliminary but important to remember that any natural stock becomes resource only after human intervention.

At the heart of our ecological problems lies what Garrett Hardin has called 'the tragedy of the commons.' Once the common resources were governed by local norms and customs with wide recognition of traditional user rights. In modern times, governments, in one way or the other, have taken over the ownership and management of these common resources. Instead of local knowledge, now national laws decide the use of these 'national' resources. No doubt these laws and their implementation can be immensely improved (I will talk about it presently), but the most effective way to make management of these resources transparent is to hand them back to their traditional user-owners. Our forests and wildlife (including degraded forests and wastelands) and water resources would be efficiently and

equitably managed by local user groups. This singular change in ownership would dramatically improve the sanctity of the ecological system.

The significance of the right to information and whistleblower protection laws cannot be overemphasised in the area of environmental management. Some other ways to make environmental management more transparent are:

- Require regulatory agencies to make public compliance of industries—the outcomes of their regulatory work. In addition, consent decrees, EIAs and EMPs should also be in public domain so that the basis of governmental decisions is open to scrutiny.
- Form consent committees that involve community leaders, NGOs, and other stakeholders to grant industrial permits. This will not only make the process transparent but also community relevant—decisions will be made by people who will be directly affected by new industries and developments.
- Separate compliance monitoring from ambient monitoring to rid the conflict of interest and source of corruption.
- Centralised monitoring through state or national level agencies is inefficient. They can play a supervisory role but actual monitoring—ambient and compliance—should be decentralised. Consent committees, industrial estate associations including CETPs, and NGOs can be involved in decentralised monitoring.<sup>11</sup>
- This may be more about transparency in indoor air of rural households that depend on wood and cow dung for fuel: Remove outdated safety norms on the storage and transport of LPG to increase its access to rural areas.

The ethical system of a society undergirds its values, norms, customs, and modes of behaviour. Professor Sen has rightly emphasised that workings of the market and the state depend critically on the ethics of the people in the society (see particularly Chapter 11). If the ethics are perverse than laws, however strictly enforced, cannot make much difference. What type of national dialogue is necessary to mould the ethical system towards the virtues of honesty, integrity, and benevolence would hopefully emerge from the discussions at the Seminar.

Our democratic system gives hope that a national dialogue, of course it cannot be a one time but a continuous process, will bear fruits. As James Buchanan has pointed out: 'The definition of democracy as 'government by discussion' implies that individual values can and do change in the process of decision-making" (p 274).

As the ethical system shapes the market and the state, the political and economic system also influences social ethics. I will illustrate the latter link with a personal example, without going into finer debates on causality. My younger brother has a house in Detroit with electricity, water, gas, and telephone connections. I have an apartment in Delhi with the same connections. When the telephone linesman

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<sup>11</sup> Bureau of Indian Standards recently decided to allow NGOs to test samples for compliance.

appears at my door, I face the dilemma of whether to pay 'chai-pani' or risk the phone going 'dead.' More often than I would like to admit, I pay up.<sup>12</sup> I engage in corrupt behaviour. My brother on the other hand never faces any such dilemma. He has never engaged in any such corrupt dealings. Is my brother more ethical than I? Or does the system in Delhi impose too high a price on morality by placing the supply of basic services at risk? Wouldn't I be equally moral in Detroit? And let's ask: Wouldn't my brother be equally corrupt in Delhi?

The public discourse is abuzz with 'corporate social responsibility,' 'triple bottom line,' and 'business ethics' to make corporations more ethical. First, this whole movement focuses mainly on large corporations and leaves out the vast majority of proprietorships and partnerships and professional practices of doctors, lawyers, teachers, and of course the whole informal sector that dot our business landscape. Second, it doesn't seem wise or productive to create separate ethics for each target community—corporates (at times divided under foreign and domestic), PSUs, small businesses, professionals, politicians, civil servants.<sup>13</sup> There would otherwise be corporate ethics, teacher ethics, physician ethics, civil servant ethics, politician ethics. True they all should be ethical. But is the ethics we would like them to follow that much different for each of the group?<sup>14</sup>

It should be recognised that there is nothing particularly morally hazardous about business. Any human activity (including non-business activity) that involves choices between right and wrong has its moral hazards. Businesspeople may face larger number of moral dilemmas in their work and their choices may have wider impact on the society, but these could scarcely be that much more than those of bureaucrats or politicians or of professionals like teachers, doctors and lawyers. We require not some special ethics for businesspeople but an ethics for all individuals. Ethics is necessary not just in commercial transactions, but in all dealings of life. If individuals are moral then so would be the corporate tycoons, small entrepreneurs, professionals, civil servants, and politicians. Business morality, if understood properly, is simply individual morality, no more and no less.

There is no algorithm for creating moral individuals. But education surely has much to do with it. If we can educate individuals to be moral, we won't need any crusade for social responsibility of corporates, politicians, civil servants, or academics.

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<sup>12</sup> For more than a year, we have vowed not give money for any such demands.

<sup>13</sup> The professional codes of conduct, like Hippocratic oath of physicians, are different from the normally proposed 'business ethics.' Such professional codes of conduct can become an important part of self-regulation.

<sup>14</sup> The corporate social responsibility is a large movement since even a minuscule percentage of corporate profits adds upto a rather large sum, which can be used for the movement's favourite causes. How many NGOs work for 'teacher ethics?' Most who work in the field of education typically demand higher pay for teachers, not sacrifice for the greater good.

### **The Agency Problem and Information Asymmetry**

I have discussed so far the issue of transparency within the framework of various systems that comprise a society: political, economic, social, ecological, and ethical. An alternative framework is to focus on the 'agency problem' and 'asymmetric information.' Transparency issues arise primarily due to these two problems.

The agency problem—the principal-agent problem—exists because of the separation of ownership or funding from the management of enterprises (forprofit or nonprofit), and because of the representative system of governance that separates principals (voters) from agents (politicians and civil servants). There is a further agency problem in the political system as principals (politicians) are distinct from agents (civil servants).

Information asymmetry exists since managers know a lot more about the enterprise than owners (of corporations) or funders (of nonprofits) who know relatively little or largely what the managers tell them. Similarly, politicians and not voters have more intimate knowledge of the condition of the government and the reasons for that condition. For the owners or funders or voters, the corporation or the NGO or the government is but one of the concerns in their lives. For managers and politicians the corporation (or the NGO) and the government is the main focus of their work. The principals can exploit the knowledge advantage by keeping the system as less transparent as possible.

We have better understanding and experience in dealing with the agency problem and the problem of asymmetric information in the private sector. It should be instructive to apply that to the political system. I leave this idea for further exploration at the Seminar. However the following table illustrates the direction my thinking on the agency problem.

## Dealing with the Agency Problem

Remedy	Economic System	Political System	
		Voter-Politician	Politician-Civil Servant
Align the interests of the principal and the agent	With carrot: Institute performance pay—tie to profit rate or give stock options	Re-elect	Promise plum posting
	With stick: Threat of mergers and takeovers	Vote out; Lok Pal	Assure undesirable posting; CVC
Get insider information to lessen the knowledge disadvantage	Establish whistleblower protection and reward system (WPRS) Encourage insider trading	WPRS Right to information Act	WPRS CAG
Organise alternative sources of information	Ask accounts and sales heads to report directly to the Board of Directors	Opposition parties and politicians, media	CAG reporting to the legislature
Reply on an expert third party	Rating agencies, pension funds, investor groups, employee associations, regulators	Advocacy groups	Independent performance evaluation

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