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## **Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective**

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**Abstract:** *Most freedom of information laws exclude the private sector from their jurisdictional purview, and apply only to information and records held by the state, subject to exemptions. A main reason for the exclusion is that the laws have evolved in the conventional human rights framework, which has long imposed obligations for human rights on the state only. A departure from this convention is now taking place with sharing of human rights responsibilities with the private sector as well. In this scenario, exclusion of the private sector from the laws has deleterious effects on transparency and integrity in public policy as well as on capability of the citizens to exercise their human rights. Because the private sector is now performing many public functions that were conventionally performed by the state, substantial amount of information held by the former is now placed out of the scope of legal regime for access to information. Therefore, extension of the regime to the private sector has become vital for advancement of the human rights agenda.*

### **1. Introduction**

Freedom of information, defined as the freedom to “seek, receive and impart information and ideas through any media and regardless of frontiers” in Article 19 of the Universal Declaration of Human Rights (United Nations, 1948)<sup>1</sup>, has received a spectacular legislative response in the recent years. According to a global survey, nearly 70 countries had adopted comprehensive Freedom of Information Acts till June 2006 (Banisar, 2006: 6). Of these, the Acts of 19 countries apply to information held by government as well as private bodies, whereas the others

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<sup>1</sup> For an account of historical evolution of freedom of information, see Tomasevaki (1987) and Burkart and Holzner (2006).

apply to government information only.<sup>1</sup> This means that in the large number of countries where the private sector has been excluded from jurisdiction of the freedom of information laws, individuals can access information from government, subject to certain exemptions, but cannot access information from private bodies as a legal right.

In this context, this article looks at the consequences of this exclusion, conceptually and empirically, from the standpoint of human rights. It begins by placing the private sector in a human rights context for understanding the reasons for exclusion of the private sector from most freedom of information laws. This part of the discussion will also provide insights into the debate on relationship between the private sector and human rights. Then, it briefly describes the disclosure regimes to illustrate how they have increasingly failed to reduce the adverse effects of confidentiality in the private sector on legal rights of individuals. Then, based on this analysis, the article makes a case for extending the freedom of information laws to the private sector and outlines the key challenges that have to be taken into account in this regard.

Before proceeding further, let us consider four important parameters of the analysis: First, the term ‘private sector’ is used for the statutory bodies that are not owned by the state, and are operating mainly for profits such as businesses, companies, corporations, firms, banks, etc. They may or may not be performing public functions. This definition excludes the voluntary organizations, inter-governmental organization and international financial institutions due to the unique orientation of these bodies towards human rights, which requires different parameters of analysis. Secondly, ‘freedom of information’ and ‘disclosure’ are considered two distinct categories. The former is understood as the ‘right to know’, and is generally exercised by individuals through information requests under freedom of information laws. The latter applies when an entity discloses information voluntarily or mandatorily for government or public consumption under specific laws. Thirdly, the term “human rights” is used in its broadest

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<sup>1</sup> The author has worked out this number from the information presented in the global survey conducted by Banisar (2006). The law that cover the private sector are discussed in Section 4.

sense to include all the legal rights – civil, political, economic, social and cultural. Fourthly, the topic of our discussion is concerned with exclusion of the private sector from most freedom of information laws only, and therefore, I do not focus on all the deficiencies in legal provisions and implementation of the freedom of information laws.

## **2. Exclusion of the Private Sector: A Human Rights Perspective**

Traditionally, freedom of information has been regarded as “the touchstone of all the freedoms” (Tomasevaki, 1987: 1), and this belief, *prima facie*, appears to be the main driving force behind the exceptional recognition that it has received in the human rights framework. Banisar (2006) noted that in addition to the nearly 70 countries that have adopted Comprehensive Freedom of Information Acts, legislative efforts were pending in other 50 countries. He further observed that nearly half of the existing Acts were adopted in just the last ten years.

Recent works have traced the causes of this trend in the mounting realization about its enabling role for other human rights, its value as a discrete human right notwithstanding. This realization is predicated upon the understanding that access to information is a pre-requisite for transparency and accountability in governments and markets (Burkart and Holzner, 2006: 3), facilitation for consumers to make informed choices (Consumer Rights Commission of Pakistan [CRCP], 2005: 1), and provision of safeguards to the citizens against abuses, mismanagement and corruption (Banisar, 2006: 6). One may argue that the realization about its enabling role should have led the countries to apply their freedom of information laws to all the main sources of information (including the private sector) that could have any effects on the freedoms and human rights, but this has not happened.

In this context, our discussion in this section is concerned with a fundamental question: why have most freedom of information laws failed to provide a legal right of access to information held by the private sector? We attempt

to answer this question by placing the private sector in a human rights context. We begin by formulating a proposition, i.e. the individuals have certain legal rights whose corresponding obligations are placed on the private sector, and/or information held by the private sector has an impact on these legal rights. Therefore, the individuals should be entitled to access information from the private sector as a legal right in the same manner as from the government. This assumption is important because if there are no corresponding obligations on the private sector, and/or the information held by it has little or no impact on the rights, then the precepts of our topic of discussion will have to be re-examined.

The conventional human rights framework considers the state as the principal, if not the sole duty holder, for the protection of human rights (Dine, 2005: 168-169). At a theoretical level, this worldview has created two domains in the society: the state and the citizen; the citizen has certain claims or rights whose corresponding obligations are placed on the state (Dunne and Wheeler, 1999: 3). As a result, the notion of accountability in respect of human rights has always been associated with the state in the national as well as international contexts. "Human rights, although held equally by all human beings, are held with respect to, and exercised against, the sovereign territorial state... international human rights treaties establish rights for all individuals. The obligations they create, however, are only for states" (Donnelly in Dunne and Wheeler, 1999: 85). Most academic works on the private sector have overlooked the role that it can play in promoting or violating human rights. For this reason, the matter of placing direct human rights obligations on the private sector has been out of question for a long time. The conservative viewpoint that direct obligations cannot be placed on the private sector due to primacy of the nation states, has long dominated the international human rights law. According to this viewpoint, the private sector should be held accountable for its role in human rights *through* the state (Dine, 2005).<sup>1</sup>

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<sup>1</sup> For a detailed account of the debate on placing direct human rights obligations on the private sector, particularly on the companies, see Dine (2005), Chapter 4.

In recent years, however, a departure from this conventional theoretical design has begun to take place due to the increasing role of the private sector in economy and public functions. The governments are increasingly shifting the focus of service delivery towards privatization and contracting out that has created what Lewis (2001: 111) labels as “the private world of government”. Dine (2005: 168) describes this shift in the following words: “...international human rights structures normally focus solely on accountability of nation states, mostly their citizens. The view that private bodies may be bound by responsibilities imposed by international or human rights law is a recent departure from that original framework”.

The debate on holding the private sector accountable for its impact on human rights is slowly creeping into the human rights framework. It is being realized that, “The state-centred model of accountability must be extended to the obligations of non-state actors...” (United Nations Development Program [UNDP], 2000: 9). Although similar demands have been forcefully made in a large body of research, the international community has not yet been able to reach a consensus on placing direct human rights obligations on the private sector (Fryans and Pegg 2003; International Council of Human Rights [ICHR], 2002; Dunne and Wheeler, 1999; Dine 1995). This state of ambivalence provides a part of the answer to our question posed in the beginning of this section. Because freedom of information laws have evolved in the conventional human rights framework, which imposes obligations for human rights primarily on the state, most countries have applied the freedom of information laws to government information only because it represents the state.

The second part of the answer to our question can be found by looking at the nature of the rights that are actually affected by the private sector. Most literature on this subject has tackled this aspect in respect of companies only, instead of broader category of private sector. ICHR (2002), for example, lists nine rights that are likely to be directly violated by companies, namely non-discrimination, women’s rights, life, liberty and physical integrity of the person, employees’ rights, child labour, slavery, forced and bonded labour, right to food, health, education and housing,

environmental rights, and civic freedoms. Because it is not possible to discuss all these rights here, we consider only two broad categories of rights that originate largely in the marketplace, namely “consumer rights” and “investor rights”.

Individuals are entitled to consumer rights in relation to their consumption of goods, products, and services produced and delivered by the government or the private sector.<sup>1</sup> The need for information for protection of these rights was formally recognized in 1983 when the Commission on Transnational Corporations wrote in its Code, “Transnational corporations shall/should disclose to the public in the countries in which they operate all appropriate information on the contents and the to the extent known on possible hazardous effects of the products they produce or market in the countries concerned by means of proper labeling, information and accurate advertising or other appropriate methods”.<sup>2</sup> Later, the Guidelines for Consumer Protection embodied access to information as a basic consumer right because it helps the consumers to make informed choices in the market. Since then, the international human rights law has emphasized the need for “preventive disclosure”, i.e. disclosure of information which poses a threat to human lives, health and safety (Tomasevaki, 1987). With the increasing involvement of private sector in the production and delivery of goods and services, information in the possession of private sector is becoming more relevant for the protection of consumer rights.

Investor rights originate when the individuals invest in the market for the purpose of profit (e.g. purchase of securities). Access to information is among the important rights of investors because it facilitates in investment decision-making. Secrecy, on the other hand, tends to place the price-sensitive information in the hands of a few executives and their associates prompting them to engage in insider trading and manipulation of disclosure for keeping the stock prices high. This creates asymmetric information and breeds the ground for corporate scandals. This

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<sup>1</sup> The United Nations Guidelines for Consumer Protection stipulate eight rights of consumers including access to information. For details, see United Nations (2003).

<sup>2</sup> For a fuller analysis, see General Assembly resolution 37/137 of 3 March 1983, Para. 2 in Tomasevaki (1987: 16).

realization led the Britain to legislate for protecting investors through disclosure in the early twentieth century; this idea then spread to North America and other countries (Rider and Ffrench, 1979: 9).

These two categories of rights are perhaps most important in terms of the impact of the private sector. In addition, involvement of the transnational corporations in abuse of civil and political rights has also been documented. Frynas and Pegg (2003) have collected case studies, which illustrate the involvement of companies in the provision of assistance to repressive states in Burma, Colombia, Nigeria and Sudan. Another case in point is the transportation of military troops by companies in their helicopters and boats in Burma, Indonesia, and Nigeria (Pegg in Frynas and Pegg, 2003: 14). It is widely recognized, however, that not all corporations are involved in violation of human rights.

Based on the above analysis, we make a point that the interaction between the private sector and the individuals mostly takes place in the marketplace in relation to consumption and investment, and therefore, the rights that originate from this interaction largely fall in the economic category. This point leads us to second part of the answer to our question. That is, economic, social and cultural rights have been treated traditionally as the “junior branch” of human rights law (Dine, 2003: 170). This dichotomy has created different tolerance levels of the states and international community against violations of these rights. Steiner *et. al* (2008: 264) noted that the UN Committee on Economic, Social and Cultural Rights in its statements to the Vienna World Conference of 1993 observed that the breaches of economic, social and cultural rights were not considered as serious as those of civil and political rights, which was a shocking reality. Because the rights affected by the private sector are mostly economic, their violation has not been considered as serious as that of civil and political rights. Therefore, most countries applied the freedom of information laws to government information because it was important for civil and political rights; they ignored the private sector because information held by it was largely relevant to economic rights, which have been considered relatively inferior by the states, as compared to the civil and political rights.

### **3. Disclosure Regimes for the Private Sector: A Story of Failures?**

So far, we have attempted to frame a human rights argument for explaining exclusion of the private sector. One may offer an alternative explanation that most countries did not feel the need to cover the private sector in freedom of information laws because a plethora of disclosure laws was already in place. An argument can possibly be made that, because the private entities are bound to disclose information to the regulatory agencies of the government under the disclosure laws, individuals can access information belonging to the private sector *through* the government, and therefore, there is no need to cover the private sector in the freedom of information laws. In this section, we examine this alternative explanation.

Historically, the mandatory obligations for the private sector to disclose information have been enforced mainly through two types of regimes, which have emerged concurrently: comprehensive disclosure and targeted transparency. It is not possible here to give a comprehensive account of the historical evolution of these regimes; therefore, we shall confine our analysis, for the most part of it, to selective evidence from the disclosure regimes in securities market in the United States, and the banking sector in Pakistan.

#### **3.1 Comprehensive Disclosure Laws**

The concepts of transparency and disclosure in the private sector gained much attention in the nineteenth century. Burkart and Holzner (2006: 13) have argued that a powerful idea in this regard came from a writing of Louis D. Brandeis in 1913 who advocated, “sunlight is ... the best of disinfectants”. He recommended that new laws should be enacted to require the public companies to disclose their profits and losses in order to stop insider deals that decided investors. Although the first securities law in the United States was already enacted as early as 1911 (Benston, 1976:

18), Brandeis' idea inspired the United States' President Franklin D. Roosevelt for new corporate financial disclosure rules after millions of Americans had lost their savings in the stock market crash of 1929, write Burkart and Holzner (2006). The years following this episode were crucial in the establishment of a state-mandated disclosure regime in the United States. The Congress enacted Securities and Exchange Acts in 1933 and 1934, which required the publicly traded companies to disclose assets and liabilities at regular intervals and in a standardized format (Fung et .al, 2007: 7)

The issue of disclosure in the securities market became the subject of voluminous literature in the 1970s.<sup>1</sup> A convincing account came from Kripke (1979) who argued that the U.S. disclosure regime had remained largely unhelpful in forcing the companies to disclose information that was needed for sophisticated investment decision-making. He argued that the SEC was overzealously involved in the enforcement of the regulation contrary to the investor's needs. He made a compelling case for redesigning the disclosure regime by arguing that most information required to be disclosed under the SEC regime was about the past, and therefore, was not helpful for reducing the risks in investment decisions.

The limitations of the disclosure regime became clearer with the onset of a trail of corporate frauds and scandals at the beginning of the twenty-first century.<sup>2</sup> Armour and McCahery (2006) observed that almost all scandals, which left many people affected, had an element of secrecy and manipulation of information. In their account of the failure of Enron's collapse in 2001, they argue that attractive incentives were attached with the company's share price, which prompted the top executives and auditors of the company to manipulate accounting information for keeping the company's stock price high. Burkart and Holzner (2006: 217) posit that the executives of the firm had been overstating its profits for consecutive three years without accounting for its cash. This failure cost thousands of workers their pension savings and millions of stockholders

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<sup>1</sup> See, for example, Benston (1976), Kripke (1979), and Rider and Ffrench (1979).

<sup>2</sup> For a history of major corporate scandals, see Armour (2006).

their investment funds (Fung et. al, 2007: xii). This has led Armour and McCahery (2006: 5) to attribute the Enron failure to “the manipulation of disclosure”.

Soon after the Enron’s spectacular tumbling, similar scandals became known in some leading companies including Worldcom, Tyco, Adelphia and Global Crossing. These failures prompted the U.S. Congress to enact the ‘Sarbanes-Oxley’ Act in 2002, which imposed new obligations on companies for improving disclosure. The Act has received a gale of criticisms on various grounds. It is argued, for example, that it was adopted hurriedly as a ‘knee-jerk’ response to populist pressure (Armour and McCahery, 2006: 8).

Apart from these indicative examples of the effects of secrecy on investor rights, there is mounting evidence available on devastating effects of private sector’s failure to disclose information on consumer rights. The Firestone scandal is a case in point. Fung *et. al* (2007), while explaining this case, have noted that a series of auto accidents occurred in the United States in which tires blew out causing the vehicles - many of them Ford Explorer SUVs - to roll over. Before the executives of the companies acknowledged this problem, 271 people had been killed in accidents involving the defective SUV design and tires. Investigations revealed that the Firestone/Bridgestone and Ford had been aware of fatal accidents due to a combination of tire tread separation and top-heavy SUVs, but they did not inform the public about its deadly risk. It was only due to media reporting of the lawsuits against the companies that people came to know about this problem.

These types of secretive practices are in vogue in the private sector in the developing countries as well. An illustrative example is found in a recent work on the banking sector in Pakistan. CRCP (2008), a non-governmental organization, noted in its study that the banks in Pakistan were operating in a highly secretive environment. As a part of its research, the Commission requested the State Bank of Pakistan – the regulatory authority for all banks – to provide data about the number of consumer loans advanced by a selected group of banks. The Bank replied that this information was not available with it, and therefore, the banks should be approached directly. This response is a

telling example of the limitations of the regulatory authorities, which very often fail to facilitate the individuals or public interest groups in accessing even ordinary information.

### **3.2 Targeted Transparency Regimes**

The term “targeted transparency” has been used by Fung et al (2007) to refer to those laws or certain provisions of the laws that require disclosure in specific sectors. The aim of the targeted transparency is to “reduce specific risks or performance problems through selective disclosure by corporations and other organizations” (Fung et. al 2007: 5). Probably, the most important law in this regard was the Pure Food and Drugs Act 1906, which required the listing of ingredients on inter-state shipment of foods in the United States. To give another example, the deadly chemical accident in Bhopal, which led to over 7000 deaths and 65,000 injuries in 1986 (Frynas and Pegg, 2003: 35) prompted the United States Congress to require all manufactures to inform the public about the toxic pollutants they released. In 1990, it required the food companies to inform the public about the levels of fat, sugar and other nutrients in each can of soup and box of cereal to reduce deaths form heart disease and cancer.

Similar targeted transparency regimes have been put in place in many countries for selective disclosure of information on hazardous products, environmental pollution, etc. One problem with the targeted transparency regime is that it is response-oriented; states act after the harm has been done. Moreover, these laws are generally criticized for poor enforcement.

## **4. The Case for Extending Freedom of Information Laws to the Private Sector**

In this section, we make a case for providing the individuals a legal right of access to information held by the private sector, subject to certain exemptions that have to be defined narrowly. We build the rationale for this case around

the conceptual and empirical debate outlined in the preceding sections, and the precedents set by some countries that have applied their freedom of information laws to the private sector, although selectively. There are three main premises of the case:

First, the private sector is now performing many public functions that were conventionally performed by the government. This change has occurred due to rapid privatization, de-regulation, and economic globalization, especially in the post-Washington Consensus period. As a result, a substantial amount of information about public functions, which was previously in the possession of governments, now belongs to the private sector. Information related to private banks, telecommunication companies, hospitals, and universities is an example. Thus, exclusion of the private sector from the freedom of information laws effectively means that individuals can no longer access this substantial amount of information, except some personal information which may be accessible under Data Protection Acts. This argument is being advanced in the United Kingdom to bring in more private bodies in the jurisdiction of its freedom of information law. Paterson (2008) writes in an article that the public demand for extending freedom of information law to private sector is increasing because, according to the Scotland's Information Commissioner, "a shift towards private sector provision of services has put much information outside the scope of the law introduced in 2005". Therefore, a need is being felt to bring in more private organizations under the purview of the freedom of information law, particularly those involved in building and maintaining hospitals, schools, leisure and sports trusts.

Secondly, a growing body of literature suggests that despite the existence of voluntary codes as well as mandatory disclosure regimes, private sector continues to operate in a highly confidential environment (Fung *et. al* 2007; Lewis 2001; CRCP 2008). This suggests that the disclosure regimes alone cannot ensure access to all information, which the individuals need for making informed choices. That is why, recent works have emphasized the need for greater transparency in the private sector (Burkart and Holzner 2006; Lewis 2001). Barkart and Holzner (2006) emphasize on access to information held and disclosed by

“centers of authority”, which lie not only in the governments, but also in corporations, professions and influential agencies. Markets do not automatically produce all the information people need to make informed choices among goods and services, therefore, we can make an argument that disclosure cannot serve as a substitute for public access to information. Moreover, disclosure regimes have increasingly failed to prevent the violation of rights of consumers and investors by the private sector. Extension of freedom of information laws to the private sector is necessary to supplement the disclosure regimes for improving their effectiveness.

Thirdly<sup>1</sup>, the precedent of extending the freedom of information laws to the private sector has already been set in the freedom of information laws of 19 countries. These countries include Antigua and Barbuda, Angola, Armenia, Colombia, Czech Republic, Dominican Republic, Estonia, Finland, France, Iceland, Liechtenstein, Panama, Poland, Peru, South Africa, Turkey, Trinidad and Tobago, Slovakia, and the United Kingdom. The freedom of information laws of these countries, however, cover the private sector only partly. For example, Liechtenstein law extends the right of access to information from only *private individuals* who perform public tasks. Angolan, Armenia and Peru laws allow access to records of only those private companies, which are performing *public functions*. Czech Republic, Dominican Republic, Finland, Trinidad and Tobago, Slovakia, Poland, and Iceland limit this right only to those private organizations that receive public funds. Estonia, France and the UK have adopted a programmatic approach by including private bodies in selected sectors.

From the standpoint of human rights, the benefits of covering the private sector have already begun to appear. Banisar (2006:7) has documented examples from South Africa where some individuals have used the private access provisions of the Promotion of Access to Information Act to know why their applications for loans were denied. Similarly, minority shareholders were able to obtain records of private companies and environmental groups have applied these

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<sup>1</sup> The information in this paragraph has been culled out from the global survey conducted by Banisar (2006).

provisions to know about possible environmental dangers of projects.

We need to bear in mind; however, that extension of the freedom of information laws to the private sector involves many complex issues.<sup>1</sup> First, balancing the right to know and commercial confidentiality is more relevant for private sector information, as compared to the government due to high sensitivity of information. This will require defining the exceptions rather narrowly, which can be an uphill task. Secondly, if the information accessed from a private body reveals a wrongdoing, it means that we are openly imposing an obligation on the private body to fix it. For this reason, the private sector may resist transparency beyond a certain point to preserve its repute in the market. Thirdly, extension of the freedom of information laws can increase the costs of collection and provision of information. This is one important criticism leveled against the 'Sarbanes-Oxley' Act that the compliance costs, which this Act has imposed on public companies are far greater than any countervailing benefits (Jain and Rezaee in Armour and McCahery, 2005). Moreover, mechanism will have to be evolved to ensure that the information provided is free from "spin", and is presented in a way that the public is able to comprehend it. These challenges, however, may need not to deter the countries to extend their freedom of information laws, as the precedent has already been set, which provides a guiding principle to make a beginning in this direction.

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<sup>1</sup> These issues require greater details, but keeping in view the topic of our discussion, we have devoted much space to the human rights aspect.

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