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An Analysis of the Official Secrets Act, 1923 vis-à-vis Right to Information Act, 2005

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Abstract

The Official Secrets Act was passed in 1923 and was kept after the United States gained independence. The legislation establishes a stable structure to tackle and overcome espionage, sedition, and other possible threats to the nation's unity, and it applies to both government employees and people. Spying, exchanging secret information, unauthorized use of uniforms, withholding information, and interfering with the armed forces in forbidden/restricted locations, among other things, are all illegal under the legislation. A person might face up to 14 years in jail, a fine, or both if found guilty. This Paper revolves around the Official Secret Act, focusing on Notable cases of the use of OSA, Difference between the RTI Act and OSA, The author also analyzed various landmark judgments. At the end the author drawn a conclusion to conclude the research.

Keywords: The Official Secrets Act, History, British Era, RTI Act, Whistle Blower.

INTRODUCTION

The The Indian Official Secrets Act (Act XIV) of 1889, which subsequently would become the Indian Official Secrets Act, 1904, with more strict and unshakeable regulations, was put into effect at a time when the Indian Publication had boldly picked over to divulge the truth of the matter and negative side of British rule in India to the Indian populace and the entire universe, in an endeavour to resurrect social consciousness and a perception of togetherness among some of the Indians. The Indian Official Secrets Act of 1904 was established while Lord Curzon remained Viceroy of India .

This Act was revised in 1923, and the Indian Official Secrets Act (Act No. XIX of 1923) took its place. Even after independence, this Act was upheld. The Indian Official Secrets Act, 1923, covers the officials that are hired by administrative powers, public workers, and civilians accused of sedition, harming the nation's integrity, espionage, illicit use of government uniform, causing armed forces involvement, and other offenses. A person who is found guilty might face 14 years in jail, a fine, or both .

The ideals of openness of government activities and accountability of public authority are essential to the functioning of a participatory democracy. This is only possible with easy access to information under public authorities' control, and when this is restricted in the name of government secrecy and confidentiality, the public interest takes precedence. In India, the Right to Information Act, 2005 (RTI, 2005) allows citizens to request information from public officials, whereas the Official Secrets Act, 1923 (OSA, 1923), a British legacy, aims to prevent information from being disclosed under certain circumstances, including to protect national security .

The Official Secrets Act of 1923 is a British colonial-era anti-espionage statute in India that specifies that activities that aid an enemy state against India are highly denounced. A forbidden government site or location cannot be approached, inspected, or simply passed over, according to the law . According to the Act,

aiding the enemy State might include sending a drawing, blueprint, or model of an official secret to the adversary, as well as passing/transferring official codes or passwords.

The Act imposes sentences ranging from three to fourteen years in jail, and a person may be charged with a felony even if the behavior was inadvertent and not meant to jeopardize the state's security. Only those in positions of authority are allowed to handle official secrets, and those who do so in banned places or outside of them face penalties .

When a firm is found to be in violation of the Act, everyone engaged in the company's management, including the board of directors, is subject to penalties. In the case of a newspaper, anybody may be imprisoned for the crime, including the editor, publisher, and owner.

The Official Secrets Act of 1923 is a dreadful colonial legacy that India has had to bear. The Attorney General of India's original threat to prosecute officials and journalists involved in the leak of government documents linked to the Rafale sale prompted a re-examination of the Official Secrets Act of 1923 (hence the Act or OSA). Sections 3 and 5 of the Act deal with espionage and the revelation of confidential government information, respectively.

The Law Commission was the first governmental organization to make a comment about OSA in 1971. Even if a cone is characterized mystery or highly classified, it should not generate the existing legislation if the news outlet thereof is in the interests of the public and no challenge of a major catastrophe or participation of the Province as such crops up, it noted in its review on Felonies Against Intelligence Gathering. The Law Council, on the other hand, made no recommendations for modifications to the Act .

In 2006, the Second Regulatory Reforms Council (ARC) proposed removing OSA and substituting it with a component in the Official Secrets Act that included anonymous source limits. The ARC stated that OSA was incompatible with the policy of accessibility in a functioning democracy, and cited a 1971 Ministry Of justice analysis that advocated for the enactment of a umbrella Act that would unite all domestic intelligence legislation under one framework.

The administration established a panel in 2015 to review the OSA's regulations in consideration of the RTI Act. It submitted a proposal to the Office Of the secretary on June 16, 2017, suggesting that OSA be made more visible and compliant with the RTI Act.

I. HISTORY OF THE ACT

The Official Secrets Act (Act XIV) of 1889 was strengthened and superseded by new legislation in 1904 and 1923. During Lord Curzon's stint as Viceroy, the 1923 Act was expanded to include all aspects of secrecy and confidentiality in the nation. Since independence in 1967, the Act has only been revised once to broaden the scope of violations and strengthen the penalties .

Various bodies have looked at the Act at various times. In its 1954 report, the Press Commission noted that there had been just one prosecution under the Act in India from 1931 to 1946, even while a foreign government was in control. Given the rarity of the statute's application, the Press Commission refrained from proposing any revisions to the Act, instead relying on the Government's goodwill. Scholars have emphasized that the major impact or goal of the OSA is not prosecution, but rather the chilling effect caused by threats of prosecution and the press's subsequent self-restraint in disclosing material even in the public interest. Furthermore, the Press Commission's assessment did not take into account administrative sanctions imposed on government personnel who made disclosures .

The Press Commission, on the other hand, made an important observation about the Act's implementation. The mere fact that a document is labelled secret or confidential should not trigger Section 5 if the material is released in the public interest and there is no significant interest or emergency of the state involved, according to the court. In 1971, the Law Commission held the same stance; nevertheless, it did not suggest any revisions.

However, in the absence of in-built protections, the reasonable exercise of OSA up to that point did not ensure the same in the future. The status quo was expectedly advocated by a research committee created by the Central Government in 1977.

In its 2006 report, the Second Administrative Reforms Commission (SARC) proposed that the

OSA be abolished entirely and that a new chapter be established to the National Security Act of 1980 to deal with disclosures that jeopardize national security or espionage. This recommendation was in accordance with the Law Commission Report of 1971, which called for an Umbrella Act to cover all national security legislation. These suggestions, however, were rejected .

The Group of Ministers (GoM) adopted 62 of SARC's recommendations in 2008, but did not agree to abolish OSA. Instead, it suggested that the Act be amended to eliminate the ambiguity. The Home Ministry also submitted proposals in 2017 to revamp OSA in order to make it in accordance with democratic principles.

In 2018, the Official Secrets Act (OSA) of 1923 was used in five incidents, resulting in five criminal punishment orders from the Ministry of Home Affairs. According to the most recent statistics from the National Crime Records Bureau (NCRB), the number of cases reported under the OSA in 2014, 2015, and 2016 was 11, 9, and 30, respectively.

II. NOTABLE CASES OF THE USE OF OSA

Tarakant Dwivedi alias Akela, a senior reporter, was jailed for criminal trespass in 2011 after he uncovered damage to weapons received following the Mumbai attacks due to roof leaks. The lawsuit was rejected by the Bombay High Court, which determined that the armoury was not a banned location to access. Because the document was labeled secret by the Delhi High Court, journalist Santanu Saikia, who published an article in Financial Express based on a leaked cabinet memo, was found not responsible .

Madhuri Gupta, a former diplomat, was found guilty and sentenced to three years in prison by a Delhi court in 2018 for spying for Pakistan's Inter-Services Intelligence (ISI) when stationed in Islamabad in 2010.

III. RELATIONSHIP BETWEEN OSA AND RTI ACT

Section 22 of the Right to Information (RTI) Act of 2005 grants it precedence over the OSA of 1923 and any other legislation or document in force at the time. Furthermore, Section 8(2) permits the publication of material exempted under Section 8(1) if the public interest outweighs the harm to the protected interest. OSA, on the other hand, does not have an express public interest exemption .

Section 2 of the OSA prevents even non-secret portions of a document containing secret information from being disclosed. Severability is particularly provided for under Section 10 of the RTI Act. While 22 security and intelligence organizations are exempt from the RTI Act, any material connected to charges of corruption must be supplied. The Bofors scandal arose as a consequence of a media inquiry and the publication of sensitive documents by Swedish news outlets. The Swedish media was bolstered by the 1766 Freedom of the Press Act, which gave citizens access to information.

IV. THE WHISTLE BLOWERS PROTECTION ACT, 2014 AND PROPOSED AMENDMENTS

The government attempted to alter the Whistle Blowers Protection Act of 2014 (hereafter WBP Act) in 2015. The WBP Act establishes a system for collecting and investigating public interest disclosures including acts of corruption, deliberate abuse of authority or discretion, or criminal offenses committed by public officials. Ministers, Members of Parliament, the lower judiciary, regulatory agencies, Central and State government personnel, and others fall under this category. The Whistleblowers Protection (Amendment) Bill, 2015 (hereafter WBP 2015 Amendment Bill) tries to reverse this by prohibiting disclosures that are forbidden under the OSA. The WBP 2015 Amendment Bill also makes it illegal to disclose a corruption-related revelation if it falls under one of ten categories . The 10 forbidden categories are modeled after those under Section 8(1) of the RTI Act, 2005, according to the WBP 2015 Amendment Bill's Statement of Objects and Reasons. This comparison, however, is incorrect since the aims of both Acts are distinct. The RTI Act strives to make information accessible to the general public, but the WBP Act requires disclosures to be made in confidence to a high-level constitutional or statutory body. It's worth noting that the RTI Act allows the appropriate public authority to release information that falls into those ten categories provided the public good exceeds the damage to protected interests. In addition, the Act provides for a two-stage appeal procedure if a decision to withhold requested information is made. There are no

such provisions in the WBP 2015 Amendment Bill. Furthermore, the WBP 2015 Amendment Bill states that once a disclosure is made, the responsible authority must send it to a Government-authorized authority, which will decide if the disclosure is banned. Overall, the WBP 2015 Amendment Bill not only weakens the Act, but it also exploits the OSA and RTI Acts to justify the proposed changes . The Lok Sabha approved the WBP 2015 Amendment Bill in May 2015, and the Rajya Sabha is now considering it.

V. UNCONSTITUTIONALITY OF OSA

The unconstitutionality of OSA has been highlighted by advocate Abhinav Sekhri. He claims that offenses under the OSA (such as Section 3) Citizens must engage in ways that are detrimental to India's security, including obtaining or disseminating confidential employee formula, or passcode, or any drawing, blueprint, pattern, or other material that is valuable to the adversary and/or adverse to India's desires. Section 3(2) allows a punishment based solely on the complainant's behaviour or established disposition, eliminating the need for the courts to prove discriminatory motive on the defendant's part .

Section 5 deals with erroneous information exchange, among other things. Out of the three sub-sections dealing with communication offenses, only sub-section (2) utilizes the phrase knowing or having reasonable grounds to think. This suggests that the accused does not need to be aware of the nature of the information in the other two sub-sections. As a result, the legislation plainly implies that neither knowledge nor a lack of it is a defense. However, under the United Kingdom's Official Secrets Act, 1989, the previous provision was abolished, and lack of knowledge was included as a defense.

The OSA, for example, does not define the terms secret or official secret. The Ministry of Home Affairs' Manual on Departmental Security Instructions (hence the Manual), which is not a public document, is used to classify documents. In Venkatesh Nayak v. Ministry of Home Affairs, 2011 SCC OnLine , the Central Information Commission (hereafter CIC) affirmed the rejection of the Manual in response to an RTI request, arguing that making the classification public would jeopardize the state's safety. 13766 is the CIC number. As a result of CIC's decision, those who weren't authorities couldn't tell whether some material was classified as secret or not, or how serious it was. Furthermore, the State may determine that something is a secret after it has been made public because of its concealment. In Shreya Singhal v. Union of India (2015) SCC 5 1 , Abhinav has denounced this system of secret and retrospective legislation, arguing that it is illegal since it authorizes unlawful acts and is unclear.

The Official Secrets Act of 1923 addresses the issue of terrorism and the risk of revealing personal knowledge held by the government. This regulation divides secret information into divisions such as government secrets, algorithms, drawings, layouts, modeling techniques, essays, and papers, but it will not define what makes a private publication. With the progression of time, debates have developed over when the statute should be examined, amended, or repealed. The Law Commission stated in its 1971 report on Offenses Against National Security that every government material ought not to be susceptible to the Act's obligations if there is a public tragedy. They did not, however, suggest any changes. The Second Administrative Reforms Commission repealed the Act and integrated it into the National Security Act (ARC). It was alleged that the Official Secrets Act was irreconcilable with constitutional principles of transparent government.

VI. DEFINITIONS

The Official Secrets Act, 1923, established many classifications under Section 2 that applied to the whole country, government officials, and Indian people. The following are some examples of definitions:

While Section 2(1) specifies a position pertaining to Administration as any territory maintained under the jurisdiction of the administration, even if it has no rights, Section 2(6) specifies a office under Administration as any job prospect under a recognized department of the administration. Clause eleven also mentions the position of Commissioner of Police, which is a police officer with specific powers granted by the Public Authorities.

Section 2 handover or communication of the schematic, strategize, framework, editorial,

note, or manuscript covers any component of the disclaimer, conversation, or registration of any knowledge relevant to a specific proposal, template, memorandum, illustration, and other item, as well as the acquiring and supportive of such documentation.

Cluster bombs of battle, as defined under the Act, include any part or entire cruiser, armor, sub, artillery, warhead, and other equipment utilised or promoted for use in fighting.

After that, Section 2 defines a outlawed location (8). Any area where armaments, designs, figures, blueprints, ordnance, and other products are created, kept, or manufactured under a contractual obligation on behalf of the people: Any land or water-based correspondence, as well as any destination with a general populace source of energy and moisture, or a destination where the fastfood restaurants plans, product lines, or war weapons, for illustration, have been asserted outlawed positions but since knowledge about them or disruption inflicted to them could be useful to an opponent.

VII. MAIN PROVISIONS

The Official Secrets Act of 1923 increased its protections to protect the country's president's security and secrecy, especially for accessing and monitoring. Among the provisions are the following:

Any participant who has rational evidence of wrongdoing of being utilised by a hostile nation by any means, for the reason of holding out a deed with or without complying with the country's protection [India], discriminatory to the nation's safety or desires, or who can be accused of perpetrating or intending to devote the conduct for the abroad energy's curiosity, according to Section 4.

Interconnect with a foreign government is defined as any position or identify that is evidence is sufficient of high absorption for an agent's intention, or where an abroad government inhabits, gives or collects feedback, or undertakes any marketing, and may be supposed as an abroad agent's location, to which interactions are acknowledged.

Under Section 6, if any participant dons a national colors or a reminiscent homogeneous without legitimate authorities for the purpose of misleading and portraying oneself as someone with jurisdiction, or obtains a verbal pronouncement or memorandum or helps make any misrepresentations, or misleading somebody or something symbolises himself as an official utilised by the authorities to benefit financially, or misguiding somebody or something signifies ourself as an executive hired by the administration to benefit financially, or misguiding somebody or something denotes himself as an executive engaged by the authorities to collect A violation of this legislation is punished by three years in prison, a fine, or both.

VIII. LANDMARK JUDGMENTS

(A) Badiul Alam Majumdar and Others v Information Commission and Others 2017 (1) LNJ 251

Right to information is a core right that people of a democratic nation desire in the larger horizon of their right to life, the High Court Division confirmed in Badiul Alam Majumdar and Others v Information Commission and Others in 2015. The court went on to emphasize the importance of the right to information, stating that it has taken on a new dimension and urgency in light of the need for public openness and accountability. The right to free dissemination and sharing of information is an important part of freedom of speech, and it must be protected by laws like the Right to Information Act of 2009. (RTI Act). Section 3 of the RTI Act stipulates that if there is a dispute between the RTI Act and other laws that obstruct the exercise of the right to information, the RTI Act would take precedence. As a result, it might be claimed that the right to information overrides the OSA rules to the degree that they clash with the right to information of the general public. The issue of whether the OSA's application harms the spirit of the RTI Act must be considered. One point of contention is the OSA's position in light of the RTI Act's passage.

(B) R.S. Raghunath v State of Karnataka AIR 1993 SC 81

In R.S. Raghunath v State of Karnataka, the Indian Supreme Court held that if the two statutes clash, the latter abrogates the former if two requirements are met: I The two laws are at odds with one another. ii) the subsequent enactment makes explicit reference to the prior enactment. Applying this approach would either lead to the conclusion that the two Acts are

incompatible, or that a high threshold is applied to violations under the OSA in order to avoid interfering with the right to information. In this case, the international principle is that disclosure takes priority, meaning that any regulations that conflict with the exercise of the right to information must surrender to it.

(C) Asif Hussain v. State AIR 2019 SC 1286

The appellant in Asif Hussain v. State was described as a Pakistani resident residing in Kolkata who was passing on vital information about the Indian Army. Documents seized were vetted and shown to be for limited and official reasons. The appellant was found guilty and sentenced to nine years in jail for violating Section 3 of the Official Secrets Act of 1923, as well as four years in prison and a $10,000 fine for violating Section 474 of the Indian Penal Code. The appellant's sentences had to be served concurrently, not consecutively, according to the court.

IX. DIFFERENCE BETWEEN THE RTI ACT AND OSA

Section 22 of the RTI Act establishes its precedence over other laws, including the OSA. This gives the RTI Act precedence over any sections of the OSA that are in conflict with it. So, if the OSA has any inconsistencies in terms of information disclosure, the RTI Act shall take precedence. The government may, however, withhold information under Sections 8 and 9 of the RTI Act. In effect, if the government defines a document as secret under OSA Clause 6, the material may be kept outside the scope of the RTI Act, and the government can use Sections 8 and 9 to justify it. This, according to legal experts, is a loophole.

X. OFFICIAL SECRETS OFFICIAL SECRETS ACT AND OTHER LAWS

Chapters 6 and 7 of the Indian Penal Code; (ii) the Foreign Recruiting Act, 1874; (iii) the Official Secrets Act, 1923; (iv) the Criminal Law Amendment Act, 1938; (v) the Criminal Law Amendment Act, 1961; and (vi) the Unlawful Activities (Prevention) Act, 1967 are the various enactments in force in India dealing with offences against national security.

The Indian Penal Code's Chapters 6 and 7 have been thoroughly examined by us in our Report on that Code. We proposed that the Criminal Law Amendment Act of 1938 be included into Chapter 7 of the Code.

Since the right to freedom of information was merged with the wide range of Article 21 in Reliance Petrochemicals Ltd v Indian Express Newspaper, portions of the Official Secrets Act have been asserted to be inconsistent with the provisions of Art 21 of the Constitution. However, in the case of Buddhikota v State of Maharashtra, a Bombay HC decision, it was unequivocally established that the OSA, 1923 provisions are not in violation of Article 21.

CONCLUSION

The Official Secrets Act, which applies to every Indian government official and every Indian citizen living inside or outside of the country, is a comprehensive statute that protects the country's security and integrity by protecting it from spies sent by enemies or unauthorized disclosure of sensitive information to anyone other than the authorized official. This British-era statute was originally enacted to stifle the voices and activities of national newspapers in an attempt to overthrow the Raj. The Act's legitimacy in the twenty-first century is often questioned. The Act's categorization of confidential materials has been called into doubt. It is frequently thought that this Act was enacted to prevent individuals from questioning the government's actions. Even if examples have shown the RTI's superiority, there are still occasions when unfairness and wrongdoings are camouflaged under the guise of national interest. Because spies have been captured and important information has been divulged, the repeal of this Act would put the nation in jeopardy. As a result, revisions and adjustments are required.

It seems that the moment has come to say goodbye to the antiquated OSA, which protects corruption and favoritism in the guise of confidentiality and is used to silence forward-thinking media outlets. OSA was a product of colonial distrust of people and authorities' dominance, as SARC correctly observed. The same should not be allowed in a democratic system when the activities of the government are subject to constitutional and legal examination by the public and the courts. Article 19(1) (a) of the citizens' charter, which covers both the freedom to provide and receive information, should be fully implemented, and journalists

should no longer be intimidated by the OSA's Damocles sword. Scrapping OSA is critical for improving democracy's fourth pillar, and the SARC's advice should be approved in this respect.

The Official Secrets Act of 1923 is a law that was created with the noble goal of safeguarding the state's sovereignty and integrity. It is regrettable that the broad discretionary powers provided to Administrative Authorities in confidence with the goal of aiding the work of protecting national security were used to hide the government's or ruling party's unwanted actions and to prevent the media from doing its job.

It is undeniable that a regulation like the Official Secrets Act of 1923 is an unavoidable prerequisite for a nation to enable the safeguarding of national security affairs. It is obvious, however, that the Fundamental Rights of Citizens in a Democratic Republic cannot be infringed upon, and that any legislation that does so must inevitably be a'reasonable limitation,' bearing in mind the court dictum that nothing arbitrary can be reasonable. As a result, the Official Secrets Act of 1923 may be argued to be a legislation that, if altered to include clear rules, policies, and constraints on excessive discretionary powers provided, would be a much more effective and enforceable act.

With the passage of the Freedom of Information Act of 2003, it is reasonable to assume that the Official Secrets Act of 1923 will be limited in scope and application to a greater extent, unless the Freedom of Information Act's loopholes are exploited to facilitate the OSA's 1923's broad and ambiguous scope. However, the significance of the FOI Act, 2003 lies in the fact that it is a sign of recognition of the importance of this right, and it will go a long way toward facilitating the task that a democratic country's media has taken on, which is to provide information to its citizens in a responsible manner.

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