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Analysing the Incessant Battlefront: Conflict of Public Interest with Official Secrets

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ABSTRACT

The growing consciousness of participatory democracy has led to an increase in the exercise of their fundamental right to information by the citizen through the Right to Information Act. Participatory Democracy's existence owes to the notions of transparency of Government acts and accountability of public authorities. While the citizens are proactively seeking information from public authorities, the Government is aggressively retaining information under the broad undefined ambit of 'secrecy' or 'confidentiality' according to the Official Secrets Act. This is where the conflict of public interest of the citizens and protected interests of the Government enters the battlefield of democracy. Public interest is futile, when the security of the Nation is compromised, and safety of public becomes a concern due to such disclosure.

In light of this, the paper examines the areas of conflict under the RTI Act and Official Secrets Act and makes a Comparative study of the existence of Official Secrets Act and freedom of Information in common law countries. With special reference to the misuse of section 5 of the OSA Act, arguments are made against the existence of Official Secrets Act while analysing the views of the judiciary and Central Information Commission on the conflict.

Keywords: Confidentiality, Official Secrets, participatory democracy, public interest, Right to Information.

I. INTRODUCTION

"Secrecy, being an instrument of conspiracy, ought never to be the system of regular government." – Jeremy Bentham, 1839.

A participatory democracy's existence owes to the notions of transparency of government acts and accountability of public authorities. This is achievable only through the ease of access to information under the control of public officials and when this is hampered in the name of government secrecy and confidentiality, the public interest is superseded. In India,

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the Right to Information Act, 2005 ("RTI, 2005") allows the citizens to seek the information available with the public Officials whereas the Official Secrets Act, 1923 ("OSA,1923"), a British legacy, strives to stifle the disclosure of information under specified grounds including to protect the national security.

II. AREAS OF CONFLICT UNDER THE RTI ACT, 2005 AND OFFICIAL SECRETS ACT, 1923

The OSA, 1923 was a culmination of the British's deep rooted mistrust of the Indians and assertion of official supremacy. The sole object of the Act is to consolidate and amend the law relating to Official Secrets. However, the Act is silent about the definition, nature or classification of the word 'Official Secret' thus leaving room for flexibility and arbitrariness in classifying any information under the opaque nature of secrecy. The Act criminalises the wrongful communication of information[2] and the wider connotation of the word 'Information'[3] in the Act allows to effectively altering any kind of data within the meaning of the definition. The word 'document'[4] is also defined as part of a document with no mention of segregation as to the part of the document containing confidential information from the rest of the document which can be disclosed, thereby, allowing for filing the entire document as secret. Further, this section penalises the disclosure of such information whose disclosure is likely to affect the 'sovereignty and integrity of India', 'Security of State', 'friendly relation with foreign States' or 'confidential'. Nevertheless, in the absence of an explicit definition for these words and how to process and classify the information, it is left to the discretion of the Government to classify. Ironically, the Manual of Departmental Security Instruction ("MoDSI") of the Ministry of Home Affairs which lays down the criteria for classifying any information as 'secret', 'top secret', 'confidential' etc. is also kept a secret.

The RTI Act of 2005 as opposed to the OSA, 1923 is more in tune with the stated decisions in a manner of speaking. While the OSA, 1923 excludes disclosure of official information completely, the RTI Act, 2005, allows the citizen to seek the information with certain exemptions such as prejudicially affecting sovereignty etc.[5] given under section 8. A check is kept on this general exemption as well as on the provisions of the OSA, 1923 by way of

[2] Official Secrets Act, 1923, § 5.

[3] Official Secrets Act, 1923, § 5 which states: *"If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place,.."*.

[4] Official Secrets Act, 1923, § 2(3).

[5] Right to Information Act,2005 § 8 (1) (a) states: *"information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence"*.

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allowing access to information if public interest in disclosure outweighs the harm to the protected interests.[6] Section 10 of the RTI Act, 1923 further clarifies that when any information is denied under the exemption, access maybe given to the part of the record which can 'reasonably be severed from any part that contains exempted information'.[7] Thus, unlike the OSA, RTI does not put a blanket ban on disclosure of information on the grounds of security of nation being affected.

III. COMPARATIVE STUDY OF SOME COMMON LAW COUNTRIES

Most of the commonwealth countries including the Hong Kong, Myanmar, United Kingdom, Malaysia, Singapore have a similar Official Secrets Act in force. Countries like Canada, New Zealand have scrapped the Official Secret Act.

A. United Kingdom

The Official Secrets Act 1911-1989 together deals with espionage and unauthorised disclosure of official information by Government employees. The Official Secrets Act of 1989 distinguishes between two types of Government employees – members or former members of security and intelligence services and Crown servants and Government contractors. For Crown Servants and Government contractors, an unlawful disclosure related to one of the six categories including security etc. must be deemed "damaging" for it to constitute an offence.[8] Criteria for a damaging disclosure under the 1989 Act differ for each category of information. The Government is required to prove that a disclosure is damaging.[9] However, the Act provides as a defence, to prove that at the time of commission of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to the offence or that its disclosure would be damaging as provided in the respective sub-section.[10]

In United Kingdom, the Freedom of Information Act, 2000 allows the general public to seek information available with the public authorities. The Act however provides for two types of exemptions, absolute[11] and qualified. The qualified exemptions which includes national security, defence etc. are subject to the Public Interest Test laid down in section 2 of the Act, that is, in all the circumstances of the case, the public interest in maintaining the exemption

[6] Right to Information Act, 2005, § 8 (2).
[7] Right to Information Act, 2005, § 10 (1).
[8] Gail Bartlett and Michael Everett (2017), *The Official Secrets Act and Official Secrecy, House of Commons Library Briefing paper no. CBP07422*, **LONDON: HOUSE OF COMMONS LIBRARY** (Nov. 13, 2020, 04:30 PM), https://researchbriefings.files.parliament.uk/documents/CBP-7422/CBP-7422.pdf
[9] *Id.*
[10] Official Secrets Act, 1989, § 2(3) and §1 (5).
[11] Freedom of Information Act, 2000, § 2(3).

prevails over the public interest in disclosing the information.

B. Singapore

Section 5 of the Singapore Official Secrets Act, 1935 which is similar to section 5 of the Indian Official Secrets Act, allows for the person alleged to be guilty of the offence in that section to prove that the communication to him of the code word, countersign, password, photograph, drawing, plan, model, article, note, document or information was contrary to his desire. This Act in the absence of any freedom to information Act governs all the disclosure of information.

C. Hong Kong

In Hong Kong, section 12-26 of part III of the Official Secrets Ordinance (Cap. 521) deals with unlawful disclosures. This is in the same pattern as the Official Secrets Act, 1989 of United Kingdom. The Code on Access to Information, 1995, allows public to seek information from public authorities but also exempts the disclosure of information on the grounds of security, defence etc. However, this code is fraught with inadequacies such as (a) limited coverage of public organizations; (b) inconsistencies among Bureaux/Departments in the application of the exemptions and lack of a mechanism on review of the exemption provisions; and (c) inadequate proactive disclosure and public promotion.[12]

D. Canada

The Officials Secret Act was revised and renamed as the Security of Information Act in 2001. The revised Act, among other things, modernizes the espionage provisions and introduces new concepts, such as "special operational information" and "persons permanently bound to secrecy.[13]Access to Information Act (R.S.C., 1985, c. A-1) a complementary Act to the Security of Information Act allows the access to information under the control of the Government of Canada. Exemptions to this disclosure such as the disclosure affecting the federal-provincial relations, etc. are provided under section 13- 26 of the Act.

E. India

Compared to the above commonwealth nations, India has in force a vague OSA which gives a blanket cover to the Government to prevent disclosure of information. There are no criteria laid down in the Act to classify the information as prejudicial to national security such as the

[12]Legislative Council Secretariat, *Information Note: Freedom of information law in selected places (2018),* **LEGISLATIVE COUNCIL** (Nov. 15, 2020, 07:30 PM), https://www.legco.gov.hk/research-publications/english/1718in10-freedom-of-information-law-in-selected-places-20180525-e.pdf

[13] Government of Canada**,** *Operational Standard for the Security of Information Act***, GOVERNMENT OF CANADA** *(*Dec. 01, 2020, 07:40 PM), https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12323

damaging test available with the OSA, 1989 of United Kingdom and Hong Kong. India's OSA also does not provide a defence of proving that the accused had no knowledge that the wrongful communication will be damaging as provided in the United Kingdom's OSA, 1989 or a defence of proving that the communication of the information was contrary to his desire as provided in the Singapore's OSA. India's RTI, 2005 also falls back when compared to the Canada's Access to Information Act,1985which is complementary to the Security of Information Act, 2001 (earlier known as OSA), however, it stands on a better footing when compared to Singapore, Hong Kong where there is no or limited access to Information available with public officials.

IV. NO JUSTIFICATION FOR THE EXISTENCE OF OSA, 1923

The OSA, 1923 has long since out-lived its purpose and finds no place in the participatory democracy and good governance rule.

A. Under RTI Regime

The existence of the draconian OSA, 1923 is questioned when the RTI Act, 2005under Section 22 expressly declares the Act to have an overriding effect on the OSA,1923 as far as the inconsistencies are concerned. Moreover, specifically to protect the sovereignty and integrity of the nation for which the OSA was enacted, section 8 (1) (a) of RTI Act exempts the disclosure of information which would affect prejudicially the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence. The RTI Act, 2005 further overrides[14] the OSA, 1923 by mandating the public authority to allow access to exempted information if public interest in disclosure outweighs the harm to the protected interests. Also, the RTI Act excludes within its purview the specified intelligence and security Organisations established by the Central and State Government except the information pertaining to the allegations of corruption and human rights violations.[15]

B. Contravenes Article 13(1) of the Indian Constitution:

The existence of OSA is not justified by virtue of Article 13(1) of the Indian Constitution which declares the pre-constitution laws which are inconsistent with Fundamental rights to be void to the extent of the inconsistency. Judicial interpretations in catena of cases such as, *Civil Liberties and Anr. v. Union of India and Ors*.[16], *Reliance Petrochemicals Ltd. v.*

[14] RTI Act, 2005, § 8(2).
[15] RTI Act, 2005, § 24.
[16] (2004) 2 SCC 476.

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Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & others[17] has made the Right to Information a fundamental right by bringing it within the ambits of Article 19(1)(a) and Article 21 of the Indian Constitution. In this context, the provisions of OSA, 1923 is incongruous to the provisions of RTI, 2005 and thereby making it perpetually void to the extent of its inconsistencies. Application of doctrine of eclipse might revive the OSA[18] however, given the circumstances it is highly unlikely that the draconian British era legacy will subsist as such in the pro-democratic era.

C. Commissions Recommends Repeal

The second Administrative Reforms commission and the Shourie Commission had recommended for the repeal of the OSA, 1923 and to be substituted by a chapter in the National Security Act, containing provisions relating to official secrets.[19] However, the Government of India has not accepted the recommendation, based upon the weak reasoning that the OSA,1923 is the only law to deal with the cases of espionage, wrongful possession and communication of sensitive information detrimental to the security of the State; that this law has stood the test of time and has a high conviction rate and that the National Security Act (NSA) merely provides for preventive detention but does not define any substantive offence unlike the OSA, which is a substantive law.[20]

V. INSTANCES OF MISUSE OF SECTION 5 OF THE OSA ACT, 1923

Brave hearted souls, who in public interest expose the mal-administration within the Government often, face the wrath of the Government under OSA. One such instance was in the case of Capt. B.K. Subbarao who was booked in 1988 under section 5 of the OSA. He was denied bail for one year and the evidence against him was simply that he was carrying abroad his Ph.D. thesis submitted earlier.[21] Another blatant misuse was in the case of Iftikar Gilani, a Kashmiri Times journalist, who in 2002 was charged under OSA, 1923 for possessing sensitive information which was nothing but a pamphlet publically issued by a Pakistan Institute regarding deployment of Indian troops in Jammu and Kashmir. Similarly, in 2007 when Maj. Gen V.K. Singh published his book - *India's External Intelligence*, which exposed corruption, negligence within RAW, he was charged under the OSA for leaking

[17] (1988) 4 SCC 592.
[18]Mahendra Lal Jaini v. State of Uttar Pradesh, AIR 1963 SC 1019; See Also: Bhikhaji v. State of Madhya Pradesh AIR 1955 SC 781; Keshavan Madhavan Menon v. State of Bombay, 1951 SCR 228;
[19]Second Admistrative Reforms Commission. *Right To Information: Master Key To Good Governance, (1st report, June 2006)*, **SD** (Nov. 20, 2020, 08:14 PM), https://darpg.gov.in/sites/default/files/rti_masterkey1.pdf
[20]Details of the Government's decisions on the recommendations of the Administrative Reforms Commission, (Nov. 06, 2020, 5:10 p.m.),https://darpg.gov.in/sites/default/files/decision1.pdf
[21] State of Maharashtra v. Dr. B.K. Subbarao and Another 1993 CriLJ 2984 (Bomaby HC)

confidential information. Journalists are oft targeted for their exposés.

The 2nd Administrative Reforms commission, the Shourie Commission[22] and the Law Commission of India in its 43rd Report on Offences against National Security, 1971, time and again has regarded section 5 to be a catch-all provision. Any kind of information can be covered by this Section if it is classified as 'secret' as there is no definition. Therefore, public servants enjoy the discretion to classify anything as "secret"[23] to suit their convenience.

VI. THE JUDICIAL PRONOUNCEMENT AND CIC DECISIONS ON THE CONFLICT

Prior to the enactment of RTI Act, 2005, in the landmark *Judges transfer Case*[24], dealt with issue of Government's non-disclosure of information on the ground of injuring public interest, wherein it was held by the Hon'ble Supreme Court that, the "*disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands"*. They recognised the importance of right to know in a democratic and open society.[25] In another instance of non-disclosure in public interest, the Hon'ble Apex Court held that to cover the common routine business, with veil of secrecy, is not in the interest of the public. Such secrecy can seldom be legitimately desired. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.[26]

The Hon'ble Supreme Court and Central Information Commission (CIC) have tried to reconcile the conflicts inherent in the OSA, 1923 and RTI Act, 2005. The Apex Court in *Sama Alana Abdulla v. The State Of Gujarat*[27], clarified that, the qualifying word 'secret' has been used only with respect to or in relation to official code or password and the legislature did not intend that the sketch, plan, model, article, note, document or information should also be secret. The approach of the court must be to attenuate the area of secrecy consistently with the requirement of public interest.[28] Regarding the overriding nature of Section 22 of the RTI Act, 2005, the Hon'ble Supreme Court in *Namit Sharma v. Union of India*,[29] observed that, the RTI Act, 2005 is to prevail over the specified Acts and instruments to the extent of any inconsistency between the two and where the provisions of any other law can be applied harmoniously, without any conflict, the question of repugnancy would not arise. This is the

[22] Shourie Committee: Report of the Working Group, *Right to Information and Transparency*, 1997.
[23]Second Administrative Reforms Commission, *Supra*, note 18.
[24]S.P.Gupta v. Union of India and Others, AIR 1982 SC 149
[25] *Id.* para 57, 63, 66
[26]State of Uttar Pradesh v. Raj Narain AIR 1975 SC 865
[27]1996 SCC (1) 427; See Also: Sunil Ranjan Das v. The State Criminal Rev. No 908 of 197.
[28]S.P.Gupta case, *supra* note 23.
[29] (2013) 1 SCC 745.

most significant provision of the RTI Act which gives overriding power to the Act over past and contemporary practices and legislations in order to bring transparency.[30] In *Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors*[31], the Hon'ble Supreme Court has succinctly observed that, courts and Information Commissions enforcing the provisions of the RTI Act, 2005 have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act. Thus, it is evident that the Judiciary and CIC have tried to curb the broad ambit of OSA, 1923.

VII. Conclusion and Suggestions

The British legacy of 'Official Secrets' has no justification in our pro-democratic era. The notions of 'public interest' and 'good governance' have pushed the draconian OSA, 1923 into its brink of extinction. When compared to other commonwealth nations' OSA, it is evident that caution was thrown into the wind when the pre-constitution OSA, 1923 was enacted as a means of catch-all especially under section 5. Though a balance between public interest and official secret is sought to be achieved by the RTI Act, 2005, the conflict arises from the lack of definition of the word 'secrecy', the wide nature of the 'information' in the OSA, 1923. Thus, even though the RTI Act, 2005 overrides the OSA, 1923, the problem persists due to the Government of India's insistence in continuing with the OSA along with its myriad deficiencies on flimsy grounds regardless of the recommendations of the various commissions report to repeal it. The Government has not hesitated to misuse the OSA, 1923 on many occasions. Therefore, moving forward, the OSA, 1923 needs to be repealed and its provisions subsumed in a consolidated National Security Act as recommended by the Law Commission of India in its 43rd Report (1971) thus effectively creating a National Security Act as a substantial law.

Meanwhile, to balance the conflicting public interest and Official interest under the proposed National Security Act, it is further necessary to incorporate in it the damage tests concepts of the United Kingdom's OSA, 1989 and place the burden of proof on the Government of India to prove the damaging nature of the disclosure. This will prevent the blatant persecution on mere suspicion by the Government of India. Further, a defence ground should be made available to the accused of proving that, at the time of commission of the alleged offence, he had no knowledge and had no reasonable cause to believe, that the information's disclosure would be prejudicial to Nation's security as provided in the United Kingdom's OSA, 1989.

[30]Manjit Singh v. Department of Posts, Second Appeal No.: CIC/POSTS/A/2017/131334.
[31] (2011)8 SCC 497.

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Similarly, a defence of proving that the communication of the information was contrary to his desire as provided in the Singapore's OSA, 1935 should be made available to accused. This will eliminate innocent communications and unnecessary prosecutions thereon. Finally, the RTI Act, 2005 and the proposed new consolidated National Security Act must be made complementary to each other, to prevent subsequent conflicts.

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