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A Relic of Empire: The Enduring Legacy of the Official Secrets Act in India

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ABSTRACT

India's Official Secrets Act (OSA), implemented in 1923, stands as a stark reminder of the country's colonial past. Inherited from British rule, the Act criminalizes any act deemed to aid an enemy nation. While the concept of safeguarding national security through official secrets legislation exists in many countries, India's OSA carries a unique burden due to its colonial origins. This paper delves into the OSA, exploring its historical development, legal framework, and current implications. By examining the Act's scope and its impact on individual freedoms, the paper aims to contribute to the ongoing debate about potential reforms. The historical context is crucial. Early restrictions on information sharing emerged in mid-19th century India through British pronouncements. These measures aimed to control government communication, with officials requiring permission to engage with the press and maintain tight confidentiality. The critical point is that the Indian OSA was not born out of a democratic need for transparency and accountability, but rather from a colonial desire to control information and suppress dissent. This legacy continues to shape debates about the Act's role in modern India. By comparing and contrasting the OSA with similar legislation in other countries, we can gain valuable insights into the challenges of balancing national security with individual freedoms in a democratic society.

Keywords: *secrecy, confidentiality, corruption, national security, espionage.*

I. INTRODUCTION

India's current anti-espionage legislation is the Official Secrets Act of 1923, a relic of British colonial rule. This act outlines two key offenses. First, it criminalizes any actions that aid a nation hostile to India. Second, it prohibits approaching, inspecting, or even entering restricted government areas or facilities. Many professions that handle sensitive government information require employees to sign a document acknowledging the Official Secrets Act. This is often referred to as "signing the Official Secrets Act,"² but it's important to understand that signing doesn't actually change the legal landscape. The Act itself is a law, and everyone is bound by it regardless of their signature. The purpose of signing this document is to serve as a reminder

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² N.K. JAIN, RIGHT TO INFORMATION- CONCEPT, LAW, PRACTICE (Deep and Deep Publications) (2007).

to the employee of their legal obligations under the Official Secrets Act. It emphasizes the seriousness of handling classified information. In some cases, employees may be required to sign this document both upon starting a position with access to classified information and again upon leaving that position. This reinforces the ongoing nature of their responsibility in protecting sensitive government secrets.

II. HISTORY OF THE OFFICIAL SECRETS ACT, 1923

The concept of government secrecy in India has a long and complex history, deeply intertwined with British colonial rule. Early restrictions on information sharing emerged in the mid-19th century through a series of notifications and resolutions. These measures aimed to control government communication, requiring officials to obtain permission before becoming newspaper correspondents and maintain a level of professional confidentiality akin to lawyers and bankers. In 1888, the British Parliament introduced the Official Secrets Bill, which was extended to India the following year. However, concerns arose about its suitability for the Indian legal system. As a result, the Indian Official Secrets Act was passed by the Viceroy's Executive Council in 1889.³

A pivotal incident occurred in 1896 when espionage charges against two individuals couldn't be proven due to the lack of a legal framework placing the burden of proof on the accused. This led to pressure from the military for an amendment shifting the burden of proof. While initially resisted, protests eventually resulted in the Indian Official Secrets (Amendment) Act of 1904. Further escalation came in 1915 with the Defense of India Act, enacted by the British to stifle nationalist and revolutionary movements during WWI. Despite resistance from Indian leaders, the Act became a powerful tool for suppressing dissent, notably in the Lahore Conspiracy trial and quelling revolutionary movements like the Ghadar Party and Anushilan Samiti. This act was further complemented by the Rowlatt Act of 1919.⁴

Meanwhile, in 1911, the British Parliament itself recognized the need to update their own Official Secrets Act. Discussions were centred on military espionage, prompting calls for revisions to the Indian law as well. Finally, in 1923, following a series of discussions, the new Official Secrets Act was implemented in India, which remains in effect today. This historical context reveals how the Official Secrets Act in India carries the legacy of colonial control. Its origins lie in restricting information flow and suppressing dissent rather than in a transparent and accountable democracy. Understanding these historical roots is crucial for ongoing debates

³ Kaunain Sheriff M, *Explained: India's Official Secrets Act, its history and use*, INDIAN EXPRESS, March 7, 2019.

⁴ Raj Krishna, *Official Secrets Act A Critique*, TIMES OF INDIA, September 23, 2022.

about potential reforms or revisions to the Act in the context of modern India.

III. THE OFFICIAL SECRETS ACT, 1923

India's anti-espionage legislation, the Official Secrets Act (OSA) of 1923, dates back to the British colonial era. The Act criminalizes two key offenses. First, it prohibits any actions that aid a nation considered hostile to India. Second, it restricts access to designated government sites and areas, making it illegal to approach, inspect, or even trespass near them. This could include sensitive locations like electrical substations. The OSA's colonial origins have sparked debate in recent times. Some argue that its provisions may not fully align with the needs of a modern, independent India. However, the Act remains in effect, highlighting the ongoing challenge of balancing national security concerns with transparency and public access to information in a democratic society.

The preamble of the Official Secrets Act, 1923 is to consolidate and amend the law relating to official secrets⁵. The act contains 16 sections. This act shall extend to the whole of India and applies also to servants of the Government and to citizens of India outside India.⁶ Section 2 of the act defines various terms but the word "secret" or words "official secrets" are nowhere defined in the act. The Official Secrets Act, 1923 mainly deals with two aspects-

- (i) Espionage or spying activity⁷ and
- (ii) Disclosure of other secret official information⁸

IV. MEANING OF THE TERM SECRET INFORMATION

The Official Secrets Act (OSA) doesn't have a clear-cut definition of "secret" or "official secrets." This lack of definition can be confusing. However, the Act does give examples of what it considers "official secrets." These include things like any secret official code or password, or an sketch, plan, model, article, note, or other document or information⁹. Importantly, for information to be classified as a secret under the OSA, it must be something whose disclosure could harm India's security or foreign relations. It's crucial to remember that the OSA only applies to official government information. It doesn't cover personal secrets in any way. Within the Indian government, information is typically classified, with secrecy being the default approach. Openness and public access to information are considered exceptions. Government documents are categorized as either "non-classified" or "classified," with stricter handling

⁵ The Official Secrets Act, 1923, No.19, Preamble.

⁶ The Official Secrets Act, 1923, No. 19, s. 1(2).

⁷ The Official Secrets Act, 1923, No. 19, s. 3.

⁸ The Official Secrets Act, 1923, No. 19, s. 5.

⁹ The Official Secrets Act, 1923, No.19, s. 3.

procedures for classified materials. This ensures that sensitive information receives the necessary level of protection. India's Government Information tiers are as follows,

- **Top Secret:** Highly sensitive information critical to national security. This includes military secrets, high-level international policy matters, and intelligence reports.
- **Secret:** Information that could potentially endanger national security, harm India's interests or prestige, or cause serious government embarrassment domestically or internationally.¹⁰
- **Confidential:** Information that, if disclosed, could be disadvantageous to India or benefit a foreign nation, or even cause administrative inconvenience.
- **Personal-Not Publication:** Information suitable for sharing with individual citizens, but not intended for public release.

V. SECTION 5 OF THE OFFICIAL SECRETS ACT, 1923

The Official Secrets Act casts a wide net when it comes to **who can be held liable** for possessing classified information. This extends far beyond just government employees.

- 1) Anyone in possession or control of secret government information, regardless of how they obtained it.
- 2) Individuals who acquired classified information through illegal means as defined by the Act.
- 3) Anyone entrusted with confidential government information by a government official.
- 4) Individuals who gain access to classified information due to a current or past government position, a government contract, or even through someone holding one of these positions.

On the **following grounds**¹¹ the person shall be guilty of an offence under this section,

- a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it or a Court of Justice or a person to whom it is, in the interests of the State his duty to communicate it or
- b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State or

¹⁰ Policy of classifying documents, <https://pib.gov.in/newsite/PrintRelease.aspx?relid=137542>.

¹¹ The Official Secrets Act, 1923, No. 19, s. 5(1).

c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof or

d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information.

The Official Secrets Act goes beyond punishing government officials who leak classified information. It also holds those who knowingly receive such information accountable. Section 5 of the Act makes it an offense for someone to voluntarily receive secret government information. This means that simply being given classified information, even if unsolicited, can be a crime if the recipient is aware of its secrecy.¹²

The Official Secrets Act doesn't assign specific **punishments** based on the severity of the information leak or the resulting harm. Instead, it has a single provision for all offenses. This provision allows for imprisonment for up to three years, a fine, or both. The responsibility for determining the appropriate punishment falls on the courts. Judges consider the specific circumstances of each case, including the gravity of the offense and the potential damage caused to India. This judicial discretion allows for a more nuanced approach to punishment, tailoring it to the specific situation.

VI. RIGHT TO INFORMATION ACT AND OFFICIAL SECRETS ACT

The Official Secrets Act (OSA) of 1923 and the Right to Information (RTI) Act of 2005 represent a stark contrast in philosophies. The OSA, a relic of the past, embodies a culture of secrecy and discourages questioning government actions. In stark opposition, the RTI Act promotes transparency and empowers citizens to hold authorities accountable. While the OSA restricts access to information, the RTI Act carves out exceptions. Section 8(2) of the RTI Act explicitly overrides the OSA in cases of public interest. If disclosing information serves a greater public good or outweighs potential harm, the RTI Act grants access. Similarly, Section 22 reinforces the RTI Act's supremacy, ensuring it prevails over conflicting provisions, including those in the OSA¹³. The RTI Act's significance lies in its ability to combat corruption and promote responsible governance. By granting citizens the right to access information, the Act fosters transparency and accountability in the functioning of government departments. This shift towards openness represents a crucial step in India's democratic evolution.

¹² MP JAIN AND SN JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW*, (Lexis Nexis) (2015).

¹³ Dr. VIJAYA CHANDRA TENNETI, *RIGHT TO INFORMATION ACT, 2005*, (Asia Law House) (2015).

VII. OFFICIAL SECRETS ACT AND OTHER LAWS

In a democratic society, power ultimately resides with the people. Elected officials and government workers are public servants, accountable to the citizenry. Ideally, transparency should be the default setting for government operations. Citizens have a right to be informed about government decisions and the reasoning behind them. However, there are legitimate reasons for some degree of confidentiality in certain situations, particularly regarding sensitive discussions within the cabinet. The Official Secrets Act (OSA) acknowledges this need for secrecy in state matters by exempting them from disclosure under Section 8.

The OSA, enacted during British rule (1923), establishes the legal framework for handling secrecy and confidentiality in government. Its primary focus is national security, providing tools to combat espionage, sedition, and threats to national unity. While Section 5 of the OSA was likely intended to address potential breaches of national security, its broad wording and colonial origins have arguably turned it into a catch-all provision. This has allowed for the classification of many non-security-related government matters as confidential.

This tendency towards excessive secrecy is further amplified by the **Civil Service Conduct Rules, 1964** which restrict the sharing of official documents without authorization. Additionally, Section 123 of the **Indian Evidence Act, 1872** makes it difficult to obtain evidence from unpublished government records. The discretionary power granted to department heads in this matter further hinders transparency. The passage highlights the ongoing tension between transparency and secrecy in a democracy. While national security requires some level of confidentiality, citizens also deserve to hold their government accountable. Finding the right balance between these competing interests remains a challenge.

VIII. CRITICISMS AGAINST THE ACT

The Official Secrets Act (OSA) of 1923 is a relic of British colonial rule in India, and its continued existence sparks heated debate. Critics argue it flips the script on transparency in a democratic society, where citizens ideally have a right to know what their government is doing. While everyone agrees some information, like wartime troop movements or trade negotiations, needs to be classified, the act grants the state broad powers to deem information secret at will. This lack of clear criteria and heavy penalties for unauthorized disclosure, regardless of public interest, creates a chilling effect on investigative journalism and whistle-blowing. Exposing government wrongdoing, no matter how crucial, becomes a dangerous gamble under the act. Calls for reform, amendment, or even repeal have grown over time.

The Law Commission of India, in 1971, suggested limiting the Act's scope to information truly critical to national security, not just any secret document. However, no changes materialized. The Second Administrative Reforms Commission (ARC) went a step further, advocating for the OSA's complete repeal and integration into a revised National Security Act. Their argument centered on the incompatibility of the act with the ideals of transparency in a democratic society¹⁴. Opponents of reform argue that the act remains a vital tool for safeguarding national security. They fear that weakening its provisions could leave India vulnerable to espionage and foreign interference. They also raise concerns about protecting sensitive government information and protocols that could be misused if widely accessible.

The debate hinges on striking a delicate balance. National security is paramount, but so is citizen awareness and holding their government accountable. A modernized approach to classifying information, with clear criteria and independent oversight, could be a way forward. This would ensure true national security concerns are protected while allowing for greater transparency in areas where the public interest outweighs secrecy. Ultimately, the question remains: how can India best balance the need for national security with the democratic ideals of a transparent and accountable government the solution would be revisiting and potentially reforming the act could be a significant step towards achieving this balance.

IX. CASE LAWS

1. Sama Alana Abdulla v. State of Gujarat¹⁵

Rayna's arrest in 1986 while crossing the Indian border sparked a case centered on the Official Secrets Act. During questioning, Rayna admitted to traveling and meeting with other individuals in India for four years. Authorities suspected these meetings involved acquiring sensitive information for Pakistani intelligence. Based on warrants issued under the Act, police searched the homes of the Indian nationals Rayna had met. Incriminating evidence was only found at one location: a map. This map, created by India's Border Security Force (BSF), detailed an underground pipeline supplying water to military personnel near the Bhuj-Khavda border. Possessing this classified map (falling under Section 3(1)(c) of the Act) and potentially passing it on to a potential enemy (Pakistan) constituted an act of espionage. Rayna was charged with offenses under the Official Secrets Act, not only for possessing the map but also for potentially aiding the second accused in their alleged spying activities.

¹⁴ Harsh Dabas, *Keeping In Black & White: An Analysis Of The Official Secrets Act, 1923*, LIVELAW.IN (Apr. 7, 2024).

¹⁵ *Sama Alana Abdulla v. State of Gujarat*, AIR 1996 SC 569.

2. Kulbhusan Parasher v. State through CBI¹⁶

This case centered on a major national security breach involving classified information. Kulbhusan Parashar, along with seven others including Indian Air Force personnel, were accused of engaging in an illegal trade of sensitive documents and information related to India's Ministry of Defense. These actions allegedly posed a serious threat to national security. Parashar faced multiple charges under the Official Secrets Act and the Indian Penal Code (IPC). Charges included criminal conspiracy (IPC Section 120-B), jeopardizing national security (Official Secrets Act Section 3(1)), and unauthorized communication of classified information (Official Secrets Act Section 5). The Central Bureau of Investigation (CBI) conducted searches under the Act due to the case's urgency. Prosecutors alleged that Parashar and Ravi Shankaran offered cash and other benefits to entice Air Force officers (Sambhajee L. Surve and Vijender Rana) into sharing sensitive information about India's defense capabilities. All eight individuals were arrested in April 2006. Authorities also recovered a pen drive containing classified information from the accused. The court, considering the seriousness of the charges, denied bail to the accused.

3. State v. Madhuri Gupta

Madhuri Gupta, Second Secretary (Press & Information) at the Indian High Commission in Islamabad, faced serious charges under the Official Secrets Act and the Indian Penal Code. She was accused of engaging in unauthorized communication with Pakistani intelligence officers, essentially acting as a spy. Emails found in her possession allegedly contained classified information about hydroelectric power projects in Jammu and Kashmir. These communications also reportedly compromised Indian defense officials working at the Ministry of External Affairs and their families.

Authorities seized electronic devices belonging to Gupta that revealed email exchanges and ongoing contact with Pakistani intelligence personnel. Based on this evidence, she was charged under Section 3 of the Official Secrets Act for espionage, Section 3(1)© for sharing classified information with an enemy, and Section 120-B of the Indian Penal Code for criminal conspiracy. Despite pleas for leniency, the court held Gupta accountable for her actions. Citing the high level of trust associated with her position and the severity of the national security breach, the court denied leniency. While not convicted under all charges, Gupta was found guilty and sentenced to three years in prison for her offenses.

¹⁶ Kulbhusan Parasher v. State through CBI, 2007 Cri LJ 3601.

4. Asif Hussain v. State¹⁷

Asif Hussain, a Pakistani national residing in Kolkata, found himself in legal trouble for leaking sensitive information about the Indian Army. Authorities seized documents from Hussain that were confirmed to be classified and restricted for official use only. Hussain faced charges under two separate laws: the Official Secrets Act and the Indian Penal Code (IPC). He was convicted under Section 3 of the Official Secrets Act for espionage and sentenced to nine years in prison. Additionally, he received a four-year sentence and a fine of ₹10,000 for forgery (IPC Section 474). Importantly, the court ruled that the sentences would be served concurrently, meaning they would run at the same time rather than consecutively.

5. State v. K. Balakrishna¹⁸

This case involved the early publication of portions of a government budget in a newspaper, before its official presentation. The court ruled that the budget constituted a “secret document” under the Official Secrets Act, even though there wasn’t a formal written rule classifying it as such. The court’s decision was based on established practices and expert opinions. Since budgets are typically treated as highly confidential until presented to the legislature, publishing them prematurely was deemed a violation of the Act. Specifically, the court found the act to fall under Section 5(2) (receiving a secret document) and Section 5(1)(b) (disclosing information from a secret document) of the Official Secrets Act. The court emphasized that this wasn’t a minor offense. Early disclosure of budgetary information could have “far-reaching consequences and repercussions” on the state’s economy.

6. Nandlal More v. The State¹⁹

This case concerning the premature disclosure of budget information, the Punjab High Court reaffirmed that such leaks constitute an offense under the Official Secrets Act. The court rejected the argument that budgets lose their “official secret” status because they are eventually made public. The court’s reasoning centered on the principle of confidentiality until official disclosure. While budgets are ultimately presented publicly, they are considered secret until that designated time. Therefore, any unauthorized leak before the official announcement remains a violation of the Act.

X. CONCLUSION

The Official Secrets Act, a relic of British rule, casts a long shadow over modern India. This

¹⁷ Asif Hussain v. State, AIR 2019 SC 1286.

¹⁸ State v. K. Balakrishna, AIR 1961 Ker 25.

¹⁹ Nandlal More v. The State, (1965) Cr LJ 392 (Pb.).

law, applicable to all government officials and citizens, aims to safeguard national security by deterring espionage and unauthorized disclosure of sensitive information. However, its legacy is complex. Initially intended to stifle dissent and control the press during colonial times, the Act's broad scope and vague definitions raise concerns in the 21st century. The clashes with Right to Information Act, which empowers citizens to access government information. While precedents have established the Right to Information's supremacy, the Official Secrets Act can still be used to shroud inconvenient truths under the guise of national security. Despite concerns, the complete repeal of the Act would leave India vulnerable. Cases of espionage and information breaches highlight the need for some level of protection. The solution lies not in abolishment, but in reform. Clearer definitions of classified information, independent oversight of secrecy classifications, and exemptions for public interest disclosures could all contribute to a more balanced approach. The Official Secrets Act can still serve a role in safeguarding national security, but it must do so in a way that respects democratic principles and fosters transparency.
