The Official Secrets Act, 1923: A Critical Review

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Abstract

The Indian Official Secrets Act (1904) was enacted During Lord Curzon's times mainly to restrict the freedom of the press. The Official Secrets Act, 1923 (OSA) took its position as the law governing all concerns of secrecy and confidentiality relating to Indian government. A framework for dealing with espionage, sedition, and other threats to the integrity and unity of the country was also established by the law. The law had ingrained a culture of secrecy in India due to the mistrust that existed between the British administration and the populace.

The Official Secrets Act deals with two main aspects (i) espionage or spying activity and (iis) disclosure of other secret official information. The former is dealt with by Section 3 and the latter by section 5.

Keywords: Official Secret Act 1923, Indian Official Secrets Act 1904, Disclosure, Spying Activity and Disclosure

Introduction

The Indian Official Secrets Act (1904) was enacted During Lord Curzon's times mainly to restrict the freedom of the press. The Official Secrets Act, 1923 (OSA) took its position as the law governing all concerns of secrecy and confidentiality relating to Indian government. A framework for dealing with espionage, sedition, and other threats to the integrity and unity of the country was also established by the law. The law had ingrained a culture of secrecy in India due to the mistrust that existed between the British administration and the populace.

The Official Secrets Act[1] deals with two main aspects (i)espionage or spying activity and (ii)disclosure of other secret official information. The former is dealt with by Section 3[2] and the latter by section 5.

It is the "disclosure" which is punishable and not the purpose of disclosure or prejudicial effect on certain interests deserving of protection in the national interest. Both the person communicating and the person receiving official information are guilty of an offence under the Act.

But fortunately this did not happen. There have been very few reported instances of legal prosecution of media outlets in high courts or the Supreme Court. The Press Commission in its report of 1954[3] stated: "Statistics showed that there was only one prosecution during 1931 to 1946 throughout the whole of India even while a foreign Government was in power.' The law is rarely used by governments, but its detrimental impact on press freedom is undeniable. Assessing the impact of

[1] For historical development of the Official Secrets Act, 1923 and the earlier Acts on the subject, see S. Maheshwari, Open Government in India (1981).

[2] Section 3 OSA- Penalties for spying.—
(1) If any person for any purpose prejudicial to the safety or interests of the State—
(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or
(c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy 9 [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States], he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of 10 [Government] or in relation to any secret official code, to fourteen years and in other cases to three years.

[3] Report of the Press Commission 401 (1954).

legislation based on the number of reported cases can be misleading. It does not prove two main aspects-the frequency of threats used by the government to prevent the press from publishing information, and the fear of violation of the Act by the press and the possibility of prosecution as a self-restraining factor in withholding information whose disclosure may be in the public interest.

I. Section 5: "Secret" Information and "Official Secrets"

Section 5 is broadly worded and its provisions may be examined under the following headings.

(i) Person in possession of official information

(a) Any person in possession or control of secret official information.

(b) Any person obtaining information in contravention of this Act.

(c) Any person to whom official information has been entrusted in confidence by any person holding office under the government.

(d) Any person obtaining or having access to information owing to his holding any office (present or past), or holding any government contract, or any person holding office under any of these persons.

(ii) Person receiving the information.

Not only is the person communicating the information guilty of an offence under the section but also the person receiving it.

(iii) The secret information.

The official data covered by the section is also broad. Any kind of information is covered provided it is "secret". Thus, it contains any official code, pass word, sketch, plan, model, article, note, document or information. The only qualification is that it should be "secret". Nowhere in the law is the word "secret" or "official secret" defined. It is clear that the law applies only to public secrets and not to private secrets. Thus it will extend to secrets of a ministry or department of the government, but not to an incorporated body like a university, government company or public

corporation,"[4] In the absence of any definition in the Act it is for the government to decide what it should treat secret and what not, though the government does not seem to be the sole judge of the matter as the courts can review the decision of the government

(iv)The disclosure of secret government information.

(v) Punishment under section 5

By itself, the Act does not classify penalties in accordance with the severity or kind of harm brought on by the exposure of classified information. A general rule states that anyone found guilty of violating the section will face a sentence of up to three years in prison, a fine, or a combination of the two. In light of the facts of each case and the severity of the harm done to the country, the judge has the authority to determine the appropriate sentence, subject to the maximum set forth in the section.

The OSA does not define the expression “official secrets. Instead, its significance must be determined by carefully reading the Act's numerous clauses. For instance, actions like approaching, inspecting, or flying over any location that has been designated as "prohibited" under the Act will result in penalties. Therefore, even though they cannot be referred to as "information," these areas technically meet the definition of "official secrets." Making sketches, plans, models, or notes that are "calculated to be," "could be," or "planned to be" directly or indirectly valuable to the adversary could also be considered to be a "official secret," even though no government official may have actually developed them. However, for the purposes of the Act, obtaining, gathering, recording, publishing, or disclosing to any other person any "secret code or password" or any sketch, plan, model, article, or note of other document or information that is calculated to be or might be or is "intended" to be directly or indirectly useful to the enemy is deemed to be a spying act. It would also be considered espionage if the disclosure of any such material had the potential to harm India's sovereignty and integrity, the state's security, or friendly ties with other countries. The maximum prison sentence for any one of these offences is three years. The sentence could be up to fourteen years if the forbidden activities are committed in regard to any defence work, arsenal, and establishment of the defence

[4] *Emperor* v. *R.K. Karanjia* , AIR 1946 BOM.322

forces, mines (exploding sort), minefield, factory, dockyard, camp, ship, or aircraft in relation to the affairs of the three defence forces.

Other provisions of the OSA criminalize wrongful communication of such information in order to adversely affect India's national security interests or foreign relations explained above. While interpreting the meaning of the term "official secret" the Supreme Court of India restricted it to "secret code or password mentioned in Section 3(c) of OSA'. Do sketches, maps, blueprints, and other objects described in that section qualify as "official secrets"? A closer examination of these clauses reveals that the OSA does not mandate that all material maintained by the government be labelled as "official secrets." So, even though the OSA has a distinct and specialised function in dealing with espionage, it is MODSI that establishes the procedure for designating official documents as "top secret," "secret," or "confidential." These documents don't appear to have anything to do with the OSA. It won't be obvious whether the MODSI is based on the OSA until it is made available to the public Consequently, the OSA should not be a stumbling block for the disclosure of any information other than those covered by the exemption clause in Section 8(1) (a) of the RTI Act and that too only in relation to State security and foreign relations and no other. However, the deleterious effect of the OSA is more apparent in its use against persons whom the powers that be want to fix.

II. Judicial Review and the OSA

Judicial review provides some protection to an individual against government arbitrariness in the matter of official secrecy. It is a court of law which has to decide whether a person has committed an offence under the Act or not.

It is apparent that the word "secret" raises a jurisdictional issue, and that the courts have the authority to resolve that jurisdictional question. However, it is unclear whether the courts also have the authority to resolve the issue of "public interest," and to declare that if disclosure was justified by public interest, the person cannot be considered to have committed the crime. Quite frequently, the "disclosure in public interest" and "secrecy" issues are intertwined. The determination of one may require passing an indirect judgment over the other. Thus, in *Nand Lal More v, The State*[5],

[5] *Nand Lai* v. *The State*, (1965) 1 cr. L.J. 392 (Pb.).

while holding that budget proposals were closely guarded secrets until the budget was presented. Considering that the Official Secrets Act is now silent on this issue, how far does the court have the authority to decide the issue of "disclosure in public interest"? In this regard, it is appropriate to make reference to Section 123 of the Evidence Act of 1872, which grants the government the authority to prevent the release of its records in a court of law. "No one shall be entitled to present any testimony drawn from unpublished official records relating to any affairs of State except with the approval of the officer at the head of the concerned department, who shall give or withhold such authorization as he considers fit," the clause states.. However, the only justification of the existence of such a privilege is the requirement of public interest. Initially in *State of Punjab v. Sodhi Sukhdev Singh*[6], the approach of the court was restrictive. If the court determined that the relevant document fell under the heading of "affairs of State," it would be up to the department head to decide whether to allow its production or not; the court would not address the issue of whether or not its publication would actually harm the public interest.

The court adopted a more lenient stance regarding the disclosure of government documents under Section 123 of the Evidence Act in the Judges case (S P Gupta v. President of India). In order to determine whether the records connected to state activities and whether overall the public interest justified their disclosure, the court concluded that it had a right to inspect the documents. The court must weigh competing claims of public interest when considering whether to disclose information, including disclosure for the sake of administering justice (which is in the public interest) and nondisclosure due to harm to other areas of the public interest. The court was reluctant to acknowledge the theory of "class documents," which grants an absolute exemption from disclosure regardless of the contents of the documents by virtue of the class to which they belong. Cabinet papers, minutes of meetings of department heads, and high-level documents pertaining to the inner workings of the government apparatus or associated with the formulation of government policy may fall under the class concept. Even "class documents" are subject to the courts' "balancing" process. In this regard, Mr. Justice Bhagwati said the following: "The immunity which is conferred to papers because they belong to a certain class is not sacrosanct." The underlying idea behind class immunity is that

[6] A.I.R. 1961 S.C. 439

disclosing documents that belong to that class would be against the public interest because doing so would interfere with the proper operation of the public service, and this aspect of the public interest requires that no one be denied justice by withholding pertinent evidence. The Court must always strike a balance in all of these instances.

III. RTI and OSA

The Right to Information Act, 2005 (RTI Act), ushering India into an era of transparency and accountability, contrasted with the OSA's legal perpetuation of a culture of secrecy (and corruption) and denial of any rights against them. The actual distinction between these two acts thus lies in the cultural transition between the two regimes. The RTI Act hasn't completely replaced the OSA, though. In the event of a conflict between the RTI Act and the Official Secrets Act, the public interest shall take precedence. A public authority may grant access to information if the public interest in disclosure outweighs the harm to the protected interests, according to Section 8(2) of the RTI Act, "notwithstanding anything in the Official Secrets Act, 1923, or any of the exemptions permissible in accordance with subsection 8(1) of RTI Act." According to Section 22 of the RTI Act, the provisions of the Act shall apply despite any inconsistencies with the OSA, other laws, or any instrument in force as a result of another law.

IV **Prosecution under the OSA**

According to the Government of India, the OSA has had a fairly successful prosecution rate. However, comprehensive statistics are scarce. The Home Ministry indicated that the Central Government has authorised criminal proceedings against 395 people between 2000 and the date of the parliamentary inquiry in answer to a question posed on the Lok Sabha's floor in August 2010.

The Ministry did acknowledge that the Central Bureau of Investigation or the State Police Departments are responsible for maintaining a record of actual prosecutions and their outcomes. Such State-level data about prosecutions under the OSA and their outcomes are similarly absent from the National Crime Records Bureau's Annual Crime Reports. The OSA has, however, reportedly frequently been abused to settle disputes with uncooperative officers and investigative journalists, according to anecdotal evidence.

For instance, the renowned expert on atomic energy, Dr. B. Subbarao, was imprisoned for over two years on allegations brought against him under the OSA and other similar laws. His offence, according to the prosecutors, was travelling with his doctoral thesis. It claimed that he had assembled his thesis using material that was considered a defence secret and that he had acquired while doing his official job.

The lawsuit was dismissed by the Bombay High Court, and he was released. The obligatory sanction for prosecution under Section 197 of the Code of Criminal Procedure, 1973 had not been received from the Government; therefore the Supreme Court later confirmed the High Court's decision.

Investigative journalists are frequently brought before the OSA. Iftikhar Gilani, a journalist based in Delhi, was detained by the police in June 2002 on suspicion of having "classified material." The allegedly violated human right by the defence forces in Kashmir was later revealed to be publicly available information in a document issued by Pakistan's foreign ministry.

IV. Official Secret Act review/repeal

There has long been a need to guarantee compatibility between the RTI act and the OSA and to ensure that citizens participate in national governance by making real information available. In this regard, practices from a few other nations are mentioned. For instance, the UK declassifies its papers after a predetermined amount of time, while Germany is currently progressively allowing researchers access to its archives. The Second Administrative Reforms Commission (ARC) of India also recommended repealing the Official Secrets Act of 1923. However, the Government rejected the advice to abolish OSA on the grounds that it is the only law to address instances of espionage, improper holding of sensitive information, and distribution of that information in a way that jeopardises national security. The Departmental Security Instructions should be changed, and "typically, only such information should be accorded a security classification that would qualify for exemption from disclosure under the RTI Act," according to the ARC's other recommendation. However, the administration claimed that classifying records based on different RTI Act Sections was "not practicable"There is m as far as the Law Commission's recommendations are concerned." In the Law Commission's report on Offenses Against National Security, Section 5 of the Official Secrets Act is

mentioned in relation to the Commission's recommendations. The Commission does not appear to have thoroughly investigated the issue of amending section 5 because it was not its primary focus while considering the Official Secrets Act. Only a couple of pages were spent to discussing the section. The Commission did not advocate for any restrictions on the section's current expansive language. It deemed it appropriate to let the government decide whether to forgo prosecuting where the disclosure of such information is of a relatively minor nature.

Conclusion

The problem of reconciling through law the nation's need in government secrecy and its need in disclosure is quite a complex and difficult one. Two basic issues need to be tackled-the problem of classification of information and procedural safeguards to the individual against administrative abuse including the safeguard judicial review. Classifying documents which are to be kept secret and those not is a formidable task and defies a satisfactory solution. Classification at the most will have to be broad and general with several exceptions. It will be difficult to bring within the four-corners of law all the possible details of classification. For instance, if defense is in the classified list of secrecy, still some matters relating to defense , like, defense factories or foreign purchases may not be entitled to secrecy under certain circumstances so as to expose corruption and mismanagement. On the one hand, a breach of secrecy in the matter of defense may seriously damage the nation, but on the other hand, Parliament and people have a close interest in questions of defense as a substantial portion of the country's resources is spent on the same. These kinds of problems do pose a dilemma even in the recognized areas of secrecy.

A central question that the Government must answer is if the procedures for classification of sensitive information held by the government are not sanctioned by the OSA, then how will the OSA review committee make any recommendation to improve the levels of transparency? Official secrets under the OSA are limited to 'secret codes and pass word**".** If it weren't necessary to prove the defence forces' and security establishment's responsibility, no civilian in their right mind would request the revelation of such material. What exactly is the OSA Review Committee looking at, and how will it contribute to strengthening the transparency framework put in place by the RTI Act? The public will continue to speculate about the government's goals unless it comes clear about it.

The contents of MODSI must first be made public before a practical examination of the classification and declassification processes can be conducted. The next step is to review these policies and actual practise in light of the RTI Act's exemptions as well as the policies for declassifying and archiving sensitive material as outlined in the Public Records Act and Rules.

First and foremost, parliamentary monitoring of the national security regime, including the operations and spending plans of the intelligence services, is necessary. Today, there is sufficient information available to strike a balance between the need for open and accountable governance and concerns about national security. The Tshwane Principles on National Security and the Right to Information are a collection of guidelines for balancing the two conflicting public interests.

Reviewing the prosecutions that resulted in the dismissal or acquittal of individuals charged with OSA violations is essential and must be done. In order to review every case of acquittal in a criminal trial, the Supreme Court established a process.

A long list of legitimate public interests, including the sovereignty and security of the State, its defence, strategic, scientific, or economic interests, trade secrets or third parties' intellectual property rights, information obtained in confidence from foreign governments, and the privacy of any individual, are all listed in Section 8 of the RTI Act.

Additionally, there is no obligation to disclose information if doing so will put someone's life or safety in danger, encourage others to commit crimes, jeopardise the investigation or prosecution of someone for a crime, or if disclosure has been forbidden by a court or other authority. Information shared in a relationship built on trust, such as one between a doctor and patient or a lawyer and a client, is also shielded from disclosure. Information cannot be disclosed under Section 9 if doing so would violate any copyright held by a private individual, and under Section 24, notified intelligence and security organizations like the Intelligence Bureau, R&AW, CBI, and 22 others in a similar position are exempt from the usual disclosure requirements. However, if the material relates to "allegations of human rights violations," these organizations will not be free from sharing it.

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