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Unveiling Secrecy: Legal Dimensions and The Need for Reforms in the Official Secrets Act 1923

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The Official Secrets Act of 1923 (OSA), a law from the colonial period, was built up to secure national security by confining unauthorized sharing of delicate data. Be that as it may, despite its unique reason, the Act has remained for the most part unaltered since it was to begin presented, raising concerns concerning its significance and compatibility with modern majority rule standards. However, with the dynamic advancements in society, the act needs certain repeals and amendments. This article gives a basic investigation of the OSA's legitimate perspectives, indicating its deficiencies, impacts on principal rights, and the pivotal requirements for reforms. The Act regularly clashes with the right to information, which is outlined to improve straightforwardness and responsibility inside government. Several critics and researchers argue that. All things considered, vulnerabilities inside the OSA proceed to prevent free expression and investigative news coverage. Case ponders, counting the unreasonable indictment of writers and whistleblowers, outline the requirement for a measured approach that maintains national security regarding gracious liberties. This article calls for the OSA's annual report, proposing that its components be consolidated into a changed National Security Act, as prescribed by the Law Commission of India. Therefore, this article delves into the legal aspects of the OSA, outlining its key provisions and exploring its relationship with democratic governance. By addressing its deficiencies, it aims to offer suggestions to achieve effective implementation and a more balanced approach that guarantees national security while promoting transparency and safeguarding civil liberties.

Keywords: *official secrets act, key provision, national security issues.*

INTRODUCTION

On September 14, 2020, the Delhi Special Cell apprehended journalist Rajiv Sharma under Section 5 of the Official Secrets Act.¹ At the same time, a second-year law student faced espionage charges under Section 3 of the same act for filming a police station.² But what is the Official Secrets Act? This article examines its provisions more closely. The Official Secrets Act (OSA) of 1923³ (hereinafter referred to as 'OSA' or 'the act') is a cornerstone of India's legal system intended to protect national security and prevent the unauthorized sharing of sensitive information. Enacted during colonial rule, the act has seen few reforms since its creation, leaving its provisions rooted in an earlier period. The OSA is primarily aimed at combating espionage and ensuring government confidentiality. However, its application raises critical questions regarding its compatibility with democratic ideals, particularly in terms of transparency, accountability, and the fundamental rights established in the Constitution. The evolving socio-political landscape and rapid technological changes have intensified discussions on the need to reform the OSA. Critics contend that the Act's vague and overly broad definitions of 'official secrets' enable potential misuse, suppressing legitimate dissent and investigative journalism. This article delves into the legal aspects of the OSA, outlining its key provisions and exploring its relationship with democratic governance. It further seeks to address its deficiencies and offer suggestions to achieve a more balanced approach that guarantees national security while promoting transparency and safeguarding civil liberties.

¹ Sandeep Unnithan, 'The big phone hack' *India Today* (08 November 2019) <<https://www.indiatoday.in/magazine/special-report/story/20191118-the-big-phone-hack-1616610-2019-11-08>> accessed 15 November 2024

² Vijay Kumar Yadav, 'Law student booked under Official Secrets Act for making video inside police station in Mumbai' *Hindustan Times* (20 September 2020) <<https://www.hindustantimes.com>> accessed 15 November 2024

³ The Official Secrets Act 1923

THE OFFICIAL SECRETS ACT 1923

The legislators' intent behind the enactment of the OSA in 1923 was to tackle issues related to espionage and safeguard the nation's confidential information from being disclosed.⁴ The term 'secret information' pertains to official codes, sketches, plans, documents, articles, etc., yet remains ambiguous as the act fails to define what constitutes 'secret information'.⁵ Over time, numerous critics have called for a review, amendment, or repeal of the act. In its 1971 report on 'Offences against National Security', the Law Commission noted that not every classified document should be subject to the provisions of the OSA unless it pertains to a national emergency. However, the report did not endorse any amendments. The Second Administrative Reforms Commission stated that the OSA contradicts the principles of a transparent government in a democratic framework. It also recommended repealing the act and integrating it into the National Security Act of 1980.⁶

In 2011, senior reporter Tarakant Dwivedi, known as Akela, was imprisoned for criminal trespass after uncovering that weapons received after the Mumbai attacks were damaged due to leaking roofs. The Bombay High Court dismissed the lawsuit, concluding that the armoury was not an off-limits area. Journalist Santanu Saikia, who wrote an article in the Financial Express based on a leaked cabinet memo, was not held liable as the document was classified as secret by the Delhi High Court. Additionally, in 2018, a former diplomat, Madhuri Gupta, was convicted and sentenced to three years in prison by a Delhi court for espionage on behalf of Pakistan's Inter-Services Intelligence (ISI) while she was stationed in Islamabad in 2010.

KEY PROVISIONS UNDER THE OSA, 1923

The Official Secrets Act of 1923 enhanced its safeguards to ensure the security and confidentiality of the nation's president, particularly regarding access and surveillance. Some significant provisions include:

⁴ *Ibid*

⁵ Raj Krishna and Sagarika Swapnil, 'Official Secrets Act: A Critique' *Times of India* (23 September 2022) <<https://timesofindia.indiatimes.com/readersblog/my-tryst-with-law/official-secrets-act-a-critique-45147/>> accessed 15 November 2024

⁶ *Ibid*

- As per Section 4,⁷ Any individual possessing credible evidence of misconduct involving the exploitation of the country by a hostile nation, for actions that are detrimental to India's security or interests, may be charged if they are found to be committing or intending actions that benefit foreign entities.
- Interaction with a foreign government is characterized as any place or situation that demonstrates substantial interest in an agent's intentions, or where a foreign government resides and gathers information or conducts communications that may be recognized as contacts with foreign agents.
- Sec 6⁸ Stipulates that if an individual improperly wears national insignia or similar uniforms without authorization, to mislead others into believing they hold official status, or if they make false claims or assist in misrepresentation for personal financial gain, it results in a violation of this law. Offenders may face three years of imprisonment, fines, or both.

PROSECUTION UNDER THE OSA

As reported by the Government of India, the OSA has shown a relatively successful rate of prosecution, although detailed statistics are limited. The Home Ministry disclosed that between 2000 and a parliamentary inquiry in August 2010, criminal actions were initiated against 395 individuals. It noted that record-keeping of actual prosecutions and their results is managed by the Central Bureau of Investigation and the State Police Departments. However, similar data at the state level regarding OSA prosecutions is also absent from the National Crime Records Bureau's Annual Crime Reports.

Anecdotal evidence suggests that the OSA has frequently been misused to resolve conflicts with resistant officials and investigative journalists. For example, Dr. B. Subbarao, a well-known nuclear energy expert, was incarcerated for over two years under allegations connected to the OSA and similar regulations. Prosecutors claimed that his doctoral thesis included material deemed classified and obtained during his official duties. The Bombay High Court dismissed

⁷ The Official Secrets Act 1923, s 4

⁸ The Official Secrets Act 1923, s 6

the case, leading to his release, as the mandatory approval for prosecution under Section 197 of the Code of Criminal Procedure, 1973, had not been granted by the Government, a ruling later upheld by the Supreme Court. Investigative journalists often find themselves facing charges under the OSA. Iftikhar Gilani, a journalist from Delhi, was arrested in June 2002 for allegedly possessing 'classified materials,' which were eventually revealed to be publicly available documentation from Pakistan's foreign ministry regarding human rights violations by defense forces in Kashmir.

ISSUES IN OS, 1923

Conflict between OSA and RTI: Before the enactment of the RTI Act in 2005,⁹ The issue of government withholding information under the pretext of public interest was addressed in the renowned Judges Transfer Case. In this case, the Supreme Court determined that 'disclosure of information regarding the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.' They recognized the importance of the right to know in a democratic society, asserting that it is not in the public interest to conceal routine operations behind a veil of secrecy, as this kind of secrecy is rarely justified. The responsibility of officials to justify and defend their actions serves as the primary safeguard against tyranny and corruption.

The Central Information Commission has similarly engaged with the issues inherent in both the OSA, 1923 and the RTI Act, 2005. In the case of *Sama Alana Abdulla v The State of Gujarat*,¹⁰ The Supreme Court clarified that 'Secret' refers only to official codes or passwords, and it was not the legislative intent to keep other forms of information, like sketches or documents, confidential. The court must adopt a stance that limits secrecy while still prioritizing public interest. Regarding the overarching nature of Section 22¹¹ Of the RTI Act, 2005, the Supreme Court noted in *Namit Sharma v Union of India*.¹² That the RTI Act prevails over specified Acts

⁹ 'India's Official Secrets Act, its history and use' (*Insight IAS*, 10 March 2019)

<<https://www.insightsonindia.com/2019/03/10/indias-official-secrets-act-its-history-and-use/>> accessed 15 November 2024

¹⁰ *Sama Alana Abdulla v The State of Gujarat* (1996) 1 SCC 427

¹¹ Right to Information Act 2005, s 22

¹² *Namit Sharma v Union of India* (2013) 1 SCC 745

and statutes in case of inconsistency, and repugnancy does not arise when the provisions of any other law can be harmonized without conflict.

The most significant aspect of the RTI Act empowers it to transcend existing laws and practices, both current and historical, to foster transparency. The Supreme Court clarified in *Central Board of Secondary Education and Anr. v Aditya Bandopadhyay and Ors.*¹³ that courts and information commissions must adopt a purposive interpretation of the RTI Act's provisions, implementing a reasonable and balanced approach to harmonize both objectives of the Act. Thus, it is clear that there has been an attempt by the Judiciary and the CIC to limit the expansive scope of the OSA, 1923.

Misuse of OSA: Under the Official Secrets Act (OSA), those who bravely expose government mismanagement for the public interest must face severe repercussions. A notable instance occurred in 1988 when Captain B.K. Subbarao was arrested under Section 5 of the OSA and denied bail for a year merely for attempting to take his previously submitted PhD thesis out of the country.

In 2002, Iftikhar Gilani, a journalist with *Kashmiri Times*, was also prosecuted under the OSA for possessing sensitive materials, which turned out to be nothing more than a publicly distributed pamphlet by a Pakistan institution detailing Indian military deployments in Jammu and Kashmir. Similarly, in 2007, Maj. Gen. VK. Singh faced OSA allegations for publishing a book, 'India's External Intelligence,' that exposed corruption and negligence within RAW. Journalists frequently encounter threats and violence due to their investigative work.

The 2nd Administrative Reforms Commission, the Shourie Commission,¹⁴ and the Law Commission of India's 43rd Report on Offences against National Security in 1971 have repeatedly identified Section 5¹⁵ as a broadly applicable provision. Because the term 'secret'

¹³ *Central Board of Secondary Education and Anr v Aditya Bandopadhyay and Ors* (2011) 8 SCC 497

¹⁴ Shourie Committee, *Report of the working group, right to information and transparency* (1997)

¹⁵ The Official Secrets Act 1923, s 5

lacks a clear definition, virtually any material classed as such can be subject to this clause, allowing public officials to label anything they wish as 'secret.'¹⁶

RECENT CASE ANALYSIS

Badiul Alam Majumdar and Others v Information Commission and Ors (2017):¹⁷ Asserts that the fundamental right to freely disseminate and share information is integral to freedom of speech, necessitating protection under laws such as the Right to Information Act of 2009 (RTI Act). According to Section 3¹⁸ Of the RTI Act, in cases where it conflicts with other laws that hinder the right to information, the RTI Act prevails. This suggests that the right to information may supersede OSA regulations when they conflict with the public's right to know. The relevance of the OSA in the context of the RTI Act's enactment remains a point of debate.

R.S. Raghunath v State of Karnataka:¹⁹ The Indian Supreme Court ruled that when two laws conflict, the latter law nullifies the former if two criteria are satisfied: (i) the laws contradict each other, and (ii) the newer law specifically references the earlier one. Applying this principle may imply either that the two Acts are incompatible or that a stringent standard is imposed on violations of the OSA to avoid interfering with the right to information. The international principle indicates that disclosure is favoured, meaning any regulations that counteract the right to information must yield.

Asif Hussain v State:²⁰ The appellant, a Pakistani national residing in Kolkata, was accused of relaying crucial information about the Indian Army. The documents that were seized were reviewed and confirmed to be intended for limited and official purposes. The court convicted the appellant, sentencing him to nine years for breaching Section 3²¹ of the Official Secrets Act of 1923, along with four years and a \$10,000 fine for violating Section 474²² of the Indian Penal Code, with the sentences to be served concurrently.

¹⁶ Second Administrative Reforms Commission, *Report* (2005)

¹⁷ *Badiul Alam Majumdar and Ors v Information Commission and Ors* (2016) 8 SCOB HCD

¹⁸ The Official Secrets Act 1923, s 3

¹⁹ *R.S. Raghunath v State of Karnataka* (1991) 1 SCC 335

²⁰ *Asif Hussain v State* (2019) CrI App No 428/2017

²¹ *Ibid*

²² Indian Penal Code 1860, s 474

SUGGESTIONS

1. Moving forward, it is essential to repeal the OSA of 1923 and integrate its provisions into a consolidated National Security Act, as advocated by the Law Commission of India in its 43rd Report (1971), thereby establishing a comprehensive National Security Act.
2. Additionally, to reconcile public interest and official secrets within the proposed National Security Act, it is crucial to incorporate the damage test principles from the United Kingdom's OSA of 1989, transferring the burden of proof to the Government of India to demonstrate the harmful nature of any disclosures.
3. This approach will mitigate the harassment stemming from mere suspicion by the Government of India. Furthermore, a defense should be made available for the accused, allowing them to prove that, at the time of the alleged offense, they were unaware and had no reasonable basis to think that the information disclosed would jeopardize national security, as outlined in the UK's OSA of 1989.
4. A similar defense option should extend to proving that the information was communicated against the accused's intention, in line with Singapore's OSA of 1935. This will help eliminate wrongful communications and unwarranted prosecutions. Lastly, the RTI Act of 2005 and the new consolidated National Security Act must be structured to complement each other, preventing future conflicts.

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 primitive 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.²³ The classification of secret documents put forth by the Act has been in question it sometimes is considered that this Act is

²³ Annu Bahl Mehra and Suvesh Kumar, 'The Official Secrets Act, 1923: A Critical Review' (2023) 1 *Ishan Law Journal* <<https://law.ishan.ac/wp-content/uploads/2023/08/The-Official-Secrets-Act-1923-A-Critical-Review-1.pdf>> accessed 15 November 2024

just a way to stop the citizens from questioning the doings of the government. The Official Secret Act is considered to be violating the Right to Information. Even though precedents have shown the superiority of the RTI.²⁴ Changes to the OSA ought to point to harmonising its goals with the majority rule objectives of straightforwardness and responsibility. This may be accomplished by clearly characterizing the scope of what constitutes 'official insider facts' and joining shields to avoid abuse. Moreover, guaranteeing arrangement with universal best honours and India's protected standards will fortify its authenticity. This change should be brought out not only for national security but also to cultivate faith between the government and its citizens, leading to a more public policy and administrative framework. Addressing the absolute pressures between the OSA and RTI is fundamental to making a lawful administration that ensures both state interface and individual rights, guaranteeing an adjusted and advanced approach to mystery in an equitable society.

²⁴ Shoranya Banerjee, 'Official Secrets Act, 1923: a Critical analysis' (*iPleaders*, 10 January 2021) <<https://blog.iplayers.in/official-secrets-act-1923-critical-analysis/>> accessed 15 November 2024