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**“TRANSPARENCY, ACCOUNTABILITY AND THE STATE
SECURITY: EVALUATING THE STRAIN IN THE RTI ACT
2005, THE WHISTLE BLOWERS ACT, 2014 AND THE
OFFICER’S SECRET ACT, 1923”**

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ABSTRACT

Transparency and secrecy are prima facie contradictory principles of democratic governance. As one requires citizens right to know while the other protects information from disclosure. This further gets complicated when an insider tries to expose abuse of power, or other institutional wrongdoings.

In Indian legal system, legislations – The Officials Secret Act, 1923, the Right to Information Act, 2005 and the Whistleblowers Act, 2014 deals with secrecy, transparency and protection of whistleblowers respectively with each embodying different legislative intent. Where the Right to Information Act, 2005 aims to maximise the dissemination of information, on the other hand, the Officials Secret Act, 1923 empowers the government to classify any information as secret without subject to any exceptions, which may disguise disclosure of wrongful act as secrecy, and restrains transparency as intended under the RTI Act 2005. The Whistleblowers Act, 2014 tries to unravel the corruption and abuse of power prevailing in the public institutions with protecting the insider or the informant’s identity.

This essay aims to examines that whether these legislations can create a balance between protection of whistle blowers with guaranteeing state’s transparency and accountability while upholding state’s secrecy and security.

KEYWORDS:

Accountability, State Secrecy, National Security, Transparency, Whistleblower

INTRODUCTION

The Constitutionalism is anti-thesis of arbitrary political system, and as we know, India follows the principle of constitutionalism, it should promote a governance system based on public accountability where government's power is subject to scrutiny by the citizens. Therefore, access to information and right to know is vital for a constitutionally democratic state.

The Indian Constitution does not explicitly mention the expression 'right to know' a statutory or fundamental right. However, hon'ble Supreme Court through its judicial activism has considered it as one of the genus of specie of the rights provided under article 19(1)(a) of the Constitution of India. The hon'ble Court has recognized the citizens has "*the right to know about the policies and the functioning of the public officials*"¹ and expanded it to include open government.² And this later receive legislative recognition in the form of the Right to Information Act of 2005.

This Right to Information Act of 2005 entails that a constitutional democracy can be laid upon only through informed citizens and transparent state machinery which can be hold accountable and responsible for it actions. However, the rights guaranteed here are not absolute it is subject to certain restrictions, which the act recognized under section 8 of the Act itself. This is so, to maintain state's security and preserve national integrity and security.

Maintenance of secrecy is further upheld by statutory provisions provided under the Officials Secret Act, 1923 to protection the intelligence system, bureaucracy, espionage, research and defense system of the country.

The real debate arises when this right to know and access public record and information comes in conflict with official secrecy combined with the indication of possible abuse of power. Alongwith ensuring the protection that of a whistleblower and ensuring the secrecy of the legitimate information provided so as to not to risk national security. Therefore, the question arises that –

How should the legislative framework protect the legitimate State secret without letting secrecy to become an armor for state arbitrariness?

This article, thus, aim to evaluate and critically examine the fragmented laws and provide appropriate suggestions to draw harmony between whistle-blowing, access to information and state secrecy.

¹ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

² *SP Gupta v. Union of India*, AIR 1982 SC 149.

DEVELOPMENT – FROM SECRECY TO INFORMATION

The Officials Secret Act, 1923

The Officials Secret Act, 1923 replaced the prior Act of 1904 and extended the provisions of secrecy and confidentiality in the state's action. The Act was passed by the colonial government to prevent any scrutiny to their policies and functions.

However, the scenario changed with independence, as the commencement of the Indian Constitution subjected the State and state's action to judicial review, in case, if found, arbitrary or in contravention with the fundamental rights guaranteed under the Constitution of India.

But the Act continued to be in existence, and the contradiction comes in picture with the continued existence of this regime as it often comes in conflict with the inherent transparency and answerability of the democratic government as proliferated under the Constitution of Independent India.

The Right to Information Act, 2005

There is no expressed right to information or right to know under the constitution of India or any other law in India before 2005. The concept emerged through judicial activism, supported by the recommendation of National Advisory Council³ which provide assistance in the enactment of the Right to Information Act, 2005. The Act was intended to make the governance more transparent and provide citizens with the liberty to access to government records and information. But it is not absolute rather subject to certain exceptions as provided in the section 8 of the Act itself. This section in itself act in assistance for the Officials Secret Act, 1923.

The Whistleblowers Act, 2014

The legal genesis of the act was credited to public outcry which emerged in 2003 over killing of Satyendra Dubey, a project director with NHAI, who exposed the corruption brewing within the Golden Quadrilateral project. The Act was aimed at protect whistleblowers from victimization, coercion or intimidations, thereby fostering transparency and good governance. Though the act gets presidential assent on May 9th, 2014 and was notified in the official gazette on May 12th, 2014, yet it still not in force due inefficient and ineffective administrative action. This loophole is one of the foremost and fundamental apprehension of discourse which was examined in this essay.

³ The National Advisory Council, 2004.

THE CONSTITUTIONAL FRAMEWORK

The Right to Information

The Constitution of India is the grundnorm of the land and therefore provide legitimate basis for any right and their corresponding duties. The right to information is synonym with the right to know. However, one can observe that there is no expressed provision in the Constitution regarding the right to information or the right to know, but as the Apex court of the land has established, it is inherent in the **Article 19(1)(a)** the Constitution of India, which states that:

All citizens shall have the right of freedom of speech and expression

Though, the above expression does not voice for right to information or to know, but as stated earlier this Article includes in itself the right to access and receive information.

As the Hon'ble Supreme Court has recognised in the case of *State of UP versus Raj Narain*⁴, that *within the connotation of the freedom of speech and expression comprehends the rights of the citizens to know, the right to receive information about public acts and the action of the functionaries and the right to access public records*. In 1982, the Hon'ble Court has further broadened the perspective of the right to know in case of *SP Gupta versus Union of India*⁵, by emphasizing that the concept of open-government is a direct emanation from right to know which is implicit under the freedom of speech and expression of Article 19(1)(a) of the Constitution. The Hon'ble Court has identified a broad dimension by lying down the proposition in *CIC versus State of Manipur*⁶ freedom speech involves not only communication, but also the receipt of information, thus *being the two sides of the same coin*⁷. The Article 19(1)(a) is not the sole basis for the right to information, but is in consonance with other articles of the constitution, which are herein mentioned:

Article 14 – the article ensures equality before law. Acting as the cornerstone of the democracy, plays crucial in building a just and equitable society based on rule of law, and for this objective it grants power to question and scrutinize the action and policies of the government.

Article 21 – assures protection of life and personal liberty of an individual along with dignity. This article provide foundational basis for expeditious conveyance of information sought by any applicant where his personal liberty is at stake under the Right to Information Act, 2005.

Article 22 – this article further aids the provision of personal liberty and the expeditious disposal of applications under the Right to Information Act, 2005.

⁴ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

⁵ *SP Gupta v. Union of India*, AIR 1982 SC 149.

⁶ *CIC v. State of Manipur*, AIR 2012 SC 864.

⁷ AIR 2012 SC 864.

The Right to Privacy

The Right to Information and the Right to Privacy are the two sides of the same coin¹. While one facet, there is a fundamental right to receive information, on the other is that to safeguard the personal information of an individual. Despite being the part of same transaction, these two right often comes in conflict with each other. As when this privacy is coupled with secrecy it under mines the transparency and answerability of the State's action.

THE LEGISLATIVE FRAMEWORK

THE RIGHT TO INFORMATION ACT, 2005

The Act is called 'sunshine law' because it act as a source of optimism for activist and social workers and others by "*setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities*"⁸, in order to promote transparency and accountability in the working of every public authority⁹, the constitution of a suitable machinery for the same objective.¹⁰ This is centred to harmonise the conflicting interests while preserving the paramountcy of the democratic values.¹¹

The Act provides, all the citizens the statutory right to information¹² and imposes obligation of proactive disclosure¹³ on public authorities to form a strong transparency regime as well as to reduce the administrative burden, making public record easily accessible.

The Act ensure that there must be proper mechanism and body of individuals for enforcement and exercise of right granted under the statute within the limited time frame. It also, recognises expeditious bequest of information taking shift from general of 30 days to conveyance within 48 hours, in case where information concerns life of liberty of an individual.

However, this is not absolute it is subject to restrictions provided under Section 8 of the Act that is to protect information which could 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 offence¹⁴; or is expressly forbidden to be published by any court of law or tribunal¹⁵; or can lead to breach of parliamentary privilege¹⁶; or regarding a

⁸ The Right to Information Act, No. 22 OF 2005, INDIA CODE (2005), Preamble of the Act.

⁹ The Right to Information Act, No. 22 OF 2005, INDIA CODE (2005).

¹⁰ The Right to Information Act, No. 22 OF 2005, INDIA CODE (2005).

¹¹ The Right to Information Act, No. 22 OF 2005, INDIA CODE (2005).

¹² ACT No. 22 OF 2005, INDIA CODE (2005), Section 3.

¹³ ACT No. 22 OF 2005, INDIA CODE (2005), Section 4.

¹⁴ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(a).

¹⁵ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(b).

¹⁶ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(c).

person in his fiduciary relationship¹⁷; or of such a nature that its disclosure would endanger the life or physical safety of any person¹⁸; or can impede the process of investigation¹⁹; or cabinet papers²⁰.

The Act itself also proclaims that the Act will have ‘an overriding effect’²¹ over anything, if found, inconsistent with the Official Secrets Act, 1923²² and any other law²³.

THE WHISTLEBLOWERS ACT, 2014

The Origin and Objective

The legislation itself has trenchant journey of enactment as the legislature felt the need of such a law only after the murder of a project director associated with the National Highway Authority of India, named Satyendra Dubey, who tried to expose the corruption steeping in the Golden Quadrilateral Project.²⁴ The massive public outrage led the legislature to put the bill on the table before the parliament in 2011 (in the Lok Sabha) and received presidential assent on 9th May, 2014 and was published in the Official Gazette on 12th May, 2014.²⁵

The Act was aimed to enable the disclosures relating to corruption, abuse of power, criminal offences committed by and arbitrariness in action of the officials of the public authorities.

Non-enforcement of the Act

“No matter how noble the object of any legislation is, it is nothing more than a sheet of paper until it is brought into force” to attain its desired objective, same is the case with this legislation. The Act is skeleton without blood and skin, as soon after its publication in the Official Gazette of India, the Act went to dormant status as provisions under Section 1(3)²⁶ shall come into force with the notification Central Government in the Official Gazette²⁷ only. And the government made no such notification on the grounds that the Act needs further modification by way of amendment as it the disclosure raises concerns against the sovereignty, integrity and the security of India.

¹⁷ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(e).

¹⁸ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(g).

¹⁹ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(h).

²⁰ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8(i).

²¹ ACT No. 22 OF 2005, INDIA CODE (2005), Section 22.

²² The Official Secrets Act, No. 19 of 1923, INDIA CODE(1923).

²³ ACT No. 22 OF 2005, INDIA CODE (2005), Section 22.

²⁴ Behind Closed Doors: The Silent Revolution of Whistleblower Laws in India;

<https://www.vintagelegalvl.com/post/behind-closed-doors-the-silent-revolution-of-whistleblower-laws-in-india> .

²⁵ Parliament Question: Whistleblowers Protection Act, 2014, The Press Information Bureau, 11-12-2025.

²⁶ The Whistle Blowers Protection Act, NO 17 OF 2014, INDIA CODE(2014).

²⁷ ACT NO. 17 OF 2014, INDIA CODE (2014), Section 1(3).

Later, in 2015 an Amendment Bill²⁸ was brought which was passed by the Lok Sabha on 11th May, 2015 and the transmitted to the Rajya Sabha, but the bill has lapsed since dissolution of 16th Lok Sabha.²⁹

This is the real bone of contention because insider informant faces the risk and threats as their information concerns secret dealings with regard to public officials.

THE OFFICIAL SECRETS ACT, 1923

The Official Secrets Act, 1923 is a brainchild of Lord Curzon, enacted for facilitating the British governance apparatus. Even after independence, act as a blanket of protection to action of the government and of its unauthorised activity.

This Act has one particular legislative creativeness which is its both the greatest backing as well as the critical drawback is that the Act nowhere defines secrecy which provides immunity to the action of State machineries and public authorities.

The Section 3 of the Act, working as a shield dealing with the actions which can proved to be threat for nation security and hampers national integrity and disruption of socio-political fabric of the Country. As the section provides punitive measures for anyone who makes sketches, plots, or models in places related to defence and intelligence, or sensitive to national security, to be imprisoned up to 15 years.³⁰

Another provision of core relevance is Section 5 which states having secret codes or data in unauthorized places or manners that help enemies or harm India's sovereignty can be punished with jail and fines.³¹ It further provides that any other residuary action related to secret official information under Section 5 and breaches this provision are also forbidden and punishable.

The issue arises when it comes in conflict with the provisions of the RTI Act, 2005. Also, it is difficult to understand that why the Act remain in force, even if still is in force why has not been amended despite the recommendations and suggestion made by the Law Commission. Further, problem arises with the unauthorised communication with regard whistle-blowers and the Whistleblowers Act, 2014, especially with regard to Section 5 of the Act.

²⁸ The Whistle Blowers Protection(Amendment) Bill, 2015.

²⁹ Parliament Question: Whistleblowers Protection Act, 2014,The Press Information Bureau, 11-12-2025.

³⁰ The Officers Secret Act, 1923, INDIA CODE (1923), Section 3.

³¹ The Officers Secret Act, No. 19 of 1923, INDIA CODE(1923), Section 5.

JURISPRUDENTIAL ASPECT OF RIGHT TO INFORMATION ACT, 2005 & THE OFFICIAL SECRETS ACT, 1923

In the landmark case of **State of UP versus Raj Narain**³², the Hon'ble Court has recognised primarily and said that –

“Within the connotation of the freedom of speech and expression comprehends the rights of the citizens to know, the right to receive information about public acts³³ and the action of the functionaries and the right to access public records.”³⁴

Thus, the case laid the foundational basis of the right to know.

Then, the Hon'ble Court has further expanded the right to know in case of **SP Gupta v. Union of India**³⁵, by emphasizing that *“the concept of open-government is a direct emanation from right to know”³⁶* which is implicit under the freedom of speech and expression of Article 19(1)(a) of the Constitution. The court here made it clear that transparency under right to know is a general rule and that secrecy is an exception to the general rule. This landmark case made following points clear :

- i. Transparency is integral for functioning of democratic regime
- ii. Secrecy should be only allowed upon justified grounds
- iii. The ambit of Secrecy should not be developed too wide-ranging by the administrative institution to come in conflict with the constitutional commitment to open government.

In addition to recognising open government, the Hon'ble Court further emphasised upon the need of informed citizen and thus in the case of **Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal**³⁷, the Court reiterated the proposition alongwith adding that Article 19(1)(a) includes *“the right to acquire information and disseminate the same.”³⁸*

Following these development, subsequent development regarding the Right to Information Act has been made in **Central Board of Secondary Education v. Aditya Bandyopadhyay**³⁹, where the Court explained that the Act provides access to information, but does not require public authority to conduct search for the applicant that is the right is not unrestricted.⁴⁰ As in this

³² *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

³³ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

³⁴ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

³⁵ *SP Gupta v. Union of India*, AIR 1982 SC 149.

³⁶ *SP Gupta v. Union of India*, AIR 1982 SC 149.

³⁷ *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*, AIR 1995 SC 1236.

³⁸ *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*, AIR 1995 SC 1236.

³⁹ (2011)8 SCC 497.

⁴⁰ *Central Board of Secondary Education v. Aditya Bandyopadhyay*, (2011)8 SCC 497.

case examinee sought information from examining body, who is in fiduciary relationship with the examinee, not with regard to his writings but with regard to the marks awarded by the examiner, thus, exemption under Section is not available.⁴¹

Later the debate over right to information and right to privacy (or secrecy in the name of confidentiality) came for determination, in **CPIO, Supreme Court of India v. Subhash Chandra Agarwal**⁴², where the Hon'ble Court laid down the 'public interest test' to determine *whether the information sought is line with the object of the right to information act or is impinging upon the personal information or the right to privacy.*⁴³

Then, final seal of affirmation over the right to information was put by the 9- judges constitutional bench of **KS Puttaswamy v. Union of India**⁴⁴, where the bench overruled the verdict of MP Sharma⁴⁵ case of 1954. The Court unanimously agreed that right to privacy is a fundamental right guaranteed under Article 21 of the Constitution of India.⁴⁶ Further, Hon'ble Court laid down the 'test of proportionality' that is in the context of Article 21, "*any invasion of the privacy must be justified if it meet the three-fold requirements of legality, which postulates the existence of law, defined in terms of a legitimate aim, and proportionality which ensure a rational nexus between the objects and the means adopted to achieve them.*"⁴⁷

While above cases shows the interplay between the right to information and right to privacy (be a tool for confidentiality and secrecy). The herein mentioned cases tries to suggest the need for reform in the act to bring transparency and build public confidence. As in the case of journalist **Iftikhar Gilani 2002** and **Nambi Narayan case**⁴⁸ were both were made victim of the OSA's strict provisions, causing them loss of reputation and subjecting them to immense mental cruelty.

THE RIGHT TO INFORMATION ACT, 2005 & THE WHISTLE BLOWERS ACT, 2014

INTER-RELATIONSHIP

The Right to Information Act, 2005 and the Whistle Blowers Protection Act, 2014 shares two-fold relationship. Under the regime of the Right Information Act, 2005 the citizens exclusive

⁴¹ *Aditya Bandyopadhyay*, (2011)8 SCC 497.

⁴² AIR 2019 SC.

⁴³ *CPIO, Supreme Court of India v. Subhash Chandra Agarwal*, AIR 2019 SC.

⁴⁴ (2017) 10 SCC 1.

⁴⁵ *MP Sharma v. Satish Chandra*, AIR 1954 SC 300.

⁴⁶ *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴⁷ *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴⁸ *S. Nambi Narayan v. Siby Mathew & Ors.*, AIR 2018 SC 5112.

exercise the right to ask the government about its functioning, seeking public disclosure of State policies and its records, thereby holding the government contrivance accountable under recognised democratic transparency reign. On other hand, under the legislative dictate of the Whistle Blowers Protection Act, 2014 any insider's reports the wrongdoing of a public official, or sleaze or corruption going under the public authority, where confidentiality about the identity of the whistle-blower is maintained.

It is in contrast, in a sense that the Right Information Act, 2005 is for the citizens of India only and is primarily about disclosure either self-disclosure by the public authority or upon the application of the applicant. Meanwhile, the Whistle Blowers Protection Act, 2014 deals with any person who is a whistle-blower per se, and disclosure of information, here, remains confidential. Where accountability under the Right Information Act is ensured through asking questions and seeking information, while the Whistle Blowers Protection Act ensures accountability through protected but screened reporting of wrongs.

NEED OF PROTECTION TO WHISTLE BLOWING

The protection to whistle-blower is need to prevent him from being subject to retaliation. Such a person may face transfer, suspension, disciplinary action, professional isolation or oppression, threats or harassment, therefore, law must ensure such an anti-retaliation mechanism to ensure that the whistle-blower's life must not be affected or laden with menace.

The protection is needed because it involves disclosure of sensitive information, which if not handled properly will cause misbalance between disclosure in public interest and national security, giving licence to invade both – privacy and security.

THE INSTITUTIONAL CHALLENGES

The institutional framework of these acts seems effective and competent in itself for ensuring a better transparent and responsive democratic foundation of the socio-political setup of the country, but it suffers from considerable impediments and deficiencies. These are :

Balance between Public Disclosure and Protected Disclosure

It is upon the authorities to safeguard and guarantee sustain the balance between public disclosure and protected disclosure. That is to say, a whistle-blower does not always need to publish classified material, rather can make a confidential disclosure to an 'independent authority'. Then, such authority can determine that whether such information is genuine, whether it undermined national security and to what extent , and whether it can be brought

public domain. This comes with further question that who will guarantee the legitimacy of the decision of such 'independent authority'.

Confidentiality of Applicants

The effectiveness of the Right Information Act, 2005 depends upon how secure the identity of the applicants is, that whether they are able to seek information without intimidation.

Likewise, the implementation of the Whistle Blowers Protection Act, 2014 has to be compelled for protection of insider informant(the whistle-blowers) who is taking the menace to reveal wrong inside public and administrative institutions.

Delays

The information called upon by the applicant under the Right Information Act, 2005 often faces administrative delays which substantially reduces its significance as well as its relevance. For instance, if an activist or academician needed information which is of grant significance and is for greater public good but due to administrative delay it did not reach within time, thus such instance will reduce not only its relevance but may also loose is significance.

Inefficiency

Though institutional framework of the Right Information Act, 2005 seems almost perfect, but act not competent to deal with the loopholes created by the exemptions. This further becomes complex when accompanied by the wide ambit of 'secrecy' under the Official Secrets Act, 1923 giving public authority a chance to withhold information.

Further, the changes brought in the institutional structure of the Commission by the Right Information (Amendment) Act, 2019 raise concerns regarding independent nature and stable working of the commission.

Same is the case with the Whistle Blowers Protection Act, 2014 which was not eve brought to force on very apprehension of being in conflict with the integrity and security of the country.

Lack of Funds

The Right Information Act, 2005 will continue to suffer delays and inefficiency so long as the lack of financial backing will prevail there, as is observed with its institution like Information Commission that they lack staff and institutional resources. Also, the problem of resource diversion aid and provide a valid ground for overriding public interest.

THE CRITICAL ANALYSIS

THE RIGHT TO INFORMATION ACT, 2005

The Right Information Act, 2005 provide a comprehensive framework for promoting transparency, accountability and answerability of the State, through guaranteeing statutory

right to seek information from Public Information Officer. The Act to ensure non-interference of the State provides independent Information Commissions to look after the compliance with provisions of the Act, and imposes fines and penalties upon its officers for non-compliance. The sanctity of the Act is, further, insured by the overriding effect of the Act which originates from Section 22 of the Act, which substantially strengthens the legislative framework of the Act whenever it meets with inconsistencies of the other legislations.

Nevertheless, in practical aspect and with the present trend it is more like “a tiger without teeth” as is subject to statutory and institutional limitations, varying from administrative delays to inadequate staff and resources, and most critical to the argument – is the challenge to maintain the balance between these contradictory concepts, i.e., the right to information and the right to privacy. Also, the exemptions stated under section 8⁴⁹ adds to the deliberation of right to know over secrecy, as the section is used as tool to overrule the right to information and to withhold information beyond what is necessary.

THE WHISTLEBLOWERS ACT, 2014

The fundamental merit of the Whistle Blowers Act is that the legislation recognises not only the need to safeguard the individuals who make disclosures about corruption, misuse of power and wrongdoings, but also recognised these acts as a matter of significant public interest. The Act further seeks to establish a competent authority to deal with such disclosures and examining the disclosures and contemplate measures accordingly in compliance with the provisions of the Act.

The Act, at the same time, in present-day suffers the fundamental drawback of non-enforcement status. Despite, being passed from the table of the legislature, nothing has changed much for the legislation itself because in the present scenario it is still nothing more than stack of paper having no effect. The Act completely fails its objectives due to non-operationability. Also, the Act raise the question that who will guarantee the legitimacy of the decision of the ‘competent authority’.

THE OFFICIAL SECRETS ACT, 1923

The Official Secrets Act, 1923 is a British legislation which is still in existence till date this reflects that how relevant and significant the legislation is even today. The Act is still in force mainly because of it's the purpose as it serve that is to ensure the maintenance of security and integrity of the country under a framework addressing espionage, intelligence activities and unauthorised sensitive information which if disclosed can be threat to national security or

⁴⁹ ACT No. 22 OF 2005, INDIA CODE (2005), Section 8.

State's interest .

The Act has been severely criticised because it has become tool for government to escape public scrutiny. This may have a potential chilling effect on public officials, journalists, whistle-blowers and other persons seeking to disclose information concerning State's functioning. The Act has also been criticised for giving broad ambit to term 'secrecy'. Further, the legislation has insufficiently differentiated various categories of unauthorised disclosures. More integral to critique is the continued existence of the Act as the Act rises question of State's compatibility with respect to the principle of good governance under a democratic regime.

CENTRAL ARGUMENT – Secrecy Should Be Based on Actual Harm That Is Likely to Be Caused from Disclosure of Information?

The public authorities should not classify any information as secret merely because it may cause possible discomfiture or critic the competency of the State functionaries. The secrecy should indeed be maintained where the question of sovereignty and national security arises or for legitimate grounds, such as – the disclosure constituting contempt of court, trade secrets, person's fiduciary relationship, can endangers the life or physical safety of an individual, process of investigation or relating with cabinet papers, and so on.

However, it should not be made into general rule to conceal administrative failures, corruption, red-tapism or to avoid political inconvenience. Therefore, there should be 'reasonable restrictions'⁵⁰ upon right to information to protect the legitimate interest and prevent threat to State's security, but not more than that.

RECOMMENDATIONS

Harmonising Laws

The legislature should brought reforms to the prevailing laws which would balance transparency and secrecy, thereby sustaining public interest along with privacy. Also, by relying upon the suggestion of the Cabinet Secretariat Committee, 2015⁵¹ the adoption of a balanced approach is needed to harmonise privacy and transparency.

Adequacy and Autonomy

With the new amendment to the Act, there is possibility of potential executive influence. This needs to be kept in check. Also, the institution often lack staff and members, therefore it should be given proper funding and sufficient members for smooth functioning of the institution.

⁵⁰ The Constitution of India, NO. 1 OF 1950, INDIA CODE(1950), Art. 19(2).

⁵¹ The Cabinet Secretariat Committee, 2015.

Slumber machinery needs be awakened when comes to proactive disclosure

The problem of Section 4⁵² that it waits for application of the applicant for disclosure of information. The authorities and its officers need to actively disclose the information by themselves. Then only the Section can fulfil its intended objective.

To Amend and Reform the Official Secrets Act, 1923

The Official Secrets Act, 1923 needs to be re-examined in the light of democratic principles and the recommendation of Administrative Reforms Committee⁵³ and the Cabinet Secretariat Committee, 2015⁵⁴ (suggested for a balanced 'harmonious construction' of both legislations related to secrecy and transparency regime respectively)⁵⁵. The legislation should transform to clearly demarcate between espionage, unlawful disclosure and genuine whistle-blowing. The restriction should not be based merely on the ground of secrecy, rather on some justified grounds.

Bring The Protective Legislation into Force

The first and foremost significant recommendation towards bringing the protection regime into the country is to do all that is necessary to bring the Whistle Blowers Act, 2014 in operation by the Union legislature with due consideration to the required amendments in the Act.

Creation Of Independent Mechanism for Handling Information

Also, under the Whistle Blowers Act, 2014, there should be provision for an autonomous machinery for receiving and the information, to determine that whether the disclosure of information can cause threat to national security. This mechanism should be made such that it allows alleged information to be investigated first without requiring public disclosure of classified information. This can be one of the best ways to ensure national security as well as institutional accountability.

Further, such institution should be vested institutional independence backed by financial resources coming independent from political winds blowing in the country as well as transparent method of appointment of members of such body. Also, the institution must be aided with adequate powers and effective confidentiality safeguards. But an appropriate mechanism of parliamentary oversight should be there to ensure accountability without compromising with autonomy of the institution.

Introduction Of Expressed Provision of Public-Interest as Defence Under the Whistle Blowers Regime

⁵² ACT No. 22 OF 2005, INDIA CODE (2005), Section 4.

⁵³ The Second Administrative Reforms Committee, 2006.

⁵⁴ The Cabinet Secretariat Committee, 2015.

⁵⁵ The Cabinet Secretariat Committee Report, June 16 2017.

There should be provision to ensure that protection should be there, when the person had reasonable grounds to believe that the wrongdoing had occurred and he acted in good faith, and thus, made a proportionate disclosure. Where an authorised reporting mechanism is judiciously available, the whistle-blower should ordinarily be expected to use such mechanism before making the information public.

CONCLUSION

Hence in a nutshell, the legislature should adopt a balanced approach to deal with the contrast created by the Right Information Act, 2005, the Whistle Blowers Act, 2014 and the Official Secrets Act, 1923, this balanced approach can be put into action through following procedures:—

- Classifying the information and determining that whether it requires protection from public disclosure
- Then, it has to be identified the actual harm it can cause or likely to cause and the extent of such harm
- Further, the disclosures by an insider should be kept confidential and is to be handled by autonomous independent body with adequate powers and effective confidentiality safeguards
- Then, such autonomous body should do investigation with regard to the information received while maintaining confidentiality
- The meticulous disclosure of information should be made that is categorising information which is needed for disclosure of wrongdoings and which is not
- Also, a public interest review should be undertaken to determine the public interest disclosure outweighs the legitimate secrecy of records or information
- There should be periodic declassification of the information and public records when they upon the legitimate justification need no longer continued to be in the ambit of secret or sensitive information

Thus, such framework might help in maintain an equilibrium between national security, privacy and transparency.

ⁱ Ambedkar University Delhi on 2019-04-17.