RIGHT TO INFORMATION VERSUS THE PROTECTION OF SECRECY – A CRITICAL STUDY

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Abstract: ***In India, the policy makers of the country have realized the importance of the right of the Indian citizens to seek information and the corresponding duty of the public authorities to make available the said information. The Right to information Act, 2005 has been enacted in that perspective. Right to Information Act is a social legislation to enable every citizen of the country to obtain information from the public bodies as a matter of right thus facilitated the common man to obtain information from the government agencies, thereby bringing transparency in governance and checkmate to corruption.***

However the concept of right to know, a valuable right in a democratic system, has been considerably narrowed down in our country. There is no dearth of instances where in the guise of secrecy and confidentiality, the government in order to save itself from embarrassment and public criticism, does not disclose the important information even when public interest demands their disclosure or access to such information. The Official Secrets Act, 1923 as a whole tends to cover even those governmental activities which are enmeshed in corruption, malafides and unlawful private gains. It is therefore essential that the Act should be suitably amended so that the concept of open government is duly promoted and in-roads in vigorous check on the abuse or misuse of power by the government are removed.

Key Words: Corruption, public interest, right to know, secrecy, transparency.

INTRODUCTION

The Government has a privilege not to produce its unpublished records in courts. **Section 123 of the Indian Evidence Act, 1872** provides*:"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of the state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit"*

This provision gives a great advantage to the government in any litigation between it and any private person for it can withhold a document which may be material and relevant to the case. If the Government is allowed to exercise unchecked its privilege to withhold documents from the courts in the name of secrecy, security or national interest, then it is possible for it to use this power to serve its own ends, e.g.to defeat even the legitimate claims of the other party, or to avoid adverse impact on itself, its ministers or the departmental heads. The Government can successfully thwart any judicial attempt to locate any flaw in its decision making and the person seeking relief through court action against an administrative action may be defeated in his claim as he may find it extremely difficult to prove his case. The term "affairs of the state" in Section 123 is very wide in its amplitude and could cover even business activities of the state in day to day routine administration as also highly confidential matters pertaining to defence, foreign affairs, cabinet minutes, etc.[1]

In the **State of Bihar v. Kasturbhai Lalbhai**[2], the Patna High Court explained that the expression **"affairs of the state"** would mean matters of **"a public nature"** with which the State is concerned or the disclosure of which will be prejudicial to public service. When the state is a party to the litigation and the documents relate to commercial or contractual activities of the state, privilege can be claimed in respect of such documents. The expression **"affairs of the state"** is imprecise. The only justification for the exercise of such a privilege may be public interest, i.e. when the public interest served by disclosure is outweighed by the public interest served by non-disclosure of the document in question.

A valid claim for the privilege under Section 123 proceeds on the basis that the production of an unpublished record would cause injury to public interest , and that, where a conflict arises between public and private interest, the latter must yield to the former. But care has to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of section 123. The question of disclosure of documents in courts is also related to the promotion of the ideal of open government.

In the **State of Punjab v. Sodhi Sukhdev Singh**[3]**,** the Respondent who was a district and sessions judge in a state was removed from service. He made a representation against his removal. The Council of Ministers secured the advice of the Public Service Commission and thereafter decided to re-employ him in some suitable post. He filed a suit challenging his removal from service. He wanted certain documents to be produced in the court and the state claimed privilege in respect of them.

The Court came to the conclusion that it:
"cannot hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production and that necessarily involves an enquiry in to the question as to whether the evidence relates to an affair of State under Section 123 or not"

[2]AIR 1978 Pat 78.
[3]AIR 1961 SC 493.

The Supreme Court gave a liberal interpretation to the governmental privilege of withholding documents from the court. It ruled that the concerned court could not inspect the document having reference to matters of state, but it could take other evidence to determine the validity of the objection against its production. The Power of the court was confined to determining whether the document in question related to the affairs of the state. The decision rested entirely with the court. The Court could not hold an inquiry in to the probable injury to public interest which might result from the disclosure of the document. This was a matter for the concerned authority to decide. The Court could not take any evidence as to the contents of the document.

Further in this case the court accepted the **'class doctrine'**. i.e., that there could be a class of documents which could claim privilege *"not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candor of expression of opinion in the determination and execution of public policies".* On this basis it was held that the minutes of discussion amongst the members of the Council of Ministers could not be required to be produced in the courts. Art. 163(3) of the Constitution was also invoked for the purpose.[4]

The Class doctrine was applied by the Court in several cases. Thus administrative instructions and guidance notes secretly give to various authorities at different levels and subordinate officers in the departments were field to be privileged as being documents relating to "affairs of state" under Section 123 of the Evidence Act. The view was taken that officers were entitled to such advice and instructions from time to time in dealing with matters involving law and order and discipline in the department. This was upheld in the case of **S.K.Neogi v. Union of India**[5]

A landmark judgement was delivered by the Supreme Court in the case of **State of Uttar Pradesh v. Raj Narain**[6].In this case the Hon'ble Supreme Court reinterpreted **Section 123**, which is an antiquated provision, so as to bring the Indian law in line with the modern judicial thinking in England and to curtail somewhat the government's privilege not to produce documents in courts. The Court thus made some contribution towards the promotion of the ideal of open government. In this case, the controversy arose out of a claim of privilege by the Uttar Pradesh Government in respect of the Blue book – a booklet issued by the Central Government containing rules and instructions for the security of the Prime Minister while on tour and travel.

The Allahabad High Court had rejected the claim for privilege on the ground that since a portion of the document had already been divulged in the Lok Sabha, it ceased to be an unpublished document and so no privilege could be claimed in respect thereof. On appeal, the Supreme Court reversed the Allahabad judgment and laid down certain propositions in respect of the privilege in question. Five main strands of thought rum through the Supreme Court opinion.

First, the Court clarified that the basis of the privilege was injury to public interest, i.e., the disclosure of certain documents might injure public interest. Public interest demanding that evidence be withheld is to be weighed against the public interest in the administration of justice that the court should have the fullest possible access to all relevant materials. When the former outweighs the latter, the evidence cannot be admitted. Therefore, a court should propriomotu exclude evidence, the production of which would be against public interest. It is in public interest to safeguard the confidentiality though it is not a head of privilege by itself.

Second, the Court accepted the principle of immunity of documents on the basis of **'class'**. The Court said in this connection: *"Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demands protection……".* To illustrate, the class of documents would embrace Cabinet papers, Foreign office dispatches, Papers regarding the security of the State and high level inter departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld.

Third, the court has accepted the principle that the affidavit claiming the privilege in respect of a document is not conclusive and that if the court is not satisfied with the affidavit that the document needs to be protected in public interest from production in court, it has the power to inspect the document to satisfy itself whether or not it requires protection. Usually an objection to the production of a document is raised by an affidavit affirmed by the head of the department.

Fourth, a claim to the production of the document cannot be rejected merely on the ground that the affidavit is defective. If the affidavit is found o be defective the court may provide an opportunity to file a better affidavit.

Fifth, the publication of a part of the document does not render the rest of the document unfit for protection. The rest of the document does not become unpublished. The Court has held that "any publication of the parts of the blue book which may be described as innocuous part of the document will not render the entire document a published one". When an innocuous part of a document is ordered to be produced, the court would seal up the other parts regarded as noxious because their disclosure would be undesirable.

Another important case worth to be taken note of is **S.P.Gupta v. President of India**[7].In the appointment of an additional judge, and in his continuance after the initial two year period, the Chief Justice of the respective High Court and the Chief Justice of the Supreme Court have to be consulted by the Law Minister of the Government of India. The question in the instant case was whether the correspondence between the Law Minister and these Chief Justices ought to be produced in the Supreme Court so as to enable the court to judge the question of the validity of the non-continuation of an additional judge in the Delhi High Court. The Government opposed the production of these reports. But the Hon'ble Supreme Court ruled otherwise and ordered the production of the documents.

[4]Art.163(3) runs as follows: *"the question as to whether any, and if so what advice was tendered by the ministers to the Governor shall not be inquired into any court".*
[5]AIR 1970 A&N 131.
[6]AIR 1975 SC 865.
[7]AIR 1982 SC 149.

Bhagwati J. Observed:

" The basic question to which the court would therefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to affairs of the state or in other words, it is of such a character that its disclosure would be against the interest of the state or the public service and if so, whether, the public interest in its non disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account, it should not be allowed to be disclosed. The final decision in the validity of the objection against disclosure raised under Section 123 would always be with the court by reason of Section 162".

In giving a new orientation to the statutory provision (Section 123 of the Evidence Act) Bhagwati J. emphasised that **"where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government."**

Article 74(2) [as well as Art.163(3)] prohibits a court from enquiring in to what advice was tendered by Ministers to the President [or the Governor]. How far this constitutional provision protects document from being disclosed? Bhagwati J. considered this question in the Judges case. He gave a restrictive scope to the exemption under Art.74(2). His opinion was that it protects only the advice tendered by the Minister to the President, but the material on which the "advice" is based cannot be said to for part of their advice. Thus in the matter of the non-appointment of an additional justice, the correspondence beween the high functionaries involved which constituted the basis of the Government's decision, did not come within the purview of Art.74(2). The views expressed by the two Chief Justices preceeded the formation of the advice by the Council of Ministers. The Court disagreed with its earlier ruling in Sukhdev's case that the report of the Public Service Commission on the basis of which the Council of Ministers advised the Governor to remove a Government servant from service was privileged from being produced before a court because of Art.163(3).

RTI VERSUS THE RIGHT TO SECRECY

During the British period, the freedom of speech and expression was very restricted. There was censorship on press and earlier permission was required to print any news. The Common man could not know the internal day-to-day happenings of the government and administration. Further the Englishmen had enacted an Official Secrets Act in the year 1923 by virtue of which the right to information was denied to the people.

THE INDIAN OFFICIAL SECRETS ACT, 1923

The Indian Official Secrets Bill having been passed by the legislature received its assent on 2nd April, 1923. It came on the statute book as the Indian Official Secrets Act, 1923. This Act deals with two aspects:

- **Espionage or Spying Activity [dealt under Section 3];**
- **Disclosure of other secret official information [dealt under Section 5].**

Section 3 of the Act prohibits approaching, inspecting, passing over or entering in the vicinity of a prohibited place. Further under the Act, it is also an offence to obtain, collect record, publish or communicate to any other person these items or any **"other document or information which calculated to be or might be or is intended to be, directly, useful to an enemy or which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with Foreign State".**

The basic premise of the section is that even if the case against the accused is not proved, **"his conduct or known character as proved"** could create a presumption that his action was prejudicial to the safety or interest of the state.

THE SECRET INFORMATION

The official information covered by the section 3 of the Act is also extremely broad. Any kind of information is covered provided it is "secret". This includes any official code, pass word, sketch, plan, model, article, note, document or information. The only qualification is that it should be "secret". However, one thing is clear: The Act extends only to official secrets and not to secrets of a private nature. Thus, the Act extends to secrets of a ministry or department of the government, but not to an incorporated body like a university, government company or public corporation.

In the absence of any definition in the Act, it is for the government to decide what it should treat as secret and what not. But does the government have an unquestioned right to decide what information it would classify as secret and so keep it away from the public? Will any information classified as secret be "official secrets" and would be caught by the Act? It appears that the government does not seem to be the sole judge of the matter and that the courts can review the decision of the government. The practice of government is to treat an information secret, even though there may be no danger to national security or public safety or any other public interest, merely because it may embarrass the government, that is, the political party in power.

However **Section 5** is the catch all provision. It relates to the willful communication, uses, retention or failure to take reasonable care of all information which has been entrusted in confidence to him by any person holding office, or which he has obtained or which he has had access owing to his position. Further, the voluntary reception, possession or control of any such information is also an offence, if there is knowledge or reasonable cause to believe that such information is communicated in contravention of the Act under Section 5(2) of the Act.

In the case of **R.K.Karanjia v. Emperor**[8]**,** it was held that an article published by the newspaper Blitz to send official secrets to the editor for which a lavish payment was promised would fall under Section 5(1) of the Official Secrets Act. The court said that the expression **"official secrets"** was nowhere defined, "but looking to purpose and scheme of the Official Secrets Act, especially Sections 3 to 10, which create offences against the government for publication of official secrets, they have all reference to secrets of one or the other department of Government or the State and not to any secret of a private office".

A Secret pertaining to any private office, e.g., University or a corporation, would not be called an official secret. The court refused to accept the contention that the term "official secret" used in the said article included secrets of any private institution. Referring to S. 5(1) of the Official Secrets Act, the court characterised the provision as "very comprehensive in its nature" and "it applies not merely to Government servants but also to all persons who have obtained that secret in contravention of this Act."

The invitation to the public to send official secrets would fall under S.5 (1) as *"it is really an invitation encouraging or inciting any person to commit an offence."* The court said that it was not concerned with the intention or the motive underlying the article in question *"but only with the direct or indirect tendency of the words used in the article itself,"* and in the court's opinion that tendency was "to encourage or incite any person to commit an offence".

Similarly in the case of **State v. K.Balakrishna**[9], certain parts of the budget were published in the newspaper before the presentation of the budget. It was held that the budget being a secret document of the government, the reception and publication thereof would fall within the mischief of Section 5(2) and Section 5(1)(b) of the Official Secrets Act, 1923. The Court has held that it was not a "mere technical offence" but "a serious offence which has far reaching consequences and repercussions on the economy of the state"

Further in **Nandalal More v. The State**[10]**,** the Punjab High Court considered the question of the premature leakage of budget information. This was held to be an offence under the Official Secrets Act. The court rejected the argument that the Budget proposals cannot be regarded as "official secrets" as they have to be made public after some time. According to the court, **"the fact that on a subsequent date the budget proposals have to be made public would not detract from the secrecy of those proposals till such time as they are announced in Parliament."**

DISCLOSURE OF SECRET GOVERNMENT INFORMATION

A literal reading of Section 5 indicates that disclosure of any kind of secret information will attract prosecution under the Act whatever be the purpose or its impact. Even if disclosure is justified in public interest the person or persons concerned will be liable to an action under the Act. Section 5(1)(a) uses blanket language by making punishable "wilful communication" of any official secret to any person, other than a person to whom he is authorized 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. There are no exceptions like communication in public interest, etc.

Everything is punishable whether national security or any other interest worth protecting is endangered or not. The section gives ***carte blanche*** to the executive to prosecute anyone disclosing official information or, as per S.5(2), any person voluntarily receiving such information knowing or having reasonable ground to believe that such information is being provided to him in contravention of the Act.

These provisions are harsh and the only redeeming feature is that mensrea, or the mental element, is the necessary ingredient of an offence under the provisions, for the words used are "willfully" "voluntarily," "knowing" or "having reasonable ground to believe." Thus a mere "leak", unless it was intentional or willful, will not be covered by the Act. The burden is on the government to prove mensrea as in the case of any other offence. In a department where a matter or an information is handled by different persons it may be difficult to prove mensrea or fix responsibility on any one for the leakage. This does provide some kind of safeguard to an individual against the harshness of the law.

PUNISHMENT UNDER SECTION 5 OF THE ACT

The Act by itself does not classify punishments according to the degree or the nature of harm caused by the disclosure of secret information. There is a blanket provision which says that a person guilty of an offence under the section shall be punishable with imprisonment which may extend to three years, or with fine, or with both. Thus, it is a matter of judicial discretion to fix punishment in an individual case, subject to the maximum laid down in the section, keeping in view the circumstances of the case and the degree of harm caused to the nation. According to **Section 13(3)** of the Official Secrets Act, no court can take cognizance of any offence under the Act unless upon complaint made by order of, or under authority from, the appropriate government or some officer empowered by the appropriate government in this behalf. This executive control over prosecutions under the Act makes such a drastic law tolerable in practice.

In the context of the Official Secrets Act, 1923 all information that relates to the works of the Government is critical information that should be treated according to the privacy principles to ensure that the Government does not use the provisions of the Act to be nontransparent to the citizens while at the same time the privacy of sensitive governmental information is protected. Because the Act speaks to the protection of governmental secrets the principles of notice, choice and consent, and collection limitation will not fully apply.

[8]AIR 1946 Bom.322
[9]AIR 1961 Ker 25.
[10](1965) Cr.LJ 392 (Pb.).

CONCLUSION AND SUGGESTION

The Act currently only has provisions which speak to the principles of purpose limitation and disclosure to third parties. The Act only allows officers above the rank of Sub-divisional Magistrate to issue search warrants, and only allows police officers above the rank of inspector to demand information from persons. The Government could appoint an independent overseeing body to oversee what information is being labeled as an **'official secret'** and subsequently not disclosed. Further to strengthen the principle of purpose limitation, the Act could require that all information determined to be a governmental secret, must be relevant and intended for a stated purpose. The Act could also require that all official secrets be anonymized and made public after a certain period of time has passed and their purpose has been served.

Further the Government should take all measures to ensure the security of data considered to be an **'official secret'** or **'secret document'** to protect against loss, unauthorized access, destruction, use, processing, storage, modification, and unauthorized disclosure. Also the Government could take all steps possible to implement practices, procedures, policies, and systems in a manner proportional to the scale, scope, and sensitivity of information that is not allowed to be disclosed to the public. Information regarding these steps should be made available to the public in an intelligible form, using clear and plain language. Conflicting with the principle of openness is the current provision in the Act which allows a court order for exclusion of the public from any proceedings under the Act on the grounds that any publication of evidence or any statement would be prejudicial to the safety of the State.[11] It is therefore essential that the Act should be suitably amended so that the concept of open government is duly promoted and in-roads in vigorous check on the abuse or misuse of power by the government are removed.

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[11]The Official Secrets Act, 1923; s. 14.