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An Analysis of The Conflict between the Right to Information Act 2005 and Official Secrets Act 1923 in India

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Abstract

The 2019 Rafale deal case facilitated the reemergence of an old debate between official secrecy and transparency, which now invites more scholarship with the introduction of the Right to Information Act (RTI Act 2005). The legislation intends to maximise the dissemination of information kept by public authorities, with only limited exceptions where it can be withheld. With such a profound impact on how information should be handled by public authorities, the governmental obsession with the colonial Official Secrets Act 1923 (OSA 1923) attracts scrutiny. Unlike the RTI Act 2005, which streamlines the framework on what and how information with the government can be made available, the OSA 1923, which is concerned with the regulation of official secrets in the country, is silent on the limits of withholding. Under the colonial framework, the government is empowered to classify without exception, criminalise any wrongful disclosure (sensitive or not), and minimise transparency otherwise aimed at under the RTI Act 2005. It is time that the OSA 1923 is harmonised with the RTI Act 2005, with its glaring inconsistencies. In this paper, the author argues that the OSA 1923 has become obsolete and should be harmonised with the RTI Act 2005 to prevent the dilution of the latter.

Keywords: Confidential Information, Freedom of Speech & Expression, Public interest, Section 8 of the RTI Act 2005, Whistleblower

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1. Introduction

In 2019, the Supreme Court of India made a notable observation in the high-profile *Rafale* case.[1] While discussing the importance of good governance in India, the Apex Court stated that the enactment of the Right To Information Act 2005 (RTI 2005)[2] ushered in a transformative era for access to information, as envisaged under Article 19 (1)(a).[3] In very categorical terms, Justice K.M. Joseph said that the RTI Act 2005 overrides the Official Secrets Act 1923 (OSA 1923) which had an imperial origin.[4] He observed that the OSA 1923 cannot hinder access to information if the public interest in disclosure outweighs the harm to the protected interests of the state.[5][6] This, in itself, was a landmark statement reiterating the law of the land as it stands and taking a step toward resolving a conflict that has existed for long.

The right to information is a fundamental right implicit in the right of speech and expression. Since it emerged as a right in the *Raj Narain*[7] case, the Supreme Court and the High Courts have developed jurisprudence supporting or defending in light of accountability and transparency in state functions. However, the courts have been cautious of the limitations on the rights found in the *Sanctum Sanctorum* Part III of the Constitution,[8]. In effect, Article 19(1)(a), from which the right to information flows, comes with its limitations or 'reasonable restrictions'[9] as the text shows. As a matter of law, the concept of 'reasonableness' has acquired a constitutional status, with the Supreme Court calling it a golden thread which runs

[1] Yashwant Sinha v. CBI, (2019) 6 SCC 1 (India).
[2] Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).
[3] INDIA CONST. art. 19, § 1, cl. a.
[4] Official Secrets Act, 1923 (India);
[5] *Id.*
[6] Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi And Another, 2013 AD SC 1 364 (India); Anuradha Bhasin v. Union Of India And Others, 2020 AIR SC 1308 (India); Association For Democratic Reforms v. Union Of India, 2024 SCC ONLINE SC 150 (India); K.S. Puttaswamy And Another v. Union Of India And Others, 2017 AIR SC 4161 (India).
[7] State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).
[8] *Id.*
[9] State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).

through the whole of the fabric of the Constitution.[10] Part III is not an invincible domain of individual liberties and may be subject to restrictions so long as the test of reasonableness is satisfied. The constitutional scheme is to devise an equilibrium, or as some scholars prefer to call it, a trade-off,[11] between state interests and individual interests in a polity. These 'reasonable restrictions' [12] under Article 19 (2) are an imperative limitation on the potentially dangerous territories of the fundamental rights, which can significantly impact the administration of state affairs. However, the problem lies in the abuse of this exception, perpetuating arbitrary and discriminatory state actions through a series of tools. One such tool in the hands of the State is the OSA 1923, whose form and substance have become outdated and stand in contradiction with the right to information, whose statutory expression can be located in the RTI Act 2005.[13]

The OSA 1923 is a colonial legislation that resonates with the post-independence information-centric modern era. The Act imposes a blanket prohibition on disclosing state secrets to unauthorised persons, with disproportionate penalties for offenders. It was instrumental in facilitating oppressive policies against the Press and the general public. The overarching scheme of the Act is to impose punitive constraints on public officials in their dealings with one another and with the public on matters of governmental affairs. Consequently, it creates a sweeping formula that criminalises the transmission and reception of any information deemed secret, regardless of its content or the public interest in disclosure, placing the burden of proof on the accused. [14]Understandably, the thematic purpose of the law is to prioritise governmental confidentiality over individual liberties and state accountability.

Considering the two legislations together, it is palpable that the former incorporates a framework that is mindful of the two divergent public interests involved in information and its

[10]Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722 (India).
[11]LAWRENCE QUILL, SECRETS AND DEMOCRACY 64 (Palgrave Macmillan 2014).
[12]INDIA CONST. art. 19, § 2,
[13]M. Nagaraj v. Union of India, (2006) 8 SCC 212 (India).
[14] Official Secrets Act, 1923, § 5, No. 19, Acts of Parliament, 1923 (India); Official Secrets Act, 1923, § 5 (1), No. 19, Acts of Parliament, 1923 (India).

disclosure—the public interest in disclosure and the public interest in upholding the protected interests of the State. The RTI Act acknowledges the long-standing judicial and civil society legacy of access to information subject to very limited exceptions. However, the latter remains unaltered and reinforces the colonial mindset set in scepticism, mistrust, and fear of speech and expression. Without offering any definite framework of how the government can enforce secrecy in governmental affairs, Section 5 of the Act expands the scope of bureaucratic control over governmental information, which otherwise could be or should be made available to the public, whether through RTI activists, journalists, or whistleblowers.[15] For the RTI Act 2005 to operate effectively, the OSA 1923 must be amended to establish a transparent framework concerning bureaucratic secrecy, which aligns with the requirements of the right to information. This is consistent with numerous judicial precedents regarding the right to information, governmental confidentiality, and the tensions between them. Whether addressing the authenticity of an abridged report presented to Parliament[16] or the live-streaming and video recording of court proceedings[17], emphasis has been placed on the urgency of ensuring transparency, accountability, predictability and participation[18] for good governance through the limited restriction of information from public access. As Dennis Thompson remarks, official secrecy *per se* is not antithetical to democratic values; it is the degree to which it is exercised that determines whether it is or not.[19]

Reaffirming Dennis Thompson's theoretical statement on the place of secrecy in democracy, the author shall present her arguments in favour of harmonisation of the two laws, which have been rendered incompatible due to faulty legislative design in one. In the case of OSA 1923, however, Section 5 shall be the highlight, as it concerns disclosures other than those aimed at prejudicing the

[15] Official Secrets Act, 1923, § 5 (2), No. 19, Acts of Parliament, 1923 (India); Official Secrets Act, 1923, § 5 (1), No. 19, Acts of Parliament, 1923 (India).

[16]Shri Dinesh Trivedi, MP v. Union of India, AIRONLINE 1997 SC 304(India).

[17]Swapnil Tripathi v. Supreme Court of India, Writ Petition (Civil) 1232/2017)(India).

[18]SECOND ADMINISTRATIVE REFORMS COMMISSION, RIGHT TO INFORMATION: MASTER KEY TO GOOD GOVERNANCE 1 (2006).

[19]Dennis F. Thompson, Democratic Secrecy 114 POL. SCI. QUART., 182 (1999).

interests of the state and which covers any wrongful information within the government and beyond. This paper is aimed at highlighting the major inconsistencies in OSA 1923 from the perspective of the RTI Act 2005. The RTI Act 2005 is not flawless. However, it provides an inspirational framework for the OSA 1923 so that democratic governments cannot claim a monopoly on information unless there are legitimate but limited reasons attached to such non-disclosure. sssin provisions under the Act, particularly Sections 8 and 24, recognise the protected interests of the state. However, they do not offer an absolute exemption from certain disclosures. That said, the all-encompassing purview of the OSA 1923, marked by ambiguous and undefined words, facilitates unreasonable classification of governmental information and obstructs the enforcement of the RTI Act 2005.

2. The Right to Information: Evolution and Legislative Impact in India

2.1. Overview

The Constitution of India is the grundnorm in India, with far-reaching implications on the political, economic, socio-cultural, and legal aspects of the country. The intention had been to galvanise the growth of an organic ecosystem for citizens, which emphasised immensely, *inter alia*, the sanctity of fundamental rights. This was and still is of critical importance to allow individuals, particularly from minority or socio-economic weaker sections, to seek accountability from the government and foster capacity-building.[20] Part III assembled in one place all the rights that had been historically denied but were naturally implicit in the course of human development. The right to speech and expression occupies a multi-faceted reputation, one of whose core facets is the right to information. This interpretative exercise reaffirmed the enduring principle that an informed citizenry and accountable government[21]

[20]Dennis F. Thompson, Democratic Secrecy 114 POL. SCI. QUART., 182 (1999).
[21]*The Gettysburg Address*, ABRAHAM LINCOLN ONLINE, https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

are core to a democratic framework as manifested in "the government *of* the people, by the people, for the people".[22]

Article 19 (1)(a) of the Constitution guarantees the freedom of speech and expression to citizens. This fundamental right, similar to others in Part III, is guaranteed against the State as per Article 12.[23] Freedom of speech and expression is the matrix [24] and is the wellspring of the civilisation, without it the liberty of thought would shrivel.[25] An open government with fewer limitations is a legitimate expectation in a democracy. This is very well reflected in a landmark dissenting opinion in *Abrams v. United States*. [26] Justice Oliver Wendell Holmes treated free speech as a never-ending endeavour in a democracy. In this case, while the court upheld the convictions of the petitioners under the Espionage Act 1917, [27] he categorically supported the view that free speech remains unrestrained unless it presents danger of immediate evil or an intent to bring it about.[28] He was not the first to advocate free speech, but his observations were impressionable upon fledgling democracies.

The interpretation eventually echoed in Indian jurisprudence. Over time, the jurisprudence on freedom of speech and expression has evolved and branched out. One of the milestone interpretations has been the inclusion of the right to information in the 1975 State *of U.P. v. Raj Narain*[29]case, in which the Supreme Court upheld the role of the right to access information from public officials as a chief safeguard against oppression and corruption. [30] Following this landmark ruling, a series of judgments began the process of consolidating the jurisprudence on the right to information including *Bennett Coleman & Co. v. Union of India*[31]and*SP Gupta v.*

[22]supra note 21
[23]Rajasthan State Electricity Board v. Mohanlal, 1967 AIR 1857(India).
[24]Maqbool Fida Husain v. Raj Kumar Pandey, 2008 Cri LJ 4107: (2008) 2 CCR 392(India).
[25]*Id.*
[26]Abrams v. United States,250 US 616 (1919) (US) (India).
[27]*Id.*
[28]Abrams v. United States, 250 US 616 (1919) (US) (India).
[29]State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).
[30]*Id.*
[31]Bennett Coleman & Co. v. Union of India, 1973 AIR 106.

Union of India,[32]which ultimately gave impetus to the campaign for a national law on the right to information that eventually became, following several intervening movements and incidents, the RTI Act 2005.

This was long pending in the context of similar operational international documents and laws across various jurisdictions. There is an international consensus reflected in Article 19 of the Universal Declaration of Human Rights[33], which includes, *inter alia*, the right to seek, receive and impart information and ideas through any media and regardless of frontiers[34] in the ambit of the broad-ranging freedom of opinion and expression. Even before the proclamation of this declaration, the United Nations General Assembly (UNGA) in 1946 affirmed the freedom of information as a fundamental human right of the highest importance.[35] Several countries, in the decades to come, would enact their respective laws, such as the United States of America in 1967, Australia in 1982, Canada in 1983, the Philippines in 1987, and South Korea in 1998.[36] Certain conflict-ridden African countries also ventured into the task of enforcing freedom of Information laws, such as Uganda and Zimbabwe.[37]

Right to Information, or freedom of information, lies at the heart of a representative democracy. It serves as a potent tool for exercising checks and balances and to further openness in governance through accountability. Citizens elect their representatives in hopes of securing good governance for themselves and the country at large. Since they do not participate directly, information becomes critical to gaining knowledge and understanding of the workings of the government. Inevitably, transparency becomes a prerequisite for an informed citizenry,

[32]SP Gupta v. Union of India, 1981 Supp SCC 87.

[33]*Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

[34] *Id.*

[35]*Freedom of Expression, a Fundamental Human Right*, UNITED NATIONS, https://www.un.org/en/chronicle/article/freedom-expression-fundamental-human-right.

[36]*Freedom of Information Around The World 2006*, HUMAN RIGHTS INITIATIVE, https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/intl/global_foi_survey_2006.pdf.

[37]*Id.*

which is the 'bulwark of a democracy.'[38] Unless the citizens are provided channels to access and analyse information within the government, it is highly imaginative to expect them to participate in a democracy actively and in full capacity should the governments keep essential information a secret.

2.2. Judicial Advancement of Right to Information vis-à-vis Secrecy

The first-ever formal recognition of the right to know in light of governmental secrecy was in the *State of Uttar Pradesh v. Raj Narain*.[39] The subject of contention was the disclosure of a government document called Blue Book, which consisted of security guidelines for the Prime Minister in times of travel. The respondents claimed privilege under Section 123 of the Indian Evidence Act 1872.[40] The High Court ordered the disclosure of the document, which was challenged in the Supreme Court. [41] Justice Mathew made observations with expansive ramifications on official secrecy that a government privilege over a document cannot be automatically granted without inquiring about the reasons for non-disclosure. The court went on to affirm the cause of public interest in answering whether or not disclosure should be allowed.

Against this backdrop, the Supreme Court of India pronounced that India has a government of responsibility which entails accountability on the part of all agents. This implies the preservation of a few secrets within the government. And, in categorical terms, the court went on to uphold that the citizens "have a right to know every public act, everything that is done in a public way, by their public functionaries." [42] The court did not completely reject the relevanceof official secrecy but stated that it is infrequently legitimately warranted.

From then onwards, it was implicit that freedom of speech extends to the right to information, which in itself encompasses

[38]Anshu Jain, *Good Governance and Right to Information: A Perspective*, 54 JOURNAL OF THE INDIAN LAW INSTITUTE, 506 (2012).
[39]State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).
[40]The Indian Evidence Act, 1872, § 123, No. 1, Acts of Parliament, 1872(India).
[41]State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).
[42]State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).

access to information from the government. In *S.P. Gupta v. Union of India* (or the *First Judges case*),[43], the court highlighted the basic postulate of accountability being access to information about the functioning of the government. The main issue concerned the constitutional validity of the Central Government's orders regarding the non-extension of an additional judge's term and their transfer. In the said case, the Court agreed that Article 74 (2) of the Indian Constitution[44] prevents the courts from inquiring into the advice of the Cabinet of Ministers tendered to the President. Only when the Government decides to disclose the advice can the courts evaluate it.[45] However, doubts were raised about whether the communication between the Chief Justice of India and the Chief Justice of the High Court on consultation formed part of advice.[46]

While stating that the communication preceded the formation of advice and is not protected under Article 74 (2),[47], the Court went on to observe that governments must not exercise excessive secrecy in their workings. It stated that secrecy encourages corruption and misuse or abuse of authority due to a lack of public accountability. It advocated for a weighing process to strike a balance between disclosure and non-disclosure aspects of information wherein the following essentials of public interest would be accounted for: "the character of the proceeding, and the issues arising in it and the likely effect of the documents on the determination of the issues."[48]

In the same vein, while assessing the authenticity of a report tabled in the Parliament, the Supreme Court, in *Dinesh Trivedi, M.P. v. Union of India*,[49]reiterated the *Narain*[50] and *SP Gupta*[51] cases and stated that the consensus reached so far is that the disclosure of information should be the rule of secrecy the exception, is justifiable only when it is demanded by the requirement of public interest.[52]

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[43]SP Gupta v. Union of India, 1981 Supp SCC 87 (India).
[44]*Id*
[45]SP Gupta v. Union of India, 1981 Supp SCC 87 (India).
[46]*Id.*
[47]INDIA CONST. art. 19, art. 74, § 2.
[48]SP Gupta v. Union of India, 1981 Supp SCC 87 (India).
[49]Dinesh Trivedi, M.P. v. Union of India, AIRONLINE 1997 SC 304(India).
[50] State of Uttar Pradesh v. Raj Narain, 1975 AIR 865 (India).
[51] SP Gupta v. Union of India, 1981 Supp SCC 87 (India).
[52]DINESH TRIVEDI, M.P. V. UNION OF INDIA,AIRONLINE 1997 SC 304(India).

And, in an observation that directly pertains to the theme of this paper, the court said that the right of the citizen to access information is often in competition with the right of the state to protect it.[53] Thus, a line needs to be drawn through careful calibration because secrecy in governmental affairs is equally warranted in certain circumstances.[54]

A couple of years before the enforcement of the RTI Act 2005, the Supreme Court delivered another historic judgment in the domain of electoral reforms and the right to information. The case in point is *People's Union for Civil Liberties (PUCL) v. Union of India*.[55] Delivered through Justice P. Venkatarama Reddi, the court emphasised the need to harness information for the growth of an informed citizenry.[56]While the observations were premised on the disclosure of antecedents of candidates in elections, the court was clear that the right to information includes access to information. It noted that the said right is a dynamic right that should be allowed to branch out. However, the accessibility of information is not absolute, as reiterated in *Indira Jaising v. Registrar General, Supreme Court of India*[57], pronounced in the same year, wherein the Court stated that it could not be approached for publishing the inquiry report on the allegations levelled against some Karnataka High Court judges.[58] Similarly, in *PUCL v. Union of India*,[59] while declaring Section 33-B inserted by the Representation of the People (Third Amendment) Act 2002 unconstitutional, the Supreme Court emphasized the need for Article 19 (1)(a) to ensure free and fair elections and a blanket ban on the disclosure of antecedents of an election candidate irrespective of the conditions in place does not effectively balance competing interests.[60]

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[53]*Id.*

[54]Dinesh Trivedi, M.P. v. Union of India, AIRONLINE 1997 SC 304 (India).

[55]People's Union for Civil Liberties (PUCL) v. Union of India., 2003 AIR SCW 2353 (India).

[56]*Id.*

[57]Indira Jaising v. Registrar General, Supreme Court of India, AIRONLINE 2003 SC 266 (India).

[58]*Id*

[59]PUCL v. Union of India(2003) 2 SCR 113 (India).

[60]supra note 59

2.3. Balancing Competing Interests Under the Right to Information Act, 2005

The RTI Act 2005 is India's sunshine law.[61] Sunshine laws are, in general, aimed at institutionalising transparency in government agencies through a variety of measures. These measures include establishing mechanisms for the systematic disclosure of information maintained by the public authority.[62] The hint is in the name itself; after all, *sunlight is the best disinfectant*.[63] But, more than that, it encompasses accessible channels for the flow of information between the members of the public and the government. A classic example of a sunshine law, other than the RTI Act 2005, is the Freedom of Information Act (FOIA) in the United States, which has inspired the enactment of many such laws around the world. However, the US was not the first country to enact and enforce a sunshine law; Sweden was the first country in this regard, as it enacted the Freedom of Press Act in 1766.[64]

In the case of India, we are relatively young, legislation-wise. The RTI Act 2005 derives its legitimacy from Article 19 (1) (a) of the Constitution of India. It embraces not only the right itself but also the limitations that come with it, as mentioned in Article 19 (2). This is explicit in Section 3 of the Act, which states in categorical terms that "all citizens shall have the right to information"[65] but prefixes the phrase with "subject to the provisions of the Act."[66] Even before one runs through the said provision, the Preamble to the Act makes it abundantly apparent that democracy works in publicity, but certain aspects of it may require secrecy.

In the Preamble, the Act recognises that a healthy democracy functions with an "informed citizenry and transparency of information."[67] However, it addresses the conflict that may arise

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[61] *Sunshine Laws*,LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/sunshine_laws.

[62] *Id.*

[63] Eyal Zamir and Christoph Engel, *Sunlight is the Best Disinfectant – Or is It? Anonymity as a Means to Enhance Impartiality*, 63 ARIZONA L. REV. 1064, (2021).

[64] Lennart Weibull, *Freedom of the Press Act of 1766,* BRITANNICA (2024).

[65] Right to Information Act, 2005, § 3, No. 22, Acts of Parliament, 2005 (India).

[66] *Id.*

[67] Right to Information Act, 2005, Preamble, No. 22, Acts of Parliament, 2005 (India).

with the practical application of disclosure, impacting state interests. The body of text provides for an inclusive list of the critical areas pertinent to governmental operations, use of fiscal resources, and "preservation of confidentiality of sensitive information",[68] later expanded into multiple provisions. The primary provisions in this regard are Sections 8 and 22, with the former containing the exceptions from disclosure of information and the latter dealing with non-applicability of the Act to specific organisations in the Second Schedule.

Section 8 is vital to balance the objectives that the legislation aims to attain.[69] It offers a list of matters in which a citizen can be refused the disclosure of information. These 10 exemptions reproduce and substantiate the limitations under Article 19 (2) and cover a wide range of information affecting, *inter alia*, "sovereignty, integrity, and security of India", relations with foreign states", "public order and safety", "internal deliberations and communications", economic interests", "confidential information", fiduciary relationship", and "breach of privilege."[70] However, the classification of exempted information is the first step towards balancing. The RTI Act 2005 does not clothe these exemptions with iron-clad protection, and this is reflected in section 8(2)[71] and section 10.[72]

Section 8 (2) invokes "public interest" to justify the disclosure of the otherwise exempted information.[73] The legislation gives discretion to the public authority[74] to allow the citizen access to certain information falling under sub-section (1) if "public interest in disclosure outweighs the harm to the protected interests."[75] In simpler terms, the harm resulting from non-disclosure of exempted information will be greater than the disclosure of the said information. Where the applicant can produce sufficient evidence

[68] *Id.*
[69] Right to Information Act, 2005, § 8, No. 22, Acts of Parliament, 2005 (India).
[70] *Id.*
[71] Right to Information Act, 2005, § 8(2), No. 22, Acts of Parliament, 2005 (India).
[72] Right to Information Act, 2005, § 10, No. 22, Acts of Parliament, 2005 (India).
[73] Right to Information Act, 2005, § 8, cl. 2, No. 22, Acts of Parliament, 2005 (India).

[75] Right to Information Act, 2005, § 8, third proviso, §§ 2, No. 22, Acts of Parliament, 2005 (India).

before the public authority, he is entitled to receive a certified copy of a document about any exempted information under Section 8 (1).

In *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*,[76]the Supreme Court enunciated the interpretation of "public interest" and went on to state that the expression "does not have a rigid meaning, is elastic and takes colour from the statute in which it occurs, the concept varying with time and state of society and its needs."[77] This means the interpretation of the expression would require context, and it must be something in which the general welfare of the public is at stake. Considering the fluid nature of the expression and the sanctity of the exemptions under Section 8, the authorities need to conclude objectively. The public authority must record its objective satisfaction, showing that the larger public interest stands compromised in the absence of disclosure. Such a determination is of great consequence, considering that the exemptions are vulnerable to abuse.

For example, the Supreme Court, while hearing the plea for seeking a review of the *Rafale* judgment,[78], pointed out that Section 8 (2) empowers citizens with a "priceless right" even concerning national security matters. In the concerned case, the three documents published by 'The Hindu' had not been officially published, but the authenticity of the content *per se* was not questioned. The Court pointed out that the relevancy of the material needs to be considered, and no dispute regarding how it was obtained would ordinarily have any significance.[79]

Furthermore, in Section 10, Public Information Officers (PIOs) can resort to severability[80] wherever applicable. To put it simply, governmental information is complex and interconnected; as a result, it is not always favourable to disclose the requested information because it would lead to the disclosure of sensitive information. However, circumstances exist in which information can be severed from the sensitive, exempted part and disclosed to the citizen without prejudice to the state. This could be understood from

[76]AIRONLINE 2012 SC 452 (India).
[77]*Id.*
[78] Yashwant Sinha v. CBI, (2019) 6 SCC 1 (India).
[79]Yashwant Sinha v. CBI, (2019) 6 SCC 1 (India).
[80]Right to Information Act, 2005, §10, No. 22, Acts of Parliament, 2005 (India).

the case of *Dinesh Tripathi*[81], in which the court addressed the demand to disclose the supporting documents for the report that was tabled before the Parliament.The Vohra Committee was constituted to study the activities and connections of all Mafia organisations or elements and submit a report of its findings. The Court highlighted the danger to the agencies involved and the conditions of assured secrecy and confidentiality,[82] which warrant a selective disclosure of information at times.

Section 24 is another relevant provision of great consequence. The Second Schedule of the Act lists 18 Central intelligence and security organisations.[83] The primary functions of these organisations include the storage and dissemination of sensitive information with the utmost secrecy. The absence of adequate secrecy measures can severely impact the efficiency of the organisations and endanger the lives of those involved in covert operations. Some information could be of such character that it can effectively hamper the security and integrity of the state. This has been recognised and addressed in the said provision, which exempts these organisations from the general mandate of the Act. In simple words, nothing contained in the legislation will apply to these listed organisations, including the information they provide to the government.

History is witness to the limited but exceptionally grave vulnerabilities of these organisations, especially to the abuse of power and corruption. The exclusionary status awarded to them and their operations alienates them from regular scrutiny, resulting in higher controls on information and the absence of a reasonable degree of accountability & transparency. To prevent these organisations from going rogue and acting with impunity, Section 24 comes with a series of provisos.[84] The first proviso adds a condition that the exclusion cannot be extended when the information relates to the "allegations of corruption and human

[81]Shri Dinesh Trivedi, MP v. Union of India, AIRONLINE 1997 SC 304 (India).
[82]*Id.*
[83]Right to Information Act, 2005, Second Schd., No. 22, Acts of Parliament, 2005 (India).
[84]Right to Information Act, 2005, § 24, §§ 1, No. 22, Acts of Parliament, 2005 (India).

rights violations."[85] But, as a safeguarding measure, any information on these allegations shall be furnished only upon the approval of the Central Information Commission (CIC) and within 45 days from the date of receipt of the request.[86] Thus, a systematic process for the disclosure of information exists in this regard: *prima facie* exemption of certain organizations, the rule is disclosure if the information sought pertains to corruption and human rights violation, and the disclosure of information, which could be classified as highly sensitive, needs prior approval of the primary authority under RTI, the CIC.

The scheme of the RTI Act 2005 is clear. It clarifies the substantive rights of the citizens and the powers of the authorities, as well as the procedural mechanism for the exercise of respective rights and powers. It sets the tone, amply evident that the disclosure of the information is the rule, subject to certain very specific limitations. Section 22 confirms the overriding effect of the Act upon other legislation to the extent of the inconsistency.[87] And, at one point, it even makes legislation nearly redundant in its current form—the OSA 1923, the colonial legacy empowering governmental secrecy as a rule.

3. The Conundrum of the OSA 1923 in Indian Democracy

3.1Overview

Human beings keep secrets. For George Simmel, secrecy is the ultimate sociological tool for controlling and regulating information and forms the core of social relations. It allows humans to exercise personal autonomy, create a sense of mysticism, and avoid relentless public scrutiny. Naturally, the act of keeping secrets entails access to information that may be too sensitive or embarrassing for the secret keeper. Even at an organisational level, the tendency to perpetuate secrecy in workings is rampant because it maintains exclusivity and enables informational manipulation and discrimination, which may not necessarily be carried out with ill will. The reasoning can be extrapolated to the grander, political landscape of governance where

[85] *Id.*
[86] supra note 84
[87] supra note 2 at s. 22.

state secrets or official secrets are vital to the functions of the government. Contemporary scholar Rahul Sagar argued, along the lines of Jeremy Bentham, that even democracies which entail public accountability may legitimately claim the need for secrecy.[88]

State secrets refer to state-held information that is deliberately concealed or withheld from the public because it would otherwise be contrary to the best interests of the state.[89]They are often called official secrets and categorised based on the degree of harm their disclosure might cause to the interests of the state. For example, the most strictly protected official secrets are those in the areas of national security and international relations.[90] This is one of the reasons why in all major jurisdictions in the world, special privileges are extended to military and intelligence organisations, resulting in what criminologist Willem de Lint calls "intelligencified" [91] information in which knowledge is subject to heavy, exclusionary entry controls and hierarchical filtering.[92]

Prima facie, secrecy appears to challenge democratic fundamentals, however, as Dennis Thompson affirms, the real problem lies in the nature and extent of operational secrecy in a democracy.[93] Official secrecy has several worthwhile utilities in governance. Many celebrated scholars have identified that unrestricted public deliberation on public policy can hamper free and unbiased decision-making. The government often engages in secret-keeping in matters of military, counter-intelligence, diplomacy, and public order, which may otherwise not be favourable among the public but are essential for the vitality of the state. Only when public officials misuse their discretionary powers to use secrecy to protect against abuse of power, corruption, and

[88]RAHUL SAGAR, SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY 3-4 (Princeton University Press 2013); Dennis F. Thompson, *Democratic Secrecy*114 POL. SCI. QUART., 182 (1999).

[89] Alan Mewett, *State Secrets in Canada*, 63 THE CANADIAN BAR REVIEW 358, 358-359 (1985).

[90]Stephane Lefebvre, *State Secrecy: A Literature Review*, 2 SECRECY AND SOCIETY, 12 (2021).

[91]Willem De Lint, *Intelligent Governmentality*, 26 WINDSOR YEARBOOK OF ACCESS TO JUSTICE, 281 (2008).

[92]*Id.*

[93]RAHUL SAGAR,supranote 93.

human rights violations that secrecy become deleterious for a democracy. The following best summarises the problem with official secrecy.

Herbert Block, a celebrated cartoonist for *The Washington Post*, drew up a caricature of a senior public official flipping a piece of a document at his assistant, reprimanding her, "On this order for a new typewriter ribbon—did you forget to stamp 'Secret'?"[94] Herbert Block was alluding to the practice of overclassifying prevalent in government circles, which has become a problem for free and unfiltered public discourse. Interestingly, the following year, *The Washington Post* reported that the Pentagon classified more documents than it did during World War II, of which most of the content dealt with speeches and other public information.[95] This problem is persistent not only in the United States but in every other part of the world, including India, where scholarship is limited so far as the governmental classification exercise is concerned. However, what it highlights is that democracies are exploiting their capacity to classify, leading to a vast chunk of information being disclosed.

Moreover, the 21st century is a turning point in human civilisation. Historians say that we are living in the most peaceful times in human history. Certainly, it has its dose of strife, violence, and upheavals peculiar to human tendencies, but societies have begun acknowledging the various rights and freedoms of people, especially against the state. The archaic idea that any state-sponsored subjugation of its people is legitimate for the preservation of state interests is widely debunked. And, the change manifests in the growth of jurisprudence of rights and duties of people and the states. As a result, secrecy—once an unquestioned, absolute tool of governance—has come under the radar and requires to be balanced with individual rights and freedoms. It has, especially, become a matter of immense legal, political, and cultural implications in India, which has experienced a gradual but definite transition from secrecy

[94] *Herblock's History - Political Cartoons fr"'om the Crash to the Millennium*, LIBRARY OF CONGRESS (2001), https://www.loc.gov/exhibits/herblocks-history/

[95] supra note 94

to transparency in governance as a rule, questioning the validity of the OSA 1923 in the contemporary democratic society.

3.2 Historical Evolution of the Act

The OSA 1923 is an imperialist brainchild. It is a law built upon the foundations of oppression, disenfranchisement, and supremacy of the state. The British applied this law frequently to suppress the flow of information within and beyond the government in light of the consolidating press movement and the independence campaign. This anti-espionage law, therefore, operated as a legislative counter-move and was integral to avert any case where government officials, particularly Indians, could divulge sensitive information that could be used against the establishment. In short, the OSA 1923 was a colonial vanguard meant for the oppressors.

The earliest form of the Act can be found in an 1843 notification that prohibited the publication of official documents. More than three decades later, in 1875, the British Government of India issued another resolution that restricted public officials from becoming correspondents for a newspaper.[96] In 1885, a resolution was issued to oblige public officials to safeguard information entrusted to them in the same capacity as any "lawyer, banker or other professional person."[97] The series of resolutions began the process of cementing the anti-espionage law in the country. Finally, in 1888, these resolutions were distilled into a bill, eventually becoming the first-of-its-kind law on official secrecy in India.[98]

Soon after its enforcement, discontent spread across army lines over the issue of the burden of proof. Under the original law, the burden of proof fell on the prosecution. This meant that the original scheme required the prosecution to prove that the disclosure contained a 'secret' and was 'unauthorised'. The Army representatives perceived the existing provision as producing a diluting effect on the efficacy of a law that concerned a highly sensitive national matter and whose violation incurs serious

[96]Major General VK Singh (Retd), *The Official Secrets Act 1923 – a Troubled Legacy*, 139JOURNAL OF THE UNITED SERVICE INSTITUTION OF INDIA (2009).

[97]*Id.*

[98]Major General VK Singh (Retd), *The Official Secrets Act 1923 – a Troubled Legacy*, 139 Journal of the United Service Institution of India (2009).

outcomes on the security and integrity of British India. Subsequently, the Viceroy of India, Lord Curzon, approved the amendment of the OSA in 1904, shifting the burden of proof on the accused.[99]In the years to come, several amendments were brought into force to deal with the rousing nationalist movement in the country, which worried the imperial rulers as they struggled to cope with the aftermath of World War I and informational exchange among leaders and the public. To avert any harm to the legitimacy of the British government, the 1889 law was repealed and replaced with a new 1911 law to address the "military requirements."[100] The substance and form of the law were further strengthened in 1923, which was adopted into the tranche of legitimized colonial legislation in free India.[101]Even after independence, the rigour of the Act was occasionally enhanced. The Act was first amended in 1951. In the following decade, the application of the law became stricter in terms of the scope of offences and punishment. The second amendment expanded the ambit of Section 3 (1)(c), which related to spying, with the addition of "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."[102] Similarly, Section 7, which originally provided for a two-year imprisonment for "interfering with officers of the police or members of the Armed Forces of the Union, increased the punishment by one year.[103]

3.3The Contesting Application of OSA 1923 and RTI Act 2005

The OSA 1923 relates to official secrets, covers 15 sections, and punishes unauthorised disclosure of official secrets. It is regarded as India's anti-espionage law. To hold any person guilty under the Act, it is necessary to prove the existence of a 'secret' and its unauthorised disclosure. However, interestingly, while it explicitly states that it deals with official secrets, there is no definition of the term provided in section 2 of the Act. The content of an official secret, however, includes wide-ranging facets of information such as sketches, plans,

[99]*Id.*
[100]supra note 94
[101]MP JAIN AND SN JAIN, II PRINCIPLE OF ADMINISTRATIVE LAW (Lexis Nexis 2013).
[102]Official Secrets Act, 1923, § 3, §§ 1, cl. c, No. 19, Acts of Parliament, 1923 (India).
[103]Official Secrets Act, 1923, § 7, §§ 2, No. 19, Acts of Parliament, 1923 (India).

models, articles, notes, documents, or expressions.[104]To strengthen the control of information, it also prohibits access to "prohibited places",[105] which have been defined under Section 2(8). These prohibitions are extended not only to the servants of the Government but also to the whole of India, including citizens outside India. Note that the Act also covers offences by companies.

In terms of actions treated as crimes, the OSA Act 1923 criminalises spying, wrongful communication of information, unauthorised use of uniforms, forgery, impersonation, etc, interferences with the workings of the police or members of the Armed Forces of the Union, and attempt or incitement to commit a crime under the Act. It is also criminal to harbour spies. Moreover, the Act imposes a statutory obligation upon every person to cooperate with and disclose information to the "superintendent of Police, or another police officer not below the rank of Inspector, empowered by an Inspector-General or Commissioner of Police on this behalf, or to any member of [the Armed Forces of the Union] engaged on guard, sentry, patrol or other similar duty"[106] relating to any offence or suspect offence under the Act. Failure to discharge the aforesaid obligation shall be punished in terms of imprisonment, fine or both. The maximum term of imprisonment for this offence was originally two years but was subsequently enhanced by the Act through the 1967 amendment.[107] Thus, the Act is purposively aimed at preventing inter-governmental as well as extra-governmental flow of information.

The OSA 1923, despite being the legislation that consolidates and amends the law on official secrets, fails to define official secrets. Section 2 is silent on what official secrets are. Moreover, the Act does not provide a framework for the classification of official information dependent on their degree of sensitivity. Interestingly, despite what the Preamble in the Act suggests, it does not only limit its applicability to designated official secrets; as the Supreme Court in *Sama Alana Abdulla v State of Gujarat* [108] explained that the

[104]Official Secrets Act, 1923, § 3, §§ 1, cl. c, No. 19, Acts of Parliament, 1923 (India).
[105]Official Secrets Act, 1923, § 7, No. 19, Acts of Parliament, 1923 (India).
[106] Official Secrets Act, 1923, § 8, §§ 1, No. 19, Acts of Parliament, 1923 (India).
[107]Official Secrets Act, 1923, § 8, §§ 2, No. 19, Acts of Parliament, 1923 (India).
[108]*Sama Alana Abdulla v State of Gujarat,*1996 AIR SC 569 (India).

arrangement of the words "official code or password"[109] are to be read with 'secret', however, such prefixation is not made to "any sketch, plan, model, article, or note or other document or information"[110] as mentioned in Section 3 and Section 5.

This blatantly vague and all-encompassing legislative design of the Act encourages rampant and unguided classification exercises—a problem which has been highlighted by the CIC in *Navdeep Gupta v. Public Information Officer, National Archives of India.*[111]The problem is twin-fold: Firstly, and as already made clear, the word 'secret' has not been defined, and secondly, the classification is based on the directions in the 1994 Ministry of Home Affairs' Manual on Departmental Security Instructions (the Manual), which, interestingly, is not a public document.[112] Attempts have been made to get access to the Manual but to no avail, which poses a great danger as the public is unaware of the specific criteria based on which various ministries and their respective departments engage in classification.

As a matter of fact, in *Venkatesh Nayak v. Ministry of Home Affairs*,[113] the CIC refused the disclosure of the Manual. In the said case, the Appellant had sought a copy of the latest version of the Manual along with all office memorandums, circulars, and standing orders pertinent to the procedural aspects of the classification process, as well as those wherein the government claimed privilege over official records under the Indian Evidence Act, 1872. In his arguments, the Appellant stated that "merely stating that the manual is covered under Section 8 (1)(a) is not an adequate reason."[114] Citing examples from numerous countries, including Bulgaria, New Zealand and the USA, the appellant claimed that such type of information is routinely disclosed in these countries.[115] On the other hand, the respondent argued that the Manual consists of a

[109]Official Secrets Act, 1923, § 3 (1), No. 19, Acts of Parliament, 1923 (India); Official Secrets Act, 1923, § 5 (1), No. 19, Acts of Parliament, 1923 (India).
[110]*Id.*
[111]*Navdeep Gupta v. Public Information Officer, National Archives of India,*2018 SCC ONLINE CIC 1551 (India).
[112]*Id.*
[113]Appeal No. CIC/WB/A/2009/000758 (India).
[114]*Id.*
[115]*Id.*.

wide range of instructions, from classifying a document to computer storage of the document disclosure, which can affect the interests of the State, especially in national security and foreign relations.[116] They also argued that such disclosure may indirectly reveal the "security policy/strategy of the government"[117]

Unfortunately, due to the non-existence of any legislative framework on the classification of documents and withholding of the Manual, the government can, without any accountability, engage in the proliferation of secrets in its system. A document which contains information about a routine matter or even a mechanical note can become an official secret. An objective criterion for the creation of official secrets is lacking in the discharge of bureaucratic duties, which effectively implies that any information can become an official secret and can be hidden away from public view under the guise of ambiguous categories of national security, law and order, and foreign relations, among others; in certain instances, the government need not only justify the placement at all because there is a legislative obligation to.[118] Such umbrella coverage of governmental secrecy has invited judicial scrutiny over time.

The government defends OSA 1923 as an important piece of legislation whose operations should have limited public scrutiny, considering the sensitive affairs it deals with. However, the enforcement of the RTI Act 2005 requires only exceptional withholding of information, that too without its limitations. The anti-espionage law, on the other hand, intimidates the members of the government into non-disclosure and exclusion of otherwise publicly accessible information under the RTI Act 2005 by including no exceptions. This was made evident in an observation in *Shankar Adawal v. CBI*.[119] The petitioners, including senior officers of Reliance Industries Public Ltd (RIL), were tried for offences under the OSA 1923. The case goes back to 1998 when the Delhi Police had conducted raids on the office of the RIL and procured copies of

[116] *Venkatesh Nayak v. Ministry of Home Affairs,* Appeal No. CIC/WB/A/ 2009/000758 (India).
[117] *Id.*
[118] SECOND ADMINISTRATIVE REFORMS COMMISSION, *supra* note 19 at 6.
[119] Crl Rev P Nos. 513, 515, 572, 514 of 2009 (India).

certain documents labelled 'secret' by the Government of India.[120] The petitioners had argued that the information was obtained through government sources and was already available in the public domain, but the trial court refused to acknowledge this aspect. Later on, the Delhi High Court highlighted the error and observed that a person cannot be tried under OSA 1923 merely because a document was marked as a secret. It is necessary to inspect the content of the document and ascertain its nature to identify any violation under the Act.[121]

Intriguingly, the design of the OSA 1923 is such that it blocks any potential source of information within the government, without exception. Wrongful communication of information, as Section 5 states, is criminal.[122] The duality of application is dangerous, as it not only penalises the person who communicates without authorisation [123] but also the person who receives the communication.[124]Under this infamous provision, whether it is a sensitive document or simply details about the food items in the departmental canteen if your reporting officer has not authorised the disclosure, the communication is wrongful and, hence, illegal. What frustrates the conflict between the OSA 1923 and the RTI Act 2005 is that the latter considers and upholds the issue of sensitivity[125] in certain circumstances, but qualifies them with public interest, such as where allegations of human rights violations or corruption are involved. [126] But the OSA 1923 does not. To illustrate the contradiction, it is very similar to allowing someone to inspect the house freely but locking the house for entry at the same time. The visitor is free to access the house, yet is blocked from accessing it. Section 5 exacerbates the cause of free speech and expression. It prohibits any person who possesses or controls any official secret relating to a prohibited place or "which has been entrusted in confidence to him by any person holding office under

[120]*Id.*
[121]*Id,*
[122]Official Secrets Act, 1923, § 5 (1), No. 19, Acts of Parliament, 1923 (India).
[123]*Id.*
[124]Official Secrets Act, 1923, § 5 (2), No. 19, Acts of Parliament, 1923 (India).
[125]The said issue is addressed and upheld in Section 8 and Section 24 of the RTI Act 2005.
[126]Official Secrets Act, 1923, § 24 (4), No. 19, Acts of Parliament, 1923 (India).

Government",[127] or was obtained owing to the position he holds or had held under Government. The provision also captures and controls the disclosure of information from any person who is or was in a contractual relationship with the Government. The same obligation rests on any person employed by a person who holds or has held an office under the government. Under the same section, wide-ranging coverage of the words 'possesses' or 'controls' is extended through a series of clauses. A person shall be guilty if he wilfully communicates the secret to an unauthorised person, uses the information in any manner prejudicial to the safety of the State[128] or the benefit of a foreign power,[129]undertakes unlawful retention of a secret,[130]or fails to conduct reasonable care toward the protection and preservation of the secret.[131]

The sweeping character of Section 5 is bound to create problems. For instance, Shantanu Saikia, a journalist, was arrested under OSA 1923 over an article authored by him in the *Financial Express* based on a leaked Cabinet Note regarding the government's disinvestment policy in 1999.[132] While he was being discharged, the Additional Sessions Judge stated that merely because a document has been labelled 'secret' does not immediately result in a breach of the Act. On the contrary, the real yardstick is whether the said publication concerns an "official code" or "password" in terms of Section 5. In the said case, the Judge found the publication related to disinvestment unlikely to impact the state interests.[133]

Moreover, governmental bodies themselves have acknowledged the dangers of Section 5 and the Act in general. The Press Commission, while leaving the use of the Act to the goodwill of the government, remarked that the mere fact that a document is labelled

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[127]*Id.*

[128]Official Secrets Act, 1923, § 5 (3), No. 19, Acts of Parliament, 1923 (India).

[129]*Id.*

[130]Official Secrets Act, 1923, § 5 (c), No. 19, Acts of Parliament, 1923 (India).

[131]Official Secrets Act, 1923, § 5 (1) (d), No. 19, Acts of Parliament, 1923 (India).

[132]*Oil Ministry papers leak: Not all 'secret' documents are same, judge had ruled in earlier Saikia case*, THE INDIAN EXPRESS, (Feb. 21, 2015, 05:07 AM), https://indianexpress.com/article/india/india-others/oil-ministry-papers-leak-not-all-secret-documents-are-same-judge-had-ruled-in-earlier-saikia-case/.

[133]*Id.*

a secret should not attract Section 5.[134] This position was reaffirmed in the 1971 Law Commission report,[135] which also advocated for an umbrella legislation for all matters of national security. Six years later, a group study was conducted by officials from the Ministries of Defence, Finance, and Home Affairs and the Cabinet, which suggested no changes to the Act.[136] However, in 2006, the Second Administrative Reforms Commission (SARC) came out with a report titled "Right to Information: Master Key to Good Governance,"[137] in which the recommendation was to repeal OSA 1923 and replace it with a chapter in the National Security Act 1980.[138] Nevertheless, we are yet to see the nature of changes that may or may not be included in the law–and it all, ultimately, depends on the will of the government and Parliament.

Equally concerning is the coverage of individuals who 'voluntarily' receive such wrongful communication. In India, RTI activists, particularly civil servants and journalists, function towards ensuring and enhancing transparency and accountability in governance. Most of them take recourse to the RTI Act 2005, whistleblowing, or both. However, it is no news that these individuals are subject to harassment and, at times, murdered for disseminating confidential information; many are persecuted merely because they requested certain information.[139] It is ironic how any information which will otherwise be made available under the RTI Act 2005 can be prevented from disclosure under the OSA 1923; more so, the individual receiving the information can be penalised. The plight of the whistleblowers is especially deplorable. Despite the intervention of the Supreme Court following the killing of Satyendra Dubey, the Whistleblower Protection Act 2014 (WPA

[134] PRESS COMMISSION, REPORT OF THE PRESS COMMISSION 401 (1954).

[135] LAW COMMISSION OF INDIA, 43RD REPORT ON OFFENCES AGAINST THE NATIONAL SECURITY (Aug., 1971).

[136] Shriram Maheshwari, *Secrecy in Government in India,* 25 INDIAN JOURNAL OF PUBLIC ADMINISTRATION 126, (1980).

[137] SECOND ADMINISTRATIVE REFORMS COMMISSION, *supra* note 19 at 11.

[138] *Id.*

[139] *Home Ministry submits report on proposal to amend Official Secrets Act,* The Indian Express, (Jul. 28, 2017, 09:20 AM), https://indianexpress.com/article/india/home-ministry-submits-report-on-proposal-to-amend-osa-4770758/

2014)[140] remains without operation. Its operation has been put on hold, citing the necessity to fine-tune the legislation in alignment with the protected interests of the State. In theory, public whistleblowing is regarded as the best source of information on waste and fraud in government, but it is seldom acknowledged in practice. However, in 2015, a Bill[141] was tabled but, fortunately, not passed that brought in exceptions in the WPA 2014, [142] which essentially covered all aspects generally within OSA 1923.[143] In the original WPA, disclosures of information under the OSA 1923 are permitted.[144]

Unless harmonious calibration is undertaken among these legislations, the fate of whistleblowers will be left hanging by a thread. Such a landscape will result in the persecution of whistleblowers, and courts will have to step in, time and again, to protect the interests of the whistleblowers and the larger public interest these individuals endeavoured to defend. For instance, in *Common Cause v. Union of India*,[145], the Supreme Court considered the intertwining relationship between official secrecy and whistleblowing. It held that while file notes under the CBI are not "official secrets" under the Act 1923, a whistleblower, driven by public interest, cannot be held responsible, as in the said case where corruption in Coal Block Allocation is concerned.[146]

Thus, it is becoming evident that there are glaring inconsistencies in the frameworks of the OSA 1923 and the RTI Act 2005. Undoubtedly, the WPA 2014 needs to be enforced, but that shall be a question to be addressed in detail for later research. For the RTI Act 2005 to operate at its capacity, the government will have to significantly reduce the rigidity with which the OSA 1923 is

[140]The Whistle Blowers Protection Act, No. 17, Acts of Parliament, 2014 (India).
[141]The Whistle Blowers Protection (Amendment) Bill, No. 154, Bills of Parliament, 2015 (India_.
[142]*Id*, Amendment of section 4.
[143]The Whistle Blowers Protection Act, § 4, No. 17, Acts of Parliament, 2014 (India).
[144]Attacks on RTI users in India: Hall of Shame statistics update, HUMAN RIGHTS INITIATIVE (Feb. 08, 2025, 6:04 AM), https://www.humanrightsinitiative.org/download/Attacks%20on%20RTI%20users%20in%20India.pdf
[145](2015) 6 SCC 332.
[146]*Id*.

enforced. This is indicated in Section 8(2) of the RTI Act 2005, which features a non-obstante clause on public interest, and Section 24 which creates exceptions to otherwise strict non-disclosure of information related to military and intelligence services. Adding atop this, Section 22 presents an overriding clause in which the RTI Act 2005 overrides the OSA 1923 to the degree of inconsistency.[147] It may be very well argued that Section 22 clarifies the status of the OSA 1923, and such discourse is, therefore, meaningless. As pointed out in *Namit Sharma v. Union of India,*[148] the Supreme Court stated that a harmonious interpretation between the RTI Act and the OSA 1923 will have to be applied to avoid any question of redundancy.[149] In doing so, the Court also observed that the RTI Act 2005 functions to remedy excessive secrecy in the development process under the OSA 1923 and to curb corruption among public authorities. Even so, the entire anti-espionage law is replete with contradictory provisions that only exacerbate the criminal justice system and impact the legitimate rights of citizens. If information can be sought under the RTI Act, there is no reason why the same should be prohibited under the OSA 1923. Even before the foregoing case, the SARC had exhaustively suggested the possible avenues of harmonisation between the two laws to prevent such incongruency.

The more redundancies that exist, the more leverage the government has over the control of information. The absence of legal imperatives is a dangerous fact that severely limits the operation of the RTI Act 2005. The ulterior agenda behind keeping the OSA 1923 in colonial body and soul is to reinforce the colonial, public-skeptic mindset and instrumentalise it to keep the press and the members of the public in check. The vague, undefined, and shockingly short framework of the OSA 1923 contrasts with the long, comprehensive framework of the RTI Act 2005, especially when the latter cannot effectively function without the former. If the OSA 1923 is tested as it is in courts today, it is likely to lose ground due to its open-ended, arbitrary, and vague language. As pointed out in *Shreya Singal v*

[147]Official Secrets Act, 1923, § 22, No. 19, Acts of Parliament, 1923 (India).
[148]Namit Sharma v. Union of India, 2012 AIR SCW 5523 (India).
[149]*Id.*

Union of India, [150] such laws attack Article 14 of the Indian Constitution and encourage the "capricious exercise of power."[151].

Should we only consider the *prima facie* intention to continue with legislative remnants from the colonial past? The scheme in the OSA 1923 puts in place a framework for controlling the flow of sensitive information within and beyond government—a universal practice in all jurisdictions of the world aimed at securing and preserving state interests. Supporters of the Act justify the rigours of the law based on the constitutional scheme that allows for reasonable restriction. However, Article 19 (2) cannot be read to support a catch-all restriction on access to information, especially when Article 19(1)(a) sets a general rule of speech and expression. In arguendo, should the Act find its legitimacy in Article 19(2), it may not be able to effectively counter the diametrically opposite goals aimed at by the RTI Act 2005, which stems from Article 19(1)(a). In effect, OSA 1923 has become a tool of oppression and has lost its utility in the wake of the RTI Act 2005. With its ever-expansive provisions, the Courts have shown caution in punishing persons under the Act, and the State has been only able to use it to excite fear and restrain dissidents.

4. Conclusion

Over time, the demands of good governance were refashioned and set in alignment with the growing cause of the right to information. The narrative has changed, steering away from the absolute importance of official secrecy and toward keeping the government open and accessible to a reasonable degree. The breakthrough was the *Raj Narain* case that undid a long-standing administrative practice of maintaining secrecy without cause and allowing citizens access to state-held information in the public interest. As a result of this transition, the right-to-information movement gained momentum and acquired a legislative personality as the RTI Act 2005.

The emergence of the RTI Act 2005 was a watershed moment for the Indian polity. Under the law, access to information is the rule,

[150](2015) 5 SCC 1 (India).
[151]*Id.*

and secrecy is an exception. As a result of this major legislative endeavour, citizens can only be refused information in very limited circumstances laid out explicitly in the various provisions of the Act. This approach aligns with Article 19 (1)(a) read with Article 19(2), which guarantees the right to speech and expression subject to reasonable restrictions. The supremacy of the RTI Act 2005 is reflected in Section 22, which offers it an overriding effect on other legislations to the degree of conflict. The provision makes an explicit reference to the OSA 1923, which has been the mainstay legislation for protecting official secrecy and criminalising any disclosure of information without authorisation.

Notwithstanding the foregoing conclusion, the OSA 1923, retaining its colonial form and substance, continues to be used to abuse the rights of individuals, especially activists and whistleblowers, with its all-encompassing nature, criminalization of dissemination and receipt of unauthorized information, and obliging the press to cooperate with law enforcement and disclose their sources. Anything can be a secret under this law, regardless of the content, and this, in itself, prevents the full realisation of the RTI Act despite the latter containing all requisite safeguards to prevent sensitive information from being disclosed. Nevertheless, the colonial law persists in the backdrop of failed prosecutions, divergent ideology, and as a tool of oppression.

The OSA 1923 exists with little changes, attuned to modern-day necessities. It has far-reaching effects, does not entail limitations, and cultivates a culture of governmental secrecy. Agreeably, secrecy is essential to the government's survival because public deliberation and intervention in all aspects of governance are unhealthy. However, excessive secrecy will reduce the avenues of democratic accountability and jeopardise individual rights. The endeavour must be to disclose as much information as possible so that the public can be informed about the manner it is being governed. The overall scheme of the RTI Act 2005 is to normalise access to information in a State which otherwise prioritised governmental secrecy over an individual's right to information. The gradual evolution of jurisprudence in favour of the right has necessitated an ideological and legislative shift in the manner of governmental activity. The framework of the RTI Act 2005, admittedly, is not perfect, as it is

replete with shortcomings, but it serves as an adequate base for the reassessment of the OSA 1923. An anti-espionage law is critical to the survival of the State; however, in desperation to enhance governmental control at the cost of fundamental rights without any justification is a step towards totalitarianism.

Ultimately a practical balance will have to be implemented. The task is Herculean, as the vested interests in this conflict are extremely difficult to reconcile. Too much transparency compromises the stability and security of the state; too much opacity cloaks the government with sheer discretion of unimaginable extent. It is time we take the first step towards creating a culture of trust between the government and the citizens through resolving legislative streamlining. The creation of harmonious laws will engineer, slowly but definitely (unless political will desires otherwise), an ecosystem of collaboration where the citizens will partake in reinforcing state interests, and the state will partake in procedural and substantive capacity enhancement with the support of the citizens.