

The Official Secrets Act 1923 - A Troubled Legacy

Major General VK Singh (Retd)*

Introduction

The Official Secrets Act, 1923 is one of the most draconian laws still in force in India. A legacy of the British Raj, it had often resulted in grave miscarriages that have blotted the record books of judiciary and sullied our reputation among democratic nations. Eminent jurists and civil rights activists have unequivocally voiced the opinion that the infamous statute should be scrapped. After the enactment of the Right to Information Act in 2005, it has no right to exist, a fact that has been pointed out by Veerappa Moily, heading the Second Administrative Reforms Commission that has already recommended its repeal. Unfortunately, the proposal was shot down by the bureaucrats in the Home Ministry, based on objections from the intelligence agencies. The arguments advanced for its survival are based on the hypothesis that this will hamper the prosecution of spies. In fact, nothing could be further from the truth. It is necessary to go back into the history of the law to understand why it was enacted and whether it is still relevant today.

The Indian Official Secrets Act, 1889

The first record of a regulation dealing with official secrets is a Notification issued by the Foreign Department of the Government of India on 30 August 1843 which prohibited officials from making official documents public. At that time government officials often became correspondents for newspapers, especially during war. On 8 July 1875 the Home Department issued a Resolution that an official could become a correspondent for a newspaper only after obtaining permission from his office, which was normally granted. On 3 June 1885 the Home Department issued another Resolution that stated that the Viceroy had noticed that information of a confidential nature frequently appeared in newspapers. It advised government officials to be 'as reserved in respect of all matters that may come within their cognisance during discharge of their public duties as lawyers, bankers and other professional men in regard to the affairs of their clients'. 1

In September 1887 the British Colony of Gibraltar issued an Ordinance that prohibited making a sketch, drawing or photograph of any fortification in the garrison. A similar law had been enacted in France a year earlier. All British colonies were advised to issue similar Ordinances. In October 1887 the Secretary of State in London wrote to India, informing them of the advice to the Colonies. The Commander-in-Chief asked for a similar law to be enacted in India. On 1 June 1888 the Adjutant General in India forwarded a draft Bill to the Military department to prevent unauthorised entry and making of sketches of Military and Naval stations, to be called the Indian Fortifications Act, 1888.

On 9 June 1888 the Pioneer Newspaper reported that the Official Secrets Bill had been introduced in the British Parliament. Shortly afterwards a copy of the draft Bill was received in India. Since the Bill covered the points that were intended to be included in the Bill proposed by the Army, it was decided to wait for the enactment of the law in Britain. In September 1889 the Official Secrets Act was passed in Britain. It was applicable to India, but since it was considered unsuitable to the Indian legal system, it was decided to enact a separate law for India. The Indian Official Secrets Act (Act XIV) of 1889 was passed by the Viceroy's Executive Council on 17 October 1889. There was no discussion. The Viceroy, Lord Lansdowne, gave his assent on the same date.2

The Indian Official Secrets (Amendment) Act, 1904

In 1896 two persons - one a globetrotter and the other a local photographer - were arrested for taking photographs in Bombay harbour. It was found that the 1889 Act could not be used against them since wrongful intent could not be proved. The Army authorities urged a change in the law, making it more stringent and shifting the burden of proof on the accused. Lord Curzon did not approve, and the matter was dropped.

In 1901 the Army again pressed for a change in the law, after a Parsee was found taking a harmless photograph of Colaba Fort. Curzon reluctantly approved the amending Bill in March 1902, stating that 'it was the anti-thesis of everything that I had previously thought or written.' The draft Bill was sent to the Secretary of State in London, who raised certain objections. The Bill was redrafted. Curzon approved it, but did not read the revised draft. Later, he accepted the blame for approving it, and wrote: 'it deserved the worst things that have been said about it in the Press.'

In January 1904 the Bill was sent to a Select Committee, which gave its report a month later. Several members, including GK Gokhale, gave dissenting opinions. Pandit Madan Mohan Malaviya wrote a strong letter of protest against the Bill, which was considered in the Viceroy's Executive Council and passed on 1 March 1904, after incorporating some amendments suggested by Gokhale and Dr Ashutosh Mukherjee. The Indian Official Secrets (Amendment) Act, 1904 received the Assent of the Governor General on 4 March 1904.

Defence of India Act of 1915

Another Statute that was enacted during World War I was the Defence of India (Criminal Law Amendment) Act of 1915. The Partition of Bengal in 1905 created considerable resentment and unrest in Bengal. There were several cases of subversion and sabotage. This caused alarm even in Britain, prompting the Secretary of State to write to the Viceroy. It was decided to enact a new law similar to the Irish Act of 1881, which envisaged trial by tribunals,

against which there was no appeal. Act No XIV was passed in December 1908, which provided for speedy trial of certain offences and prohibition of dangerous associations. It was to apply in Bengal and Assam.

In December 1914, the Lieutenant Governor of Punjab, Sir Michael O'Dwyer, wrote to the Viceroy, asking for the enactment of an Ordinance to deal with the Gadharites and the Komagata Maru returnees who had become very active in the Punjab. He wanted a law on the lines of the Frontier Crimes Regulation and Frontier Murderous Outrages Regulation of 1901 that were in force in the North West Frontier province. The draft of the Ordinance forwarded by Punjab envisaged arrest without warrant and trials by special tribunals against which there was no appeal. Before taking a decision on the Ordinance, the Viceroy asked for it to be circulated among the members of the Executive Council. Except for Sir RH Craddock, the Home Member, the other five members, including the Commander-in-Chief, General Sir Beauchamp Duff, were against the Ordinance. Lord Hardinge ordered that the Ordinance in its present form was not immediately desirable, but another on the lines of the Ingress of India Ordinance should be prepared.

Conditions in Punjab deteriorated. In March 1915, O'Dwyer again wrote to Calcutta, giving instances of terrorist attacks, to buttress his arguments. Finally, the Viceroy relented. But he did not approve the Ordinance that O'Dwyer wanted. Instead, he ordered a Bill to be introduced in the Council to enact a law on the lines of the Defence of Realm Act that had been enacted in Britain shortly after the commencement of World War I. The Bill for enactment of the Defence of India Act was introduced in the Executive Council on 12 March 1915. It provided for the issue of regulations by the local government. Offenders could be tried by commissioners appointed for this purpose, instead of the normal courts. There was no appeal against the sentences.

During the debate, the Bill was strongly opposed by Madan Mohan Malviya and Surendra Nath Banerjee, but was passed on 18 March 1915. The Defence of India Act was made applicable to three divisions - Lahore, Jullunder and Multan - and not the whole of the Punjab. Later, it was also made applicable to Meerut and Benares districts of the United Provinces. It was to remain in force until six months after the end of the War, after which it would automatically lapse. 4

The Indian Official Secrets Act, 1923

We now come to the Indian Official Secrets Act, 1923. In 1911, a new Official Secrets Act was enacted in Britain, repealing the British Act of 1889. The Bill, intended primarily to meet military requirements, was introduced shortly after the Portsmouth spy scare and the debates in both Houses were centred on military espionage. The Act was made applicable to India also, along with the Indian Official Secrets Act of 1889 as amended in 1904. However, the maximum punishment in the British Act of 1911 was reduced to 7 years, whereas in the Indian Act it remained transportation for life.

On 26 February 1914 a German Jew called Hahn was found loitering near the Karachi Port where manoeuvres were being held. On the same date an Englishman called Chapman was arrested after he entered the Brigade Office at Karachi. Hahn was tried but discharged by the Magistrate, since espionage as such was not an offence under the Indian Act unless committed by an employee. Chapman was also released, since the Brigade Office was held not to be a prohibited place, as defined in the Act. The British Act of 1911 covered such offences and could have been used, but the magistrates were not aware of this. Quoting the above instances, in July 1914 the Army asked the Home Department to amend the law in India in line with the British law. After getting the opinion of the Legislative Department the matter was put up to the Viceroy, who approved it. A letter was sent to the Secretary of State in London, asking for his approval.

In his reply, the Secretary of State asked for an assurance that the proposed Bill would not revive the controversy that occurred after the amendment in 1904. After getting opinions from members of his Council, the Viceroy, Lord Hardinge decided to postpone the legislation. On 7 January 1915 he noted: "After careful study of the notes, this conviction is borne in upon me that the proposed legislation will present opportunities for endless and bitter controversies which is greatly to be deprecatedI do not consider the present time opportune for dealing with the question by legislation. I hope His Excellency the Commander-in-Chief will agree with me in these views and postpone the proposed legislation to a more peaceful date.'

In December 1916, the proposal was again submitted to the new Viceroy, Lord Chelmsford, who directed that it should be deferred till after the War.

After the end of World War I, the Defence of India Act 1915 lapsed. However, the Army wished to continue with its provisions, which were more powerful than the Indian Official Secrets Act of 1889. The proposal to consolidate the law in India relating to official secrets was again initiated in 1919. The Viceroy again deferred it, because of the bitter experience of the violent protests that had followed the Amending Act of 1904. Soon afterwards, a new Official Secrets Act was enacted in England in 1920, amending the previous Act of 1911. The new Act had more stringent provisions, but did not apply to India.

In 1921 the proposal to amend the law in India was initiated for the 'fourth' time. The Law Member, Mr TB Sapru advised postponement. The matter was referred to the Chief of General Staff, General CW Jacob. The reasons given were increase in Bolshevik activity; troubles on North West Frontier; threat from Afghanistan; increase in Japanese activity; danger from other enemy powers since war plans were being revised; and the possibility of racial war between Japan and the USA affecting India. The Viceroy, Lord Reading, agreed to the Bill being drafted and introduced. The penalty for spying under Section 3 was maximum 14 and minimum 3 years; under Section 5, 6, 7, 8 and 9 it was two years; and under Section 10 (harbouring spies) it was one year.

The draft was sent to local governments, high courts and bar associations for their opinions. It was also published in Gazette of India and local gazettes in English and vernacular. After their replies had been received, the

Assembly met on 6 September 1922 to debate the bill. It was opposed by several members, including KC Neogy, M Chintamani and MTV Seshagiri Ayyar. It was decided to refer the Bill to a Select Committee.

The Select Committee submitted its report on 30 January 1923, with a Dissenting Note by Mr KC Neogy. His major objection was the provision in Section 3(2) which said that 'it will not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety and interest of the State and notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety and interests of the State.'

The Select Committee tried to address the major objections of the members, especially Mr Neogy. The maximum sentence for military offences was 14 years, while for non-military offences it was three years. The provision of a minimum sentence was removed. The special rule of evidence, wherein it was not necessary to prove that the purpose was prejudicial to the safety or interests of the State, was made applicable only to military offences. For the non-military offences, the ordinary rules of evidence would apply. Military offences would be cognisable and non bailable, while the non-military offences would be non-cognisable and bailable. However, Mr. Neogy was not fully satisfied and gave a dissenting note.

The Assembly met on 14 and 24 February 1923 to consider the report of the Select Committee and debate the provisions of the Bill. There were heated exchanges and most of the amendments proposed by members were negated after being put to vote. Among those who opposed the Bill were Dr HS Gour, Mr KBL Agnihotri; TV Seshagiri Ayyar and Mr. KC Neogy. The Bill was finally passed and sent to the Council, which suggested some minor amendments. The Bill was accepted and passed by the Legislative Assembly on 21 March 1923. The Governor General and Viceroy, Lord Reading, gave his Assent to the Indian Official Secrets Act (Act No XIX of 1923) on 2 April 1923. It was published in the Gazette of India on 14 April 1923 and has remained in force ever since. 5

After Independence

After Independence, the Official Secrets Act was amended by Act 3 of 1951 and Amending Act 24 of 1967. The latter is important, as it made several changes, nullifying the efforts of stalwarts such as Gokhale and Neogy, who had succeeded in making the Act somewhat less draconian than what was initially intended. Interestingly, the Act of 1967 was passed in both Houses of Parliament of the largest democracy in the World, with little serious debate.

The Bill to amend the Official Secrets Act was introduced in the Rajya Sabha on 23 June 1967. Moving the Bill on 24 July 1967, Shri Vidya Charan Shukla, the Minister of State for Home Affairs, said : "this is only an amending Bill. There is not much that has to be said about it, and before I give a reply or say anything about this Bill I would like to hear honourable members of the House. Therefore, I move that this Bill be taken into consideration".

This was objected to by several members, including Shri Loknath Misra, Rajendra Pratap Singh, Bhupesh Gupta, Raj Narain and PN Saprú, who raised a point of order on the Minister's inability to make a statement while moving the Bill. They accused the Minister of being unprepared and requested the Chairman to adjourn the House. The House re-assembled after two hours and resumed the discussion. In his introduction, Shri Vidya Charan Shukla stated: '.... because of the kinds of methods used to gain access to official secrets and secret documents and the variety of unscrupulous methods which are used by various foreign Powers to get our official secrets it is necessary to amend this Act to make it more efficacious and more effective.'

One of the most important changes introduced in the Bill was in Section 3, regarding the necessity of showing that the accused person was guilty of any particular act in order to prove a purpose prejudicial to the safety and interest of the State, which KC Neogy had objected to in 1923, and which had been made applicable only to military offences in the Act of 1923. The Bill sought to make it applicable to all offences under Section 3. This was done by the simple expedient of omitting the words "with simple imprisonment which may extend to fourteen years" from Section 3(2) of the Act.

While explaining this particular amendment, Shri Shukla stated : 'Under Section 3(2) of the Act imprisonment of 14 years has been prescribed for certain offences under this clause. Now we have to amend this clause to provide that the provisions apply to all offences of spying punishable under Section 3(1), that is to say, of the preceding section of this particular section which is being amended". It was obvious that Shri Shukla had not understood the implication of the amendment. Section 3(2) did not prescribe any punishment - it only implied that for military offences, it will not be necessary to produce any evidence. The words 'simple imprisonment which may extend to fourteen years' were used only to bring out the distinction between military and non-military offences. However, this escaped the notice of the House.

The other major changes proposed in the Bill were to make all offences cognisable and non-bailable, and enhance the punishments of Section 5, 6, 7 and 8 from 2 to 3 years and of Section 10 from 1 to 3 years. No reasons were given for these severe amendments.

The Rajya Sabha debated the Bill on 24 July, 31 July and 31 August 1967. There were many speakers but most raised extraneous issues not connected with the Bill. Dewan Chaman Lal spoke about the necessity for a law to deal with treason. Shri Raj Narain raised a point of order that the Minister had not given any list of specific instances when the existing Act was found wanting, mentioned a book in which the map of India did not show the State of Assam, the necessity of using the words directly and indirectly; and many other issues. Shri Sunder Singh Bhandari spoke about the Chinese road in Aksai Chin and cases in West Bengal where Police officers dismissed

for espionage had been reinstated. Shri Niren Ghosh spoke about the Ford Foundation gathering secrets of the eastern region; Mr Dharam Teja's letter to the Deputy Prime Minister and Dr Nagendra Singh; the CBI inquiry into the Pyare Lal group and so on.⁶

It was obvious that, like the Minister of State for Home Affairs, several other members had also not understood the provisions of the Bill. Shri MP Bharagava, a senior member, went over each clause of the Bill. While dealing with the proposed amendment in section 3(2) of the Act, which said 'the words with imprisonment for a term which may extend to fourteen years shall be omitted', he said "This is a repetition because in the preceding para this has been clearly provided. So this repetition is not necessary". The words were not a repetition but had been used in lieu of military offences. Surprisingly, many members including Shri RT Parthasarthy and Shri Vidya Charan Shukla complimented him for his speech and analysis of the Bill!

Another member who did not comprehend the meaning of the amendment in Section 3 (2) was Shri M Ruthnaswamy, who said : ' And why then should the term of fourteen years imprisonment be omitted from sub-section(2) of Section 3 of the principal act? I think such severe punishment must be accorded for such offences as the unauthorised revelation of official secrets....". To be fair to Shri Ruthnaswamy, he goes on to state that the provision of it not being necessary to prove that the accused acted for a purpose prejudicial to the safety and interests of the State, as given in the Statement of Objects and Reasons, was 'a very dangerous provision because the conduct and the character of the man and so on are vague things.' With rare prescience, he made plea for a Special Security Service on the lines of the MI Bureau in UK and the Deuxieme Bureau in France (RAW came into being a year later, in 1968). ⁷

The Lok Sabha debated the Bill on 12 August 1967, where it was moved by Shri Vidya Charan Shukla. Like the Rajya Sabha, many members spoke on extraneous issues. However, one member who analysed the proposed amendments was Shri Nambiar, who felt that they were draconian and likely to be misused to harass innocent citizens. (He had been convicted under the Official Secrets Act in 1948). He questioned the necessity of making the special rule of evidence applicable to all offences, enhancing the punishments and making all offences cognizable and non-bailable. He felt that the new wording of section 3: 'which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States', was very loosely worded. "Who will decide whether a particular disclosure affects the sovereignty and integrity of India", he asked? All the amendments proposed by members were negatived and the Bill was passed by the Lok Sabha on 12 August 1967.

The genesis of the Official Secrets Act was the need to prevent spying and wrongful communication of military secrets. The maximum punishment for 'spying' in respect of Defence Forces in the Act was 14 years while for wrongful communication it was 3 years. The punishments under other sections in the original Act of 1923 were between 1 to 2 years. These were enhanced to 3 years in the Amending Act of 1967. Another amendment was that the proviso of it not being necessary to prove that the action of the accused acted for a purpose prejudicial to the safety and interest of the State, which earlier applied only to military offences, was made applicable to all offences under Section 3. These amendments nullified the efforts of stalwarts such as GK Gokhale and KC Neogy and who had opposed it vehemently in 1904 and 1923, and forced the British authorities to make the changes which were reversed in 1967. The Indian Official Secrets (Amendment) Act, 1967 made the Act much more draconian than it was under British rule.

It is plain that neither the Minister nor most of the law makers who approved the Bill in 1967 were aware of its implications. The time when this happened is relevant. It was 20 years after Independence. The necessity for such an amendment had not been felt after the 1947-48 war with Pakistan or the 1962 war with China. Unlike all previous enactments, the Army had not asked for it – their own laws were much more stringent. Apparently, even the political leadership did not initiate it. Indira Gandhi had come to power only a year earlier; the Home Minister YB Chavan had recently moved from Defence to Home; and the Minister of State, VC Shukla, was oblivious about its provisions. Perhaps, the intelligence agencies, or rather the IB – RAW was yet to be formed –was behind it. Taking advantage of the inexperience of the political leadership – Nehru or Shastri would never have consented to it, having spent half their lives in jails – they got this draconian law enacted.

The Army, Navy and Air Force Acts

An interesting aspect is the overlap between the Official Secrets Act and the Acts of the Army, Navy and Air Force. The special acts of the Navy, Army and Air Force after Independence have absorbed both the infringements i.e. spying and wrongful communication of military secrets, while dramatically enhancing the punishments. Under the Navy Act, spying and wrongful communication with traitorous intent is death, while other wrongful and improper communication attracts 14 years. Interestingly, even civilians are covered by this. To illustrate, Section 38 of the Navy Act is reproduced below:

"38. Penalty for spying. – Every person not otherwise subject to Naval law who acts as a spy for the enemy shall be punished under this act with death or such other punishment as is hereinafter mentioned as if he were a person subject to Naval law."

Conclusion

The Administrative Reforms Commission chaired by Shri Veerappa Moily had recommended the repeal of the Official Secrets Act. This was opposed by the Ministry of Home Affairs and the intelligence agencies who contended that this will tie their hands and it will not be able to prosecute offenders such as those involved in the Naval War Room leak case. Another argument advanced for its continuation is that 'it has stood the test of time' and the conviction rate for charges under this Act is very high. The first point is not really valid, because there are adequate safeguards to cater for military offences in the military Acts themselves, which are in fact more stringent than the Official Secrets Act. Hence, even if the OSA is repealed, it would not make much of a

difference. The second point of a high conviction rate is fallacious. The high conviction rate is because of the draconian provision whereby the offence does not have to be proved by evidence, and the accused can be convicted merely on suspicion. Not surprisingly, there have been several instances where innocent persons have been convicted under the Act. In fact, instances of the Official Secrets Act being utilised to prosecute actual spies and moles are rare. On the other hand, cases of its misuse are legion. Hundreds of innocent citizens have suffered long periods of incarceration under the infamous Act. Examples are the soldiers involved in the Samba Spy case; the scientists prosecuted in the ISRO case; Captain BK Subbarao of the Indian Navy; newspaper correspondent Iftikhar Gilani and many others. Is it not time that we consigned the Official Secrets Act to the dustbin of history?

***Major General VK Singh (Retd)** was commissioned into the Corps of Signals in June 1965. He was CSO HQ Western Command and Joint Secretary (Tele) R&AW prior to his retirement. He has been a USI Research Fellow and has authored a number of books.

Journal of the United Service Institution of India, Vol. CXXXIX, No. 575, January-March 2009.