Walking a Tightrope:
An Analysis into the Role of State Secrecy, the Future of Whistleblowers and the Conflict in India

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Introduction

A few months ago, the researcher completed the worldly-acclaimed book 1984. This George Orwell's masterpiece features a case of startling foresight woven into a fictional story around Oceania, a totalitarian state, overrun by the members of the Thought Police and overseen by Big Brother. Various themes of 'secrecy' are used through an array of tools and techniques such as historical negationism, surveillance, and propaganda. The thematic intention of the Orwellian state is reflected in the following lines: If you want to keep a secret, you must also hide it from you. As a consequence, the protagonist, Winston Smith, could only survive the Orwellian State through self-denial of the despotism he and his compatriots are subject to. Anyone who let out a secret would disappear into oblivion. There are no freedoms to law-abiding citizens so whistleblower[1] protection is beyond imagination.

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[1]What is a Whistleblower - National Whistleblower Center, NATIONAL WHISTLEBLOWER CENTER, https://www.whistleblowers.org/what-is-a-whistleblower/ (last visited Apr. 4, 2023).

George Orwell's Oceania was modelled after Nazi Germany and Stalinist Russia, two notorious autocracies of their time. The absence of democratic freedoms was reinforced through a robust and institutionally backed regime of secrecy and surveillance. The foundational core of such regimes is the lack of consent from the citizenry in the matters of governance, and thus, whistleblowing in these governments do not require a special justification, whether legally recognized or not. Such states function under the veil of secrecy and engage in active concealment of information from the public. Since the citizenry did not participate in and consented to the election, formation, and operation of the government on their behalf, a state secret disclosed by a whistleblower, despite attracting high-handedness and criminalization, would not amount to hijacking the foundational core of the totalitarian state. Things, however, ought to be different in democratic states.

There is no singular definition of democracy[2]. Regardless, the ever-known philosophy of democracy being the representation of the will of the people[3] remains undisputed. Democracy is a collective endeavor; laws are made by representatives whom the citizenry elect. A bare reading of the Preamble of the Constitution of India suffices in substantiating the aforesaid point when it reads "WE, THE PEOPLE OF INDIA" indicating assertively that it is the

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[2]Stefan Dahlberg et al., The Meaning of Democracy: Using a Distributional Semantic Model for Collecting Co-Occurrence Information from Online Data Across Languages, HEM | GÖTEBORGSUNIVERSITET (Dec. 2016), https://www.gu.se/sites/default/files/2020-05/2017_16_Dahlberg_Axelsson_Holmberg_0.pdf; DIRK BERG-SCHLOSSER ET AL., THE SAGE HANDBOOK OF POLITICAL SCIENCE 730-740 (SAGE Publications Ltd 2020).

[3]The importance of democracy, CHATHAM HOUSE – INTERNATIONAL AFFAIRS THINK TANK, https://www.chathamhouse.org/2021/04/importance-democracy (last visited Apr. 4, 2023).

people of India who give themselves the constitution.[4]And, clearly through the ideals adapted, a system of representation is envisaged in which the expression of one's views and access to information become fundamental to make informed choices.

Whistleblowing is itself an act of transgression from the general will so it is reasonable to require a special justification. In a democratic order, obeyance to law is indispensable to governance. The collective will to elect a government and allow it to govern the affairs of the citizens is, in principle, challenged through whistleblowing. The line between civil disobedience and political vigilantism become blurred, and the sustenance of this difference is vital in a democracy. Nevertheless, this does not immediately discredit the act of whistleblowing but the task of justifying it becomes incredibly difficult because it involves violation of law resulting in dissemination of state secrets to the unauthorized members of the public—and democracies need secrecy as much as transparency to sustain themselves.

Whistleblowing in democratic states requires special justification because these states impart integral value to individual rights and freedoms in balance with the state interests. As a result, fundamental freedoms, such as freedom of speech and expression do not come with blanket enforcement, and come with due consideration of state interests which include the protection of sensitive information. The role of whistleblowers cannot be denied as they expose corruption and abuses of power within governments but they can also jeopardize national security, foreign relations, and law order. Logically, secrets are an effective medium of ensuring that national interests are not

[4]INDIA CONST, Preamble.

compromised. Thus, the philosophical and legal conundrums are faced by all democracies alike: democracy requires publicity, but democratic government may legitimately claim the need for secrecy.[5]

There are certain actions that the state will have to undertake even if they run, in principle, counter to constitutionally guaranteed freedom. However, stating that state secrecy is an offspring of wickedness or a prelude to a ridiculous or disastrous situation, or maybe even both, is an exaggeration. While dissidents complain about the veil of opacity that clouds the governance systems under a regime of secrecy, it cannot be denied that it is the same veil of opacity that often protects the domestic and international interests of the citizenry. The running risks of unregulated transparency and accountability in the national security sector, for example, can jeopardize a multitude of functions and operations such as counter-espionage, collection of sensitive intelligence data, military strategies and tactical planning, and diplomacy. Thus, it comes as no surprise that democratic governments across the globe show reluctance to government whistleblowing.

India, whose tryst with constitutionally guaranteed freedoms and protections has been comparatively recent, is no exception. It is yet to see its Whistleblowing Protection Act 2014[6] ('WPA 2014') operational. Moreover, the Right to Information Act 2005 [7] ('RTI 2005'), a hallmark legislation for the open governance advocates, has clearly overridden the draconian Official

[5]DENNIS F. THOMPSON, Democratic Secrecy, 114 POLITICAL SCIENCE QUARTERLY 181,182 (1999

[6]Whistleblowing Protection Act, 2014, No. 10, Acts of Parliament, 2014 (India).

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

Secrets Act 1923[8] ('OSA 1923'), but the latter continues to be enforced to curtail flow of information to the public and consolidate power in the hands of bureaucracy. The lack of adequate protection, despite constitutional safeguards on balancing state interests and public interests and judicial pronouncements on matters concerning, inter alia, principle of proportionality, offers keen insight into how challenging it is to favorably extend whistleblower protections. But, before any judgments are passed, it must be understood that the problem lies in the execution of the laws, not the existence of state secrecy.

The recent controversies around Rafale and Pegasus have spurred discussions on how state secrecy can be regulated. Arguments have sprung up to acknowledge the role played by whistleblowers in realizing the rights under Article 19(1)(a) of the Constitution, especially right to information.[9]Agreeably, whistleblowing can be an excellent tool to identify unaccountability and corrupt activities within government; the more important point is that it derives its strength from the constitutional guaranteed rights of and imposed duties on citizens. But, amid the calls for greater freedoms, a detailed study of state secrecy gets undermined. The fate of state secrecy lies at the core of whistleblowing. This is, especially, when democracies themselves, at times, constitutionally authorize the employment of restriction or prohibition on the dissemination of sensitive information in the form of secrets.

[8] The Official Secrets Act, 1923, No. 19, Acts of Parliament, 1923 (India).

[9] Bennett Coleman and Co. v. Union of India,1973 AIR 106; SP Gupta v. Union of India, 1981 Supp SCC 87; PUCL v. Union of India, (2003) 2 SCR 1136.

State secrecy does not necessarily challenge democratic ideals; it is the purpose, nature, and degree of the secrecy that determines its legitimacy. But, before one dwells into that area, it is essential to acknowledge that secrecy is a governance necessity with far-reaching effect on state interests. In this paper, the researcher attempts to focus on state secrecy and to offer an analysis on how state secrecy is not always a categorical evil but may be a necessary evil at times. At the same time, the researcher cautions on the impact that unregulated state secrecy can have. The discussion shall take into account the legal scenario of whistleblowing in India whose operation remains thwarted due to our obsession with exclusion and excessive opacity.

State Secrecy as a fact of governance

State secrecy is vital in governance. Scholars challenge secrecy on myriad grounds, especially in the context of democracies. Thomas Hobbes warned against arcana imperia so did Max Weber, who famously called "official secret"[10] as the invention of the bureaucracy.[11] However, it becomes essential to acknowledge that democracies legitimately employ secrets for stability and peace which otherwise could not be effectively maintained. An argument from the liberal democratic circles state that government officials breach the fundamentals of transparency to ensure safety and well-being of the state[12] so that democracy can conduct itself within the space it remains[13]; that they will

[10]Stephane Lefebvre, State Secrecy: A Literature Review, 2 SECRECY AND SOCIETY, 17 (2021), https://doi.org/10.31979/2377-6188.2021.020209 (last visited Apr. 5, 2023).

[11]*Id.*

[12]D. Pozen, Deep Secrecy, 62 STANFORD LAW REVIEW 257, 292 (2009)

[13]*Id.*

have to make compromises to protect the public interests.[14] Clearly, the argument stems from necessity, and the said 'necessity' forms the underlying foundation of the constitutional limitations imposed on the exercise of fundamental rights..

The need for state secrecy

The underlying argument is that state secrecy does not run contrary to democratic ideals and, in certain circumstances, even furthers the goals of democracies and effective governance. State secrecy is not necessarily antithetical to democratic ideals.[15] Even the likes of Jeremy Bentham, who vigorously supported the cause of publicity and, at times, leaks and hack journalism,[16] considered state secrecy as a "rational and historical fact" and that the public may not be always well-positioned to understand and appreciate the nuances of governance, which, as a matter of fact, determines the health of the democracy and its members.

Preservation of the state

The quintessential argument in favour of state secrecy is consequentialist. Advocates of state secrecy argue that state secrecy is imperative to the

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[14] *Id.*

[15] Mark A. Chinen, Secrecy and Democratic Decisions, 27 QUINNIPIAC LAW REVIEW 27(2009).

[16] L. QUILL, SECRETS AND DEMOCRACY: FROM ARCANA IMPERII TO WIKILEAKS 52 (Palgrave Macmillan Limited 2014).

foundation and strength of the state. As David Pozen posits, some access to information needs to be limited or withheld to conceal sensitive information from adversaries to act against enemies, protect intelligence and its sources, enforcement of law against violators, and safeguarding law and order in the country.[17] This holds unparalleled importance in areas of national security, diplomacy, and foreign relations which are heavily censored areas of operations and will inevitably fail in absence of a strictly enforced confidential mechanism.

It was already pointed out, and the same is reiterated here, that the reluctance of democratic states to favourably treat matters of government whistleblowing and show rather a fervent support for secrecy is not without merit. While in non-democratic states in which the citizens do not directly or indirectly participate in decision-making, democratic states are founded on the premise that obeyance to law is critical to the order of the society. Government whistleblowing is, principally, an act of disobedience and involves unauthorised disclosure of sensitive information. Thus, the governments in democracies do not encourage it as they argue that it amounts to vigilantism and usurpation of power.

It is often argued that given the explicit inclusion of 'restrictions' on the exercise of fundamental freedoms gives legitimate space for secrecy in democracies. In absence of these restrictions, democracy would be in disarray. Undoubtedly, the problem lies in the abuse of secrecy but per se secrecy does not warrant an absolute exclusion. Full publicity of

[17] David Pozen, The leaky Leviathan: Why the government condemns and condones unlawful disclosures of information, 127 HARVARD LAW REVIEW, XXXX (2013).

governmental decision-making will result in poor governance as the officers and the members of the government will fail to utilise their powers and discharge their duties without apprehension—and this brings us to the second justification for state secrecy.

Enhancement of quality deliberation

There is merit in secrecy in government circles, though many theorists are in opposition. Governments in democracies are under constant scrutiny in the public, and emanating pressures can significantly impact the decision-making of the officers.[18]Behind the veil of secrecy, officials and other members of the government feel secure that their deliberations are kept private, that their judgments would not be subject to untempered public scrutiny resulting in bad accountability, that they will be able to make riskier decisions regarding sensitive matters which, if otherwise exposed, may cause unrest among citizens, and can limit interest groups while ensuring accountability to the public[19] resulting in well-informed regulation.

Functional secrecy considers the role of secrecy in enhancing the intra and inter-ministerial deliberations. As James Madison told Jared Sparks, the multifaceted nature of opinions require that they should be discussed first to establish a uniform and consistent mechanism of opinion.[20] This way, the

[18]Mechanisms of Secrecy, 121 HARVARD LAW REVIEW 1556, 1560-1562 (2008).

[19]supra note 22 at 277.

[20]Laura Donohue, (Dys)Functional Secrecy, 2019 SSRN ELECTRONIC JOURNAL, 1, https://doi.org/10.2139/ssrn.3450806 (last visited Apr. 5, 2023).

varying views of the members would be considered and accommodated; something that would not be possible if they are first discussed in public.[21]

Public discussion provides room for influence and results in inconsistent formation of opinion. People often succumb to the public pressures and are unable to retain their respective opinions. Madison points out that the Constitution of the United States would not have ever been adopted if the debates around it were made public. Jeremy Bentham, who advocated the cause of publicity and believed that a project deliberated upon in the garb of darkness will trigger more alarm than the "worst undertaken in the auspices of light", considered the lack of understanding and comprehension that the members of the public may display in matters of policy making. Hence, absolute publicity was not encouraged.[22]

Protection and preservation of privacy

It does not come as a surprise that several defences to state secrecy are easily not welcomed. Much of the resistance come from the lack of practicality; these defences are generally very normative in character. Yet, they offer interesting perspectives to the necessity of secrecy in governance. This is, especially, the case of governmental whistleblowing, which underlies the tenets of informational freedom and freedom of expression. One such interesting perspective pits individual privacy against the government's. The basic line of argument here is this: if individuals are entitled to the right of

[21]DENNIS, supra note 11.

[22]GERALD J. POSTEMA, UTILITY, PUBLICITY, AND LAW: ESSAYS ON BENTHAM'S MORAL AND LEGAL PHILOSOPHY (Oxford University Press 2019).

privacy, then the group of these individuals should also have such an entitlement.

In the national security sector, there are myriad actors involved in the implementation of the decisions, many of which very rightfully require a heightened degree of privacy.[23] Exposure to the information may not only create a scandal but also put their lives in jeopardy. It is not difficult to think about the areas where such privacy is utmost needed; diplomatic, economic and military areas have a far-reaching, all-encompassing impact on diverse state interests as well as the rights of the citizens.[24] For instance, undercover operations require protection and preservation of the identity of those involved, the purpose and nature of operations, and modus operandi.

The idea of group privacy is not alien to scholarship. It is rather a social and cultural phenomenon. Reduce human civilisation to its basic collective unit of family and the value of limiting access to personal familiar information. It is argued, though often unsuccessfully, that the absence of privacy protection would disrupt group reason and autonomy. This disruption will yield

[23]Cemil KAYA, State Secret as an Instrument to Maintain State Security, 14 SELCUKUNIVERSITESIHUKUKFAKULTESI DERGISI 33, 35 (2006), https://doi.org/10.15337/suhfd.2017.168 (last visited Apr. 5, 2023).

[24]Dorota Mokrosinska, Why states have no right to privacy, but may be entitled to secrecy: a non-consequentialist defense of state secrecy, 23 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 415 (2018), https://doi.org/10.1080/13698230.2018.1482097 (last visited Apr. 5, 2023).

problems not only for the state but those involved in the making and the execution of those decisions.

Secrecy as a challenge to Government Whistleblowing in India

The existence of Indian democracy is often regarded as paradoxical. The intricately heterogeneous society marked by multifarious languages, castes, creed, religions, ethnicities, social and economic inequalities, and peculiar cultures are managed by a rather resilient polity. The undercurrents of long-standing traditions, collectivism, and conservatism remain strong in the age of individualism, modernity, and openness—so the struggles of the country with state secrecy and emerging necessities of whistleblower rights may not be unwaveringly dealt with. The Indian Constitution, whether you call it a patchwork or a 'beautiful patchwork', has borrowed or drawn from the Bill of Rights[25] much of what there is in Part III[26], the sanctorum of fundamental rights. But, the enforcement of these rights differ subject to the complexities of the Indian polity.

Balancing interests of the state and people

Fundamental rights are not absolute, especially Article 19 (1) (a) that serves as a tool of defence for whistleblowing activists. On mere reading, it can be understood that the general rule is to enable enforcement of fundamental rights and curtailment under exceptional circumstances. Even so, the state will have to prove that those restrictions are reasonable, which inevitably

[25]US CONST. Bill of Rights.

[26]INDIACONST, art. 12-35.

leads us to the importance of proportionality. In Chintaman Rao v State of Madhya Pradesh,[27] which is one of the first cases on the said matter, the court discussed the usage of "reasonable restriction" in Article 19 and stated that the restrictions imposed on the exercise of the fundamental right cannot be "arbitrary or of an excessive nature", and must be proportional to public interest.[28] To put it more specifically, the determination whether the executive exercise of secrecy is legitimate depends on how proportional it is. Only then, it can be concluded that an act of secrecy is a reasonable restriction and the access of information can be denied.

The Supreme Court of India has dealt with a catena of cases in which doctrine of proportionately was applied. In 2016,[29] the Court reiterated, as it did in several other precedents, that no absolute constitutional rights exists, and these rights are relative in nature. It went on to state that only when it is necessary to safeguard public interests or the rights of others can fundamental rights be limited.[30] Recently, the Anuradha Bhasin[31] case highlighted an important consideration of a 'necessity test' to ensure that the rights do not become either absolute or too restricted. Referring to a plethora of cases[32] including the landmark K.S. Puttaswamy (Retired) v. Union of India,[33]the

[27] 1951 AIR 118.

[28] *Id.*

[29] Modern Dental College& Research Centre &Ors. v. State of Madhya Pradesh &Ors., Civil Appeal No. 4060 of 2009.

[30] *Id.*

[31] Anuradha Bhasin V. Union of India, AIR 2020 SC 1308.

[32] Mohammed Faruk v. State of Madhya Pradesh, (1969) 1 SCC 853; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; supra note 40; BishambharDayal Chandra Mohan v. State of Uttar Pradesh, (1982) 1 SCC 39.

[33] (2019) 1 SCC 1.

Court enumerated the four-fold requirements under the doctrine of proportionality.

The four factors in the doctrine require, firstly, to determine the existence of a restrictive legislative or executive measure bearing a legitimate goal. It is emphasized that the said goal must be of such importance that it warrants curtailment of constitutionally guaranteed freedom or right.[34] Secondly, such measure must be rationally instrumental in achieving the goal for which the restrictions have been imposed. Thirdly, there must not be any effective, least restrictive alternative suitable to achieve the goal. Fourthly, and most importantly, the stage where the act of balancing needs to be achieved, the measure must not disproportionately curtail the rights to achieve the goal.[35]

So, while the Court, in Anuradha Bhasin case, did not go as far as to remove the limitation on the access of the Internet, it explicitly decided that these restrictions cannot be imposed indefinitely in the context of national security, and an equilibrium needs to be struck between fundamental rights and national security. It went on to stress that orders limiting the exercise of fundamental rights, especially the freedom of speech and expression, cannot be shrouded in the veil of secrecy and arbitrariness.[36] The said rationale has been a mainstay feature of the literature that advocates a reconciliation between government whistleblowing and state interests through a balanced, proportional relationship between fundamental freedoms and necessities of secrecy.

[34] *supra note 42.*

[35] *Id.*

[36] *Id.*

Existing legislative framework and the challenges

Until 2005, the general rule in the Government of India was secrecy, and openness was treated as an exception. It was in the year 2005 the RTI Act came into force that the winds of change began to blow stronger than before. It underlines the idea expressed by James Madison that effective governance requires governors of their own affairs to acknowledge the power that knowledge provides"[37], making its enforcement a watershed moment in the history of Indian polity. The enactment works on the principle that a fully-functional democracy only works on access to information as a general rule, with only a few exceptions. After all, access to information encourages good governance, and good governance encourages transparency, accountability, predictability and participation.[38]

One of the major overhauls that the RTI Act 2005 undertook was to override the effect of the colonial Official Secrets Act 1923 (OSA). It is a well settled principle that in certain matters of governance secrecy is imperative. The OSA 1923 recognizes exactly this, though in the most draconian fashion. Its Section 5[39] is of relevance to our discussion as it directly relates to "wrongful communication" of information that is likely to affect, inter alia, the security of the state.[40] The said provision extends to not only the person wrongfully

[37]Image 1 of James Madison to W. T. Barry, August 4, 1822., THE LIBRARY OF CONGRESS, https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text (last visited Apr. 5, 2023).

[38]SECOND ADMINISTRATIVE REFORMS COMMISSION, 'RIGHT TO INFORMATION: MASTER KEY TO GOOD GOVERNANCE 1 (Second Administrative Reforms Commission 2006).

[39] "Wrongful communication, etc., of information […]"

[40]*Id.*

communicating a state secret but also the person receiving the wrongful communication. Punishment under section 5 enumerates imprisonment that may extend to three years, or fine, or both.[41]

While on the face of it, the Act appears to safeguard the interests of the state, a closer look would highlight the mischief in the drafting. In several places, the language used provides room for the widest interpretation encouraging government officials to exploit the wide letter of the law to sabotage its relatively narrow spirit. Even the courts have acknowledged the unfettered use of the Act to denial legitimate demand for information.

A case on point is the Common Case v. Union of India.[42] In this case, the Apex Court issued directions to the then director of Central Bureau of Investigation (CBI) to recuse from certain cases, including Coal Block Allocation. He had met several people at his home who were accused in these cases and in absence of investigating officers. During oral evidence submission, the petitioner, furnished a file noting he received from a whistleblower. The court found that the file noting cannot be designed as a secret under the OSA 1923 and the onus lies on the CBI. The court went on to hold CBI liable for it failed to maintain the document under its care and

that it is difficult to find fault in the whistleblower when his actions were in public interest.[43]

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[41] *Id.*

[42] (2015) 6 SCC 332 (Criminal Misc, Petition No. 387 of 2015).

[43] *Id; P. ANANTHA BHAT, RIGHT TO INFORMATION AND GOOD GOVERNANCE XXXX (Sairam Bhat ed., National Law University of India University 2016).*

The provisions on secrecy are only strengthened through our enactments such as the Indian Evidence Act 1872,[44] the Civil Service Conduct Rules 1964[45], and the Central Civil Services (Pension) Rules 2021.[46] In the Indian Evidence Act 1872, Section 123, for example, allows the furnishing of any evidence from an unpublished official record if and when the Head of the concerned Department permits. The Rules 1964 also contains the flow of information by prohibiting the communication of any official information without necessary authorisation. Recently, the Department of Personnel and Training (DoPT) issued a notification stating that the Rules 1972 stood amended and prohibits former government servants in any Intelligence or Security-related organization including those mentioned in the Second Schedule of the RTI Act 2005[47] from making any publication post retirement in absence of clearance from the Head of the concerned organization.[48] Moreover, the amendment gives the final say to the Head of the Organization in determining whether a particular publication is sensitive or not.

The instructions issued for the purpose of classification are themselves classified so one cannot help but wonder the magnitude of discretion and potential of abuse that this amendment fosters. The scenario clearly projects the reversal in the governmental approach as we gradually but systemically transition back to a culture of secrecy. The word ‘secret’ itself remains

[44] The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

[45]Central Civil Services (Conduct) Rules, 1964.

[46] Central Civil Services (Conduct) Rules, 2021.

[47]Supranote 57, rule 7; Retired Security Officials Now Need Govt Nod for Any Writing Related to Former Organisation's 'Domain', THE WIRE, https://thewire.in/government/retired-security-officials-now-need-govt-nod-for-any-writing-related-to-former-organisations-domain (last visited Apr. 5, 2023).

[48]*Id.*

undefined and this easily allows the government to preclude communication of any information which may not even have any impact on national security can still be classified as such. It is this excessive withholding of information from citizenry that invites bad light to state secrecy and maligns the otherwise fundamentally indispensable objectives served by it.

The story does not end here. The RTI Act 2005[49] clearly overrides the OSA 1923 yet the colonial law prevails. This is no brainer that the objective of keeping the OSA alive despite all these years of the enforcement of the RTI Act 2005 gives an impression that the introduction of the latter was just a whitewash. The problem is simple: how can a law that encourages access to information and a law that prohibits the same co-exist? There are adequate measures in the RTI Act 2005 itself that allows for prevention of disclosure of information in certain cases.

Section 8 of the RTI Act, titled "Exemption from disclosure of Information" enumerates the categories of information that can be refused to be provided, and this includes security interests of the State. Moreover, the same provision clarifies that notwithstanding anything in the OSA 1923, a public authority may authorise information to be access to information, "if public interest in disclosure outweighs the harm to the protected interests."[50] Undeniably the problem regarding the ambit of "public interest" remains but the fact is that the RTI Act 2005 operates above all. Yet, the anomaly exists.

The penchant of the government to cover up under the garb of secrecy is evident in several other cases. In the recent review petition of the 2018 Rafael

[49]Supranote 48

[50]*Id.*

judgement, Attorney General K.K. Venugopal had argued on behalf of the Centre that certain documents pertaining to the Rafael deal were stolen and should be charged under the OSA. He had claimed privilege over the documents and that they cannot be considered as evidence under Section 123 of the Indian Evidence Act. Upon this, Justice Joseph made the Attorney General to read out the provisions of the RTI Act, under its sections 8(2) and Section 24, and said that the RTI Act overrides the OSA.

With the provisions of the RTI Act 2005 being rendered ineffective via an Act that has been explicitly overridden, citizenry is pushed back to square one where the access to information is restricted. The RTI Act 2005 becomes highly constraint, and the Whistleblower Protection laws come into picture. India lacks a whistleblower protection framework despite all the drama that surrounds it. The discourse on whistleblowing took centre-stage in the year 2003 following the murder of Satyendra Dubey, an engineer, who blew the whistle on India's Golden Quadrilateral Project of the National Highways Authority of India.[51] The Supreme Court sternly asked the Central Government to undertake necessary steps towards the protection of whistleblowers. In 2004, an office order was issued in the form of the Public Interest Disclosures and Protection of Informers Resolution.

Despite the killings, no legislative action was taken to address the matter and the Supreme Court refused to formulate any guidelines on the pretext that it cannot make law. In the year 2010, the Central Government introduced, what was then called, the Public Interest Disclosure and Protection to Persons

[51]The Satyendra Dubey murder case Homepage, REDIFF.COM: NEWS | REDIFFMAIL | STOCK QUOTES | SHOPPING, https://www.rediff.com/news/dubey.htm (last visited Apr. 5, 2023).

Making the Disclosure Bill 2010. It was only after four years that the Bill became what is now known as the Whistleblowers Protection Act 2014 (WP).[52] Now, here is the catch: the Act is not in force because certain amendments pertaining to information on national security couldn't be incorporated. In 2015, an attempt was made to provide the OSA Act 1923 overriding effect on the WP Act 2014 through the incorporation of a number of categories unauthorised disclosures pertaining to which shall not be extended protection under the latter Act. Though the Amendment Bill lapsed, it clearly showed what is expected to come out of the whistleblower law if at all it becomes operational in the near future—and it is not necessarily a good news.

The paradox of the triad—OSA, RTI Act, and WP Act—poses great dangers to the interests of whistleblowers who go beyond their duty towards the government and prioritize their responsibilities towards the nation at large. Protection of sensitive security related information is no excuse for the underlying corruption and constitutional violations that the government may be involved. What aggravates the problem in the Indian case is that the domain of fundamental freedoms is still in a highly experimental stage. For example, our colonial rulers outlawed anti-homosexuality law way back whereas India continued with it up until 2018. In the recent Rafael case, the Supreme Court did make a cursory mention that the RTI Act 2005 overrides

[52]The Whistleblowers Protection (Amendment) Bill, No. 154, Bills of Parliament, 2015 (India).

OSA 1923 but nothing more was said that could have presented a sense of urgency to do away with the latter.[53]

Conclusion

Secrecy is a social phenomenon. All of us are guilty of keeping secrets, and at the same time, we are also the ones who divulge them whenever we deem necessary. In a social setting, the divulgence of secrets, if discovered, may invite censure and, worse, exclusion from a person's society. The social cost of such an act is profound and can potentially change individuals' perceptions and affect the stability of interpersonal relationships. Extrapolating the same to a much larger collective unit, the State, and estimating the costs of breach of secrecy would yield far-reaching results. The veil of secrecy is a fact in governance; even the most openly, open democratic governments maintain a certain degree of secrecy for reasons reasonable and expected from the administration of a State.

The untenable criticism against state secrecy rests on an idealistic notion of democracy. In the earlier times, when the conception of State was limited to kingdoms and princely states, secrecy was hardly a matter of debate. It was considered an absolute prerogative of the rulers to implement a spy system with impunity, curtail dissemination of information to the public, and keep the nature of the information in circulation in check. In those times, the citizens believed more in the conception of protection from the state than the

[53]Rafale Deal Case: RTI Overrides Official Secrets Act, Says Supreme Court, THE WIRE, https://thewire.in/law/rafale-case-sc-centre-preliminary-objections (last visited Apr. 5, 2023).

rights inherent to their existence. However, as the movement of intellectual thought and reformation gained traction, humans became more aware of their respective rights and liberties.

The ‘right to know’ movement bolstered the efforts of the civil society to demand for greater transparency and accountability from governments. Advocates of the movement blame the increased propensity of the states to limit the dissemination of essential information that the citizens rightfully deserve to know to exercise their electoral rights and duties as citizens. The apprehensions are admittedly legitimate as the absence of openness leads to a dysfunctional democracy. However, absolute transparency and accountability is a utopian aspiration which is not practically feasible.

The functions of a state require a certain degree of secrecy so that sensitive information that can potentially upset public order is preserved. The problem is, therefore, not in secrecy per se; the problem rests in the abuse of secrecy. Both of these things are different. The argument that secrecy is antithetical to democracy fails to admit the administrative necessities of the State which strengthen the stability of the country. In diplomacy, secrecy is warranted for undertaking sensitive discussions over bilateral or multilateral issues without external pressures.

The state concerns will remain ineffectively addressed when all matters are completely or substantially discussed in public. Disclosure of details of the military missions, for example, can put in jeopardy the lives of several actors in the same. The real problem lies in the abuse of secrecy to hide from public scrutiny the acts of corruption, human rights violation, and constitutional

breaches—and often whistleblowers take it upon themselves to expose the government.

Government whistleblowing, which is regarded as an anathema to the regime of state secrecy, functions in two ways. One is where the actor takes the sensitive information in his possession out in the public, and the other way is where the actor is encouraged to report the alleged wrongdoings to designated, independent authority. History is witness that the former often occurs due to the failure of the internal redressal mechanisms. While it is very easy to single out the actions of the whistleblower as treacherous and reckless for having brought the sensitive information in public, the whistleblower is a prime example of a citizen exercising his right to speech and expression and duty towards upholding the constitutional values. Unless internal organizational framework is procedurally and substantially overhauled, government whistleblowing will be treated as an inimical exercise of vigilantism.

In India, secrecy is a bureaucratic obsession very much like in other democracies. The existence of the triad, RTI Act, OSA, and WPA, manifests the hesitation of the government to allow for a breathing space for the government whistleblowers. In fact, repetitive attempts to curb the channels of expression and access to information have been part of a long-drawn, historically-occurring reality. With the fate of a general whistleblower in dire uncertainty, it is not difficult to imagine the tribulations faced by government whistleblowers while addressing their cause of concerns. .

Government whistleblowing, despite of its own shortcomings, is crucial to maintaining a check on the power of the executive. However, India, as a

matter of fact, lacks the requisite legislative framework to reasonably address the rights, duties and liabilities of a government whistleblower. Due to the persistent inadequacies of the legislative action on this matter, the cause of secrecy has grown around itself a negative image that, in reality, deserves a different treatment. Secrecy needs regulation, not elimination. However, the lawmakers and administrators relentlessly pursue the cause of maximum secrecy and minimum transparency and accountability. The aim must not be to create a failproof framework; anything perfect is unachievable. What the government whistleblowing as well as state secrecy require is a balanced investigation that assists in drawing the line so that the interests of the state as well as the rights of the citizens are minimally affected.