

## LAW ANALYSIS

# The Official Secrets Act and how it affects the culture of accountability

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The Official Secrets Act, 1923 (OSA) – a nearly 100-year-old colonial legislation – has recently garnered much attention following the arrest of journalist Rozina Islam. Reports say that a case has been filed against Rozina Islam under sections 3 and 5 of the OSA, 1923 and section 379 and 411 of the Penal Code of 1860. The aforementioned provisions of the OSA relate to spying and wrongful communication of information. Section 3 of the Act penalises obtaining or collecting of document or information which might be "useful to the enemy" for purposes prejudicial to the "safety or interests of the State". Section 5 penalises willful communication of any information obtained "in contravention with the Act" and the use of such information "in any other manner prejudicial to the safety



*Commission and Others* reaffirmed that "right to information is a basic right which the citizens of a democratic country aspire in the broader horizon of their right to live." The court went on to emphasise the necessity of the right to information by opining that it "has reached a new dimension and urgency" in the light of the need for the "maintenance of transparency and accountability to the public". Free dissemination and exchange of information is a necessary aspect of freedom of expression and the same is required to be upheld by the implementation of legislation such as the Right to Information Act 2009 (RTI Act). Section 3 of the RTI Act states that in case of any conflict with laws which impede the exercise of right to information the RTI Act shall prevail. As such, it can be argued that right to information shall override the provisions of the OSA to the extent that it conflicts with the general people's right to information. Whether the spirit of the RTI Act is damaged by the application of the OSA is a question that must be evaluated. One issue is the status of the OSA in the light of the enactment of the RTI Act. Indian apex court in *R.S. Raghunath v State of Karnataka* opined that in case of conflict between the two statutes, the latter abrogates the former if two conditions are met: "i) the two laws are inconsistent with each other. ii) there is some express reference in the later to the earlier enactment." Applying this test would either lead to a conclusion that the two Acts are contradictory or arguably, that a high threshold is applied for offences under the OSA so as not to interfere with right to information. The international principle in this regard is that "disclosure takes precedence", i.e.

all laws which are inconsistent with the exercise of the right to information yields to it.

In enforcing the right to information, the authority shall also uphold the international standard of maximum disclosure. This entails a presumption in favor of disclosure and such presumption may be by-passed only in limited cases. Refusal to provide information is also required to be justified by the authority responsible for such disclosure. The international standard provides a three-part test in this regard, i.e. the refusal must be for a legitimate aim provided in law, the disclosure must pose a substantial harm to that aim and the harm must be greater than the public interest in favor of disclosure. Section 7 of the RTI Act provides that the authority may refuse to provide information sought if one of the grounds mentioned in the provision apply; however, in case of such refusal, the authority is required to obtain the approval of the Information Commission. In order to adhere to the internationally applicable standard of maximum disclosure, these grounds of refusal must be weighed against public interest.

Lastly, it can be said that dissemination of information, particularly when the same concerns matters of public importance, is a cornerstone in fostering a culture of accountability and transparency upon which democracy can sustain. Therefore, any restriction on the free-flow of information must seek to strike a balance with the public's right to information.

THE WRITER WORKS AT LAW DESK, THE DAILY STAR.

*In 2015 the High Court Division in Badiul Alam Majumdar and Others v Information Commission and Others reaffirmed that "right to information is a basic right which the citizens of a democratic country aspire in the broader horizon of their right to live."*

of the State". It appears that these provisions had been put in place to address publication of secret information in manners prejudicial to the safety and interest of the State and a question remains as to how these provisions can be applied in consonance with the exercise of constitutional rights including freedom of press when the issue is one of investigative journalism. As such, there has been a lot of debate over whether the existence of a law such as the OSA is consistent with the principles of democracy, transparency, and accountability.

In 2015 the High Court Division in *Badiul Alam Majumdar and Others v Information*

## LAW NEWS

# Comprehending the environmental dimensions of SDGs

Countries are on track to miss the Sustainable Development Goals (SDGs) relating to environmental protection, two UN entities warn in new report issued on 22 May to coincide with the International Day for Biological Diversity. Despite making progress in areas such as clean water, sanitation, clean energy and forest management, the world is still living unsustainably and biodiversity loss and climate change have continued to deteriorate.

"We have still not embraced the rate of change necessary to come in line with the 2030 Agenda", said Elizabeth Maruma Mrema, Executive Secretary of the Convention on Biological Diversity, which produced the study together with the UN Environment Programme (UNEP).

"The report makes it clear that we are falling short, and, in some cases, actually receding. The world cannot sustain our rate of use and abuse forever, and it is imperative that we accept the changes in lifestyles and livelihoods necessary to achieve the 2030 goals."

The Measuring Progress report reviews data and information about the environmental aspects of each of the 17 goals, and how countries are making headway based on assessment through respective SDG indicators. The authors found there has been an increase in downward trends among

more indicators when compared with the previous progress report published in 2019.

The report calls for improved data, and indicators, to understand how to ensure development progresses in a practical way. Gaps were identified in the diversity and use of environmental data and statistics to inform government policies, particularly "big environmental data" produced through technologies such as remote sensing and artificial intelligence.

Furthermore, many existing data products, statistics and indicators appear to be under-utilised, while governments also have failed to put emphasis on that data in policy formation or decision-making. "Our comprehension of the environmental dimension of the SDGs is lagging", said Jian Liu, Director of the Science Division at UNEP. "Our limited capacities to collect, disseminate and effectively use environmental data have hindered our holistic understanding of the environment and the effect of socio-economic factors – we hope this report will support countries as they strengthen action on the environmental dimensions with a view to meeting the 2030 Agenda," he observed.

COMPILED BY LAW DESK (SOURCE: UN.ORG).



## REVIEWING THE VIEWS

# The legal protection of Whistleblowers

RAISUL SOURAV

The Bangladesh parliament has enacted the Public Interest Information Disclosure (Provide Protection) Act (popularly referred as the Whistleblower Protection Act) to guarantee legal protection to the whistleblowers back in 2011. Even though the principal aim of this law is to ensure safeguards to the whistleblowers (Whistleblower denotes any person who discloses the public interest information), journalists are also eligible to take advantage of this legislation for their professional purposes. Regrettably, after a decade following its enactment, very little is known about what the law means and what it can do to ensure transparency, accountability, and good governance in the public domain. Most of the people including the government employees, activists, and journalists remain ignorant about the existence of such a legislation. Consequently, the application of this piece of sunshine law becomes rare in this country.

The recent incident with Rozina Islam, a senior reporter of the leading Bangla daily *Prothom Alo* brings this issue into light again. Being a journalist, Rozina Islam is entitled to collect evidence and data from any government office. The Whistleblower Protection Act of 2011 enables anybody to disclose public interest related information and provides statutory safeguards from all types of civil and criminal cases or departmental proceedings or any kind of action, punishment, discrimination etc. The focus of this law is to uphold public interest and combat corruption by disclosing material information about any irregularity.

The Right to Information Act, 2009 (RTI Act) along with the Whistleblower Protection Act, 2011 creates a new regime for free flow of information and fearless journalism for public interest in Bangladesh. These two pieces of legislation override the widely criticised Official Secrets Act and some other laws i.e provisions of the Evidence Act, 1872 (Section 123: evidence as to affairs of state); Rules of Business, 1996; the Government Servants (Conduct) Rules, 1979 etc after their enactment. Section 3 of both the RTI Act and the Whistleblower Act speak of the supremacy of the respective laws over any conflicting provisions in any other law having force for the time being in the country. So, there is no scope of hiding any public document under the veil of 'confidential'

or by virtue of the colonial-era Official Secrets Act except truly classified secret document like sensitive defence policy, important formula, bilateral confidential contract etc. However, despite extensive condemnation, Section 32 of the Digital Security Act (DSA) of 2018 refers to the Official Secrets Act although the RTI Act will prevail in case of any incongruity between these two (Section 3 of the DSA).

Coming to the context of the recent incident, it is necessary to define 'public interest information'. In accordance with the Whistleblower Protection Act, public interest information means such an information of any agency which expresses that, any officer was, is or may be involved in: irregular and unauthorised expense of public money; mismanagement of public resources; misappropriation or misuse of public money or resources; abuse of power or maladministration; committing criminal offense or illegal or prohibited acts; a conduct that is harmful or dangerous for public health, safety or to the environment; or corruption.

It is noted that disclosure of information relating to public interest is guaranteed under the Act of 2011. In addition, section 5 of the same Act confirms legal protection for the whistleblowers including non-disclosure of identity without consent; immunity from civil criminal or departmental proceedings; no measure prejudicial to financial, mental or social reputation; prohibition of demotion, transfer for harassment, forced retirement or discriminatory treatment by employer to an employee etc. If anyone contravenes this provision, s/he shall be sentenced to imprisonment for a minimum term of two years but not exceeding five years or with fine or with both and if that person is a government employee, departmental actions shall have to be taken apart from the mentioned punishment (Section 9).

It is mention worthy that anti-freedom laws like the Official Secrets Act, the DSA not only creates obstacles for journalism but also violate statutory rights of the citizens to get information while disregarding the constitutional spirit to uphold the freedom of press. These outdated and suppressing laws foster the culture of secrecy inside the bureaucracy and give impunity to the wrongdoers.

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## LAW OPINION

# Is Official Secrets Act relevant in Bangladesh?

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Bangladesh made headlines across the world due to the arrest of Rozina Islam, a prominent investigative journalist. She was arrested after the Health Ministry filed a complaint against her under the colonial-era Official Secrets Act, allegedly for taking pictures of so-called classified official documents, according to news reports.

The Official Secrets Act (OSA) was adopted in 1923 under the British colonial rule. The OSA prohibits the unauthorised collection or disclosure of secret information and imposes fines for perpetrators, even in cases when a person voluntarily receives secret official information which he/she knows or ought to have known it is classified. Attempts to or assistance in breaching the OSA are also punishable.

OSA is known as an anti-espionage law and has under its purview all matters of secrecy and confidentiality with regard to the government or state affairs. The law is applicable to government servants and citizens, provides the framework for dealing with espionage, sedition, and other potential threats to the integrity of the nation. The most commonly used sections of OSA are Section 3 and 5. Section 3 criminalises spying and Section 5 criminalises unauthorised disclosure of secret government information including any secret official code, password, sketch, plan, model, article, note and document etc. However, the OSA has been criticised because of the way it has targeted media and press. Investigative journalism in particular has been its worst victim.

On the other hand, Bangladesh has enacted the Right to Information Act (RTI Act) in 2009, which recognises in its preamble that the right to information is an integral part of the freedom of thought and conscience, and of speech, recognised as fundamental rights under Article 39 of the Constitution of Bangladesh. The preamble of RTI Act also recognises that right to information ensures transparency and accountability, reduces corruption, and establishes

good governance. Section 3 of the Act states that all other laws shall be superseded or overridden by the RTI Act. Therefore, some existing laws which uphold state secrets shall be overridden or narrowly applied in order to protect the right to information.

Upon the enactment of the RTI Act therefore, the OSA has lost its relevance as an outdated, colonial law. But, the Digital Security Act 2018 (DSA), by virtue of section 32, adds validity to the existing culture of secrecy while upholding the OSA Act.

At the same time, there is no specific Bangladeshi law which protects journalistic freedom.



However, Sections 4 and 5 of the Public Interest Information Disclosure (Provide Protection) Act, 2011 (The Whistleblowers Protection Act) provide protection and safeguards to whistleblowers if the information is true and related to public interest. This landmark Act defines public interest information as information relating to misuse of public money or resources, abuse of power, criminal acts and acts against public health, safety or the environment, and corruption. Any whistle-blower can make a "public interest disclosure" to the competent authority and avail protection from civil and criminal prosecution, employment disadvantages, protection of identity etc. Disclosure of false information or information not in the public interest is punishable. Article 39(2)(b) of the Constitution guarantees freedom of press. Bangladesh is also party to the

International Covenant on Civil and Political Rights (ICCPR). Article 19 of ICCPR clearly mentions freedom to seek, receive, and impart information, all of which support journalistic freedom including freedom to conduct investigative journalism. The right of access to information is a powerful tool in the fight against corruption and in achieving good governance and sustainable development.

The field level situation is quite dismal. A study by the RTI Forum on the implementation of the RTI Act, identified lack of interest of the media (16.3 percent) as one of the leading challenges (RTI Forum 2012). Generally, journalists use their personal contacts in collecting information as they had done before the RTI Act was enacted. The Bangladesh RTI Survey 2019 also showed that journalists working in various media outlets said that the Act was not providing much benefit to them as the process of receiving official information was slow and time-consuming (WB 2020). One of the participants of the study observed "journalists were buoyant about the legislation from the very beginning as they thought this would give them easy access to exclusive government information. However, after enactment of RTI Act, they lost their interest as the process is bureaucratic and time-consuming. They keep on using their personal contacts."

In addition, over-classification of government information on ever-expanding national security grounds has raised concerns about its impact on freedom of information, and the government's public accountability more generally. Time has come to set certain standards and principles to prevent actual or potential abuse of power in the name of state secrets protection on national security grounds. The legal protection of national security information has assumed renewed significance with the increased awareness of national security concerns associated with unauthorised disclosure of State secrets.

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