

Can Police Arrest Anyone under the Official Secrets Act, 1923?

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Abstract

It is assumed that police have inherent power to make an arrest, where matter relates to national security such as in the cases of the Official Secrets Act, 1923 (OS Act). However, in accordance with Anglo-Saxon jurisprudence, the State being the victim cannot investigate its own case. Therefore, lawmakers have brought in the provision of mandatory complaint by the state to the judiciary and submit itself to the judicial oversight. To prevent abuse of law, which can isolate an individual from the society, and police acting in haste, authorization of the complaint process has been built into the OS Act. Therefore, arrest without having such authorization is illegal and unconstitutional. Police cannot presume that it will get such authorization and a complainant on a later date. No authorization can be given without an investigation. Hence it is a 'Catch 22' situation. Therefore, lawmakers must recast the Official Secrets Act under new realities of the internet-connected global village, where security does not mean just military matters, but many other aspects form now part of national security, unlike when OS Act was passed between the two world wars.

Keywords: Official Secrets Act, cognizable offence, arrest, complaint case, national security

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INTRODUCTION

This research paper has attempted to see whether the cases under the Official Secrets Act 1923 (OS Act), are cognizable or not. Section 13(3) OS Act clearly states that even a magistrate cannot take cognizance of offence without a complaint filed by the government or a complaint so authorized. A complaint case cannot be a police case. Hence police have no powers to make an arrest. The paper dwells at all the aspects related to arrest under the OS Act. The author could not find any ruling in public domain covering this aspect. The original Act of 1923 under the Section 12 had a clear mandate as to when can police make an arrest under the OS Act. But amendments in 1967 to the OS Act have omitted this fact and made all matters under the OS Act non-cognizable being the complaint case. The world has changed dramatically since the end of world wars. The reality of the hyper-connected world, mere interaction cannot be used as a presumption of guilt. There has been a paradigm shift in the concept as to what constitutes national security. It no more just military matters which are vital for the nation but many other issues including economic,

energy and political which can cause failure of a nation-state. Therefore, the government must go back to the drawing board to recast the Official Secrets Act.

It may sound like a stupid question to ask whether the police have the power to arrest a person under the Official Secrets Act, 1923. The obvious answer is that for such a crime against the nation, such offence should be cognizable and non-bailable, where police can make an arrest without the intervention of the court. However, a more in-depth analysis of the law indicates that police has no such inherent powers to make an arrest where the accused is only facing the allegation related to the Official Secrets Act.

The Official Secrets Act was passed by the British government in between the two World Wars when spying related to defense matters were at a peak. (Today financial, nuclear or energy security matter may have a far more severe impact on the national security). For the analysis of the concept of arrest under the OS Act, it is essential to understand that unlike most other offences, where the government in a

court acts on behalf of a victim, in case of the loss of the Official Secrets of the government itself is the victim. But this makes the government an interested party of the case. Therefore, the Official Secrets Act is so drafted to protect its abuse and balance is provided through the direct oversight by the court from the very start of the case.

The amendments to the Official Secrets Act were made in 1967. One of the amendments which completely deleted was Section 12 of the original Official Secrets Act. The deleted section has explicitly stated as to which of the offences are cognizable and non-bailable. However, under the present provision, it is only by the implied meaning of the law, it can be drawn whether an offence is cognizable or not. The power of arrest by police is limited only to cognizable offences as defined under Section 2(c) and 2 (l).

The primary legal basis for deciding whether an offence falls under cognizable/bailable or not in the cases of non-IPC cases is the Schedule-II of the Code of Criminal Procedure 1973, 'Classification of Offences against Other Laws'. It has thus been presumed that the Schedule II of the CrPC which defines the law of cognizable can be used as the basis of making an arrest as well as police investigation under the Official Secrets Act. But, the sub-section 2 of Section 4 CrPC states, "All offences under any other law shall be investigated, inquiry into, tried, and otherwise dealt with according to the same provisions, what subjects to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." This means that if a particular procedure has been enacted by any law other than IPC cases, the procedure established by such law shall override the procedure established by the CrPC.

The Official Secrets Act is almost a complete law by establishing its own procedure to govern the investigation, inquiry and trial under the act [1]. The section 13(3) OS Act states, "*No Court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from, the Appropriate Government or some officer empowered by the*

Appropriate Government in this behalf:" It implies that all courts are barred from taking cognizance of offence under the Official Secrets Act, except on the basis of a complaint made along with orders or authorization issued by the appropriate government. Section 13(3) OS Act creates three serious technical challenges to make any arrest for the cases which are purely related to the Official Secrets Act. These are:

- A. Because the power to take cognizance of offence by any court is not unrestricted but conditional. Therefore, such an offence will automatically become a non-cognizable offence unless such pre-conditions are met beforehand.
- B. The case can only be a 'complaint-case'. Hence there is no space for submitting 'police-report'. Section 2(d) and Section 2(r) CrPC differentiate the 'complaint-case' and 'police-report' respectively. The procedures for complaint case are distinctly different from the police case. The orders of Delhi High Court, in case of Aniruddh Bhal & Others Vs CBI, CRL.REV.P. Nos.683/2012, 707/2012 & 34/2013 passed on 26 May 2014 by Justice Veena Birbal [1], has established the case laws that, "*The Official Secrets Act is a Special Act and a complete code in itself. As per the mandate of the Official Secrets Act, no Court shall take cognizance in the absence of a 'complaint' filed under authority of the Appropriate Government. Therefore a 'complaint' as defined under Section 2(d) of the Code, and the authority of the Appropriate Government for filing the complaint about the offence committed under the Official Secrets Act, if any, is the sine qua non for taking cognizance of any offence under the Act.*"
- C. It has also been ruled that it is bad in law to artificially conjoin the 'police-report' and 'complaint-case' to try together using section 210 CrPC for the matter related to the Official Secrets Act. Therefore, where legally police cannot even submit police report at the end of its investigation, it automatically means that police have no right to independently investigate the matters related to the Official Secrets Act and submit any police report, let alone making any arrest. In fact, the explanation

is given with Section 2(d) CrPC clarifies that only cases which are ‘non-cognizable’ and police happen to submit a report then such cases may be considered as ‘complaint-case’. Therefore, the law is evident that Police cannot make an arrest as it has no power to submit police report but a complaint which is possible only in non-cognizable cases only.

The most important fact is that the stage of cognizance of offence arrives only after submission of a complaint or the police report which generally takes around 60 or 90 days after the arrest. Even in case of the fastest investigation, there are a few days gap between the date of arrest and getting order/authorization issued in accordance with section 13(3) of the Official Secrets Act. The moot question is how any Police officer can be sure at the time of arrest, that the police will get such order or authorization from the appropriate government. Suppose, in its prudence the appropriate government decides not to issue such orders or authorization, then how will police account for the period of such arrest and stealing the freedom of a person or citizen?

Therefore, under the present law, it is technically unlawful, illegal and unconstitutional for the police to make an arrest without having such orders of authorization issued by the appropriate government. And the ‘Catch-22’ situation is that the appropriate government cannot issue any orders or authorization without perusing evidence and draft complaint. The authorization or orders can be used only after vetting the draft complaint. But evidence cannot be collected without investigation.

Probably, presently the courts, to support the Law Enforcement Agencies, are overlooking this major legal shortcoming but doesn’t this amount to breaching the Article 21 of the Constitution by not following the procedures established by law?

There are far too many inconsistencies in the present Official Secrets Act. In view of the Right Information Act and hyper-connected

Internet global village, the legislature must re-cast the Official Secrets Act from the drawing board upward. In the interim, to overcome this particular procedural lacuna, an amendment should be made, where the police are authorized to make detention (for say 30 days, max extendable to 90 days) on basis credible evidence which leads to the reasonable suspicion. The guidelines must be stringent to prevent any abuse of the law. This will serve the purpose of the safety and security of the state along with the prevention of abuse of the law. Such detention may later be converted into the judicial custody upon taking cognizance of offence on the basis of the complaint. Till such an amendment is passed, it is illegal for the police to make arrest in cases where the only accusation is of the offences under the Official Secrets Act, 1923.

CONCLUSION

The analysis of existing provisions of the Official Secrets Act read in conjunction with the Code of Criminal Procedure establishes that in the pure Official Secret Act offences are non-cognizable offences. The challenge faced is that the author could not find any ruling in this regard except the assertion that OS Act cases are complaint cases and Section 13(3) OS Act is unbreachable. There are many other aspects of the Official Secrets Act needs through assessment especially in view of the complete change of environment when this law was enacted and also in light of the Right to Information Act, 2005.

CONFLICT OF INTEREST

The authors declare no conflict of interest.

REFERENCES

1. *Aniruddh Bhal & Others Vs CBI*, (2014), Delhi High Court [2014].

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