



## RAFALE DEAL CONTROVERSY

- AKANKSHA NEGI

### ABSTRACT

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*The 'Rafale Deal Controversy' is the controversy which talks about the purchase of 36 multirole combat aircrafts by the defence ministry of India from the French Dassault Aviation and turned out to be a promising twin-engine medium multi-role combat aircraft. This deal by the Indian Government turned out to be a serious controversial issue as soon as the opposition party sensed a big scam worth thousand crores of Rupees, and thus, was also called a 'Political Controversy'. Public Interest Litigation (PIL) which was filed, seeking direction from Supreme Court to examine and analyse the deal, was later, rejected by the complete bench of Supreme Court. Claiming suppression of information, misleading the judiciary, the PIL was filed on the basis of some leaked documents seeking review of the decision. As the arguments went on in the Supreme Court, the government represented that 'the petitioners should be prosecuted for stealing and occupying the secret documents.' The Government was then questioned about the war between Right to Information and the protection of the 'Official Secrets' and whether the Official Security Act continues as the legal veil in the era of 'Right to Information'.*

**Keywords:** Rafale, Indian Government, combat aircraft, leaked documents



## RIGHT TO INFORMATION VS. OFFICIAL SECRETS ACT

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A Journalist was threatened for discovering and incriminating some documents from the Defence Department of the county. A Lawyer is threatened for attaching the same documents to a Public Interest Litigation (PIL). And all this was done under the veil of Official Secrets Act.

The Rafale Deal Controversy lit a spark to initiate a war: Right to Information vs. Official Secrets, which was extremely unhealthy for the Constitutional Governance of our country.

### **REIGN OF CONFIDENTIALITY**

The Indian Official Secrets Act (OSA), 1889, and 1904, was carried to the country by the British rulers with the solitary aim of suppressing the voice of the press. This was done to restraint them from opposing or speaking against the 'policies' and 'rules' of the government. This is basically an anti-espionage law which strongly attacks actions which involve helping an enemy country against India, as it states that nobody can pass over, inspect or even approach a prohibited government site or restricted government area. The Act helped in turning most of the 'administrative matters' into 'secrets' or 'confidential' information. According to OSA, communicating a sketch, plan, or model of an official secret will be considered, helping the enemy state against our own nation, no matter what the intentions of the person is. A person can be prosecuted under this act, even if his actions were completely unintentional and did not intend to hamper the security of the state, and thus, it was called a 'cruel' act. This act specifically empowers the people holding a certain authority which helps them to handle the official secrets.

Every secret document, leaked or obtained, cannot lead to prosecution under Official Secrets Act, unless and until it is proven as beneficial for the enemy country in any way, directly or indirectly.

According to Section 3<sup>1</sup> of Official Secrets Act,

*"Penalties for spying :( 1) If any person for any purpose prejudicial to the safety or interests of the State-*

*(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or*

*(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or*

*(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is*

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<sup>1</sup> 3. Section 3 of Official Secrets Act, 1923



*intended to be, directly or indirectly, useful to an enemy* 9[*or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States*]; *he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years*”.

Essence of the offence which is punishable up to fourteen years of imprisonment is “a person making a sketch, plan model, note or obtains, or collects documents or information which is useful to the enemy or which is likely to affect the sovereignty and integrity of India, security of state or friendly relations with the foreign states.”

Section 5 defines ‘the offence of wrongful communication of information’. It basically deals with “passing of secret official code or pass-word or any sketch document etc, which is used in a prohibited place, which is likely to assist the enemy, wilfully communicates the code or pass word or sketch or document etc to any person other than a person to whom he is authorized to communicate it or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or uses, the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State.”

“This means that presenting a part of a document, which by itself does not fall under criminal category of document which Section 5<sup>2</sup> deals with, that too to a Court of Justice, not to benefit a

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<sup>2</sup> 5. “*Wrongful communication, etc., of information: (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, 13[or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act,] or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract-*

*(a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or*

*(b) uses, the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or*

*(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or*

*(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information; he shall be guilty of an offence under this section.*



foreign country or enemy, cannot be an ‘offence’ for which journalists and lawyers could be prosecuted.”

### **CLASSIFICATION BY EXECUTIVE ORDER**

The act, named as ‘Official Secrets’ Act, doesn’t include the definition of ‘secret’ or ‘official secrets.’ It does not give the authority to the government to classify the documents. An executive order, called Manual of Department Security Instruction (MODSI)<sup>3</sup> of ministry of Home Affairs<sup>4</sup> specifies procedures for the classification of certain documents. It cannot be disclosed.

‘Secrecy’ is determined by the officials who are in a particular position of hierarchy.

“Under Article 77 of the Constitution, the President has the power to make rules for the more convenient transaction of the business of the Government of India and for the allocation amongst ministers of the said business. Exercising this power, the President has framed the Transaction of Business Rules and the Government of India (Allocation of Business) Rules 1961, also known as the Rules of Business, being published until 1973 and was available to the public but all of a sudden, the government, i.e., the bureaucrats started considering it as confidential. Unless the courts directed, these were not supplied to the Court also. Strangely, though the President makes these rules under the Constitution, yet they are treated as confidential without the Constitution or any other law explicitly giving any confidentiality to them. It is clear that the official machinery intends to cover up its own defects, wrongs and irregularities without even remotely connecting to any public interest. It is also strange that any democratic government uses this delegated legislation to keep people out of reach for ordinary business rules. Generally, while making delegated legislation the United States and England follow extensively the process of consultation of the affected interests is used extensively, but in India the rules are generally made in the secret chambers of the bureaucracy and "consultation" is an extreme exception." The Centre

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*(2) If any person voluntarily receives any secret official code or pass word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass word, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this section.*

*(3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war communicates it, directly or indirectly, to any foreign power or in any other manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.”*

*14 [(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.]*

<sup>3</sup> Navdeep Gupta vs National Archives Of India, CIC/NAIND/C/2017/605263 (2018).

<sup>4</sup>How exactly is ‘Top Secret’, ‘Secret’, ‘Confidential’ and ‘Restricted’ defined?, www.moneylife.in (2014), <https://www.moneylife.in/article/how-exactly-is-top-secret-secret-confidential-and-restricted-defined/39033.html> (last visited Jan 8, 2021).



during Emergency period provided Constitutional basis for considering these Rules of Business through the Constitution (Forty Second Amendment) Act, 1976 denying the people access to the Rules of Business. Fortunately, this was abolished by the Constitution (Forty Fourth Amendment) 1978. This proves absence of legal or constitutional ground for making rules of business inaccessible.”

Sometimes, when the government orders to hold a ‘fact-finding’ inquiry of incidents of ‘high public significance’, like plane crashes or accident, the reports of those inquiries are also called ‘secret’ or ‘confidential’.

Such rules were made by the rulers, to hide themselves from exposure. These restrictions are called MODSI, and aren’t authorised under the Official Secrets Act. Directions and guidelines are issued by the ministry of home affairs, which gives a lot of power to the officers. These powers given to the officers can be, to ‘classify’ the documents, possession of which lands the possessor in jail.

The government papers are divided into, ‘non-classified’ and ‘classified’. ‘Classified’ papers are accorded for greater secrecy, as per the departmental security instructions issued by Ministry of Home Affairs. These can be handled either by officers themselves or in sections designated as ‘secret’ or ‘top secret.’ Extra care is to be taken by the concerned officers to keep these documents safe. In ‘non-classified’ papers, no official is allowed to communicate any sort of information regarding the same, to anybody unless authorised by special or general order.

Files referred by a department to another department are also to be treated as ‘secret’ or ‘confidential.’ Press Information Bureau shall be contacted to communicate any information to the Press. Exceptionally, Ministers, secretaries and other officials authorised, may give out information to the press. If approached by the press, the official is to direct him to the Press Information Bureau.

As per MODSI, criteria and procedures must be followed by the ministry for such classifications. The office manual includes three kinds of classification: a) ‘Top Secret’, b) ‘Secret’, and c) Confidential.

- A.** Vital information is classified under ‘Top Secret’, for national security purpose. It shall not be disclosed to anybody, for whom it is not necessary to have knowledge for it, for any official purpose. Information or operations, movements, and deposition of Armed Forces. Information regarding war or it’s methods and shaping, movements, or military intelligence shall not be disclosed.



- B. Any information which will cause 'administrative embarrassment' or internal breach of peace, or injury to the interest and prestige of the government, will be classified under 'Secret' information. It will also include information that can be beneficial for the enemy country.
- C. Information, unauthorizedly disclosed, which, while not hampering the national security, damages the interest of the nation, or any government individual's activity, which may cause administrative embarrassment will be classified under the 'Confidential' category. It will also include any information which may give birth to an advantage to a foreign nation.

The given classifications restrict the media for writing about it, and even to access it, and so are the citizens.

Restricting the citizens, from accessing such knowledge, or even denying the media for using or accessing such knowledge, would clearly lead to 'breach of freedom of speech and expression' which is guaranteed under Article 19(1)(a) of Indian Constitution. The Article, no doubt, includes 'reasonable restrictions', and are listed therein, through Parliamentary enactment, but the 'classification' has no legal basis to restrict the citizens or media, as the Official Secrets Act did not authorise the classification of these government documents.

### CRITERIA REJECTED BY SC

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The Supreme Court rejected the criteria of "embarrassment to the Government" in 1981 in **S. P. Gupta vs President of India** wherein Justice Bhagwati<sup>5</sup>, held:

*"Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document."*

This judgement gave out observations, explaining the right way to deal with an 'official document'. They did not have any effect on the bureaucrats, who deal with such documents on a daily basis, until and unless a specific law mandates it.

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<sup>5</sup>S.P. Gupta vs President Of India And Ors., 1982 2 SCR 365 (1981).



### **MISUSE OF OSA**

These powers are misused, left right and centre by those in power, just the same way, bitter intentions aren't needed to prove an offence under this act. For instance, the handbook published by the Cabinet Secretariat to guide bureaucrats for preparing Notes for the consideration of the Union Cabinet requires all Cabinet Notes to be labelled 'Top Secret', right from the drafting stage, even if it contains routine matters such as approval of draft legislation or amendments to existing laws for tabling in Parliament etc. Another interesting example of absurd classification is considering appointments of Governors as 'top secret'. Nowhere the criterion prescribed was adhered to. Latest of its misuse revealed when the Supreme Court ordered Government to pay Rs 50 lakh to compensate ISRO scientist Nambi Narayanan<sup>6</sup> for falsely implicating him in a criminal case under this draconian law that ruined his entire career and prime time of life.

### **JOURNALIST VICTIMS**

In 2019, Tarakant Dwivedi, a journalist, was charged with criminal trespass under the OSA.<sup>7</sup> An article was written by him on the Mid-Day Daily, about how sophisticated weapons bought after 26/11 was being stored under a leaking roof at Chhatrapati Shivaji Terminus in Mumbai. The area which he visited was prohibited and this was found out later, through an RTI query. Later, the case was dismissed by the Bombay High Court.

Generally, the journalists are the victims of this law. Another Journalist from Kashmir, Iftikhar Gilani, was also under OSA.<sup>8</sup> It was said that, he downloaded a document from Internet as possessing a top-secret document. He was honourably acquitted, after spending seven long years in jail.

The list doesn't end here. Santanu Saikia, a journalist, wrote an article for the Financial Express. It contained a leak Cabinet note after which he was charged under the OSA.<sup>9</sup> He was harassed until

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<sup>6</sup>S. Nambi Narayanan vs Siby Mathews & Others Etc., 10 SCC 804 (2018).

<sup>7</sup>Bail for scribe booked under official secrets act, Hindustan Times (2011), <https://www.hindustantimes.com/mumbai/bail-for-scribe-booked-under-official-secrets-act/story-kjIFhbBTU8U2cxlJ7GeoN.html> (last visited Jan 8, 2021).

<sup>8</sup>India: Journalist arrested under Official Secrets Act - Committee to Protect Journalists, Committee to Protect Journalists (2002), <https://cpj.org/2002/06/india-journalist-arrested-under-official-secrets-a.php> (last visited Jan 8, 2021).

<sup>9</sup>Abhinav Garg, Court redefines 'official secret', relief to scribe | India News - Times of India The Times of India (2009), <https://timesofindia.indiatimes.com/india/Court-redefines-official-secret-relief-to-scribe/articleshow/4192355.cms?referral=PM> (last visited Jan 8, 2021).



2009, when the Delhi High Court ruled, that ‘publishing a document, which comes merely under the definition of “secret”, shall not render the journalist liable under the OSA.<sup>10</sup>

### CAUSE BEHIND THE RAFALE DEAL CONTROVERSY?

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The Rafale Deal Controversy is the controversy related to the purchase of 36 multirole combat aircrafts, called the Rafale Aircrafts. Rafale is a twin-engine medium multi-role combat aircraft which is manufactured by the French company *Dassault Aviation*. In 2007, Indian Air Force (IAF) raised the requirement of MMRCs: Medium Multi Role Combat Aircrafts to replace the old MiG Aircrafts. To buy fighter jets, various companies submitted their bids. In May 2011, two aircrafts were shortlisted: Eurofighter and Rafale.

Tenders of 126 MMRCAs were issued by India in which the Dassault Aviation of France was also in the competition. Dassault Aviation, the French company, was to transfer its technology to HAL. It was known as Transfer of Technology (ToT), in which the company shares the information on how the fighter jets could be manufactured in India. Using this technology, HAL would have manufactured the remaining 108 fighter jets. ToT was an important aspect in the deal because if in future, the relations between India and France take a bad turn, or if Dassault Aviation could not manufacture aircraft, even then we could have made the aircrafts ourselves on India, which would be similar to the Rafale Aircrafts.

In March 2014, Dassault Aviation and HAL signed a Work Share Agreement, which stated that 70% of the work to manufacture the 108 aircraft in India, was to be taken by HAL and the rest 30% by Dassault Aviation. The deal was, 126 jets were required, out of which 18 were to be imported in fly-away condition and the rest 108 were to be manufactured by Hindustan Aeronautics Ltd (HAL), on the basis of the agreement ‘Transfer of Technology’ (ToT) from Dassault Aviation. Both the countries were unable to set the price for the jets.

In 2014, the workshare agreement was signed between HAL and Dassault Aviation but the progress of the deal remained unclear.

The negotiations took a long time as the two companies could not agree on several points.

During this time, the ruling party changed and the negotiations were still not finalised.

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<sup>10</sup>Limits of ‘secrecy’, Frontline (2015), <https://frontline.thehindu.com/cover-story/limits-of-secrecy/article6951323.ece> (last visited Jan 8, 2021).





On 25<sup>th</sup> March 2015, Dassault's CEO Eric Trappier said that the paperwork was 95% completed. He said, "You can imagine my satisfaction to hear from the HAL Chairman that we are in the agreement for the responsibility sharing". He said that the deal will be signed soon enough.

On 8<sup>th</sup> April 2015, our foreign secretary said that negotiations among Indian Government, HAL and Dassault's are still not over. After two days, PM Modi went to France, and on April 10<sup>th</sup>, 2015, a joint statement was issued by the Indian and French Governments that a new deal will be struck. PM made an announcement to buy 36 Rafale Aircrafts in fly-away condition, on his visit to France, after which the Defence Minister announced the previous deal to be dead.

As per the new deal, 36 Rafale aircrafts were to be purchased by the Indian Government all of which in Fly-Away Off the Shelf Condition.

The opposition questioned this move as PM Modi finalised this deal without the approval of the Cabinet Committee on Security, and what happened to the old deal which included 108 aircrafts to be manufactured by India by Hal. In the new deal, India and France issued a joint statement on 10<sup>th</sup> April, in which it was stated that "the aircraft and associated systems and weapons would be delivered under the same configurations as had been tested and approved by the Indian Air Force."

The aircrafts of the new deal were to be of the same configuration as under the previous deal.

On 13<sup>th</sup> April 2015, then Defence Minister Manohar Parrikar said that, "PM Modi took the decision and I backed it up." After this, on 23<sup>rd</sup> September 2016, an Inter-Government agreement was finalised and signed. In 2016, the deal for acquiring 36 aircrafts was signed between the Defence Ministers of both the countries. ON MARCH 25<sup>th</sup> and 28<sup>th</sup>, two new companies were founded, Reliance Defence Ltd and Adani Defence Systems and Technologies ltd.

Later, the concern raised was, that the brand-new deal had a 50% of 'off-set' component.

Offset clause is a requirement under which the supplier is bound to spend part of the money in a specific place decided by the buyer and supplier. In the new Rafale deal, there was an offset clause for 50% of the value i.e. 50% offset clause of 59,000 crore rupees. Which means, India will buy fighter jets from Dassault for 59,000 crores, out of which, Dassault has to invest 50% of it, in India.

On 3<sup>rd</sup> October 2016, Anil Ambani's Reliance group stated a joint venture with Dassault Aviation, the Dassault Reliance Aerospace Ltd. On June 21<sup>st</sup>, 2017, a report in Hindu Business Line stated that of the 30,000 crs offset money, Dassault is planning to invest 21,000 crs in this joint venture. After this, the opposition, Congress and Rahul Gandhi repeatedly raised questions on this deal, and accused the government of favouritism towards Anil Ambani's Reliance Defence Ltd. On 21<sup>st</sup>



September 2018, the controversy blew up when the ex-French President Francois Hollande (2012-2017) said that the Modi government chose Anil Ambani as the offset partner and the French Government had no choice in it. Dassault responded to it, saying that it chose Reliance of its own accord. The present government said that they had nothing to do with the deal as it was finalised by Dassault and Reliance.

On 13<sup>th</sup> September 2018, our Defence Minister, Nirmala Sitharaman said, that the Government had not given any suggestions to Dassault as they chose Reliance on their own.

21<sup>st</sup> October 2018, Dassault's CEO said, that only 10% of the offset obligations is supposed to go to Reliance. The rest of the offset money will be invested in more than 100 companies. This directly contradicts the report of the Hindu Business Line.

#### **WHAT WERE THE CONCERNS?**

- **ToT** - The current deal has a 50% offset component.
- Accordingly, Dassault will manufacture items worth 50% of the deal in India.
- However, the absence of transfer of technology (ToT) component is raised as an issue.
- Also, no role is guaranteed for any Indian public sector company, including HAL.
- **Deal** - The present deal as direct government-to-government agreement, as against the earlier open tender, is criticised.
- Also, the 36 fighters are said to be purchased at a much higher price than earlier negotiated.

#### **WHAT WAS THE DISPUTE WITH SHARING PRICE DETAILS?**

- **Earlier deal** - The previous government's price for 126 aircraft was never finalised, and no contract was signed or executed.
- Hence, no official figure on the price was ever given.
- **New Deal** - Recently, the Defence Minister declined to share the cost of the Rafale fighters under the new deal, with Rajya Sabha.
- It was said that the price details were "**classified information**".
- This was as per the **Inter-Governmental Agreement (IGA)** between the Governments of India and France.



- Accordingly, material exchanged under IGA is governed by the provisions of the **Security Agreement**.
- However, in 2016, Minister of State for Defence had shared the price in the Lok Sabha in a written reply.
- The basic price of each Rafale aircraft was said to be around Rs 670 crore.
- At the time of its signing, the 36-aircraft deal was said to be worth around Rs 59,000 crore.

### **PIL AGAINST RAFALE SECRETS**

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On 6 March 2019 Attorney General representing the Centre in a PIL by Prashant Bhushan seeking probe into Rafale deal, told Supreme Court that journalists and lawyers who used ‘stolen’ documents of Rafale will be prosecuted<sup>11</sup>, nation in general and media was shocked. The petitioners Yashwant Sinha, Prashant Bhushan and Arun Shourie are seeking to register FIR against Prime Minister Narendra Modi and former Defence Minister Parrikar regarding this agreement with France. Earlier on December 14, 2018 the Supreme Court dismissed the PIL observing that due process was followed in signing the Rafale deal, and it did not find any “commercial favouritism” in the contract. Saying that certain critical facts were suppressed from Supreme Court, which could have resulted in a different conclusion than such dismissal, the petitioners wanted a review. The documents which media had access and petitioners relied upon include one eight-page dissent note written by three domain experts in the Indian negotiating team, and document revealing that a top defence ministry official complained about the PMO conducting “parallel parleys” with the French authorities in the controversial Rafale deal. Question is whether these policy and process related documents contain any official secret or their disclosure would benefit enemy or threaten security of nation? To threaten the journalists and lawyers with black law of British dark era will make it fully an emergency environment. It was for good that AG has retreated<sup>12</sup> from this stern stand and said government does not intend to prosecute them. Then Centre filed an affidavit on 13th March 2019, stating that those who leaked were guilty of penal

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<sup>11</sup> Reuters Staff, India may prosecute newspaper under secrets act over Rafale documents U.S. (2019), <https://www.reuters.com/article/us-india-dassault-court/india-may-prosecutenewspaper-under-secrets-act-over-rafale-documents-idUSKCN1QN292> (last visited Jan 8, 2021).

<sup>12</sup> 'Didn't Say That Rafale Documents Were Stolen; Meant Petitioners Used Photocopies Of Secret Documents', AG Clarifies, Livelaw.in (2019), <https://www.livelaw.in/top-stories/didnt-say-that-rafale-documents-were-stolenmeant-petitioners-used-photocopies-of-secret-documents-ag-clarifies-143428> (last visited Jan 8, 2021).



offences including theft. It was claimed that annexed notes were marked ‘secret’, and exempted from disclosure even under the Right to Information Act. It also raised a point under Evidence Act, saying that use of evidence derived from unpublished official records relating to the affairs of the state without permission. These contentions reflect intention to attack the review petition on technical grounds, without condemning the veracity of the contents that strengthen allegations. First of all, it is not trial of a charge that is going on where admissibility of evidence needs to be thoroughly examined, which points the government can raise during the trial that goes only after investigation, which the petitioners are seeking. The facts of the case have to be considered to decide whether probe should be ordered. Second point is marking of documents ‘secret’. Which part of the deal is secret, and why? The Centre has a duty to explain how a dissent note from three negotiators in Rafale deal would pose clear and present danger to ‘security’ or that the public interest will be secured if these secrets are not disclosed or that public interest will be seriously harmed on disclosure.

### **THE RAFALE SECRETS IN RTI ERA**

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To say that this document could not have been disclosed even under RTI Act is legally not tenable, because the RTI Act provided for disclosure of defence details and information from exempted organizations also in the context of corruption and human rights violation. The political executive cannot use the Official Secrets Act and ‘national security’ defence without justifying, to hide the truth and to prevent a probe. The Official Secrets Act, 1923 is supposed to have been repealed after Independence as per consistent resolutions of Indian National Congress, a prominent party fighting for freedom of the nation. But the post-Independent Congress governments conveniently used it, forgetting their past declarations and resolutions. In 2006, the II Administrative Reforms Commission stated that as the OSA’s background is the colonial climate of mistrust of people and the primacy of public officials in dealing with the citizens, it created a culture of secrecy. “Confidentiality became the norm and disclosure the exception,” it said. This tendency was challenged when the Right to Information Act came into existence.<sup>13</sup> II ARC recommended repeal of this Act and to remove oath of secrecy by Ministers. But the centre chose to reject this

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<sup>13</sup>Darpg.gov.in, <https://darpg.gov.in/arc-reports>, and <https://www.financialexpress.com/archive/arcfor-abolition-of-official-secrets-act/165649/> (last visited Jan 8, 2021).



suggestion.<sup>14</sup> Though the present Government in 2015 has tried to review the provisions of OS Act in the light of RTI Act, it has not initiated any step to make OSA more transparent as recommended by the Cabinet Secretariat in their report dated June 16, 2017.

Rafale defence deal is the centre of political storm in pre-2019 election scenario, wherein the centre is depending on secrecy under OSA and nondisclosure under RTI Act. It is a common habit of executive governments to call almost all papers as ‘classified’ or secret. For secrecy, the document should be properly classified as ‘official secret’. The Centre did not show when and how the ‘stolen’ Rafale deal documents were classified. The centre should have informed the apex court, if it has appropriately classified any of the Rafale deal documents along with the criteria. If there is no such classification till 6th March 2019, the day the apex court heard the case, it cannot do thereafter. The Government has to understand that the advent of Right to Information Act in 2005 makes huge difference, it cannot rely on OSA to muzzle media and it has to shift from culture of secrecy. It must explain how they were classified, before prosecuting journalists and lawyers. Law Commission observed in 1971, that ‘merely because a circular is marked as secret or confidential, it should not attract provisions of OS Act, if the publication thereof is in the interest of the public and no question of national emergency and interest of the State as such arises’. Public interest in disclosure must be considered now as statutory requirement under RTI Act. Representing the Centre, the Attorney General Mr KK Venugopal told the Supreme Court on 6 March 2019 that certain documents like dissent note by three of a seven-member negotiation team for the Rafale deal pertaining to the purchase of the fighter jets have been ‘stolen’ from the defence ministry by “present or former employees” and pleaded not to take cognisance of it to review SC decision or to order CBI probe.<sup>15</sup> He argued that the notes published in a newspaper and annexed in the review petition are “privileged” and cannot be taken note of. Mr. Venugopal referred to the lead article in the Hindu on March 6, saying ‘sensitive’ information like the price of the weapons was put in the public domain. The government had invoked ‘national security’, ‘official secrecy’ and privilege to block the probe sought in a Public Interest Litigation. ‘Sensitive’ nature of information is neither a defence nor exception to disclosure as per the RTI Act & OSA. Attorney

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<sup>14</sup>India News, MHA reviews draconian Official Secrets Act | India News - Times of India The Times of India (2017), <https://timesofindia.indiatimes.com/india/mha-reviews-draconian-official-secretsact/articleshow/59800375.cms> (last visited Jan 8, 2021).

<sup>15</sup> India News, Rafale deal: ‘Stolen’ Rafale documents must not be looked into, AG tells SC | India News - Times of India The Times of India (2019), <https://timesofindia.indiatimes.com/india/stolen-rafale-documents-must-not-be-looked-into-ag-tells-sc/articleshow/68295070.cms> (last visited Jan 8, 2021).



General questioned how ‘the Hindu’ daily had published “only the first file noting” in reference to the Ministry’s objection to “parallel parleys” by the Prime Minister’s Office with French authorities over the Rafale deal, while the second file noting by former Defence Minister Manohar Parrikar, terming the note as an “over-reaction”, was published by a news agency, Asian News International (ANI) and termed these documents with these two media houses as “stolen documents.” He contended that the documents are procured through a criminal act and are punishable under Official Secrets Act. It should be dismissed on this very ground as the petitioners have not come to the court with clean hands. He also informed the apex court that an investigation has been ordered and prosecution would be launched against the two papers and the lawyer who has annexed it with the petition.<sup>16</sup> The bench with its piercing questions punched holes in this contention. Justice Joseph from the Bench of SC hearing the review petition asked: “Mr. Attorney, you keep repeating about national security. Suppose a great crime like corruption has been committed, can you seek shelter under national security?” The AG then invoked the ‘security’ of the State to defend non-disclosure. Justice Joseph again asked: “But if the law of the country has been broken through a corrupt practice, can you seek protection under national security?” Referring to the Bofors case, Justice asked: “in an open system like in India, whether courts should shut out documents?”. Chief Justice Ranjan Gogoi questioned: “If the documents are stolen, what action you (Centre) have taken till now? The first publication was in February, what have you done?” Justice Joseph further observed: “Our judgments say that even stolen evidence can be looked into, if found relevant... Mr. Attorney, you have to state the law. You are not stating the law, we are sorry to say.” The CJI further said “a man is about to be wrongly convicted of a crime. There is a document in the possession of another man which will prove his guilt. He steals it from this man and produces it in court. Do we, the court, refuse to look into the document? We can understand you saying that petitioners came with unclean hands. That they got the documents through doubtful sources. But it is another thing to say that the court cannot consider these documents at all. That these documents are untouchable.” Third Judge on Bench Justice SK Kaul sought to know from AG: “We may not utilise these documents, but it is bit too much to say that they should not be relied on at the very threshold.” Mr. Venugopal responded that court should not look into documents which are the “subject matter of criminality”. He stated that the Rafale

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<sup>16</sup>Krishadas Rajagopal, ‘Secret papers on Rafale deal stolen,’ AG K.K. Venugopal tells SC The Hindu (2019), <https://www.thehindu.com/news/national/secret-papers-on-rafale-dealstolen/article26450436.ece> (last visited Jan 8, 2021).



controversy was political in nature and judiciary should exercise restraint. Countering the arguments of AG, the petitioner Mr Prashant Bhushan alleged that AG has committed contempt of court by attempting to intimidate petitioners with criminal prosecution for placing ‘incriminating documents’ before the court. He also alleged that Comptroller and Auditor General had succumbed to government pressure and redacted pricing details from the audit report. He said: This is the first instance in CAG history to have redacted pricing details from the audit report of a deal. Prashant Bhushan has earlier produced secret documents relating to 2G scam and coal block allocation scam in the Supreme Court, which was not opposed on such grounds.

### **RTI AND OSA- AN OVERVIEW**

The core question is how can a note, which reveal dissent of negotiators, opposition to parallel negotiation by PMO, criticism of increase in the price by 246.11 million Euros, and questioning the preference of a private person instead of HAL and ignoring Make India policy become secrets, security issues and privileges? The so called ‘official secret’ has lost its primacy after the enactment of Right to Information Act in 2005 which revolutionised the citizen’s relationship with governance empowering the people to effectively take part in decision making process. Before the RTI Act, secrecy was the rule and disclosure were an exception. It has been reversed now since 2005. To claim some document as non-disclosable the government has to justify that under Section 8(1)(a)<sup>17</sup> it cannot be given.

Executive order for classification

The MODSI, an executive order, which was not based on any statute, cannot stand valid against the Right to Information Act, 2005, which was given overriding effect on Official Secrets Act also. According to definition of ‘document’ under Section 2 of OSA, document includes part of a document. This means if any part of the document is ‘secret’ disclosure of part other than ‘secret’ part also can be denied and ‘theft’ of that part could be prosecuted. But this part contradicts with

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<sup>17</sup> RTI Act, Section 8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;



Section 10<sup>18</sup> of the RTI Act, which provided for separation of non-disclosable part and mandates disclosure of the other. Because of this conflict, the RTI prevails over OSA, to that extent.

If such classification conflicts with transparency law, RTI Act will prevail. Section 22<sup>19</sup> of the RTI Act expressly provided that ‘the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act.’

This was further fortified in Section 8(2)<sup>20</sup> which stated that information exempted under Section 8(1) or exempted under the Official Secrets Act, 1923 can be disclosed if public interest in disclosure outweighs the harm to the protected interest. The Bofors scandal was result of media investigation and leakage of key documents. In fact, the official radio of Sweden released threads of the bribery to Indian dealers behind the Bofors deal with India. This could happen because there is Freedom of Press Act in Sweden which granted Right to Information to the people in 1766 itself. The transparency law ensures corruption free defence deals. A government that promotes secrecy and threatens prosecution of journalists on the floor of apex court, should be subjected to adverse inference that there must have been murky things in the dealings, the leaders became dealers.

In this context of 21st century access law overriding a 97-year-old British relic law of secrecy, one has to see whether all papers of negotiations, undue increase in the price, irrational preference of Anil Ambani to HAL, ignoring ‘make in India’ policy, dissent of 3 of 7-member-negotiating-team against parallel bargain by PMO in Rafale deal, can be considered as ‘official secrets’? Even if agreed that they are stolen, as contended by AG, the documents accessed by media are not condemned as false. This strengthens the plea of review of December 14 decision. Government has a duty to tell apex court and people which part of the Rafale deal would harm security interests and why not disclose the rest? Whether citizen, journalist or lawyer has any right to criticise and

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<sup>18</sup> RTI Act, Section 10: Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

<sup>19</sup>RTI Act, Section 22: “The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act “.

<sup>20</sup> Section 8 (2) says; “Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests”.





challenge the policy in purchase of Rafale fighter aircrafts at a price much higher than earlier estimate with reduced quantum?

In view of the requirement of transparency, good governance and rule of law, the Centre has a duty to answer following questions for the people, the supreme sovereigns and the Supreme Court:

- a) The plea that Rafale deal documents were stolen establishes that they were not false but truthful. Government did not deny their contents. How can centre plead that 'truth' should not be considered? Does it mean '*satyamev jayate*'?
- b) Which part of the Rafale file is secret, on what basis and who classified it so?
- c) If technical specifications of Rafale fighter plane are sought, perhaps 'national security' could be invoked; how the pricing negotiation could become non-disclosable on 'security' ground?
- d) Why the Centre is ignoring a finest provision of RTI Act in Section 8(2) that says if 'public interest' overrides the 'exemptions' under Section 8(1) of RTI Act, such information shall be disclosed?
- e) Assuming that security needs some secrecy, still entire information cannot be withheld. The authority can redact such security information and could have given the rest of it as per section 10 of RTI Act. The dissent notes in the document by three persons of 7 member negotiating team cannot be considered a 'security' secret or 'privilege' under any stretch of imagination. Why the Centre is hiding everything under 'security secrecy' clause?
- f) December 14 judgement of Supreme Court mentioned that there is a CAG report on pricing of the Rafale aircraft that was placed before the Public Accounts Committee, and is in the public domain. This is not on the record, never claimed to be so by the government and factually incorrect. How those pricing details became privileged information and not available in public domain? According to SC judgement dated Dec 14, it is in public domain. How can Centre say it is official secret and petitioners and journalists would be prosecuted? The set of documents that appeared to deal with dissent and involvement of PMO, without revealing any defence security information could not be considered as 'privileged' and how government can consider it 'criminal act'?
- g) What kind of secrecy or privilege is around the agreement authorising sudden increase of the benchmark price from 5.2 billion to 8.2 billion Euros, despite the objections of three relevant official experts in the price negotiating committee who were subsequently transferred out?



h) When Supreme Court took note of the government claim that Dassault had been seeking an agreement with Reliance since 2012 though that Reliance was a Mukesh Ambani company, and offset contract was given to a new Anil Ambani Company, is it not the duty of Centre to explain to the people and Court?

i) The Government's claim that procedure followed though the rules require Air Force to give requirement of planes & then DAC to approve them. It is revealed through documents that PM himself ordered 36 aircraft in the deal though Air Force needed 126 and DAC required Transfer of Technology and Make in India. How can this be accepted?

j) The Government also claimed that selection of Anil Ambani as offset partner was done by Dassault and the government has no role in it, despite the fact that defence procurement procedures and offset guidelines require that all offset contracts must be approved by the Defence Minister. It has a duty to convince the Court about the legality of this claim.

k) Regarding the acquisition process, the Government claimed that the acquisition process in the earlier 126 aircraft deal got stuck and was not proceeding, and because of that a new deal of 36 aircrafts had to be made. How can Government counter the facts mentioned in a video filed by the petitioners that show that CEO of Dassault on 25th March 2015 said that the negotiations were 95% complete and the deal would be inked soon.

l) The prayer of petitioners was not that Supreme Court has to inquire into the deal, but seeking registration of an FIR and independent investigation either by CBI or Special Investigation Team. Supreme Court in Lalita Kumari case said that if allegations made in a complaint disclose a cognizable criminal offence, there is a duty to register an FIR and to initiate investigation. Though the complaint contained serious allegations, why FIR was not registered. It's not questions of Rafale or elections; it is the question of rule of law. The Government has to answer this question.

m) How can Government plead that no defence deal should be litigated? If that is the case, why the non-Congress party made Bofors Deal a constant litigation issue? Whether Bofors or Rafale, if there is any irregularity in the defence deals, costing thousands of crores of Rupees of public money, the Government should be accountable and answerable.

Scrap the MODSI; the rules of classification: The MODSI instructions of Ministry of Home Affairs do not have any basis of law, nor authorized by the Constitution and clearly violative of Article 19(1)(a) of the Constitution of India, and renders the Parliament enactment Right to



Information Act, 2005 useless against such arbitrary classification by bureaucracy. Hence the MODSI has to be immediately ceased to be followed.

Remove the rule 8 of Conduct Rules: A government servant under the civil service rules is under an obligation, that he shall not disclose it to anyone including a fellow government servant any information received by him during the course of his official duties. This is provided by Rule 8 of the Central Civil Service (Conduct) Rules, 1955. A violation of this rule will subject the civil servant to disciplinary action, apart from punishment under any other law, e.g., the Official Secrets Act, 1923. In the wake of Right to Information Act, it is not legal and proper to punish the officers on this ground. This rule 8 of the Central Civil Service (Conduct) Rules, 1955 has to be scrapped.

### CONCLUSION

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Repeal British relic Official Secrets Act: 'Freedom of speech and expression'<sup>21</sup> is not absolute, undoubtedly. But secrecy cannot product of arbitrary decision of a bureaucrat without Parliament giving any authority. The field is left open without any legislation by successive executive governments with a malicious intention to misuse it to cover up their irregularities, corruption and political misuse. The misuse of Official Secrets Act and the arbitrary guidelines not based on any legislative delegated power shows that the Congress and BJP Governments are no different from British colonial rulers. They are trying to hide bad governance under projected false-patriotism or by talking about it and raising issues of nationalism. The time has come for amending this highly misused British relic draconian – Official Secrets Act (OSA), 1923 and to have one anti-espionage legislation restricting the harsh prosecutions to those who committed acts of treachery by leaking or selling security information to the enemy countries. The secrecy is no more a rule but an exception based on logical and legal reason. The primacy accorded by Parliament to transparency through Right to Information Act need to be respected, encouraged and protected from onslaughts of the periodic political governments for their petty gains and corruption, abusing the grounds of nationalism, patriotism and national security.

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<sup>21</sup> Article 19(1)(a) of the Constitution of India