Supreme Court of India
Madhyamam Broadcasting Limited vs Union Of India on 5 April, 2023
Author: Hon'Ble The Justice
Bench: Hon'Ble The Justice, J.B. Pardiwala

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 8129 of 2022

Madhyamam Broadcasting Limited

Versus

Union of India & Ors.

With

Civil Appeal No. 8130 of 2022

And with

Civil Appeal No. 8131 of 2022

JUDGMENT

Dr Dhananjaya Y Chandrachud, CJI This judgment consists of the following sections:

 PART A 1 The Union Ministry of Information and Broadcasting 1 revoked the permission which it had granted to Madhyamam Broadcasting Limited 2 to uplink and downlink a news and current affairs television channel called "Media One". The appellants, comprising of MBL, the trade union of working journalists, and the editor, Senior Web Designer and Senior Cameraman of Planetcast Media Services Ltd, initiated proceedings under Article 226 of the Constitution before the High Court of Kerala for challenging the action of the first respondent. By a judgment dated 8 February 2022, a Single Judge dismissed the petitions. The writ appeal was dismissed by the Division Bench of the High Court by a judgment dated 2 March 2022. The High Court relied on material which was disclosed solely to the Court in a sealed cover by the second respondent, the Union Ministry of Home Affairs3. The appellants instituted proceedings under Article 136 of the Constitution to challenge the correctness of the judgment of the Division Bench of the High Court. A. Facts 2 On 19 May 2010, MBL applied for permission to uplink and downlink a news and current affairs television channel named 'Media One'. On 7 February 2011, MHA granted a security clearance for the operation of the channel. By an order dated 30 September 2011, MIB gave MBL permission to uplink 'Media One' for a period of ten years under the 'Policy Guidelines for Uplinking of Television Channels from India' 4. The permission was granted subject inter alia, to compliance with the terms 1 "MIB" 2 "MBL" 3 "MHA" 4 "Uplinking Guidelines" PART A and conditions set out in the Annexure to the letter. The Annexure to the uplinking permission prescribes the following conditions:

> "(i) The Licensing Authority shall be empowered to impose such restrictions as may be necessary as and when required.

(ii) The Licensing Authority shall have the power to revoke the licence on grounds of national security and public order.

(iii) The Licensing Authority shall have the power to prohibit transmission of programmes considered to be prejudicial to friendly relations with foreign governments, public order, security of state, communal harmony etc.

(iv) Licence should provide access facilities of all equipment and records/system to the Licensing Authority or its representative;

(v) License should make available detailed information about equipment and its location;

(vi) Licensing Authority shall be legally competent to take over the stations on the occurrence of public emergency or in the interest of public safety/order;

(VII) Monitoring stations should be set up so as to facilitate prompt intervention for deterrent action against violations of technical parameters and provision laid down in the legislation and licensing agreements.

(IX) The applicant would make available to the licensing Authority the detailed technical information about the equipment to be used." (emphasis supplied) On the same day, MIB issued a registration certificate for downlinking of the Media One channel for a period of five years according to the provisions of the 'Policy Guidelines for Downlinking of Television Channels' 5. The downlinking permission stipulated that in addition to complying with the terms and conditions set out in the Annexure extracted above, the channel was required to comply with the 5 "Downlinking Guidelines" PART A Programme and Advertising Code prescribed under the Cable Television Networking (Regulation) Act 1995 and the Rules framed under it. 3 In 2012, MBL applied for uplinking and downlinking of a 'non-news television channel' called 'Media One Life', and news television channel, 'Media One Global'. MBL withdrew the application for 'Media One Global'. On 26 August 2015, MIB granted permission to uplink and downlink 'Media One Life' for a period of ten years.

4 On 12 February 2016, MIB issued a notice to show cause to MBL proposing to revoke the permission for uplinking and downlinking granted to Media One and Media One Life in view of the denial of security clearance by MHA. The show cause notice is extracted below:

SHOW CAUSE NOTICE Whereas Ministry of Information and Broadcasting has granted permission to M/s Madhyamam Broadcasting Limited on 30.09.2011 to uplink and downlink one News and current affairs channel, namely, "Media One" and on 26.08.2015 one Non-News & Current Affairs Channel, namely, "Media One Life" into India.

> Whereas, the permissions so granted by this Ministry are governed by the Uplinking and Downlinking Guidelines as amended from time to time.
>
> Whereas, Clause 9.2 of Uplinking Guidelines stipulates that security clearance to the company and its directors is pre-requisite condition for grant of permission for TV channels.
>
> Whereas the security related conditions annexed with the permission letter stipulates that the license/ permission can be revoked on the grounds of national security and public order.
>
> Whereas the Ministry of Home Affairs has recently conveyed denial of the security clearance.

Whereas due to withdrawal of security clearance, the company would cease to fulfil the very basic pre-requisite for grant of permission of uplinking & downlinking TV Channels. The company is also in violation of the security PART A related conditions conveyed through the permission letters issued by the Ministry.

Whereas due to the above-non-compliances, the permissions are liable to be withdrawn/cancelled.

Now, therefore, M/s Madhyamam Broadcasting Limited is hereby called upon to show cause, within 15 days of receipt of this notice, why their permission should not be revoked or cancelled, in view of the denial of security clearance." Meanwhile, seven days after the show cause notice was issued, MBL applied to renew the licence to downlink the channel Media One since the license which was initially granted for five years had expired. By an order dated 11 July 2019, MIB renewed the downlinking permission of 'Media One' for a further period of five years. By an order dated 11 September 2019, MIB cancelled the uplinking and downlinking permission to Media-One Life. It is crucial to note that though the show cause notice was issued to both Media -One Life and Media One, only the permission granted to the former was revoked.

5 On 3 May 2021, MBL applied to renew the downlinking and uplinking permissions granted to operate Media One since they were to expire on 30 September 2021 and 29 September 2021.

6 On 5 January 2022, MIB issued another show cause notice to MBL invoking clause 9.2 of the Uplinking Guidelines and proposed to 'revoke' the permission granted to operate Media One. The show cause notice specified that (i) according to Clause 9.2 of the Uplinking Guidelines, security clearance is a pre-condition for the grant of permission and that security-related conditions are annexed to the letter granting permission ; (ii) MHA has denied security clearance in the past to the proposals of PART A MBL and that it 'may be considered as denied in the present case also'; (iii) since security clearance has been denied, MBL has ceased to fulfill the eligibility condition for renewal of permission of uplinking and downlinking. The relevant extract of the show cause notice is set out below:

> " SHOW CAUSE NOTICE [...]
>
> 3. Whereas, Clause 9.2 of Uplinking Guidelines stipulates that security clearance to the company and its directors is pre-requisite for grant of permission for TV channels. [...]
>
> 5. Whereas the security related conditions annexed with the permission letter stipulates that the license/permission can be revoked on grounds of national security and public order.
>
> 6. Whereas the Company vide letter dated 03.05.2021 applied for renewal of permission. MHA has informed that the security clearance has been denied in the past to the proposals of the company and security clearance may be considered as denied in the present case also.
>
> 7. Whereas due to denial of security clearance, the company ceased to fulfil the eligibility requirement for renewal of permission of uplinking & downlinking of TV Channels.

8. In view of the foregoing, M/s Madhyamam Broadcasting Limited is hereby called upon to show cause, within 15 days of receipt of this notice, why the permission granted to them should not be revoked or cancelled, for uplinking and Downlinking of above mentioned TV Channel with immediate effect." 7 On 19 January 2022, MBL replied to the show cause notice, submitting that:

> (i) It did not receive any intimation of the denial of security clearance to its Media One Channel as stated in the show cause notice. It was not made a party to the proceedings and no material in this regard was served upon them;

PART A

(ii) The grounds for denial of security clearance were not intimated;

(iii) MBL and Media One Channel have not indulged in any activity that would warrant the denial of security clearance;

(iv) MBL was served with a similar show cause notice on 12 February 2016 with respect to Media One channel. After MBL submitted a reply on 11 July 2019, the licence was renewed on 11 July 2019;

(v) The actions of MIB are arbitrary and violative of Article 14 of the Constitution; and

(vi) The action of MIB of denying renewal of the license is violative of MBL's right to the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.

8 By an order dated 31 January 2022, MIB revoked the permission that was granted to uplink and downlink 'Media One' because of the denial of a security clearance. The relevant portion of the order revoking the permission is extracted below:

> " Whereas Ministry of Information and Broadcasting granted permission to M/s Madhyamam Broadcasting Limited on 30.09.2011 to uplink and downlink one News and current affairs TV channel, namely, "Media One" which was valid upto 299.2021.
>
> 2. Whereas, Clause 9.2 of Uplinking Guidelines stipulates that security clearance to the company and its directors is pre-requisite condition for grant of permission for TV channels.

3. Whereas, the company M/s Madhyamam Broadcasting Limited vide application dated 03.05.2021 had applied for renewal of permission to its one permitted News & Current Affairs TV channel namely, "Media One" for a period of 10 yeas (i.1 from 30.09.2021 to 29.09.2021) PART A

4. Whereas, as per the clause 9.2 of the policy guidelines for Uplinking of Television channels from India- 2011 and para 8.3 of the Downlinking guidelines, 2011, Ministry of Home Affairs was requested to give security clearance of the company (M/s Madhyamam Broadcasting Limited) for renewal of permission of News & Current Affairs TV Channel namely, "Media One" for a period of 10 years.

5. Whereas, the Ministry of Home Affairs has denied the security clearance to M/s Madhyamam Broadcasting Limited for renewal of permission for uplinking and downlinking of News & Current Affairs TV channel "Media One".

6. Accordingly, a Show Cause Notice (SCN) dated 05.01.2022 was given to the company as to why the permission granted to them should not be revoked or cancelled, for Uplinking and Downlinking of above mentioned TV Channel. Copy of the SCN is attached at Annexure-I.

7. The Company has replied to the SCN vide their letter dated 19.01.2022. In the reply, the company has inter-alia mentioned that they are unaware of the grounds for denial of security clearance and requested not to iniate any further proceedings in the matter. The reply given by the company is attached at Annexure-II.

8. The reply of the company has been examined. The security clearance is based on security parameters of the Ministry of Home Affairs. Since the Ministry of Home Affairs has denied the security clearance. The channel cannot be allowed to operate.

9. In view of the above, the permission granted to M/s Madhyamam Broadcasting Limited to uplink and downlink a News and Current Affairs TV Channel namely, "Media One" is revoked with immediate effect and accordingly the name of this channel is removed from the list of permitted channels." (emphasis supplied) 9 MBL initiated proceedings under Article 226 of the Constitution before the High Court of Kerala to challenge MIB's order 'revoking' the uplinking and downlinking

permission granted to Media One. The appellants sought in the petitions: (i) setting aside of the order dated 31 January 2022 revoking the permission granted to Media-One; (ii) a direction to MIB and MHA to provide MBL an opportunity to be PART A heard before revoking the permission; and (iii) a declaration that there are no circumstances warranting a denial of security clearance or the revocation of the license since MBL has not violated any law or indulged in anti-national activity. 10 The Assistant Solicitor General 6 of India filed a statement before the High Court submitting that security clearance was denied on the basis of intelligence inputs, which are "sensitive and secret in nature". It was further submitted that MHA cannot disclose reasons for the denial "as a matter of policy and in the interest of national security".

11 By a judgment dated 8 February 2022, the Single Judge of the High Court of Kerala dismissed the writ petition. The Single Judge held that:

> (i) Paragraph 10.4 of the Uplinking Guidelines and paragraph 9.4 of the Downlinking Guidelines stipulate that when the application for renewal of permission is considered, the eligibility criteria stipulating the net worth of the company and experience of the top management will not apply. However, other terms and conditions that are applicable to permission for uplinking are applicable to renewal. Thus, a security clearance is a factor which must be considered at the time of renewal of the existing permission as well;

(ii) The principles of natural justice are not applicable in matters concerning national security (relied on Ex-Armymen's protection 6 "ASG" PART A Services Private Limited v. Union of India7 and Digi Cable Network (India) Private v. Union of India 8); and

(iii) The files submitted by MHA indicate that the Committee of Officers 9 took note of the inputs provided by intelligence agencies and "found that the inputs are of a serious nature and fall under the security rating parameters. In those circumstances, the Committee of Officers advised not to renew the licence". The recommendations of the Committee of Officers were accepted by MHA and are fortified by supporting material.

12 The Division Bench of the High Court directed that the files submitted by MHA shall be placed before it since the Single Judge dismissed the petition by 'relying upon the files'. On perusing the files, the Division Bench held that:

> (i) Though the nature and gravity of the issue is not discernible from the files, there are clear indications that the security of the state and public order would be impacted if the permission granted to MBL to operate the channel is renewed;
>
> (ii) While the State cannot ordinarily interfere with the freedom of the press, the scope of judicial review in matters involving national security is limited;

7 (2014) 5 SCC 409 8 AIR 2019 SC 455 9 "CoO" PART A

(iii) The Union of India may decline to provide information when "constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute". It is not sufficient for the State to plead immunity and it must be able to justify it on affidavit in Court (relied on ML Sharma v. Union of India 10); and

(iv) The State has justified the plea of non-disclosure since the statement filed by the Union of India before the Single Judge, indicates that "the Ministry of Home Affairs has informed that denial of security clearance in the case on hand is based on intelligence inputs, which are sensitive and secret in nature, therefore, as a matter of policy and in the interest of national security, MHA does not disclose reasons for denial." 13 The appellants initiated proceedings under Article 136 of the Constitution against the judgment of the Division Bench of the High Court. By an order dated 15 March 2022, this Court after perusing the relevant files that were submitted before the High Court in a sealed cover granted an interim stay on the order of MIB dated 31 January 2022 by which the permission to operate the Media One channel was revoked. The relevant portion of the order is extracted below:

> " 6. In pursuance of the earlier direction, the files were produced in the Court.
>
> 7. Mr Dushyant A Dave, learned senior counsel appearing on behalf of the petitioners, assailed the approach of the High Court in declining to disclose the contents of the files to the petitioners. Mr Dave pressed the application for 10 AIR 2021 SC 5396 PART A interim relief and submits that there is no objection to this Court perusing the files. Accordingly, during the course of the hearing, the files have been perused by the Court.
>
> 8. At the present stage, we are of the view that a case for the grant of interim relief has been made out on behalf of the petitioners having due regards to the contents of the files which have been perused by the Court.
>
> 9. We accordingly order and direct that pending further orders, the orders of the Union government dated 31 January 2022 revoking the security clearance which was granted to the petitioner, Madhyamam Broadcasting Limited, shall remain stayed. The petitioners shall be permitted to continue operating the news and current affairs TV channel called Media One on the same basis on which the channel was being operated immediately prior to the revocation of the clearance on 31 January 2022." This Court also observed that the issue of whether the contents of the files should be disclosed to the appellants is expressly kept open:
>
> > "11. The issue as to whether the contents of the files should be disclosed to the petitioners in order to enable them to effectively pursue their challenge in these proceedings is expressly kept open to be resolved before the petitions are taken up for final disposal.
>
> [...]

13. We clarify that perusal of the files by the Court at this stage is not an expression on the tenability of the contentions of the petitioners that they would be entitled to inspect the files. The issue is kept open to be resolved at the stage of the final disposal." PART B B. Submissions 14 Mr Dushyant Dave, Senior Counsel appearing on behalf of MBL made the following submissions:

> (i) The order issued by MIB revoking the permission granted to uplink and downlink the channel, Media One, is unconstitutional for the following reasons:
>
> (a) Security Clearance is a pre-condition only for the grant of permission to operate the channel and not for the renewal of the existing permission. Under Clause 10.2 of the Uplinking Guidelines, the renewal of the existing permission is subject only to the channel not having been found guilty of violating the terms and conditions of the Programme and Advertising Code on five occasions or more;

(b) Without prejudice to the above argument, security clearance cannot be denied on grounds that exceed the reasonable restrictions on the freedom of the press prescribed under Article 19(2) of the Constitution. The order revoking the permission refers to paragraph 9.2 of the Uplinking Guidelines. Paragraph 9.2 is a part of the 'procedure for obtaining permission' which provides that an application for permission will be sent to the Ministry of Home Affairs for security clearance. The procedure to grant or refuse security clearance must be subject to the limitations prescribed in PART B Article 19(2) of the Constitution read with Section 4(6) of the Cable Television Networks (Regulations) Act 1995; and

(c) Paragraphs 5.2 and 5.9 of the Uplinking Guidelines prescribe limited grounds of public interest and national security to suspend the permission granted for a specified period.

(ii) In 2011, MIB granted permission to operate Media One. It pre-

> supposes that security clearance as required under Paragraphs 9.3 and 9.4 of the Uplinking Guidelines was granted before the permission was granted. The security clearance was not withdrawn between 2011 and 2022. The renewal should have been granted automatically, more so because the show cause notice does not allege any violation of the conditions set down under Paragraph 10.2 of the Uplinking Guidelines; and
>
> (iii) MBL was not provided access to the material which MIB submitted before the High Court to support the allegations made in the show cause notice. The Union of India, by submitting material in a 'sealed cover,' and the High Court, by relying on it in the course of its judgment, negated the principles of natural justice. This procedure is violative of the principle of an open court and of fairness to parties.

PART B 15 Mr Huzefa A Ahmadi, senior counsel appearing on behalf of the editor, Senior Web Designer and Senior Camera Man of Media One 11 made the following submissions:

(i) The order issued by MIB violates MBL's freedom protected under Article 19(1)(a) of the Constitution. The action of MIB denying the renewal of permission is not protected by reasonable restrictions prescribed in Article 19(2). The fundamental rights of MBL cannot be abridged on an arbitrary hypothesis:

(a) The show cause notice and the order revoking the permission are bereft of reasons and details;

(b) In the counter affidavit filed before the High Court, MIB only contended that the material is sensitive and 'as a matter of policy, and in the interests of national security, Ministry of Home Affairs does not disclose reasons for the denial";

(c) The Division Bench of the High Court acknowledges that the 'gravity', 'impact', 'nature', and 'depth' of the issue are not discernible from the files produced by MIB. It was also observed that 'too many details are not available in the files produced before us"; and PART B

(d) This Court has consistently frowned upon the overbroad use of 'national security' to abridge fundamental rights.

(ii) The doctrine of proportionality envisages that the least restrictive means for restraining fundamental rights ought to be used. (Anuradha Bhasin v. Union of India 12 and KS Puttaswamy (9J) v. Union of India 13) The Uplinking and Downlinking Guidelines contemplate suspension of the licence to operate for varied time periods. The revocation of the permission was not the least restrictive means available at the disposal of MIB; and

(iii) The High Court relied on material that was placed in a sealed cover to reject the challenge to the revocation order. This course of action undertaken by the High Court violates the principles of natural justice. 16 Mr Mukul Rohatgi, senior counsel appearing for the Kerala Union of Working Journalists 14 submitted that the freedom of the press protected under Article 19(1)(a) of the Constitution is one of the most precious freedoms and must not be infringed callously. He contended that though the conditions for renewal of permission are different from the conditions for the grant of permission, the High Court applied the same standard for both the grant of permission and renewal of license. On the disclosure of relevant material to the High Court in a sealed cover, it was submitted that if there was sensitive information in the material, the respondent could have redacted it before allowing the appellants to peruse the file. 12 (2020) 3 SCC 637 13 (2017) 10 SCC 1 PART B It was argued that the sensitivity of material cannot preclude the affected party from viewing the remaining portions.

17 Mr K M Nataraj, Additional Solicitor General appearing on behalf of the respondents made the following submissions:

(i) Paragraphs 9.2 and 10 of the Uplinking Guidelines demonstrate that security clearance is a pre-condition for renewal of license;

(ii) MIB was justified in revoking the permission granted to Media One because MHA denied security clearance; and

(iii) The principles of natural justice stand excluded when issues of national security are involved (Ex-Armymen (supra) and Digi Cable (supra)).

C. Issues 18 The following issues arise in the course of determining the validity of the order issued by MIB refusing to renew the uplinking and downlinking permission granted to MBL to operate the television channel, Media One:

(i) Whether security clearance is one of the conditions required to be fulfilled for renewal of permission under the Uplinking and Downlinking Guidelines;

(ii) Whether denying a renewal of license and the course of action adopted by the Division Bench of the High Court violated the appellants procedural guarantees under the Constitution; and PART C

(iii) Whether the order denying renewal of license is an arbitrary restriction on MBL's right to the freedom of speech and expression under Article 19(1)(a) of the Constitution.

19 Before proceeding to the analysis, certain factual aspects need to be noticed. On 3 May 2021, MBL submitted an application for renewal of uplinking and downlinking permission to MIB. The application stated that the uplinking and downlinking permissions granted to Media One would expire on 30 September 2021 and 29 September 2021 respectively. In the statement filed by the ASG before the Kerala High Court, it was submitted that:

(i) the application for 'renewal' filed by the MBL was forwarded by MIB to MHA; and

(ii) by a letter dated 29 December 2021, MHA denied security clearance to MBL for 'renewal' of uplinking and downlinking permission.

20 MIB issued a show cause notice stating that, MBL has "ceased to fulfil the eligibility requirement for 'renewal' of permission for uplinking and downlinking" due to the denial of security clearance. MBL was asked to show cause as to why the 'permission granted to them should not be revoked or cancelled'. By its letter dated 31 January 2022, MIB ordered that the permission granted to MBL to uplink and downlink Media One be 'revoked'. Though the show cause notice stated that security clearance which is a requirement for 'renewal' of license is denied, MIB was asked to show cause as to why its license should not be 'revoked'. A similar phraseology of 'revocation' was used in MIB's order dated 31 January 2022. The PART D Division Bench of the High Court in its judgment dated 2 March 2022 noted the inconsistency between the phraseology used in the 'renewal' application and 'revocation' order.

21 The notice to show cause and the order of revocation refer to the 'revocation of license'. However, both the former and the latter note that MBL has not fulfilled one of the conditions for renewal of license since it was denied a security clearance by the MHA. Counsel for the appellants have not

made submissions on the inconsistency arising out of the use of the phrases 'renewal' and 'revocation' interchangeably. Thus, we will proceed on the understanding that the order of MIB dated 31 January 2022 rejected the application for renewal of the licence to operate the channel.

D. Requirement of security clearance for renewal of permission 22 Paragraph 10 of the Uplinking Guidelines stipulates the conditions for renewal of existing permissions. According to paragraph 10, renewal of permission is to be considered for ten years, subject to the condition that the channel should not be found guilty of violating the terms and conditions of permission, including any violation of the programme and advertising code on five or more occasions. Paragraph 10.4 stipulates that the terms and conditions applicable at the time when permission is granted would be applicable at the time of renewal, subject to modifications made by the terms of the permission. The relevant paragraphs of the provision are extracted below:

> " 10. RENEWAL OF EXISTING PERMISSIONS 10.2 Renewal of permission will be considered for a period of 10 years at a time, subject to the condition that the PART D channel should not have been found guilty of violating the terms and conditions of permission including violations of the programme and advertisement code on five occasions or more. What should constitute a violation would be determined in consultation with the established self- regulating mechanisms.

[...] 10.4 At the time of considering the renewal of permission of the existing permission holders, the eligibility criteria of net worth of the company and experience of the top management will not apply. However, other terms and conditions would be applicable as per modified terms and conditions of the permission." 23 Paragraph 9 of the Downlinking Guidelines which stipulates the procedure for renewal of existing permissions for downlinking is similar in terms to paragraph 10 of the Uplinking Guidelines. The provision indicates that renewal of an existing permission is not a vested right. Paragraph 10.2 provides that the 'renewal of permission will be considered...subject to the conditions...' spelt out thereafter. The conditions stipulated in paragraph 10 for the renewal of uplinking and downlinking are :

(i) The channel should not have violated the programme and advertisement code on five or more occasions;

(ii) The channel should not have been found guilty of violating the terms and conditions of permission; and

(iii) The channel must fulfil all the terms and conditions that apply to the grant of permission as modified by the letter of permission. PART D Condition 1: Violation of Programme Code 24 Media One has not been found guilty of violating the programme and advertisement code on five or more occasions. On 28 February 2020, a show cause notice was issued by MIB alleging a violation of the Cable Television Network Rules 1994 and Programme Code of the Cable Television Networks (Regulation) Act 1995 while telecasting reports on the violence which took place in North-East Delhi during the protests organised against the Citizenship (Amendment) Act 2019.

25 By an order dated 6 March 2020, MIB in exercise of powers conferred by Section 20(2) and 20(3) of the Cable television Networks (Regulation) Act 1995 and paragraphs 8.1 & 8.2 of the Uplinking Guidelines ordered the prohibition on the transmission and retransmission of Media-One channel for forty eight hours. 26 However, by an order dated 7 March 2020, MIB directed that MBL may resume uplinking the channel Media One from 9.30 am on the same day. Other than this instance, there is nothing on record to indicate that Media One violated the Programme Code. Paragraph 10.2 of the Uplinking Guidelines states that the channel should not have violated the Programme Code on more than five occasions. The solitary incident of an alleged violation of the Programme Code does not fulfil the first condition of Paragraph 10 of the guidelines. Condition 2 and 3: requirement of security clearance for renewal of license 27 Paragraph 10.4 of the Uplinking Guidelines stipulates that at the time of considering the application for renewal, the channel should fulfil all the terms and PART D conditions that apply to the grant of permission as modified by the letter of permission. The terms and conditions that are applicable for the grant of permission are spread across the Uplinking and Downlinking Guidelines and are not concentrated in a specific paragraph or clause. Paragraph 2 of the Uplinking Guidelines (and paragraph 1 of the Downlinking Guidelines) prescribes the criteria of eligibility applicable to applicant companies. The conditions, inter alia, include minimum net worth and prior managerial experience. Paragraph 3 of the Uplinking Guidelines (and paragraph 2 of the Downlinking Guidelines) prescribe the eligibility criteria for uplinking and downlinking a news and current affairs TV channel. Paragraph 9 of the Uplinking Guidelines (and Paragraph 8 of the Downlinking Guidelines) prescribe the "procedure for grant of permission of channels". The provision is extracted below:

> "9. PROCEDURE FOR GRANT OF PERMISSION OF CHANNELS 9.1. The applicant company can apply to the Secretary, Ministry of Information & Broadcasting, in triplicate, in the prescribed format "Form 1" along with all requisite documents including a demand draft for an amount equal to processing fee wherever prescribed, payable at par at New Delhi, in favour of the Pay & Accounts Officer, Ministry of Information & Broadcasting, Shastri Bhawan, New Delhi.
>
> 9.2. On the basis of information furnished in the application form, if the applicant is found eligible, its application will be sent for security clearance to the Ministry of Home Affairs and for clearance of satellite use to the Department of Space (wherever required).

[...]" (emphasis supplied) 28 Paragraph 9.2 stipulates that an application which is found to be eligible would be sent to MHA for security clearance. Paragraphs 3 and 9 indicate that upon the receipt of the application form, MIB will undertake an exercise to determine if the PART D conditions of eligibility prescribed in Paragraphs 2 and 3 are fulfilled. If the conditions are fulfilled, the application is sent to MHA for security clearance. Thus, Paragraph 9.2 prescribes a condition in addition to those stipulated in Paragraphs 2 and 3 of the Uplinking guidelines.

29 The heading of Paragraph 9,namely, "procedure for obtaining permission,' does not detract from the prescription of a substantive condition. Paragraph 10.4 excludes the eligibility criteria of net worth of the company and managerial experience from the consideration of the renewal application.

All other conditions prescribed by the guidelines for permission are applicable for renewal of permission. The requirement of security clearance arises at a stage subsequent to the fulfilment of conditions prescribed under Paragraphs 2 and 3. If the preliminary conditions prescribed are applicable at the time of renewal, there is no reason to exclude the application of the requirement of the security clearance for renewal of permission.

30 Further, Paragraph 10. 4 of the Uplinking Guidelines stipulates that the conditions 'as modified by the permission letter' are applicable at the time of renewal of the license. The annexure to the 'permission letter' does not specify any condition modifying or eliminating the condition of security clearance. Rather, the annexure provides that the licence shall be revoked on grounds of 'public order and national security'. Though in view of Paragraph 10 of the Uplinking Guidelines, the licensee does not have a vested interest for renewal of the permission, the grounds for denying a renewal of license cannot be materially different from the grounds for revoking the licence. This is because both non-renewal of license and revocation PART E of license are restrictions on the right to freedom of press. The intent behind the exclusion of the eligibility criteria of net worth and managerial experience for the purpose of a renewal application is because the freedom of press cannot be restricted on grounds other than stipulations under Article 19(2) of the Constitution. Thus, Paragraph 10. 4 of the Uplinking Guidelines as modified by the 'permission letter' indicates that MHA could deny security clearance on the grounds of national security and public order. Thus, according to the Uplinking and Downlinking guidelines, security clearance from MHA is one of the conditions that is required to be fulfilled for renewal of permission for Uplinking and Downlinking of news channels.

E. Judicial Review on procedural grounds 31 Article 13 of the Constitution states that all laws that are inconsistent with fundamental rights enumerated in Part III of the Constitution shall be void. Article 13(3)(a) states that for the purpose of this provision, law includes 'any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.' It is, thus, a settled position of law that an administrative action can be challenged on the ground of a violation of fundamental rights. Following the expansion of the content of the right to equality under Article 14 to include the guarantee against arbitrariness, the grounds for judicial review of administrative action have expanded. Administrative action is judicially reviewable on the grounds of (i) unreasonableness or irrationality; (ii) illegality; and (iii) PART E procedural impropriety. 15 This Court has also held that in addition to the above grounds, administrative action can be reviewed on the ground of proportionality if it affects freedoms that are guaranteed under Articles 19 and 21 of the Constitution. 16 32 The principle of natural justice that is derived from common law has two primary facets- Audi Alterum Partem and Nemo Judex In Causa Sua. Audi Alterum Partem encapsulates the rule of fair hearing. Nemo Judex In Causa Sua encapsulates the rule against bias, that is, no person should be a judge of their own case. It is the case of MBL that MIB did not comply with the principle of Audi Alterum Partem because the reasons for the denial of security clearance and the material relevant to the decision of revocation were not disclosed. This, it is argued, infringes upon the right of MBL to a fair hearing. On the other hand, MIB contends that it was not required to comply with the principles of natural justice since the denial of security clearance is on a matter involving national security, which is an established exception to the application of the principles of natural justice. 33 There are three important considerations that

have to be answered in the context:

> (i) Whether the non-disclosure of reasons and relevant material for the decision to deny security clearance infringes upon the right to a fair hearing, that is protected under Articles 14 and 21;

15 See State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709; Tata Cellular v. Union of India, (1994) 6 SCC 651; and Council of Civil Service Unions v. Minister for Civil Service, (1985) A.C 374 16 See Om Kumar v. Union of India, (2001) 2 SCC 386; Union of India v. G. Ganayutham, (1997) 7 SCC 463 PART E

(ii) Whether the infringement of the right to a fair hearing would render the decision void; and

(iii) If considerations of national security are an established exception to principles of natural justice, how should the court resolve the competing interests represented by the principles of natural justice and national security.

34 This case presents the Court with an opportunity to clarify and lay down the law on the applicability of the principles of natural justice when issues of national security are involved. The Court must choose between the two visions of either permitting a complete abrogation of the principles of natural justice or attempting to balance the principles of natural justice with concerns of national security. It is imperative that we analyse the purpose natural justice serves, and the jurisprudential development of procedural due process before choosing between these two competing visions.

E. 1 Principles of natural justice: purpose and content 35 The principles of natural justice were read into the law and conduct of judicial and administrative proceedings with an aim of securing fairness. These principles seek to realise the following four momentous purposes:

36 Fair Outcome: Procedural rules are established to prevent the seepage of bias and unfairness in the process of decision making. A decision that is reached after following the procedural rules is expected to be fair. An outcome that is reached through a fair process is reliable and accurate. In the context of criminal PART E proceedings, procedural rules are prescribed in the Indian Evidence Act 1872 and the Code of Criminal Procedure 1973 to secure the ‘correct’ outcome and to identify the ‘truth’.

37 In Chief Constable of North Wales Police v. Evans17, the appellant was a probationary member of the North Wales Police Force. He was removed from the force without putting forth the allegations against him. The House of Lords set aside the decision on the ground that the non-disclosure of allegations was violative of the principles of natural justice. The Court cautioned that there was an extreme danger in proceeding without putting forth the allegations against him because the veracity of the allegations could never be tested:

> "As an example of the extreme danger of proceeding in this way, it must be observed that, as one of the two clinching matters which seem to have influenced him, the appellant says in his affidavit: "Further, it became known" (sic) "to senior officers that the applicant and his wife had lived a 'hippy' type life-style at Tyddyn Mynyddig Farm, Bangor." This had never been put to the respondent at all, and had the appellant or his deputy to whom he delegated the inquiry taken the trouble to ask the respondent about it, he would have discovered at once that this allegedly clinching allegation was palpably untrue, and simply the result of a mistaken address. It was, in short, an utterly incorrect statement relied upon precisely owing to the failure of natural justice of which complaint is made." 38 Inherent value in fair procedure: Fair procedure is not only a means to the end of achieving a fair outcome but is an end in itself. Fair procedure induces equality in the proceedings. The proceedings 'seem' to be and are seen to be fair. In Kanda 17 (1982) 1 WLR 1155 PART E v. Government of Malaya 18, an Inspector of Police challenged his dismissal on the ground that the disciplinary proceedings were not conducted in accordance with the principles of natural justice. It was contended that he did not have knowledge of the contents of the enquiry report that was before the adjudicating officer. The crux of the case was whether his lack of knowledge of the contents of the report led to a likelihood of bias – both conscious and unconscious. The Court held that the likelihood of bias test cannot be solely used to determine the violation of natural justice. The Court held that it is not necessary that the accused must prove bias or prejudice. Rather, it is sufficient if the non-disclosure would lead to a possibility of bias and prejudice since "no one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing." The House of Lords held that non-disclosure of information is per se violative of the principles of fair trial.

39 Legitimacy of the decision and decision making authority: When a decision is formed following the principles of natural justice, there is a perception that the decision is accurate and just. It preserves the integrity of the system as the decisions, in addition to being fair, also 'appear' to be fair. The perception of the general public that the decisions appear to be fair is important in building public confidence in institutions, which aid in securing the legitimacy of the courts and other decision making bodies. 19 18 (1962) 28 MLJ 169 19 Mark Elliotts, Jack Beatson, Martin Mathews, Administrative Law: text and Materials (3rd ed. Oxford University Press) PART E 40 Dignity of individuals: Non-outcome values, that is, values that are independent of the accuracy and soundness of the verdict, are intrinsically important. The principles of fairness 'express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one'.20 D.J Galligan in his book "Due Process and Fair Procedures: A Study of Administrative Procedures" 21 explains that to insist on fair treatment is implicit on a renewed understanding of the relationship between citizens and the State:

> " It builds on the idea of decision-making as a social process rather than a purely logical activity, on the inherent indeterminacy and contingency of standards... to insist on fair treatment of persons by administrative bodies is to draw on those implicit commitments and understandings at the very base of the relationship

between the citizen and the State." TRS Allan argues that more often than not, the right outcome is itself a matter of controversy. It is possible to arrive at divergent views, both of which are reasonable. He argues that when procedures allow the genuine participation and contestation of ideas, a citizen is treated with respect and dignity that they deserve in a society that is governed by the rule of law. 22 41 Indian Courts have been significantly influenced by the courts in England on the interpretation, application, and content of natural justice, primarily because the principles are derived from common law and are grounded in the rule of law. The jurisprudential developments across other common law jurisdictions relating to the principles of natural justice usually, if not always, spill over to Indian jurisdiction.

20 Laurence Tribe, American Constitution Law (2nd ed.). Pg. 666 21 DJ Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (Clarendon Press 1996) 22 TRS Allan, Procedural Fairness and the Duty of Respect (Oxford Journal of Legal Studies) p. 510 PART E Our Courts were soon to follow suit when the courts in England made a functional distinction between executive and non-judicial 23 actions and between an action that deprives rights and an action that deprives privilege 24 for deciding the applicability of the principles of natural justice. In Ridge v. Baldwin 25, the House of Lords repudiated the functional distinction based on the nature of the adjudicating body and held that the duty to act judicially in compliance with the principles of natural justice can be inferred from the nature of the decision and not the nature of the decision-making body. Courts have with time substituted the usage of the terminology of the principles of natural justice with the doctrine of 'fairness' because natural justice is encapsulated in the doctrine of fariness; as Justice Bhagwati termed it, "fair-action in play".26 42 The duty to act fairly that is derived from common law is not exhaustively defined in a set of concrete principles. Courts, both in India and abroad, have demonstrated considerable flexibility in the application of the principles of natural justice by fine- tuning them to situational variations. This Court has observed earlier that the concept of natural justice cannot be put into a 'straitjacket formula' 27 and that it is incapable of a 'precise definition' 28. Courts have undertaken an ends-based reasoning to test if the action violates the common law principle of natural justice 29. The party alleging a violation of a principle of natural justice has to prove that the administrative action violated the principles of natural justice and that non- 23 The King v. Inspector of Leman Street Police Station, Ex Parte Venicoff, (1920) 3 K.B. 72 24 Nakkuda Ali v. MF De S Jayaratne, [1951] AC 66 25 [1964] A.C 40 26 Justice Bhagwati in Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (paragraph 9) 27 NK Prasada v. Government of India, (2004) 6 SCC 299 28 Automotive Tyre Manufacturers Association v. Designated Authority, (2011) 2 SCC 258 29Raeesa Vakil, Constitutionalizing administrative law in the Indian Supreme Court: Natural Justice and Fundamental Rights, (Volume 16, Issue 2, International Journal of Constitutional Law, 2018, p. 475–502 PART E compliance with natural justice prejudiced the party.30 The courts, while assessing prejudice, determine if compliance of the principles of natural justice could have benefitted the party in securing a just outcome. It needs to be seen if this content of natural justice and the standard for judicial review of non-compliance has undergone a change after principles of natural justice were constitutionalized in Maneka Gandhi v. Union of India31 .

E. 2 Constitutionalizing principles of natural justice: the impact of Maneka Gandhi 43 Two jurisprudential developments on the interpretation of Part III of the Constitution must be noticed to understand the impact of constitutionalising the principles of natural justice. The first, is the expansion of the meaning of the expression 'procedure established by law' as it finds place in Article 21 of the Constitution to include procedural due process. The second, is the shift from reading the provisions of Part III of the Constitution as isolated silos to understanding the overlapping tendencies of fundamental rights.

44 In AK Gopalan v. State of Madras32, the appellant contended that the phrase 'procedure established by law' as it finds place in Article 21 includes within its ambit the principles of natural justice. While the majority rejected this contention, Justice Fazl Ali in his celebrated dissent held that the expression 'procedure established by law' cannot be given a limited meaning. The learned Judge observed that the phrase must include procedural due process which includes (i) issuance of a notice 30 NK Prasada (n 27) 31 Maneka Gandhi (n 26) 32 AIR 1950 SC 27 PART E

(ii) an opportunity to be heard; (iii) an impartial tribunal; and (iv) an orderly course of procedure. Justice Fazl Ali's opinion was followed by this Court in Maneka Gandhi (supra). In Maneka Gandhi (supra), it was held that the life and liberty of a person cannot be restricted by any procedure that is established by law but only by a procedure that is just, fair, and reasonable. In that case, the appellant challenged the order of the Regional Passport Officer impounding her passport. The impounding order did not disclose the reasons for such action. The Government of India declined to disclose its reasons for the action by relying on Section 10(5) of the Passports Act 1967 which stipulates that the reason for impounding the passport may not be given where the passport authority is of the opinion that the disclosure of reasons is not in the interests of the sovereignty and integrity of India, security of India, friendly relations of India with any foreign country or in the interest of general public. The appellant filed a writ petition, inter alia, challenging the action of the Government of India declining to give reasons. 45 This Court observed that the right to go abroad is an extension of the right to life and personal liberty protected under Article 21 of the Constitution. This right, it was observed, can only be taken away by a procedure that is not unfair, arbitrary, and unreasonable. Relying on the judgment of a Constitution Bench of this Court in RC Cooper v. Union of India33 which had held that fundamental rights are not water- tight compartments, it was observed that the principle of reasonableness that is guaranteed under Article 14 of the Constitution projects on the procedure that is 33 (1970) 1 SCC 248 PART E contemplated by Article 21. Thus, every individual has a right to a reasonable hearing:

> "[..] we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21. [...] The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article
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> 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it .would be no procedure at all and the requirement of Article 21 would

> not be satisfied." This Court held that principles of natural justice infuse reasonableness into the procedure. However, the court noted that the principles of natural justice are not set-in stone and are by their very nature modifiable. So, the violation of every conception of natural justice will not necessarily render the procedure unreasonable and violative of Articles 21 and 14. The court held that the test that must be followed to determine if non-compliance of natural justice has led to an unreasonable procedure is whether the procedure that was followed (or the procedure that was not followed) violates the core of the primary tenets of natural justice- the right to a fair hearing34 and the right against bias.

46 On the facts of the case, Justice Bhagwati held that the procedure for impounding a passport under the provisions of the Passport Act 1967 was fair and just. The learned Judge held that the denial of pre-decisional hearing was justified because otherwise, the purpose of impounding the passport which is to take prompt action 34 See Zahira Habibulla H Sheikh v. State of Gujarat, (2004) 4 SCC 158, where this Court recognized the right to fair trial.

PART E would be defeated, and that the exceptional circumstances reasonably justified the departure from the settled principle of pre-decisional hearing. 47 The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case. 35 Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds. 36 Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14,19 and

21. The facet of audi alterum partem encompasses the components of notice, contents of the notice, reports of inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core 35 SL Kapoor v. Jagmohan, (1980) 4 SCC 379; "The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary; also see Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818.

36 Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545); C B Gautam v. Union of India (1993) 1 SCC 78; Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I (2008) 14 SCC 151; Kesar Enterprises Ltd v. State of Uttar Pradesh (2011) 13 SCC 733 PART E of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating

authority, in effect, infringes upon the core of the right to a fair and reasonable hearing. 37 E. 3 Standard to test reasonableness of procedure: proportionality as reasonableness 48 Once the applicant proves that the procedure that was followed was not reasonable with reference to the core of the principles of natural justice, the burden shifts on the State to prove that the limitation of the right is justified and reasonable. The State usually claims that the limitation of the right is justified because following a fair procedure would, inter alia, be prejudicial to public interest. What standard of review should the courts employ to test the reasonableness of the limitation? Rights are not absolute in a constitutional democracy. The jurisprudence that has emanated from this Court is that rights can be limited but such a limitation must be justified on the ground of reasonableness. Though, only Article 19 of the constitution expressly prescribes that the limitation must be reasonable, after the judgments of this Court in RC Cooper(supra) and Maneka Gandhi (supra) it is conclusive that the thread of reasonableness runs through the entire chapter on fundamental rights guiding the exercise of procedural and substantive limitations. That leaves us to answer the question of the standard used to assess the 'reasonableness' of the limitation. The text of the Constitution does not prescribe a standard of review. Much ink has flowed from this Court in laying down the varying 37 See paragraph 12 of Justice Bhagwati's judgment in Maneka Gandhi. PART E standards to test reasonability: rationality, Wednesbury unreasonableness, proportionality, and strict scrutiny.

49 Reasonableness is a normative concept that is identified by an evaluation of the relevant considerations and balancing them in accordance with their weight.38 It is value oriented and not purpose oriented. That is why the courts have been more than open in identifying that the action is unreasonable rather than identifying if the action is reasonable. 39 This is also why the courts while assessing the reasonableness of limitations on fundamental rights have adopted a higher standard of scrutiny in the form of proportionality 40. The link between reasonableness and proportionality and the necessity of using the proportionality standard to test the limitation on fundamental rights has been captured by Justice Jackson in the course of the Canadian Supreme Court's judgment in R v. Oakes 41:

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutionally protected right or freedom…Second … the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." (emphasis supplied) 38 Aharon Barak, Proportionality: Constitutional Rights and their limitations (Cambridge University Press, 2012),
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> 374.

39 Giacinto della Cananea, Reasonableness in Administrative law in Reasonableness and Law (ed. by Giorgio Boniovanni, Giovanni Sartar, Chiara Valentini) 40 Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 4 SCC 346 , Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1 41 (1986) 1 SCR 103; This passage was quoted with affirmation in the judgment of the Constitution bench in Modern Dental.

PART E 50 The proportionality analysis assesses both the object and the means utilised, which are pertinent requirements while testing an infringement of fundamental rights. This Court has held that the proportionality standard can be used to assess the validity of administrative action infringing upon fundamental freedoms.42 However, the courts have till date used the proportionality standard to only test the infringement of a substantive right such as the right to privacy protected under Article 21, and the freedoms protected under Article19. Courts have been using a vague and unstructured standard of the reasonableness test to assess the validity of limitations on procedural due process.

51 We are of the opinion that the standard of proportionality must be used to assess the reasonableness of the limitation of procedural rights as well. The courts have to undeniably undertake a balancing exercise while deciding if the limitation on the right is valid. A three-Judge Bench of this Court in MH Hoskot v. State of Maharashtra 43, observed that procedural reasonableness does not have an abstract standard of reasonableness. It must be assessed on the touchstone of numerous factors. The factors list the considerations that are undertaken in the balancing stage. The relevant observations are extracted below:

> "28. [...] The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions." 42 Om Kumar (n 16) ; Teri Oat Estates (P) Ltd. V. UT, Chandigarh, (2004) 2 SCC 130.

43 (1978) 3 SCC 544 PART F 52 The judgments of this Court in Justice KS Puttaswamy (9J) (supra) and Modern Dental College & Research Centre v. State of Madhya Pradesh 44, establishing the proportionality standard to test the reasonableness of the infringements on substantive rights do not preclude the application of the proportionality standard to test the reasonableness of limitations on procedural guarantees. The standard of proportionality infuses a culture of justification, where the State has to discharge the burden of justifying that its action was reasonable and not arbitrary.45 Once the principle of reasonableness is read into procedural requirements, there is no reason for the court to use different standards to test the reasonability of substantive and procedural actions.

F. Infringement of MBL's right to a fair hearing 53 MBL contends that the principles of a reasoned order, disclosure of relevant material, and open justice have been infringed by the order of the MIB and the judgment of the High Court. It is contended that the abrogation of these three principles infringe upon the right to a fair hearing which constitutes the core of the procedural requirements protected under Article 21:

> (i) Reasoned order: In the present case, the notice to show cause states that MHA has denied security clearance to MBL to operate its channel, Media One. However, it does not mention the reasons for the denial of security clearance. Further, the order dated

31 January 2022 denying the permission for renewal of license also does not provide reasons for the 44 (2016) 7 SCC 353 45 See Justice Chandrachud's opinion in Justice KS Puttaswamy (5J) v. Union of India (5 J), (2019) 1 SCC 1 (para

310) PART F denial of security clearance. In such circumstances, MIB was put in a precarious position without any actual recourse to defend the case against them;

(ii) Disclosure of material relevant to the decision: MHA declined to disclose any material that was relevant to its decision. The claim of non-disclosure of relevant documents by MHA was not limited to a few 'top secret' documents. Rather, all documents that were relevant to the decision have not been disclosed; and

(iii) Open Justice: MHA disclosed the documents in a sealed cover to the High Court. The High Court dismissed the writ petition by relying on the material that was disclosed solely to it in sealed cover. The relevant material is not removed from the proceedings. The material is only removed from the affected party's docket. The party defending its actions, which most often is the State, and adjudicating authority rely on the material while making arguments and while reaching a finding respectively.

54 An ancillary question that must be answered at this stage is whether the three alleged procedural infractions have to be individually or collectively assessed to decide if the right to a fair and reasonable hearing is violated. We are of the opinion that the court must determine if the procedure that was followed as a whole is fair and reasonable. After the judgment of this court in Maneka Gandhi (supra), where this court prioritised the process (and the effect of the process) as opposed to the outcome (and the objective of the outcome), it is sufficient if the affected party PART F proves that the procedure that was followed by the adjudicating authority was not procedurally fair and reasonable without any reference to the impact on the outcome due to non-compliance. While doing so, it is well within the power of the claimant to argue that multiple facets of the right to a fair trial were infringed. However, the court while undertaking the exercise of assessing the validity of such a claim must view violation claims from a holistic procedural perspective. This is for the simple reason that the principles of natural justice are mouldable. The requirement of procedural fairness "does not impose a uniform, unvarying standard to be applied irrespective of the context, facts, and circumstances.46 Adjudicatory bodies must be provided sufficient flexibility in deciding procedural requirements. As observed above, a non-compliance of every facet and component of natural justice does not render the procedure unreasonable. The claimant must prove that the effect of non-compliance of a component of natural justice is so grave that the core of the right to a fair trial is infringed while making an argument from a component-facet perspective. The procedure followed must not infringe upon the core which secures reasonableness of a procedure.

55 The appellants have discharged their burden by proving that the non-compliance of the above three principles infringed the core of the principles of natural justice: the right to a fair and reasonable hearing.

56 The principles of natural justice ensure that justice is not only done but it is seen to be done as well. A reasoned order is one of the fundamental requirements of fair administration. It holds utmost significance in ensuring fairness; scholars and 46 A & Ors. v. The United Kingdom, Application no. 3455/05 PART F courts now term it as the third principle of natural justice. 47 The rule of a reasoned order serves five important purposes. Firstly, it ensures transparency and accountability. It places a check on arbitrary exercise of power. Lord Denning observed that in giving reasons "lies a whole difference between a judicial decision and an arbitrary one".48 Justice Bhagwati observed in Maneka Gandhi (supra) that the rule is "designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case." Secondly, non-reasoned orders have the practical effect of placing the decision out of the purview of judicial review. A non-reasoned order limits the power of the courts to exercise judicial review because the scope of judicial review is not limited to the final finding on law or facts but extends to the reasons to arrive at the finding. A limitation on the right to appeal necessarily means that the scope of judicial review is restricted. Thirdly, articulation of reasons aids in arriving at a just decision by minimalizing concerns of arbitrary state action. 49 It introduces clarity of thought 50 and eschews irrelevant and extraneous considerations. Fourthly, it enhances the legitimacy of the institution because decisions will appear to be fair. There is a higher probability that the finding through a reasoned order is just. Fifthly, reasoned orders are in furtherance of the right to information and the constitutional goal of open government. Secrecy broods partiality, corruption and other vices that are antithetical to a governance model that is premised on the rule of law.

47 See SN Mukherjee v. Union of India, (1990) 4 SCC 594; Seimens Engineering and Manufacturing Company v. Union of India, (1976) 2 SCC 981; CCI v. SAIL (2010) 10 SCC 744; Kranti Associates v. Masood Ahmed Khan, 2010 9 SCC 496 48 Sir Alfred Denning, Freedom Under the Law (Stevens and Sons 1949) p. 92 49 Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Dharan Varshney, (2009) 4 SCC 240 50 State of West Bengal v. Alpana Roy, (2005) 8 SCC 296 PART F 57 On the facts of the case, MIB has denied to disclose even the summary of the reasoning denying security clearance. This has necessarily left MBL with no remedy. It is crucial to note that the freedom of press which is protected under Article 19(1)(a) has effectively been trumped without providing them with an effective and reasonable avenue to challenge the decision. This infringes upon the core of a right to fair hearing. The appellants have proved that the disclosure of reasons is necessary for them to have a reasonable hearing. The reply to the show cause notice and the writ petition challenging the validity of the revocation order also indicate that the appellants have been constrained in a situation where they are unable to effectively lay a challenge against the decision. 58 MHA disclosed the material forming the opinion for denying of security clearance solely to the High Court. The High Court instead of deciding if any other less restrictive but equally effective means could have been employed, straight away received the material in a sealed cover without any application of mind. It is now an established principle of natural justice that relevant material must be disclosed to the affected party. This rule ensures that the affected party is able to effectively exercise their right to appeal. When the state government claims non-disclosure on the ground of public interest under Section 124 of the Evidence Act, the material is removed from the trial itself. As opposed to this method, when relevant material is disclosed in a sealed cover, there are two injuries that are perpetuated. First, the documents are not available to the affected party. Second, the documents are relied upon by the opposite party (which is most often the state) in the course of the arguments, and

the court arrives at a finding by relying on the material. In such a case, the affected party does not have any recourse to legal remedies because PART F it would be unable to (dis)prove any inferences from the material before the adjudicating authority.

59 This form of adjudication perpetuates a culture of secrecy and opaqueness, and places the judgment beyond the reach of challenge. The affected party would be unable to "contradict errors, identify omissions, challenge the credibility of informants or refute false allegations". 51 The right to seek judicial review which has now been read into Articles 14 and 21 is restricted. A corresponding effect of the sealed cover procedure is a non-reasoned order. In Commander Amit Kumar Sharma v. Union of India 52, one of us (DY Chandrachud, J) speaking for the court commented on the procedural infirmities which the procedure of sealed cover perpetuates:

> "27. The elementary principle of law is that all material which is relied upon by either party in the course of a judicial proceeding must be disclosed. Even if the adjudicating authority does not rely on the material while arriving at a finding, information that is relevant to the dispute, which would with 'reasonable probability' influence the decision of the authority must be disclosed. A one-sided submission of material which forms the subject matter of adjudication to the exclusion of the other party causes a serious violation of natural justice. In the present case, this has resulted in grave prejudice to officers whose careers are directly affected as a consequence.

28. The non-disclosure of relevant material to the affected party and its disclosure in a sealed-cover to the adjudicating authority (in this case the AFT) sets a dangerous precedent. The disclosure of relevant material to the adjudicating authority in a sealed cover makes the process of adjudication vague and opaque. The disclosure in a sealed cover perpetuates two problems. Firstly, it denies the aggrieved party their legal right to effectively 51 Charkaoui v. Canada (Citizenship and Immigration), (2007) 1 S.C.R 350 52 (2022) SCC OnLine SC 1570 PART F challenge an order since the adjudication of issues has proceeded on the basis of unshared material provided in a sealed cover. The adjudicating authority while relying on material furnished in the sealed cover arrives at a finding which is then effectively placed beyond the reach of challenge. Secondly, it perpetuates a culture of opaqueness and secrecy. It bestows absolute power in the hands of the adjudicating authority. It also tilts the balance of power in a litigation in favour of a dominant party which has control over information. Most often than not this is the state. A judicial order accompanied by reasons is the hallmark of the justice system. It espouses the rule of law. However, the sealed cover practice places the process by which the decision is arrived beyond scrutiny. The sealed cover procedure affects the functioning of the justice delivery system both at an individual case to - case level and at an institutional level." 60 Upon a perusal of the material in sealed cover, the Single Judge of the High Court observed that the files submitted by MHA indicate that the Committee of Officers took note of the inputs provided by intelligence agencies and "found that the inputs are of a serious nature and fall under the security rating parameters." The Single judge observed that "in those circumstances, the Committee of Officers advised not to renew the licence". The Single Judge does not provide any clarity on the nature of the 'inputs that were of a serious nature'. Additionally, there is no mention of the security rating parameters that have been relied on. A non-reasoned order

perpetuates the non-application of judicial mind in assessing the veracity of the inputs. The nexus of the reasons to the order cannot be adjudicated upon if the reasons are not disclosed.

61 On appeal, the Division Bench of the High Court observed that though the nature and gravity of the issue is not discernible from the files, there are clear indications that the security of the state and public order would be impacted if the permission granted to MBL to operate the channel is renewed. The Division Bench has also PART G not disclosed the reasons for the denial of security clearance. There is no explanation of what weighed in the mind of the court leading it to hold that the denial of clearance was justified despite observing that the nature and gravity of the issue is not discernible. The sealed cover procedure followed by the Single Judge and the Division Bench have necessarily rendered the appellant's right to writ remedies, which has been described as the 'heart and soul' of the Constitution 53 and a basic feature of the constitution 54, a dry parchment. The non- disclosure of reasons for the denial of security clearance which is the sole ground for denying the permission to renew the license and the disclosure of relevant material only to the court in a sealed cover has rendered the appellant's procedural guarantees under the Constitution otiose. The appellants' right to writ remedies has been denied through a formalistic order by the High Court. The procedure that was followed by the High Court has left the appellants in a maze where they are attempting strenuously to fight in the dark. The non-disclosure of reasons for denial of security clearance to the appellants and the disclosure solely to the Court in a sealed cover has restricted the core of the principles of the natural justice - the right to a fair and reasonable proceeding.

G. Whether the infringement of MBL's right to a fair hearing is justified 62 The ASG in the statement filed before the High Court stated that the reasons for denial of security clearance cannot be disclosed because (i) intelligence inputs on the basis of which security clearance was denied are 'secret and sensitive'; and (ii) in the interest of national security. It has thus been submitted that the principles of 53 Dr BR Ambedkar, Constituent Assembly of India Debates (Vol. VII, 9 December 1948 54 L. Chandra Kumar v. Union of India, (1995) 1 SCC 400 PART G natural justice stand abrogated because: firstly, the decision is based on intelligence inputs which are 'sensitive' in nature from security and intelligence agencies; and secondly, these inputs are in the interest of national security. The Union of India has relied on the judgments of this Court in Ex-Armymen's Protection Services (supra) and Digi Cable Network (supra) to contend that the principles of natural justice will not apply when considerations of national security are involved. The validity of this argument has to be assessed before deciding if the State has discharged its burden justifying that the infringements on procedural guarantees are reasonable.

G. 1 Natural justice and national security: decisions in Digi and Ex-armymen 63 In Ex-Armymen's Protection Services (supra), the appellant was granted the business of ground handling services. Rule 92 of the Aircraft Rules 1937 stipulates that the business shall be provided subject to security clearance. The appellant was informed that security clearance was withdrawn on grounds of 'national interest'. The appellant initiated proceedings under Article 226 of the Constitution before the High Court of Patna. The writ petition was disposed with a direction that the appellant should be furnished materials that were relied on by the Central Government for withdrawal of security clearance. However, the Central Government passed an order that the documents in the file were classified as 'secret' and could not be shared with the appellant. The documents were placed in a

'sealed cover' before the Single Judge of the High Court. On a perusal of the documents, the Single Judge directed that a gist of the allegations be disclosed. The Division Bench of the High Court allowed the appeal and held that the materials could not be disclosed to the appellant in national interest. The appellant PART G initiated proceedings under Article 136. A two-Judge Bench of this Court dismissed the proceedings. Justice Kurian Joseph writing for the Bench observed that if concerns of national security are involved, then the party cannot 'insist on the strict observance of the principles of natural justice'. It was further observed that it is open to the Court to satisfy itself that the claim of the government that national security is involved is indeed true. This Court relied on the judgments in the Zamora 55 and Secretary of State for Home Department v. Rehman 56 to hold that deference must be given to the Government's decision when it is of the opinion that issues of national security are involved. However, it was held that the Court may call for records to satisfy itself that issues of national security are involved. Further, the judgment in Council of Civil Service Unions v. Minister of Civil Service 57 was relied on to hold that strict observance of the principles of natural justice may not be possible when national security is involved. It is important to note that this Court did not decide on the factual considerations in the matter because the security clearance that was granted to the appellant had already expired. The relevant observation is extracted below:

> "16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of the State or not. It should be left to the executive. To quote Lord Hoffman in Secy. of State for Home Deptt. v. Rehman [(2003) 1 AC 153 : (2001) 3 WLR 877 :

(2002) 1 All ER 122 (HL)] : (AC p. 192C) "... [in the matter] of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in 55 (1916) 2 AC 77(PC) 56 (2003) 1 AC 153 57 1985 AC 374 PART G the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases, it is the duty of the court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field.

Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.

18. Be that as it may, on facts we find that the security clearance granted to the appellant by order dated 17-4- 2007 for a period of five years has already expired. To quote:

"I am directed to inform you that background check on the company has been conducted and nothing adverse has been found. The Company's security clearance shall be valid for a period of five years from the date of this letter at the end of which a fresh approval of this Bureau is mandatory."

(emphasis supplied)

19. In that view of the matter, it has become unnecessary for this Court to go into more factual details and consideration of the appeal on merits. The same is accordingly disposed of. There is no order as to costs." (emphasis supplied) 64 In Digi Cable Network (supra), the permission that was granted to the appellant for operating as a Multi-Systems Operator in the Digital Addressable System was cancelled on the ground that MHA denied security clearance to the appellant. The High Court rejected the challenge to the order of cancellation. The Additional Solicitor General filed a copy of the reasons for the denial of security clearance in a sealed cover before this Court. A two-Judge Bench of this Court dismissed the appeal by relying on the judgment in Ex-Armymen's Protection Services (supra) PART G holding that the appellant was not entitled to claim any prior notice before the order cancelling the permission was passed :

> "16. Having perused the note filed by the Union of India, which resulted in the cancellation of permission, we are of the considered opinion that in the facts of this case, the appellant was not entitled to claim any prior notice before passing of the cancellation order in question.

17. In other words, we are of the view that the principles of natural justice were not violated in this case in the light of the law laid down by this Court in Ex-Armymen's Protection Services (P) Ltd. Inasmuch as the appellant was not entitled to claim any prior notice before cancellation of permission." 65 The observation in Ex-Armymen's Protection Services (supra) that what is in national security is a question of policy and not law for the courts to decide was affirmed in the majority opinion in Justice KS Puttaswamy (5J) v. Union of India58 while deciding on the constitutional validity of Section 33 of the Aadhar Act. 66 It must be noted that this Court in Ex-Armymen's Protection Services (supra) referred to a series of judgments from the Courts in the United Kingdom to elucidate the principle that the government is best placed to decide whether national security concerns are involved; and that principles of natural justice may not be complied with when issues of national security are involved. The evidentiary principle laid down by the Courts in the United Kingdom needs to be elucidated in order to understand the scope of the observations in Ex-Armymen's Protection Services (supra).

58 (2019) 1 SCC 1 PART G 67 In The Zamora (supra), a ship that was captured contained contraband in the cargo. The cargo belonged to the Austrian Government, and was imported into Sweden. The ship was chartered to a German, who was acting as an agent for the Austrian Government, and the Swedish consignees were merely playing a part in the transaction. The right to requisition exists in international law, that is, the right to requisition vessels pending a decision on whether it must be condemned or released. One of the limitations to the right to requisition is that vessels must be urgently required in the defence of the realm or for matters involving national security. It was in this context that the Privy Council made the widely cited observation that:

> "With regard to the first of these limitations, their Lordships are of the opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which is sought to requisition are urgently

> required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact.

[...] Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." However, the Court put the affidavit that was filed by the Director of Army Contracts claiming exception to the right to requisition on the grounds of national security to the test of reason. It was observed that there was 'no satisfactory evidence' that such a right was exercisable:

> "In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the Court, but because the judge PART G has before him no satisfactory evidence that such a right was exercisable. The affidavit of the Director of Army Contracts, following the words of Order XXIX, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release." (emphasis supplied) 68 In Council of Civil Service Unions (supra), the Minister of Civil Service released an instruction that employees of the Government Communications Headquarters cannot be a part of trade unions. This decision was challenged on the ground that the employees and the trade unions were not consulted before the instruction was issued. It was submitted that it was a well-established practice for the trade unions to be consulted before conditions of service are altered.

69 The Government Communications Headquarters is a branch of the Foreign and Commonwealth Office which ensures the security of the United Kingdom military, and provides intelligence signals for the Government. The respondent defended its action on the ground that because "prior consultation would involve a real risk that it would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid." The House of Lords observed that generally the decision of whether the requirements of national security outweigh the duty of fairness is for the Government and not the courts to decide. However, this observation was qualified. It was held that the Government is under an obligation to produce evidence that the decision was based on the grounds of national security which warranted the departure from the rule of fairness if the PART G decision is successfully challenged on the ground that it was arrived by an unfair process:

> "The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the

> Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Authority for both these points is found in The Zamora [1916] 2 A.C. 77." On a perusal of the evidence on record, the Court was satisfied that the departure was justified because it involved national security concerns.

70 Lord Scarman in his opinion observed that the observations in The Zamora (supra) were not indicative of an abdication of judicial function but were an indication that evidence was required by the Court. In this context, it was observed that it has to be established by evidence that the interest of national security arises in judicial proceedings:

> "My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown PART G could in the circumstances reasonably have held.

There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable: and the limitation is entirely consistent with the general development of the modern case law of judicial review." (emphasis supplied) On a perusal of the evidence, it was held that work at the headquarters involved matters of grave national security, and that if the employees and trade unions were consulted before the decision then the security would have been compromised. Lord Scarman observed that the Minister did not consult the employees because she feared that a union-organised disruption of services could occur. It was held that this conclusion by the Minister could have been reached reasonably. 71 In Rehman (supra), the appellant, a Pakistani National whose parents were British citizens, applied for indefinite leave to remain in the United Kingdom. The Secretary of State refused his application on the ground that he was involved with a terrorist organization. The Secretary of State also added that his deportation from the United Kingdom would be conducive to public good and 'in the interests of national security'. The Special Immigration Appeals Commission allowed the appeal against the decision of the Secretary of State observing that the standard of civil balance of probabilities had not been satisfied. The Commission observed that though it was not disputed that the appellant provided sponsorship, information and advice to persons going to Pakistan for training which may have included militant training, it could not be concluded that these actions constituted a threat to 'national security'. The Court of Appeal allowed the appeal against the judgment of the Commission.

PART G 72 The appeal against the judgment of the Court of Appeal was dismissed by the House of Lords. Lord Slynn of Hadley observed in his opinion that: (i) where the liberty of the person and the opportunity of his family to remain in the country are at stake, and when specific actions which have

already occurred are relied on, then it is fair that the civil standard of proof is applied; (ii) when the Secretary of State decides that a person must be deported for public good, he is entitled to have precautionary and preventive principles. There must be material on the basis on which he can reasonably and proportionately conclude that there is a real possibility that that the activities harm national security; (iii) the Secretary of State is in the best position to assess the security threat. Due weight must be given to his assessment. However, his decision is open to review on the above two grounds; and (iv) It was held in Council of Civil Service Unions (supra) that if it is contested that the deportation was not based on the grounds of national security, then the Government must produce evidence to satisfy the Court that the decision is based on the grounds of national security. However, 'that is not the issue in the present case'.

73 Lord Hoffman in his opinion observed that the Commission cannot differ from the opinion of the Secretary of State on the meaning of national security. That is, the question of whether for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security is for the Government to decide. Relying on the judgment in Council of Civil Service Unions (supra), it was held that the decision on the validity of deportation is not conceded to the Secretary of the State. The Commission has to determine (i) the factual basis for the executive's opinion that deportation would be in the interests PART G of national security'; (ii) if the decision of the Secretary of the State was one which a reasonable minister would have arrived at; and (iii) any other legal defence that was available to the appellant. The relevant observations are extracted below:

> 54. This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to "defeat the purpose for which the Commission was set up": see the Commission's decision. It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to Chandler's case in his speech in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 406. His analysis shows that the Commission serves at least three important functions which were shown to be necessary by the decision in Chahal. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held". Thirdly, an appeal to the Commission may turn upon issues

> which at no point lie within the exclusive province of the executive. A good example is the question, which arose in Chahal itself, as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a PART G sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.

(emphasis supplied) 74 The following principles emerge from the above judgements:

> (i) The party affected by the decision must establish that the decision was reached by a process that was unfair without complying with the principles of natural justice;
>
> (ii) The State can claim that the principles of natural justice could not be followed because issues concerning national security were involved;

(iii) The Courts have to assess if the departure was justified. For this purpose, the State must satisfy the Court that firstly, national security is involved; and secondly, whether on the facts of the case, the requirements of national security outweigh the duty of fairness. At this stage, the court must make its decision based on the component of natural justice that is sought to be abrogated; and

(iv) While satisfying itself of the national security claim, the Courts must give due weightage to the assessment and the conclusion of the State. The Courts cannot disagree on the broad actions that invoke national security concerns - that is, a question of principle such as whether preparation of terrorist activities by a citizen in a foreign country amounts a threat of national security. However, the courts must review the assessment of the PART G State to the extent of determining whether it has proved through cogent material that the actions of the aggrieved person fall within the principles established above.

75 The contention of the respondent that the judgment of this Court in Ex-Armymen's Protection Services (supra) held that the principles of natural justice shall be excluded when concerns of national security are involved is erroneous. The principle that was expounded in that case was that the principles of natural justice may be excluded when on the facts of the case, national security concerns outweigh the duty of fairness. Thus, national security is one of the few grounds on which the right to a reasonable procedural guarantee may be restricted. The mere involvement of issues concerning national security would not preclude the state's duty to act fairly. If the State discards its duty to act fairly, then it must be justified before the court on the facts of the case. Firstly, the State must satisfy the Court that national security concerns are involved. Secondly, the State must satisfy the court that an abrogation of the principle(s) of natural justice is justified. These two standards that have emerged from the jurisprudence abroad resemble the proportionality standard. The first test resembles the legitimate aim prong, and the second test of justification resembles the necessity

and the balancing prongs. G.2 Application of the proportionality standard 76 Having held that the concerns of national security do not permit an absolute abrogation of the principles of natural justice, we are now required to assess if the restriction on procedural guarantees is reasonable on an application of the PART G proportionality standard. The proportionality standard as laid down by this Court in Modern Dental (supra) is as follows:

(i) The measure restricting a right must have a legitimate goal (legitimate goal stage).

(ii) The measure must be a suitable means for furthering this goal (suitability or rational connection stage).

(iii) The measure must be least restrictive and equally effective (necessity stage).

(iv) The measure must not have a disproportionate impact on the right holder (balancing stage).

G. 2 (a) Legitimate Goal Stage 77 This prong requires an analysis of the legitimacy of the aim that restricts rights. The aim must be of sufficient importance to override fundamental rights. At this stage, the State is required to discharge the burden of proving that the action is in furtherance of an aim that is legitimate. The State is also required to discharge the additional burden of proving that the action is indeed in furtherance of the legitimate aim that is contended to be served. The Union of India claims that the reasons and the documents cannot be disclosed in the interest of national security and confidentiality of intelligence inputs. The State at this stage is required to prove that confidentiality and national security are legitimate aims, and that the purposes of confidentiality and national security are served by non-disclosure. PART G 78 At this stage, the court has to examine the threshold question whether in a constitutional democracy, a fundamental right can be limited to realise the purpose underlying the law or action. 59 The criteria for determining proper purpose differs from one legal system to another. For instance, the South African Constitution prescribes a general limitation clause which prescribes the general grounds to limit all fundamental rights. 60 The Indian Constitution does not prescribe a general limitations' clause. A few of the provisions in Part III such as Article 19 and 25 have a specific purpose based limitation clause. This does not mean that the provisions that do not have an express limitation clause are absolute. Other rights that do not have an express limitation clause can be limited through an implied reading of the provisions of the Constitution. Our constitutional jurisprudence does not accept the theory that constitutionally protected rights live and survive in contextual isolation. Each is linked to the other. Hence, the entire text has to evolve in meaning and content with the canvas which bears the tapestry.

79 Aharon Barak argues that one of the accepted grounds of proper purpose for the limitation of rights is public interest (or public good). 61 Though the existence of such a purpose is never in contention, the content of public interest is unclear. Public interest, he argues, must reflect the notions of justice and tolerance shared by the society. The courts while identifying if the purpose is legitimate must not fall into the den of dominant impulses but instead prioritise purposes in furtherance of constitutional ideals and values. However, the court must necessarily be cautious 59 Aharon Barak (n 38) 247;Justice Sikri in Modern Dental (paragraph 55) 60 Article 26(1) states that

the limitation on human rights should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. 61 Aharon Barak (n 38) 289 PART G to not cross the thin line between adjudication and policy making. Certain purposes are absolutely antithetical to public interest in a constitutional democracy. The Constitution, as we all know, is a living document. Its meaning and the values it espouses develop with time. The court while determining the purpose must be cognizant of such developments and must read the Constitution in the socio- political context – bearing in mind both history and the prospect of societal change at the time of interpretation.

80 The Constitution prescribes national security as one of the grounds which can be used to reasonably restrict rights expressly in the context of Article 19. Further, other provisions of the Constitution prescribe a departure from principles during emergency situations that impact national security. 62 Similarly, informational privacy and confidentiality are now values that have been read into the Constitution, particularly in view of the decision of a nine Judge Bench in Justice KS Puttaswamy (9J) (supra) and the enactment of the Right to Information Act 2005. Thus, confidentiality and national security are legitimate goals recognised by the Constitution for the purpose of limiting procedural rights.

(I) Confidentiality and IB Reports 81 The state has to now prove that these are the two purposes that the state action seeks to serve. MHA in response to MBL's request for disclosure of reasons for denial of security clearance states that the reasons cannot be disclosed because reports from investigative agencies are "secret" in nature. MHA has made a general claim that all reports of the investigative agencies are confidential. We are unable 62 Article 359 of the Constitution PART G to accept such an argument. Investigative agencies such as the CBI and IB are required to conduct background checks on innumerable personnel and entities for a multitude of reasons. The interaction between private individuals and the State has increased by virtue of which the involvement of intelligence agencies has also proliferated. The reports of the intelligence agencies are not merely fact-finding reports. As it would be evident from the extractions of the material below, reports of investigative agencies make observations and provide inferences on the conduct of individuals which are then relied upon by the decision making authority. To argue that reports of the intelligence agencies may contain confidential information is one thing but to argue that the all such reports are confidential is another. Such an argument is misplaced and cannot be accepted on the touchstone of constitutional values. The reports by investigative agencies impact decisions on the life, liberty, and profession of individuals and entities, and to give such reports absolute immunity from disclosure is antithetical to a transparent and accountable system.

(II) National Security 82 The MHA also opined that the relevant material must not be disclosed in the interest of national security. The issue before us is whether the court can judicially review this inference, and if it can, the extent of such review. We must refer to the jurisprudence on the extent of judicial review of national security claims before assessing if the action serves the purpose of national security. 83 It is now settled that the Courts do not resort to a hands-off approach when it is claimed that national security implications are involved. In Manohar Lal Sharma PART G v. Union of India 63, a three-Judge Bench of this Court held that though the extent of judicial review in matters concerning national security is limited, it does not mean that the State gets a free pass every

time the argument of national security is made. This Court held that the State must plead on affidavit and prove that disclosure of information would injure national security. The court observed:

> "50. Of course, the Respondent-Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. The Respondent-Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept in secret as their divulgence would affect national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator." The issue is not whether the inference that national security concerns are involved is judicially reviewable. It is rather on the standard of proof that is required to be discharged by the State to prove that national security concerns are involved. It is necessary that we understand the meaning and implications of the term national security before embarking on an analysis of the issue. This Court has held that it is not possible to define national security in strict terms. 64 National security has numerous facets, a few of which are recognised under Article 19(2) of the Constitution. In Ex-Armymen's Protection Services (supra), a two-Judge Bench of this Court observed that the phrase national security would include factors like 'socio-political stability, territorial integrity, economic stability and strength, 63 2021 SCC OnLine SC 985 64 AK Roy v. Union of India, (1982) 1 SCC 271 PART G ecological balance cultural cohesiveness and external peace. Justice Patanjali Sastri writing for the majority in Romesh Thappar v. State of Madras65 demarcated the fields of 'public order' and 'security of state' as they find place in Article 19 of the Constitution. This Court held that the expression 'security of the state' was defined to include a 'distinct category of those offences against public order which aim at undermining the security of the State or overthrowing it'. In Ram Manohar Lohia v. State of Bihar 66, Justice M Hidayatullah (as the learned Chief Justice then was) distinguished the expressions 'security of State', 'law and order', and 'public disorder'. He observed that disorders affecting the security of State are more aggravated than disorders that affect public order and law and order:
>
> 55. It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause

to the Defence of India Rules.

(emphasis supplied) 84 Thus, the expression national security does not have a fixed meaning. While courts have attempted to conceptually distinguish national security from public order, it is impossible (and perhaps unwise) to lay down a text-book definition of the 65 1950 SCC 436 66 AIR 1966 SC 740 PART G expression which can help the courts decide if the factual situation is covered within the meaning of the phrase. The phrase derives its meaning from the context. It is not sufficient for the State to identify its purpose in broad conceptual terms such as national security and public order. Rather, it is imperative for the State to prove through the submission of cogent material that non-disclosure is in the interest of national security. It is the Court's duty to assess if there is sufficient material for forming such an opinion. A claim cannot be made out of thin air without material backing for such a conclusion. The Court must determine if the State makes the claim in a bona fide manner. The Court must assess the validity of the claim of purpose by determining (i) whether there is material to conclude that the non-

disclosure of the information is in the interest of national security; and (ii) whether a reasonable prudent person would arrive at the same conclusion based on the material 67. The reasonable prudent person standard which is one of the lowest standards to test the reasonableness of an action is used to test national security claims by courts across jurisdictions because of their deferential perception towards such claims. This is because courts recognise that the State is best placed to decide if the interest of national security would be served. The court allows due deference to the State to form its opinion but reviews the opinion on limited grounds of whether there is nexus between the material and the conclusion. The Court cannot second-guess the judgment of the State that the purpose identified would violate India's national security. It is the executive wing and not the judicial wing 67 This standard of judicial review is derived from the standard that has been laid down on the limited extent of justiciability of the aid and advice of the council of ministers to the President/Governor. Refer to the judgment of the Constitution Bench in BP Singhal v. Union of India, (2010) 6 SCC 331: Paragraph 79. PART G that has the knowledge of India's geo-political relationships to assess if an action is in the interest of India's national security.

85 We now proceed to assess if on the facts of the case, there is sufficient material to conclude that the action is in furtherance of the interests of confidentiality and national security, as contended.

(III) Opening the sealed cover 86 In 2010, MBL applied for permission to uplink and downlink the news and current affairs television channel 'Media One'. According to the Uplinking and Downlinking Guidelines, the application would be sent for security clearance if the applicant is eligible according to the information provided. 68 MBL's application was sent for security clearance. Central Bureau of Investigation 69 remarked that there was nothing adverse that was found on the record against MBL. However, the Intelligence Bureau 70 made the following adverse remarks against MBL:

(i) MBL is closely associated with 'Madhyamam Daily' which has links to Jamaat-e-Islami71;

(ii) The tenor of articles carried out by 'Madhyamam Daily' was of an adverse nature from the security perspective;

(iii) A few of the key executives of the applicant had associated with JEI-H;

and 68 Paragraph 9.2 of the Uplinking Guidelines and Paragraph 8.2 of the Downlinking Guidelines 69 "CBI" 70 "IB" 71 "JEL/H" PART G

(iv) The proposed TV channel may espouse the ideology of JEI/H if permitted to operate.

87 IB also submitted a note on the alleged role and activities of JEI-H. The note stated that:

(i) JEI-H was formed in 1941 with the objective of securing the rule of Allah.

After the partition of the Indian sub-continent, JEI formed units in India, Pakistan, and Kashmir. JEI-H is opposed to secularism, democracy, and socialism;

(ii) JEI-H was banned: (i) In 1955 for anti-national activities in Kashmir. The ban was lifted in 1955; (ii) In 1975 under the Defence and Internal Security Rules 1971. The ban was lifted in 1977; and (iii) In 1992, under the Unlawful Activities (Prevention) Act 1967 72. The Supreme Court nullified the ban in 1994;

(iii) JEI-H plays a crucial role in attracting and channelizing foreign funds to Islamic institutions in the country through official and clandestine channels; and

(iv) JEI-H through its publication, Madhyamam Daily has been "critical of India's foreign policy, besides indulging in anti-US propaganda. It has also been critical of security agencies/judiciary and often presents news from a communal perspective. Senior functionaries of JEI, Kerala are 72 "UAPA" PART G learnt to be mobilizing funds through hawala channels from the Gulf for launching a TV Channel." 88 The MHA considered the report and noted that these remarks were not so strongly adverse in nature to deny permission on the grounds of security, especially when the applicants were operating a newspaper with twelve editions. The IB report on Madhyamam Daily on the 'tenor' of the articles is extracted below:

> "Madhyamam Daily brings out 12 editions (published from 6 places in Kerala, 2 in Karnataka and 4 places abroad in Saudi Arabia, Qatar, Bahrain, and Dubai), which are published by JEI/H run Islamic Publishing House, Kozhikode, Kerala. The newspapers which have a combined circulation are of 1.75 lakhs approximately being used by JEI/H to air its views on various issues affecting the Muslim community. It has been highlighting the alleged discrimination against Muslims in India.

Recently it had alleged targeted attack on [..] who is the prime accused in the Bangalore bomb blast, and his family members and vehemently criticised police action against [...] for her alleged role in the Kalamassery bus burning case and has contrasted it with the alleged soft attitude taken against Hindu fundamentalists responsible for bomb blasts in the country and Babri Masjid demolition." (emphasis supplied) 89 In 2014, when security clearance was again sought by MBL for uplinking and downlinking TV Channels Media-One Life and Media One Global, IB submitted a report stating that fresh enquiries corroborated the issues that were flagged earlier. The fresh enquiries were based on a 'scrutiny of the contents of programmes aired in the recent past by Media One TV'. On a scrutiny of the contents of the programmes that were telecast by Media One, IB opined that Media-One: (i) tends to propagate the ideology of JEI-H; (ii) portrays security forces and intelligence PART G agencies of India in bad light; (iii) is overcritical of Government policies, especially vis-a-vis its handling of law and order issues involving minorities and militancy'. 90 MHA sought fresh comments from IB after receiving the above report. In the subsequent report, IB made three findings. Firstly, that the major source of funding for MBL is through shares in which JEI/H cadres and sympathizers have reportedly invested. IB submitted a comprehensive list of shareholders who have invested in MBL. We have not extracted the list of the shareholders to protect their privacy and confidentiality. Secondly, that enquiries have confirmed that Media One airs provocative programmes such as: (i) On 5 August 2015, the channel reportedly made attempts to denigrate the Indian Judiciary for alleged adoption of double standards in dealing with terrorism related cases; (ii) It blames US and Israel for the misery of the Muslims across the world; and (iii) a publication of MBL 'Prabodhanam Weekly', propagates fundamental Islamic viewpoint through its editorials.

91 On 24 July 2014, a CoO recommended that security clearance may be denied with respect to the proposals to uplink and downlink 'Media-One Life' and 'Media One Global', and security clearance maybe withdrawn to MBL based on the adverse remarks by IB in 2011 and 2014. MHA sought fresh comments and multiple CoO meetings were held to discuss the same. On 26 August 2015, MIB granted permission to uplink and downlink 'Media One Life'.

92 However, on 22 January 2015, CoO recommended denial of security clearance to two proposals (A) to Uplink/downlink non-news and current affairs TV channel Media-One Life and Media-One Global; (B) for the appointment of two directors. PART G However, it was noted that the security clearance granted in 2011 may not be withdrawn. The minutes of the meeting of CoO notes as follows:

> "The MHA had issued policy guidelines for assessment of proposal for national security on 30.6.2015 which clearly prescribe security relating parameter for assessment of proposals. The CoO felt that adverse inputs against the company and its Directors are serious in nature (linkage with radical organization) and falls under security rating parameters mentioned in Sl No. 13 of Ministry of Home Affairs Policy guidelines issued vide OM dated 30.6.2015. Further, CoO observed that the policy mandates that the security clearance granted by the MHA will usually have prospective effect unless otherwise decided by the Ministry concerned in the discharge of its mandate.

Therefore, the security clearance granted in 2011 may not be withdrawn. However, the future expansion of the company may be stopped in view of the adverse inputs." (emphasis supplied) 93 MHA denied security clearance for these two proposals based on the recommendation of the CoO. Though the order of MHA denying security clearance on such recommendation is not annexed to the file submitted, it finds mention in the internal notes on the file. It seems that the MHA was not aware that MIB had by then already granted the permission to uplink and downlink Media One Life. Further, in spite of the observations of CoO that the revocation may not be retrospective, MIB issued a show cause notice to MIB for revocation of the permission granted to Media One and Media One Life. The MIB requested MHA to consider the response of MBL against the show cause notice. In this regard, MHA observed that though it had not withdrawn security clearance of the existing News and Current Affairs Channel 'Media One', the actions of MIB were in compliance of the guidelines dated 30 June 2015. It is crucial to note that as on the date when PART G security clearance was denied by MHA, both Media One and Media One Life were existing news channels. The relevant extract of the response of MHA is extracted below:

> "Since the MHA has not withdrawn security clearance of existing News and Current Affairs TV channel 'Media One', it is Ministry of I&B which has to justify its action of issuing show-cause notice for withdrawal of permission. At the same time, since the MHA has given leverage to the nodal Ministry in the guidelines dated 30.06.2015 to take action for retrospective application of the guidelines in the discharge of its mandate and that the MIB has taken action in accordance with their own guidelines, we may not state that MHA has not withdrawn security clearance granted vide OM dated 17.2.2011. This would give impression if action of the nodal Ministry was not in conformity with MHA guidelines.

We may simply mention the proposals to which security clearance was denied on 27.1.2016, and state that Ministry of I&B has issued SCN in discharge of its mandate it may defend its action. As regards sharing of reason for denial of clearance, it is informed that the denial is based on inputs from intelligence Agencies which are secret in nature and cannot be disclosed to the applicant." (emphasis supplied) The response of MHA further notes that the security clearance was denied based on 'inputs from intelligence agencies which are secret and cannot be disclosed to the applicant.' 94 On 11 September 2019, MIB revoked the uplinking and downlinking permission which was granted to Media One life. MBL submitted a representation against the revocation. MHA requested IB to furnish comments on the representation of MBL. IB concluded that the inputs attract parameters (Sl. Nos. 20 and 21) stipulated by the Guidelines issued on June 25 2018 73 for assessment of proposals received in 73 "2018 Guidelines" PART G the Ministry of Home Affairs for national security clearance. IB made the following two adverse remarks:

(i) "Main source of income: MBL's main source of income is the shares invested by cadres of JEI-H through its sympathizers. Most of the Board of Directors are JEI-H sympathizers"; and

(ii) "Anti-establishment stance: Media One channel is learnt to be espousing its anti-establishment stance on various issues 'including UAPA, Armed Forces (Special Power) Act, developmental projects of the Government, encounter killings, Citizenship (Amendment) Act, CAA/NPR/NRC". 95

The 2018 Guidelines stipulate that national security covers a wide range of issues but the principle focus, inter alia, is on (i) matters relating to preserving the unity, territorial integrity and sovereignty of the nation and protecting the life, and liberty of its citizens; and (ii) matters vital to economic security, protection of critical infrastructure, and development and prosperity of the country and its citizens. Clause 3.2 stipulates that sector sensitive proposals emanating from, inter alia, MIB shall be assessed in accordance with the Guidelines. According to Clause 4 national security verification will be done through "record checks/field enquiries and other means for the vetting of the company, entity and the persons associated with the same." The provision stipulates that on receipt of a proposal from the concerned ministry (in this case, MIB), MHA would seek inputs from security and law enforcement agencies. Clause 5 stipulates that the intelligence and law enforcement agencies will conduct an assessment based on the list of security parameters set out in in Annexure C. The assessment will be done on the basis of PART G the reported threat, probability of materialization, and overall impact. Annexure C prescribes the security parameters. Sl. No 13 of the Annexure reads: "Terror funding, financial linkage with underworld, drug cartels, crime syndicates." Sl No. 20 reads as "Involvement in religious proselytization activities in India", and Sl. No. 22 reads as "Intentional or systemic infringement of safety concerns or security systems endangering the safety of the public".

96 MBL filed an application for renewal of permission to uplink and downlink the Media-One channel. MIB forwarded the application for renewal to MHA for security clearance. MHA noted that there is no reason to consider the renewal of permission if security clearance has been denied to the company and its directors earlier:

> "3. It has been observed that Ministry of Information and Broadcasting has been forwarding the proposals for renewal of security clearance to MHA on routine basis including cases, where security clearance has already been denied to the company and its directors, If security clearance has been denied by MHA to a company and its directors. there is no reason to consider its renewal unless there are specific reasons to indicate that the situation has changed.
>
> The security clearance guidelines dated 25.06.2018, para 7.4 stipulates that the decision on security clearance by the MHA will have prospective effect unless otherwise decided by the ministry /department concerned in the discharge of its mandate. This was explicitly clarified in the meeting dated 21.01.2016 of the then Home Secretary and Secretary of Information & Broadcasting in response to MIB query on whether withdrawal of security clearance to company/individual entities in one sector would tantamount to withdrawal in other sectors also Since MIB has already been communicated denial of security clearance to the above mentioned companies, there is no need of fresh consideration for the cases as per security clearance guidelines.

In view of the above, Ministry of Information and Broadcasting may be requested that the proposals for renewal of security clearance in the cases where security clearance has already been denied to the company, PART G should not have forwarded to MHA, in a routine manner unless and until there is

sufficient and proper reasons for the same." 97 Before addressing whether the non-disclosure of the relevant material would be in the interest of national security, it is our constitutional duty to mention the cavalier manner in which Union of India has raised the claim of national security. Other than merely claiming that national security is involved, both in the affidavit that was filed before the High Court and in the submissions before us, the Union of India made no attempt to explain how non-disclosure would be in the interest of national security. The Union of India has adopted this approach inspite of reiterations by this Court that judicial review would not be excluded on a mere mention of the phrase 'national security'. The State is using national security as a tool to deny citizens remedies that are provided under the law. This is not compatible with the rule of law.

98 Security clearance was denied to MBL because of its alleged link with JEI-H, and its alleged anti-establishment stance. To conclude that MBL is linked to JEI-H, IB has relied on the 'tenor' of the articles published by dailies of MBL, and the shareholding pattern of MBL. To conclude that JEI-H has an anti-establishment stance, IB has solely relied upon the programmes that were broadcast by Media- One. Some of the views that were highlighted in the IB report to conclude that MBL has an anti-establishment stand are that (i) it portrays security forces and the judiciary in a bad light; (ii) it highlighted the discrimination faced by minorities in the country and contrasted it with the State's alleged soft attitude towards the Hindus who were involved in the destruction of Babri Masjid; and (iii) its comments on UAPA, Armed Forces (Special Power) Act, developmental projects of the PART G Government, encounter killings, Citizenship (Amendment) Act, and CAA/NPR/NRC.

99 Significantly, with respect to the list of shareholders who are alleged sympathizers of JEI-H, the file does not contain any evidence on the alleged link between the shareholders and JEI-H. The report of IB is purely an inference drawn from information that is already in the public domain. There is nothing 'secretive' about this information to attract the ground of confidentiality. Additionally, it cannot be argued that the purpose of national security will be served by non-disclosure merely by alleging that MBL is involved with JEI-H which is an organisation with alleged terrorist links. While we have held above that it would be impractical and unwise for the courts to define the phrase national security, we also hold that national security claims cannot be made out of thin air. There must be material backing such an inference. The material on the file and the inference drawn from such material have no nexus. The non-disclosure of this information would not be in the interest of any facet of public interest, much less national security. On a perusal of the material, no reasonable person would arrive at the conclusion that the non-disclosure of the relevant material would be in the interest of national security and confidentiality.

G.2 (b) Suitability 100 We proceed to apply the subsequent prongs of the proportionality standard, even assuming that the action taken is in the interest of confidentiality and national security. The second prong of the proportionality analysis requires the State to assess whether the means used are rationally connected to the purpose. At this PART G stage, the court is required to assess whether the means, if realised, would increase the likelihood of protecting the interests of national security and confidentiality. It is not necessary that the means chosen should be the only means capable of realising the purpose of the state action. This stage of the analysis does not prescribe an efficiency

standard. It is sufficient if the means used constitute one of the many methods by which the purpose can be realised, even if it only partially gives effect to the purpose. 74 The Canadian Supreme Court in the case of Oakes (supra) emphasised that the means adopted must not be "arbitrary, unfair, or based on irrational connection". The requirements under this prong will not be fulfilled if the State uses constitutionally impermissible means. Though it is not necessary that the means opted should be the 'best possible means', the means must still pass the muster of the constitution.

101 The Ministry of Home Affairs disclosed the relevant material solely to the court in a sealed cover. By this method of disclosure, information that is claimed to be confidential and in the interests of national security is sought to be protected by not disclosing it to the public and the claimant. The means that are used may not necessarily be the best possible means to protect the interest involved because the sealed cover procedure permits partial disclosure as opposed to complete non- disclosure. However, it still shares a rational connection to the purpose that is sought to be achieved.

102 On the other hand, the non-disclosure of even a summary of reasons for denying security clearance does not share a rational connection with the purpose identified. 74 Aharon Barak (n 38) 305 PART G In A v. The United Kingdom 75, the ECHR held that there must always be 'equality of arms' between the parties. The court held that if procedural guarantees are restricted, then the limitation must be sufficiently counterbalanced. In Secretary of State for the Home Department v. AF 76 the House of Lords while interpreting the judgment of the ECHR in A (supra) held that there is a 'core irreducible minimum' of procedural guarantees which cannot be infringed. The House of Lords observed that the 'essence of the case against the applicant' is a core irreducible minimum which has to be disclosed. We are in agreement with the observations of the House of Lords and ECHR in AF (supra) and A (supra) respectively. MHA by not disclosing the reasons for denying security clearance has rendered MBL's procedural guarantees otiose. The summary of reasons for denying security clearance constitute the 'core irreducible minimum' of the procedural guarantees under Article 14. By not disclosing the summary of reasons, the MHA has undertaken an unreasonable and arbitrary means to fulfil its purpose. G. 3 (c) Least restrictive means 103 The judgment of the majority in Justice KS Puttaswamy (5J) (supra) adopted the 'moderate interpretation of necessity' that was propounded by David Bilchitz. 77 The author sought to draw a middle ground between strong and weak forms of the necessity prong. The sub-components of the necessity prong as devised by Bilchitz are as follows: 78 75 Application no. 3455/05 76 2009] UKHL 28, (paras 62-65, 81)) 77 David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach? in Liora Lazarus et al (eds), Reasoning Rights: Comparative Judicial Engagement (Hart 2014) 49. 78 ibid, p. 51.

PART G

(a) Whether there are other possible means which could have been adopted by the State;

(b) Whether the alternative means identified realise the objective in a 'real and substantial manner';

(c) Whether the alternative identified and the means used by the State impact fundamental rights differently; and

(d) Whether on an overall comparison (and balancing) of the measure and the alternative, the alternative is better suited considering the degree of realising the government objective and the impact on fundamental rights. 104 In Charkaoui v. Canada (Citizenship and Immigration) 79, the Canadian Supreme Court held that the procedure for detention prescribed under the Immigration and Refugee Protection Act 2001 80 suffered from procedural infirmities. Under the 2001 Act, a person may be deprived of some or all of the information on the basis of which the detention was ordered. The Canadian Supreme Court held that the provisions of the 2001 Act unjustifiably violate Section 7 of the Canadian Charter of Rights and Freedom81 because State action is judicially reviewed based on secret material without devising any means to protect the affected person's procedural rights. The court referred to the system of special advocates in the United Kingdom and observed that this system protects the interests of the affected party. The court concluded that the procedure prescribed 79 (2007) 1 SCR 350 80 "2001 Act" 81 Section 7 of the Canadian Charter of Rights and Freedoms stipulates that the right to life, liberty, and security of a person shall not be deprived except in accordance with the principles of fundamental justice. PART G in the statute cannot be 'justified as minimum impairment of the individual's right to a judicial determination on the facts and the law, and right to know and meet the case.' 105 The Canadian Supreme Court referred to the jurisprudence on the procedure followed by courts across various jurisdictions to decide claims that involve State secrets and held that there were other lesser restrictive means that could have been employed, as in the United Kingdom. As a part of the analysis of the least restrictive means prong, we deem it necessary to refer to alternative procedures that are available in India and in other countries that substantially aid in realising the objective and which protects the interest of the affected party in a better fashion.

(I) Totten claim: non-justiciability of the issue 106 The Courts in the United States have recognised that in exceptional circumstances, the court must act in the interest of national security to prevent the disclosure of state secrets. One of the applications of this principle is through the Totten claim. According to the Totten claim, if claims are premised on state secrets, then they are barred from adjudication 82. If the subject matter is a matter of state secret then the action may be dismissed on pleadings before the proceedings could reach the stage of evidence. The Totten claim, if allowed, permits the dismissal of the suit in the pre-discovery stage.

82 Totten v. United States, 92 US 105,107 (1876) PART G (II) Closed Material Procedure and Special Advocates 107 In Chahal v. United Kingdom 83, the Home Secretary issued an order to deport the appellant, an Indian national and a Sikh separatist. One of the grounds of the appellant's challenge to the deportation order was that although the Home Secretary's decision is amenable to judicial review, the effective determination of his risk to national security was made by an internal Home Office advisory panel on the basis of material which was not disclosed to him. The European Court of Human Rights 84 accepted the contention of the appellant and held that the procedure violated the rights under Article 5(4) of the European Convention on Human Rights. 85 The court observed that there are other less restrictive methods which could be employed to accommodate legitimate concerns of national security and procedural justice. The Court referred to the procedure

that is applied in Canada under the Canadian Immigration Act 1976 under which a Federal Court judge holds an in - camera hearing of all the evidence; the applicant is provided a statement summarising the case that is made against them; and the confidential material is then disclosed to a security-cleared counsel who assists the court in testing the strength of the State's case.

108 In response to the judgment in Chahal (supra), the Government of the United Kingdom passed the Special Immigration Appeals Commission Act 1997 which paved the way for security-cleared Special Advocates to represent the applicant in substantive proceedings that take place behind closed doors. The material is not 83 (1996) 23 EHRR 413 84 "ECHR" 85 Article 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." PART G disclosed to the claimant. However, the Special Advocate represents the interest of the party before the court though they are not permitted to interact with to the claimant about the non-disclosable security evidence in the closed proceedings. For all purposes, closed material proceedings are similar to the sealed cover procedure, except that a security cleared lawyer is appointed to counterbalance the limitations on procedural guarantees. The Terrorism Act 2000 prescribes a similar procedure. Since then the Courts in the United Kingdom have been using Special Advocates in civil proceedings, quasi-criminal proceedings 86, and in public interest immunity claims. 87 The Special Advocate serves two purposes : firstly, to seek maximum possible disclosure of closed material; and secondly, to test by cross-examination and make submissions on any material that remains closed.88 (III) Public Interest Immunity 109 The Evidence Act prescribes rules precluding disclosure of certain communications and evidence. Section 123 stipulates that no person shall be permitted to give any evidence that is derived from unpublished official records relating to affairs of the State. The evidence shall be disclosed only with the permission of the officer at the head of the department:

> 123. Evidence as to affairs of State.- No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

86 Roberts v. Parole Board, (2005) 2 AC 738 87 R v. H, (2004) AC 134 88 Martin Chamberlain, Special Advocates and Amici Curiae in National Security proceedings in the United Kingdom, The University of Toronto Law Journal , Summer 2018, Vol. 68, No. 3, Special Issue on Indigenous Law (Summer 2018), pp. 496-510 PART G Section 124 provides that a public officer shall not be compelled to disclose communications made to him in official confidence if the disclosure affects public interest:

> 124. Official communications.- No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

110 Section 162 stipulates that a witness who is summoned to produce a document in court shall bring the document to court notwithstanding any objection that is raised on its production and

admissibility. The provision provides that the objection shall be decided by the Court. For this purpose, the court shall inspect the document, unless it refers to matters of state. The provision is extracted below:

> 162. Production of document.- A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.
>
> The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

111 The claim of public interest immunity allows the State to remove the material from the proceedings on the ground that its disclosure would injure public interest. All three parties to the proceeding, that is, the applicant, the state, and the court cannot refer to or rely on the documents for substantive hearings in the course of the proceedings if the court allows the public interest immunity claim at the discovery stage. In effect, the public interest immunity claim renders the relevant document non-existent for the purposes of the proceedings. Public interest PART G immunity substantially realises the objective of protecting the interests of confidentiality and national security.

112 All the three alternatives identified above realise the objective in a real and substantive manner in as much as it furthers non-disclosure. However, each of the alternative means have a different effect on fundamental rights because they operate in different penumbrae. In a public interest immunity claim, the material is not relied on by both the parties and the court in the course of the substantive hearings. The court removes the material from the proceeding, and the public interest immunity proceedings are conducted in a closed setting. In a Totten claim, the court at the admission stage itself declares that the issue is non-justiciable if the material on state secrets may have to be disclosed. The court does not undertake any balancing exercise to decide if the injury due to the disclosure of information is heavier than the injury due to non-disclosure. Rather, if the material is, according to the state, related to a state secret then the applicant is deprived of the remedy of judicial review. Under the closed material procedure, non- disclosable material is relied on by the State and referred to by the court in the course of the substantive hearing. The special advocate would represent the interests of the affected party. However, the special advocate would be precluded from discussing the evidence with the affected party. It must be noted that special advocates are involved even in public interest immunity claims to represent the affected party in the closed hearing to decide if the relevant information must be disclosed. Thus, the special advocates' system is a means to counterbalance the effect of the limitation on procedural guarantees of the affected party. PART G 113 When these three means identified are placed on the continuum, public interest immunity claims would be placed on one end as they have the least impact on rights as opposed to the Totten claim which would be placed on the other end. The closed material procedure would be placed in the middle because Special Advocates are used in an attempt to counterbalance the infringement of procedural rights. The difference in the impact must be determined firstly, based on the stage of consideration. The public interest immunity claim and closed material

procedure claim are raised at the discovery stage. As opposed to this procedure, under the Totten claim, the claim is held to be non-justiciable at the pleading stage if the State contends that the proceedings are premised on state secrets. Secondly, the Totten claim limits the fundamental right to judicial review since claims based on state secrets are rendered non-justiciable. However, in a public interest immunity claim, whichever way the claim is decided, the parties will have equality of arms because the same evidence will have to be relied on in the course of the proceedings. It may be argued that the removal of the documents from the proceedings would, in effect, render the claim non-justiciable if the documents that are sought to be not disclosed are closely intertwined with the cause of action. We have addressed this argument in detail in Section J of this judgment. Similar to the sealed cover procedure, in the closed material proceeding, the non-disclosable evidence that is used in a substantive hearing of the case is excluded for the claimant. However, the closed material procedure in the United Kingdom does not exist independent of special advocates who aim to provide sufficient counterbalance. The closed material proceeding is more injurious to the claimant's procedural guarantees as compared to public interest immunity because non-disclosed material is used by PART G the State to defend its actions and relied on by the court to arrive at a conclusion. As compared to this, in public interest immunity, the non-disclosable evidence is completely removed at the discovery stage. Though the Special Advocates aim to provide sufficient counterbalance, the process still causes prejudice to the claimant since the security cleared advocates are not permitted to interact with the claimant about the evidence. The (in)sufficiency of the counterbalance provided by special advocates largely depends on the facts of the case, particularly on the material that is sought to be unrevealed and revealed. The interrelationship between the allegations, open material, and closed material was aptly addressed by the ECHR in A (supra). The relevant observations are extracted below:

> " 220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special

> advocate PART G with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied." (emphasis supplied) In view of the above discussion, public interest immunity is perhaps a less restrictive means of the alternative methods listed above.

114 Having held that there are alternative means which further the purpose of non-

> disclosure at the disposal of the State, we shall now undertake a comparative analysis of the impact of the alternative means identified (public interest immunity) and the means used (sealed cover) on fundamental rights. In section F, we have already discussed the effect of the disclosure of material solely to the courts in a sealed cover on the fundamental precepts of procedural fairness and how the courts do not employ any safeguards to protect the procedural rights of the applicant. In the next section, we will be discussing the jurisprudence on public interest immunity. A reference of how the courts have dealt with public interest immunity claims will allow us to analyse if the courts have employed sufficient procedural guarantees to protect the rights of the applicant or have on the contrary been deferential to the claims of the State. This analysis is important because it is only a comparative analysis of how the courts would deal with sealed cover and public interest immunity claims that would allow us to evaluate their relative effect on procedural rights.

PART H H. Jurisprudence on public interest immunity claims H.1 India 115 This Court has on earlier occasions interpreted Sections 124 and 164 of the Evidence Act. In State of Punjab v. Sodhi Sukhdev Singh 89, the respondent, a District and Sessions Judge, who was removed from service and later re-employed sought the report of the Public Service Commission and the proceedings of the Council of Ministers. The Chief Secretary filed an affidavit claiming privilege under Section 123 of the Evidence Act. The claim for privilege was allowed. Justice Gajendragadkar, writing the majority opinion of the Constitution Bench, laid down the scope of review of a claim of non-disclosure. Sections 164 and 123 were construed to deal with the conflict between public interest and private interest. It was observed that the court must assess if the disclosure that affects public interest would outweigh the concerns of private interest which disclosure of material to the litigant furthers:

> "13. The principle on which this departure can be and is justified is the principle of the overriding and paramount character of public interest. A valid claim for privilege made under Section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and the court,

> in reaching the said decision, may feel dissatisfied; but that will not affect the validity of the basic principle that public good and interest must override considerations of private good and private interest." 89 (1961) 2 SCR 371 PART H The court held that when a claim of public interest immunity is made against disclosure, the Court must on a preliminary enquiry of the affidavit determine if the document relates to affairs of the State. If the document relates to state affairs, then the decision of the head of the department on whether the disclosure would violate public interest would be final. The document must be disclosed if on a preliminary enquiry the court is of the opinion that the document does not relate to 'State affairs'. The court would only possess the power to scrutinise the affidavit and not inspect the document on which immunity is claimed to determine if the document 'relates to affairs of state'.

116 Justice Subba Rao in his opinion differed from the majority opinion on this point of law. The divergence was one of principle. While the majority pitted the issues on the lines of public interest and private interest, Justice Subba Rao held that both disclosure and non-disclosure further public interest. It was held that the disclosure of information aids the party in the proceedings but beyond that the disclosure also serves the purpose of administration of justice. On the extent of scrutiny by the Court, Justice Subba Rao observed that the Court has the power to disallow a claim of privilege. For this purpose, the court has to determine if the public interest in disclosure outweighs the public interest in non-disclosure. It was observed that the Courts should ordinarily accept the affidavit of the Minister claiming privilege but when the court has reason to disbelieve the claim, it can examine the Minister. Justice Subba Rao agreed with the opinion of Justice Gajendragadkar that the court shall not inspect the document that is sought to be protected from disclosure. PART H 117 In State of Uttar Pradesh v. Raj Narain 90, the respondent sought to summon documents in an election petition. The State made a claim for immunity. Justice K K Mathew in his concurring opinion for the Constitution Bench raised doubts on the observation in Sodhi Sukhdev Singh (supra) that the Court does not have the power to inspect documents for which the claim of privilege is made. It was held that it would be difficult to determine the effect of the disclosure on public interest without inspecting the document. The learned Judge classified such documents as those belonging to noxious classes and others. It was held that if the documents belong to noxious classes (such as national security), it would per se infringe on public interest. For other documents that do not belong to noxious classes, the courts ought to survey aspects of public interest involved in both disclosure and non-disclosure to assess the relative claims of the different aspects of public interest:

> "71. Few would question the necessity of the rule to exclude that which would cause serious prejudice to the State. When a question of national security is involved, the Court may not be the proper forum to weigh the matter and that is the reason why a minister's certificate is taken as conclusive. "Those who are responsible for the national security must be the sole judges of what national security requires." [Lord Parker of Weddington in The Zamora, (1916) 2 AC 77, 107] As the Executive is solely responsible for national security including foreign relations, no other organ could judge so well of such matters. Therefore, documents in relation to these matters might fall into a class which per se might require protection. [...]

> 72. The power reserved to the Court is a power to order production even though public interest is to some extent prejudicially affected. This amounts to a recognition that more than one aspect of public interest will have to be surveyed. The interests of Government for which the minister speaks do not exhaust the whole public interest. Another aspect of that interest is seen in the 90 (1975) 4 SCC 428 PART H need for impartial administration of justice. It seems reasonable to assume that a court is better qualified than the minister to measure the importance of the public interest in the case before it. The court has to make an assessment of the relative claims of these different aspects of public interest. While there are overwhelming arguments for giving to the Executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive an exclusive power to determine what matters may affect public interest. Once considerations of national security are left out, there are few matters of public interest which cannot safely be discussed in public. The administration itself knows of many classes of security documents ranging from those merely reserved for official use to those which can be seen only by a handful of ministers or officials bound by oath of secrecy." (emphasis supplied) 118 In SP Gupta v. Union of India 91, a seven-Judge Bench of this Court settled the position of law on claims of non-disclosure on the grounds of public interest. In this case, the Union of India claimed immunity against the disclosure of the correspondence between the Law Minister, the Chief Justice of the Delhi High Court and the Chief Justice of India. It was argued that the documents sought to be disclosed belong to a class that is immune from disclosure, and thus the courts ought to allow the claim for non-disclosure irrespective of its contents. Justice Bhagwati, whose view five other judges agreed to, 92 rejected the claim for non-

disclosure. 93 Justice Bhagwati observed that claim of class immunity is not absolute:

> "The executive cannot by merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice between the parties, for otherwise the doctrine of class 91 1981 Supp SCC 87 92 Justice Gupta (paragraph 142); Justice Tulzapurka (paragraph 662); Justice Desai (paragraph 855); Justice Pathak (paragraphs 941 and 942). Justice Venkataramiah authored a concurring opinion.

93 Justice Fazl Ali dissented allowing the claim for non-disclosure. PART H immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up its inefficiencies and sometimes even hiding its corruption. Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely, what does public interest require — disclosure or non-disclosure. The doctrine of class immunity is therefore no longer impregnable; it does not any more deny judicial scrutiny; it is no more a mantra to which the court pays obeisance. Whenever class immunity is claimed in respect of a document, the court has to weigh in the scales the one aspect of public interest which requires that the document should not be disclosed against the other that the court in performing its functions should

not be denied access to relevant documents and decide which way the balance lies. And this exercise has to be performed in the context of the democratic ideal of an open Government." 119 Justice Bhagwati further observed that the non-appointment of a Judge for an additional term, which was under challenge in this case, could only be challenged on the ground that there was no full and effective consultation between the three constitutional functionaries, or that the decision was mala fide. Hence, the correspondence that is sought is the only documentary evidence that would aid in establishing the claim. On the other hand, the non-disclosure would have the effect of ensuring the dismissal of the writ petition. Moreover, it was held that other than the impact of non-disclosure on the applicant's case, it would also affect the wider constitutional principles of independence of the judiciary if the appointment process is insulated from public view. Further, when the transfer of a High Court Judge is challenged, the burden to prove that the transfer was not mala fide is on the Union of India. It was observed that the Union of India cannot seek to discharge such a heavy burden by merely filing an affidavit for non-disclosure. Justice Bhagwati rejected the claim for non-disclosure by observing that the Union of India has been PART H unable to prove its claim that the disclosure of the correspondence must be injurious to public interest.

120 The view taken by Justice Mathew in Raj Narain (supra) and Justice Subba Rao in Sodhi Sukhdev Singh (supra) was partially adopted by Justice Bhagwati, writing for the majority in SP Gupta (supra) and was further developed upon. The principles elucidated in the judgment are summarised below:

(i) Open government is one of the crucial components of a democratic form of government. Disclosure of information is advantageous to the affected party in the proceedings. In addition, it also furthers public interest in access to information and open government. The conflict which Sections 123 and 162 seek to redress is not between public interest and private interest but between two conflicting conceptions of public interest;

(ii) The majority opinion in Sodhi Sukhdev Singh (supra) perpetuates two inconsistencies. Firstly, it would be difficult to determine if a document relates to affairs of the state without inspecting it . The court determines the effect of its disclosure on public interest only after inspection. This conclusion is apparent since Sodhi Sukhdev Singh (supra) has already held that only documents which affect public interest can be regarded as documents relating to state affairs; and secondly, the court and not the head of the department determines if the disclosure of the information would affect public interest. On an objection raised by the head of the department, the court conducts an exercise to determine if the document relates to affairs of the State by assessing the effect of disclosure on PART H public interest. After the court undertakes this exercise, it would be futile for the head of the department to again decide if the disclosure would be injurious to public interest;

(iii) The burden of establishing the claim for immunity is on the person making the claim;

(iv) When a claim of public interest immunity is made, the court must on a perusal of the affidavit filed by the Minister or the head of the department decide if the disclosure would be injurious to public interest. The Court may inspect the document if it doubts the claim of the State and is unable to satisfy itself on a perusal of the affidavit. This power of inspection of the Court is not excluded by

the operation of Section 162 of the Evidence Act;

(v) Protection from disclosure must not be granted to documents merely because disclosure would lead to political criticism. The right to access information cannot be limited due to fear of criticism of actions of the government in a democratic society premised on open government;

(vi) Disclosure cannot be denied per se merely because the documents belong to a noxious 'class'. The court must still conduct a balancing exercise. Class immunity 'is not absolute or inviolable'. It is not a rule of law to be applied mechanically in all cases;

(vii) The court must determine if: (a) the disclosure of the document would in effect be against public interest (the effect test), and (b) if so, whether the PART H public interest in disclosure is 'so strong' that it must prevail over the public interest in the administration of justice (the balancing test); and

(viii) While undertaking the balancing test, the Court should consider the following lines of enquiry:

(a) On facts: Whether the non-disclosure would injure the interest of the party of the case. Injury due to non-disclosure must be determined on the basis of the nature of the proceedings in which the disclosure is sought, the relevance of the document, the degree of likelihood that the document will be of importance to the litigation, and whether allowing the claim of non-disclosure would render the issue non- justiciable; and

(b) On principle: Whether non-disclosure would affect a constitutional principle other than administration of justice.

121 We think that it is important to refer to the approach of courts across jurisdictions towards balancing the different conceptions of public interest in the context of public interest immunity claims. This is necessary because the law on public interest immunity that was developed in India in SP Gupta (supra) heavily relied on the jurisprudence emanating from other common law countries. In fact, Chief Justice Ray records in paragraph 41 of the Constitution Bench judgment in Raj Narain (supra) that the foundation of the law behind Section 123 and Section 162 of the Evidence Act is the same as in English law.

PART H H. 2 United Kingdom 122 The account of this subject in the United Kingdom began with the decision of the House of Lords in Duncan v. Cammell Laird 94. The House of Lords in this case gave precedence to form over substance while assessing a public interest immunity claim for non-disclosure. Lord Simon framed two issues: (i) the form in which an objection to disclosure has to be made; and (ii) if the objection is made in a proper form, whether the court ought to treat the objection as conclusive without scrutiny. The Law Lord held that the claim for non-disclosure must be allowed if the form of the objection is valid, and the interests of a private citizen may have to be subsumed by public interest. Consequently, courts cannot examine the documents while determining the validity of the claim because it would violate the 'first principle of justice that the Judge should have no dealings on the matter in hand with one of the litigants save in the presence of

and to the equal knowledge of the other.' Thus, the House of Lords did not frame the issue as a conflict between conceptions of public interest but that of private interest and public interest. The House of Lords established two principles for the application of public interest immunity: that the interest of a litigant must give way to the secrecy of the government, and the Minister has the sole power to decide if the document ought to be withheld. 123 The House of Lords altered its approach in Conway v. Rimmer 95. Lord Reid observed that that impact of non-disclosure must not be viewed through the narrow lens of private interest and it is public interest in the administration of justice that is injured due to non-disclosure of documents. The House of Lords established three 94 [1942] AC 624 95 [1968] AC 910 PART H principles of seminal importance. Firstly, the power to decide if evidence has to be withheld from the court resides with the court and not the executive. Secondly, the court while exercising this power must balance the potential harm to the public interest due to disclosure with the court's inability to administer justice. The Court while determining the later harm must assess the effect of non-disclosure on ascertaining the 'true facts' and on the wider principle of public confidence in the court system. Thirdly, the court is entitled to inspect, in private, the material on which immunity is claimed. On scrutinising the material, the court has to determine if non-disclosure is necessary due to public interest, and not merely advantageous to the functioning of public service. Lord Hudson held that the Court in its scrutiny must discard the generalities of classes and must weigh the injuries to the public 'of a denial of justice on the one side and, on the other, a revelation of governmental documents which were never intended to be made public and which might be inhibited by an unlikely possibility of disclosure.' The conflict of the claims of public interest must be determined based on the importance of the documents sought to be withheld in the case before the court (a question of outcome), and whether the non-disclosure would result in a 'complete' or 'partial' denial of justice (a question of process and outcome).

124 In Reg v. Chief Constable, W.Midlands, Ex p. Wiley 96, Lord Woolf speaking for the House of Lords observed that while determining the balance on the scale, the Court should also enquire if the interest in disclosure could be effectuated through 'other alternate means':

96 [1994] WLR 433 PART H "[...] It may be possible to provide any necessary information without producing the actual document. It may be possible to disclose a part of the document of a document on a restricted basis. [...] There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non-disclosure is reduced to the minimum." (emphasis supplied) 125 The Queen's Bench Division in R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs 97 applied a four-pronged test to determine the validity of a public interest claim. In this case, an Ethiopian national who was a former resident of the United Kingdom was held by the authorities of the United States in a detention facility in Cuba where he was alleged to have been treated inhumanly. He sought the disclosure of the information in the possession of the United Kingdom Government which may have supported his defence that the confessions he made while in detention were inadmissible. The Court held that the Security Service of the United Kingdom had facilitated the wrongdoing. In the course of the judgment, the reports by the United States Government to the United Kingdom security and intelligence services were summarised in seven paragraphs. These seven paragraphs were sought to be redacted by the Court by claiming public interest immunity. It was contended that the United States Government would re- evaluate its intelligence sharing relationship with the United Kingdom if the paragraphs were

published, which would in turn prejudice the national security of the United Kingdom. The Court applied a four-pronged test to decide the claim of whether the paragraphs had to be redacted:

97 [2009] EWHC 152 (Admins) PART H

(i) Is there a public interest in bringing the redacted paragraphs into the public domain?

(ii) Will the disclosure cause serious harm to an important public interest, and if so which interest?

(iii) Can the injury to the public interest in disclosure be prevented by other methods of limited disclosure?

(iv) If the alternatives are insufficient, where does the balance of public interest lie?

126 While answering the first test, the Court identified the impact of disclosure on public confidence in the judiciary to the principles of public hearing and reasoned judgement; and the role of information in furthering public debate which promotes a healthy democracy. In the specific context of the case, it was observed that the disclosure would further public discourse on torture and inhuman treatment. Due weightage was given to the affidavit filed. The Court scrutinised the reasons in the affidavit and concluded that the assessment of public injury was made in good faith. This conclusion was arrived at based on the public statements that were made by members at the highest level of the United States Government. Applying the facts to the 'alternate means test', the court observed that the paragraphs that were sought to be redacted did not disclose all the information but the redacted portions of the information; and that it would not be possible to further redact the information without engendering national security and violating the constitutional principles of open justice. While answering this test, the court looked at whether PART H the interest of both the litigant and the State could be secured by means other than the full disclosure of information. While applying the balancing test, the court held that the democratic principles which the disclosure of information serves can be protected by information that has already been placed in the public forum. H. 3 United States 127 Judicial decisions in the United States have recognised that in exceptional circumstances, the court must act in the interest of national security to prevent the disclosure of state secrets. One example of the application of this principle is the Reynolds privilege. Reynolds privilege is an evidentiary principle where the successful assertion of the privilege will remove the privileged evidence from litigation. The test propounded in Reynolds is "if there is reasonable danger that compulsion of evidence will expose....matters which, in the interest of national security, should not be divulged." The privileged evidence is excluded from the case which may incidentally also result in the dismissal of the claims 98. 128 Unlike the standard in the United Kingdom, even the 'most compelling necessity' in disclosure cannot overcome the claim of privilege if the court is satisfied that state secrets are at stake. Ordinarily, the evidence is excluded unlike a Totten bar where the issue is declared non-justiciable, if the information relates to a class of protected evidence. However, in some cases, the application of 'privilege may require dismissal of the action and at this point, the Reynolds privilege converges with the Totten bar.

98 United States v. Reynolds, 345 US 1 (1953) PART H 129 The US Court of Appeals for the Ninth Circuit in Binyam Mohamed v. Jeppesen Dataplan 99 observed that in three circumstances, the termination of the case is justified on the application of Reynolds privilege: (i) if the plaintiff cannot prove their case prima facie; (ii) if the plaintiff prima facie proves their case but if the privilege deprives the defendant of information that would provide the defendant a valid defence, then the court may grant a summary judgment to the defendant; and (iii) even if the claims might be theoretically established without relying on privileged evidence, it may be impossible to proceed since the privileged evidence is inseparable from the non-privileged.

130 The standard of scrutiny followed by the courts in the United States is different from the United Kingdom on three basic principles: firstly, the standard established in Reynolds privilege is to identify if the information relates to 'protected classes'; secondly, the court does not conduct the exercise of balancing the claims of disclosure and non-disclosure. If the information relates to the protected class, the claim is allowed irrespective of the effect of non-disclosure on the case and broader constitutional principles; and thirdly, the burden of proof is on the affected party to prove its case with non-privileged evidence and not on the State to prove the necessity of non-disclosure.

H. 4 Canada 131 Similar to the Courts in the United Kingdom, the Canadian jurisprudence on non-

disclosure of information has shifted away from 'class' scrutiny towards the scrutiny 99 614 F 3d 1070 (9th Cir 2010) (United States) PART H of individual documents. 100 The consistent view of the Canadian Courts has been that the documents maybe withheld only 'for the proper functioning of the executive branch and not to facilitate its improper conduct'. 101 132 Section 38 of the Canada Evidence Act 1985 stipulates the conditions for disclosure of information that is sought to be protected. The Court undertakes the following analysis to determine the validity of the claim of non-disclosure filed by the Attorney General of Canada:

> (i) The relevancy test: Whether the information sought to be disclosed is relevant to the case. The burden of proof to prove relevancy of the information is on the party claiming disclosure 102;
>
> (ii) The injury test: Whether the disclosure would be injurious to international relations, national defence or national security. 103 The burden of proving injury due to disclosure is on the party opposing disclosure.104 The Court must assess if the executive's claim of injury has a factual basis. The court at this stage must consider the nature of the information, and the nature of the injury that is sought to be protected;

(a) The Court should order disclosure if the State is unable to discharge its burden of proving it to the court that the disclosure of information is injurious; and 100 Carey v. Majesty, (1986), 72 N.R 81 (SCC) 101 Ibid.

102 Ribic v. Canada (Attorney General), 2003 FCA 246 103 Section 38.06(1) of the Canada Evidence Act 104 Ribic (n 102) PART H

(b) The court must undertake a balancing exercise if the State has proved that the disclosure would be injurious to national security;

(iii) The alternative test: Whether there are alternatives to full disclosure that would protect a fair trial.

(iv) The balancing test: The Court must determine if public interest in disclosure outweighs public interest in non-disclosure 105. If it does, then the information must be disclosed. The Court must consider the following factors while undertaking the balancing exercise 106:

(a) The 'relative importance' of the information in proving or defending the claim- that is, whether the information is 'necessary' and 'crucial' to the case;

(b) the extent of injury that would be caused by the disclosure;

(c) whether there are higher interests such as human rights issues, the right to make a full answer and defence in the criminal context at stake;

(d) the importance of the open court principle; and

(e) whether the redacted information is already known to the public. 105 Section 38.06(2) of the Canada Evidence Act 106 R v. Ahmad, (2011) SCC 6 PART H 133 On the basis of the discussion on the public interest immunity claims for non-

> disclosure in the above-mentioned jurisdictions, the following conclusions emerge:
>
> (i) The earlier position of law across all jurisdictions was that the courts should be deferential to the claim of the government that the disclosure of document(s) would be injurious to public interest. However, this position has undergone a sea-change. It is now a settled position of law that courts possess the power to assess the validity of public interest immunity claims. The extent of such power is the bone of contention;
>
> (ii) The extent of scrutiny of public interest immunity claims by the courts hinges on four primary factors: (a) the identification of the injury that is caused due to non-disclosure of information; (b) the extent of permissibility of class claims; (c) the burden of proof; and (d) evidentiary requirement to prove the claim;
>
> (iii) The identification of injury due to non-disclosure and the assessment of the ground for non-disclosure impacts the court's standard of assessment of the permissibility of class claims, the burden of proof and the evidentiary requirement. The standard of scrutiny is higher when the effect of non-disclosure of information is not identified based on a narrow reference to the facts before the court but on its wider implications to democratic governance and rule of law;

(iv) The courts in India, the United Kingdom, and Canada have held that the non-disclosure of relevant material affects public interest, and the PART H interests of the party seeking disclosure. The non-disclosure of information injures the principle of open government which is one of the basic premises of a democracy. It denies the citizens an opportunity to initiate a discussion or question the functioning of the government. However, the Courts in the United States have been deferential to the claim of non-disclosure, particularly on the ground of national security so much so that the court does not undertake a balancing exercise between the claims of disclosure and non-disclosure. This is also because the courts in the United States give prominence to the objective of non- disclosure as opposed to its effect;

(v) The standard laid down in India (in SP Gupta), United Kingdom, and Canada on the assessment of PII claims is similar to the extent that the impact of non-disclosure on broader principles of constitutional governance is also considered;

(vi) In Canada, the party seeking production is required to prove relevancy of the material sought after the PII claim is made by the state. The inclusion of the relevancy test as one of the tests imposes a heightened burden of proof than what is required otherwise. This is because the court is at that stage aware that the state is contesting the production on grounds of national security. Such claims are always met with a deferential tone by the courts. Secondly, and most importantly, this leads to an integration of the discovery stages and the objection stages. This integration is problematic because the considerations of the court at the PART H discovery stage and objection stage are distinct. The party seeking discovery of documents must prima facie prove the relevance of the document to the proceedings. Once the party discharges this burden, and the court orders disclosure, the state may object to disclosure on the ground that it would injure public interest. At this stage, the burden is wholly on the state to prove injury to public interest. After the objection is raised, the relevancy of the disclosure must only be weighed at the balancing stage. Identifying the relevancy of the document even before the state is required to discharge the burden of proving public interest introduces a fundamental misconception in the application of public interest immunity which is an exception to the production of documents. Furthermore, at an elementary level, it would be impossible to prove the relevancy of the document to the proceedings without the party having viewed it; and

(vii) Once the injury due to disclosure is proved, the Courts in the UK and Canada follow the structured proportionality test to balance the conflicting claims of public interest.

134 According to the Code of Civil Procedure 1908, a party to a proceeding may file an application for discovery to secure knowledge of information that the other party holds. A party may file an application, 107 without filing any affidavit, seeking a direction for disclosure of documents relating to any matter in question in the possession or power of the other party. The Court may either refuse or adjourn the 107 Order XI Rule 12 of CPC 1908 PART H application if it is satisfied on the hearing of the application that such discovery is not necessary at the stage of the suit. Additionally, the Court shall issue an order limiting the discovery to ‘certain classes of documents’. The application shall be dismissed if the discovery of documents is not necessary for the fair disposal of the suit or for saving costs. It must be noted that the provision uses the phrase ‘fair disposal of the suit’. The use of the

said expression includes the spirit of the requirements of procedural and substantive fairness. If the Court allows the application considering that the discovery is necessary, the other party should file an affidavit listing the documents that are in their possession relating to the matter is question. The affidavit must be produced in the form specified in Form No. 5 in Appendix C, 'with such variations as circumstances may require.' 108 The form in which the affidavit is required to be made is extracted below:

> AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 13.) (Title as in No. 1, supra) I, the above-named defendant C. D., make oath and say as follows : —
>
> 1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.
>
> 2. I object to produce the said documents set forth in the second part of the first schedule hereto [state grounds of objection.]
>
> 3. I have had but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on. [State when and what has become of them and in whose possession they now are.]

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book 108 Order XI Rule 13 of CPC 1908 PART H of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other documents whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

(emphasis supplied) 135 After the court has directed disclosure of all documents, the party who is directed to disclose all the relevant documents may object to the disclosure of specific documents in its possession in the form prescribed in Annexure C of the Code. It must be noted that Order XI Rule 13 CPC stipulates that the form of discovery may be changed if circumstances require. The purpose of referring to the provisions of the CPC on discovery, inspection, and production is to elucidate and expand upon the principle that guides these provisions. That is, while a party seeks discovery of documents that are in the possession of the other party, it is not necessary to prove that disclosure of the documents would be relevant to the outcome of the proceedings. Such a consideration does not arise at the stage of discovery. It is only justified that the burden of proof lies entirely on the party objecting disclosure to prove injury to public interest, and to justify the claim of public interest immunity. It is of utmost importance that the burden that is placed on the party seeking production at the discovery stage is not conflated with the burden placed on the party opposing such discovery at the stage of objection to the discovery. 136 The Constitution Bench of this Court in SP Gupta

(supra) has held that if the state objects to disclosure of documents on the ground of public interest immunity, then PART I the Courts shall assess the validity of the objection based on the reasons in the affidavit. The Court has the power to inspect the document if on a perusal of the affidavit, the Court has 'any doubt on whether the document relates to the affairs of the state'. 109 It is therefore, of abundant importance that the affidavit stipulating the reasons of the non-disclosure (along with the grounds) is made in sufficient detail so as to enable the courts to assess the claim of PII. This Court in SP Gupta (supra) has observed that the claim has to be made by the minister who is the political head of the department concerned or, failing him, by the secretary of the department. The claim should always be made in the form of an affidavit. The extent of information required to be placed in the affidavit to enable the government to discharge the onus of justification is based on the standard of scrutiny that the Court applies to assess public interest immunity claims. I. Proportionality standard to test public interest immunity claims 137 The substance of a public interest immunity claim is to seek an exception to the compliance of principles of natural justice. We have already held above that a departure from compliance of principles of procedural fairness, after it has been proved that the party has been denied a fair and reasonable hearing due to non-compliance must be tested on the proportionality standard. 138 In addition to the above discussion, we are of the opinion that the courts must use the proportionality standard to assess claims of public interest immunity for the following reasons:

109 SP Gupta (Paragraph 77) PART I

(i) Firstly, the state while making a claim for public interest immunity seeks an accommodation to deviate from an established principle of natural justice, that is, the right to know the case that is made against a person due to non-disclosure of relevant material. This claim by its very nature infringes upon the right to a fair trial or hearing that flows from Article 21 of the Constitution. The role of the courts while assessing the validity of the claim of public interest immunity is restricted to determining if the infringement of the right that is protected under Article 21 of the Constitution is reasonable;

(ii) Secondly, though the Constitution Bench of this Court in SP Gupta (supra) did not use the standard of structured proportionality as it exists in the present form to assess the claim of PII, the standard that was laid down resembled the sub-facets of the proportionality standard as the focus was on: (i) effect and not the purpose of non-disclosure; and (ii) balancing the effects of disclosure and non-disclosure (both on facts and principle). This Court shifted the focus away from the claim based on 'class of documents' and towards the impact of non-disclosure of individual material. These two principles are important components of the standard of structured proportionality that was laid down by this Court in Justice KS Puttaswamy (9J) (supra);

(iii) The proportionality standard in addition to introducing a culture of justification by prescribing a standard four step test that must be satisfied also provides sufficient flexibility within each step for the courts to apply PART I the jurisprudence that has already been evolved by the courts on the subject matter; and

(iv) Lastly, PII claim is founded on common law doctrine. The jurisprudence that has emanated from various common law countries on the subject has been relied on by the Courts in India to the extent permitted by our constitutional scheme. The jurisprudence that has emanated from other common law countries on this subject has a persuasive value. The courts in both the United Kingdom and Canada use the proportionality standard to assess the validity of a PII claim.

139 The structured proportionality standard used by the courts to test the infringement of fundamental rights has to be remodelled along the lines of the jurisprudence on public interest immunity, if need be. It is crucial to note the difference in the terminology between Article 19(2) to Article 19(6) of the Constitution and Section 124 of the Evidence Act. The reasonable restriction clauses in Article 19 stipulate that the right can be 'reasonably restricted' in the interests of sovereignty and integrity of India [...]. Section 124 stipulates that the restriction to disclosure is only justified if public interest is injured. Section 124, thus, prescribes a heightened standard for the application of public interest immunity. 140 The proportionality standard tests the effect of the infringement only at the balancing stage. Both the suitability prong and legitimate aim prong of the proportionality standard are framed in the language of purpose as opposed to effects. Section 124 of the Evidence Act stipulates that the right to fair trial and the right to information protected under Articles 21 and 19(1)(a) cannot be restricted to PART I advance a public interest. The principle implicit in Section 124 of the Evidence Act is that no purpose could be of sufficient importance to override the right to a fair hearing. Such a restriction is unjustified. It is only an injury of public interest that justifies the non-disclosure of documents.

141 In view of the above discussion, the proportionality standard laid down by this Court in Modern Dental (supra) has to be nuanced keeping in view the standard that is prescribed by the provisions of Section 124 of the Evidence Act and the observations of this Court in SP Gupta (supra). Apart from the measure being in furtherance of a legitimate goal, there must be an injury to a legitimate goal. The burden is on the party opposing disclosure of material to prove all the sub-facets of the proportionality standard. The structured proportionality standard based on the principles in Section 124 of the Evidence Act is as follows:

(i) Whether the disclosure of information would injure public interest (injury stage);

(ii) Whether there is a less restrictive but equally effective alternative means;

by which the injury to public interest could be protected (necessity stage); and

(iii) Whether the public interest in non-disclosure outweighs the public interest in disclosure (balancing stage).

142 In the balancing stage, as has already been laid down by this court in SP Gupta (supra) and the courts in the United Kingdom and Canada, considerations based on the facts of the case and on broader questions of principle have to be assessed. PART J The Court has to consider if non-disclosure would render the issue non-justiciable, the relative relevancy of the material - on whether the material is 'crucial' or 'necessary', or is the essence of the case against the claimant,

among others. On questions of principles, the Court shall consider the impact of non-disclosure on other constitutional rights such as the freedom of press. J. Public interest immunity or sealed cover: the less restrictive means 143 The court must follow the structured proportionality standard, modified on the basis of the content of Section 124 of the Evidence Act, to assess claims of public interest immunity. Under the structured proportionality standard, the court places the burden of proof on the party opposing disclosure of documents to prove the claim of public interest in non-disclosure. The proportionality test prescribes a strict standard to test the reasonableness of an action. As opposed to the structured standard of proportionality which must be used by the court to assess public interest immunity claims, the exercise of power by courts to secure material in a sealed cover has rather been ad-hoc and extemporaneous. 144 Article 145 of the Constitution grants the Supreme Court the power to make rules for regulating the practice and procedure of the Court. In pursuance of its power under Article 145, the Supreme Court Rules 1966 110 were notified. These Rules did not contain any provision on disclosure of documents to the court in a sealed cover. The 1966 Rules were substituted by the Supreme Court of India Rules 2013. Order XIII Rule 1 of the Supreme Court Rules 2013 stipulates that a party to a proceeding in the Supreme Court shall be entitled to apply for and receive certified 110 "1966 Rules" PART J copies of all pleadings, judgments, decrees or orders, documents and deposition of witnesses made or exhibited in the proceeding. Rule 7 provides an exception to the rule. The rule stipulates that no person has a right to documents that are (i) confidential; (ii) directed to be placed in a sealed cover by the court or the Chief Justice; and (iii) the disclosure of which is not in public interest. The rule states that documents that fall within any of the above clauses can be disclosed only with the permission of the court or the Chief Justice. Order XIII Rule 7 is extracted below for reference:

> "7. Notwithstanding anything contained in this order, no party or person shall be entitled as of right to receive copies of or extracts from any minutes, letter or document of any confidential nature or any paper sent, filed or produced, which the Chief Justice or the Court directs to keep in a sealed cover or considers to be of confidential nature or the publication of which is considered to be not in the interest of the public, except under and in accordance with an order made by the Chief Justice or by the Court." 145 The power of the court to receive material relevant to a proceeding in a sealed cover is read from Order XIII Rule 7. Unlike the closed material procedure in the United Kingdom and Canada, the sealed cover procedure is not a creation of the legislature but of the courts. In fact, Rule 7 while prescribing the power of the court to receive material in a sealed cover also recognises non-disclosure on the ground of public interest immunity. The provision does not stipulate any guidelines for the exercise of power by the court to secure material in a sealed cover. However, the Rule as a whole indicates that the court may exercise its power to secure material in a sealed cover if the material is confidential or the disclosure of which would injure public interest. As discussed above, public interest immunity claims also PART J seek to address the same harms. It was not intended that the sealed cover procedure shall replace public interest immunity proceedings which constitute an established method for dealing with claims of confidentiality. The sealed cover procedure cannot be introduced to cover harms that could not have been remedied by public interest immunity proceedings.

146 In both the sealed cover procedure and public interest immunity claims, the documents that are sought to be withheld from disclosure are not revealed to the counsel for the applicant. The proceedings, in effect, are conducted ex-parte where the counsel for the party claiming disclosure is precluded from accessing a part of the record in the proceedings. However, one crucial difference between the sealed cover procedure and public interest immunity claims is that in the former, the court relies on the material that is disclosed in a sealed cover in the course of the proceedings, as opposed to the latter where the documents are completely removed from the proceedings and both the parties and the adjudicator cannot rely on such material. Sealed cover procedures violate both principles of natural justice and open justice. In Al Rawi v. The Security Service 111, the Supreme Court of the United Kingdom recognised that the closed material procedure causes a greater degree of harm as compared to the public interest immunity. As held above, the closed material procedure is similar to the sealed cover procedure in as much as relevant material that is not disclosed to the applicant is used in the course of substantive hearings. In that case, the issue before the Court was whether the court has the power to order a closed material procedure for the whole or a part of 111 (2011) UKSC 34 PART J the trial. In a closed proceeding, the claimant would be represented by a Special Advocate who would be unable to take instructions from the claimant. The Supreme Court of the United Kingdom observed that a closed material procedure, unlike the law relating to public interest immunity, departs from the principles of both open justice and natural justice. Lord Dyson in his opinion observed as follows:

> "41. [...]The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court.

Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. I have already referred to the limits of the special advocate system." 147 The total removal of the information from the proceedings has two impacts. First, it may lead to the dismissal of the proceedings instituted by the claimant, rendering the issue non-justiciable. Second, it may render the defendant (in this case, the State) defenceless. The court must also take into account these considerations while deciding if a public interest immunity claim is a less restrictive means. Thus, at the second stage, the enquiry turns into whether the information excluded on a successful PII claim can be fairly removed from the proceeding. 148 The report by the New Zealand Law Commission on National Security Information in Proceedings provides a two-step procedure for dealing with sensitive PART J information. 112 The first consideration is whether the information should be disclosed to the party on a balance of considerations. The second consideration is whether the information can be fairly excluded from the proceedings. The Commission recommended that the court should opt for the closed material proceedings only if the material is 'sufficiently relevant to the proceedings that it would be in the interest of justice to use a closed procedure rather than to exclude the information and proceed without it." That is, the court concludes that national security considerations are so high that they trump over the relevancy of the document in proceedings but the information cannot be fairly excluded from the proceedings because it would cause one of the

two injuries recognised above. The Commission recommends that it would be in the interest of justice to follow the closed proceedings to obviate such unfairness. The report recommended that the closed material procedure was to be used in addition to the public interest immunity procedure to protect the interest of justice. The report of the Law Commission of New Zealand also recognised that though the option of a closed procedure would be available to the State, it would be difficult for the State to prove that this would be in the interests of justice because it seeks to withhold information from the claimant and use it against them. The relevant observations of the Commission are extracted below :

> "5.51 At this second stage, the court determines whether to order the use of a closed procedure for part of the substantive hearing. The court should only order that part of the substantive hearing be closed where it is satisfied that the national security information is sufficiently relevant to the proceedings that it is in the interests of justice to use a closed procedure rather than to exclude the information 112 Law Commission, The Crown in Court: A review of the Court proceedings Act and National Security Information in Proceedings (December 2015, Wellington, New Zealand) Report 135 PART J and have the case proceed without it. Although a closed procedure would be available in cases where the national security information was beneficial to the Crown's case, the interests of justice test will be much harder for the Crown to satisfy because it is seeking to withhold information from the other party but also use it against them. In some cases where the Crown is defending an action, the courts may consider that this is appropriate, but we would anticipate this would be quite rare. It is more likely that a closed procedure would be in the interests of justice where it would prejudice the non-Crown party if the court excluded the national security information." 149 The Supreme Court of the United Kingdom dealt with the effect of exclusion of relevant material on a successful claim of public interest immunity in Al Rawi (supra). In that case, it was argued by the State that the Court must exercise its inherent power to order a closed material procedure in certain classes of cases, such as where the defendant cannot deploy its defence fully (or sometimes not at all) if an open procedure is followed. It was argued that exclusion of relevant material from the proceedings after the public interest immunity exercise reduces the chances of the court reaching a correct outcome. In other words, the case of the State was that the court has the power to substitute a closed material procedure for public interest immunity exercise in exceptional circumstances. While the Court unanimously agreed that the courts cannot substitute a public interest immunity procedure with the closed material procedure, the judges disagreed on whether a closed material procedure can be used in addition, and not in alternative, to the public interest immunity procedure.

150 Lord Dyson in his opinion held that the court does not have the power to direct closed material procedure in addition to public interest immunity claim because: (i) closed material procedure is the antithesis of public interest immunity procedure. PART J There is no equality of arms in closed material procedure; (ii) the party in possession of the document possesses sole knowledge of whether the document would be beneficial in their case. The claimant, who does not have access to

the material would not be aware if the material would affect their case. It would thus put them in a disadvantageous position making the procedure inherently unfair to the one of the parties; and (iii) the courts should not be called to perform the exercise of deciding the relevance of a document to the case of claimant and the defendant.

151 Lord Kerr in his opinion pointed out two additional problems with the argument of the State. He noted that the proposition that placing all evidence before the Judge is preferable to withholding potentially pivotal evidence from the proceedings is misleading. Lord Kerr observed that it cannot be assumed that the adjudicator would reach a fair result since the judge sees all the evidence because to be truly valuable, the evidence must be capable of withstanding challenge. The relevant observations are extracted below:

> " 93. The appellants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central PART J place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable." (emphasis supplied) 152 Lord Kerr further observed that the State faces a healthy dilemma with public interest immunity claims since it will want to produce as much material as it can to defend its claim and would not resort to public interest immunity claims comfortably because if their claim is allowed, then the material will be removed from the proceedings itself. The learned Judge observed that it would be tempting for the State to seek a closed material procedure claiming that all the documents when disclosed would injure national security.

153 Lord Mance (with whom Lord Hale agreed) and Lord Clarke held that the court has the power to order a closed material procedure in certain circumstances after the public interest immunity claim is decided. However, they disagreed on what those certain circumstances would be. In Lord Mance's view, after the public interest immunity claim is allowed, the court may order a closed material procedure if the material is in the defendant's possession and the claimant consents for such a procedure to avoid their claim from being struck out. In Lord Clarke's view, after the public interest immunity process has been completed, the parties should consider their respective positions and make representations to the judge who may order a closed material procedure depending on the

facts of the case. PART J 154 The recommendations of the Law Commission of New Zealand and the opinions of Lord Clarke and Lord Mance in Al Rawi (supra) introduce closed material proceedings as an additional step after the completion of public interest immunity proceedings. The court in a closed material procedure, similar to the sealed cover process, relies on the material that the claimant is not privy to while disposing the proceedings. The closed material proceedings are sought to be introduced to counterbalance the injustice(s) caused on the conclusion of the public interest immunity proceedings.

155 The claimant would be jumping into a pit of fire with their eyes closed even if they consent to a sealed cover procedure. As Lord Kerr remarked in Al Rawi (supra), the claim that closed material procedure would provide a fairer outcome is premised on the assumption that the adjudicator is impartial. However, beyond this assumption, it must be recognised that the court could be misled by the material that is not subject to inspection and examination. This would lead a situation where the court renders an unfair judgment and such an unfair decision would not be amenable to both judicial review and public criticism on merits. 156 While it cannot be denied that allowing a public interest immunity claim may cause some degree of injury to the procedural guarantees of the claimant and the defendant, a sealed cover procedure will not ensure a fairer proceeding. The purpose of public interest immunity proceedings would become redundant if the defendant is provided the option of requesting a closed material procedure after the conclusion of public interest immunity proceedings, which the defendant makes, is allowed. Rather, we are of the opinion that the effect of public interest PART J immunity proceedings of removing the evidence completely from the proceedings would persuade the State in making restricted claims of public interest immunity. Further, as Lord Dyson remarked, the procedure would be inherently disadvantageous to the claimant because they are unaware of the contents of the document.

157 It may be argued that the removal of the documents from the proceedings would render the proceedings non-justiciable if the documents that are sought to be protected are so closely intertwined with the cause of action. Though the argument holds merit on a cursory glance, it does not hold water when delved into deeper. As observed above, one of the relevant considerations for the court in the balancing stage of adjudicating the public interest immunity claim is whether the non-disclosure of the material would render the issue non-justiciable. The court while analysing the relevancy of the material and the potential non-justiciability of the issue due to non-disclosure may direct that the material should be disclosed. The purpose of the balancing prong is to weigh in the conflicting claims and effects of such claims. Even if the disclosure would conceivably injure public interest, the courts may still dismiss the claim of public interest immunity if the non-disclosure would render the issue non-justiciable, and on the facts of the case it is decided that the injury due to non-disclosure overweighs the injury due to disclosure. 158 The courts could adopt the course of action of redacting the confidential portions of the document and providing a summary of the contents of the document instead of opting for the sealed cover procedure to fairly exclude the document from the proceedings on a successful public interest immunity claim. Both the parties can PART J then only be permitted to refer to the redacted version of the document or the summary in the proceeding. In view of the above discussion, we are of the opinion that public interest immunity proceeding is a less restrictive means to deal with non-disclosure on the grounds of public interest and confidentiality. This leaves the final issue to be answered: if public interest immunity is a less

restrictive means, then whether the procedure of sealed cover can be used at all, and if so, in what circumstances would it be permissible for the court to exercise its power to secure evidence in a sealed cover. While it would be beyond the scope of this judgment to lay down the possible situations when the sealed cover procedure can be used, it is sufficient to state that if the purpose could be realised effectively by public interest immunity proceedings or any other less restrictive means, then the sealed cover procedure should not be adopted. The court should undertake an analysis of the possible procedural modalities that could be used to realise the purpose, and the means that are less restrictive of the procedural guarantees must be adopted.

159 In view of the observations above, we are of the opinion that the respondents by not providing a reasoned order denying the renewal of license, not disclosing the relevant material, and by disclosing the material only to the court in a sealed cover have violated the appellant's right to a fair hearing protected under Article 21 of the Constitution. The respondents were unable to prove that the restrictions on the appellants' right to a fair hearing were reasonable. Therefore, the order of MIB dated 31 January 2022 denying permission for renewal of the license and the judgment of the Division Bench of the High Court dated 2 March 2022 must be set aside on the ground of the infringement of procedural guarantees. PART K K Substantive Challenge: the validity of the action of the MIB in denying to renew the permission 160 In the course of his arguments, Mr Huzefa A Ahmadi, in addition to arguments on the violation of procedural guarantees, requested the court to peruse the material that was disclosed solely to the court in a sealed cover to decide if there was sufficient material to justify the non-renewal of permission. Thus, notwithstanding the conclusion that we have reached above setting aside the order of the MIB dated 31 January 2022 and the judgment of the High Court dated 2 March 2022 on procedural grounds, we will proceed to decide the substantive challenge to the order denying renewal of permission on the ground of denial of security clearance by the MHA.

161 In 2010, MBL applied for permission to uplink and downlink the news and current affairs television channel, 'Media One'. MHA sought reports from IB and CBI for granting security clearance. CBI remarked that there was nothing adverse on record against MBL. IB reported that MBL shares a close association with 'Madhyamam Daily', and that the tenor of the articles carried out by Madhyamam Daily are adverse. To substantiate its conclusion on the adverse tenor of the articles, IB referred to reports of Madhyamam Daily on the alleged discrimination against Muslims in India and the allegedly soft attitude taken against "Hindu fundamentalists responsible for bomb blasts as opposed to the view taken against Muslim fundamentalists". MHA considered the report and concluded that the remarks were not strong enough to deny permission on security grounds, thereby granting security clearance to MBL.

PART K 162 Between 2014-2019, similar reports were submitted by IB when security clearance was sought for other proposals of MBL. IB made adverse remarks on MBL's main source of income which was alleged to be from JEI-H sympathizers, and its anti- establishment stance. To substantiate its conclusion that MBL has been taking an anti-establishment stance, references were made to its reports on UAPA, Armed Forces (Special Powers) Act, development projects of the Government, encounter killings, Citizenship (Amendment) Act, NRC, NPR, the Indian Judiciary's alleged "double standards in terrorism cases", and the alleged portrayal of security forces in a bad

light. MHA denied security clearance based on the IB reports. We are required to decide if these reasons provide a justifiable ground for the denial of security clearance, and consequently, restricting MBL's right to the freedom of press under Article 19(1)(a) of the Constitution.

163 The freedom of the press which is protected as a component of Article 19(1)(a) can only be restricted on the grounds stipulated in Article 19(2) of the Constitution. The grounds stipulated in Article 19(2) include the "sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." We have already held in Part C of this judgment that security clearance is a requirement for renewal of an Uplinking and Downlinking license. The denial of security clearance to operate a news channel is a restriction on the freedom of press, and such restriction is constitutionally permissible only on the grounds stipulated in Article 19(2) of the Constitution.

PART K 164 Though the courts have been using the proportionality standard to test the reasonableness of restrictions on fundamental rights after the decisions in Modern Dental (supra) and Justice KS Puttaswamy (9J) (supra), this has generally been deployed in the area of legislative action. The position laid down by this court is that all violations of fundamental rights have to be tested on the standard of proportionality. The court under Article 13 of the Constitution has the power to declare 'laws' that violate fundamental rights to be void. For the purpose of the provision, 'law' includes administrative action. The position of law that administrative action infringing fundamental freedoms has to be tested on the proportionality standard has been established by this court in its earlier judgments. 113 Thus, the action of the MIB denying renewal of permission will be judicially reviewed based on the proportionality standard. 165 The first test of the proportionality standard as laid down by this Court in Modern Dental (supra) requires the court to assess if the measure restricting the right has a legitimate goal. Article 19, unlike other provisions of Part III of the Constitution, prescribes the purposes for which the rights recognised can be reasonably restricted. Thus, the purpose of the state action that is challenged must necessarily be traceable to the grounds stipulated in Article 19(2) to test if the freedom of press has been reasonably restricted. Security clearance was denied on the basis of two grounds: the alleged anti-establishment stand of MBL, and the alleged link of MBL with JEI-H.

113 Om Kumar v. Union of India, (2001) 2 SCC 386; Union of India v. Ganayutham, (1997) 7 SCC 463 PART K 166 An independent press is vital for the robust functioning of a democratic republic.

Its role in a democratic society is crucial for it shines a light on the functioning of the state. The press has a duty to speak truth to power, and present citizens with hard facts enabling them to make choices that propel democracy in the right direction. The restriction on the freedom of the press compels citizens to think along the same tangent. A homogenised view on issues that range from socio- economic polity to political ideologies would pose grave dangers to democracy. 167 The critical views of the Channel, Media-One on policies of the government cannot be termed, 'anti-establishment'. The use of such a terminology in itself, represents an expectation that the press must support the establishment. The action of the MIB by denying a security clearance to a media channel on the basis of the views which the channel is constitutionally entitled to hold produces a

chilling effect on free speech, and in particular on press freedom. Criticism of governmental policy can by no stretch of imagination be brought withing the fold of any of the grounds stipulated in Article 19(2).

168 The note that was submitted by the IB on the alleged role and activities of JEI-H states that the organisation was banned thrice and all the three bans were revoked. The organisation was banned last in 1992 under the Unlawful Activities (Prevention) Act 1947. This Court had nullified the ban in 1994. Thus, when JEI-H is not a banned organisation, it would be rather precarious for the State to contend that the links with the organisation would affect the sovereignty and integrity of the nation, the security of the State, friendly relations with Foreign States, or public order. Additionally, the only piece of evidence in the file to link MBL to JEI-H is the PART K alleged investment in the shares of MBL by cadres of JEI-H. In the support of this, IB has submitted a list of shareholders. However, there is no evidence on record to link them to JEI-H. Thus, the allegation that MBL is linked to JEI-H is fallacious, firstly, because JEI-H is not a banned organisation and there is no material to conclude that the investment by JEI-H sympathizers would affect India's security, and secondly, even if it is accepted that the investment by JEI-H sympathizers would affect the security of the State, there is no material to prove that the shareholders are sympathizers of JEI-H. In view of the discussion above, the purpose of denying security clearance does not have a legitimate goal or a proper purpose.

169 The IB has noted that the above material against MIB attracts Sl. No. 20 and 22 of the security parameters annexed to the 2018 Guidelines which are used to assess security clearance proposals. Sl No. 20 reads as "Involvement in religious proselytization activities in India", and Sl. No. 22 reads as "Intentional or systemic infringement of safety concerns or security systems endangering the safety of the public". There is no rational nexus between the material submitted against MBL to the security parameters in Sl. No 20 and 22 of the security parameters. MBL cannot be said to be indulging in religious proselytization for merely publishing reports on the alleged discrimination against the Muslim community in India, or infringing safety concerns by a mere reference to the shareholding pattern of MBL.

PART L

L Conclusion and Directions

170 In view of the discussion above, the appeals are allowed and the order of the MIB dated 31 January 2022 and the judgment of the High Court dated 2 March 2022 are set aside. We summarise our findings below:

(i) Security clearance is one of the conditions required to be fulfilled for renewal of permission under Uplinking and Downlinking Guidelines;

(ii) The challenge to the order of the MIB and judgment of the High Court on procedural grounds is allowed for the following reasons:

(a) The principles of natural justice were constitutionalised by the judgement of this Court in Maneka Gandhi (supra). The effect is that the courts have recognised that there is an inherent value in securing compliance with the principles of natural justice independent of the outcome of the case. Actions which violate procedural guarantees can be struck down even if non-compliance does not prejudice the outcome of the case. The core of the principles of natural justice breathes reasonableness into procedure. The burden is on the claimant to prove that the procedure followed infringes upon the core of procedural guarantees;

(b) The appellants have proved that MBL's right to a fair hearing has been infringed by the unreasoned order of the MIB dated 31 January 2022, and the non-disclosure of relevant material to the appellants, and its disclosure solely to the court. The burden then shifts on the PART L respondents to prove that the procedure that was followed was reasonable and in compliance with the requirements of Articles 14 and 21 of the Constitution. The standard of proportionality has been used to test the reasonableness of the procedure.

(c) The judgments of this court in Ex-Armymen's Protection Services (supra) and Digi Cable Network (supra) held that the principles of natural justice may be excluded when on the facts of the case, national security concerns overweigh the duty of fairness;

(d) Though confidentiality and national security are legitimate aims for the purpose of limiting procedural guarantees, the state has been unable to prove that these considerations arise in the present factual scenario. A blanket immunity from disclosure of all investigative reports cannot be granted;

(e) The validity of the claim of involvement of national security considerations must be assessed on the test of (i) whether there is material to conclude that the non-disclosure of information is in the interest of national security; and (ii) whether a reasonable prudent person would draw the same inference from the material on record;

(f) Even assuming that non-disclosure is in the interest of confidentiality and national security, the means adopted by the respondents do not satisfy the other prongs of the proportionality standard. The non- disclosure of a summary of the reasons for the denial of security PART L clearance to MBL, which constitutes the core irreducible minimum of procedural guarantees, does not satisfy the suitability prong;

(g) The courts assess the validity of public interest immunity claims, which address the same harms as the sealed cover procedure, based on the structured proportionality standard. The power of courts to secure material in a sealed cover when contradistinguished with the scope of assessment of public interest immunity claims is rather unguided and ad-hoc. The standard of review that is used by the courts in public interest immunity claims and the lack of such a standard in sealed cover proceedings to protect procedural safeguards indicates that public interest immunity claims

constitute less restrictive means. Additionally, while public interest immunity claims conceivably impact the principles of natural justice, sealed cover proceedings infringe the principles natural justice and open justice;

(h) The courts could take the course of redacting confidential portions of the document and providing a summary of the contents of the document to fairly exclude materials after a successful public interest immunity claim; and

(iii) The challenge to the order of MIB is allowed on substantive grounds. The non-renewal of permission to operate a media channel is a restriction on the freedom of the press which can only be reasonably restricted on the grounds stipulated in Article 19(2) of the Constitution. The reasons for PART L denying a security clearance to MBL, that is, its alleged anti- establishment stance and the alleged link of the shareholders to JEI-H, are not legitimate purposes for the restriction of the right of freedom of speech protected under Article 19(1)(a) of the Constitution. In any event, there was no material to demonstrate any link of the shareholders, as was alleged.

171 While we have concluded that a public interest immunity claim is a less restrictive means, the dilution of procedural guarantees while hearing the claim cannot be ignored by the Court. It is only the Court and the party seeking non-disclosure of the material who are privy to the public interest immunity proceedings. The court has a duty to consider factors such as the relevance of the material to the case of the applicant while undertaking the proportionality standard to test the public interest immunity claim. However, the applicant who is unrepresented in the proceedings would be effectively impaired. While there may be material on serious concerns of national security which cannot be disclosed; the constitutional principle of procedural guarantees is equally important and it cannot be turned into a dead letter. As the highest constitutional court, it is our responsibility to balance these two considerations when they are in conflict. To safeguard the claimant against a potential injury to procedural guarantees in public interest immunity proceedings, we have recognised a power in the court to appoint an amicus curiae. The appointment of an amicus curiae will balance concerns of confidentiality with the need to preserve public confidence in the objectivity of the justice delivery process. 172 The amicus curiae appointed by the Court shall be given access to the materials sought to be withheld by the State. The amicus curiae shall be allowed to interact PART L with the applicant and their counsel before the proceedings to ascertain their case to enable them to make effective submissions on the necessity of disclosure. However, the amicus curiae shall not interact with the applicant or their counsel after the public interest immunity proceeding has begun and the counsel has viewed the document sought to be withheld. The amicus curiae shall to the best of their ability represent the interests of the applicant. The amicus curiae would be bound by oath to not disclose or discuss the material with any other person, including the applicant or their counsel.

173 Article 145 of the Constitution stipulates that all judgments of the Supreme Court shall only be delivered in open court. Though public interest immunity proceedings will take place in a closed setting, the Court is required to pass a reasoned order for allowing or dismissing the claim in open court. We are cognizant of the objection that may be raised that an order justifying the reasons for allowing the claim would have to inevitably disclose information on the very material that it seeks to

protect. The Court in such cases is still required to provide a reasoned order on the principles that it had considered and applied, even if the material that is sought to not be disclosed is redacted from the reasoned order. However, the redacted material from the reasoned order shall be preserved in the court records which may be accessed by the courts in the future, if the need arises. 174 The Civil Appeals are accordingly allowed. MIB shall now proceed to issue renewal permissions in terms of this judgment within four weeks and all other authorities shall co-operate in issuing necessary approvals. The interim order of this Court shall continue to operate until the renewal permissions are granted. PART L 175 Pending application(s), if any, stand disposed of.

... ... CJI [Dr Dhananjaya Y Chandrachud] .....J [Hima Kohli] New Delhi;

April 05, 2023