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Common Law Right to Defense and Disclosure in India

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Can a fair trial proceed without disclosure of material to a party against whom it is used? Can justice be found in secrecy? The Article initiates a discussion on the common law right to defend oneself against the case put against him and right to a fair trial in civil litigation. The Article proceeds to identify the loopholes in the procedural system in India when exceptions for the public interest are used against a person's right to full disclosure. Since the right to full disclosure of evidence flows from the common law right to defend and the principles of natural justice, it cannot be derogated from easily without laying down any alternatives. The Article then addresses the same principle in the United Kingdom and how this derogation is negated by provisions introduced as alternatives confronting the compromise between public interest and the opportunity to defend. The Article concludes by outlining lessons and proposals for adopting in India a similar model to the United Kingdom with regard to disclosure of evidence in civil disputes concerning materials of national interest.

INTRODUCTION

Natural justice requires that a party whose interests are likely to be prejudiced by a decision-making authority receive a fair hearing, an opportunity to rebut the material furnished against him, and an opportunity to produce all the material in support of his case.[1] Two of the chief facets of the maxim *audi alteram partem* are: (a) notice of the case to be met; and (b) opportunity to explain.[2] This universally accepted rule casts a duty to afford a fair hearing upon every individual who exercises adjudicative power.[3] Each party is also entitled to defend against the material supplied by the other party.[4] The concept of fairness requires notice to satisfy the "adjudicating authority that those very documents upon which

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[1] Dhakeswari Cotton Mills Ltd. v. Comm'r of Income Tax, West Bengal, AIR 1955 SC 65 (India); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 350 (1850) ("No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence.").

[2] Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664, 685, 707 (India).

[3] General Medical Council v. Spackman [1943] AC 627 (HL), 638 (appeal taken from EWCA).

[4] *See* Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights."); Jasper v. United Kingdom, (App no 27052/95) [2000] ECHR 27052/95, 30 EHRR 41, ¶ 51; Fitt v. United Kingdom, 2000-II Eur. Ct. H.R. 369, (2000) 30 EHRR 480, ¶ 45.

reliance has been placed do not make out even a prima facie case requiring any further inquiry."[5] Thus, a fair hearing is one which not only focuses on the claim or prosecution but also gives the defendant an equal right to present his case and defend himself effectively.[6] This right to a fair hearing is a guaranteed right in India, and every person has a right to know the reasoning for a case's outcome.[7]

In India, any procedure which prevents a party from receiving a fair trial would violate Article 14 and Article 21 of the Constitution of India.[8] The rationale behind this idea is to strike a balance between both parties in an adversarial litigation system and to empower the court to adjudge the issue effectively and give a reasoned decision. The absence of either party or their defense renders the judicial system meaningless.

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.[9]

It is equally settled that there are certain exceptions to the principle of fair trial, such as overriding considerations of national security.[10] In a situation of national security a party cannot insist for strict observance of the principles of natural justice, and in such cases it is the duty of the court to provide for statutory exclusion, if not expressly provided in the rules governing the field.[11] "*Audi alteram partem* rule may be disregarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests."[12] Certain exceptions are made to the general rule of evidential disclosure when the disclosure might inflict serious harm on the persons directly concerned, or where it would result in a breach of confidence, might be injurious to the public interest, reveal official secrets, or inhibit frankness of comment or result

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[5] Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255, 270, 271 (India).

[6] State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364, 387, 389, 390 (India) ("Justice means justice between both the parties."); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006).

[7] Dhakeswari Cotton Mills Ltd. v. Comm'r of Income Tax, West Bengal, AIR 1955 SC 65 (India).

[8] Dwarka Prasad Agarwal v. B.D. Agarwal, (2003) 6 SCC 230, 245–46; ECIL v. B. Karunakar, (1993) 4 SCC 727, 773.

[9] Kanda v. Gov't of Malaya [1962] AC 322 (PC), 337 (appeal taken from Malyasia).

[10] Ex-Armymen's Protection Services (P) Ltd. v. Union of India, (2014) 5 SCC 409, 415 (India); H.W.R. WILLIAM WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 468–70 (2009).

[11] *Ex-Armymen's Protection*, (2014) 5 SCC at 415.

[12] Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664, 685 (India).

in detection of crime.[13] Despite the exceptional circumstances, the court must make every effort to salvage this cardinal rule to the maximum extent possible, and when necessary with situational modifications.[14] Where disclosure is not possible, the affected party must be allowed to review the relevant material, inspect it, and take notes if possible.[15] Full disclosure of any material held by the prosecution which weakens its case or strengthens that of the defendants must also always be disclosed to the defendants. Furthermore, "the principles of natural justice must be read into unoccupied interstices of the statute unless there is a clear mandate to the contrary."[16] Therefore, unless the statute expressly rules out natural justice, any exercise of power which results in civil consequences to citizens must abide by the principles of natural justice.

Rulings Witnessing the Indian Judiciary Balance Disclosure and Non-Disclosure of Documents

a) **Tribhuvandas Bhimji Zaveri v. CCE:** Where the decision-making authority expressed inability to disclose the materials found against the accused and yet issued a show cause notice to it requiring an answer, the court found fault in the very issuance of the show cause notice. It held that the document which set the law into motion against the accused ought to be made available to it so as to require a proper explanation. The failure to supply important piece of information to the affected party had prejudiced its case and the principles of natural justice stood violated.[17]

b) **Swadeshi Cotton Mills v. Union of India:** Where the government was satisfied, by the documents and other evidences in its possession, that an industrial undertaking was being managed in a manner detrimental to the industry and public interest, it ordered a take-over of the undertaking under the relevant statute. The Supreme Court adjudicating upon the decision of the government, observed that the company could have been given an opportunity to explain the evidence against it, as also an opportunity to be informed of the proposed action of take-over and to represent why it should not have been taken.[18]

c) **Global Vectra Helicorp vs. Directorate General of Civil Aviation:** Even in quasi-judicial proceedings, there is a duty cast on the adjudicating authority to disclose

[13] Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255, 255, 269 (India).
[14] *Swadeshi Cotton Mills*, (1981) 1 SCC at 689, 705, 707.
[15] State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364, 389, 391 (India).
[16] N.S Tewana v. Union of India, (1994) 29 DRJ 258, 283 (India).
[17] Tribhuvandas Bhimji Zaveri v. CCE (1997) 11 SCC 276, 283 (India).
[18] *Swadeshi Cotton Mills*, (1981) SCC at 689, 707–09.

and supply copies of all the documents that may be available with it, enabling a noticee to effectively defend and rebut allegations contained in a show-cause notice.[19] It is an established position of law that even if the details of the case against the noticee are not spelt out in the show cause notice, the noticee is entitled to be made aware of the material on the basis of which the proposed action is to be taken or is taken.[20] The Government may or may not be required to give detailed information. In such a case, the Government is obliged to at least communicate the broad reasons on the basis of which the action is proposed or action in fact is taken.[21]

d) **Union of India v. Ranu Bhandari:** Where certain vital documents having direct bearing on a detention order against the detenu were withheld, preventing him from defending himself effectively, the court placed importance on the significance of effective representation.[22] It held that irrespective of whether the detenu had knowledge of the documents and their contents or not, the documents must have to be supplied in compliance with Article 22(5) of the Constitution in order to effectuate proper representation.[23]

Moreover, the courts have also observed that even when time is of essence, the cardinal principle of hearing cannot be martyred for administrative immediacy.[24] Even when a decision has to be reached expeditiously, there ought to be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him.

I. Piercing the Public Interest Immunity and National Security Argument in India: Identifying the Gray Areas

One of the exceptions to the general rule of disclosure is Public Interest Immunity

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[19] *Tribhuvandas*, (1997) 11 SCC at 283; Pepsu Road Transport Corpn. v. Lachhman Dass Gupta, (2001) 9 SCC 523, 523 (India); *see* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 475 (1986).

[20] *Tribhuvandas*, (1997) 11 SCC at 283.

[21] Global Vectra Helicorp vs. Directorate General of Civil Aviation and Anr., 2012 SCC Online Del 3267, W.P.(C) 2775/2012 at ¶¶ 61, 69, 75 (India); *see* Baldwin v. Hale, 68 U.S. (I Wall.) 223, 233 (1864) (recognizing a due process right to notice and hearing prior to a court's adjudication of property rights); Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (recognizing a due process right to notice and hearing prior to an administrative agency's termination of welfare benefits).

[22] Union of India v. Ranu Bhandari, (2008) 17 SCC 348 (India).

[23] *Id.* at 349; *see* India Const. art. 22, § 5.

[24] Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664, 687 (India) (citing Wiseman v. Borneman [1971] AC 297 (HL)).

("PII"), a mechanism for handling disclosure of sensitive information[25] raised by the government to resist the production of or access to information that may produce harm to the national interest. A typical PII process entails applications departing from traditional notions of procedural fairness and open justice[26] because the party seeking the information is prevented from seeing and testing the evidence in support of the PII claim. The judge views secret evidence to assess whether the public interest in disclosure outweighs the public interest in maintaining secrecy.[27] Based on this decision, the proceedings continue with or without the documents in question. The Indian Evidence Act of 1872, for example, gives the government a right, grounded in the public interest, to claim privilege or immunity from disclosing documents.[28] A valid claim for privilege made under this provision 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.[29] This statutory exclusion provides a blanket disallowance against the principles of natural justice to the extent that, once the State takes the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.[30] Therefore, if an affidavit claiming PII is found to be valid, then the party whose interests would be prejudiced by a subsequent judgment would be in no position to question the evidence.

If the court finds the affidavit in support of the claim preventing disclosure unsatisfactory, then "further opportunity may be given to file additional affidavit or [the Minister] may be summoned for cross-examination"[31] The courts have interpreted this provision as an immunity granted in order to protect public interest and not a privilege which can be waived by the state. It has been held by the court that it is duty-bound not only to the extent of determining on the basis of the affidavit, but even if an affidavit filed by the state is not satisfactory, the court cannot "abdicate its duty" of deciding whether the document warrants protection or disclosure depending on the effect on public interest[32:] "That is why in

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[25] SECRETARY OF STATE FOR JUSTICE, JUSTICE AND SECURITY GREEN PAPER, 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79293/green-paper_1.pdf.

[26] *See* Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603, 723 (India) (holding that open justice permits fair and accurate reports of court proceedings to be published).

[27] Kumar, Miiko A., *Protecting State Secrets: Jurisdictional Differences and Current Developments*, 82 MISS. L.J. 853, 878 (2013).

[28] Indian Evidence Act, No. 1 of 1872, INDIA CODE, § 123.

[29] State of Punjab v. Sodhi Sukhdev Singh, AIR 1961 SC 493 (India), ¶ 13; R.K. Jain v. Union of India, (1993) 4 SCC 119, 137 (India).

[30] Tribhuvandas Bhimji Zaveri v. CCE (1997) 11 SCC 276, 283 (India).

[31] R.K. Jain v. Union of India, (1993) 4 SCC 119, 138 (India).

[32] S.P. Gupta v. Union of India, 1981 Supp. SCC 87, 287 (India).

England this immunity is no longer described as 'Crown Privilege' but is called "public interest immunity."[33] The reason for weighing public interest against administration of justice is that "there is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents; which must be produced if justice is to be done."[34] Therefore, the real question before every court of law is to determine whether the public interest outweighs an ordinary citizen's right to question the evidence in a proceeding against them.

However, the power to enquire into the ramifications of disclosure and its outcome on public interest is only available with the state. Where the High Court conducted an enquiry into the consequences of disclosure, the Supreme Court held that such an action was erroneous in the light of the narrow limits prescribed by the second clause of Section 162 of the Indian Evidence Act of 1872 (which confers power on courts to determine the validity of the objection raised under Section 123) under which such an enquiry is conducted.[35] The Supreme Court proceeded to make the following observations[36]:

a) "Reading Sections 123 and 162 together the court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question; that is a matter for the authority concerned to decide;"

b) "The court is competent, and indeed is bound, to hold a preliminary enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not."

c) "In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not."

The courts have observed that, if they took upon themselves the task of deciding the nature of the document, then "the discretion to ban its production by the head of the department must necessarily become illusory."[37] While the power to hold a preliminary enquiry was given to the courts, the ultimate discretion lay in the hands of the head of the

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[33] *Id.* at 287.
[34] *Id* at 138.
[35] State of Punjab v. Sodhi Sukhdev Singh, AIR 1961 SC 493, ¶¶ 25, 26.
[36] *Id.*
[37] *Id.* ¶ 55.

department(s).

But if dealing with the question of privilege under Section 123 is taken away from the court's jurisdiction, and is only made available with the ministry, then does it not fall foul of the principle *nemo judex in causa sua*, that is, no one should be a judge in his own cause? The court, while interpreting the Indian statute in accordance with English law, has stated: "The court has not the power to override ministerial certificate against production."[38] Thus, the aforenoted approach not only thwarts the power of inquiry commanded by the judiciary, but also undermines equal justice.

Another noticeable issue is highlighted by the absence of a definition of "national security" in the Indian context. While the courts have tried to encompass "socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc.," within its characterization, it has been emphasized that what is in the interest of national security is "not a question of law," but instead "a matter of policy."[39] The judiciary has maintained its stand that "it is not for the court to decide whether something is in the interest of State or not."[40]

Naturally, the affected party would not be in a position to determine the level of secrecy that each document possesses; however, an alternative provision of explanation or cross-examination on the basis of such a document is evidently absent from the legislation governing disclosure. Would it enhance the representation of an excluded party if his advocate is able to access the material on his behalf—without disclosing confidential contents, but only to the extent it strengthened his case?

Therefore, this time immemorial common law right to disclosure faces derogation due to not only an absence of a proper definition, but also an alternative procedure that ought to follow fair hearing in cases of public interest and national security. These issues propel more questions towards the evidentiary value of the judgments rendered therein.

A. The Judge's Quandary

It would be incongruous, to forego the fact that the very integrity of the judiciary depends on true and full disclosure of all facts within the framework of the rules of evidence, which in turn inspires public confidence. The assumption is that a judgment issued by a judge who has reviewed all the material disclosed is bound to be fair. However, the necessary corollary to the *audi alteram partem rule is qui aliquid statuerit, parte inaudita altera aequum licet dixerit, hand aequum fecerit*—that is, "he who shall decide anything without

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[38] *Id.* ¶ 85.

[39] Ex-Armymen's Protection Services (P) Ltd. v. Union of India, (2014) 5 SCC 409, 416 (India).

[40] *Id.*

the other side having been heard, although he may have said what is right, will not have done what is right."[41] Thus, it matters not how astutely or assiduously a judgment is delivered, if 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. It would be rather implausible that a judge delivering upon the civil claim be kept in the dark regarding the defense and rebuttal of one party. No matter how judiciously or diligently a judgment is delivered, natural justice hinges upon the necessity of the right to reason and to defend. A complete travesty of principles of natural justice might take place if the court is not made aware of defense of both sides to the litigation.[42]

> The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counterevidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet…. How can one meet a case one does not know?[43]

B. Rulings by the Indian Judiciary Favoring Public Interest Against the Fair-Trial Principle

For a long time, the Indian judiciary has supplemented the procedure of evidential disclosure, having barely managed to grapple with the fair trial principle in its true sense. However, the convoluted issue of disclosure subsequent to a denial by the State on the ground of public interest has seemingly not been addressed. It is noteworthy that such an invidious approach by the judiciary rarely mitigates the harm it causes to the principle of fair hearing. Thus, when there is exclusion of an affected party to the extent that it is sent away with no redress at all, it in effect results in an outlawing.

The following cases instantiate the issues that arise in the absence of a definitive legislative model of disclosure against the argument of national security and/or public interest:

a) **Ex-Armymen's Protection Services (P) Ltd. v. Union of India:** In a case where the denial of security clearance for ground handling service at different airports on the ground of national interest was challenged, the court accepted that the argument entailing "national interest" fell within the exceptions to the principles of natural justice. It was held that a party could not insist on the strict observance of the

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[41] Union of India v. Tulsiram Patel, (1985) 3 SCC 398 (India) (quoting Boswell's Case (1606) 6 Co Rep 48-b, 52-a, 77 ER 326).

[42] Union of India v. Tulsiram Patel, (1985) 3 SCC 398, 419, 470 (India).

[43] Charkaoui v. Canada (Citizenship and Immigration) [2007] 1 S.C.R. 350 (Can.) ¶ 64 ("The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence").

principles of natural justice. The court also assumed the power to call for the files and determine whether the invocation of national security was justified. The court laid that once the state took the stand that the issues involved national security concerns, it would not disclose the reasons to the affected party.[44]

b) **SCOD 18 Networking Pvt. Ltd. v. Ministry of Information & Broadcasting:** In another case an affected Multi Service Operator ("MSO"), which ran a cable television service, sought the production of relevant files pertaining to the withdrawal of its security clearance by the Ministry of Home Affairs and Ministry of Information and Broadcasting. Though the thrust of the MSO's case was disclosure, it subsequently consented to the court's exclusive perusal of the files. The Court, however, maintained that in the event "there [was] any material produced before the Court, then, without disclosing its source," the Court might still direct the government to comply with the "contours" of a reasonable hearing opportunity. The High Court, after perusing the files, observed that there was definite material that would enable the Government to conclude that the Home Ministry had withdrawn the security clearance. An opportunity, as observed by the Court, would not enable the affected MSO to probe the "confidential or secret" information that "cannot not be disclosed at any cost."[45] It was emphasized that if it is the Ministry's "primary job" to preserve security interests, then its observations and remarks could not be "allowed to be probed in the manner sought by [the affected MSO]."[46] If the parties were to seek the above details, then it would "expose" all those concerned, which would not be in the interests of justice either.[47] Thus, relying on the material which was found to be germane to the security interests of the nation, the court held that "no useful purpose" would be served by directing a hearing.[48]

c) **Satish Nambiar v. Union of India, through Ministry of Home Affairs, through its Secretary, Foreigners Division:** Where a security agency of the Central Government had submitted an adverse report necessitating the cancellation of an Overseas Citizenship of India registration granted to the Petitioner, the challenge against the legality of the order was on the ground that a hearing ought to have been granted before passing such a prejudicial order. The court after examining the documents

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[44] Ex-Armymen's Protection Services (P) Ltd. v. Union of India, (2014) 5 SCC 409 (India).

[45] SCOD 18 Networking Pvt. Ltd. v. Ministry of Information & Broadcasting, Writ Petition No. 2459 of 2015, ¶ 51 (Oct. 30, 2015).

[46] *Id.*

[47] *Id.*

[48] *Id.*

produced before it in a sealed cover came to the conclusion that when the Government had acted on the opinion of the security agency that it was likely to affect the security of the country and relationship with foreign countries, there would hardly be a requirement to grant a pre-decisional hearing.[49] Evidently, the court did not deal with the question of a post-decisional hearing and in fact concluded that the Petitioner had hardly suffered any prejudice.

d) **Bycell Telecommunications India Pvt. Ltd. v. Union of India:** In yet another decision wherein the intelligence and security agencies had reached a subjective conclusion regarding a company's financial investments and after due consideration withdrew the company's security clearance, the affected company argued the recovation without a disclosure of the underlying grounds was a violation of natural justice. The approval was chiefly rejected on the ground that the investment was being routed through countries of concern/unfriendly countries. It was urged by the Petitioner that if the information only pertained to funds being tainted then it should be provided to enable a response to this information. The plea was negatived by the court, which observed that the disclosure of information was likely to jeopardize and expose the sources of information. Lastly, a further request on the ground that the conclusions remained inconclusive was also declined by the Court.[50]

II. Public Interest and the Shadow of Immunity

While there are many grey areas owing to the absence of a proper procedure guiding fair trial due to limited disclosure by the Indian judicial system, there is nothing that offends fair trial more than the shadow of public interest immunity. Absence of a proper legislative model provides weak and fragile support to courts already burdened courts with hard choices, which after satisfying themselves regarding the adverse material, unreservedly sanction non-disclosure on grounds of public interest even if it means depriving the fair trial of a claim or defense. Even the smallest probability of injury to the public interest outweighs the right of disclosure. Naturally, the state needs to balance the preservation of national secrets and the right to a fair trial, keeping in mind the overall public interest. It also cannot lose sight of twin imperatives—justice and security. But such exceptions and limitations to the general rule make it nearly impossible for an affected party to demand the right to disclosure.

The two competing interests which need to be fortified against each other by the State and the Judiciary are–

[49] Satish Nambiar v. Union of India, through Ministry of Home Affairs, through its Secretary, Foreigners Division, AIR 2008 SC 158, ¶¶ 17–18 (India).

[50] Bycell Telecommunications India Pvt. Ltd. v. Union of India (2011) 185 DLT 494 (India).

a) The interest of a litigant in a fair system and other essential principles of natural justice; and

b) The interest of the state in maintaining and preserving national security social peace and political stability, preventing witness intimidation, and prevention and detection of crime or misconduct.

A. If National Interest is of Paramount Importance, Should Natural Justice Always Give Way?

What ensues if the Court cannot reconcile the right, on the one hand to disclosure of evidence, and, on the other, the state's interests in security, inclining the entire proceeding towards the national interest? Do we have alternatives to deal with a breakdown of the fundamental principle of human rights and principles of natural justice which ought to be followed in every proceeding? While it is true that the presumption of observance of principles of natural justice in favor of the private interest of an excluded party will weaken against the public interest, is the public interest argument so forceful that no alternative could reconcile the divide between the two? The Author envisages a workable alternative in order to harmonize the delicate principle of fair hearing after a valid claim for withholding evidence is made by the state. Therefore, the question that emerges from the compelling discussion is when the state denies adverse material to the affected party, does it necessarily have to result in a complete derogation of fair representation and the right to cross examine, which would in turn imply no trial at all. Indubitably, an alternative, without compromising the source and secrecy behind the adverse material, would salvage the fair hearing principle from being rendered otiose. Such a system would enable representation and rebuttal of secret evidence even in the absence of the excluded party.

III. Current Position in the United Kingdom: "Closed Proceeding"

In order to overcome the above-stated anomaly, it is proposed that India study the model of "closed proceeding" in the United Kingdom and adopt it in the Indian system. This section outlines the mechanism adopted by the United Kingdom in managing its civil disputes concerning materials of national interest, the common law principle of the public interest immunity, the evolving concept of a "special advocate" appointment, and the Justice and Security Act of 2013.

The development of PII, a construct of common law, began due to rising conflicts between public interest and established rules of defense and disclosure. Under the Civil Procedural Rules of the UK, public authorities were precluded from disclosing materials which

could be proved to be of national importance.[51] It is pertinent to note the legislature has not passed a counterweight to these procedural rules or otherwise assisted litigants in proceedings so affected. The Justice Security Bill introduced by the UK Parliament sought to legalize the closed procedures with the use of special advocates so "that secret evidence could be used in a civil proceeding where the parties and their lawyers are absent from the trial . . . ."[52]

Before discussing the Justice and Security Act of 2013, which was enacted in the wake of the UK Supreme Court's 2011 ruling in *Al Rawi v. Security Service*,[53] it is crucial to understand that the United Kingdom itself did not have a particular provision dealing with civil litigation that gave rise to questions of national interest.[54] The UK Supreme Court cases that contextualize the establishment of the Justice and Security Act are the following:

1. Duncan v. Cammell Laird[55]

A submarine, HMS *Thetis*, while engaged on a trial drive, sank and killed ninety-nine servicemen on board. The kin of the deceased later sued the manufacturers for negligence. The suit, though between two private parties, had the state intervening in order to prevent the production of documents in possession of one of the parties.[56] The state claimed Crown Privilege in response to a request for documents on the ground that it would be injurious to public interest. The documents sought to be produced included the contract for the hull and machinery of the *Thetis*, letters written before the disaster relating to the vessel's trim, and reports as to the condition of the *Thetis*.

The question to be determined was as to the circumstances in which privilege could have been claimed validly on behalf of the Crown in a civil action and the proper procedure

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[51] See Civ. Proc. R. 76.1(4) (UK) ("[D]isclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."); Civ. Proc. R. 76.2(2) (UK) ("The court must ensure that information is not disclosed contrary to the public interest."); Civ. Proc. R. 76.29(8) (UK) ("The court must give permission to the Secretary of State to withhold closed material where it considers that the disclosure of that material would be contrary to the public interest."); Civ. Proc. R. 31.19(1) (UK) (" A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.").

[52] Miiko A. Kumar, *Protecting State Secrets: Jurisdictional Differences and Current Developments*, 82 MISS. L.J. 853, 874 (2013).

[53] [2011] UKSC 34 (appeal taken from EWCA).

[54] The UK Parliament used a similar procedure via the Prevention of Terrorism Act 2005 and the Counter-Terrorism Act in matters relating to national security interests.

[55] [1942] AC 624 (HL) (appeal taken from EWCA).

[56] *Id.* at 633.

to be followed if this claim is to be made good. The court observed that the question whether the production of a document is or is not detrimental to the public service depends on the various viewpoints of informed officials of respective departments. The Court being unaware of the exigencies of the public service ought not to grant inspection.[57] The court, however, concluded that it is the judge who is in control of the trial ruling over the production, not the executive.[58]

With respect to the validity of a claim, the court indicated that claims invoked on the grounds of public criticism and parliamentary discussion ought to not to be entertained as against serious exceptions such as national defense, diplomatic relations, and proper functioning of the public service.[59]

Lord Simon, dismissing the appeal, concluded:

> After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.[60]

2. Conway v. Rimmer[61]

This private dispute was between a probationary police officer (Conway) and his superintendent who was sued in an action for malicious prosecution by Conway. The documents included four reports made by the superintendent about Conway during his period of probation, and a report by him to the chief constable for transmission to the Director of Public Prosecutions in connection with the prosecution of Conway on a criminal charge, on which Conway was acquitted. The objections to disclosure were made by the Secretary of State of Home Affairs on the grounds that the production of the documents would be injurious to the public interest.

The questions framed by the court were whether the court had any right to question the finality of a Minister's certificate and, in the presence of the same, how and in what circumstances was it to be exercised and made effective.[62]

The argument favoring disclosure was made in the light of the fact that there was no trace of confidentiality in an administrative and disciplinary matter such like the present one, as against any other matter disclosing the activities of criminals or the names of

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[57] *Id*. at 640 (Lord Simon).
[58] *Id*. at 642.
[59] *Id*.
[60] *Id*. at 643.
[61] [1968] AC 910 (HL) 940 (appeal taken from EWCA).
[62] *Id.* at 1007.

informers or the methods of the police. Opposing disclosure, the Ministry argued that the probation reports should be privileged because of the hardship caused on the man reporting and also to ensure full and frank reports.

Lord Reid, without expressing any doubt over the decision of *Duncan v. Cammell*, emphasized that the strong impression of disclosure which fell from Lord Simon in that case was because Lord Simon had primarily in mind cases where disclosure would involve a danger of real prejudice to the national interest. Lord Reid found it difficult to apply the same principle in the present case, which entailed the discovery of routine reports on a probationer constable.[63]

In Lord Pearce's view, it was "essential to leave the vague generalities of wide classes and get down to realities in weighing the respective 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."[64] The court, allowing the appeal, ordered production for inspection of the document in question.

3. Al Rawi v. Security Service[65]

The issue before the UK Supreme Court was whether the court had an inherent power to order a "closed material procedure" instead of determining the issue through a conventional PII procedure in respect of documents which were the subject of the government's PII claim. The civil claim arose from the detention of the claimants by various foreign authorities including the Security Service at Guantanamo Bay whereunder the claimants had pleaded causes of action including false imprisonment, ill treatment, conspiracy to injure and torture, and breach of the Human Rights Act of 1998.

> The preliminary issue was in these terms:
>
> "Could it be lawful and proper for a court to order that a 'closed material procedure' (as defined below) be adopted in a civil claim for damages?
>
> Definition of 'closed material procedure'
>
> A "closed material procedure" means a procedure in which
>
> (a) a party is permitted to
>
> (i) comply with his obligations for disclosure of documents, and
>
> (ii) rely on pleadings and/or written evidence and/or oral evidence

[63] *Id.* at 938, 939 (Lord Reid).
[64] *Id*. at 986 (Lord Pearce).
[65] Al Rawi v. Security Service [2011] UKSC 34 (appeal taken from EWCA).

> without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as "closed material"), and
>
> (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and
>
> (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.
>
> For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

The government, while admitting that the claimants had been transferred and detained, denied the liability for the alleged mistreatment. The course contended by the government required closed proceedings and special advocates who would represent the interest of the claimants in the closed hearings. Via this procedure, the government sought to rely on the material as evidence against the plaintiffs' claim while preventing the plaintiffs from seeing material. Unexpectedly, the claimants opted for the conventional PII exercise to be conducted ex parte by a judge in relation to the closed material.

Referring to the Government's application, which was an alternative to the public interest immunity claim, the majority found that the common law of PII could not be replaced in such a way that it extended to closed-court procedures, but rather a specific legislative amendment was required for such a fundamental departure from the common law principles of procedural justice.[66] While holding that there could be no objection to improving the position of an excluded party by the use of special advocates,[67] the court was wary of the limits of its inherent power in controlling its own procedure in the absence of a statute or statutory procedural rules.[68]

Lord Phillips raised a notable question regarding this departure from the usual practice of leading evidence from both parties for subsequent defense. He questioned "[w]hether the general principles applied by the Court of Appeal would necessarily preclude the use of a different closed material procedure, not as a substitute for the conventional PII exercise, but to mitigate the injustice that can occur when relevant evidence is excluded from disclosure because of PII, is a question that should be left open until it actually

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[66] *Id.* at [186] (Lord Dyson).
[67] *Id.* at [133] (Lord Clark).
[68] *Id.* at [21] (Lord Dyson).

arises . . . ."[69]

The dissenting opinion, however, emphasized the flexibility of the development of common law and suggested permitting a closed-court procedure involving special advocates.[70]

While the aforenoted statement of Lord Phillips does not provide a solution to the looming derogation from the right to defend, it undeniably implants the idea of mitigating the injustice of not having a fair trial by having an approachable mechanism to start with.

B. Review of the Closed Material Procedure Under the Justice and Security Act of 2013[71]

Any court (High Court, the Court of Appeal, the Court of Session or the Supreme Court) hearing a civil proceeding is empowered to make a declaration that a particular case is one in which a closed material application may be made in relation to certain evidentiary material.[72] The application may be made by a "party to the proceedings," "the Secretary of State," or by the court "of its own motion."[73] The application may or may not be supported by some of the adverse secret material to demonstrate the sensitivity and relevance of the documents. The person making the application would need to persuade the court that if certain evidentiary material were to be disclosed it would cause damage to the national security[74] and that a closed proceeding would be in the interest of effective administration of justice. The lynchpin of the entire closed proceeding system is attached to the condition that no court will be able to declare that a case should be tried under the said system unless it considers that it is in the interests of the fair and effective administration of justice to do.

Special advocates would then be served the closed material bundles and would assist in representing the interests of the excluded party. The purpose of appointing a special advocate is to enable representation of the interests of an excluded party in closed material proceedings.[75] This advocate is security-cleared lawyer and is mostly appointed by the Attorney General.[76]

For the purposes of accountability, the Secretary of the State is obligated to annually lay a report before the Parliament to state the operation of the provisions of the closed

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[69] *Id.* at [196] (Lord Phillips).
[70] *See id.* at [159]–[164] (Lord Clarke)
[71] Justice and Security Act 2013, c. 18 (UK).
[72] *Id.* § 6(1).
[73] *Id.* § 6(2) 2013.
[74] *Id.* § 11(1).
[75] *Id.* § 9.
[76] *Id.*

material proceedings, the number of applications made, and whether the court granted or revoked the declarations thereunder.[77] This practice is much against the PII regime where there were no ready records or "means of understanding whether its use is routine, occasional or exceptional."[78]

The court while determining the issue would focus on the relevance of the sensitive material to the issues in the case. Further, the judge's power is made explicit and can be exercised at any stage to invoke, review, revoke,[79] or declare the closed material proceeding, considering the interest of a "fair and effective administration of justice."[80] While exercising its discretion, the court must review all the documents put before it in the course of proceedings and not just the information on which its decision to grant the declaration is based. A decision ought to be a reasoned one but which may attract restrictions in relation to certain damaging particulars.[81] This way the closed material procedure is different from the conventional PII exercise whereunder if adverse material is found to be inadmissible, then "[n]o-one may rely on it, including the court."[82]

The next stage of the process entails the court's satisfaction and agreement on the issue of disclosure and its consequences on national security.[83] At this stage, the court might also consider if a non-damaging summary of the material should be provided or not. Regardless, the court must always act in accordance with Article 6 of the European Convention on Human Rights. It is imperative that such an application is always considered without any other party or their legal representatives being present, unless it is a person appointed as a special advocate.

IV. The Implementation of Closed Material Proceedings in India: Lessons to be Learned

Rather than disavowing the need for a procedure that would deny a litigant of his fundamental common law rights, it is vital that a paradigm of an equitable system is explored. No doubt, the closed material procedure followed in the United Kingdom defeats the two dimensions of an open justice system, that is, the private interest of an individual's right to

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[77] *Id.* § 12.

[78] Adam Tomkins, *Justice and Security in the United Kingdom*, 47 Isr. L. Rev. 305, 311 (2014) [hereinafter Tomkins, *Justice*]; *see also* Adam Tomkins, National Security and the Due Process of Law, 64 Current Legal Probs. 215, 252 (2011).

[79] Justice and Security Act, § 7(2).

[80] *Id.* § 7 2013.

[81] *Id.* § 11(1).

[82] Tomkins, *Justice*, *supra* note 78, at 311.

[83] Justice and Security Act, § 8.

proper administration of justice and the social value of media scrutiny of the adjudication.[84] The procedure also obviates the decision-making power of the court and lets the government decide what evidence should remain closed and serves only that material to the special advocate. An open justice system not only serves a wider purpose by maintaining public confidence in the justice system but also instills discipline in its administration. Public trials ensure efficiency, competence and implant integrity within the judiciary. All of these underpinned essentials are lost in closed material proceedings. In India, there is presently no procedure on having closed material proceedings, let alone special advocates designated to mitigate the defects of the same. An inspection of the UK model would reveal the strengths and likely limitations if it were to be introduced in India as a means of conducting public interest or national security litigation. A critical review of the UK model would help to identify and implement an improvised version in India.

The use of special advocates would definitely be necessary in order to enable the courts to carry out the balancing exercise. While the appointment of a special advocate goes against the right of an individual to be able to deal with the evidence personally, it certainly offers a potential solution, that is, a right to an effective remedy. However, this solution lies solely within the domain of Parliament. If the Parliament does allow this modification to the trial process, it ought not overlook the intricacies involved in the process.

If the Indian legislature has to adopt the closed material procedure, it would be only possible and appropriate if all the safeguards against the prejudice that it might create are taken. The Indian legislature would not only have to introduce a similar provision to the present laws, but it would also have to consider certain gripping aspects in the course of action, such as outlining:

a) **A definition of "public interest" or "national security" and whether an injury to either would be caused by disclosure of documents:** The first and foremost proposal is to define "public interest" which would entail with it the scope and to what extent public interest shall weigh upon a fair trial procedure. This is imperative since the weight that national security upholds in public interest would make a blanket claim for obstructing fairness. Since public interest concerns itself with the safekeeping of national security, it is quintessential to define the two concepts which might include socio-political stability, territorial integrity, economic solidarity and strength, external peace, prevention of crime, its detection, and witness intimidation, etc. A proper definition of the terms "national security" and "public interest" would enable the courts to explicate the nature of the document sought to be

[84] *See* Adrian Zuckerman, Editor's Note, Closed Material Procedure — Denial of Natural Justice, 30 CIV. JUST. Q. 345 (2011) (UK).

withheld.

b) **Conceptualizing the closed material procedure in India:** As has been discussed earlier, the closed material procedure shall encompass the appointment of special advocates who would test the adverse material on behalf of the affected parties, and it would enable a rebuttal against the same, all without compromising the source of the material. The difficulty really lies in distinguishing between what makes a departure from procedure a mere irregularity and what makes it an illegality. In the absence of any legislative model, the courts will not be in a position to order any denial or departure from the right to defend and disclosure to the excluded party which might coerce the procedure towards illegality. Therefore, any procedure that hampers fair hearing principles and that has a direct bearing on the interest of the affected party would be illegal without a governing rule or regulation. There is a thin line between making the procedural changes with minor repercussions on a case-by-case basis, such as allowing the excluded party to take notes rather than have the entire material, which would not affect the substance of a fair trial procedure, and broader violations of fair trial rights. However, a substantial usurpation of the right to peruse and assigning the same to a special advocate would require a legal sanction.

c) **Who can file an application for having a closed proceeding or claim the public interest defense:** While there have been cases in India whereunder the affected party has, despite seeking disclosure of the adverse material, acceded to the court's exclusive perusal of the file without disclosing it to them; either party, or the court *suo moto*, may move for a closed proceeding.

d) **A test to check the risk or harm that the document plays in the event of disclosure:** The court shall first satisfy itself on the factum of the degree of harm that a disclosure may cause as compared to the public interest in fair and open justice system. Once the evidence has passed the threshold of being able to receive protection against disclosure, the court shall appoint special advocates in order to assist the court and the accused for the rest of the proceeding.

e) **Appointments of "special advocates" for the purpose of examining the material withheld:** Special advocates must be independent and impartial with a longstanding reputation at the bar. The special advocate must not be appointed by the government, for example the Attorney General, since the Government would be an interested party.

f) **The scope of assistance that a "special advocate" might be able to give his client who would still be unaware of the contents of the documents:** *First,* the special

advocates who has been privy to the documents undisclosed shall assist the excluded party (that is, the party who has been excluded from disclosing the material) in letting them know the reasons behind the likely outcome, rather than disclosing the entire material off-record. This is with a view to meet the ends of justice which requires the excluded party to be aware of the case put against them, when she or he has no choice but to accede to the procedure. *Second,* as much information that can be provided without comprising its security should be given to the excluded party. Rules governing the communication between the special advocate and the excluded party ought to be restrictive, but not to the extent that it renders the process completely otiose.

g) **Role of the courts**: *First,* enough discretion shall be given to the court to decide if the material ought to be relied upon or not, or if it could be made available to the court alone for arriving at a reasoned order. Therefore, it matters not if the proceeding is chosen to be a closed one, since each material or document would be open to the test of balancing against the principle of fair trial. *Second,* the judges delivering a judgment referring to closed materials ought to openly speak about the material relied upon, without revealing the contents of it. *Third,* impeccable impartiality from the judge would be expected to point out any evidence which is in favor of the excluded party and against the State. *Fourth,* where the court feels that the ends of justice can be met by the special advocate's presence itself, it may order or sanction the absence of the excluded party. However, there ought to be no compromise on the right to rebut and cross examine the witnesses.

h) **Role of the State**: The golden rule that full disclosure of any material which strengthens or weakens the case of the affected party shall be disclosed to the defense shall be followed throughout the proceeding. The State pleading non-disclosure shall be allowed to produce the aforenoted material at any point of the proceeding.

i) **Who would be the ultimate decision maker regarding whether public interest favors non-disclosure:** Arguably, the independence of the courts can only be sustained if the courts can analyze whether the information meets public interest and national security threshold. The final decision-making authority shall reside with the Courts, upon their satisfaction by examining the material placed on record by the state. If an agency of the state decides against disclosure, then the final decision-making power cannot reside with it. This would fall foul of the principle *nemo judex in causasua*, that is, no one should be a judge in his own cause.

Conclusion

The court cannot, however, introduce or seek to regulate its procedure by using its inherent powers resulting in a denial of the right to participate in the proceedings in accordance with the fundamental practice of natural and open justice. Any new mechanism bringing in departure from the open justice and the natural justice principles shall have to be introduced by the Parliament alone. It is not the sole responsibility of the courts to deal with the formidable weapon of public policy; the legislature, which has a heightened responsibility, too, has to step in to take charge of the necessary law reforms. Undisclosed and unchallenged evidence can never effectively fulfill the needs of a proper justice administration system. Yet communication between an advocate and his client, without revealing the specific details about the evidence would still be better than no communication at all. This at the least improves the defendant's chance and ability to present his case. This defense of natural justice has the power to create good while protecting our fundamental and civil rights—and cause equal harm and much mischief, if it is used potently for vested rights and to obstruct the path of justice. Even though it is impossible to lay down straightjacket rules for principles of natural justice, their scope cannot be limited to the extent of eliminating the right to fair trial. As Justice Bridge rightly put it, "My Lords, the so-called rules of natural justice are not engraved on tablets of stone."[85] It is, thus, the need of the hour to revolutionize this principle into serving public interest, which encompasses within its realm the requirement of a fair decision-making mechanism.

[85] Lloyd v. McMahon, [1987] 1 AC 625 (HL) 702, 703 (appeal taken from Eng.).