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# **CONSTITUTIONAL BALANCING OR INSTITUTIONAL DEFERENCE? RE-EXAMINING JUDICIAL REVIEW IN NATIONAL SECURITY CASES**

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## **Abstract**

*Indian constitutional adjudication in national security cases oscillates between two competing judicial impulses: institutional deference to executive expertise and constitutional balancing through proportionality. While the former emphasises separation of powers and secrecy, the latter demands justification for rights-restrictive State action. Recent Supreme Court decisions reveal a decisive shift away from blanket deference towards a “culture of justification,” yet without abandoning restraint altogether.*

*This article examines how courts can review national security claims without either abdicating their constitutional role or intruding into executive policy-making. Through a comparative analysis of *Manohar Lal Sharma v. Narendra Modi (Rafale, 2018)*, *Manohar Lal Sharma v. Union of India (Pegasus, 2021)*, and *Madhyamam Broadcasting v. Union of India (MediaOne, 2023)*, it argues that proportionality remains viable in security contexts only if courts enforce a minimum justificatory burden on the State.*

*The article proposes a calibrated framework requiring partial disclosure, reasoned affidavits, consideration of less restrictive alternatives, and independent judicial verification, while permitting limited confidentiality where strictly necessary. It concludes that such procedural safeguards reconcile executive expertise with constitutional accountability and prevent “national security” from becoming a talismanic shield against judicial review. This approach is in lieu with India’s post-Emergency constitutional ethos and also offers particular relevance for sensitive regions in respect of security that is governed by exceptional legal regimes.*

**Keywords:** Institutional Deference, Constitutional Balancing, National Security, Justified Proportionality, Accountability

## Introduction

Judicial review in national security cases presents one of constitutional law's most persistent dilemmas: how should courts protect fundamental rights without undermining the executive's capacity to act swiftly and secretly in matters of defence and internal security? In India, this tension is sharpened by the expansive interpretation of Article 21<sup>1</sup> following *Maneka Gandhi*<sup>2</sup>, which requires that any deprivation of liberty be "just, fair, and reasonable."

Yet, when the State invokes "national security," courts have historically displayed restraint, often limiting review to procedural legality and deferring on merits. This tendency is most visible in the increasing reliance on sealed-cover material, which curtails adversarial scrutiny and raises serious concerns about procedural fairness. At the same time, recent jurisprudence suggests growing judicial unease with unreasoned deference, particularly where fundamental rights are substantially curtailed.

This article argues that the apparent conflict between deference and constitutional balancing is false. What is required is not maximal judicial intervention, but calibrated deference, a model in which courts respect executive expertise while insisting on minimum standards of justification compatible with proportionality review.

## The Doctrinal Shift: From Deference to Justification

Judicial deference in matters of national security has traditionally been justified on the grounds of separation of powers and institutional competence. Courts have acknowledged that decisions relating to defence procurement, intelligence operations, counter-terrorism strategies, and internal security are inherently polycentric, depend on classified information, and often require predictive judgments about risk areas in which the executive possesses both expertise and access unavailable to the judiciary. Indian courts, particularly in the pre-constitutional-maturity phase, reflected this restraint, implicitly drawing from comparative traditions such as the UK's *GCHQ* case<sup>3</sup>, where review was limited to the legality of decision-making rather than its merits.

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<sup>1</sup> INDIA CONST. art. 21.

<sup>2</sup> *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India)

<sup>3</sup> *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.)

However, post-Emergency constitutionalism marks a decisive normative rupture from this culture of reflexive deference. The repudiation of *ADM Jabalpur*<sup>4</sup> and the re-centering of individual dignity as the core of Article 21 signify a constitutional rejection of unreviewable executive discretion, even in the name of security. National security, while a legitimate state interest, ceased to function as a talisman capable of suspending constitutional scrutiny. Instead, it became a claim that must be demonstrated and defended within a constitutional framework. This transformation finds doctrinal expression in the principle of proportionality, first systematised in *Modern Dental College*<sup>5</sup> and elevated to a constitutional standard in *Puttaswamy*<sup>6</sup>. Proportionality reframes judicial review from asking whether courts should defer to the executive, to asking whether the executive has discharged a justificatory burden. It requires the State to establish a legitimate aim, a rational connection between the measure and that aim, necessity in the sense of least restrictive means, and a balance between the severity of rights infringement and the public interest pursued.

The real challenge, however, lies not in the articulation of proportionality as doctrine, but in its operationalisation in cases where the State invokes secrecy. When evidence is withheld, reasons are undisclosed, or materials are placed in sealed cover, the justificatory logic of proportionality risks being hollowed out. Without meaningful disclosure at least to the court, judicial review threatens to regress into the very deference that proportionality was designed to overcome.

### **The Rafale Case: Institutional Deference at Its Peak**

In *Manohar Lal Sharma v. Narendra Modi*<sup>7</sup>, the Supreme Court examined allegations of irregularities in the Rafale fighter jet procurement. Emphasising the subject matter's sensitivity, the Court confined its review to allegations of illegality, procedural impropriety, and irrationality. Critical pricing and decision-making details were assessed through sealed-cover submissions.

The Court's approach reflected classical deference: it accepted the executive's national security justification largely at face value and declined to probe the necessity or proportionality of the

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<sup>4</sup> A.D.M., Jabalpur v. Shivkant Shukla, (1976) 2 S.C.C. 521 (India)

<sup>5</sup> Modern Dental Coll. & Rsch. Ctr. v. State of Madhya Pradesh, (2016) 7 S.C.C. 353 (India)

<sup>6</sup> K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India)

<sup>7</sup> Manohar Lal Sharma v. Narendra Modi, (2019) 3 S.C.C. 1, pp. 22-24 (India)

procurement choices. While defensible given the context of defence acquisitions and international agreements, the judgment illustrates how sealed-cover practices can compress judicial scrutiny to near-vanishing point.

Crucially, proportionality was not rejected, it was simply not operationalised. The case thus represents the outer limit of permissible deference rather than a general template for all security-related adjudication.

### **The Pegasus Case: Rejecting the “Free Pass”**

The Supreme Court recalibrated its stance in *Manohar Lal Sharma v. Union of India* (Pegasus, 2021). Faced with allegations of illegal surveillance using military-grade spyware, the Union Government refused to file a detailed affidavit, citing national security.

Departing from *Rafale*, the Court held that national security cannot be invoked as a “free pass” to evade judicial scrutiny. While acknowledging the sensitivity of intelligence operations, it insisted that the State must at least justify the legality and necessity of surveillance measures. The constitution of an independent expert committee represented a procedural innovation that preserved confidentiality while enabling meaningful review.

Pegasus thus confirms that deference does not eliminate the State’s burden of justification; it merely modifies how that burden is discharged.<sup>8</sup>

### **MediaOne: The Limits of Secrecy**

In *Madhyamam Broadcasting v. Union of India (2023)*<sup>9</sup>, the Court confronted the use of sealed-cover intelligence reports to revoke a television channel’s security clearance. Unlike *Rafale*, the rights at stake freedom of speech and livelihood, were direct and immediate.

The Court held that total non-disclosure violated principles of natural justice and Article 21, particularly when the allegedly sensitive material was already in the public domain. Importantly, it rejected the conflation of critical journalism with threats to national security.

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<sup>8</sup> *Manohar Lal Sharma v. Union of India*, (2021) 10 S.C.C. 1, pp. 70-72, 86-88 (India)

<sup>9</sup> *Madhyamam Broad. Ltd. v. Union of India*, (2023) 7 S.C.C. 469 (India)

MediaOne exposes the pathology of sealed covers: when secrecy becomes routine rather than exceptional, judicial review collapses into uncritical deference.

### **Towards Calibrated Deference: A Minimum Justificatory Threshold**

Read together, the recent line of cases suggests that the real constitutional problem is no longer whether courts should defer to the executive in matters of national security. Some degree of deference is inevitable, and often justified, given the executive's access to intelligence, operational expertise, and real-time threat assessment. The harder and more important question is how far such deference can extend before judicial review of rights becomes meaningless.

Deference becomes constitutionally troubling when it slides from respect for institutional competence into uncritical acceptance of executive assertion. When courts merely record that the State has invoked "national security," adjudication risks collapsing into endorsement. To avoid this, this article proposes a minimum justificatory threshold one that remains workable even where secrecy is unavoidable, yet stays faithful to proportionality's core demand that power be justified through reasons capable of judicial evaluation.

#### *1. A prima facie legitimate aim grounded in evidence*

At the threshold stage, the State must identify a security objective that is facially legitimate, such as preventing terrorism, sabotage, espionage, or targeted violence. But legitimacy cannot be established through labels alone. Courts should require an evidentiary foundation, typically in the form of sworn affidavits by responsible officials, setting out the nature of the threat, its immediacy, and the categories of harm sought to be prevented.

Even where underlying intelligence inputs cannot be fully disclosed, the affidavit should still provide concrete and verifiable contours, such as the general nature of the risk, relevant timelines, affected sectors or locations, and the decision-making process within the executive. Without such structure, "national security" remains infinitely elastic, capable of justifying almost any restriction. Requiring this minimum evidentiary framing transforms security from a rhetorical shield into a legally accountable claim.

#### *2. Rational nexus through reasoned non-sensitive disclosure*

Once a legitimate aim is shown, the State must explain how the challenged measure is plausibly connected to the stated threat. A rational nexus is not satisfied by the bare assertion that a

measure will “enhance security.” What is required is disclosure at least in non-sensitive terms of the reasoning that links the intervention to risk reduction.

Courts are well placed to distinguish between information that is genuinely sensitive, such as sources, methods, or deployment details, and information that is not, such as the theory of harm, the mechanism of prevention, and the intended causal chain. This distinction matters because secrecy often disables affected parties from identifying logical gaps. Requiring reasoned disclosure ensures that rationality review remains a substantive evaluative exercise, rather than a ritual incantation performed in the shadow of secrecy.

### *3. Necessity and the consideration of less restrictive alternatives*

The necessity limb of proportionality demands more than showing that a measure might be effective. It requires demonstrating that comparably effective but less rights-restrictive alternatives were not reasonably available. In security cases, courts should insist on an official certification that alternatives were considered and rejected, accompanied by a structured explanation of why those alternatives were found inadequate, whether due to feasibility constraints, time sensitivity, resource limitations, or insufficient risk mitigation.

Such certification should not operate as a conclusive “trust us” device. It must remain open to limited judicial probing through targeted questions, contextual scrutiny, and, where appropriate, confidential examination of supporting material. This approach forces the executive to internalise rights as a design constraint at the decision-making stage, rather than treating rights as an afterthought defended only once litigation begins.

### *4. Independent oversight to preserve fairness under conditions of secrecy*

Because secrecy weakens adversarial testing, a minimum justificatory threshold must also incorporate procedural substitutes that restore some measure of fairness and institutional balance. Courts may employ tools such as special advocates with security clearance, court-appointed technical experts, independent committees, or in-camera review, calibrated to both the sensitivity of the material and the severity of the rights at stake.

The purpose is not to replicate executive decision-making within the judiciary, but to prevent one-sided disclosure from converting rights adjudication into an ex parte exercise. Properly designed oversight mechanisms also strengthen institutional legitimacy: they allow courts to defer where justified, while credibly demonstrating that such deference followed scrutiny rather than abdication.

The underlying constitutional logic is that the framework respects the executive's comparative advantage in assessing threats and managing security operations, while preserving the judiciary's constitutional role as a guardian of rights. It treats secrecy as a constraint on disclosure, not as a licence to evade justification altogether. On this account, calibrated deference is not judicial passivity, but a disciplined posture: courts may accept that not everything can be shared publicly, but they cannot accept that nothing meaningful must be explained, examined, or verified.

## Conclusion

National security undoubtedly warrants judicial restraint, but restraint cannot degenerate into abdication. The Supreme Court's evolving jurisprudence from *Rafale* to *Pegasus* and *MediaOne*, signals a transition from unquestioned deference towards a justification-based model of review.

By enforcing minimum justificatory burdens through calibrated proportionality, courts can reconcile secrecy with accountability and ensure that "national security" remains a constitutional justification rather than an impenetrable shield. Such an approach is essential not only for individual rights but for maintaining the legitimacy of constitutional governance in security-sensitive regions governed by exceptional laws. Ultimately, a constitutional democracy secures itself not by silencing scrutiny, but by ensuring that power is exercised with reason.

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