ORDINANCES AND THE BASIC STRUCTURE REVIEW: TO TEST OR NOT TO TEST?

Krishangee Parikh & Krishna Ravishankar[*]

Promulgation of ordinances and the procedure adopted by the Executive have often been a topic of discussion in the Indian context. Interestingly, due to the recently promulgated Delhi (Civil Services) Ordinance 2023, debates around the effectiveness of the current modes of judicial review of these instruments have recommenced. This paper aims to discuss these modes of judicial review while reading it along the trajectory of the Basic Structure doctrine and its principles. This shall further help us identify an appropriate review mechanism that can be applied to ordinances, especially those affecting the ideals of the basic structure. In order to arrive at this mechanism, the article shall first, deal with an overview of the Indian scenario pre-Kesavananda Bharati judgement, emphasising the urgent need to save the constitution from further arbitrary alterations. Furthermore, post the Kesavananda Bharati judgement, the Courts applied the basic structure review test in multiple cases. This sheds light on understanding its current ambit with regard to normal legislations and executive action. Thereafter, we would delve into the concept of negative and intermediary approaches of reviewing ordinances as provided by Professor Shubhankar Dam. By adopting a collaborative analysis, it shall provide an insight into the standard to be applied to ordinances under both these approaches, ensuring they are compliant with basic structure values, as proposed by us.

TABLE OF CONTENTS

[*] 3rd-year B.A. L.L.b. (Hons.) students from National Law University, Jodhpur. The paper was awarded the 2nd prize for the Sub-Theme: Promulgation of Ordinances, at the Nani A. Palkhivala Memorial Essay Competition, 2023, organised by WBNUJS, Kolkata, and Nani A. Palkhivala Memorial Trust, with support from the Tata Group. The authors may be contacted at krishangee.parikh@nlujodhpur.ac.in and krishna.ravishankar@nlujodhpur.ac.in, respectively, for any feedbacks or comments.

I. INTRODUCTION

With the recent promulgation of the Delhi (Civil Services) Ordinance by the Central Government in lieu of the Constitution Bench's judgement in *NCT* v. *Union of India*, constitutional law circles have started debating and deliberating upon the power of promulgation of ordinances by the Executive yet again.[1] While the discussion around the powers of promulgation has taken a forefront, this essay aims to blend in another momentous event of India's constitutional history; i.e., the formulation of the basic structure doctrine ('Doctrine'). This doctrine evolved in 1973, and has played a vital role in the protection of India's constitutional values.[2] Although it is criticised by man as an act of judicial overreach, since it is a doctrine which seven unelected judges created, it has stood the test of time for the past fifty years and has been ever expanding in its outreach.[3]

This essay explores the interplay between basic structure as a means of constitutional or judicial review and the promulgation of ordinances. It tries to diagnose the problem of existing and varied doctrines of judicial review that the Courts have adopted while scrutinising the validity of the ordinances. It does so by reconciling a more basic structure compliant review approach, especially when a basic structure value is involved with respect to an ordinance and its promulgation.

Part II consists of a reiteration of the evolution of the basic structure. It discusses at length, the academic discussions surrounding the Doctrine of Implied Limitation regarding the constituent power of the Parliament to amend the Constitution, as well as important precedents starting from *Shankari Prasad Singh* v. *Union of India* ('Shankari Prasad') to *IC Golaknath and Ors* v. *State of Punjab* ('Golaknath'). The discussion in this section culminates in the famous *Keshavananda Bharati* v. *State of Kerala* ('Kesavananda Bharati'), a turning point in Indian constitutionalism.

[1] P.D.T. Acharya, *The Legality of the Delhi Ordinance*, THE HINDU, July 03, 2023, Available At https://www.thehindu.com/news/national/the-legality-of-the-delhi-ordinance/article67038623.ece (Last visited on August 04, 2023).
[2] Apurva Vishwanath, *50 Years of Basic Structure Doctrine | Only Safeguard Against Majoritarian Govt: Sr Advocate Ramachandran*, The INDIAN EXPRESS, April 28, 2023, Available At https://indianexpress.com/article/explained/explained-law/basic-structure-only-safeguard-against-majoritarian-govt-ramachandran-8577983/ (Last visited on August 03, 2023).
[3] ARUN SHOURIE, COURTS AND THEIR JUDGMENTS: PROMISES, PREREQUISITES, CONSEQUENCES, 399–421 (2001).

Part III deals with the power of promulgation of ordinances under Article 123 and Article 213 of the Constitution. This section primarily deals with the ordinance-issuing power of the executive and its features. Furthermore, it considers the debate around equating ordinances to Acts and the consequences that follow from the point of judicial review. It also covers the discussion around ordinances being included under the ambit of 'law' under Article 13 of the Constitution.

Part IV deals with 'basic structure' as a review mechanism to test normal legislations and executive actions. The discussion revolves around the two parts of the Pre-Kesavananda phase and the Post-Kesavananda phase. It covers the various interpretations of the basic structure tests given by jurists and attempts to solve the dilemma around critical constitutional terms like 'basic features', 'basic structure' and 'integral parts' that may seem syllogistic to each other. It also shows how Courts have applied a strict scrutiny test or hard judicial review test when a normal legislation is subjected to this review mechanism. Further, at this juncture, we also look into the expansive nature of the basic structure as a means to validate or invalidate not only constitutional amendments but also normal legislations or executive actions which come under a normal scrutiny of either judicial review or the rights review under Article 13(2). Having defined the contours of the review in this section, we seek to diagnose the problem of varied judicial review approaches and their inefficacies regarding ordinances in the next section.

Part V discusses the various mechanisms that the Supreme Court and High Courts have evolved to examine the validity of a promulgated ordinance. We have referred to the two approaches undertaken by Indian Courts mentioned by Professor Shubhankar Dam: the negative approach and the intermediate approach. While discussing the limited nature of the negative approach, given its restrictive nature of merely looking into the presidential satisfaction test, we have also explored a plethora of case law and have emphasised the need to adopt the intermediate approach. Since the intermediate approach only considers the circumstances in which the ordinance was passed subject to presidential satisfaction, we have examined the case of *Hasanabha* v. *State of Karnataka* ('Hasanabha'), where legislative motive was considered when the basic structure feature was challenged by the promulgation of an ordinance to determine according to the circumstances threshold.

However, since the Supreme Court in *Krishna Kumar Singh* v. *State of Bihar* ('Krishna Kumar Singh') has recognised the negative approach of judicial review, we have proposed a dual standard, i.e., one for the act of promulgation of the ordinance and two, for the substance of the ordinance itself. While the act itself can be validated based on of the negative approach, the substantive content of the ordinance can be made subject to the normal basic structure review test other legislations undergo. We also explain how the rights review for the substantive part of the ordinance in *State of Orissa* v. *Bhupendra Kumar Bose* ('Bhupendra Kumar Bose') could have been supplemented by using the basic structure review mechanism for a more constitutional robust approach, as is done in the case of legislations. We conclude by suggesting how this approach, if used in adjudicating the Delhi Civil Service Ordinance, will act as the 'north star' for re-establishing constitutionalism. It shall effectively check this unfettered use of the executive's 'legislative' powers, which is unclear mainly due to the mired judicial review approaches ordinances are subject to.

II. THE EVOLUTION OF THE BASIC STRUCTURE DOCTRINE: A TALE OF A FIFTY-YEAR RICH JURISPRUDENCE

The Doctrine's evolution has always had an interesting place in the discourse and debates on Indian constitutional amendments. This section of the paper tries to trace this extraordinary evolution of the doctrine and its further judicial extrapolations. Sub-Part I deals with how the Supreme Court in Shankari Prasad had accorded *carte-blanche* power to the Parliament to amend the Constitution under Article 368 and explores how the dissents in *Sajjan Singh* v. *State of Rajasthan* ('Sajjan Singh') (despite the majority following the Shankari Prasad precedent) played an important role in shaping this doctrine in the years to come. Sub-Part II expounds further on how the findings of the Court in Golaknath changed the narrative on this amendment powers of the Parliament and sowed the seeds of a basic structure doctrine. The last sub-part deals with how this doctrine attained finality and culminated through the Court's judgement in Keshavananda Bharti.

A. THE ALL POWERFUL "ARTICLE 368": FROM SHANKARI PRASAD TO GOLAKNATH

The starting point of this debate *ad-nauseum* is always anchored around the famous precedent of Shankari Prasad.[4] The Supreme Court, while putting out the fire that enraged between the power of 'rights review' under Article 13(2) and the power of the Parliament to amend the Constitution under Article 368, limited the scope of 'law' under Article 13. The Court made Article 13(2) applicable only to "those rules and regulations made in exercise of ordinary legislative power and not to amendments made to the Constitution."[5] This 1951 judgement gave the Parliament unlimited powers to amend the Constitution, up until 1965. Interestingly, at this juncture, Professor Dietrich Conrad delivered a lecture at the Banaras Hindu University on the topic, "Implied Limitations of the Amending Power", wherein he posed a hypothetical yet important question on the amending power of the Parliament.[6] He asked, "Could the amending power be used to abolish the Constitution, and reintroduce, let's say, the rule of a Moghul emperor or the Crown of England?".

This struck a chord with M. K. Nambayyar who argued the same postulation before the Supreme Court in Sajjan Singh.[7] While the majority opinion delivered by Chief Justice Gajendragadkar decided to stick with the law laid down in Shankari Prasad, two dissenting voices on the Bench truly shaped the history in many ways. Justice Hidayatullah expressed his reservations on giving the Parliament unfettered or absolute powers under Article 368 to amend the Constitution, especially concerning the rights enshrined under Part III, while the icing on the cake was that of Justice Mudolkar's opinion.[8] The origins of the 'Basic Structure Doctrine' can be found in his dissenting voice wherein he expresses doubt on whether constitutional amendments can be completely excluded from the 'rights review' of "law" under Article 13(2).[9] Moreover, he locates these "basic features" of the Constitution in its "solemn and dignified preamble" and poses a question whether a change to these "basic features" under Article 368 is merely an amendment or a rewriting of the Constitution.[10]

---

[4] Shankari Prasad Singh v. Union of India, AIR 1951 SC 458.
[5] *Id*., 458 (per Patanjali Sastri, C.J.).
[6] A.G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS, 11–26 (2006).
[7] DIETRICH CONARD, INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS, 375–430 (1967).
[8] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845, ¶¶41-46 (per Hidayatullah, J.).
[9] *Id*., ¶¶56-58 (per Mudolkar, J.).
[10] *Id*., ¶59 (per Mudolkar, J.).

B. THE TIPPING POINT OF IC GOLAKNATH

The famous Golaknath judgement was the next tipping point of the basic structure jurisprudence. An eleven-judge bench headed by Chief Justice Subba Rao was constituted. Speaking for the majority, Justice Rao traced the inalienable and transcendental nature of the fundamental rights under Part III to the Constituent Assembly debates. Placing them on a pedestal, he rejected the argument that the amending power of the Parliament can go beyond the reach of judicial review, especially when a constitutional amendment tried to alter Part III.[11] As Arvind Datar writes,

> "while Shankari Prasad and Sajjan Singh had held that parliament had unlimited power to amend the constitution, the majority in Golak Nath held that parliament could not amend any part of the Constitution in Part III that dealt with fundamental rights."[12]

This is the starting point where we witness a positivist court turning into an activist court. This triggered the Parliament to enact the 24th Amendment, which brought a slew of changes expanding the amending power of the Parliament.[13] *First***,** Article 13(4) was added to state that Article 13 will not act as an obstacle in the way of any constitutional amendment made under Article 368. *Second*, a corresponding addition was also made to Article 368 that it shall not be subject to the judicial review test under Article 13. *Third*, it clarified by changing the title of the provision from "procedure to amend" to "power to amend" of Article 368 since Golaknath's interpretation of this article stated that Article 368 merely talks about the "procedure to amend" while the "power to amend", which can be traced back to Article 246, is a legislative power of the Parliament subject to judicial review.[14]

C. KESHAVANANDA BHARATI: A GOLDEN EPOCH IN INDIA'S CONSTITUTIONAL HISTORY

The 24th Amendment's challenge led to Kesavananda Bharati which culminated the debate on the criteria with regards to deciding on the validity of constitutional amendments. A thirteen-judge bench headed by Chief Justice A. N. Ray studied this issue and decided by a wafer-thin majority on the following aspects. Nine judges expressively overruled Golaknath, holding that there is a clear distinction between an ordinary law made by the Parliament and the Constitution.[15] Seven judges, who were in favour of limiting the amending powers of the Parliament, held that the basic structure theory reconciles the Parliament's power to amend any part of the Constitution. At the same time, they emphasised the importance of limiting the amendment power to make sure no amendment violates the fundamental or essential features of the Constitution, with the other six opposing this theorisation.[16] The seven judges did not unanimously agree on the contents of the basic structure.

Common themes that arose included aspects like supremacy of the Constitution, republic and democratic forms of government, sovereignty and unity of the country, separation

---

[11] I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643, ¶19 (per Subba Rao, C.J.).
[12] SOLI SORABJEE & ARVIND DATAR, THE COURTROOM GENIUS, 53 (1st ed., 2012).
[13] The Constitution (Forty Fourth Amendment) Act, 1971.
[14] Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, Vol. 1, S.C.C. (JOUR), 45 (1974).
[15] Manoj Mate, *Two Paths to Judicial Power: The Basis Structure Doctrine and Public Interest Litigation in Comparative Perspective*, Vol. 12, SAN DIEGO INT'L L.J., 183 (2010)
[16] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 739 (per Khanna, J.).

of powers, justice, and fundamental rights.[17] The sum and substance of the evolution of basic structure doctrine is reflected in this quote by Professor Laurence Tribe: "The constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values."[18] Given the unascertained nature of the basic structure, Constitutional Courts have used this ever-expansive nature of the Doctrine to protect fundamental constitutional values not only in cases of abridgement and constitutional amendments, but also in the cases of ordinary legislations. Thus, we yearn to explore the power of promulgation of ordinance and their review vis-à-vis this 'ever-expansive' nature of the Basic Structure Doctrine.

III. ORDINANCES AND THEIR PROMULGATION: EXAMINING THE CONTOURS AND CONUNDRUMS

The Cambridge Advanced Learner's Dictionary defines ordinance as "a law or rule made by a government or authority."[19] Recognising the discussion is in reference to the Indian jurisprudence, an ordinance is an authoritative law passed by the executive when none of the Houses of the Parliament are in session, and is meant to be used as an emergency power by the Government.[20] This rule-making power is conferred upon the executive, which is, the President of India and the Governor of the State via Article 123[21] and Article 213[22] of the Indian Constitution respectively. The ordinances cease to operate if the Parliament does not approve of them within six weeks of reassembly or if both Houses reject it. Furthermore, it is mandatory for a Parliamentary session to be held within six weeks of the enactment of the ordinance. The procedure mandated applies similarly for ordinances passed by the Governor at state-level bodies.

Ordinances are sought to have the same effect as an Act of Parliament for the duration it is applicable. This instrument derives its validity and definition as a law from Article 13 of the Indian Constitution. This is clarified in two aspects. *First*, the effect of laws violative of fundamental rights and *second*, what the term "law" means. Article 13(3) states,

> "In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."[23]

Thus, it explicitly covers ordinances under the ambit of law.

Tracing it back to Article 123 of the Indian Constitution, sub-section (2) states: "An ordinance promulgated under this article shall have the same force and effect as an act of parliament, but every such Ordinance".[24] Similarly for the power that the Governor holds,

---

[17] H.M. Seervai, *Fundamental Rights Case at the Cross Road*, Vol. 75, BOM. L. REP., 47 (1973).
[18] Laurence H. Tribe, *A Constitution We Are Amending – In Defense of a Restrained Judicial Role*, HARV. LAW REV., 441 (1983).
[19] CAMBRIDGE ADVANCED LEARNER'S DICTIONARY, 1003 (3rd ed., 2008).
[20] SHUBANKAR DAM, PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES, 27-28 (2014).
[21] The Constitution of India, 1950, Art. 123(1).
[22] *Id*., Art. 213(1).
[23] *Id*., Art. 13.
[24] *Id*., Art. 123(2).

Article 213 of the Indian Constitution states that such an ordinance shall have the "same force and effect as an act of Legislature of the State."[25] These two provisions bring out two strong deliberations over the wording used. *First*, equating an ordinance with a permanent statute. *Second*, the six-week time period provided in sub-section (2) of both, Article 123 and Article 213 of the Constitution, emphasising on the process being time-bound. Another important aspect to note is that though there is a formal vesting of the power of ordinance-making in the hands of the President, he acts on the aid and advice of the Councils of Ministers, as he does in other matters. Therefore, this ordinance-making power is vested effectively in the hands of the Executive.[26]

Though linguistically, an ordinance is equated to an act, the fundamental nature and procedure applied is much different. Post the Cabinet's approval, the Ministry of Law and Justice puts forth the document as a draft bill. An act undergoes multiple deliberations and drafts to be finally accepted. This process is spread over a period of time and requires the simultaneous participation of various legislative bodies and the public that help pre-empt the effect of enacting such laws. The process is elaborately stated in the Anon Manual of Parliamentary Procedures in the Government of India.[27]

Contrarily, an ordinance, never sees the light of elaborate discussions upon its effects before it is promulgated. They are first implemented, then brought before either house of the Parliament[28] or State Legislative Assembly,[29] as the case may be. Furthermore, unlike an act that receives visibility from the general public and other interested bodies in the form of a bill, an ordinance follows a different procedure. It is not necessary for an ordinance, as for an act, under the 'rule of law' argument, for citizens to have the bare minimum involvement in public legislation.[30] Thus, having laid these differences, it would be ironic to equate the nature of an ordinance to an act. However, given the conundrum created by ordinances being included under Article 13(3) despite not being treated on par with normal legislations, a confusing jurisprudence regarding its judicial review has emerged which we shall discuss further.

IV. THE BASIC STRUCTURE DOCTRINE TO THE BASIC STRUCTURE REVIEW: THE PANACEA TO UPHOLD CONSTITUTIONALISM

The debate around constitutionalism and protection of constitutional identity in India can be classified into two phases: *First*, the pre-Kesavananda phase which was more rights-centric and *second*, post-Kesavananda phase that led to the birth of the doctrine of basic structure which was more value-centric.

A. THE RESTRICTIVE "RIGHTS VIEW" AND THE POSITION OF JUDICIAL REVIEW BEFORE KESHANVANANDA BHARATI

Prior to the advent of Kesavananda Bharati, apart from normal judicial review of executive action, a law under Article 13 could only be tested against Part III (also called the "rights review"). During the making of the Constitution, a passing point was made by one of the members during the discussions on the interim report on Fundamental Rights. Mr. Somnath

[25] *Id*., Art. 213(2).
[26] John M. Carey & Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms?* in EXECUTIVE DECREE AUTHORITY, 1–29 (1998).
[27] A.R. MURKHERJEA, PARLIAMENTARY PROCEDURE IN INDIA, 232-276 (Oxford University Press, 1983).
[28] The Constitution of India, 1950, Art. 123(2)(a).
[29] *Id*., Art. 213(2)(a).
[30] Shubankar Dam, *President's Legislative Powers in India: 2½ Myths*, Vol. 11(2), OUCLJ, 1–30 (2011).

Lahiri believed that the rights were provided to people almost "grudgingly".[31] At that time, the proviso to fundamental rights was worded such that they could be suspended under the garb of 'emergency'. The ambiguity in determining what served as a 'grave' emergency was an open invitation to the Executive and government in power to justify their actions to any extent. These fundamental rights could be suppressed completely, even in a situation that did not warrant the same. Mr. Lahiri pointed to it being a situation of a constant sword hanging above the people's head.[32] However, the framers of the Constitution consciously ensured that the people's fundamental rights serve as assurances.

The pre-Kesavananda phase that began with great uncertainty and cases like Shankari Prasad[33] and Sajjan Singh[34] proved the apprehensions of Mr. Lahiri to be accurate to a certain extent, given the all-pervading nature of the 'executive' (executive plus legislature) with regards to its amending powers. Golaknath[35] was transitioning to a phase that would help bring more clarity by evolving a framework to determine if the amendment stepped over a glaring red line. Golaknath, while limiting the powers of the Parliament (rightly so), took a very restrictive approach. It equated constitutional identity to merely the unamendable nature of fundamental rights rather than a more comprehensive approach emphasising on constitutional values. Thus, if the review test were to be applied at this juncture, it would want to protect the 10th floor of a building (rights' unamendable nature) without providing a mechanism to protect the very base of the building (the values from which these rights stem)! In other words, the judges in Golaknath evolved a text-based constitutionalism limitation on the Parliament's powers to amend rather than a value-based constitutionalism limitation. The second phase rectified this error.

B. "THE SEEDS HAVE BEEN SOWN": ANALYSING THE HOLISTIC BASIC STRUCTURE REVIEW TEST AND ITS EVOLUTION

Post-Kesavananda, courts had managed to structure and limit the amending power to specific ideals under the famous "Basic Structure Doctrine". The uncertainty of the basic structure doctrine has allowed the Supreme Court to have an ever-expansive approach to include various facets under this doctrine. While the original intent of this doctrine was to keep the amending powers of the Parliament in check, courts have tried expanding the basic structure review to ordinary legislations and executive actions too, as opposed to the usual 'rights review' they are subjected to under Article 13(2).

The first mention of using this standard to adjudicate the validity of an ordinary legislation was in *Indira Nehru Gandhi* v. *Shri Raj Narain* ('Indira Nehru Gandhi'). The Court held that:

> "The concept of a basic structure as a brooding omnipresence in the sky apart from the specific provisions of the Constitution […] is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law."[36]

Thus, the Court, in the first case where the basic structure review was applied, held it to be strictly restricted to the amending power of the Parliament.

---

[31] R.S. Dossal, *Constituent Assembly Debates on Fundamental Rights A Sidelight*, Vol.13(3), THE INDIAN JOURNAL OF POLITICAL SCIENCE, 99–107 (1952).
[32] CONSTITUENT ASSEMBLY DEBATES, Book No. 3, April 29, 1947 *speech by* SOMNATH LAHIRI, 33 (1999).
[33] Shankari Prasad Singh v. Union of India, AIR 1951 SC 458.
[34] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[35] I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643.
[36] Indira Nehru Gandhi v. Shri Raj Narain, (1975) 2 SCC 159, ¶357 (per Matthew, J.).

The next milestone which witnessed the use of the basic structure review was Justice Beg's opinion in *State of Karnataka* v. *Union of India* ('Inquiries Case'),[37] which dealt with a notification issued under §3 of the Inquires Act challenged by the State of Karnataka under an Article 131 petition. Though Justice Beg, in his opinion, converts the basic structure review as a method of interpretation, he fails to apply the same standard while interpreting legislative incompetence under Article 246.[38] This shows a departure of the traditional restriction of the basic structure review to merely constitutional amendments and considers the basic structure as an interpretative tool to check the validity of "law" under Article 13(2) which otherwise would be subject to the "rights review" test.

Later on, *Minerva Mills* v. *Union of India* ('Minerva Mills')[39] identified parameters potentially constituting the basic structure review. The constitutional amendment in question affected the basic features to an extent that the constitutional values themselves were impacted.

Thus, Justice Bhagwati, in the above decision, considered the basic structure review to examine three aspects:[40]

1. Whether the goal of the constitutional amendment is violative or suppressive of the basic features of the constitution?
2. Whether the constitutional amendment is incoherent with the original intent of the makers of the Constitution?
3. Whether the constitutional amendment may be so aligned with the basic features of the constitution that both aspects co-exist without damaging the identity of the constitution?

As interpreted by Justice Bhagwati, the basic structure review does not restrict itself to the fundamental rights but extends to "basic features" that are expressed in the Constitution as fundamental terms. It extends to subjectively analysing if the constitutional values are altered or not. At this junction, it is pertinent to note the mindful use of "basic structure" and "basic features". This distinction is highlighted by Raju Ramachandran via Justice Sikhri and Justice Khanna's opinions in the Kesavananda Bharati judgement. A basic feature is the ground 'constitutional value' itself and not the prima-facie text or wording of the constitutional provision. It is the underlying intent or idea that the provision is unconsciously protecting.[41] However, it was unclear whether this underlying idea was derived from our historical background.

This play of words was explicitly resolved in *R Ganpatrao* v. *Union of India*.[42] The petitioner, who was a co-ruler of a princely state, was bereft of his title and allowance due to the abolishment of the Privy Purses via the 26th Amendment. The Amendment was challenged on grounds of it being violative of fundamental rights that damaged the basic structure. Petitioners argued that Article 291, Article 362 and Article 366(12) were an 'integral part' of the Constitution and formed a part of the basic structure.[43] They contended that the

[37] State of Karnataka v. Union of India, (1977) 4 SCC 608, ¶¶111-120 (per Beg, C.J.).
[38] *Id*., ¶124 (per Beg, C.J.).
[39] Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶¶82-87 (per Bhagwati, J.).
[40] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA, 83 (2nd ed., 2011).
[41] Raju Ramachandran, *Supreme Court and Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, 107-133 (B.N. Kirpal, Ashok K. Desai et al, 7th ed., 2000).
[42] Raghunathrao Ganpatrao v. Union of India, 1994 Supp (1) SCC191, ¶19 (per Pandian, J.)
[43] *Id*.

removal of these articles would separate the Constitution from its historical principles and thereby, destroy the basic structure itself. Justice S. Pandian, rejecting the Petitioner's arguments, well-articulated that these 'constitutional values' were not historical and political underpinnings of the sub-continent, but rather the socio-economic, political, moral and legal principles that helped create the constitutional identity.[44]

On the other hand, Justice Kapadia's opinion in *M. Nagaraj* v. *Union of India*[45] ('Nagaraj') provides an alternative application of the basic structure review, i.e. the "width test" and the "identity test". The former assigns the Article 13(2) judicial review to constitutional amendments to check if the violation to fundamental rights is greater than the other state actions under Article 13. The "identity test" focuses on protecting the Constitution and its values. It seems to be more appropriate since it protected the 'constitutional values' rather than focusing on the existing Constitutional text. Thus, it was more accurate as it directly brought the constitutional amendment in challenge to face the very basic feature of the Constitution. [46]

C. A NEW DAWN: EXTENSION OF THE BASIC STRUCTURE REVIEW TO EXECUTIVE ACTIONS AND THE TALE FROM WAMAN RAO TO PM BHARGAVA

While the debate with regards to the inclusion of legislations under the basic structure review has had a chequered history, discussing the history of the inclusion of executive action would be worthwhile in the context of discussing ordinances. With respect to executive actions, in *Waman Rao* v. *Union of India*[47] ('Waman Rao') (in context of a national emergency under Article 352) and *SR Bommai* v. *Union of India*[48] **(**'Bommai'**)** (in context of President's rule), we see how the basic structure review has been used to test the validity of an emergency proclamation. While the Court avoided answering this question in Waman Rao*,* in Bommai*,* it ruled that secularism and federalism are basic features of the Constitution which it used to delineate a legitimate and illegitimate emergency proclamation. Another important distinguishing feature, as seen in Justice Sawant's majority opinion, is how the normal judicial review standard was superseded by the basic structure review in those executive action which had constitutional ramifications.[49] The Supreme Court surely was turning from an activist court to a revisionist court at this juncture. This notion is aptly expressed in the words of Ashok Desai:

> "indeed, the temptation to invoke the basic structure doctrine even in areas which do not involve constitutional amendments is so strong that the court has sometimes referred to the doctrine even when considering challenges to executive orders … an instructive example of the imprecise radiations of the doctrine arose in Bommai."*[50]*

This logical reasoning was further followed and expanded in the *BR Kapur* v. *Union of India*[51] where Justice Bharucha's opinion developed the doctrine of basic structure review to apply to executive action independent of normal judicial review over the Governor's appointment of a minister with a criminal antecedent, considering it went against the rule of

---

[44] *Id*., ¶107 (per Pandian, J.).
[45] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶28.
[46] KRISHNASWAMY, *supra* note 40, 78.
[47] Waman Rao v. Union of India, (1981) 2 SCC 282, ¶¶56-63 (per Chandrachud, C.J.).
[48] S. R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶100-104,153 (per Sawant, J.).
[49] *Id*.
[50] Ashok Desai, *Constitutional Amendments and the "Basic Structure" Doctrine* in DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW, 90 (2000).
[51] BR Kapur v. Union of India, (2001) 7 SCC 231, ¶28 (per Bharucha. J.).

law which was recognised to be a basic structure value. In the decision of *Aruna Roy* v. *Union of India*[52] , this review mechanism was adopted, as seen in the majority opinion of Justice Shah, which considered secularism to be a basic structure value in deciding the validity of the new educational curriculum on the grounds that it violated secularism. Similarly, *PM Bhargava* v. *University Grants Commission*,[53] ('PM Bhargava') challenged the inclusion of "Vedic Astrology" courses in PG Diplomas by the UGC which according to the petitioner violated the basic feature of secularism. The Court affirmed that the basic structure can be a basis to look at the validity of an executive action.

This system of review of focusing only on the values made it even more abstract. Values as such can neither be understood from only judicial precedents, nor through the practices of other countries. They are unique and decided upon accordingly for India. It all boils down to taking assistance of the constitutional text and the Court's discretion and interpretation. Another major fallback we notice is the lack of a uniform standard evolved to check executive action or legislations under the basic structure review. However, as Professor Sudhir Krishnaswamy theorises, given the evolution of the overarching nature of the basic structure used as a constitutional review doctrine by Courts and the greyness and haziness on its precise contours, Constitutional Courts have considered this mode of review to invalidate normal legislations or even executive actions. The basic structure review, classifies as a "hard judicial review" wherein the review for compliance with constitutional values is stricter. [54] In further discussions, we suggest the inclusion of ordinances and their review under the basic structure by examining the various facets of ordinances from their promulgation to their judicial scrutiny.

V. THE EVOLUTION OF REVIEW STANDARDS FOR ORDINANCES AND THE TWO PRACTICED STANDARDS

On the basis of judicial precedents and efforts to reach a solution on the review of ordinances, Shubhankar Dam categorises the approach adopted by the Courts while judicially reviewing ordinances into two parts.[55] First, the Negative Approach, wherein Courts consider Acts and ordinances on the basis of their features and review them on similar grounds holding that since motives don't determine the validity of legislations, the same shouldn't be applicable to ordinances. Second, the Intermediary Approach, that takes a more plausible route by differentiating between Acts and ordinances and setting different grounds of review.

A. THE NEGATIVE APPROACH: A STANDARD OF REVIEW BEAMING OF 'NEGATIVITY'

Traditionally, Courts have adopted the negative approach. The contours of the negative approach need to be understood as the equation of legislations and ordinances. As held in *SKG Sugar Limited* v. *State of Bihar*, the governor's satisfaction under Article 213 is not justiciable, and it cannot be questioned on the ground of error of judgement or otherwise in a court of law, which is an embodiment of the negative approach that courts have taken when any ordinance is challenged.[56] In *RK Garg* v. *Union of India* ('RK Garg'), the negative

[52] Aruna Roy v. Union of India, (2002) 7 SCC 368, ¶56 (per Shah, J.). While Justice Shah pondered on this review mechanism centered around secularism as a basic feature, he does not find the curriculum to be in direct blatant violation of this feature and hence ruled against the contention of the petitioners.
[53] PM Bhargava v. University Grants Commission, (2004) 6 SCC 661, ¶7 (per Mathur, J).
[54] KRISHNASWAMY, *supra* note 40, 121.
[55] DAM, *supra* note 20, 178-185.
[56] SKG Sugar Limited v. State of Bihar, (1974) 4 SCC 827, ¶16.

approach stems from Justice YV Chandrachud's opinion that under Article 123, the President is conferred the "power to legislate".[57] Moreover, even in *AK Roy* v. *Union of India* ('AK Roy'), the Supreme Court emphatically held that an ordinance is "the exact equation, for all practical purposes, between a law made by the Parliament and an Ordinance issued by the President."[58] The culmination of this was expressed in the opinion of the then Chief Justice Y.V. Chandrachud in Nagaraj wherein he held, an ordinance could not

> "be invalidated on the ground of non-application of mind […] The power to issue an ordinance was 'not an executive power but [a] power of the executive to legislate and because 'transferred malice' was unknown to the field of legislation, an ordinance could not be invalidated on the ground of mala fide intent, either."[59]

Thus, Nagaraj is explicitly clear that motive has no role in determination of Presidential Satisfaction which is the pre-requisite under Article 123.

In *Reddy* v. *State of AP*, the Court was crystal clear that "while the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power."[60] The negative approach was further solidified and assented to in Krishna Kumar Singh. The majority opinion authored by Justice D.Y. Chandrachud held:

> "The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review, in other words, would enquire into whether there was no satisfaction at all."[61]

The negative approach has three primary problems with regards to its evaluation of judicial review. It rather leads us into a paradox. The first problem is the usage of the metric of mere "presidential satisfaction", which is too restrictive to test the validity of an ordinance and its promulgation. If we go by the test laid down in Bommai and *Rameshwar Prasad* v. *Union of India,* we encounter an expanded judicial review for presidential satisfaction. Article 356 requires four components: presidential satisfaction, the said satisfaction being within the 'proper scope' of Article 356, objective records to support the said satisfaction and 'legitimate inference' based on those records.[62] However, Article 123 restricts itself to the first component: mere presidential satisfaction. Furthermore, though Courts were cognisant of the entire test, they only cared to apply the first prong.

The second issue that arises from the negative review is the omission of the 'circumstances' threshold that both Articles 123 and 213 mandate for a competent formation of presidential or gubernatorial satisfaction. From R. K. Garg to Krishna Kumar Singh, the negative approach completely leaves out the 'circumstances' threshold. Unfortunately, Courts have not yet been able to cross the bar of questioning the intent; it is assumed to be untouchable and unquestionable, which doesn't allow the judiciary to pierce the veil of motives which hide behind the apparent 'intent'.

---

[57] R. K. Garg v. Union of India, (1981) 4 SCC 675, ¶¶4-5 (per Bhagwati, J.).
[58] A. K. Roy v. Union of India, (1982) 1 SCC 271, ¶14 (per Chandrachud, C.J.).
[59] M. Nagaraj v. State of Andhra Pradesh, (1985) 1 SCC 523, ¶36 (per Chandrachud, C.J.).
[60] Reddy v. State of Andhra Pradesh, AIR 1985 SC 724, ¶14 (per Bhagwati, J.)
[61] Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1, ¶105 (per Chandrachud, J.)
[62] S. R. Bommai v. Union of India, (1994) 3 SCC 1; Rameshwar Prasad v. Union of India, (2006) 2 SCC 1, ¶208.

Third, the negative approach does not account for the scope of misuse of these ordinances. An example would be the three ordinances challenged in *DC Wadhwa* v. *State of Bihar* ('DC Wadhwa'), namely Bihar Forest Produce (Regulations of Trade) Third Ordinance, 1983, the Bihar Intermediate Education Council Third Ordinance, 1983 and the Bihar Bricks Supply (Control) Third Ordinance, 1983.[63] All were operative for a period of more than 11 years, extending up to 13 years 11 months and 19 days. The ordinances were 'kept alive'[64] by repeated promulgation. Post-emergency, though the number of ordinances shot up, the first few years can be attributed to the advent of liberalisation, privatisation and globalisation in India that required immediate policy changes to be made.[65] However, according to scholarly opinions, under the Indira Gandhi regime, many ordinances were uncalled for as they bypassed the normal legislative route.[66] Examples include the callous SEBI ordinance where the Finance Ministry had taken complete control over the situation[67] or the Bank Nationalisation where the Cabinet was not consulted before sending it to President V.V. Giri, who passed it as law.[68] Unfortunately, even the exception that DC Wadhwa carved out that Presidents or Governors can re-promulgate ordinances when there is too much 'legislative business',[69] worsens the case by voluntarily providing a loophole to escape and assume the role of the legislature. Hence, it is important to switch the lane of testing the validity of an ordinance from the Negative Approach to the Intermediate Approach.

B. THE INTERMEDIATE APPROACH AND THE MIDDLE GROUND JURISPRUDENCE: HITS AND MISSES

The departure from the negative approach slowly started from the 1970s. With regards to the Bank Nationalisation case, wherein the constitutional validity of the 1969 Ordinance was challenged on the grounds of necessity and motive, the Supreme Court again refused to interfere on the grounds of the negative approach.[70] However, an addendum, interestingly, is the addition of invalidation of Presidential satisfaction if it was *mala fide*. Moreover, as observed in A. K. Roy,[71] the intermediate approach was given more steam wherein apart from the presidential satisfaction test laid down in the negative approach, the Court, while holding that this presidential satisfaction can be challenged under judicial review had further added that it is important for the government to establish the circumstances under which the ordinances promulgated.[72] As noted scholar MP Jain remarks, a casual challenge to the circumstances leading to the President's satisfaction to issue the ordinance in question can be invalidated if it is under an imaginary state of affairs or *mala fide* against the normal

---

[63] D. C. WADHWA, RE-PROMULGATION OF ORDINANCES: A FRAUD ON THE CONSTITUTION, 53-60 (1983).
[64] D. C. Wadhwa v. State of Bihar, AIR 1987 SC 576, ¶4.
[65] Rahul Srivastva, *Congress Passed 456 Ordinances in 50 Years. That's 9 a Year,* January 21, 2015, available at https://www.ndtv.com/india-news/congress-passed-456-ordinances-in-50-years-thats-9-a-year-730189 (Last visited on July 04, 2023).
[66] DAM, *supra* note 20, 85.
[67] *Id*.
[68] Chandrashekaran Mridual Bhardwaj, *An Analysis of The Power to Issue Ordinance in India*, Vol. 42(3), STATUTE LAW REVIEW, 305-312 (2021).
[69] D. C. Wadhwa v. State of Bihar, AIR 1987 SC 576, ¶7; *See also* Gyanendra Kumar v. Union of India, AIR 1997 Del 58 (where the Delhi High Court validated the act of re-promulgation of those ordinances that couldn't be placed before the Parliament due to increased volume of business which shows how the loophole that DC Wadhwa carved in the form of an exception was utilised by the Executive to engage in this action".
[70] Kusum W. Ketkar & Suhas L. Ketkar, *Bank Nationalization, Financial Savings, And Economic Development: A Case Study O=of India*, Vol. 27(1), THE JOURNAL OF DEVELOPING AREAS, 69-84 (1992).
[71] A. K. Roy v. Union of India, 1982 (1) SCC 27 1982, ¶26 (per Chandrachud, J.).
[72] DAM, *supra* at 20, 178.

legislative process.[73] A similar tone of a review mechanism can be in Justice Sujatha Manohar's opinion in the pre-appeal judgement of Krishna Kumar Singh where she expanded the review for ordinance to include parameters "limited duration", "scrutiny of legislature" as essential features to determine the governor's satisfaction's *bona fide* nature.[74] Moreover, another judgement in this regard is this case of Hasanabha, where Justice Saldanha went a step further holding that the invalidation of the Governor's satisfaction can be on the basis of pure motives behind gubernatorial satisfaction. Justice Saldanha, in his order, said that the admission of the Chief Minister in the Legislature showed that the real motive was to further the interests of the ruling party. Justice Saldanha went on to call this ordinance to be "a total and complete sabotage", and held that the required circumstances didn't exist for a proper manner of gubernatorial satisfaction.[75]

As Dam advocates, the Intermediary Approach sits as the perfect middle ground to the conundrum. Thus, the Intermediary Approach brings a harmonious understanding of Article 123 and Article 356 to the extent that the scope of judicial review under the former to 'purposive' as well. Thus, the objective test would check if the presidential satisfaction fits into the definition and scope while the subjective test would focus on materials and inferences that back the claim of satisfaction which covers the circumstances threshold under Article 123 and Article 213. Furthermore, the burden of proof will be on the petitioner who claims that the executive had an improper motive in issuing the ordinance.

C. BASIC STRUCTURE TO THE RESCUE AGAIN: FILLING THE GAPS OF THE EXISTING JUDICIAL REVIEW MECHANISMS

The question, then, arises on how to relate the basic structure doctrine to these tests. While the negative approach can be seen to be completely apathetic to the spirit of judicial review, infusing basic structure review into the intermediate approach would be a suggestion we would like to build on. While the intermediate approach merely looks at the circumstances under which an ordinance was undertaken to make sure there was *bona fide* presidential satisfaction, what is important to note, in addition to this, is whether the Courts should consider the motives behind the promulgation of an ordinance and if the motive is in violation of the basic structure doctrine. However, with the culmination of the negative approach in Krishna Kumar Singh, we also try and examine how this approach can be examined to review an ordinance in a more basic structure compliant manner. This brings us to an interesting crossroad, through the help of some comparative perspectives.

Let us keep the starting point of the evolution of the standard from the cases of Hasanabha and Bhupendra Kumar Bose, both involving elections-based ordinances, with the former undertaking the intermediate approach and the latter undertaking the negative approach. The basic structure value that can be called into question in both cases is that of free and fair elections, which was recognised in the landmark case of Indira Nehru Gandhi. Before moving on to the standard formulation, there exists another aspect which should be kept in mind, which is the motive attribution test. It is a popular doctrine formulated by the United States Courts to judicially scrutinise the legislative intent of the Congress while enacting legislations.

---

[73] M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 174–175 (2009).

[74] Krishna Kumar Singh v. State of Bihar, AIR 1998 SC 2288, ¶37 (per Manohar, J.) (this two-judge bench decision being a split verdict was referred to a larger bench which was adjudicated by a constitution bench in 2017).

[75] Hasanabha v. State of Karnataka, AIR 1998 Kant 91, ¶7 (per Saldanha, J.) (while the single judge order used the motives test under the intermediate approach, it eventually overruled in appeal by the Division Bench of the Karnataka High Court).

The motive approach, *in toto,* places importance on not only the process by which the rule or decision was made, but also the intentions behind the criteria or objectives which the rule-maker considers while making a law. This approach can be seen in the invalidation of various acts of the Congress by the United States Supreme Court. Professor Nelson has shown this in his study of the positivist court turning into an activist one, wherein motives of the Congress were questioned as a colourable exercise of its legislative authority which imposed a "purpose-based" limitation on Congress' law-making power.[76] One such decision is Justice Powell's majority opinion in *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation.* Dealing with a zoning ordinance which prevented people of coloured origins to reside in residential neighborhoods, Justice Powell held that while trying to ascertain the legislative intent of the ordinance using the motive approach, judges must look at the "sequence of events leading up to the challenged decisions", the "legislative or administrative history" and in extraordinary cases, may even summon individual legislators "to testify concerning the purpose of the official action".[77]

In Hasanabha, an ordinance was passed in order to allow office bearers of the existing agricultural produce marketing committee structure to continue due to the failure of the ruling party to get a majority in these committees. Justice Saldanha, while invalidating the ordinance, for the first time in Indian jurisprudence, extended the aspect of motive to ascertain whether there was a colourable exercise of power. He stated: "the action was ill-timed, that the challenge to the 'action-on the ground of *mala fides* is well founded in so far as' it totally and completely subverts the electoral process whereby the Agricultural Produce Market Committees ('APMCs') are required to be constituted by elected representatives and not nominated persons."[78] While he invalidated the ordinance on the grounds of it being a colourable exercise of power by relying on AK Roy, SR Bommai and DC Wadhwa, holding that the circumstances didn't allow for a *bona fide* presidential satisfaction, he did not venture into a stricter scrutiny. A basic structure review would have allowed the Court to have a harder review as the act of promulgation of this ordinance was a blatant violation of the free and fair elections value which Indira Nehru Gandhi recognised. This would have been a fit case where the Court could have also ventured into the 'identity test'.[79] While the evolution of this test came after the pronouncement of Hasanabha, given the real motive, as ascertained by the Court, was merely to protect the political interests of the ruling dispensation, the Court surely could have extended the basic structure review since this action constituted a blatant undermining of free and fair elections which constitutes an integral feature of the Constitution and undermining the same threatens the Constitutional identity.

If the recent example of the Delhi Civil Service Ordinances is taken into account, there are again serious questions of federalism involved, which has been held to be a basic structure feature. Given the judgement of the Supreme Court in the 2018 in *Government of NCT of Delhi* v. *Union of India*,[80] as well as the reiteration of same by a Constitutional Bench in 2023, it has been held that those subjects mentioned in the State and the Concurrent List under Article 246, barring the three exceptions, shall provide the necessary competence for the

[76] Caleb Nelson, *Judicial Review of Legislative Purpose*, Vol. 83, N. Y. U. LAW REV., 1784 (2008).
[77] Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), ¶¶267-268 (while Justice Powell did not find any invidious motive in violation of the 13th Amendment to the US Constitution with regards to the zoning ordinance's alleged discriminatory nature, he did use the motive attribution test to judicially review Congress's legislative intent behind passing the Zoning Ordinance).
[78] Hasanabha v. State of Karnataka, AIR 1998 Kant 91, ¶7.
[79] While the "identity test" arose of the Nagaraj judgement in 2006, the authors have juxtaposed the same in the Hasanabha judgement analysis to show how the court using the basic structure review could have invalidated the Ordinance given the mischief it tries to create with regards to free and fair elections.
[80] Government of NCT Delhi v. Union of India, 2018 8 SCC 501.

legislative assembly of Delhi to enact laws on them.[81] Another question that arises is whether the exceptional circumstances requirement under Article 123(1) is satisfied. The legislation was brought in just two weeks before the onset of the monsoon session of the Parliament, thereby attempting to bypass the ordinary route of legislative approval. Since, there are questions of federalism and separation of powers (both basic structure features) involved, it is our opinion that extension of the basic structure review along with the intermediate approach of judicial review of this Ordinance shall be the most appropriate review mechanism.

Thus, along with the intermediate standard, while conducting a judicial review of an ordinance, the Court should also consider whether the ordinance is affecting a basic structure value. The Court can take help of the identity test and the width test to see if the motive of the executive is in contravention of a basic structure value at this stage. After determining that there has been a *prima facie* violation of a basic structure value, the Court, apart from adopting the intermediate approach, can also add the basic structure review as addendum to look at the motive of the executive promulgating the ordinance.

However, given the recent position in Krishna Kumar Singh, where there is an equation of laws and ordinances under the negative approach, a standard can be evolved by the Courts wherein the Courts can apply the Basic Structure Review the same way they scrutinise a normal legislation. There is also a requirement to draw a distinction between the act of promulgation and the substantive nature of the ordinance. While courts can leave out the attribution of motive and merely look at presidential satisfaction with regards to the act of promulgation, Chandrachud J. does provide for a window where motives can be looked into by courts when he uses the term "oblique". However, even if future courts decide to leave aside motive from the judicial review of ordinances under the negative approach with regards to the act of promulgating while equating legislations and ordinances to limit judicial review, since the basic structure review is used to (in)validate the substance of normal legislations as seen from the judicial precedents from Indira Nehru Gandhi to PM Bhargava, the same can be used to strictly scrutinise the substance of the ordinance. Moreover, this approach can be seen in Bhupendra Kumar Bose. In Bhupendra Kumar Bose, the aspect that was being undermined was the basic structure value of free and fair elections via the State of Odisha's ordinance of validating a fabricated electoral roll list which was declared void by the High Court. Chief Justice Gajendragadkar overturned the Odisha High Court's order while writing for the majority and held in favour of the ordinance by stating:

> "but if it is held that in promulgating the validating ordinance the governor was exercising his powers under Art. 213(1) and his legislative competence in that behalf is not in doubt, then it is difficult to appreciate how the high court should have allowed itself to be influenced by the grievance made by Mr. Bose that he had been deprived of the fruits of his success in the earlier writ petition".[82]

While this again brings us back to the negative approach test which limits the scope of review to Article 213(1)'s requirement of only gubernatorial satisfaction with regards to the act of promulgation, it surely extended testing the substance of the ordinance using the rights review under Article 13(2). The Court concluded while there existed a gap with regards to the need of promulgating this ordinance, given it undermined electoral sanctity which is a key element for democratic constitutionalism, nonetheless, the ordinance should be held valid in the larger public interest of the state exchequer. This is the exact gap which the basic structure review can fill by asking the question on whether allowing fabricated voter lists to continue via

[81] State (NCT of Delhi) v. Union of India, 2023 SCC OnLine SC 606, ¶176(c) (per Chandrachud, C.J.).
[82] State of Orrissa v. Bhupendra Kumar Bose, AIR 1962 SC 945, ¶11 (per Ganjendragadkar, C.J.).

an ordinance does or does not violate the idea of free and fair elections, which is a cherished basic structure value.[83] Thus, when there is a constitutional void recognised by the Court despite a normal review test or the rights' review test being satisfied, it is the most appropriate stage to extend the basic structure review to undertake a stricter scrutiny of an ordinance.

VI. CONCLUSION

The golden jubilee occasion of India being introduced to the iconic concept of Basic Structure Doctrine compels us to wonder in what ways did the Doctrine transform our understanding and save the Constitution from any further damage. The basic structure, that was introduced as a desperate attempt to shield the Indian Constitution from the unfettered misuse by the majority Government, now serves as a sword. We have tried to extend this sword-shield mechanism that the basic structure envisions, to the review of ordinances.

While the classical approaches do not solve the purpose, there is a need of attaching accountability and non-arbitrariness with regards to promulgation of ordinances. Thus, with reference to existing approaches, we have attempted to provide a succinct middle ground. It is the culmination of the negative and the intermediary approach, and finding the middle path that can be applied along with the basic structure review which helps in filling this gap. This shall simultaneously ensure that the constitutional values are not disturbed, thereby saving the 'identity' of the Constitution.

The application of this mixed approach shall ensure that we protect the constitutional values which the basic structure aimed to shield 50 years back. The Supreme Court has been keen on referring the Delhi Services Ordinance to a five judge Constitution Bench.[84] It would be a wonderful opportunity for the Supreme Court to apply the Basic Structure Review to this case, given the ramifications it has on Centre-State relations, federalism and separation of powers. Probably, a *tabula rasa* in the jurisprudence of ordinances and its promulgation and what better year to do it than the golden jubilee of the Basic Structure Doctrine itself!

[83] While the authors are aware that the Bhupendra Kumar Bose case was adjudicated in 1961 with the basic structure doctrine coming into vogue only 1973, this is just used an illustration to understand the gap created by the negative approach due to its limited scope of review to show the basic structure review would have supplemented the rights review approach the court takes while determining the validity of the substance of the Ordinance.

[84] Times of India, *Delhi Ordinance Case: SC Indicates Matter Maybe Referred to Constitution Bench*, July 17, 2023, available at https://timesofindia.indiatimes.com/india/delhi-ordinance-case-sc-indicates-matter-may-be-referred-to-constitution-bench/articleshow/101824171.cms?from=mdr (Last visited on July 4, 2023).