

# Judicial Review of Ordinances in India: Safeguarding the Basic Structure in the Face of Executive Power

**Dr. Shashank Misra**

Principal, Law, Dewan Law College

## **ABSTRACT:**

The issuance of ordinances by the government and its ensuing judicial examination has historically been a controversial topic in India's constitutional dialogue. Recent developments, notably the Delhi (Civil Services) Ordinance of 2023, have rekindled discussions on the effectiveness and suitability of the judicial review processes established for such instruments. This study aims to critically examine the methods of judicial review of ordinances, specifically concerning the Basic Structure theory, a fundamental element of Indian constitutional law as established in "*Kesavananda Bharati v. State of Kerala* (1973)." The paper commences by delineating the constitutional framework before the "*Kesavananda Bharati*" verdict, emphasizing the imperative of protecting the Constitution from capricious modifications. It subsequently explores the post-*Kesavananda* period, during which the Supreme Court employed the Basic Structure test in its rulings to evaluate legislative and executive activities, therefore fortifying the sanctity of fundamental constitutional values. The debate centres on the analysis of judicial review mechanisms relevant to ordinances. This analysis utilizes the conceptual frameworks of negative and intermediary methods to review, as described by Professor Shubhankar Dam, to evaluate their relevance and sufficiency in the context of ordinances. These two methodologies—though varying in scope and application—function as mechanisms to guarantee that ordinances, especially those affecting essential constitutional principles, do not compromise the Basic Structure. The study presents a system for analyzing ordinances that is consistent with the ideas of the Basic Structure doctrine, based on a collaborative and nuanced analysis. The paper proposes a strong framework for judicial review to guarantee that ordinances, particularly those impacting fundamental constitutional principles, get thorough examination to preserve the Constitution's integrity.

**KEYWORDS:** Ordinances, Judicial Review, Basic Structure Doctrine, "*Kesavananda Bharati*", Delhi Civil Services Ordinance, Negative Approach, Intermediary Approach, Executive Power, Constitutional Safeguards.

## **1. INTRODUCTION**

Following the decision of the "*Constitution Bench in NCT v. Union of India*," the Delhi (Civil Services) Ordinance recently issued by the Central Government revived the debate on the Executive's power to issue ordinances.<sup>1</sup> This discussion emphasizes not only the need for publication but also a fundamental

---

<sup>1</sup> P.D.T. Acharya, *The Legality of the Delhi Ordinance*, THE HINDU, July 03, 2023, Available At

component of India's constitutional history: the *basic structure theory*. Originally adopted in 1973, the basic structure theory has been instrumental in upholding constitutional values despite criticism for reflecting judicial overreach by non-elected judges. Still, the philosophy has survived over time and is extending its impact.<sup>2</sup> With special focus on court scrutiny and the validity of ordinances in line with constitutional values, this essay attempts to investigate the relationship between basic structure and the issuing of ordinances.<sup>3</sup> The second part of the research charts the development of the fundamental structural theory. It looks at the scholarly arguments on the theory of implied limitation—more especially, on Parliament's power to change the Constitution. Beginning with “*Shankari Prasad Singh v. Union of India*”<sup>4</sup> (hereinafter *Shankari Prasad*), it follows “*IC “Golaknath” and Ors v. State of Punjab*” (hereinafter “*Golaknath*”) and ends with “*Kesavananda Bharati v. State of Kerala*” (hereinafter “*Kesavananda Bharati*”). Establishing that some of the Constitution's basic structure is immutable as they define it, “*Kesavananda Bharati*” marks a turning point in Indian constitutional law.<sup>5</sup> Part three addresses Article 123 and 213 of the Constitution's authority of the Executive to create ordinances. This part looks at the constitutional framework for the publication of ordinances and their consequences, together with the debate on whether ordinances should be considered as Acts of Parliament and their classification under the name “*law*” in Article 13.<sup>6</sup> It looks at the constitutional scrutiny ordinances go through and the court examination of them. Part four examines the fundamental idea of a process for judicial review of legislative and executive activity. It looks at the prelude to and following “*Kesavananda Bharati*” as well as the several readings of the fundamental ideas among legal academics.<sup>7</sup> This segment tries to clarify the meanings of terms like “*integral parts*” and “*basic features*” and their applicability in court review. It underlines the strict review judges undertake when assessing laws or government policies that can compromise the basic structure of the Constitution. The growing influence of the basic structure theory in assessing not only constitutional revisions but also regular legislation and presidential directives under judicial scrutiny. Part five looks at how the Supreme Court and High Courts assess the validity of ordinances, particularly stressing two approaches defined by Professor Shubhankar Dam: the negative and intermediate ones. Considered as constrictive is the negative approach, which evaluates the President's happiness in publishing the ordinance only. The intermediate approach considers the background of the ordinance's issuing. The paper uses the *Hasanabha v. State of Karnataka* case to show how the court assessed legislative purpose in cases whereby an ordinance affected a basic structural basis.

The Supreme Court's stance in “*Krishna Kumar Singh v. State of Bihar*” has confirmed a negative approach, hence the article proposes a twofold test for assessing ordinances: one for the act of publishing and another for the substance content of the ordinance. The act might be justified by a negative perspective, but the content of the ordinance has to be routinely reviewed under the basic structural

---

<https://www.thehindu.com/news/national/the-legality-of-the-delhi-ordinance/article67038623.ece>.

<sup>2</sup> 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).

<sup>3</sup> ARUN SHOURIE, *COURTS AND THEIR JUDGMENTS: PROMISES, PREREQUISITES, CONSEQUENCES*, 399–421 (2001).

<sup>4</sup> *Shankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

<sup>5</sup> *Id.*, 458 (per Patanjali Sastri, C.J.).

<sup>6</sup> A.G. Noorani, *Constitutional Questions and Citizens' Rights*, 11–26 (2006).

<sup>7</sup> Dietrich Conard, *Indian Year Book of International Affairs*, 375–430 (1967).

theory under ordinary court authority. The study suggests that the basic structure test would enhance the rights review approach used in “*State of Orissa v. Bhupendra Kumar Bose*,” therefore providing a more constitutionally exact assessment of ordinances. The conclusion emphasizes how using this dual-standard approach to the Delhi Civil Service Ordinance might serve as a basic foundation for restoring constitutionalism. This approach guarantees that the Executive’s legislative powers are under examination, therefore addressing the ambiguities and constraints contained in current judicial review criteria concerning ordinances.

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

The evolution of the basic structure hypothesis has been a main focus of discussion on changes to the Indian constitution. The first half of this chapter traces the development of the theory and examines important court decisions. The key case “*Shankari Prasad*” demonstrated that Article 368 gives Parliament unquestionable power to change the Constitution. Under Article 13(2), the Court limited the concept of “*law*” to regular legislative actions and excluded constitutional modifications, therefore restricting it just to ordinary legislative activity. With this resolution, Parliament could change the Constitution free from judicial control. Nevertheless, even though the “*Shankari Prasad*” precedent was upheld in the case of “*Sajjan Singh v. State of Rajasthan*,” the case had rather strong opposing opinions that greatly affected<sup>9</sup> the later development of the basic structure theory.<sup>10</sup> In his dissent, Justice Hidayatullah expressed concerns about the hand-off of unbridled power to Parliament, particularly with relation to fundamental rights defined in Part III of the Constitution. Justice Mudolkar then asked if changes to the “*basic features*” of the Constitution could be categorized as simple amendments or as a thorough revision of the document. Part II examines how the “*Golaknath*” case affected the debate on Parliament’s modifying power. Reversing the “*Shankari Prasad*” decision, the Court decided in “*Golaknath*” that Article 368 of Parliament cannot change or modify the fundamental rights inherent in Part III of the Constitution.<sup>11</sup> This ruling started the evolution of the basic structure theory by emphasizing the protection of fundamental rights from unconstitutional changes.<sup>12</sup> Sub-Part III clarifies the conclusive crystallization of the basic structure hypothesis in “*Kesavananda Bharati v. State of Kerala*.”<sup>13</sup> This ruling was a turning point in Indian constitutional law since the Supreme Court decided that Parliament could not alter the “*basic structure*” of the Constitution even if it might amend its wording.<sup>14</sup> This case clearly shows that particular fundamental values of the Constitution could not be changed by ordinary parliamentary processes, therefore opening the path for judicial review of constitutional amendments.<sup>15</sup>

<sup>8</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845, ¶¶41-46 (per Hidayatullah, J.).

<sup>9</sup> *Id.*, ¶59 (per Mudolkar, J.).

<sup>10</sup> *Id.*, ¶¶56-58 (per Mudolkar, J.).

<sup>11</sup> *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643, ¶19 (per Subba Rao, C.J.).

<sup>12</sup> SOLI SORABJEE & ARVIND DATAR, *THE COURTROOM GENIUS*, 53 (1st ed., 2012).

<sup>13</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 739 (per Khanna, J.).

<sup>14</sup> The Constitution (Forty Fourth Amendment) Act, 1971.

<sup>15</sup> Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, Vol. 1, S.C.C. (JOUR), 45 (1974).

A turning point in the development of the basic structural idea was the “*Golaknath*” decision.<sup>16</sup> Chief Justice Subba Rao chaired an eleven-judge bench in the case that emphasized the inherent and transcendental qualities of fundamental rights as defined in Part III of the Constitution. Particularly in cases involving the modification of fundamental rights, the Court rejected the claim made by the Constituent Assembly debates that Parliament’s modifying power could avoid court inspection.<sup>17</sup> Arvind Datar points out that past rulings like “*Shankari Prasad*” and “*Sajjan Singh*” gave Parliament unbridled power to change the Constitution; yet, the “*Golaknath*” case made clear that Parliament is not allowed to change any part of Part III, which deals with fundamental rights. This change marked the beginning of a metamorphosis as the Court moved from a mostly positivist viewpoint to one marked by court activism. Parliament created the 24th Amendment in response to “*Golaknath*”, therefore changing the constitutional framework. Article 13(4) was passed, therefore suggesting that Article 13 has no bearing on constitutional revisions carried out under Article 368. Moreover, Article 368 changed to indicate that under Article 13 court review would not be possible. Reacting to the Court’s interpretation in “*Golaknath*” that Article 368 merely defined the amendment process, the amendment changed the title of Article 368 from “*procedure to amend*” to “*power to amend*,” so reflecting the legislative power of Parliament, subject to judicial review.

The struggle against the 24th Amendment produced the historic case “*Kesavananda Bharati*” v, therefore defining a major turning point in Indian constitutional history. Under Chief Justice A. N. Ray, a thirteen-judge court examined the degree of Parliament’s power to change the Constitution. Nine justices of the Court reversed “*Golaknath*” and maintained a distinction between common law and the Constitution. Promoting the limitation of the amending power, seven judges developed the basic structure theory, arguing that even if Parliament could change the Constitution, it could not change its fundamental form. Still, the judges came to agree on the exact content of the basic structure.<sup>18</sup> Notable concerns that arose were constitutional supremacy, republicanism and democratic government, sovereignty, unity, separation of powers, fairness, and basic liberties. At “*Kesavananda Bharati*”, the evolution of the basic structure notion peaked as the Court emphasized the Constitution as both a framework for government and a statement of the fundamental values of the country. Courts have applied this approach in both constitutional amendment procedures and the assessment of ordinary legislation, as the flexible nature of the Basic structure allows them to do. Especially with relation to ordinances and their analysis, the theory’s broad reach is crucial in safeguarding fundamental constitutional values.

### 3. ORDINANCES AND THEIR PROMULGATION: EXAMINING THE CONTOURS AND CONUNDRUMS

“*Ordinance*,” according to the Cambridge Advanced Learner’s Dictionary, is a law or rule passed by a body of government. An ordinance in Indian law is legislation passed by the government while Parliament is not in session.<sup>19</sup> Its intended use is as an emergency power given to the government. Articles 123 and 213 of the Indian Constitution respectively specify that the Governor of a State and the

<sup>16</sup> 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)

<sup>17</sup> H.M. Seervai, *Fundamental Rights Case at the Cross Road*, Vol. 75, BOM. L. REP., 47 (1973).

<sup>18</sup> Laurence H. Tribe, *A Constitution We Are Amending – In Defense of a Restrained Judicial Role*, HARV. LAW REV., 441 (1983).

<sup>19</sup> CAMBRIDGE ADVANCED LEARNER’S DICTIONARY, 1003 (3rd ed., 2008).

President of India have the authority to enact ordinances. These ordinances stay legitimate only if the Parliament approves them six weeks from reconvening. The ordinance turns useless if both Houses of Parliament reject it.<sup>20</sup> The same strategy is relevant for state-level Governor's ordinance enactment. Once passed, an ordinance has the same legal power as an Act of Parliament for the term of validity. Article 13 of the Indian Constitution grounds an ordinance's legitimacy in two important respects: first, whether a law violates fundamental rights; second, the meaning of the word "law." Article 13(3) defines "law" to include ordinances, rules, by-laws, notifications, customs, and usages having legal authority in India. It also covers laws passed before the founding of the Constitution that remain unactivated independent of their present relevance. As such, ordinances are especially recognized as laws contained within the Constitution.

Article 123 of the Indian Constitution states that an ordinance published by the President ought to have the same power as an Act of Parliament.<sup>21</sup> Article 213 similarly gives the Governor the power to draft ordinances, which have the same force as acts of the state legislature.<sup>22</sup> Emphasizing the urgency inherent in the ordinance process, this contrast between an ordinance and a permanent statute shows two important points: first, an ordinance is equivalent to a permanent statute; second, the six weeks for Parliament's approval.<sup>23</sup> Although the President has nominal ability to issue ordinances, this authority is used under the direction of the Council of Ministers, therefore suggesting that the Executive essentially controls the authority for drafting ordinances.<sup>24</sup> Though their basic essence and procedures are essentially different, ordinances and Acts show grammatical parallels. While an ordinance avoids these thorough processes, an Act goes through several debates and revisions, including many legislative bodies and public participation.<sup>25</sup> After Cabinet approval of the ordinance, the Ministry of Law and Justice develops a draft which is then published under less public or legislative control.<sup>26</sup> An ordinance is fast passed and then sent to the State Legislative Assembly or Parliament for approval. Under the concept of the "rule of law," an ordinance does not demand the same degree of citizen involvement as an Act, which calls for public input.<sup>27</sup> Therefore, even if an ordinance might be legally categorized as an Act under Article 13(3), its inception and degree of public participation in its development greatly vary.<sup>28</sup> Since ordinances are considered as laws even though their legislative processes<sup>29</sup> differ from those of regular laws, this creates a convoluted legal framework for the court review of them.<sup>30</sup>

#### 4. THE BASIC STRUCTURE DOCTRINE TO THE BASIC STRUCTURE REVIEW: THE PANACEA TO UPHOLD CONSTITUTIONALISM

Two phases define the discussion on constitutionalism and the preservation of constitutional identity in

---

<sup>20</sup> Shubankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances*, 27-28 (2014).

<sup>21</sup> *The Constitution of India, 1950*, Art. 123(1).

<sup>22</sup> *Id.*, Art. 213(1).

<sup>23</sup> *Id.*, Art. 13.

<sup>24</sup> *Id.*, Art. 123(2).

<sup>25</sup> *Id.*, Art. 213(2).

<sup>26</sup> John M. Carey & Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms?* in EXECUTIVE DECREE AUTHORITY, 1-29 (1998).

<sup>27</sup> A.R. MURKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA*, 232-276 (Oxford University Press, 1983).

<sup>28</sup> *The Constitution of India, 1950*, Art. 123(2)(a).

<sup>29</sup> *Id.*, Art. 213(2)(a).

<sup>30</sup> Shubankar Dam, *President's Legislative Powers in India: 2½ Myths*, Vol. 11(2), OUCIJ, 1-30 (2011).

India. First phase, before the “*Kesavananda Bharati*” case, focused mostly on personal liberties. Later “*Kesavananda Bharati*” developed the concept of “*basic structure*,” so emphasizing constitutional values. Judicial review before “*Kesavananda Bharati*” mostly focused on executive branch actions.<sup>31</sup> Laws may thus also be challenged under Article 13, but only about their conformity with Part III of the Constitution, so addressing fundamental rights. Member Somnath Lahiri noted during the drafting of the Constitution that the people were given their fundamental rights with rather reluctance. Although the definition of an “*emergency*” was vague, fundamental rights could be suspended during that period in case of one.<sup>32</sup> This ambiguity allowed the government and the administration to justify policies that might otherwise violate people’s rights. Lahiri underlined that this created a situation whereby even in cases when it was unjustified, basic liberties could be completely suppressed.<sup>33</sup> Notwithstanding these concerns, the writers of the Constitution were determined in their will to create basic rights as protectors for the people. The period before “*Kesavananda Bharati*” was marked by uncertainty; cases like “*Shankari Prasad*” and “*Sajjan Singh*” confirmed Lahiri’s fears.<sup>34</sup> These cases highlighted the significant influence the executive-legislature, sometimes known as the “*execulature*,” has in changing constitutional clauses. Seeking to define the limits of parliamentary changes, the “*Golaknath*” case moved toward a more clear-cut framework. The approach used in “*Golaknath*” was constrictive, focusing just on limiting Parliament’s ability to change fundamental liberties, so linking constitutional identity with the unchangeable core of such rights. This narrow view missed the basic constitutional values supporting those liberties. The strategy aimed to protect particular rights while neglecting the basic ideas guiding these rights.<sup>35</sup> “*Golaknath*” essentially gave a textual constraint on changes top priority over a value-oriented safeguarding of the Constitution. Later on, under “*Kesavananda Bharati*”, this restriction was corrected.

The court defined and limited the power to change the Constitution using the “*Basic Structure Doctrine*,” following the “*Kesavananda Bharati*” case. This theory aimed to restrict Parliament’s power to change the Constitution, so preserving particular fundamental values contained within it. The uncertainty about the doctrine allowed the Supreme Court to adopt a broader interpretation, so including regular legislation and executive actions in addition to constitutional amendments. This represented a shift from the traditional “*rights review*” under Article 13(2), which mostly addresses safeguarding of fundamental rights. “*Indira Nehru Gandhi v. Shri Raj Narain*” was the first significant case where the basic structure theory was applied to evaluate the validity of a regular law.<sup>36</sup> The Court decided that the concept of “*basic structure*” as an abstract, general constitutional principle was unduly vague and indeterminate to operate as a benchmark for evaluating the validity of regular legislation. The Court thus excluded the relevance of the basic structure review to ordinary legislation by restricting its application to the amending authority of the Parliament. Later development occurred in “*State of Karnataka v. Union of India*” (“*Inquiries Case*”), in which Justice Beg suggested interpreting using the basic structure theory.<sup>37</sup> The case concerned a notification sent under Section 3 of the Inquiries Act, which the State of Karnataka

<sup>31</sup> R.S. Dossal, *Constituent Assembly Debates on Fundamental Rights A Sidelight*, Vol.13(3), THE INDIAN JOURNAL OF POLITICAL SCIENCE, 99–107 (1952).

<sup>32</sup> CONSTITUENT ASSEMBLY DEBATES, Book No. 3, April 29, 1947 *speech by* SOMNATH LAHIRI, 33 (1999).

<sup>33</sup> *Shankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

<sup>34</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>35</sup> *I. C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

<sup>36</sup> *Indira Nehru Gandhi v. Shri Raj Narain*, (1975) 2 SCC 159, ¶357 (per Matthew, J.).

<sup>37</sup> *State of Karnataka v. Union of India*, (1977) 4 SCC 608, ¶¶111-120 (per Beg, C.J.).

challenged with an Article 131 petition.<sup>38</sup> Justice Beg used the same criterion when evaluating legislative competency under Article 246, even though he considered the basic structure as an interpretative tool. This marked a change from the previous limited application of the basic structure theory, so extending its use to evaluate the validity of laws under Article 13(2), where laws are generally assessed by the "rights review" test. This change allowed the basic framework to be used for evaluating not only the validity of regular legislation but also the constitutional amendments.

In "*Minerva Mills v. Union of India*" (hereinafter "Minerva Mills")<sup>39</sup>, the Court developed the basic structure theory by defining necessary criteria that might define the basic structure. The proposed constitutional amendment was judged to have a major impact on the fundamental constitutional values, so changing the core of the Constitution itself.<sup>40</sup> Justice Bhagwati defined three key areas of focus for the evaluation of the basic structural integrity:

- Whether the constitutional amendment compromises or violates the underlying values of the Constitution.
- Whether the amendment runs counter to the founders' original intentions for the Constitution.
- Whether the amendment might fit the basic features of the Constitution without sacrificing its uniqueness.

Justice Bhagwati's interpretation expanded the basic structure review to include "basic features" expressed in the Constitution as fundamental principles, outside just fundamental rights.<sup>41</sup> This study consists of a subjective assessment to determine whether constitutional values have changed. One must be able to distinguish "basic structure" from "basic features." Rather than only the language or phrasing of a constitutional clause, a fundamental aspect relates to the basic constitutional principle. It represents the basic idea that, independent of its exact phrasing, the provision seeks to protect. Still, it remained unclear whether this fundamental idea came from the historical background of the Constitution. "*R Ganpatrao v. Union of India*" helped to clarify the uncertainty.<sup>42</sup> Claiming that the abolition of the Privy Purses violated fundamental rights and compromised the basic framework of the Constitution, the petitioner—a co-ruler of a princely state—contested the amendment's passage.<sup>43</sup> The petitioner claimed that the basic framework of the Constitution included particular articles (Articles 291, 362, and 366(12)) indispensable. They argued that the removal of these articles would separate the Constitution from its fundamental values, so compromising its basic framework. Justice S. Pandian refuted this claim, clarifying that the constitutional identity was socio-economic, political, moral, legal, rather than historical and political context of the subcontinent derived values.<sup>44</sup> Emphasizing the "width test" and the "identity test," Justice Kapadia in "*M. Nagaraj v. Union of India*" (hereinafter "Nagaraj") proposed another approach for carrying out the basic structure review.<sup>45</sup> Under Article 13(2), the "width test" extends judicial review to include constitutional amendments, evaluating their infringement on fundamental rights about other state activities. The "identity test" gives protection of the Constitution's

<sup>38</sup> *Id.*, ¶124 (per Beg, C.J.).

<sup>39</sup> *Minerva Mills v. Union of India*, (1980) 3 SCC 625, ¶¶82-87 (per Bhagwati, J.).

<sup>40</sup> SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA*, 83 (2nd ed., 2011).

<sup>41</sup> 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).

<sup>42</sup> *Raghunathrao Ganpatrao v. Union of India*, 1994 Supp (1) SCC191, ¶19 (per Pandian, J.)

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, ¶107 (per Pandian, J.).

<sup>45</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, ¶28.

basic values top priority.<sup>46</sup> Emphasizing the protection of constitutional values rather than only textual stipulations, this test seems to be more exact since it directly investigates the effect of the amendment on the essential features of the Constitution. One important legal development that has emerged from the inclusion of executive actions inside the basic structure review is especially their relevance to ordinances. The Supreme Court considered the applicability of the basic structure theory to the legitimacy of emergency proclamations in *Waman Rao v. Union of India* (hereinafter "Waman Rao")<sup>47</sup> and "SR *Bommai v. Union of India*" (hereinafter "Bommai").<sup>48</sup> While the Court decided in "Bommai" that secularism and federalism are fundamental constitutional traits, in "Waman Rao" it refrained from squarely confronting this issue. These ideas helped to separate valid from invalid emergency proclamations. Moreover, the majority view of Justice Sawant in "Bommai" underlined in cases of executive actions with constitutional consequences that the fundamental structure review comes first over the standard judicial review.<sup>49</sup> This shift represented a change in the function of the Supreme Court from activist to revisionist.<sup>50</sup>

The case of "*BR Kapur v. Union of India*" clearly shows how the basic structure review is extending beyond constitutional changes.<sup>51</sup> Using the basic structure review, Justice Bharucha evaluated an executive action involving the appointment of a minister with a criminal past, concluding it to be a breach of the rule of law, so respecting a basic constitutional principle. Declared unconstitutional for violating the secularism principle, "*Aruna Roy v. Union of India*" used the basic structure review to assess the validity of a new educational curriculum.<sup>52</sup> The Court used the basic structure theory in "*PM Bhargava v. University Grants Commission*" to challenge the inclusion of "Vedic Astrology" in postgraduate diplomas, so violating the fundamental principle of secularism.<sup>53</sup> Rather than focusing just on legislative changes, these cases show how the basic structure theory is applied in assessing executive actions.<sup>54</sup> Increased abstraction has come out of this review process since judicial decisions or international practices cannot fully capture the ideas guiding the basic framework. Their determination depends much on the Court's interpretation and discretion; they are shaped by the specific constitutional framework of India.<sup>55</sup> The lack of a consistent criterion for evaluating legislative actions and executive decisions is a main problem with the application of the basic structure review. However, Professor Sudhir Krishnaswamy argues that the growing relevance of the basic structure theory in constitutional review combined with its vague boundaries has led Constitutional Courts to use it to invalidate regular legislation and executive actions. Under this approach, sometimes known as "*hard judicial review*," actions about constitutional values are closely examined. Through an analysis of their adoption and court review, the present debate points to the possibility for extending the basic structure review to include

<sup>46</sup> KRISHNASWAMY, *supra* note 40, 78.

<sup>47</sup> *Waman Rao v. Union of India*, (1981) 2 SCC 282, ¶¶56-63 (per Chandrachud, C.J.).

<sup>48</sup> *S. R. Bommai v. Union of India*, (1994) 3 SCC 1, ¶¶100-104,153 (per Sawant, J.).

<sup>49</sup> *Id.*

<sup>50</sup> Ashok Desai, *Constitutional Amendments and the "Basic Structure" Doctrine* in DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW, 90 (2000).

<sup>51</sup> *BR Kapur v. Union of India*, (2001) 7 SCC 231, ¶28 (per Bharucha, J.).

<sup>52</sup> *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.

<sup>53</sup> *PM Bhargava v. University Grants Commission*, (2004) 6 SCC 661, ¶7 (per Mathur, J.).

<sup>54</sup> KRISHNASWAMY, *supra* note 40, 121.

<sup>55</sup> DAM, *supra* note 20, 178-185.



ordinances. Apart from their legal validity, this review will assess ordinances in terms of their compliance with fundamental constitutional values.

## 5. THE EVOLUTION OF REVIEW STANDARDS FOR ORDINANCES AND THE TWO PRACTICED STANDARDS

Shubhankar Dam divides the court approaches for reviewing ordinances into two groups: the Intermediary Approach and the Negative Approach. The Negative Approach emphasizes their features while ignoring underlying motivations, so evaluating both acts and ordinances similarly. Judicial bodies following this viewpoint argue that the validity of laws does not depend on their intentions, hence ordinances should not have any effect either. Using different criteria of review for every category, the Intermediary Approach separates acts from ordinances. Courts have long mostly followed the Negative Approach. This is shown in “*SKG Sugar Limited v. State of Bihar*,” where the Court decided, independent of any mistakes in judgment, the Governor’s satisfaction under Article 213 is non-justiciable and immune to judicial scrutiny.<sup>56</sup> This position reflects the Negative Approach, according to which the intentions underlying an ordinance cannot make them void. Justice YV Chandrachud’s view confirmed in “*RK Garg v. Union of India*” that the President’s authority under Article 123 to publish ordinances corresponds with his legislative power.<sup>57</sup> The Court strengthened this in “*AK Roy v. Union of India*” by likening a presidential ordinance with a parliamentary law, so indicating that ordinances are seen as equivalent to laws for pragmatic purposes.<sup>58</sup> Chief Justice Y.V. Chandrachud said in the “*Nagaraj case*” that an ordinance cannot be declared void just because one does not apply their mind or due to mala fide intent.<sup>59</sup> He argued that motives cannot be used to revoke an ordinance since the authority to create one is not an executive but a legislative power granted upon the executive. This posture confirms that the evaluation of presidential satisfaction under Article 123 is not subject to judicial review concerning motives.

The Court clarified in “*Reddy v. State of AP*” that although a statute may be declared unconstitutional for surpassing constitutional limits, the court lacks jurisdiction to examine the suitability of legislative power execution.<sup>60</sup> “*Krishna Kumar Singh*” also established the Negative Approach when Justice D.Y. Chandrachud declared that court review would not assess the sufficiency or appropriateness of the evidence backing an ordinance.<sup>61</sup> The Court would just evaluate whether the satisfaction amounted to a reasonable exercise of power or if it included dishonesty or ulterior motives. Judicial review is essentially limited to confirming the validity of the justification for the ordinance, not to investigate the legislative process itself. The negative view of judicial review of ordinances faces three main difficulties that lead to an inconsistency in its application. The main issue is the assessment of the validity of an ordinance depending just on the single metric of “*presidential satisfaction*”.<sup>62</sup> This approach is thought to be unduly restrictive. Under Article 356 judicial review expanded to include a more thorough criterion for presidential satisfaction in cases like “*Bommai*” and “*Rameshwar Prasad v. Union of India*.” Four elements make up this assessment: the presidential satisfaction itself; confirmation that the satisfaction

<sup>56</sup> *SKG Sugar Limited v. State of Bihar*, (1974) 4 SCC 827, ¶16.

<sup>57</sup> *R. K. Garg v. Union of India*, (1981) 4 SCC 675, ¶¶4-5 (per Bhagwati, J.).

<sup>58</sup> *A. K. Roy v. Union of India*, (1982) 1 SCC 271, ¶14 (per Chandrachud, C.J.).

<sup>59</sup> *M. Nagaraj v. State of Andhra Pradesh*, (1985) 1 SCC 523, ¶36 (per Chandrachud, C.J.).

<sup>60</sup> *Reddy v. State of Andhra Pradesh*, AIR 1985 SC 724, ¶14 (per Bhagwati, J.)

<sup>61</sup> *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1, ¶105 (per Chandrachud, J.)

<sup>62</sup> *S. R. Bommai v. Union of India*, (1994) 3 SCC 1; *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1, ¶208.

fits the "appropriate scope" of Article 356; presence of objective data to support the satisfaction; and derived conclusions from that data. Still, Article 123 limits the emphasis to the first element—that of presidential satisfaction—so excluding a thorough analysis. Though aware of the overall structure, courts have only applied the first component, so limiting the degree of judicial review.

The second problem with the negative approach is the exclusion of the "circumstances" criterion mandated by Articles 123 and 213 for the suitable establishment of presidential or gubernatorial satisfaction. Cases like "R.K. Garg" and "Krishna Kumar Singh" show how the negative viewpoint ignores the "circumstances" around the passing of an ordinance. This exclusion causes courts not to closely examine the intention underlying the satisfaction, so rendering it mainly unquestioned. The court has not yet examined the underlying reasons, which are hidden under the presumed legitimacy of the ordinance's "intent." The third problem is the inadequate respect given to the possible misuse of ordinances. One such case is "DC Wadhwa v. State of Bihar,"<sup>63</sup> where three ordinances were regularly issued over long periods and some persisted for almost 14 years.<sup>64</sup> Re-promulgating ordinances extended their lifespan much beyond what would have otherwise happened.<sup>65</sup> While some early post-emergency rules could be justified by the need for quick policy changes during India's liberalization period, many others—especially under the Indira Gandhi government—violated the usual legislative process.<sup>66</sup> Enacted without enough consultation, the SEBI ordinance and the Bank Nationalization ordinance were seen as dodging accepted legislative procedures. The exception found in "DC Wadhwa," allowing the re-promulgation of ordinances resulting from legislative delays, has aggravated the problem by creating a hole allowing the executive to perform legislative tasks.<sup>67</sup> These flaws make the shift from the Negative Approach to the Intermediate Approach in evaluating the validity of ordinances necessary. This change would enable a more thorough and meticulous analysis, so addressing problems of intention, context, and possible exploitation.<sup>68</sup> The change from the negative attitude started in the 1970s. Tasked with assessing the constitutional validity of a 1969 ordinance in the "Bank Nationalisation case," the Supreme Court questioned it depending on need and motivation.<sup>69</sup> Notwithstanding these difficulties, the Court stayed negative and refused to step in. Still, a major improvement in this case was realizing that, should one find to be mala fide, presidential satisfaction could be rendered null and void. This indicated the beginning of a change from the just negative perspective.<sup>70</sup>

<sup>63</sup> D. C. Wadhwa v. State of Bihar, AIR 1987 SC 576, ¶4.

<sup>64</sup> D. C. Wadhwa, Re-promulgation of Ordinances: A fraud on The Constitution, 53-60 (1983).

<sup>65</sup> 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)

<sup>66</sup> DAM, *supra* note 20, 85.

<sup>67</sup> *Id.*

<sup>68</sup> Chandrashekar Mridul Bhardwaj, *An Analysis of The Power to Issue Ordinance in India*, Vol. 42(3), STATUTE LAW REVIEW, 305-312 (2021).

<sup>69</sup> 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").

<sup>70</sup> Kusum W. Ketkar & Suhas L. Ketkar, *Bank Nationalization, Financial Savings, And Economic Development: A Case Study Of India*, Vol. 27(1), THE JOURNAL OF DEVELOPING AREAS, 69-84 (1992).

The Court used the intermediate approach in “A. K. Roy,” exceeding the presidential satisfaction criterion set out in the negative approach.<sup>71</sup> The Court found that court review governs presidential satisfaction. It also underlined the need of the government clarifying the circumstances under which the ordinance was passed.<sup>72</sup> Scholar M.P. Jain notes that a challenge to the conditions surrounding presidential satisfaction could be rendered invalid if based on a manufactured state of affairs or negative intentions, so undermining the standard legislative process.<sup>73</sup> The pre-appeal ruling of Krishna Kumar Singh by Justice Sujatha Manohar extended the analysis of ordinances even more. She listed as essential criteria for assessing the validity of the governor’s satisfaction “*limited duration*” and “*legislative scrutiny*”. In the *Hasanabha case*, Justice Saldanha advanced the stance by claiming that the underlying reasons affecting the governor’s satisfaction could make it void. Justice Saldanha said that the Chief Minister’s admission in the Legislature revealed that the ordinance’s actual purpose was to forward the interests of the ruling party. He said the ordinance was “*a total and complete sabotage*” and concluded there were not the requirements for gubernatorial approval. According to Shubhankar Dam, the middle ground approach presents the best compromise. It offers a measured reading of Articles 123 and 56, defining Article 123’s “*purposive*” degree of judicial review. Whereas the subjective test will examine the evidence and deductions supporting the satisfaction claim, considering the conditions specified in Articles 123 and 213, the objective test will evaluate whether presidential satisfaction conforms with the designated criteria. The petitioner bears the burden of proof since she has to show that the executive adopted the ordinance with inappropriate motives. This approach aims to offer a more complete and fair way of assessing ordinances.

The study relates to the interaction between the several tests used in judicial review and the basic structure theory. While including the basic structure review into the intermediate approach may offer a more complete framework for evaluating ordinances, the negative viewpoint on judicial review seems indifferent to the intent of judicial examination. The middle ground approach mostly examines the circumstances surrounding the adoption of an ordinance to confirm that presidential approval was sincere. Still, one should also take into account whether the reasons behind the ordinance’s adoption follow the basic structure approach. Should the motivation compromise the constitutional values protected by the fundamental framework, the ordinance might be voidable. The result of the negative approach in “*Krishna Kumar Singh*” provides a basis for investigating how this approach could be changed to more fit the basic structure theory.<sup>74</sup> This situation offers an interesting junction that is best understood from comparative points of view. Cases like “*Hasanabha*”<sup>75</sup> and “*Bhupendra Kumar Bose*”, both about election-related ordinances, clearly form the basis for creating this standard. Whereas “*Bhupendra Kumar Bose*” followed the negative approach, *Hasanabha* used the intermediate approach. As outlined in the foundational *Indira Nehru Gandhi case*, the basic structural value at issue in both cases was the principle of free and fair elections.<sup>76</sup> Before developing a review criterion, one should consider the “*motive attribution test*,” a concept used by U.S. Courts to investigate legislative intent

<sup>71</sup> A. K. Roy v. Union of India, 1982 (1) SCC 27 1982, ¶26 (per Chandrachud, J.).

<sup>72</sup> DAM, *supra* at 20, 178.

<sup>73</sup> M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 174–175 (2009).

<sup>74</sup> 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).

<sup>75</sup> 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).

<sup>76</sup> Caleb Nelson, *Judicial Review of Legislative Purpose*, Vol. 83, N. Y. U. LAW REV., 1784 (2008)

during law passage. Emphasizing both the decision-making process and the intentions guiding the criteria or objectives guiding the rule-making process, the motive approach. By closely examining the validity of the legislative intent underlying many congressional acts, the U.S. Supreme Court has used this method to nullify several of them. Professor Nelson shows how Congress's intentions were examined in his study of the change in positivism to activism, so imposing a "purpose-based" limitation on its legislative power. One case is "*Village of Arlington Heights v. Metropolitan Housing Development Corporation*," in which Justice Powell's majority view examined the reasons behind a zoning rule discriminating against persons of color.<sup>77</sup> Powell said that when using the motive approach, judges should review the legislative or administrative history, the chronological events before the decision, and, in extraordinary circumstances, may call individual legislators to testify concerning the intent behind the official action. This method underlines that court review covers not only the legality of a decision but also the underlying intentions, which could be very important in assessing the validity of ordinances under the basic structure theory.

Since the ruling party in *Hasanabha* did not get a majority in the Agricultural Produce Marketing Committees (APMCs), an ordinance allowing office bearers of these committees to keep their positions was instituted.<sup>78</sup> In nullifying the ordinance, Justice Saldanha instituted the idea of closely examining the reason behind its adoption, so advancing Indian law. Arguing that the ordinance was poorly timed and compromised the electoral process, which calls for APMCs to be founded by elected representatives rather than appointed ones, he said the ordinance represented a dishonest exercise of power. Referring to past cases including *AK Roy*, *SR "Bommai"*, and *DC Wadhwa*, Justice Saldanha decided that the circumstances did not allow true presidential satisfaction but he refrained from enforcing a stricter review. Had the Court applied a basic structure review, it could have evaluated the ordinance on the constitutional principle of free and fair elections, as decided upon in the "*Indira Nehru Gandhi*" case. Given the ordinance directly compromised the integrity of the electoral process, this situation called for the application of the "*identity test*," which would have looked at the violation of this fundamental constitutional principle.<sup>79</sup> Considered as a basic structural element, a recent event generating important questions of federalism is the Delhi Civil Service Ordinance. With some exceptions, the Supreme Court decided in the 2018 case *Government of "NCT of Delhi v. Union of India"* that the Delhi legislative assembly has the power under Article 246 to legislate on issues designated in the State and Concurrent Lists.<sup>80</sup> A constitutional bench restated this idea in 2023.<sup>81</sup> Seeking to avoid the usual legislative process, the law was passed just two weeks before Parliament's monsoon session. The issue relates to federalism and the separation of powers—fundamental structural elements—which begs significant questions on the fulfilment of the exceptional circumstances criterion under Article 123(1). Taking these elements into

---

<sup>77</sup> *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 13<sup>th</sup> 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).

<sup>78</sup> *Hasanabha v. State of Karnataka*, AIR 1998 Kant 91, ¶7.

<sup>79</sup> 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.

<sup>80</sup> *Government of NCT Delhi v. Union of India*, 2018 8 SCC 501.

<sup>81</sup> *State (NCT of Delhi) v. Union of India*, 2023 SCC OnLine SC 606, ¶176(c) (per Chandrachud, C.J.)

account, it is advised that the most suitable approach to assess the validity of this ordinance would be using both the fundamental structure review and the intermediate approach to judicial review.

Under a judicial review of an ordinance, the Court must assess its impact on a fundamental structural value using the intermediate criteria simultaneously. The Court might use the width test and the identity test to determine whether the executive's intention about the ordinance runs against a basic structural principle. Should a fundamental structural principle be prima facie violated, the Court may, in conjunction with the intermediate approach, apply basic structure review to assess the executive's intent in publishing the ordinance. Still, given the latest decision in *Krishna Kumar Singh*, which treats laws and ordinances under a negative perspective, the Court might set a criterion for assessing ordinances similar to its evaluation of standard legislation. This means separating the act of passing the ordinance from its main features. Justice Chandrachud has said that motives may be considered when the action is "oblique," even if courts may refuse to examine the reasons behind the issuing of ordinances and focus just on presidential satisfaction. As shown in court decisions such as *Indira Nehru Gandhi* and *PM Bhargava*, the basic structure review can still be used to examine the content of the ordinance should future courts decide to focus just on its implementation through a negative lens. "*Bhupendra Kumar Bose*" also shows a similar approach whereby an Odisha ordinance approving a falsified electoral roll compromised the fundamental idea of free and fair elections.<sup>82</sup> The High Court declared the ordinance void; but Chief Justice Gajendragadkar reversed this ruling, arguing that the ordinance should be kept in effect if the governor behaved within his Article 213(1) authority.<sup>83</sup> This ruling examined the content of the ordinance through the rights review under Article 13(2), even while it took a negative stance focused on gubernatorial approval for the publication. The Court decided that, given state financial concerns, the ordinance served the larger public interest even though it was not desperately needed.<sup>84</sup> This decision emphasizes the need for a basic structure review in correcting the shortcomings, especially in cases when an ordinance compromises the integrity of democratic procedures, including free and fair elections. By extending the basic structure review at this point, the Court could closely review the ordinance to find whether it violates a fundamental constitutional principle.

## 6. CONCLUSION

The Basic Structure Doctrine's golden jubilee of introduction in India invites reflection on its transforming effect on constitutional interpretation and its part in defending the Constitution from possible dangers. Originally meant to prevent the unbridled use of authority by a majority government, the Basic Structure Doctrine today acts as both a weapon and a shield. Examining ordinances requires this dual function since the doctrine can be used to ensure responsibility and prevent arbitrary behavior in their adoption. Conventional approaches of assessing ordinances have shown insufficient in fully handling these problems. As such, a compromise is necessary that combines the Basic Structure Review with elements of the negative and intermediary approaches. This hybrid approach guarantees the

<sup>82</sup> *State of Orissa v. Bhupendra Kumar Bose*, AIR 1962 SC 945, ¶11 (per Gajendragadkar, C.J.).

<sup>83</sup> 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.

<sup>84</sup> *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).

preservation of constitutional values and solves the shortcomings of traditional methods, so preserving the "*identity*" of the Constitution. By applying this hybrid strategy, we can protect the constitutional values founded in the Basic Structure Doctrine which have lasted five decades. The Basic Structure Review finds a relevant chance in the Supreme Court's decision to send the Delhi Services Ordinance to a five-judge Constitutional Bench. The case has great ramifications for federalism, separation of powers, and Centre-State relations. Given the importance of this case, the golden jubilee of the Basic Structure Doctrine offers a perfect opportunity to review and rethink the jurisprudence on ordinances and their publication.