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The Broadening Scope of
Basic Structure Review
Emergency, Legislative, and Executive Powers

The basic structure doctrine was developed as a rare residuary power to be used by the Court to control the excesses of a transitory majority... But there is a problem. The formulation of the doctrine has not been precise and it is tempting for a judge with the best of intentions to invoke it and try to mould the Constitution in his own image.¹

Much of the debate over the basic structure doctrine, both within the Supreme Court and outside, has often been at cross-purposes for a number of reasons. The court has itself compounded the confusion by refusing to be clear about the scope of the doctrine.²

The doctrine of basic structure review was developed in the context of challenges to the validity of constitutional amendments. In the previous chapter we argued that the constitutional basis for basic structure review may be understood to be the result of implied limitations on the amending power under Article 368. The extension of basic structure review to emergency powers, as well as legislative and executive action, requires the court to either articulate a novel constitutional basis for such a power or offer good reasons for extending to these forms of state action the implied limitations

which form the constitutional basis for basic structure review of constitutional amendments. The analysis of the relevant cases in this chapter reveals that the court fails to articulate the constitutional basis for basic structure review in either of these ways. I conclude by arguing that the constitutional basis of basic structure review of emergency power, legislation, and executive power is best understood as having the same constitutional basis as constitutional amendments: namely, implied limitations which circumscribe the grant of executive and legislative powers in the constitution.

The exercise of federal emergency power, either at the national level under Article 352 or at the regional level under Article 356, is through an executive action carried out in the name of the President of India. The court is yet to use basic structure review to strike down a proclamation of emergency as unconstitutional. Where it has applied basic structure review to evaluate the validity of such a proclamation, it has found them to be valid on the particular facts and circumstances of the case. In these cases the court has not held that basic structure review emerged from any particular phrase in the provisions authorizing the President to proclaim an emergency. This chapter will argue that even in such cases the constitutional basis of basic structure review emerges from the implied limitations which place substantive restraints on the scope of the emergency power conferred by the constitution.

Ordinary legislative power and executive power is subject to judicial review by the High Courts and the Supreme Court for competence and compliance with fundamental rights. The question of whether basic structure review would apply to these species of state action was considered and dismissed in Indira Gandhi v. Raj Narain. Subsequently, the court has moved away from this position and utilized basic structure review in conjunction with other available forms of review. In a recent case, the court has reverted to the view that basic

4 AIR 1975 SC 2299.
structure review does not apply to legislation by relying on the *Indira Gandhi* case and ignoring subsequent precedent. As these divergent holdings have been delivered by coordinate constitutional benches of equal strength, the law on the point is unsettled. Moreover, as is the case with emergency proclamations, the court has not articulated a constitutional basis for basic structure review by interpreting the provisions granting executive or legislative power. I will show that the extension of implied limitations to regulate ordinary legislative and executive powers offers us the best constitutional basis for basic structure review in these cases.

**Emergency Power**

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*.7

This section investigates former Attorney General, Ashok Desai’s concerns with the ‘imprecise radiations’ of the basic structure doctrine leading to the judicial review over executive proclamations of emergency of a national and regional character. These exercises of emergency power had previously been challenged in the courts on administrative law grounds. It was initially in *Waman Rao* and later in *Bommai* that the court considered the application of the basic structure doctrine to such action. As with the critical commentary on the use of basic structure review with respect to amendments, the quotation above indicates unease with the use of the doctrine to review proclamations of emergency. Some of this unease arises from the inability of the court to articulate a precise constitutional basis for this form of judicial review. This section of the chapter investigates the cases on this point of law and shows that there are good reasons for this unease. The court has not applied itself to the constitutional basis for basic structure review of constitutional amendments. The concluding part of this section explores options available to the court and advances the most justifiable constitutional basis for basic structure review of executive proclamations of Emergency.

7 Ashok Desai, supra n. 1.
The court’s first expansion of the doctrine beyond amendment cases was to test the executive proclamation of Emergency. The Indian Constitution allows the executive to proclaim two kinds of Emergency—national and regional. In *Waman Rao*, the court had the opportunity to apply the basic structure doctrine to the proclamation of a national emergency in 1975. As the emergency had been revoked before the court reached its decision, the court did not find it necessary to apply the doctrine. However, the court did not rule out the application of the doctrine to such cases. In *Bommai*, the proclamation of regional emergency in several states was challenged and the court ruled that secularism, which was among the basic features of the constitution, provided a basis to distinguish between legitimate and illegitimate proclamations of emergency. I will now investigate the court’s justification for the use of the basic structure doctrine as a limit on the executive’s power to proclaim emergency and whether the reasoning and justification for such an exercise is consistent with that adopted in the amendment cases.

**National Emergency**

The complex political factors which gave rise to the petition in *Waman Rao* forced the court to consider a unique constitutional challenge. The 40th Constitution Amendment Act, 1976 placed several land reform statutes in the 9th Schedule, thereby immunising them from judicial review for violation of fundamental rights. This amendment was enacted during an extended term of the Lok Sabha beyond its usual term of 5 years. This extension was carried out by statutes enacted during the period of national emergency under Article 352. The petitioners challenged the vires of the constitutional amendment, the statutes which extended the term of Parliament, and the proclamation of emergency. Though these challenges were intricately connected in the facts and circumstances of the case,

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8 *Waman Rao*, supra n. 3 on proclamations of national emergency under Article 352.

9 *Bommai*, ibid., on proclamations of state emergencies under Article 356.

10 *Waman Rao*, supra n. 3.

11 House of the People (Extension of Duration) Act, 1976 and the House of the People (Extension of Duration) Amendment Act, 1976 respectively.
for the purposes of this chapter I will consider the challenge to the emergency proclamation in isolation.

Counsels for the petitioner raised two issues: was the power to proclaim an emergency under Article 352 properly exercised and if there were any circumstances justifying the continuance of the emergency? The petitioners relied extensively on factual averments designed to show that the government acted injudiciously to advance partisan political considerations. These arguments used administrative law judicial review understandings of substantive unreasonableness to challenge the executive proclamation. Given that there is scope for abuse of power by a government which extends such a proclamation indefinitely, petitioners urged the court that the provisions of Article 352 should ‘be interpreted in a liberal and progressive manner so that the democratic ideal of the Constitution will be furthered and not frustrated’.

A constitutional challenge to the proclamation of emergency before the courts invites two objections: first, lack of jurisdiction and second, the absence of a judicial standard which provides a basis for such review. Chandrachud amplified these concerns and observed that courts ‘have severe constraints which deter them from undertaking a task which cannot judicially be performed’. Further, as the emergency proclamation was no longer in force and the 42nd Constitution Amendment Act, 1976 had inserted safeguards against such possible abuse in clauses (2) to (8) in Article 352, the court declined to engage with the issue in the hope that similar issues will not arise in the future.

Besides this pious hope, Chandrachud carefully considered the reasons for his decision to decline jurisdiction. As the challenge to the proclamation of emergency under Article 352 in this case was tangential to the core challenge to the constitutionality of Article 31-A, 31-B, and 31-C, he took the view that it was best adjudicated in a case where it was the central issue. The more substantive reasons were the inability of the court to marshal evidence from diverse sources, or apply the preponderance of probabilities standard that the extension

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13 Ibid., p. 293 (Chandrachud, CJ).
14 Waman Rao, supra n. 3, p. 294.
of the emergency was motivated by mala fides. Distinguishing between the standards applied by lay persons, newspapers and public men, and those applied by the court, Chandrachud took the view that the court could not reach a binding conclusion in such a case based on public commentary and newspaper editorials and reports.

The petitioners and the judgments in the case failed to develop two key arguments in this case: first, the applicability of the basic structure doctrine to the proclamation of emergency under Article 352 and second, the task of fashioning a mode of review suitable for administrative action by high constitutional functionaries. I will examine each in turn.

Chandrachud applied the basic structure doctrine in a nuanced and complex fashion in *Waman Rao* to uphold Article 31-A as it furthered the basic values and aspirations of the Constitution. By applying the basic structure doctrine to constitutional amendments in *Kesavananda*, the court had overcome arguments about the justiciability of constitutional amendments under Article 368 which are similar to the respondents’ arguments against the judicial review of executive proclamations of national emergency under Article 352 in *Waman Rao*. The petitioners and the judges failed to notice that the *Kesavananda* court had already disposed arguments about the absence of judicial standards in basic structure review and these conclusions could be applied with minor modifications to the review of executive proclamations of emergency. If the court had identified basic structure review as a model of judicial review independent from administrative law review then the court could have applied a set of judicially manageable standards developed in the constitutional amendment cases, thereby bypassing the constraints of administrative law judicial review which was hitherto inapplicable to these forms of higher executive action.

The second element that needed careful attention was the nature of the action that was being challenged in this case. The proclamation of a national emergency under Article 352 is an executive decision of the Cabinet carried out in the name of the President of India. The petitioners in *Waman Rao* set out to establish that this action was motivated by mala fides. In judicial review of ordinary executive action this standard is the most exacting for any petitioner to satisfy in order to succeed in the action. Even if the petitioner was able to
provide extensive evidence to the court it is unlikely that the court would find that this ground was satisfied. Hence, administrative law review is unsuited for application to the executive action by higher constitutional authorities. Moreover, even if the court was to apply basic structure review to executive action it would have to mould it to apply effectively to such a case.

In cases where the court reviews constitutional amendments, the court conducts a substantive review to enquire if the constitutional amendments ‘destroy or damage’ the basic structure of the constitution. Before the court applies basic structure review to executive action, it must clarify whether it is merely extending this substantive review model or adopting a modified administrative law review model which evaluates whether the executive action accords with basic features of the constitution. By testing the proclamation of emergency under Article 352 only on the grounds of mala fides and not subjecting such proclamations to other grounds available in administrative law review the court adopts a very low level of scrutiny of such executive action. Further, the court failed to tackle the complex issues which arose in the judicial review of executive orders by high constitutional functionaries, missing a significant opportunity to develop constitutional judicial review jurisprudence in a coherent and rational manner.

Thus far, I have argued that the court in Waman Rao failed to accommodate basic structure review while reviewing the national emergency proclamations challenged in that case. Even if the court were to develop the doctrine along the strategies advanced above, a significant issue remains unaddressed. I will have to consider carefully whether the constitutional basis for the basic structure doctrine is inextricably tied to the courts’ interpretation of Article 368 in Kesavananda or if it may equally be applied to an executive action under Article 352. The court at this stage has two options: first, it may develop an interpretation of the Article 352 which entails basic structure review or second, recognize that the constitutional basis of the basic structure is non-textual and is derivative of the ‘spirit of the Constitution’ in some sense. In the next section, we will examine if the court addressed any of these concerns while reaching its conclusion in Bommai before returning to these fundamental questions about the constitutional basis for basic structure review.
Regional Emergency

In the section above I outlined the various obstacles that the basic structure doctrine which evolved in the context of constitutional amending power must overcome to be properly used in the review of national emergency powers. A 9-judge bench in S.R. Bommai v. Union of India\(^{15}\) addressed these concerns when the presidential proclamation of a regional emergency under Article 356, whereby six state governments were dismissed and their legislative assemblies dissolved, was challenged as being unconstitutional. The court was invited to consider the scope, type, and extent of judicial review that the courts could exercise over presidential discretion in exercise of this power. In this section, I am particularly concerned with the constitutional basis for basic structure review of emergency proclamations.

Earlier in State of Rajasthan v. Union of India\(^{16}\) Bhagwati had established the extent and scope of judicial review of a presidential proclamation under Article 356. He began with a broad statement of principle: ‘So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, [this] can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so …’.\(^{17}\) However, he translated this broad principle of constitutional accountability into a very narrow holding on the scope of the court’s enquiry into the ‘satisfaction’ of the President that the conditions set out in Article 356 are satisfied. He surprisingly concluded that ‘the satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests …’\(^{18}\) and hence such a decision cannot be based on ‘judicially discoverable and manageable standards’.\(^{19}\) It was only in the ‘narrow minimal area’ where the satisfaction of the President required for the exercise of power under Article 356 was ‘mala fide or is based on wholly extraneous and irrelevant grounds’ that the court would have jurisdiction to review it. Bhagwati did not advance any reasons for narrowing down a constitutional basis for judicial review of executive

\(^{15}\) Bommai, supra n. 3.

\(^{16}\) AIR 1977 SC 1361.

\(^{17}\) State of Rajasthan v. Union of India, supra n. 16, p. 1413 (Bhagwati, J).

\(^{18}\) Ibid.

\(^{19}\) Ibid.
action by the higher executive to a select few grounds of common law administrative law review.

It was Sawant who developed this line of reasoning in *Bommai*. He surmised that on previous authority it was safe to conclude that presidential powers under Article 356 ‘is subject to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the proclamation have been satisfied or not.’ Hence the court could ensure that there indeed ‘existed material for the satisfaction of the President’. Though the court could not enquire into ‘the sufficiency or otherwise of the material’ the ‘legitimacy of inference drawn from such material is certainly open to judicial review’. Hence he concluded that ‘the material in question has to be such as would induce a reasonable man to come to the conclusion in question’. This incremental approach to expanding the scope of review outlined in *State of Rajasthan* was modest in two respects: first, it did not respond to the broader constitutional role of the court as guardian of the constitution proposed by Bhagwati as the abiding rationale for judicial review. Second, it remained trapped in the language of administrative law review and merely supplements the malafides ground of review with a general reasonableness ground of review.

While the major part of his opinion related to the principles of administrative law review applicable to Article 356 proclamation, Sawant changed track late in his opinion. He recognized that as provisions such as Article 356 ‘have a potentiality to unsettle and subvert the entire constitutional scheme’ the exercise of powers ‘needs … to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed.’ He recognized that

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20 Besides *State of Rajasthan v. Union of India* he relied on *Kehar Singh v. Union of India*, AIR 1989 SC 653, which deal with the presidential power of pardon under Article 72. The cases discussed in this section would be discussed under the category of prerogative power in British public law.

21 *Bommai*, supra n. 3, p. 1994 (Sawant, J).

22 Ibid.

23 Ibid., p. 1995.

24 Ibid.

25 Ibid.

26 *Bommai*, supra n. 3, p. 1976 (Sawant, J).
basic structure review could be ‘achieved … without bending, much less breaking, the normal rules of interpretation, if the interpretation is alive to the other provisions of the Constitution and its bearing on them.’ Identifying the principles of democracy and federalism to be at stake in such cases, he was of the view that ‘any interpretation’ of Article 356 must preserve and not subvert these values. These principles would authorize the court to ‘scrutinize the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly’.

The Supreme Court recently applied the ruling in the Bommai case to hold a proclamation of regional emergency under Article 356 to be illegal and unconstitutional. However, this case did not develop on the application of basic structure review to such executive proclamations. Hence, the analysis of basic structure review of executive proclamations of emergency in this chapter will stay focused on the Bommai ruling. The application of basic structure review to Article 356 proclamations in Bommai lacked two crucial ingredients: first, Sawant proposed an interpretive strategy in support of his conclusions but failed to apply this strategy to the provisions of Article 356. He seems to identify a potential abuse of the provision and conclude that it is for the courts to check for such abuse. Second, this inability to identify basic structure review as a free standing constitutional doctrine for judicial review is confirmed when Sawant concludes that this enhanced review to protect essential features ‘can be done by the courts while confining themselves to the acknowledged parameters of the judicial review as discussed above, viz., illegality, irrationality, and mala fides’. In the next chapter I consider the limitations of such a view and the potential for the courts to develop a distinct doctrine of basic structure review with respect to executive action more generally. In the rest of this section I will propose a sounder constitutional basis for basic structure review of emergency proclamations by exploring the manner in which the interpretive strategy proposed by Sawant—namely a structural interpretation—will modify the scope of judicial review of emergency powers.

27 Ibid.
28 Ibid.
30 Bommai, supra n. 3, p. 1976.
Articles 352 and 356 require that the President be ‘satisfied’ that certain ‘pre-conditions’ are fulfilled before a proclamation of emergency may be issued. In Bommai, Sawant sought to interpret these two facets—the Presidential satisfaction common to both articles and the different preconditions set out by them—in the light of other provisions of the Constitution. Such an interpretation needs to identify what implied limitations may apply to these two aspects of the proclamation. I will examine each in turn.

The President is the only officer under the Constitution who takes oath under Article 60 to ‘preserve, protect and defend the Constitution …’. Article 74 which requires the president to carry out his ‘functions’ in accordance with the advice tendered by the prime minister as the head of the Council of Ministers has cast a long shadow on the potential for independent action by the president. This provision enshrines the working principles of the British parliamentary model of government with respect to the ordinary executive functions of the president. However, doubt is cast on the scope of this principle with respect to the exercise of ‘prerogative powers’ including the power to proclaim an emergency. The unique role of the president as defender of the constitution, and by implication its basic structure, arguably requires him to exercise an independent role in the exercise of such powers. As the president, together with the prime minister, who is the leader of the Parliamentary majority party, should promote the observance of constitutional values, the court would be justified in utilizing basic structure review to scrutinize the advice offered by the prime minister and the presidential decision under these circumstances.

The pre-conditions required to be satisfied before a valid proclamation of emergency may be issued are distinct under each article. Article 352 establishes a narrow necessity standard for the proclamation of emergency—a grave emergency arising out of armed rebellion or external aggression which threatens the security of the nation—and does not expressly invoke or otherwise integrate the wider constitutional principles that basic structure review is concerned with. Article 356 by contrast allows the President to

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31 Constitution of India, 1950, Article 60.
32 Constitution of India, 1950, Article 352(1).
proclaim an emergency where the ‘government of the State cannot be carried on in accordance with the provisions of the Constitution’ and thereby presciently accommodates the preservation of basic features of the constitution. Although the article does not specify the particular constitutional provisions which need to be complied with, surely the provisions relating to federalism, democracy, and republicanism are among those protected. The Sarkaria Commission on Centre-State Relations interprets this phrase to deal primarily with political problems within the State or between the Centre and State(s). The report’s recommendations have been cited with approval in Bommai and have tended to dominate public discussions on this topic. Sawant supplements this narrow formulation of the range of concerns of Article 356 and interprets the scope of the phrase ‘breakdown of constitutional machinery’ to include an assessment of normative constitutional principles identified under the basic structure doctrine.

The analysis above suggests that there are adequate reasons to integrate the implied limitations on the exercise of state power inherent in basic structure review into our interpretation of both aspects of executive proclamations considered above—the presidential role and the pre-conditions to be satisfied. If such an interpretation were to rest on the nature and content of the presidential role as defender of the constitution, the court would apply similar standards to both state and national emergencies. However, if the court pays attention only to the pre-conditions to the exercise of the power, as its present analysis of these provisions suggests, then basic structure review would require a greater level of scrutiny of state emergency while conceding a wider zone of autonomy to the political process in the case of national emergency.

This differential approach to the two provisions may arise from the different character of the power in each case. National emergency power is a conventional prerogative power to deal with security—external and internal—a subject frequently considered to be beyond judicial standards. Regional emergency power on the other hand

33 Ibid., Article 356 (1).
34 Sarkaria Commission Report on Centre–State Relations, para 6.4.01
35 Bommai, supra n. 3, pp. 1972–3 (Sawant, J).
responds to conditions of political instability and disregard for basic features of the constitution which are capable of judicial scrutiny. It is more likely though that this distinction between the scope of judicial review of these two types of emergency power arises from an inability of the court to isolate the character of basic structure review and consider how it might integrate such review with the administrative law review model previously applied to executive proclamations. But this is a topic that I return to in the next chapter.

**Ordinary Executive and Legislative Power**

The Indian Constitution confers, and distributes, legislative and executive powers between the Union and the states in an identical fashion.\(^{36}\) Besides these general powers, some special powers are conferred on each unit through special provisions.\(^{37}\) These special powers are subject to particular conditions that need to be satisfied before they are exercised. In this section, I will investigate the courts’ approach to basic structure review of ordinary legislative and executive power and will argue that there are good reasons to construe the constitutional provisions regulating executive and legislative powers to accommodate basic structure judicial review.

As the court has not distinguished pointedly between the application of the basic structure review to legislative and executive power, I will not emphasize this distinction either. I treat these two types of state action to be of the same status and requiring the same constitutional basis. The distinction between these two types of state action assumes greater significance when I examine the nature and standard of basic structure review in the next chapter. As legislative and executive powers are conferred by similarly phrased constitutional provisions, an argument for the application of basic structure review which turns on the interpretation of either constitutional provision should apply equally to the other type of state action. Although legislative and executive power are distinct types of power, they are

\(^{36}\) Articles 245 and 246 confer legislative power while Articles 73 and 162 confer executive power on the same subject matter.

\(^{37}\) Articles 247 to 254 confer significant special legislative powers while Articles 256 to 263 confer significant special executive powers. Several other provisions of the constitution confer minor executive and legislative powers.
both constitutional powers conferred on the organs created by the constitution and in this sense pose similar problems for the extension of basic structure review. Before I go further, I will briefly survey the provisions of the constitution which confer ordinary executive and legislative powers.

Executive powers are vested in, and distributed between, the Union and State governments in separate articles of the Constitution. Articles 53 and 154 invest executive power of the Union and State governments on the President and Governor respectively. Clause 1 in both articles vests the powers and provides that they may be exercised either directly or through subordinate officers. The nature of executive power and manner of its exercise has provoked significant judicial attention and critical commentary, but these controversies are unrelated to basic structure review with which I am concerned in this section. The extent of executive power of the Union and the State is determined by Articles 73 and 162 respectively. The extent of the general executive power of the Union and State is co-extensive with the distribution of legislative powers discussed below. As with legislative powers, the extent of executive power is circumscribed by the phrase: ‘Subject to the provisions of this Constitution…’.

Unlike what I observed with executive power, the constitution does not expressly confer legislative power on the Parliament and State Legislatures. For that matter, the judicial power is not expressly vested in the judiciary either. In practice, the absence of an exclusive vesting clause for legislative and judicial power has not assumed any significance in the interpretation of the constitution. Notably, legislative power is distributed between the Union and State by Articles 245 and 246 of the constitution. Article 245 makes the Parliament’s and the State legislatures’ power to make laws subject to the provisions of the Constitution...’ While Article 245 sets out the territorial jurisdictional limits of the respective legislatures, Article
246 read with the three lists in Schedule VII distributes subject matter between the legislatures. A precise account of the distribution of powers is crucial for any account of the federal arrangements in the Indian Constitution but this is not the focus of this section of the chapter.

Besides this general power of legislation, other provisions of the Constitution confer special legislative powers on the Union government to enact laws relating to citizenship\(^{38}\) or on state subject matters ‘in the national interest’.\(^{39}\) In some exceptional circumstances legislative powers are conferred on the executive branch of government to make temporary laws.\(^{40}\) The exercise of special legislative powers may potentially threaten the basic structure doctrine, but this is yet to happen. Moreover the analysis in the rest of this chapter, confined though it is to the general legislative power, offers us sufficient guidance as to how one may approach the basic structure review of special legislative powers.

The brief survey conducted above of the constitutional provisions related to the scope and extent of executive and legislative power highlight the centrality of the phrase ‘subject to the provisions of the Constitution’ which circumscribes both these powers. The courts have deployed this phrase in support of their conclusion that two significant limits emerge from it: first, that no state action shall take away or abridge fundamental rights conferred in Part III of the constitution\(^{41}\) and second, that jurisdictional boundaries of the Union and State\(^{42}\) set out in the Constitution are to be maintained. Judicial review for the protection of fundamental rights and for competence has developed extensively taking into account the relevant constitutional provisions and the courts’ interpretations of these provisions. One may then anticipate that the legal arguments about the application of basic structure review to these powers would concentrate on an interpretation of this phrase. Surprisingly, this is yet to happen!

\(^{38}\) Constitution of India, 1950, Article 11.
\(^{39}\) Ibid., Article 249.
\(^{40}\) Ibid., Articles 123 and 213.
\(^{41}\) Constitution of India, 1950, Article 13.
\(^{42}\) Ibid., Article 246.
The Election Case

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.43

The Representation of the People (Amendment) Act, 1974 and the Election Law (Amendment) Act, 1975 were enacted to validate the disputed election of the then Prime Minister, Indira Gandhi. These statutes together with the constitutional amendments sought to fortify her legal position in the election dispute. These were challenged in Indira Gandhi v. Raj Narain44 where the doctrine of basic structure was invoked as binding precedent for the first time. Three of the judges who dissented in Kesavananda were part of the 5–judge constitutional bench which decided this case. The Respondents counsel argued an alluringly simple proposition: ‘that ordinary legislative measures are subject like Constitution amendments to the restrictions of not damaging or destroying the basic structure or basic features’.45 Three judges rejected the proposition outright, while two others46 found it unnecessary to consider the argument as they decided the case on other grounds. Mathew’s observations, quoted above, signal the difficulties faced by a court dealing with a new doctrine, particularly one which they had to reluctantly apply by the force of precedent.

Ray, in his lead opinion, characterized arguments which subject ordinary legislation to the basic structure doctrine to mistakenly ‘equate legislative measures with Constitution amendment’.47 He took the purpose of the doctrine to render the change of constitutional norms ‘more difficult by regulating the manner and form of … amendments’.48 As seven judges in Kesavananda had rejected the theory of implied limits in the constitution, he took any attempt at using the basic structure doctrine to review legislation to be an exercise in ‘rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution’.49 He concluded

43 Indira Gandhi v. Raj Narain, supra n. 4, pp. 2388–9 (Mathew, J).
44 Ibid.
45 Indira Gandhi v. Raj Narain, supra n. 4, p. 2331 (Ray, CJ).
46 Ibid., p. 2365.
47 Ibid.
48 Ibid.
49 Ibid.
by reiterating that the ‘constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13’.\(^50\) Chandrachud concurred that the existing two-tier model of judicial review exhausted the potential for useful judicial review of ordinary legislative action and pointed out that as the basic structure was ‘not a part of the fundamental rights nor indeed a provision of the Constitution’\(^51\) it could not form the basis of review of ordinary legislation.

Mathew addressed the constitutional basis of the basic structure doctrine more directly. First, he noted that there was no support for the review of ordinary legislation in the *Kesavananda* opinion\(^52\) which he correctly understood to be a ‘limitation on the power of amendment under Article 368’.\(^53\) Then it fell to the respondents to show that such a limitation is found in Articles 245 and 246 which provide for the legislative power of Parliament and the State legislatures. By rejecting the idea that the concept of basic structure was an abstract model of review, removed from the Constitutional text, Mathew sharpens the enquiry into the constitutional basis for basic structure review of ordinary legislation. At this point in his opinion, he conflates the enquiry into the constitutional basis for basic structure review of ordinary legislation with an important, but analytically unrelated, enquiry into the process of identifying basic features of the Constitution.\(^54\) As I discuss the identification of basic features in Chapter 5, I now turn to address the other important questions raised by Mathew.

Three aspects of the conclusion in *Indira Gandhi* require scrutiny. First, the judges in this case offer little explanation for the constitutional basis and rationale for the basic structure doctrine in *Kesavananda*. They assume the doctrine to be authoritative precedent for judicial review with respect to amendments but offer no justifying reasons for the doctrine. Unless, the court develops an understanding of the role and scope of basic structure review as an independent model of judicial review, it will be difficult to use it to

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\(^{50}\) Ibid., p. 2332.

\(^{51}\) *Indira Gandhi v. Raj Narain*, supra n. 4, p. 2472 (Chandrachud, J).

\(^{52}\) Ibid., p. 2388 (Chandrachud, J).

\(^{53}\) Ibid., p. 2385.

\(^{54}\) Ibid., pp. 2383–7.
review amendments or any other species of state action convincingly. Second, despite the interpretive approach adopted in Kesavananda to Article 368, the judges in Indira Gandhi revert to a limited view of the role of the court in interpreting the constitution by adopting a formalist approach to construing the scope of the legislative power of Parliament and the State legislatures set out in Articles 245 and 246. Moreover, none of the opinions in Indira Gandhi considers the impact of the Kesavananda opinion on the content of the phrase ‘subject to the provisions of the Constitution’. Finally, the court is reluctant to subject Parliament’s legislative power to limits which are uncertain and indeterminate. As this is the first case where the basic structure doctrine was applied, the court was unsure about the process by which basic features are to be identified and the nature and scope of basic structure review. These concerns, though strictly unconnected to whether the scope of basic structure review should apply to ordinary legislation and executive action, play a significant role in the court’s conclusion.

Of the three aspects considered above, I address the first and the third in Chapters 4 and 5 respectively. In this part of the Chapter I will confine the discussion to the interpretation of Articles 245 and 246. In Chapter 2 I have proposed that the constitutional basis for basic structure review of constitutional amendments is the operation of implied limitations on the amending power in Article 368. In order to develop the argument for basic structure review of executive and legislative action, in the next section I consider a few relevant cases where the court has utilized the basic structure doctrine.

The Inquiries Case

I specifically said there that the doctrine of the basic structure of the Constitution could be used to test the validity of laws made by Parliament either in its constituent or ordinary law making capacities because ‘ordinary law making cannot go beyond the range of constituent power’…. But, if, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution’s ‘basic structure’, just as though they are its express mandates, they can be and have to be used to test the, validity of ordinary laws just as other parts of the Constitution are so used.55

55 State of Karnataka v. Union of India, AIR 1978 Supreme Court 68 (Beg, CJ)
In *State of Karnataka v. Union of India*\(^{56}\), through an original civil suit under Article 131 of the Constitution, the State of Karnataka challenged a notification issued by the Union government in exercise of its powers under Section 3 of the Commissions of Inquiry Act, 1952, constituting a Commission of Inquiry into allegations of corruption on the part of the chief minister and other ministers of the state government. Despite the proceeding taking the form of a civil suit for a declaration, this executive order was challenged on administrative law grounds of mala fide motives and constitutional grounds of a lack of competence on ‘the terms of the Constitution as well as the federal structure implicit and accepted as an inviolable basic feature of the Constitution’.\(^{57}\) The court brushed off the administrative law challenges with relative ease and concentrated on the challenge to the plenary power of the Union to legislate on Commissions of Inquiry. Though it was the exercise of executive power in the form of a Union notification that was challenged in the case, the court focused on the legislative competence of the Union to enact the parent statute. The court seems to assume that if the legislation passed the competence enquiry, the executive action would be competent too. The court conflated the two types of state action and did not anticipate the possibility that though the executive action may satisfy judicial review on competence grounds, it may fail to satisfy administrative law review and basic structure review. Further, the court also failed to distinguish between competence review and basic structure review as the court did not apply itself to the problems related to the basic structure review of executive action.

Basic structure review of ordinary legislative and executive action did not emerge through a single logical step as suggested by Beg in his lead opinion in the *Inquiries* case. I had concluded the discussion of the *Election* case by pointing out that before a court could extend basic structure review to ordinary legislative and executive powers, it must apply itself to an understanding of the constitutional basis of the basic structure doctrine in *Kesavananda* as well as an approach to constitutional interpretation. Beg, in his lead opinion in the *Inquiries* case...
case, responded to these concerns. Hence, his opinion deserves close analysis.

**Reading Kesavananda**

Beg while reviewing the *Kesavananda* holding, where he took a dissenting view, observed that:

although a majority of learned Judges of this Court . . . rejected the theory of ‘implied limitations’ upon express plenary legislative powers of constitutional amendment, yet, we accepted, I say so with the utmost respect, again by a majority, limitations which appeared to be not easily distinguishable from implied limitations upon plenary legislative powers even though they were classed as parts of ‘the basic structure of the Constitution’.58

In Chapter 2 I had noted that several justifications were advanced in support of a doctrine of implied limitations—natural rights, historical commitments of the freedom movement, constitutional common law, limited sovereignty of a post-colonial state—which had been expressly rejected by the majority in the court. Beg revives the implied limitations argument despite its express rejection by the *Kesavananda* majority and seeks to justify it by turning to the provisions of the constitution.

He begins by clarifying that he did not consider *Kesavananda* ‘to lay down some theory of a vague basic structure floating, like a cloud in the skies, above the surface of the Constitution and outside it or one that lies buried beneath the surface for which we have to dig in order to discover it’ and then draws us back to the constitutional text. He then sets out a restatement of the *Kesavananda* holding with clarity that is yet to be found in any other opinion of the Supreme Court and deserves to be quoted in full:59

I prefer to think that the doctrine of ‘a basic structure’ was nothing more than a set of obvious inferences relating to the intents of the Constitution makers arrived at by applying the established canons of construction rather broadly, as they should be so far as an organic Constitutional document, meant to govern the fate of a nation, is concerned. But, in every case where reliance is placed upon it, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an amendment of the Constitution), what

58 *State of Karnataka v. Union of India*, supra n. 56.
59 *State of Karnataka v. Union of India*, supra n. 49, para 121.
is put forward as part of ‘a basic structure’ must be justified by references to the express provisions of the Constitution. That structure does not exist in vacuo. Inferences from it must be shown to be embedded in and to flow logically and naturally from the bases of that structure. In other words, it must be related to the provisions of the Constitution and to the manner in which they could indubitably be presumed to naturally and reasonably function … So viewed, the doctrine is nothing more than a way of advancing a well recognised mode of construing the Constitution … Thus, it is clear that whenever the doctrine of the basic structure has been expounded or applied it is only as a doctrine of interpretation of the Constitution as it actually exists and not of a Constitution which could exist only subjectively in the minds of different individuals as mere theories about what the Constitution is. The doctrine did not add to the contents of the Constitution. It did not, in theory, deduct anything from what was there. It only purported to bring out and explain the meaning of what was already there.

This rather long extract is clear but confused. Beg rightly identifies three aspects of the *Kesavananda* holding. First, that the court developed a particular approach to constitutional interpretation; second, that applying this method of interpretation the court concluded that the amending powers of Parliament did not extend to the basic structure of the Constitution. Finally, he isolates an interpretive technique for the identification of basic features which pays attention to the textual provisions of the Constitution and not to abstract political or moral theory. We will return to this third aspect of the judgment in Chapter 5 but for the moment it is crucial to disentangle these distinct enquiries to overcome their jumbled presentation in the above quotation.

By presenting these three distinct enquiries together, Beg comes to the conclusion that the ‘basic structure’ doctrine is nothing more than a principle of construction of the Constitution. In Chapter 2, I had argued that the basic structure doctrine was the result of a ‘structural interpretation’ of important constitutional provisions which give rise to limits on the amending power. The doctrine which results from such an interpretive approach has developed into a full-fledged doctrine of judicial review which includes well worked out standards of application and carefully identified grounds of review. The structural interpretation of the Constitution allows the court to articulate a constitutional basis for the basic structure doctrine, which in *Kesavananda* resides in an interpretation of the amending power in Article 368. In the *Inquiries* case, Beg rightly identifies the technique
of interpretation but fails to apply this technique to interpret Articles 245 and 246 which confer legislative power on Parliament.

He reviews the refusal of the court in the Election case to extend basic structure review to ordinary legislation and observes that the reason for that decision was ‘that there was no ambiguity to be resolved about the ordinary law making powers of Parliament. It was applied to interpret the ambit of the Constituent power as there was some uncertainty about its scope’.60 Although he accepts the reasoning of the court in the Election case he does not apply this to the provisions of the Constitution which grants executive and legislative power.

We had noted earlier that the Constitution confers executive and legislative power by making them expressly ‘subject to the provisions of the Constitution.’ The application of the method of constitutional interpretation identified by Beg would require that the courts determine whether the scope of this phrase is limited to the provisions of the Constitution or include the implied limits developed by the court while interpreting these constitutional provisions. For example, as the court has interpreted Article 14 of the Constitution to include the Wednesbury unreasonableness principle,61 executive power which is ‘subject to the provisions of the Constitution’ is therefore subject to the Wednesbury standard. Clearly, the court has accepted the proposition that the ‘provisions’ of the Constitution include its interpretation of these provisions. The key issue then is whether the basic structure doctrine announced in Kesavananda is a limit on the legislative and executive powers. Though the Election case did not address this question, Beg did so in the Inquiries case albeit in a roundabout fashion:

[I]f, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution’s ‘basic structure’, just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.62

This observation, though unrelated to an interpretation of Article 245 or 246 in Beg’s opinion, does articulate a constitutional basis for the basic structure review of legislative and executive power through

60 State of Karnataka v. Union of India, supra n. 56 (Beg, CJ).
62 State of Karnataka v. Union of India, supra n. 56, p. 679 (Beg, CJ).
an interpretation of the phrase ‘subject to the provisions of the Constitution.’ Such an argument pre-supposes that an interpretation of the constitutional provisions generates emergent basic features which operate as implied limitations on the power-conferring provisions of the Constitution. As these implied limitations are a result of an interpretation of the ‘provisions’ of the Constitution, all legislative and executive powers which must be exercised subject to the ‘provisions’ of the Constitution are therefore subject to basic structure review.

**Reading the Election Case**

Even if the above interpretation of the Constitution is persuasive, the 7-judge bench in the *Inquiries* case had to deal with the refusal to apply basic structure review to ordinary legislation by another 5-judge bench in the *Election* case. I had noted earlier that Beg interpreted the basic structure doctrine to be a principle of interpretation of the Constitution. Therefore, he read the majority opinion in the *Election* case to affirm that the basic structure was a valid principle of construction but that ‘it was not available to test the validity of the impugned provisions of the Representation of People Act because the expressly laid down ordinary law making powers of Parliament are clear enough. In other words, it was held to be inapplicable here on the view that there was no ambiguity to be resolved about the ordinary law making powers of Parliament.’ The analysis in this section clearly suggests that Beg’s analytical approach to the basic structure doctrine in the *Inquiries* case was more precise and persuasive than that adopted by the bench in the *Election* case. Moreover, the *Inquiries* case was before a 7-judge bench while the *Election* case came before a 5-judge bench. Technically this means that Beg’s majority opinion in the *Inquiries* case should overrule the

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63 Ibid. (Beg, CJ).
Election case on the applicability of basic structure review to ordinary legislation. However, the presence of plural opinions in the Inquiries case does not allow us to assert the proposition on basic structure review and ordinary legislation unequivocally. Beg does not expressly overrule the Election case and concludes that the basic feature of ‘federalism’ does not impose a further limit on the Union’s power to legislate on inquiries in the States. Hence, this leaves some ambiguity on the impact of the Inquiries case. Given the diametrically opposite conclusions arrived at by the two benches on the applicability of basic structure review with respect to ordinary legislation, it was left to the subsequent cases to establish which of these arguments were to succeed. I will turn to this in the next section and then conclude on the constitutional basis of basic structure review as it applies to ordinary legislation and executive action.

The Rajya Sabha Case

The basic structure doctrine has been applied to test the constitutionality of legislation and executive action in several cases after the Inquiries case. However, most of these cases failed to reconcile the conflicting views of the judges in the Election and Inquiries cases on the constitutional basis for extending basic structure review to ordinary legislation and executive action. Significantly, in Ismail Faruqui v. Union of India, the basic structure doctrine was used to invalidate an ordinary legislation, namely Ayodhya (Acquisition of Certain Areas) Act, 1993. In several other cases, the basic structure doctrine has been used to validate legislations and executive action. I turn to these cases in Chapter 4 as they assist in refining the type and standards of review for the basic structure doctrine.

Raju Ramachandran complains that these decisions do not distinguish the ‘authoritative view laid down in Indira Gandhi’ but he ignores the impact of the Inquiries case. Moreover he argues that that these cases ‘… illustrate the danger of an easy resort to the basic structure mantra when the Court could have invalidated the

64 (1994) 6 SCC 360. See also G.C. Kanungo v. State of Orissa (1995) 5 SCC 96, where the court used basic structure review to invalidate a state arbitration law.

concerned legislation on other well-recognized grounds’. This is an argument about the nature of basic structure review and its relationship with existing models of judicial review which I will consider in greater detail in Chapter 4.

The ambiguity around the constitutional basis for basic structure review of ordinary legislation and executive action was sought to be settled decisively in a recent 5-judge bench in *Kuldip Nayar v. Union of India*.66 Kuldip Nayar challenged amendments to the Representation of People Act, 1951 on two grounds, both of which relied on the basic structure doctrine. First, he challenged the amendment which dispensed with the requirement of a candidate for a Rajya Sabha election to be domiciled in the State he seeks to represent. He argued that this principle of representation was central to the composition of the Rajya Sabha as a Council of States and its removal damaged the basic feature of federalism which dispensed with the requirement of a secret ballot in Rajya Sabha elections as it irreparably damaged the feature of ‘democracy’ which entails a free and fair election by secret ballot.

Sabharwal, speaking for the majority, upheld both amendments and held that the ‘doctrine of basic feature in the context of our Constitution…, does not apply to ordinary legislation…’.67 He reached this conclusion by relying extensively on the opinions of several judges in the *Election* case where the court categorically ruled that basic structure review does not apply to ordinary legislation.68 While considering the impact of the *Inquiries* case Sabharwal cited from portions of Beg’s opinion where he pointed out that the basic structure doctrine ‘must be justified by references to the express provisions of the Constitution’69 but surprisingly did not cite his conclusion that limits arising out of the express provisions of the constitution, basic structure review applied in full measure to ordinary legislation.70 Sabharwal then goes on to cite Untwalia’s concurring

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67 Ibid. (Sabharwal, CJ).
69 *State of Karnataka v. Union of India*, supra n. 56 cited at *Kuldip Nayar* (n. 67) p. 66 (Sabharwal, CJ).
70 Ibid., p. 679 (Beg, CJ).
opinion in the *Inquiries* case where he rejects the application of basic structure review to ordinary legislation.\(^{71}\)

The Supreme Court passed over on the opportunity in the *Rajya Sabha* case to reconcile the conflicting positions in the *Election* and *Inquiries* cases. While the court’s ruling that basic structure review does not apply to ordinary legislation is likely to be treated as the current position of law, this proposition should be reconsidered and revised at the next available opportunity. In this section I have argued that Beg’s opinion in the *Inquiries* case offers us the best rationale for applying basic structure review to ordinary legislation and executive action. As we have shown above, the implied limitations which sustain basic structure review are readily accommodated by the language of Articles 245 and 246 which requires that all powers must be exercised ‘subject to the provisions of the constitution’.

**Conclusion**

We conclude this chapter by responding to some of the recent work by Sathe who is one of the few scholars who have seriously tracked the evolution of the basic structure doctrine beyond the review of constitutional amendments. He concludes his review of the *Bommai* case by posing a critical question: ‘Do we conclude that the basic structure doctrine could now be pressed into service for challenging the validity of an executive act?’\(^{72}\) In this chapter I have argued that the answer to this precisely framed question has to be an unambiguous yes. Although Sathe construes the political impact of the *Bommai* case to be a warning the political right which sought to put in place a majoritarian Hindu state, I have attempted to articulate a general constitutional basis for the application of basic structure review to higher executive action or the exercise of prerogative powers. He then observes that while the court refers to the basic structure in other cases where ordinary legislative and executive action is challenged, it seems to use the words ‘basic structure’ in a different sense from which they are used in determining the validity of a constitutional amendment.\(^{73}\) This is the topic I turn to in the next chapter where I

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\(^{71}\) Kuldip Nayar, supra n. 67, p. 67 (Sabharwal, CJ).


\(^{73}\) Ibid., p. 98.
outline the type and standards of basic structure review as it applies to these various forms of state action. I conclude this chapter with a final endorsement of Sathe’s prognosis on the evolution of the basic structure doctrine:

So it seems that while the horizon of the basic structure doctrine may expand to include legislative as well as executive actions, its use for considering the validity of a constitutional amendment may become rare.\textsuperscript{74}

\textsuperscript{74} Ibid.