BEYOND ADMINISTRATIVE LAW REVIEW: ASSESSING ORDINANCE PROMULGATION THROUGH THE LENS OF THE BASIC STRUCTURE DOCTRINE

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The limited decisions and commentary on the justiciability of ordinances have relied upon administrative law grounds. Given the constitutional origin of ordinances and the unique executive law-making they entail, there is significant scope for the application of principles of constitutional law to their review. This paper pitches the application of the basic structure doctrine in judicial scrutiny of ordinances. First, ordinances are broken down into their constituent executive and legislative elements to strip them of the immunities ordinary legislation enjoys from judicial review. Second, lessons are drawn from the application of the basic structure doctrine to executive action in S. R. Bommai v. Union of India ('Bommai') with support from the United Kingdom Supreme Court's ruling R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland. Thereafter, Bommai's reasoning is enhanced with novel propositions and applied to ordinance-making powers. The rule of separation of powers is extended to form a new principle of tripartite equilibrium for a balance between the branches of government. Tripartite equilibrium further rationalises the application of the basic structure doctrine to ordinances. Lastly, a two-fold model of motive examination of ordinances is expounded to review the condition precedent of an 'immediate need' of the ordinance.

Table of Contents

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I. INTRODUCTION

As the 50th anniversary of the *Kesavananda Bharti* v. *State of Kerala*,[1] ('Kesavananda Bharti') decision captures scholarly interest, the following year will also commemorate the 30th anniversary of the ruling in *S.R. Bommai* v. *Union of India*,[2] ('Bommai') one of the most pivotal advancements stemming from the Kesavananda ruling. While Kesavananda identified an immutable 'basic structure' of the Indian Constitution, 1950 ('the Constitution') and limited the Parliament's constituent power to preserve core democratic values, Bommai extended the application of this conception to executive action. Over the years the basic structure doctrine has emerged as one of the most significant innovations of the Indian judiciary. Described by D.Y. Chandrachud J. as a "North Star" in guiding the interpretation of the Constitution,[3] it has acted as a safeguard against democratic subversion. A commentary by Arvind P. Datar has described it as having repeatedly protected the Constitution's integrity and sanctity.[4]

The means of democratic subversion are not limited to constitutional amendments. The decision in Bommaiadopted the basic structure doctrine as a normative resource for interpreting constitutional provisions relating to executive actions.[5] Among the several powers granted to the executive, the exercise of ordinance-making prompts important constitutional questions which have drawn little attention. Drawing lessons from Bommai, this paper attempts to apply the basic structure doctrine to ordinance promulgation.

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1 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

2 S.R. Bommai v. Union of India, (1994) 3 SCC 1 ('Bommai').

3 India Today, *Basic Structure of Constitution Guides Like North Star: CJI DY Chandrachud*, India Today, January 22, 2023, available at https://www.indiatoday.in/law/story/cji-dy-chandrachud-says-basic-structure-of-constitution-guides-judges-like-north-star-2324861-2023-01-22 (Last visited on July 30, 2023).

4 Arvind P. Datar, Our Constitution and its Self-Inflicted Wounds, Vol. 4, Indian J. Const. Law (2007).

5 Bommai, *supra* note 2, ¶96.

The Constitution confers the executive with unique legislative powers by way of ordinances. Articles 123 and 213 grant powers to the Central[6] and State[7] executives to promulgate ordinances when the house is not in session. These powers are not distinct from the powers of the Parliament in terms of legislative domain. Although the provision requires ordinances to be laid before the house within six weeks of reassembly,[8] it creates a mechanism for the executive to temporarily bypass parliamentary scrutiny. Such a bypass of the legislative branch of government creates important questions of constitutional law which deserve examination.

To prevent such misuse of this power, the provision prescribes an important condition precedent – the President's satisfaction of the existing circumstances warranting immediate action.[9] It is this condition precedent that several arguments of this paper revolve around. While several commentators[10] and a few judicial decisions[11] have expressed views of the justiciability of the President's satisfaction of conditions warranting immediate action, most of them have restricted themselves to administrative law grounds. These views have been adequately examined while making a pitch for the application of the basic structure review to this power.

In Part II, the paper begins by examining the nature of ordinances. This serves the purpose of setting the standards of judicial review of ordinances and dissects the ordinance into its constituent executive and legislative elements. Part III explores the application of the basic structure doctrine and establishes the basic structure review as an independent and distinct form of constitutional law review. Thereafter, Part IV discusses important perspectives from the Bommai and Miller II cases. Part V goes on to propose the 'principle of tripartite equilibrium' to justify a basic structure review of ordinances. In Part VI, a two-fold model is set out as a standard for this basic structure review. Part VII concludes the paper.

II. DISSECTING THE ORDINANCE: LEGISLATIVE ACT OR EXECUTIVE ACT?

In order to determine standards of judicial review of an ordinance, it is essential to set the context in which an ordinance is to be viewed, i.e. the nature of an ordinance. For the desirable standards of review, ordinance promulgation, or at the very least, Presidential satisfaction must be established as an executive act, to disrobe it of the immunities parliamentary legislation enjoys. The Supreme Court has previously relied upon the headings[12] of the chapters of the Constitution

6 The Constitution of India, Art. 123(1).
7 *Id.*, Art. 213(1).
8 *Id.*, Art. 123(2).
12 Arts. 123 and 213 of the Indian Constitution are placed under chapters titled 'Legislative Powers of the President' and 'Legislative Powers of the Governor' respectively.

and categorised ordinance promulgation as an act of legislation by the President[13] Is well established in Indian[14] and English[15] law that legislative motives are beyond the scope of the court's examination. Thus, effectively these decisions clothed ordinances with the immunity provided to parliamentary legislations.[16]

This immunity however appears to have been eliminated in the seven-Judge decision of *Krishna Kumar Singh* v. *State of Bihar*[17] ('Krishna Kumar Singh'). In this case, judicial intervention in promulgation was enabled in cases involving an abuse of power or when ordinances are passed for an "oblique motive".[18] Furthermore, the court held that the Governor could not be titled as a "parallel law-making authority".[19] In line with the principle of legislative supremacy,[20] the executive's ordinance-making powers were stripped of the immunity enjoyed by parliamentary legislation.[21]

While the court enabled judicial scrutiny, it lost the opportunity to explicitly distinguish between the nature of an ordinance and ordinary legislation. Making this distinction would have provided a sound basis to apply different standards of scrutiny to ordinances and parliamentary legislation, and would have substantiated the enhanced scrutiny of ordinances. The reasoning behind this enhanced judicial scrutiny still remains unclear. Several commentators have attempted to propose a framework for the judicial examination of ordinance promulgation and have in the process categorised the nature of ordinances in numerous ways. It is useful to examine some of them before proposing the framework used in this paper.

Firstly, commentators have approached ordinances by viewing them as analogous to delegated legislation,[22] or even as a subset of delegated legislation.[23] Both these approaches are misguided since delegated legislation is derived from primary legislation passed by the Parliament and may be declared *ultra vires* on violation of its source legislation. Essentially, the power vested with the executive to make delegated legislation is statutory in nature. On the other hand,

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13 K. Nagaraj v. State of A.P., (1985) 1 SCC 523, ¶31; T. Venkata Reddy v. State of A.P., (1985)3 SCC 198, ¶9.

14 K.C. Gajapati Narayan Deo v. State of Orissa, (1953) 2 SCC 178 : 1954 SCR 1, ¶9.

15 Edinburgh and Dalkeith Railway Co. v. Wauchope, 1842 UKHL 710 (United Kingdom House of Lords); Hollinshead v. Hazelton, (1916) 1 AC 428 (Ireland Court of Appeal).

16 Ordinary legislation can be reviewed on two grounds only, lack of legislative competence and violation of constitutional provisions. This forecloses any other grounds of review of ordinances, namely motive, review of satisfaction, amongst others, *see* State of A.P. v. McDowell &Co., (1996) 3 SCC 709.

17 Krishna Kumar Singh, *supra* note 11, ¶118.

18 *Id*.

19 *Id*.,¶105.

20 *Id*.

21 *Id*.,¶118.

22 Tara, *supra* note 10.

23 Subir Kumar & Pranjal Chaturvedi, *Ordinances and Administrative Legislations: Discretion Involved in a Legislative Power Vested in the Executive*, Vol. 1(1), ILR, 1 (2020).

ordinances are a direct exercise of power by the executive as envisaged in the Constitution. Any analogy equating ordinances with delegated legislation neglects the core differences between statutory and constitutional powers. Courts have repeatedly drawn this distinction between constitutional and statutory powers of the executive.[24]

Authors H.M. Seervai[25] and M.P. Jain[26] in their works have sought to dissociate ordinances from ordinary legislation. Seervai has pointed out the executive's discretionary power in the promulgation of ordinances,[27] while Jain goes on to highlight the lack of parliamentary deliberation.[28] Both works have recognised the shortcomings of clothing ordinances with the immunities of parliamentary legislation but fail to clearly demarcate and categorise the nature of ordinances. Their commentaries reject a purely legislative categorisation of ordinances but remain unclear on what alternative demarcation they offer.

Shubhankar Dam recognises this ambiguity in his commentary and argues for a unique categorisation of ordinances as the products of an 'intermediate' legislative power.[29] This category would neither be purely executive nor purely legislative but would have elements of both.[30] Dam's lucidly argued work addresses several jurisprudential gaps. However, in the creation of an entirely new third category separate from both executive and legislative powers, Dam introduces an unnecessary departure from the existing constitutional framework.

This paper proposes an alternative approach, which is 'dissecting' ordinance promulgation into its two constituent parts, namely *first* presidential satisfaction of an immediate need, and *second*, the actual ordinance itself.

The Presidential satisfaction under Article 123 is contingent upon the existence of an immediate need.[31] The President's discretionary satisfaction of the existence of these *ex necessitate* circumstances must be viewed as a separate step preceding the act of promulgation. When viewed independently, it is amply clear that Presidential satisfaction is not a legislative act and cannot possibly be clothed with the immunity an act of Parliament may be clothed with.

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[24] Ashok Kumar v. Union of India, (1991) 3 SCC 498, ¶16 (differentiates between constitutional and statutory powers of the executive with respect to clemency and pardoning powers); Bhaskar Jalan v. Housing Estates (P)Ltd., 2016 SCC OnLine Cal 1806, ¶4 (differentiates between constitutional and statutory powers with respect to jurisdictional issues).

[25] Seervai, *supra* note 10, 2566-2567.

[26] Jain, *supra* note 10, 174-175.

[27] Seervai, *supra* note 10.

[28] Jain, *supra* note 10.

[29] Shubhankar Dam, Presidential Legislation in India: The Law and Practice of Ordinances, 167 (Cambridge University Press, 2013).

[30] *Id*., 179.

[31] The Constitution of India,Art. 123.

While the ordinance in itself may be legislation, the act of Presidential satisfaction, by its very nature, is an executive act. The legislative content of an ordinance may be reviewed for its constitutionality by employing the standards of scrutiny applicable to an act of Parliament. However, it is argued that the preceding Presidential satisfaction must be reviewed as an executive act, with such standards in play.

The Constitution confers the power to promulgate ordinances *ex necessitate*, or only on the satisfaction of an immediate need for the ordinance.[32] The case made here is for the judicial examination of the President's satisfaction of this necessity. Invariably, an examination of the 'necessity' of the ordinance will lead to a test of the motive involved in its promulgation. A model for judicial scrutiny of this motive is discussed in a later part of this paper.[33]

III. THE BASIC STRUCTURE REVIEW

Most commentary[34] and judicial decisions[35] concerning the justiciability of ordinance promulgation have restricted themselves to administrative law grounds of review of executive action, namely *mala fides*, reasonableness, improper material, amongst others. Even in Krishna Kumar Singh, D.Y. Chandrachud J. restricted himself to the grounds of illegality, abuse of power, and administrative law review grounds.[36] This is despite the decision rendered in Bommai,[37] which made use of basic structure doctrine to substantiate its review of a proclamation of emergency under Article 356, a power analogous to ordinance promulgation, as detailed in the next part. While the implications of Bommai are discussed in a later part of this paper, it is crucial to address this jurisprudential gap in the usage of the basic structure doctrine.

The basic structure doctrine originated in decisions concerning the Parliament's constituent power. However, with the passage of time, its scope has been expanded to other forms of democratic subversion as well.[38] *M. Ismail Faruqui*v. *Union of India*,[39] struck down provisions precluding proceedings concerning the Ayodhya dispute site as violative of the rule of law, a basic feature of the Constitution. In *G.C. Kanungo* v. *State of Orissa*,[40] legislative action providing for the nullification of arbitral awards was recognised as an encroachment of

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32 *Id*.

33 *See* discussion *infra* Part V on "Rationale for a Basic Structure Review of Ordinance Promulgation".

34 *See*Seervai, *supra* note 10; Jain, *supra* note 10; Tara, *supra* note 10.

35 *See* Krishna Kumar Singh, *supra* note 11, ¶118; N. Ramesh Kumar v. State of A.P.,2020 SCC OnLine AP 5001, ¶410.

36 Krishna Kumar Singh, *supra* note 11, ¶118.

37 Bommai, *supra* note 2, ¶96.

38 Christopher J. Beshara, *Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India*, Vol. 48(2), Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America, 115 (2015).

39 (1994) 6 SCC 360, ¶96.

40 (1995) 5 SCC 96, ¶28.

judicial power and was held invalid for violating the rule of law. While both these cases extended the use of the basic structure doctrine to the review of ordinary legislation, they were preceded by Sawant J's opinion in Bommai, where the doctrine was used to review the president's proclamation of state emergency.[41] The pronouncement in Bommai is discussed at length in the next part of this paper.

Sudhir Krishnaswamy points out the insufficient articulation of a constitutional basis for this expansion of the doctrine and provides his own reasoning to fill in this lacuna, extending the principle of implied limitations to apply to the grant of both executive and legislative powers in the Constitution.[42]

Furthermore, for a clear and unhampered usage of the basic structure doctrine in judicial scrutiny of Presidential satisfaction, it is beneficial to make use of Krishnaswamy's conception of the 'basic structure review' as an independent and original form of judicial review, distinct from all other forms of constitutional judicial review.[43] Identifying the basic structure review as a distinct form of review emerging from constitutional common law provides an analytical structuring to the use of the basic structure doctrine. Furthermore, it provides a basis for the use of the doctrine in scrutiny of powers apart from constituent power. Henceforth in this paper, the use of the phrase 'basic structure review' corresponds to Krishnaswamy's conception of an independent and distinct review.

IV. REFLECTIONS FROM BOMMAI AND MILLER II

This part examines the decisions of the Supreme Courts of India and the UK in Bommai and Miller II respectively. Both concern judicial scrutiny of executive action on constitutional law grounds.

A. EXAMINING BOMMAI

After establishing the basic structure review as an independent form of review, it is imperative to explore its only application by the Supreme Court on executive action. Bommai was a case concerning the proclamation of emergency under Article 356, an executive act requiring presidential satisfaction akin to the constitutional scheme in ordinance promulgation.[44] Furthermore, Article 356 mandates a time-bound Parliamentary approval comparable to ordinance promulgation under Article 123.[45] The analogous nature of the two powers as well as the application of the basic structure review in Bommai, makes the case worthy of deliberation.

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41 Bommai, *supra* note 2, ¶96.

42 Sudhir Krishnaswamy, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, 44 (Oxford University Press, 2009).

43 *Id*., 18.

44 The Constitution of India, Art. 356.

45 *Id*.

Before Bommai, a proclamation of regional emergency could only be challenged on the administrative law grounds of bad faith.[46] In Bommai, however, the Supreme Court recognised that "Article 356 [had] a potentiality to unsettle and subvert the entire constitutional scheme".[47] Basic features of the Constitution, namely federalism, social pluralism, and secularism, would define and limit the scope of the President's satisfaction under Article 356.[48] The underlying motive behind the act was taken into consideration.

Two important tactics from this judgment must be noted for their relevance in ordinance promulgation. *Firstly*, the use of the basic structure review to limit the scope of Presidential satisfaction, and *secondly*, scrutiny of the underlying motive behind such satisfaction. Seeing the disruptive potentiality of Article 356 on the constitutional order, Sawant J. prudently used the basic structure doctrine as the normative resource to determine the legitimacy of the proclamation. To adjudge this legitimacy, the underlying motive was examined.

For instance, "the temptation of the political party or parties in power to destabilize or sack the Government in the State not run by the same political party or parties"[49] was noted and construed to undermine the principle of federalism. Such interpretation of Article 356, according to Sawant J., would be alive to other equally important provisions of the Constitution.[50] He relied upon a holistic reading of the Constitution while applying the basic structure doctrine to review Article 356.

Sawant J. in Bommai must be commended for his insight into Article 356, its nature and potential misuse, and for embracing the basic structure review which had so far been limited to the parliament's constituent power. The Supreme Court in Krishna Kumar Singh missed a significant opportunity to incorporate the basic structure review, especially given the readily available framework that Bommai provides.

While the merits of the reasoning in Bommai are evident, the positioning of the basic structure review in the decision remains problematic. A concept envisioned as an independent form of judicial review was given a subordinate position within the conventional administrative law framework. Sawant J. believed that this enhanced review which protected basic features, i.e. the basic structure review could be done by the courts within the framework of conventional administrative law and illegality grounds.[51] The central part of his opinion adopted an administrative law review of Presidential satisfaction, while he added the basic structure review only towards the later part of his opinion to extend his reasoning.

[46] State of Rajasthan v. Union of India, (1977) 3 SCC 592, ¶1414.
[47] Bommai, *supra* note 2, ¶96.
[48] *Id*.
[49] *Id*., ¶101.
[50] *Id*., ¶96.
[51] *Id*.

Effectively, Sawant J. envisioned the basic structure review as an extension of common law administrative law review.

Krishnaswamy has rightly criticised this opinion for its failure to recognise the basic structure review as an independent constitutional doctrine.[52] The first application of the review to executive action provided a ripe opportunity to create an analytical and coherent framework for the application of the basic structure doctrine to other forms of state action. The lack of such recognition of the basic structure review may well be the reason for its hesitant application to executive action in the years following Bommai.

While Krishnaswamy has completely segregated the basic structure review from aspects of administrative law, one cannot preclude the inclusion of administrative law principles into the doctrine in a future expansion of the basic structure's scope. Over the years of the development of Indian constitutional jurisprudence, the judiciary has found ample room for its application even in the absence of any explicit mention of administrative law in the Constitution. Articles 14 and 21 of the Constitution woven together with judicial review powers under Articles 32, 226, and 142 have carried most of this interpretative burden.[53] Judicial pronouncements have held both judicial review[54] and Articles 14 and 21[55] as parts of the basic structure of the Constitution. In fact, Articles 14 and 21 form two of the nodes of the 'golden triangle' envisaged to uphold human dignity and freedom by Chandrachud J. in *Minerva Mills Ltd.* v. *Union of India*.[56] One wonders if the similar role that administrative law review plays in preserving individual liberty, combined with a holistic reading of the Constitution could be used to read administrative law into the basic structure of the Constitution. The proposition is too much of a digression from the subject matter of this paper and remains open for further academic deliberation.

B. PARALLELS IN MILLER II

Exploration of British jurisprudence brings forth an interesting parallel. The United Kingdoms ('the UK') Supreme Court's decision in *R.* v. *Prime Minister*,[57] ('Miller II') concluding the Boris Johnson government's attempt to prorogue the Parliament as unlawful, involves a similar striking down of executive action. So uncanny are the parallels with Bommai that a commentator has referred to the case as an application of "the UK's basic structure doctrine".[58]

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52 KRISHNASWAMY, *supra* note 42, 52.
53 *Id*., 89.
54 Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
55 I.R. Coelho v. State of T.N, (2007) 2 SCC 1.
56 Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
57 R.v. Prime Minister, 2020 AC 373 :2019 UKSC 41 ('Miller II').
58 Erin F. Delaney, *The UK's Basic Structure Doctrine: Miller II and Judicial Power in Comparative Perspective*, Vol. 12(1), NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, Article 4 (2022).

Miller II concerned the prorogation of Parliament, a prerogative power in Britain exercised by the Monarch on the advice of the Prime Minister.[59] In the Brexit backdrop, former Prime Minister Boris Johnson had advised the Monarch to prorogue Parliament for a period of five weeks.[60] Such prorogation would have helped his government dodge scrutiny of a no-deal Brexit.[61] When the issue reached the UK Supreme Court, it held that the issue was justiciable,[62] and the prorogation was unlawful.[63] It recognised two 'fundamental principles' of constitutional law – sovereignty of Parliament and Parliamentary accountability – as limiting the power of prorogation.[64] The court held that the Prime Minister's advice would entail a compromise of the Parliament's 'constitutional functions' of holding the executive accountable,[65] and would have "extreme effects on the fundamentals of our democracy".[66]

The repeated references in Miller II to 'higher' and more fundamental constitutional principles will resonate with any proponent of the basic structure review. Commentary attempts to recast Miller II in the basic structure review garb by pointing to how the principle of Parliamentary accountability is accepted as a foundational element of the British constitutional set-up.[67] Furthermore, B.P. Jeevan Reddy J. in his opinion in Bommai implied similarities between the Presidential proclamation of emergency in India with the Monarch's prerogative powers in Britain as he examined opinions reviewing the exercise of these powers.[68]

The use of the principle of 'Parliamentary accountability' as a normative lodestar by Miller II may find much use in the proposition made in this paper.

V. RATIONALE FOR A BASIC STRUCTURE REVIEW OF ORDINANCE PROMULGATION

While Bommai brings forth the basic structure review in the emergency context, the position of its application on ordinance promulgation remains ambiguous. As highlighted before, most commentators and judicial decisions restrict themselves to an administrative law review of ordinance promulgation, eschewing the application of the basic structure review. Having explored the reasoning in Bommai, it is only a natural advancement of this paper to champion the

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59 R. Blackburn, Monarchy and the Personal Prerogatives, Public Law 546 (2004).
60 Miller II, *supra* note 57, ¶15.
61 *Id*., ¶¶56-57.
62 *Id*., ¶52.
63 *Id*., ¶61.
64 *Id*., ¶41.
65 *Id*., ¶48.
66 *Id*., ¶57.
67 Delaney, *supra* note 58, 33.
68 Bommai, *supra* note 2, ¶¶327-329.

application of the basic structure review to ordinance promulgation. Several valuable tactics and lessons from Bommai are combined with new propositions and to pitch for the application of such basic structure review.

A. POTENTIALITY OF ARTICLE 123 TO DISRUPT THE CONSTITUTIONAL SCHEME

The inherent rationale in Bommai to bring in the basic structure doctrine rests on the nature of Article 356. Sawant J.'s opinion gives special focus to the ability of regional emergency powers to "unsettle and subvert the entire constitutional scheme".[69]

By opining that the Constitution could be "defaced and destroyed"[70] by its very own provision of regional emergency powers, Sawant J. points to a 'superior' set of normative principles within the constitutional setup. This set of normative principles, as is seen in the opinion, translates to the basic structure of the Constitution. In order to safeguard this unalterable basic structure from the disruptive potential of Article 356, Sawant J. made use of the basic structure review.[71] He then goes on to establish federalism and democracy as parts of the basic structure of the Constitution, which would be defaced by arbitrary usage of Article 356.[72]

Sawant J. also goes on to describe the nature of India's democracy as a pluralist multi-party democracy in which it is not uncommon for Union and State governments to be run by different political parties.[73] Given the resultant power struggle, a temptation would exist in the Union to dismiss or destabilise State governments run by a different political. Sawant J. demonstrates this apprehension by highlighting the working experience of Article 356 since the inception of the Constitution, with the power being used against opposition parties in almost all cases.[74] This reasoning substantiates the disruptive potentiality of Article 356 that Sawant J. sought to establish while providing the rationale for using the basic structure review.

The focus must now be shifted back toward the comparison between the powers conferred under Articles 123 and 356. It is readily apparent how Article 123 carries a similar disruptive potentiality as the one Sawant J. eloquently described.

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[69] *Id*., ¶96.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*., ¶101.
[74] *Id*.

The very nature of ordinance-making powers makes them an exception to the rule of separation of powers. Contingent upon *ex necessitate* circumstances and timely parliamentary oversight, Article 123 confers the executive with legislative powers. Under ordinary circumstances, and in consonance with the principle of separation of powers, legislative powers are the sole prerogative of the Parliament. The exception created by Article 123 calls for special scrutiny given the status judicial pronouncements have accorded to the rule of separation of powers.

The separation of powers between the legislature, executive, and judiciary is a part of the Constitution's basic structure, as has been found in Kesavananda Bharati case,[75] followed by a reiteration in *Indira Nehru Gandhi* v. *Raj Narain*.[76] This potentiality of Article 123 to disrupt the rule of separation of powers, an element of the basic structure of the constitution, is analogous to the disruptive potentiality of Article 356 noted by Sawant J. in Bommai.

It is easy to forebode the arbitrary usage of Article 123 as a means to circumvent parliamentary procedure and thereby the very principle of separation of powers. Empirical studies by scholars confirm this apprehension. Shubhankar Dam's study[77] of the 615 ordinances promulgated between 1952 and 2006 examined the proximity between Parliament sessions and dates of promulgation. Out of these 615, at least 214 were promulgated within fifteen days prior to Parliament coming back into session. 261 were promulgated within fifteen days after the Parliament was prorogued.[78] These numbers demonstrate the obvious intent of the executive to circumvent parliamentary deliberation, in apparent violation of both the rule of separation of powers and the foundational principle of Parliamentary accountability as articulated in Miller II.

Even during the deliberations of the Constituent Assembly, this disruptive potentiality of Article 123 was warned of. Detractors had foreboded the coming of a dictatorial executive that would misuse ordinance-making powers to circumvent parliamentary deliberations.[79] H. V. Kamath even referred to ordinances as a relic from the British regime and pointed out the then ruling party's struggle against this power.[80] He appealed for the strongest possible constitutional safeguards. Similarly, Professor K. T. Shah expressed his distrust of the ordinance-making power and did not desire it to last "a minute longer" than the extraordinary circumstances required.[81] He highlighted how ordinances did not pass through the

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75 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶316 (per S.M. Sikri C.J.).

76 Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

77 Dam, *supra* note 29, 104-106.

78 *Id*.

79 Shri H.V. Kamath, *Constituent Assembly Debates*, 205 May 23, 1949 available at https://eparlib.nic.in/bitstream/123456789/763316/1/cad_23-05-1949.pdf (Last visited on December 24, 2023).

80 *Id*.

81 Prof. K.T. Shah, *Constituent Assembly Debates*, 208 May 23, 1949 available at https://eparlib.nic.in/bitstream/123456789/763316/1/cad_23-05-1949.pdf (Last visited on December 24, 2023).

scrutiny of the legislature, and yet would have the force and effect of legislation. Professor Shah considered this as "a negation of the rule of law".

The potential of ordinance-making powers as a means to circumvent parliamentary deliberation and legislative procedure, and thereby undermine the rule of separation of power is clear and may be substantiated with both empirical evidence and constituent assembly debates. Analogous to the reasoning in Bommai, the potentiality of Article 123 to unsettle the constitutional scheme may be seen as a rationale for applying the basic structure review.

B. ROLE OF THE PRESIDENT AS A DEFENDER OF THE CONSTITUTION

Defending the use of the basic structure review in Bommai, Krishnaswamy attempts to add an additional set of reasoning.[82] He highlights the President's unique role as the defender of the Constitution. Article 60 requires the President to 'preserve, protect, and defend the constitution'.[83] In combination with Sawant J.'s view of the unsettling nature of emergency powers, Krishnaswamy believes that the President's role as the defender of the Constitution added strength to the case for a basic structure review of Presidential satisfaction in emergency powers.[84] The President had a mandate to prevent such unsettlement and undermining of basic features of the Constitution.

Given the similarly unsettling nature of ordinance-making powers, it is easy to superimpose the template of Krishnaswamy's reasoning on Article 123. The President's role as a defender of the Constitution may strengthen the case to apply the basic structure review to ordinance-making powers.

C. TRIPARTITE EQUILIBRIUM: EXTENDING THE RULE OF SEPARATION OF POWERS

This paper now ventures into the creation of safeguards to prevent future undermining of the basic structure of the Constitution.

Sawant J. saw the inherent design of Article 356 and its potential to undermine basic features of the Constitution, namely federalism and democracy. He established this potential using empirical data of previous use of the power to dismiss opposition party governments in states. While similar empirical data on the misuse of ordinance-making powers has been provided in Part V(A), a more conclusive theoretical basis to apply the basic structure review is needed.

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82 KRISHNASWAMY, *supra* note 42, 53.
83 The Constitution of India, Art. 60.
84 KRISHNASWAMY, *supra* note 42, 53.

This part of the paper considers three factors: *first*, the unsettling nature of ordinances on the basic structure of the Constitution, *second*, the extraordinary nature of ordinance-making powers, and *third*, the mandate for a balance between branches of government. While the first factor has found elaboration in a previous part, the other two find an explanation now, only to be followed by a resulting proposal of a 'principle of tripartite equilibrium' which shall be delineated subsequently in the paper. The principle is a natural advancement of the rule of separation of powers and forms a basis for special judicial scrutiny of powers that do not follow conventional patterns of separation of powers.

1. The Extraordinary Transfer of Powers an Ordinance Entails

As this paper has elucidated, ordinance-making powers effectively serve as exceptions to the rule of separation of powers. Separation of powers is inherent to the Indian democratic set-up and has been recognised as a part of the basic structure of the Constitution.[85] A.G. Noorani noted the exceptional nature of Ordinances in a democratic setup and commented, "Ordinances simply do not exist in any other democracy, whether in Europe or in North America. Its roots lie in British Raj and the framers of the Constitution found the noxious plant most attractive".[86]

Dam's work reinforces Noorani's cynical notions. In almost all liberal democratic jurisdictions, executive powers to legislate either do not exist, are provided on specified emergency cases, or come into play only on the declaration of an emergency.[87] The provision to promulgate ordinances in non-emergency times, and on 'regular' subject matters is something most democratic legal systems thrive without.

In the UK, the Monarch's power to legislate domestically was abandoned four centuries ago in the case of proclamations.[88] However in sharp contrast, as D.Y. Chandrachud J. noted in Krishna Kumar Singh,this power remained much wider in British colonies.[89] In modern UK, the only comparable power the executive exercises is the power to make regulations[90] under the Civil Contingencies Act, 2004, in times of emergency. Unlike ordinances, the scope of such regulations is certainly not at par with an act of Parliament and can only last thirty days.[91] Similarly, Canadian law empowers the executive to make regulations on specific subject matters only in times of emergency.[92]

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85 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶316.
86 A.G. Noorani, *Ordinance Raj*, Vol. 33(50), Economic and Political Weekly, 3173-3174 (1998).
87 Dam, *supra* note 29, 59-60.
88 The Case of Proclamations, 1610 EWHC KB J22 (Court of King's Bench of the United Kingdom).
89 Krishna Kumar Singh, *supra* note 11, ¶94.
90 The Civil Contingencies Act, 2004, §20(2) (UK).
91 *Id*., §21.
92 The Emergencies Act, 1985 (4th Supp.), §8 (Canada).

The Federal Constitution of Malaysia and the Constitution of Singapore both provide wider law-making powers to the executive with respect to the subject matter of legislation.[93] Both these Constitutions do not restrict the subject matter of ordinances, which on promulgation have the force of law.[94] However, unlike the Constitution, both these frameworks permit promulgation of ordinances only after an emergency has been proclaimed.[95]

In the United States of America, the executive is not conferred with any ordinance-like powers. 'Signing statements' issued by the President may act as appendages to legislation but are not equivalents of congressional legislation.[96]

As a comparative study demonstrates, it is most unusual in a democratic setup to confer the executive with unfettered law-making powers at par with those conferred to the legislature. What is even more unusual is that these powers have been conferred for ordinary, non-emergency periods. While the framers of the Constitution saw utility in it, the exceptional nature of ordinance-making powers is evident.

2. The Mandate for Equilibrium Between Branches of Government

For an in-depth understanding of the rule of separation of powers, examining the views illuminated in the Federalist Papers is useful. The papers are a key source not just of American constitutionalism but may provide valuable insights for any constitutional setup. Thomas Jefferson described the Federalist papers as "the best commentary on the principles of government, whichever was written".[97]

In particular, the writings of James Madison expound the separation of powers. In Federalist No. 51,[98] Madison discusses the importance of a system of checks and balances. His vision was to prevent the concentration of several powers in the same branch of government. To achieve this end, Madison banked on giving each branch of government the means to resist the encroachments of the other branches.[99] In other words, as a commentator has noted,[100] Madisonian theory propounded that the constitutional commitment to separation of powers was contingent upon a balance between the executive and legislative branches of government.

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93 The Federal Constitution of Malaysia, 1957, Art. 151(2B); The Constitution of Singapore, 1963, Art. 150(2).

94 *Id*.

95 *Id*.

96 DAM, *supra* note 29, 62.

97 Thomas Jefferson, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON, LATE PRESIDENT OF THE UNITED STATES, 384-385 (HardPress Publishing, 2015).

98 James Madison, *Federalist No. 51.*

99 *Id*.

100 William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters*, Vol. 88, BOSTON UNIVERSITY LAW REVIEW, 519 (2008).

The extraordinary power of ordinance-making must be viewed in the context of this Madisonian theory. Arbitrary use of ordinance-making powers carries the potential to disrupt the balance between the executive and the legislature that Madison articulated and disregards the mandate to maintain an equilibrium between the branches of government. A credible framework needs to be established, to prevent the arbitrary use of not just ordinances, but any such provisions with the potential to undermine basic features of the Constitution.

3. Proposing A New Principle

This paper has established three important factors, among others, namely *first*,the unsettling nature of ordinance-making powers towards the basic structure of the Constitution; *second*, the extraordinary transfer of legislative powers to the executive, and *third*, the mandate to maintain an equilibrium between the three branches of government. Keeping in mind the challenges these three factors hold, the insufficiency of existent constitutional safeguards, and the need for a credible framework, this paper proposes 'the principle of tripartite equilibrium'. The principle would hold the following,

In cases where powers ordinarily held by one branch of the government are conferred upon another branch of government, i.e. the Constitution creates an exception to the rule of separation of powers, additional judicial scrutiny must be permitted to prevent the undermining of the basic structure of the Constitution.

Tripartite equilibrium signifies the balance of power between the three branches of government, namely the legislature, the executive, and the judiciary. The principle finds a basis in the rule of separation of powers, is aided by Madisonian theory, and serves complementarily to the basic structure review. Tripartite equilibrium serves as a credible model for the basic structure review to expand its frontiers into new forms of state action and can be used to keep ordinance-making powers in check.

Ultimately, the rationale formed for the application of the basic structure review involves both lessons from Bommai as well as novel propositions from the author. The nature of ordinance-making power conferred under the Constitution is dissected for a sound application of principles derived from Bommai. An additional theoretical basis is added by proposing the principle of tripartite equilibrium. The main proposition behind the basic structure review of ordinances is to scrutinise Presidential satisfaction for the fulfillment of the constitutional necessity of an 'immediate' need. While a rationale for the application of the basic structure review has been formed, a methodology for such scrutiny is required. The next part expounds on such methodology.

VI. STANDARDS FOR REVIEW: A TWO-FOLD MODEL FOR MOTIVE EXAMINATION

After establishing a rationale for the basic structure review of ordinance promulgation, a natural progression would be to set standards for this review, i.e. 'how' must a basic structure review of Presidential satisfaction be conducted.

The Constitution grants ordinance-making powers *ex necessitate* to the executive. The existence of an immediate need is necessary to prevent undermining the rule of separation of powers, a basic feature of the Constitution. An assessment of the existence of this immediate need would inevitably lead to a review of the executive's motive behind the promulgation of the ordinance.[101]

A two-fold model for the review of this motive is presented. *Firstly*, the 'timing' of ordinance promulgation must be examined in relation to its proximity to the Parliament's session, to check for a motive to bypass the legislative process. *Secondly*, the 'criterion' for Presidential satisfaction must be examined. Both stages of this review model are expounded below.

A. EXAMINING THE TIMING

As Dam's empirical research demonstrated in Part V(A) of this paper, there has been close proximity between Parliament sessions and dates of ordinance promulgation. To reiterate, 475 out of the 615 ordinances promulgated between 1952 and 2006 were within a fifteen-day margin of either the reassembly or the prorogation of parliament. Preponing or delaying such ordinances by a matter of a few days would have resulted in them being laid before the legislature as an ordinary bill, subject to deliberations of Parliament.

However, the act of promulgation soon after the prorogation of the session would permit the government to escape legislative procedure for a period of up to six months and six weeks.[102] Even promulgation soon before the reassembly of Parliament signifies an intent to escape parliamentary scrutiny for six weeks before the law mandates it to be laid before the House. Promulgation just before reassembly is a convenient scheme to first enact laws and then create a six-week margin to deal with the challenges of parliamentary scrutiny.[103] As Dam points out, perhaps the most scandalous example is the bid to nationalise banks through

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[101] *See*Francis Bennion, BENNION ON STATUTORY INTERPRETATION, 484–486 (Lexis Nexis, 2008).

[102] The Constitution of India, Art. 85, mandates the next session to be held within six months of prorogation of the house, while Art. 123(2) mandates an ordinance to be laid before the house within six weeks of reassembly.

[103] Shubhankar Dam, *Decoding India's Ordinance System*, MINT, January 10, 2014, available at https://www.livemint.com/Specials/ZRtVJMBfOLoQ4l9Z0MA2wK/Decoding-Indias-ordinance-system--Shubhankar-Dam.html (Last visited on July 31, 2023).

an ordinance.[104] The said ordinance was promulgated on July 19, 1969, just one day before Parliament came back into session.

The promulgation of an ordinance in close proximity to a session of Parliament clearly demonstrates an absence of any immediate need and indicates the executive's motive to avoid the legislative process. Courts must construe such promulgation as lacking the constitutional requirement of an immediate need and use the basic structure review to strike down such presidential satisfaction.

B. EXAMINING THE EXECUTIVE'S CRITERION

This stage of scrutiny is relatively more complicated than merely seeing proximity to the parliament's session. Even if the ordinance has been promulgated several days into the parliament's recess, it is by no means sufficient to fulfill the immediate need condition. For a full analysis of the executive's motive behind promulgation, it is necessary to examine the criteria the executive took into account while arriving at its satisfaction of an immediate need.

The executive must have had a sound basis for determining that the situation warranted 'immediate action'. In order to examine the executive's criteria, the nature of the ordinance, the pre-legislative circumstances leading to ordinance promulgation, and the effect it might lead to may be examined. Furthermore, the material relied upon to arrive at satisfaction may be examined.

While the Supreme Court adopted a mere procedural or formal standard of material scrutiny in Krishna Kumar Singh, Dam has contrasted[105] this approach with the 'substantive' approach adopted by Saldanha J. of the Karnataka High Court in *State of Karnataka* v. *B.A. Hasanabha*[106] ('Hasanabha'). In Hasanabha, the Karnataka government replaced elected members of an agricultural committee with nominated members.[107] Saldanha J. considered the background and content of the ordinance to determine if the situation warranted an immediate need.[108] He concluded that the ordinance had been brought to further ruling party interests since elections to the committee had been unfavorable to it.[109] The ordinance amounted to a "sabotage of the democratic process" and could not be permitted.[110] In his decision, Saldanha J. examined both pre-legislative controversies and the content of the ordinance. Although this decision was later overturned by a bench giving ordinances the immunity of parliamentary legislation,[111] it can serve as a credible model for motive review of ordinances.

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[104] *Id*.
[105] Dam, *supra* note 29, 194.
[106] State of Karnataka v. B.A. Hasanabha, 1998 SCC OnLine Kar 93 :AIR 1998 Kar 210.
[107] *Id*., ¶2.
[108] *Id*., ¶8.
[109] *Id*., ¶13.
[110] *Id*., ¶12.
[111] State of Karnataka v. B.A. Hasanabha, 1998 SCC OnLine Kar 93 :AIR 1998 Kar 210, ¶6.

The more recent pronouncement of the Andhra Pradesh High Court in *N. Ramesh Kumar* v. *State of A.P.*,[112] deserves even more attention. This case concerned an ordinance that altered the term of office and criteria for selection of the State Election Commissioner ('SEC'), effectively removing him from office.[113] The court went even beyond the standards applied by Saldanha J. and summoned all the files which formed the basis of the Governor's satisfaction.[114] It inferred an undercurrent of animosity between the government and the SEC and concluded that the action had been taken merely on the desirability of the State government without the constitutional necessity of an immediate need.[115]

Though both these cases did not attempt a basic structure review of the executive's action, they took into account pre-legislative circumstances and contents of the ordinances to come to a decision. These standards of motive review remain relevant.

The two-fold methodology for a motive review discussed above can serve the application of the basic structure review to ordinance promulgation. Combined with the rationale for application provided in the preceding part of the paper, the methodology in this part must be utilised in scrutinising the executive with respect to ordinance-making powers.

VII. CONCLUSION

By its very nature, ordinance-making entails an exceptional exercise of legislation by the executive branch of government. Both judicial decisions and commentary have restricted themselves to an administrative law framework for judicial scrutiny of this power. This paper attempts to give a rationale and a model for the basic structure review of this power. In doing so, it heavily draws from the reasoning in Bommai while conceptualising and propounding a principle of tripartite equilibrium to serve as a basis for the application of the basic structure review to ordinances.

Ordinance-making power is also dissected into its constituent legislative and executive elements to set justiciability standards for Presidential satisfaction. This judicial review involves inspection of the constitutional requirement of an immediate need for promulgation, which inevitably leads to a motive review of ordinances. Accordingly, the paper provides a model for examining the executive's motive in promulgating ordinances. This two-fold model recommends a preliminary examination of the timing of promulgation followed by scrutiny of the criteria adopted by the executive.

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[112] N. Ramesh Kumar v. State of A.P., 2020 SCC OnLine AP 5001.
[113] *Id*., ¶14.
[114] *Id*., ¶281.
[115] *Id*., ¶410.

While there has been a shift in the earlier approach of courts to immunise ordinances from review akin to parliamentary legislation, such review has remained within the narrow boundaries of administrative law. This paper serves as an instrument to venture beyond these narrow constraints and to apply the basic structure review.