APPLICATION OF THE BASIC STRUCTURE DOCTRINE TO THE POWERS OF PROMULGATING ORDINANCES

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Articles 123 and 213 of the Indian Constitution, 1950 ('the Constitution') grant the power of promulgating ordinances to the President and the Governor respectively. The intent behind carving such powers is to deal with sudden emergencies when the existing laws fail to resolve it. However, this intent has been ransacked due to the grave misuse of the power in promulgating non-urgent ordinances only to bypass legislative scrutiny. This practice is further marred by a formalistic judicial review of the promulgating powers which obstructs a substantive scrutiny of ordinance-making powers. Therefore, to prevent the misuse of these provisions, this article suggests an application of the basic structure doctrine to the powers of promulgating ordinances. It argues that such an application would test the effect of the ordinance on the anvil of the basic principles of the Constitution instead of scrutinising the motive behind promulgation, which is advantageous for rigorous scrutiny of the promulgating powers. Moreover, it presents a framework laying down an independent substantive model of basic structure review with elaborate methods and arguments to apply the basic structure doctrine to the ordinances. Lastly, it urges us to adopt this basic structure review to preserve the foundational ideals and supremacy of our Constitution.

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I. INTRODUCTION

Before the Indian Constitution, 1950 ('the Constitution') came into force, §42 and §88 of the Government of India Act, 1935 conferred ordinance promulgating powers on the Governor-General and the Governor, respectively.[1] The Privy Council on several occasions has held that the exercise of this power by the Governor-General and the Governor during the recess of the Federal and State legislature respectively should be done at times of emergency.[2] Also, the Governor or the Governor-General, as the case may be, is the sole judge of the existence of the emergency.[3] Similarly, Articles 123 and 213 confer ordinance promulgating powers on the President and the Governor of a State, respectively. The President's ordinance promulgating power granted under Article 123(1) is conditional in nature.[4] It can be exercised when three conditions are fulfilled: (a) when one of the Houses of the Parliament is not in session, (b) the satisfaction of the President of some legislative emergency, and (c) the necessity of immediate action.[5] Article 123(2) states that an ordinance has the same force and effect as an Act of Parliament which implies that the ordinance-making power is an exercise of legislative power. It further lays down the period of expiration of an ordinance, which is after the completion of six weeks from the reassembly of Parliament. Article 123(3) provides that the extent of competence required to promulgate ordinance is equivalent to the competence of Parliament. Article 213 consists of similar provisions but with some additional restrictions on the power of the Governor to promulgate ordinances.

1 H.M. Seervai, Constitutional Law of India, 2565 (4th edn., 2015).
2 *Id*., 2566.
3 *Id*.
4 Shubhankar Dam, Presidential Legislation in India: The Law and Practices of Ordinances, 177 (2013).
5 The Constitution of India, Art. 123(1).

This power was intended to be exercised in exigent circumstances when the prevailing legal regime cannot exercise the same. This ordinance-making power was intended to be used in emergencies when the ordinary process of law involving rigorous debates and discussions cannot take place. However, some legislative instrument is essential to deal with a situation when such deliberations are absent. This, although anti-democratic, is essential for handling lawlessness during that particular time. Therefore, it is drafted as a temporary measure with a limited life span, subject to the scrutiny of the Houses of the Parliament after the expiration of six months from the reassembly of the Parliament. However, this emergency provision has been diluted excessively to the extent of replacing the legislative role due to the routine promulgation of ordinances.

Therefore, the author contends that the application of the basic structure doctrine to ordinance promulgating powers would transcend the restraints in the prevailing judicial review and remedy the current infirmities. Part II will cover the intent behind framing the ordinance promulgating power. It lays down Dr B.R. Ambedkar's intention behind the introduction of the power in the Constitution and the circumstances in which the power was contemplated to be exercised. Part III will focus on the necessity of applying the basic structure doctrine to the power of promulgating ordinance. It enumerates certain major concerns associated with the promulgation of ordinances that are not being remedied by the existing judicial review. It also elaborates on the lacunae in the current judicial review, that is, its formalistic nature that enables little scrutiny of the motive behind the promulgation of ordinances.

Part IV will present the advantage of applying the basic structure review to the ordinance-making power. Part V will deal with certain pertinent roadblocks present in the way of applying the basic structure review to ordinances. In this part, it is contended that the basic structure doctrine cannot be applied to ordinances with the set of arguments that are generally used to apply the doctrine to legislations. It traces certain issues that need to dealt with and clarified before the doctrine is applied to ordinance-making powers. Part VI will provide an entire framework for applying the basic structure review to the ordinance promulgating powers and establish a constitutional basis for the same. Part VII concludes by urging that the frequent promulgations of ordinances have become an egregious state action that plays fraud on our Constitution. Hence, this substantive basic structure review ought to be applied to limit the misuse of such an extraordinary power.

II. SCRUTINISING THE INTENT BEHIND FRAMING THE PROMULGATING POWERS

The Constitution of India envisages separation of powers among the three branches of government namely legislature, executive, and judiciary in their

scope and functions.[6] However, this separation is not a water-tight static restriction but rather a dynamic fusion where certain legislative responsibilities are endowed upon the executive, the degree of which depends on the political climate of the state.[7] Such overlapping of powers can be seen in the ordinance-making power of the President and the Governor under Articles 123 and 213 of the Constitution, respectively.[8] The intent behind adopting such a provision can be traced to the Constituent Assembly Debates. Dr B.R. Ambedkar stated a hypothetical sudden and immediate situation that could neither be dealt with the ordinary process of law nor by the existing code of law. Hence, a plausible solution was to confer ordinance promulgating power upon the President to deal with such a situation.[9] Further, regarding the life of an ordinance being confined to six weeks from the reassembly of the Parliament,[10] suspicions were raised by the Assembly members regarding misuse of the provision by the executive to maintain ordinances for an unduly long period.[11] However, Dr Ambedkar allaying all of them spoke about Draft Article 69 (Article 85) which states that six months shall not lapse between the sittings of the Houses of the Parliament and acts as a bulwark against inordinate extension of ordinances, thus, preventing misuse of Article 123(2).[12] He also expressed his hope that "owing to the exigencies of parliamentary business, there will be more frequent sessions of the Parliament" as the government will have to maintain the confidence of the Parliament which would preclude the executive from unduly extending the life of an ordinance.[13]

Unfortunately, this very purpose of retaining the ordinance-making power is defeated by the notorious trend of frequent promulgation of ordinances. It is neither propelled by sudden and immediate necessity nor barred by the time of its expiration. Instead, it appears as a fallacious escape from the rigor of the legislative process.

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6 Rai Sahib Ram Jawaya Kapur v. State of Punjab, 1955 SCC OnLine SC 14 : AIR 1955 SC 549, ¶12.

7 A.P. Pandey, *Hundred Years of Ordinances in India:1861-1961*, Vol. 10, Economic and Political Weekly 259 (1968).

8 Sanjay Kumar Baranwal & Jai Shanker Prasad Srivastava, *Separation of Powers in Indian Perspective*, Vol. 8, Recent Researches in Social Sciences & Humanities, 24 (2021).

9 Constituent Assembly Debates, May 23, 1949 *speech by* Dr B.R. Ambedkar, 214, available at https://eparlib.nic.in/handle/123456789/763316?view_type=browse (Last visited on June 3, 2023) ('CAD').

10 The Constitution of India, Art. 123(2).

11 Constituent Assembly Debates, May 23, 1949 *speech by* Pandit Hirday Nath Kunzru, 206-207, available at https://eparlib.nic.in/handle/123456789/763316?view_type=browse (Last visited on June 18, 2023).

12 CAD, *supra* note 9, 215.

13 *Id*.

III. PROMULGATION OF ORDINANCES: ASSESSING THE NEED AND ADVANTAGE OF APPLYING BASIC STRUCTURE DOCTRINE

Initially, it is pertinent to assess the need to apply this doctrine when there is already a set mechanism of judicial review for ordinance-making powers. It also needs to be answered as to how the basic structure review would provide any extra advantage in the current scenario. A discussion initiated by Dr Krishnaswami on 16 February, 1954 regarding taxation by ordinances was one of such initial instances which pressed upon the issues associated with ordinance-making power.[14] He pointed out that nearly one ordinance was promulgated per week during the brief recess of the Parliament.[15] This issue was further taken up by Shri G.V. Mavalankar who deemed such promulgations to be anti-democratic and stated that the government should exercise this power "only when they must" at times of sudden exigencies.[16] He also provided many oppositions to Pandit Nehru, then Prime Minister, in proroguing the House merely to promulgate an ordinance.[17] He had written several times to Pandit Nehru denouncing such misuse of power. For the first time, he stated that it was wrong to promulgate ordinances merely due to a shortage of time as it is an exigent power meant for emergent situations.[18] On another occasion, he mentioned that such practices of promulgating ordinances for want of time, if allowed unabated, would set an undesirable precedent for which "the government may go on issuing Ordinances giving the Lok Sabha no option, but to rubber-stamp the Ordinances".[19]

Moreover, scholars like Shri A.G. Noorani have blatantly stated that handing over the legislative powers to the President or the Governor is itself an anachronism.[20] He states that the assurance that the exercise of this extraordinary power shall not perpetuate fraud on the Constitution has been systematically ransacked.[21] This is due to the court's reluctance to pronounce upon the validity of the ordinance merely because the ordinance was re-enacted by the Parliament.[22] Hence, such serious exploitation of ordinance promulgating powers along with a

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[14] Subhash C. Kashyap, *Dada Saheb Mavalankar: "Father of Lok Sabha"* in Dada Saheb Mavalankar, Father of Lok Sabha: His Life, Work, and Ideas: A Centenary Volume, Vol. 3, 31 (6th edn., 1989).

[15] *Id*.

[16] *Id*.

[17] S.L. Shakdher, *Dada Saheb Mavalankar* in Dada Saheb Mavalankar, Father of Lok Sabha: His Life, Work, and Ideas: A Centenary Volume, Vol. 58, 62 (6th edn., 1989).

[18] Chakshu Roy, *When Nehru had Disagreements with First Lok Sabha Speaker GV Mavalankar over Ordinances*, PRS India, November 14, 2021, available at https://prsindia.org/articles-by-prs-team/when-nehru-had-disagreements-with-first-lok-sabha-speaker-gv-mavalankar-over-ordinances (Last visited on July 15, 2023).

[19] *Id*.

[20] A.G. Noorani, Constitutional Questions in India: The President, Parliament and the States, 60 (2002).

[21] *Id*., 62.

[22] *Id*.

low level of judicial scrutiny and inherent restrictions on challenging the motive behind such promulgations needs to be countered.

Therefore, in this section, various grave issues associated with the promulgation of ordinances are briefly highlighted. Further, the lacunae in the prevailing judicial review in restricting these issues are presented which paves the way for the basic structure review.

A. INCONSISTENT RATIO OF ORDINANCE PROMULGATION TO SITTINGS OF LEGISLATURE

There has been a surge of ordinances promulgated in India by the central government, counting up to nearly 755 from 1950 to 2023 (as of May 22, 2023), which gives an average of almost ten (10.20) ordinances per year.[23] This figure shows an astonishing occurrence of emergencies in India which surprisingly can neither be dealt with by existing law nor be discussed in the legislature. The sittings in the lower house have declined from 121 days during 1952-70 to sixty-eight days since 2000 accompanied by the passing of fewer bills in the lower house.[24] Similarly, in 2021, the Kerala Governor promulgated as many as 144 ordinances when the legislative sittings were only sixty-one days.[25] This data portrays a contrasting image as, on one hand, escalating promulgation of ordinances highlights a sudden surge of emergencies which, as aspired by Dr Ambedkar,[26] should have propelled the legislature to conduct frequent sittings. On the other hand, declining sittings of the legislature reflect no such emergency which casts a serious suspicion on the intrinsic motives of the government in promulgating such ordinances. Hence, it appears as a double-edged sword tilting more towards the latter suspicion and pointing towards the misuse of ordinance-making powers as highlighted in the following sections.

B. CASTING AWAY THE MAINSPRING OF "CIRCUMSTANCES THAT RENDER IT NECESSARY"

On perusing the content and objective behind the promulgation of ordinances it appears that the motive is not driven by sudden exigencies but by political factors at play. It is important to note the difference between the nature

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[23] Legislative Department, *Legislative References: Text of Central Ordinances*, available at https://legislative.gov.in/document-category/text-of-the-central-ordinances/ (Last visited on July 25, 2023).

[24] PRS Legislative Research, *Vital Stats: 70 Years of Parliament*, May 13, 2022, available at https://prsindia.org/files/parliament/vital_stats/Vital%20Stats_70%20years%20of%20Parliament.pdf (Last visited on June 6, 2023).

[25] Parvathi Benu, *Karnataka Passed Most Number of Bills, Kerala Promulgated Most Ordinances in 2021*, The Hindu Business Line, June 30, 2022, available at https://www.thehindubusinessline.com/data-stories/data-focus/karnataka-passed-most-number-of-bills-kerala-promulgated-most-ordinances-in-2021/article65585691.ece (Last visited on June 6, 2023).

[26] CAD, *supra* note 9, 215.

of the emergency as intended under our Constitution and the political emergency which is used to justify the promulgation of frequent ordinances. The emergency envisioned by Dr B.R. Ambedkar is legislative urgency. He stated that when there is neither any existing code of law available nor the ordinary process of law can be followed to deal with the exigencies then only the ordinance route is to be paved.[27] It can be inferred from his intention that at times of exigencies, first an effort needs to be made to deal with existing laws. In case it is not possible do so, then an ordinance is to be promulgated. The purpose of ordinance promulgation is to provide an alternative arrangement by which legislation could be enacted during a legislative crisis.[28] However, there is no such correlation observed between the rise of ordinances and number of Acts dropped.[29] This shows that ordinances were not promulgated during legislative emergencies but rather political emergencies. A political emergency is not necessarily due to a legislative emergency but can be due to any other factor that could shake the confidence of public on the incumbent government.

For instance, the Criminal Law (Amendment) Ordinance, 2018, allowed imposition of death penalty for rapes of children below twelve years and a minimum imprisonment of twelve years.[30] This hurried step is criticised for being a populist move to quell the protesters of the Kathua and Unnao rape cases instead of being motivated by any sudden legislative emergency.[31] Instead the ordinance was promulgated to display the government in a good light to the public by showing the concern of the executive towards the people and retain their confidence. Similarly, the Fugitive Economic Offenders Ordinance, 2018[32] was promulgated to ensure that the fugitive economic offenders return to India to face trial and allowed seizure of their assets. It is contended that this ordinance could affect the company itself due to mischief of its promoters/key managing personnel ('KMP')[33] and undermine the true nature of the Fugitive Offenders Act[34] which could have been avoided by following a regular process of legislation. Moreover, the Criminal Law (Amendment) Ordinance, 2018 has no retrospective effect and can only

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27 *Id*.

28 Dam, *supra* note 4, 69.

29 *Id*., 71.

30 The Criminal Law (Amendment) Ordinance, 2018 (April 21, 2018).

31 Aakar Patel, *Kathua, Unnao Rape Cases: Death Penalty Won't Solve Problem, Attitude Towards Women Needs to Change*, Firstpost, April 15, 2018, available at https://www.firstpost.com/india/kathua-unnao-rape-cases-demanding-death-penalty-for-rapists-wont-solve-problem-general-attitude-needs-to-change-4432213.html (Last visited on June 6, 2023); Flavia Agnes, *Death Penalty for Child Rapists: This Populist Move Will Only Cause India's Children More Harm*, Scroll.in, April 23, 2018, available at https://scroll.in/article/876554/death-penalty-for-child-rapists-this-populist-move-will-cause-more-harm-to-indias-children (Last visited on June 6, 2023).

32 Fugitive Economic Offenders Ordinance, 2018 (April 21, 2018).

33 Somasekhar Sundaresan, *Fugitive Law Can Victimise the Victim*, May 10, 2018, available at https://somasekhars.wordpress.com/2018/05/10/fugitive-law-can-victimise-the-victim/ (Last visited on June 6, 2023).

34 Rohan Garg, *The Fugitive Economic Offenders Act, 2018: A Bad Law*, SCC OnLine, December 10, 2022 available at https://www.scconline.com/blog/post/2022/12/10/the-fugitive-economic-offenders-act-2018-a-bad-law/ (Last visited on January 28, 2024).

remedy future rapes. Similarly, the Fugitive Economic Offenders Ordinance, 2018 has no bearing on those who have already left India and can only act as a prospective deterrence.[35] It is unfathomable how immediate wrongs could be remedied or circumstances would change suddenly through ordinances when their lifetime is uncertainly short.[36]

Not only the Centre, but states have also promulgated ordinances in this manner. For instance, the Prevention of Slaughter and Preservation of Cattle Ordinance, 2020 and Prohibition of Unlawful Conversion of Religion Conversion Ordinance, 2020 promulgated by the Governor of Karnataka and Uttar Pradesh, respectively, only show a deliberate attempt to construct a new legislative process to avoid deliberations and discussions on these issues.[37] Unfortunately, this pattern was followed for almost all ordinances between 1952 and 2009 which were promulgated apprehending its rejection in the regular Parliamentary process due to the lack of majority of the ruling party.[38] Moreover, certain ordinances were passed considering the pandemic as a time of emergency out of which only eleven were related to the pandemic while others such as the Banking Regulation (Amendment) Ordinance and the set of farm laws ordinances had no such relation.[39] This trend highlights a clear subversion of the necessity requirement, thus, requiring serious scrutiny.

C. REPEATED REPROMULGATIONS: ROBBING THE ESSENCE OF "SIX WEEKS"

Article 123(2) fixes the life of an ordinance at six weeks from the date of reassembly after which it would lapse if it fails to garner the approval of the Parliament. Article 213(2) also has such a provision. However, a blatant violation of this provision was reflected in *D.C. Wadhwa* v. *State of Bihar* ('D.C. Wadhwa') where 256 ordinances were promulgated and kept alive by re-promulgation from time to time between 1967 and 1981 in Bihar.[40] The Court rightly held the re-promulgation to be unconstitutional.[41] But it went further to state that the re-promulgation may not be questioned when the legislature may have too

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[35] Alok Prasanna Kumar, *The Ordinance Route: Exception or Rule?*, Vol. 53(20), Economic and Political Weekly, 11 (2018).

[36] *Id*.

[37] Harsh Jain, *Ruling by Executive Fiat: Time for Greater Judicial Control?*, Law and Other Things, March 31, 2021, available at https://lawandotherthings.com/ruling-by-executive-fiat-time-for-greater-judicial-control/ (Last visited on July 16, 2023).

[38] Shubhankar Dam, *Constitutionally Lawless: Ordinance Raj in India*, Centre for the Advanced Study of India, March 10, 2014, available at https://casi.sas.upenn.edu/iit/shubhankardam (Last visited on July 16, 2023).

[39] Derek O' Brien, *The Ordinance Raj of the Bharatiya Janata Party*, Hindustan Times, September 11, 2020, available at https://www.hindustantimes.com/analysis/the-ordinance-raj-of-the-bharatiya-janata-party/story-NlVvn0pm6updxwYlj0gSvJ.html (Last visited on July 16, 2023).

[40] D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378, ¶4.

[41] *Id*., ¶6.

much legislative business in a particular session of a short time period.[42] Due to such vague justification, this judgment was used to defend re-promulgation instead of inhibiting the practice. For instance, in *Gyanendra Kumar* v. *Union of India* re-promulgation of ten ordinances was validated on the ground that both the Houses of the Parliament were burdened with "heavy and other urgent and emergent work-load of the business" so the bill could not be debated upon.[43] Even the Centre, disregarding D. C. Wadhwa, re-promulgated several ordinances such as the Securities Laws (Amendment) Ordinance, 2014 three times,[44] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2015 two times,[45] and the Enemy Property Ordinance, 2016 five times.[46]

Another such instance of re-promulgation occurred in Bihar in 1989 when an ordinance titled the Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance, 1989 was promulgated with the effect of taking over 429 out of 651 private Sanskrit schools by the State.[47] Thereafter, six more ordinances were promulgated from 1990 to 1992 to preserve the effect of the initial ordinance.[48] In *Krishna Kumar Singh* v. *State of Bihar* ('Krishna Kumar I'), Sujata Manohar, J. observed that the intention from the inception was to dodge the legislature by not placing even the first ordinance before it. Therefore, she held all the ordinances, including the first one, as unconstitutional.[49] However, D.P. Wadhwa, J. dissented that the first ordinance is a valid one for which the case eventually got placed before a seven-Judge Bench.[50] The majority in the seven-Judge Bench ('Krishna Kumar II') concurring with the judgment of Sujata Manohar J. held that "the accountability of the executive to the legislature is symbolised by the manner in which the Constitution has subjected the Ordinance-making power to legislative authority" so re-promulgation subverts the constitutional process and, hence, is unconstitutional.[51]

Surprisingly, the current central government also overlooked the ruling of the seven-judge Bench in Krishna Kumar II and repromulgated the

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42 *Id*.

43 Gyanendra Kumar v. Union of India, 1996 SCC OnLine Del 367, ¶9.

44 Shreya, *Ordinances Promulgated During Different Lok Sabhas*, PRS INDIA, April 21, 2014, available at https://prsindia.org/theprsblog/ordinances-promulgated-during-different-lok-sabhas?page=3&per-page=1 (Last visited on July 16, 2023).

45 Sucheta, *Re-Promulgation of Land Ordinance, 2015*, SCC ONLINE, June 1, 2015, available at https://www.scconline.com/blog/post/2015/06/01/re-promulgation-of-land-ordinance-2015/ (Last visited on July 16, 2023).

46 The Wire Staff, *Why the Enemy Property Ordinance Needed Parliament's Reconsideration*, THE WIRE, December 26, 2016, available at https://thewire.in/law/pranab-mukherjee-enemy-property-ordinance (Last visited on January 29, 2024).

47 Krishna Kumar Singh v. State of Bihar, (1998) 5 SCC 643, ¶11.

48 *Id*., ¶¶13-15.

49 *Id*., ¶24.

50 Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1, ¶4 (per D.Y. Chandrachud J.) ('Krishna Kumar Singh II').

51 *Id*., ¶104.

Commission for Air Quality Management in NCR Region Ordinance, 2021 on April 13, 2021.[52] Such a habitual action of the government without any restriction and achieving its agendas by setting aside the constitutional process is truly menacing for the Constitution requiring a stringent check.

D. PREVAILING STANDARDS OF JUDICIAL REVIEW OF ORDINANCE PROMULGATING POWERS

The abovementioned issues highlight the inherent ill motive of the executive to transform an emergency provision into a new normal by disregarding the Constitution and judicial pronouncements. The executive has equated legislative emergency to political emergency and paved upon the ordinance route to surpass the scrutiny of the Parliament. Hence, it has become necessary to delve into the possibilities of a strict judicial review of ordinances but that could only be done after understanding the lacunae in the current standard of judicial review.

Under the current system, the courts in India have somehow immunised the power of promulgating ordinances from the purview of judicial review.[53] This immunity emanates from attributing the ordinance-making power as being completely legislative in nature.[54] Based upon the words in Article 123(2) that the ordinance "shall have the same force and effect as an Act of Parliament" the Supreme Court in *A.K. Roy* v. *Union of India*,[55] held that both law made by a legislature and ordinances promulgated by the President "are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power".[56] This view can also be validated by the Constituent Assembly Debates where Professor K.T. Shah moved an amendment to replace the word "Legislative" with "Extraordinary*"* in the heading to Chapter III on the basis that the executive head should not have legislative power.[57] However, Mr Tajamul Hussain, countering it, stated that the power is extraordinary as well as legislative in nature and the amendment was negatived.[58]

Further, the Court in *K. Nagaraj* v. *State of A.P.* held that the ordinance promulgating power is restricted to only those constraints that bind a legislation and cannot be invalidated for non-application of mind.[59] This view was upheld in *Dharam Dutt* v. *Union of India* that "if the legislature is competent to

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[52] The Economic Times, *Commission for Air Quality Management in NCR, Adjoining Areas Bill passed by LS*, August 4, 2021, available at https://economictimes.indiatimes.com/news/india/commission-for-air-quality-management-in-ncr-adjoining-areas-bill-passed-by-ls/articleshow/85035507.cms?from=mdr (Last visited on July 16, 2023).

[53] M.P. Jain, Indian Constitutional Law, 178 (8th edn., 2018).

[54] R.K. Garg v. Union of India, (1981) 4 SCC 675, ¶4 (per P.N. Bhagwati J.).

[55] A.K. Roy v. Union of India, (1982) 1 SCC 271.

[56] *Id*., ¶14 (per Y.V. Chandrachud C.J.).

[57] CAD, *supra* note 9, 201-202.

[58] *Id*., 202.

[59] K. Nagaraj v. State of A.P., (1985) 1 SCC 523, ¶31.

pass a particular law, the motives which impelled it to act are really irrelevant".[60] This clarifies that a legislation cannot be scrutinised on the grounds of motive due to the presumption of constitutionality by the courts towards the acts of the legislature.[61] Consequently, an ordinance is also free from such scrutiny.[62] Therefore, similar to a law made by Parliament or State legislature, an ordinance can be invalidated on two grounds alone, *first*, absence of legislative competence and *second*, for violating any fundamental right under Part III of the Constitution or any other constitutional provision.[63]

However, Dr D.Y. Chandrachud, J. in Krishna Kumar II by drawing inspiration from the standard of review framed in *S.R. Bommai* v. *Union of India*,[64] ('S.R. Bommai') devised some grounds to judicially review the satisfaction of the President.[65] It was held that "it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case".[66] However, the Court also noted that there can be no inquiry regarding the correctness or adequacy of materials and Court can be satisfied with some relevant material, even if vaguely relevant.[67] There are two concerns with such a review, *first*, it is a very formal limited review with negligible impact on the abuse of the promulgating power owing to its low standard of scrutiny.[68] *Second*, the standard of review of presidential satisfaction devised in S.R. Bommai is concerned with Article 356 under which the President exercises executive power. But the same cannot be applied to the ordinance-making power under Article 123 which is legislative in nature and the President acts in a legislative capacity by substituting the Parliament.[69] However, such cross-application could be made if the nature of ordinance-making power can be shown to be somehow similar to the executive power as exercised under Article 356, which the Court missed in formulating but is presented later in this article. The author simply wants to fill the void left out in this judgment by providing a sound reasoning as to how such cross-application of grounds of review can be made. Although the emergencies provided under Article 356 and Article 123 are different but the grounds of review are made dependant on the nature of power exercised by the Parliament. It is because such grounds of review test the

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60 Dharam Dutt v. Union of India, (2004) 1 SCC 712, ¶16.

61 Vijay K. Tyagi & Bhanu Partap Singh Sambyal, *Invocation of Scrutiny Test in Delegated Legislation and Ordinance: A Relook at the Doctrine of Presumption of Constitutionality*, Vol. 7, SDLR, 20, 24-25 (2020).

62 Dam, *supra* note 4, 177-178.

63 State of A.P. v. McDowell & Co., (1996) 3 SCC 709, ¶43.

64 S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶374 (per B.P. Jeevan Reddy J.).

65 Krishna Kumar Singh II, *supra* note 50, ¶56.

66 *Id*., ¶57.

67 *Id*.

68 Amlan Mishra, *Guest Post: The Andhra Pradesh Ordinances Case — Towards Substantive Judicial Review*, Indian Constitutional Law and Philosophy, June 14, 2020, available at https://indconlawphil.wordpress.com/2020/06/14/guest-post-the-andhra-pradesh-ordinances-case-towards-substantive-judicial-review/ (Last visited on July 17, 2023).

69 Dam, *supra* note 4, 171.

valid exercise of the power vested on the President which is in case of Article 356 is the executive power. Hence, cross-application of grounds of review can be made if it can be proved that the ordinance-making power has some hues of executive power as well.

This shows an urgent need to construct a framework of a substantive judicial review to properly test the power of promulgating ordinances in order to prevent the government's escape owing to low scrutiny. One such effective ground of judicial review is to apply the basic structure doctrine due to the reasons enumerated in the following part.

IV. ADVANTAGES OF APPLYING THE BASIC STRUCTURE DOCTRINE

Many liberal democratic constitutional jurisdictions are currently facing the issue of 'executive aggrandisement'. Executive aggrandisement means an incremental but systematic dismantling of checking mechanisms set up by the Constitutions to ensure accountability of political executive.[70] This aggrandisement inflicts multiple micro-assaults instead of completely overhauling the mechanisms so it becomes hard to find when the red line has been crossed.[71] It also becomes challenging for the judiciary to effectively check executive aggrandisement as this requires adjudicating the micro-assaults in accumulation as, otherwise, they lose the impact of threat when examined in isolation.[72] Therefore, Professor Khaitan aptly pointed out that it is this incremental and systematic disruption of the checking mechanisms which is killing the democracy without making any noise.[73] Further, he considers these measures as "constitutionally shameless" because they are not illegal, nevertheless, breach the accepted norms of civility and comity in political life.[74] Constitutionally shameless acts are not necessarily unconstitutional or illegal as they do not expressly violate any textual provision of the Constitution.[75] Instead, they tamper with the fundamental principles that underpin our Constitution. Therefore, such shameless actions cannot be shown to have infringed any provision of the Constitution and can easily escape judicial scrutiny. However, some instrument is essential to restrict such actions, which possess the characteristic of rendering an action that violates the basic principles of the Constitution as unconstitutional. Such characteristic, in Indian context, can

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[70] Tarunabh Khaitan, *Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism*, Vol. 17, Int'l J. Const. L. 342, 343 (2019).

[71] *Id*., 352-353.

[72] *Id*., 354.

[73] *Id*.

[74] Tarunabh Khaitan, *On Coups, Constitutional Shamelessness, and* Lingchi, UK Constitutional Law, September 6, 2019, available at https://ukconstitutionallaw.org/2019/09/06/tarunabh-khaitan-on-coups-constitutional-shamelessness-and-lingchi/ (Last visited on July 17, 2023).

[75] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, Vol. 14, Law & Ethics of Human Rights, 93 (2020) ('Tarunabh Khaitan').

be better fulfilled by the basic structure doctrine. This doctrine can be evoked to test the validity of such shameless executive actions on the anvil of whether they violate the fundamental principles of our Constitution.[76] This establishes the link between the potentiality of applying the doctrine and the possible review of constitutionally shameless actions.

Similarly, the author contends that the misuse of the power of promulgating ordinances is also a kind of executive aggrandisement. Although it does not expressly violate the textual provisions of the Constitution, it runs contrary to the intention behind its drafting and violates certain basic features of the Constitution. The basic features of 'separation of power' and 'Parliamentary democracy' get severely affected due to such misuse of the power as briefly highlighted in Part VI of this article. This implies that the basic structure doctrine needs to be applied to adjudicate such an exercise of an extraordinary power so as to close the escape route of the executive from the clutches of prevailing judicial review. How the basic structure doctrine is to be applied to nullify such actions is presented below.

The prevailing judicial review stresses upon the grounds of *mala fides* or extraneous motive which needs to be proved to invalidate the exercise of promulgating an ordinance. Even scholars suggest that challenging the executive decision on grounds of *mala fides* should always remain a possibility.[77] However, the issue with this "purpose test", as Professor Khaitan states, is that judges are reluctant to attribute ill motives to political actors and it could also make them institutionally vulnerable.[78] Therefore, he proposes an 'effect-based approach' which would prevent the judges from traversing into the muddle of attaching motives.[79] The 'effect test' asks the question as to what is the impact of a state action on the principles of the Constitution or the functioning of the Parliament. Generally, all ordinances have an effect of violating 'separation of power' and 'Parliamentary democracy' but then all ordinances cannot be held to be constitutionally shameless. Here, Professor Khaitan mentions that only when the action presents a fait accompli, i.e., the action produces an effect which causes injury to the Constitution and such injury cannot be undone, then such action is constitutionally shameless.[80]

The application of this approach can be seen in *R.* v. *Prime Minister*,[81] ('Miller') which deals with the legality of prorogation of the Parliament by the Queen on the advice of the Prime Minister. The alleged motive behind such advice

[76] John Simte, *The Basic Structure Doctrine, Article 370 and the Future of India's Democracy*, VERFASSUNGSBLOG, October 20, 2023, available at https://verfassungsblog.de/the-basic-structure-doctrine-article-370-and-the-future-of-indias-democracy/ (Last visited on December 1, 2023).

[77] JAIN, *supra* note 53.

[78] Tarun Khaitan, *From 'Purpose' to 'Effect': A Principled Way to Decide Whether Prorogation is Legal*, LSE BREXIT, September 20, 2019, available at https://blogs.lse.ac.uk/brexit/2019/09/20/from-purpose-to-effect-a-principled-way-to-decide-whether-prorogation-is-legal/ (Last visited on July 17, 2023) ('Tarun Khaitan').

[79] *Id*.

[80] *Id*.

[81] R. v. Prime Minister, (2019) 3 WLR 589 : 2019 UKSC 41 (United Kingdom).

was to escape Parliamentary scrutiny while withdrawing from the European Union without an agreement when the majority in the Parliament was opposed to such withdrawal without any agreement.[82] The Court, instead of delving into the motives, held such a decision of prorogation "will be unlawful if the prorogation 'has the effect' of frustrating or preventing, 'without reasonable justification', the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive".[83] Further, the Court applied the constitutional principles of Parliamentary sovereignty and Parliamentary accountability to test the 'effect' of the prorogation in infringing them, rather than invoking any statutory rules.[84] This decision based on the 'effect test' instead of the 'purpose test' was highly appreciated in countering the executive aggrandisement.[85] Similarly, drawing inspiration from this approach, the 'effect test' should be applied to prevent the misuse of ordinance promulgating power instead of questioning the motive.

However, an argument against such application of the 'effect test' can be made on the ground that the test in the Miller case was applied at a time which can be better categorised as National/State emergency and not a legislative emergency. However, ordinances are promulgated to handle situations of legislative emergencies making it unclear how this test could be used to adjudge the ordinance promulgating powers when the backdrops are different. The counter to this could be that the 'effect test' is not connected to the backdrop in which it is applied rather it is independent of it. This can be inferred from the fact that the 'effect test' draws its origin from the discrimination law where it assisted the litigants in proving indirect discrimination through its effects as it was difficult to establish it by satisfying the *mens rea* requirement.[86] Hence, this concept of discrimination law is applied to deal with prorogation in the Miller case due to its unique characteristic to test the legality of an action by sidelining the mental element of intention or mala fides. Therefore, this test can be severed from the background in which it was applied and can be used to test the constitutionality of the ordinance promulgating powers.

This means when an ordinance is challenged for being promulgated without any legislative emergency then the effect of such promulgation can be perused by the courts. Such challenge and perusal can take place within short period after the promulgation which is useful to prevent the evil consequences which could have flown from such ordinance. At this point, a question may arise that as the effects of an ordinance are adjudged ex-post then even if the ordinance

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82 *Id*., ¶53.

83 *Id*., ¶50.

84 *Id*., ¶¶40-46.

85 Tarun Khaitan, *The Supreme Court Ruling: Why the Effects Test Could Help Save Democracy (Somewhat)*, LSE Brexit, September 24, 2019, available at https://blogs.lse.ac.uk/brexit/2019/09/24/the-supreme-court-ruling-why-the-effects-test-could-help-save-democracy-somewhat/ (Last visited on July 17, 2023).

86 Tarun Khaitan, *supra* note 78.

is declared unconstitutional how can the rights already conferred by the effect of promulgation of the ordinance be dealt with? This question is based on the premise that ordinances have enduring effect for which the rights conferred by them cannot be abrogated retrospectively. However, this premise is flawed to the extent that Dr D.Y. Chandrachud, J. in Krishna Kumar II held that the 'enduring rights theory' do not apply to the ordinances and the phrase "shall cease to operate" means that effects will stand obliterated from the very inception of the ordinance.[87] However, an exception was carved to give the ordinance a permanent effect in cases involving "grave elements of public interest or constitutional morality demonstrated by clear and cogent material".[88] Therefore, subject to this exception, ordinances cannot have enduring nature.

However, while these only answers part of the query, the other part puts a different question that as to whether an ordinance 'ceases to operate' when declared unconstitutional by the Apex court. It is to be noted that Article 123 states the conditions when an ordinance will 'cease to operate'; them being: at the expiration of six weeks from the reassembly of the Parliament, upon passing a resolution disapproving it by both Houses and upon withdrawal by the President. It nowhere states that the ordinance will 'cease to operate' when declared unconstitutional as the power to cease its operation is not placed in the hands of the judiciary. However, as explained in Part VI.C.1 of this article, the ordinance-making is subjected to the provisions of the Constitution by inference even though there is no express provision to that extent in Article 123. Further, Dr B.R. Ambedkar expressed his opinions that Draft Clause (3) of Article 102 (same as Clause 3 of Article 123) lays down that the ordinance is made "subject to the same limitations as a law made by the legislature by the ordinary process".[89] Therefore, as any ordinary law is made subject to the provisions contained in the Fundamental Rights, resultantly the provisions of draft Article 102 is similarly subjected to it.[90] Such an interpretation of Article 123(3) along with the judicial precedent that ordinances are subjected to judicial review, give an impression that the ordinance can be declared unconstitutional by the judiciary for infringing the fundamental provisions of the Constitution and it is upon such declaration it will be *void ab initio*[91] with all its effects getting wiped off from the inception.

In this segment, two things are discussed, one about the application of basic structure doctrine and the other about the 'effect test'. There is a link between the two which is necessary to highlight so as to answer the question posed before about how exactly the doctrine can be applied. One possible way to use this 'effect test' is to directly adopt from the foreign jurisdiction and apply it in the Indian context. Second way is either to find a constitutional basis for such

87 Krishna Kumar Singh II, *supra* note 50, ¶¶92, 93.
88 *Id.*, ¶94.
89 CAD, *supra* note 9.
90 *Id.*
91 CBI v. R.R. Kishore, 2023 SCC OnLine SC 1146, ¶96.

application of the 'effect test' or find an equivalent legal instrument in Indian context which can produce the same results as the 'effect test'. The author contends that the second approach is better than the first. Although it is welcoming to adopt and apply foreign precedents in the Indian context to develop 'trans-judicial communication', that should be done in a systematic manner after carefully examining the structural similarities before applying the foreign precedents.[92] This is because simple adoption and application of foreign precedents will grant excessive discretion in the hands of judges to shape the constitutional law in a manner which can be contrary to the intention of the framers.[93] There are many instances where Indian courts have relied on numerous foreign precedents but such reliance was founded upon some constitutional basis by providing a broader interpretation to existing provisions.[94] Therefore, it is better to not directly or independently apply the 'effect test' without finding a constitutional basis for it.

Here, the author proposes that the basic structure doctrine can provide a constitutional base by interpreting which the 'effect test' can be read into it. In another way, the doctrine can serve as an equivalent instrument to the 'effect test' producing the same results. It is because the doctrine is concerned with the consequences or impact of the challenged state action and not the manner in which it was advanced.[95] So, using this doctrine as a constitutional basis or as an equivalent the effect/impact of promulgating an ordinance can be adjudged. This analysis attempts to connect the dots between the doctrine, the effect test and the judicial review of the promulgating powers.

Even scholars have found the basic structure doctrine as a comparative analogue to the Miller case.[96] In the Miller case, the requirement of 'reasonable justification' shows that irrationality, apart from mala fides, can be a way to exceed the scope of an otherwise non-justiciable power.[97] This can be useful to India as currently courts are restricted to scrutinise sufficient relevant materials because they are constrained from attaching ill motives to the higher executive. But with this approach, they can properly scrutinise sufficient relevant materials to infer the presence of reasonable justification for promulgating an ordinance. Thus, the application of the doctrine can tremendously assist in moving away from the formal review 'purpose test' to a more substantive review of the 'effect test' to place a greater burden of reasonably justifying the necessity of promulgating an ordinance.

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92 K.G. Balakrishnan, *The Role of Foreign Precedents in a Country's Legal System*, Vol. 22(1), NLSIR, 15-16 (2010).

93 *Id*., 7-8.

94 *Id*., 12-15.

95 Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, 119 (2010).

96 Erin F. Delaney, *The UK's Basic Structure Doctrine: Miller II and Judicial Power in Comparative Perspective*, Vol. 12, Notre Dame Journal of International & Comparative Law, 28-32 (2022).

97 *Anurag Deb: A Constitution of Principles: From Miller to Minerva Mills*, UK Constitutional Law, October 1, 2019, available at https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/ (Last visited on July 17, 2023).

V. SERIOUS ROADBLOCKS IN THE APPLICATION OF THE BASIC STRUCTURE DOCTRINE

The evolution of the basic structure doctrine in the celebrated case of *Kesavananda Bharati* v. *State of Kerala* ('Kesavananda Bharati'),[98] came as a saviour to the Indian judiciary. It is driven by the philosophical foundation of constitutional "entrenchment" that inherently offers resistance to change beyond limits.[99] This nature played a pivotal role in stemming the constitutional amendments from altering the core tenets of the Constitution and preserving its identity through overarching principles.[100] The Apex Court has negatively defined basic structure as, "amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity".[101]

The rough journey of this doctrine after getting challenged at every turn has posed novel dilemmas for the judiciary. One of them is regarding its application to other forms of state action other than constitutional amendments.[102] This dilemma is important to address because, after presenting the need and advantage of the doctrine, the formulation of the method of its application to ordinances needs to be constructed. However, considering the current elusiveness regarding its application to legislations, hope for its extension to ordinances seems dim enough.

Initially, the basic structure doctrine was intended to be applicable to constitutional amendments only. In *Indira Nehru Gandhi* v. *Raj Narain*, a string argument was put forth stating that it is a paradox that a higher power i.e. the power to amend the Constitution is subjected to implied limitations but not a relatively lower power, i.e., the legislative power.[103] However, Chandrachud J. stated that it is no paradox as certain stringent limitations apply on a higher power for the reason that it is a higher power.[104] He further stated of the differences between the procedure of passing a legislation and that of constitutional amendment and held that they operate in different fields so cannot be subjected to similar limitations.[105] A.N. Ray J. also stated that certain limitations are already imposed upon an ordinary legislation through Articles 245, 246 and 13 so putting extra fetters on legislative power would amount to re-writing the Constitution.[106] Hence, the application of doctrine should only be limited to constitutional amendments as there is no such express provisions restricting the amending power.

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

99 Shivprasad Swaminathan, *The Philosophical Foundations of the Basic Structure Doctrine: Entrenchment or Defeasibility?* in BASIC STRUCTURE CONSTITUTIONALISM-REVISITING KESAVANANDA BHARATI, 257, 257-272 (1st edn., 2011).

100 Navajyoti Samanta & Sumitava Basu, *Test of Basic Structure: An Analysis*, Vol. 1, NUJS L. REV., 499, 500 (2008).

101 Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, ¶16 (per Y.V. Chandrachud C.J.) ('Minerva Mills').

106 *Id*., ¶134.

However, the Supreme Court in several instances has moved away from the precedents and invalidated legislations for infringing the basic structure doctrine. This involves cases like *L. Chandra Kumar* v. *Union of India*,[107] *M. Ismail Faruqui* v. *Union of India*,[108] *G. C. Kanungo* v. *State of Orissa*[109]. But the law established by the Apex Court in *Bhim Singhji* v. *Union of India*,[110] and *Kuldip Nayar* v. *Union of India*,[111] each consisting of five-Judge Benches which ruled against the application of the doctrine to ordinary legislations still possesses substantive precedential value resulting in inapplicability of the doctrine to ordinary legislations. The Court reasoned that such an extension of the doctrine would rob the legislature of its power to function properly within the framework of the Constitution.

In such a dilemmatic situation, where there is a prevailing confusion regarding the applicability of the basic structure doctrine to legislative actions, it appears more difficult to apply the doctrine to ordinance, the promulgating power of which also has a legislative nature. However, a seemingly easy way of argument could be — proving the application of the doctrine to the legislations through favouring judgments; then establishing the legislative character of ordinances; then owing to similar characteristics of legislative action and ordinance-making power, applying the doctrine to it. However, this suffers from various serious hindrances. *First*, there is a possibility that the initial step of establishing the application of the doctrine to legislation would not be accepted by the court. This would whittle down the very base of the argument. Therefore, it is not wise to premise the entire argument on this base. *Second*, the courts by attributing the ordinance to be solely legislative in nature could be hesitant to add another constraint to it apart from the already established ones. This would restrict the grounds of review to those established in Krishna Kumar II which is formal in nature and prevent it from having a substantive review model. Hence, a new nature of the ordinance needs to be framed. *Third*, it needs to be established that the basic structure doctrine applies to the newly established nature of the ordinance. *Fourth*, as the promulgation of ordinances is not illegal *per se* but its frequent unnecessary promulgation is 'constitutionally shameless' so it needs to be proved that the overarching basic features get violated due to such misuse of the promulgating powers. Owing to these

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[107] *See also* L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, ¶99 (Administrative Tribunals Act, 1985, §28 was held to be unconstitutional for violating the basic feature of judicial review as it mentioned about the exclusion of jurisdiction of courts).

[108] *See also* M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360, ¶134 (Acquisition of Certain Area at Ayodhya Act, 1993, §4(3) sought to abate any pending suits or legal proceedings in respect of the title to the property that has been vested in the Central Government without providing any alternative dispute resolution mechanism. It was held unconstitutional as it deprived the Muslim Community of the right to plead which offends the basic feature of secularism).

[109] *See also* G.C. Kanungo v. State of Orissa, (1995) 5 SCC 96, ¶28 (The Arbitration (Orissa Second Amendment) Act, 1991, was held unconstitutional for infringing the basic feature of the rule of law as the Act encroached upon the judicial powers of the Special Administrative Tribunals).

[110] Bhim Singhji v. Union of India, (1981) 1 SCC 166, ¶20.

[111] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶¶106-107.

hindrances, it becomes abundantly clear that a different model of judicial review for applying the basic structure doctrine needs to be constructed.

Before moving on to construct a new model of judicial review, one important question that needs to be addressed is as to why the basic structure doctrine is being made applicable to state actions other than constitutional amendments. One of the primary reasons for subjecting the amending power to the doctrine is that the amending power could not have been restricted by interpretation of express textual provisions of the Constitution but damaged the identity of our Constitution.[112] Therefore, implied limitations were devised to preserve the basic structure of the Constitution from getting destroyed.[113] Currently, there are certain actions of the legislature and the executive which cannot be considered as unconstitutional by mere textual interpretation of the constitutional provisions. But these actions damage the foundational principles of the Constitution much like the amendments. It is possible for the legislature to legislate Acts that can violate the basic structure doctrine without infringing express provisions of the Constitution.[114] Further, there are executive actions like the introduction of electoral bonds scheme which is anonymous for others except the government receiving the donation.[115] Also, it engages the ruling government in a quid pro quo activity with the donors resulting in a partisan attitude for other political parties.[116] Similarly, the demolition drives that targeted the Muslim community[117] and the passage of non-money bills as money bills[118] highlight the way in which the foundational principles of representative democracy, secularism and supremacy of the Constitution are ransacked. Apart from these, Professor Khaitan has enumerated several other such executive actions most of which are constitutionally shameless and cannot be declared unconstitutional by mere application of textual provisions.[119] This discussion highlights that it is not only the constitutional amendment which can infringe the basic structure but also the ordinary legislative and

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[112] N.A. Palkhivala, OUR CONSTITUTION DEFACED AND DEFILED, 113 (1974).

[113] *Id*.

[114] Sayan Mukherjee, *The Unconventional Dimensions of the Basic Structure Doctrine: An Insight*, Vol. 1, NULJ, 51 (2011).

[115] ECONOMIC TIMES, *Explained: What are Electoral Bonds? How do They Work and Why are They Challenged in SC?,* November 1, 2023, available at https://economictimes.indiatimes.com/news/how-to/explained-what-are-electoral-bonds-how-it-works-and-why-its-challenged-in-supreme-court/articleshow/104889034.cms (Last visited on December 1, 2023).

[116] SC OBSERVER, Gauri Kashyap, *Electoral Bonds Constitution Bench | Day 1: Anonymous Corporate Funding Decimates a Representative Democracy*, October 31, 2023, available at https://www.scobserver.in/reports/electoral-bonds-constitution-bench-day-1-anonymous-corporate-funding-decimates-a-representative-democracy/ (Last visited on December 1, 2023).

[117] The Wire Staff, *'Collective Punishment for Muslims': Human Rights Watch Slams Demolition Drives in BJP-Ruled States*, THE WIRE, January 13, 2023, available at https://thewire.in/rights/collective-punishment-for-muslims-human-rights-watch-slams-demolition-drives-in-bjp-ruled-states (Last visited on December 1, 2023).

[118] Nirun R.N. & Anu Stephen, *The Saga of Money Bill Controversies in India*, LIVELAW, June 21, 2023, available at https://www.livelaw.in/articles/the-saga-of-money-bill-controversies-in-india-231024 (Last visited on December 1, 2023).

[119] Tarunabh Khaitan, *supra* note 75, 58-73.

executive actions that can damage it without infringing express provisions. Thus, this presents a necessity to apply the basic structure review to state actions other than amending power.

VI. CONSTRUCTING A NEW MODEL OF JUDICIAL REVIEW: THE BASIC STRUCTURE REVIEW

As highlighted in the above part, a new model of 'basic structure review' needs to be constructed to counter the abovementioned concerns. Such a model of judicial review that deals with the above hindrances is summarised here:

1. Deciphering the appropriate nature of ordinances to convincingly allow framing a substantive judicial review of the promulgating power.

2. Identifying the 'basic feature(s)' which could be challenged of being violated due to frequent promulgation of ordinances.

Establishing that the basic structure doctrine can apply to all forms of state actions which includes ordinances also, irrespective of its nature, by not being constricted to constitutional amendments only.

A. DECIPHERING THE NATURE OF ORDINANCES

As discussed earlier, the ordinance-making power is considered to be legislative in nature owing to the phrase "same force and effect as an Act" in Article 123(2) and Article 213(2) for which it is subjected to a formal judicial review only. But, according to Professor Shubhankar Dam, such a "syllogistic template" (a model of attributing ordinances with the same limitations as an Act of legislature owing to their similar nature) may have the immediate effect of validating every ordinance passed by the President.[120] He also apprehends that in the absence of a substantive judicial review of presidential satisfaction, the President or Governor can consider any situation as exigent and promulgate ordinances even at times not faltering to "purposefully create a situation of legislative emergency by dissolving a house in session to promulgate an ordinance".[121] So, to construct a framework of substantive judicial review he very wisely attacks the very foundation of the ordinance-making power which is its legislative nature. He also rightly points out that though the Ordinances and Acts are similar in some respects but in other aspects, they are completely different, therefore, the promulgating power cannot be accorded a complete legislative nature.

Firstly, he indicates that even though Article 123(3) states that the ordinances can be promulgated by President on matters that the Parliament is

[120] Dam, *supra* note 4, 181.
[121] *Id*.

"competent to enact" such competence is restrictive in nature.[122] He rightly states that the syllogistic template holds true in ordinary legislative powers but not for extraordinary legislative powers granted under Articles 249, 250 and 252 which state about the power of Parliament to legislate on matters in the State list that the President cannot promulgate through ordinances.[123] Thus, the competence is restricted to ordinary legislative subject matters and not to extraordinary ones which shows that ordinances and Acts have a difference in subject matter competence. *Secondly*, differences can be seen regarding the commencement and lapse of ordinances which, unlike Acts, commence only when they get fully published and upon lapsation, all of their previous effects get wiped out.[124] *Lastly*, unlike Acts, some additional limitations apply to the prospective and retrospective effects of the ordinances.[125] Hence, these differences depict that even though the 'same scope and effect' has been granted to ordinances but that should not elevate an Ordinance to the pedestal of an Act. Instead, their differences should be accounted for while deciphering the true nature of an ordinance for interpretation purposes.

Therefore, Professor Dam very wisely deciphered the nature of the power of promulgating ordinance as "circumstantially conditional legislative power" owing to its invocation in specific circumstances specified in Article 123 which are missing for an Act.[126] In Krishna Kumar II while relying on R.C. Cooper,[127] the Court endorsed the view of Prof. Dam by stating that the ordinance promulgating power is conditional in nature based on the existence of exigent circumstances compelling the President to take immediate actions.[128] This characterisation of an ordinance is useful because it is neither fully legislative nor fully executive, as a result of which the ordinance can be reviewed on grounds that are inapplicable to legislations.[129]

Thus, it can be concluded that if such a distinct nature of an ordinance is established, it could lead to distinct grounds for judicial review.[130] Consequently, that would provide an opportunity to break through the formal standard of judicial review applicable to the President's satisfaction and apply a rigorous standard of substantive judicial review to objectively scrutinise the pre-conditions for promulgating an ordinance to effectively check the misuse of such power.

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122 *Id*., 161-165.
123 *Id*., 163-165.
124 *Id*., 165.
125 *Id*.
126 *Id*., 177.
127 Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, ¶19 (per J.C. Shah J.).
128 Krishna Kumar Singh II, *supra* note 50, ¶¶49, 50.
129 DAM, *supra* note 4, 178-179.
130 *Id*., 195.

B. IDENTIFYING THE BASIC FEATURES HAMPERED DUE TO MISUSE OF PROMULGATING POWER

This segment presents the effect of the misuse of power of promulgating ordinances. It needs to be answered as to what is the effect when an ordinance is promulgated without there being any legislative urgency or to surpass the Parliamentary scrutiny. This effect is essential to be presented because in the previous Part IV the unnecessary promulgation of ordinances was contended to be constitutionally shameless. So, it needs to displayed as to how the principles of 'separation of power' and 'Parliamentary democracy' are damaged which is presented very briefly in this segment. The ordinance promulgating powers can be majorly challenged for violating the basic features of 'separation of powers'[131] and 'democratic form of government'[132]. Although, the Indian Constitution has not recognised a strict separation of powers, the functions of different organs of the government have been abundantly differentiated.[133] The reason being that it is better to have a harmonious governmental structure rather than a conflicting trinity arising out of a water-tight separation of powers.[134] However, this permitted diffusion of power to maintain mutual cooperation hinges on the idea that the organs will not usurp their functions and exercise their discretion judiciously.[135] It not only prevents concentration of power but more importantly requires maintaining a 'check and balance' system as well.[136] So, it is not the unsurmountable barriers or compartmentalisation among the three organs but the mutual restraint that is the 'check and balance' in their exercise of powers that forms the soul of the 'separation of powers'.[137] However, the frequent non-urgent promulgation of ordinances sits uneasily with this principle as it encroaches on the legislature's domain.[138] There have been numerous instances of ordinances getting promulgated when there is no such emergency such as just after or before the sitting of the Houses, when a bill is already introduced and many more.[139] Such promulgations annex the domain of legislature which is tasked with the function of law-making in ordinary times. Moreover, there is no effective check on such power that imbalances the power structure by tilting more towards the overpowering of the executive, thus, violating the principle of 'separation of powers.'

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131 Kesavananda Bharati, *supra* note 98, ¶292 (per S.M. Sikri C.J.).

132 *Id*.

133 Rai Sahib Ram Jawaya Kapur v. State of Punjab, 1955 SCC OnLine SC 14 : (1955) 2 SCR 225, ¶12.

134 Constituent Assembly Debates, December 10, 1948 *speech by* Shri K. Hanumanthaiya, 962, available at https://eparlib.nic.in/handle/123456789/762994?view_type=search (Last visited on July 18, 2023).

135 Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364, ¶17.

136 Shashank Krishna, *Separation of Powers in the Indian Constitution & Why the Supreme Court was Right in Intervening in the "Jharkhand" Imbroglio*, Vol. 18, Stud. Bar Rev., 19-20 (2006).

137 I.P. Massey, Administrative Law, 43 (8th edn., 2012).

138 Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, Vol. 17(1), Or. Rev. Int'l L., 35 (2015).

139 *See also* Dam, *supra* note 4, 111-117 (discusses different reasons for widespread promulgation of ordinances which are majorly categorised into historical, empirical and attitudinal reasons. Further, attitudinal reasons are categorised into five different types).

Further, it is the basic tenet of parliamentary democracy to include debates and discussions but such non-urgent promulgations minimise the importance of the legislature as a pillar of democracy that assails the roots of parliamentary democracy.[140] Apart from weakening the debates in the legislature, even the legislature's power to review these laws after their passing has also been eroded.[141] This abundantly proves the fact that promulgation of ordinances in the absence of exigencies shakes the foundation of democracy and more specifically parliamentary democracy. Therefore, such promulgations are a serious onslaught on the basic feature of 'democracy' as well.

1. Establishing an Independent Substantive Basic Structure Review: Applicable to all Forms of State Actions

Pondering upon the question as to how basic structure doctrine can be applied as a form of substantive judicial review on the power of promulgating ordinances the ideas of Professor Sudhir Krishnaswamy in his book 'Democracy and Constitutionalism in India' appears to be an extremely useful starting point. In the book, Professor Krishnaswamy argues that the basic structure doctrine has emerged as an independent and novel type of constitutional judicial review that applies not only to constitutional amendments but also to other forms of state actions such as general legislative and executive powers.[142] Further, according to him, this argument can be extended to the ordinance-making power as well. It is because by considering such powers as special legislative powers he stated that "the analysis (...) confined though it is to general legislative power, offers us sufficient guidance as to how one may approach the basic structure review of special legislative powers".[143] Therefore, following the same lines of justifications given by him for establishing the application of the doctrine to general legislative and executive powers, an attempt is made to apply them to the ordinance-making power as well.

2. Setting a Constitutional Basis for Applying the Doctrine to Ordinances

From the beginning, Professor Krishnaswamy aptly establishes the constitutional basis for applying the basic structure review to legislative and executive powers by employing a 'structural interpretation' of the Constitution.[144] This preliminary establishment is essential to prove that such an application of the doctrine is not something purely fictitious that is out of the Constitution. Rather it can be read into the Constitution for any form of state action including ordinance making power as well. *First*, he applies this technique of 'structural interpretation'

[140] D.C. Wadhwa, *Executive's Law Making: Lesson from East India Company*, Vol. 28, ECONOMIC AND POLITICAL WEEKLY, 192-195 (1986).
[141] Chopra, *supra* note 138, 38-40.
[142] KRISHNASWAMY, *supra* note 95.
[143] *Id*., 57.
[144] *Id*., 63.

to the phrase "subject to the 'provisions' of the Constitution"[145] which is interpreted in a manner to circumscribe the limits of legislative and executive powers.[146] *Second*, relying on the opinion of Beg, J. in *State of Karnataka* v. *Union of India*,[147] he proves that the term 'provisions' in the above phrase include the interpretation of those provisions as well.[148] In other words, if any legislative action is subject to the provisions of the Constitution then it is also subject to the interpretation of those provisions. Further, it needs to be understood that it is the 'interpretation' of constitutional provisions, and not the provisions themselves, which generate the "emergent basic features" that act as implied limitations on those provisions.[149] Thus, as the implied limitations are a result of the interpretation of the constitutional provisions so subjecting the legislative and executive powers to the constitutional provisions, that is interpretation of the provisions, implies subjecting them to the implied limitations which is the basic structure doctrine.[150]

This line of argument can be conveniently applied to ordinance promulgating power as well owing to its special legislative nature. It is previously highlighted that the promulgating power has both legislative and executive nature, even though it is substantially legislative in nature. Although, there is no such express mention of the phrase "subject to the provisions of the Constitution" either in Article 123 or Article 213 but that restriction can be inferred. It may be reminded that the ordinance-making power has been subjected to similar restrictions as an Act of Parliament. These restrictions remain even when the ordinance-making power is contended to be a special legislative power or a circumstantially conditional legislative power having some hues of executive power in it. One of these restrictions was that an ordinance cannot infringe any provision of the Constitution similar to an Act of Parliament as both of them are subject to same constitutional inhibitions.[151] This clearly shows that the phrase "subject to the provisions of the Constitution" appearing in Article 245 also applies to the ordinance-making power as well. It may be questioned that this restriction may not apply because a new nature was given to the ordinance which is not purely legislative in character. However, the contention in this paper does not negate an ordinance's legislative character rather adds an executive character to it. This does not imply that if an additional nature is added then the restrictions flowing from the initial nature will be precluded. Hence, it is through such an inference and judicial precedents that the impact of the phrase "subject to the provisions of the Constitution" can be read into Articles 123 and 213.

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[145] The Constitution of India, Art. 245(1); The Constitution of India, Art. 73(1).

[146] Krishnaswamy, *supra* note 95, 64.

[147] State of Karnataka v. Union of India, (1977) 4 SCC 608, ¶125 (per M.H. Beg C.J.) ('State of Karnataka').

[148] Krishnaswamy, *supra* note 95, 64.

[149] *Id*.

[150] *Id*., 65.

[151] Krishna Kumar Singh II, *supra* note 50, ¶¶43-48.

Moreover, as it is shown that all legislative and executive powers are subject to the basic structure review, so ordinance making power being partly legislative and partly executive can also be inferred to be subject to the 'provisions' of the Constitution. This consequently proves that the promulgation is also subject to the interpretation of those provisions. Hence, being subject to the interpretation of provisions clearly establish that it is also subject to the basic structure doctrine.

3. Establishing the Type of Basic Structure Review for Ordinances

Regarding the type of basic structure review, Professor Krishnaswamy compares two types of review: *first*, as an extension of Article 13 fundamental rights judicial review as illustrated by Chandrachud J. in the *Indira Nehru Gandhi* v. *Raj Narain*[152] and *second*, as an independent substantive judicial review as devised by Bhagwati J. in *Minerva Mills Ltd.* v. *Union of India*[153] The extension of Article 13 fundamental rights judicial review views that the basic structure review comes into play when any important provision of the Constitution especially Part III gets infringed.[154] When Clauses (4) and (5) of Article 329-A were challenged for violating principle of equality, Chandrachud J. undertook an analysis of Article 14 and held the provisions to be violative of the rational nexus test under it.[155] This led him to conclude that the basic feature of equality got violated. This type of review is based on the ground that basic structure review is a text-based limit and examines the nature and extent of infraction of fundamental rights and whether such infringement of the provisions affect the basic structure.[156] On the other hand, the independent substantive kind of judicial review does not investigate which provision or fundamental right is violated rather whether any broad constitutional principle is damaged or destroyed.[157] Even when the basic feature which is the ground for challenge is expressed in terms of fundamental rights, still then the impact on that broad principle is assessed.[158] Under this type of review, an amendment which if modifies or omits any article of the Constitution can be held constitutional if the principle underlying those articles is preserved as this does not damage any basic feature but simply changes it.[159]

After a rigorous analysis of both types of review, Professor Krishnaswamy rightfully favours the opinion of Bhagwati J. who made a distinction between the egalitarian principle and the doctrinal interpretation of Article 14 of the Constitution.[160] Through this distinction, it is clearly shown that the ba-

[152] Indira Gandhi, *supra* note 103, ¶¶679-680 (per Y.V. Chandrachud J.).
[153] Minerva Mills, *supra* note 101, ¶41; Krishnaswamy, *supra* note 95, 76-86.
[154] Krishnaswamy, *supra* note 95, 77.
[155] *Id*., 76.
[156] *Id*., 79-80.
[157] *Id*., 80.
[158] *Id*., 82.
[159] *Id*., 87.
[160] *Id*., 86.

sic structure review evaluates whether the amendments damage or destroy the overarching principles of the Constitution, affecting its identity instead of testing the constitutional amendments on specific constitutional provisions.[161] The major reason for favouring the independent substantive judicial review is based on the distinction between constitutional provisions and constitutional principles. It is the latter that is broad in nature and that hinges the basic structure review "on the text of constitution may fail to preserve the constitutional provisions".[162] Therefore, the basic structure review must be applied as an independent substantive judicial review that considers compliance with constitutional principles rather than the constitutional provisions.

Professor Krishnaswamy further contends that this novel kind of review also applies to executive and legislative actions instead of being restricted to the constitutional amendments.[163] In the case of executive actions by high constitutional authorities, Sawant, J. in S. R. Bommai attempted "to accommodate the basic structure review by modifying the administrative law review instead to supplementing it with an independent substantive model of review".[164] This clearly shows that he failed to identify the type of review as an independent one and instead grafted it into the administrative law review model. But in *B.R. Kapur* v. *State of T.N.*[165] the basic structure review was applied as an independent substantive judicial review independently of the administrative law review model.[166] In this case, the questions before the Court was two-fold: *first*, if the discretion of the Governor under Article 164 is subject to any limitation, and *second*, deciphering the limit of judicially reviewing this discretion of the Governor.[167] Bharucha J. while analysing the duties and functions of the Governor as vested by the Constitution invalidated the discretion of the Governor in appointing a person convicted of a criminal offence as the chief minister.[168] He held that the role of the Governor should be seen as a Constitutional functionary levied with the task of preserving it, so by exercising the discretion in such a manner the Governor ran contrary to the Constitution.[169] In this way, he applied the Constitutional principles associated with the powers of the Governor to nullify his actions instead of merely following the constitutional provisions. Although he did not mention any specific basic feature but the feature of 'democracy' can be seen to have been violated as the Governor failed to uphold the essence of democracy which entails a representative government led by qualified elected leaders.[170] Moreover, Bharucha J. made a breakthrough in extending the application of the basic structure review

[161] *Id*.
[162] *Id*., 86-87.
[163] *Id*., 70-71.
[164] *Id*., 92.
[165] B.R. Kapur v. State of T,N., (2001) 7 SCC 231 ('B.R. Kapur').
[166] Krishnaswamy, *supra* note 95, 93-95.
[167] B.R. Kapur, *supra* note 165.
[168] *Id*., ¶54.
[169] *Id*., ¶¶50-51.
[170] Krishnaswamy, *supra* note 95, 95.

as an independent substantive limit to the exercise of executive power.[171] He gave such a verdict irrespective of the distinction followed between the intensity of administrative law review applied to executive power exercised by high constitutional authorities and ordinary executive action.[172]

Similarly, regarding legislative actions, Beg CJ in *State of Karnataka* v. *Union of India* held that

> "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".[173]

Interestingly, the reasoning behind expanding the application of the doctrine is that it is considered to be inherently flowing the Constitution. This implies that the doctrine is like a mandate of the Constitution and generally every such mandate binds all the State actions. Further, like the mandate of compliance with fundamental rights, this doctrine can be independently applied to state actions other than constitutional amendments. Therefore, employing these reasonings, the doctrine can also act as an independent substantive review for scrutinising the powers of promulgating ordinances.

Moreover, as established earlier, the ordinance-making power is partly executive in nature and involves the satisfaction of the President. So, inspiration can be also drawn from the case of B.R. Kapur which involved judicial review of the Governor's discretion which is also executive in nature and S.R. Bommai where an attempt was made to incorporate the basic structure review to adjudicate presidential satisfaction in proclaiming emergency. However, B.R. Kapur was successful in breaking the practice of following an unreasonable distinction between applying a low-intensity review for executive actions by high constitutional authorities and a high-intensity one for ordinary executive actions. Considering the case in this sense, the basic structure review can be applied to set a high-intensity review for higher constitutional authorities such as the President and the Governors while reviewing the effects of ordinances. It can be useful in overcoming the restriction of having a low level of scrutiny for the powers of promulgating ordinances. Therefore, the application of basic structure doctrine as an independent model of substantive judicial review should be adopted as it would provide a solid ground for actualising the 'effect test' to scrutinise the invalid exercise of this power.

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171 *Id*., 100-101.

172 *Id*.

173 State of Karnataka, *supra* note 147.

4. Formulating the Standard of Scrutiny for Ordinances

According to Professor Krishnaswamy, this review covers only those state actions that 'damage or destroy' the basic structure of the Constitution.[174] This level of scrutiny is lower than the fundamental rights compliance review under Article 13 and the competence review under Article 245 which have a high standard of scrutiny and put more limits on the legislative and executive branches.[175] This scrutiny consists of two components: *first*, the basic features are not damaged or destroyed and *second*, the identity of the Constitution is preserved. These components are complementary in nature which means the Constitution suffers a loss of identity even when a single basic feature is damaged.[176] However, it needs to be noticed that such a scrutiny is well applicable to the constitutional amendments which make certain changes to the content of the Constitution and those changes could be challenged for perverting its identity. However, it seems difficult to challenge any executive or legislative action that do not make any textual change in the Constitution for tampering with its identity. But this query has been answered in a very lucid fashion stating that this review "is not concerned with the quantitative analysis of the degree of textual effacement of constitutional provisions" rather its pivotal function is to preserve the "normative identity of the core constitutional principles".[177] The author relying on *R.C. Poudyal* v. *Union of India*,[178] states that the basic structure review is qualitative and not quantitative in nature and preserves the normative identity of the Constitution.[179] Therefore, this review applies to all forms of state action as it is concerned with the effect or impact of that action. It tests that effect on the anvil of its two complementary components rather than considering the form and manner in which that action is exercised. Further, more importantly, this review is a "hard review" similar to the review under Article 13 and Article 245 and it can be applied even to the extent of striking down the offending state actions.[180]

This level of scrutiny can also be applied to the power of promulgating ordinances owing to the effect that the exercise of such power casts on the identity of the Constitution. This qualitative nature is based on the foundation that even if there is no textual change in the Constitution by any amendment still the identity of the Constitution can be hampered. This tinkering with the identity can be done by any legislative, executive or special legislative action like ordinances. The process in which an ordinance is promulgated can have debilitating impact on the bedrock principles of the Constitution which cannot be restricted by mere provisions of the Constitution. As highlighted in the previous segment, the brazen misuse of the power clearly has the effect of subverting the basic features of

[174] Krishnaswamy, *supra* note 95, 110.
[175] *Id*., 111.
[176] *Id*., 116-117.
[177] *Id*., 118-119.
[178] R.C. Poudyal v. Union of India, 1994 Supp (1) SCC 324.
[179] Krishnaswamy, *supra* note 95, 116.
[180] *Id*., 119-120.

'separation of power' and 'representative democracy'. Such a debilitating effect of this egregious action satisfies the high threshold required to meet for the basic structure review and necessitates a 'hard review.' This review is not only essential for testing the effect of the action by sidelining the ill-motive ground but also provides a scope for objective assessment of sufficient relevant materials to decipher the reasonable justification validating the presence of exigent circumstances. It further assists in diluting the distinction of judicial review of executive actions by high constitutional authorities such as ordinance promulgation powers and ordinary executive actions. Therefore, this type of basic structure review must be established and accepted to curb the burgeoning executive aggrandisement.

A hypothetical example can better explain the necessity and advantage of the basic structure review as explained in the above segments of the article. Suppose an ordinance is promulgated one day after a session of one of the Houses of Parliament ends. Now, the question is whether such promulgation is constitutionally valid or not? Was the cabinet not aware of such legislative beforehand and, if yes, could it not have resorted to the ordinary process of law? Can an emergency be perceived in such a small duration of time and an ordinance be promulgated within such time? All these questions lead us to an answer that the promulgating power is misused. But can this action be restrained with the existing judicial review? The prevailing judicial review tests an ordinance on three parameters namely: lack of competence, infringing any provision of the Constitution, and satisfaction of President based on completely extraneous grounds. It can be seen that such an action cannot be invalidated on any of these grounds if the content of the ordinance does not infringe any constitutional provision and is related to the emergency. However, upon applying the basic structure review which is an equivalent to the 'effect test,' the ordinance can be challenged, even invalidated, for violating 'Parliamentary democracy' and preventing the legislature from exercising their duty of legislating any law after proper deliberation. This shows that the basic structure review can be a more robust review than the prevailing ones.

VII. CONCLUSION

This paper highlighted the necessity, advantage and method of applying the basic structure doctrine to restrict the powers of promulgating ordinances. The issues of frequent re-promulgation, unnecessary promulgations, possible misuse of the exception laid down for the enduring effect of an ordinance and wilful sidelining of legislature by the executive cast serious repercussions on the supremacy of the Constitution. Therefore, to alleviate such issues and strengthen the prevailing sickly judicial review, the application of the basic structure doctrine is strongly proposed in this article.

In this article, an attempt is made to carve out a path through which the basic structure doctrine can be applied to the powers of promulgating ordinances apart from the content of the ordinances. It is the exercise of such power

which is attempted to bring under the clutches of the basic structure judicial review. Further, this type of judicial review is useful in drifting away from the examination of mala fides of executive authorities to a novel arena of testing the effects of an ordinance. This is essential for sustaining the supremacy of the Constitution of India and preventing the executive from normalising the ordinance route. However, this judicial review also provides a power in the hands of the judiciary to intervene into the domain of the executive and impose their judicial opinions on it. Therefore, what further needs to be looked is the exercise of the power of judicial review itself does not breach the basic feature of separation of powers. Therefore, it is to be kept in the mind of the judiciary that while applying the basic structure review it should not itself infringe the basic features. This is yet another interesting area of exploration as to how the basic structure doctrine can be applied against the excess of judicial review in case separation of powers is diluted by the judiciary.