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From Equity to Plenary Instrumentalism: A Critique of the Supreme Court of India's Remedial Ad-Hocism in Exercise of Article 142 Jurisdiction

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ABSTRACT

This paper examines the transformation of Article 142(1) of the Constitution of India from a narrow, procedural safety valve into an expansive and largely unconstrained source of remedial authority. Tracing the provision's genealogy from Section 210 of the Government of India Act, 1935, through four Constitution Bench landmarks, and drawing on the most comprehensive empirical study of Article 142 usage between 1950 and 2023, the paper argues that the Supreme Court's reflexive self-description of the power as an exercise of classical equity is analytically inadequate for its structural governance applications. It contends that the Court's contemporary practice is better conceptualised not as remedial constitutionalism but as plenary instrumentalism, a results-oriented paradigm in which Article 142 is treated as an all-purpose tool of problem-solving and institutional substitution. Through a domain-by-domain analysis of fiscal, criminal, family-law, and federal interventions, and by situating these pathologies within a broader institutional malaise spanning bail jurisprudence, recusal practice, and collegium opacity, the paper proposes a five-stage proportionality test and an integrated structural reform agenda to tether the power within the separation of powers architecture.

Keywords: Article 142, complete justice, Supreme Court of India, plenary instrumentalism, remedial constitutionalism, separation of powers, judicial restraint, proportionality.

I. INTRODUCTION: THE METAMORPHOSIS INTO A "KAMDHENU" AND THE INSTITUTIONAL MALAISE

Article 142(1) of the Constitution of India empowers the Supreme Court to pass "such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."¹ Adapted from Section 210 of the Government of India Act, 1935,² and placed before

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¹ INDIA CONST. art. 142, cl. (1).

² The Government of India Act, 1935, § 210.

the Constituent Assembly on 27 May 1949, the provision passed without recorded debate. Its framers envisaged a narrow, procedural safety valve, a residual power to enforce decrees and fill procedural gaps when the strict letter of statute fell short of justice. Over time, this modest clause has evolved into what former Attorney General K.K. Venugopal described as a "Kamdhenu,"³ a metaphor illustrating an uncatalogued, expansive judicial power operating at the subjective impulse of individual benches.

This development presents a complex institutional paradigm. A provision intended to supplement statutory frameworks has occasionally been implemented to supplant them, being invoked to establish substantive legal rights, modify unappealed judgments of multiple High Courts simultaneously, create a new ground of divorce, and substitute judicial acts for constitutional executive actions. Public and legislative commentary has increasingly highlighted the structural anxieties surrounding this expansion, with institutional critiques characterising the plenary application of the provision as a profound challenge to the democratic separation of powers.⁴ Academic commentary within peer-reviewed Indian constitutional law journals confirms that this inconsistent operational paradigm is not merely a collection of isolated doctrinal overreaches, but rather a systemic feature of contemporary jurisprudence.⁵ This paper argues that the Supreme Court's unmoored application of Article 142 is symptomatic of a deeper, structural pathology: the persistent absence of institutional memory, direction, and self-governance discipline, a phenomenon that manifests across its bail jurisprudence, recusal practices, collegium opacity, and administrative functioning.⁶

The thesis proceeds through four distinct conceptual movements. First, the reflexive self-description of Article 142 as an exercise of classical equity is analytically inadequate for structural governance uses. The common law equity model cannot validate or constrain the specific genus of prospective, governance-creating orders that characterise the provision's most controversial applications. Second, while this paper engages with remedial constitutionalism, the comparative public law doctrine by which a constitutional court fashions remedies necessary to give practical effect to constitutional guarantees, as theorised in the transformative constitutionalism literature,⁷ it argues that the term is a descriptive misnomer for the Indian reality. True constitutionalism fundamentally implies limitation, predictability, and institutional

³ K.K. Venugopal, *Article 142 and the Need for Judicial Restraint*, THE HINDU (May 18, 2017).

⁴ *What is Article 142? Why VP Jagdeep Dhankhar Called It a 'Nuclear Missile'*, TIMES OF INDIA (Apr. 24, 2025).

⁵ M.P. Ram Mohan et al., *The Supreme Court of India's Use of Inherent Power under Article 142 of the Constitution: An Empirical Study*, 37 NAT'L L. SCH. INDIA REV. 528 (2025).

⁶ UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980).

⁷ GAUTAM BHATIA, *THE TRANSFORMATIVE CONSTITUTION* (2019).

restraint; what the Indian Supreme Court practices is better conceptualised as plenary instrumentalism, a paradigm in which the Court treats Article 142 not as a source of constitutional law bounded by doctrine, but as an all-purpose tool of pragmatic problem-solving and institutional substitution. Third, empirical data and peer-reviewed scholarship jointly demonstrate that the Court's practice has been doctrinally inconsistent precisely because it has pursued structural interventions without an explicit theoretical baseline, exit strategies, or limiting principles. Fourth, a structural reform agenda grounded in constitutional first principles is necessary to tether this plenary power within the separation of powers architecture.

II. TRACING THE ORIGINS: FROM SECTION 210 TO ARTICLE 142

The genealogy of Article 142 begins with Section 210 of the Government of India Act, 1935, which empowered the Federal Court to pass "any order or direction" necessary "to do complete justice between the parties in any proceeding."⁸ This clause functioned as a standard enforcement mechanism designed to ensure that decrees could be practically implemented across a vast territory with divergent local enforcement regimes. Its purpose was strictly administrative and procedural, aimed at preventing jurisdictional lacunae. Available records of Federal Court decisions from 1937 to 1950 reveal no reported case in which Section 210 was invoked for structural governance or policy formulation; the provision was deployed exclusively in enforcement contexts.⁹

When Draft Article 118, the predecessor to Article 142, was introduced to the Constituent Assembly on 27 May 1949, it was presented as a technical housekeeping provision and passed without recorded debate.¹⁰ Granville Austin's authoritative study observes that administrative and procedural clauses were routinely adopted rapidly because the Assembly trusted the future prudence of the judiciary.¹¹ This historical silence indicates that the framers did not explicitly contemplate the expansive governance power that the Court has since developed. The text's reference to "complete justice" must be interpreted through a rigorous constitutional methodology. Rather than relying on rigid literalism, the Supreme Court has recognised that a purposive, non-originalist interpretive approach, as articulated in *Maneka Gandhi v. Union of India*,¹² requires evaluating fundamental rights as an integrated, cohesive whole. B. Shiva Rao's

⁸ The Government of India Act, 1935, § 210.

⁹ See *Yeshwant Deorao v. Walchand Ramchand Kothari*, AIR 1950 SC 852; available Federal Court records from 1937 to 1950 reveal no reported invocation of Section 210 for structural governance or policy formulation.

¹⁰ CONSTITUENT ASSEMBLY OF INDIA DEBATES, vol. VIII (May 27, 1949) (proceedings on Draft Article 118, adopted without recorded substantive debate).

¹¹ GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 277 (1966).

¹² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

framing account confirms that the founders regarded Article 142 as a procedural tool located within Chapter IV of Part V, rather than an independent, parallel source of legislative authority.¹³

The pre-independence background reinforces this restrictive baseline. The Presidency High Courts operated under the "justice, equity, and good conscience" standard from the time of the Letters Patent, a standard traditionally constrained by equitable maxims that prevented it from overriding positive statute or creating new substantive rights.¹⁴ Even the most expansive reading of that historical tradition would not have contemplated a judicial body issuing nationwide regulatory norms on the basis of equitable jurisdiction alone.

III. THE DOCTRINAL GENEALOGY: FOUR CONSTITUTION BENCH LANDMARKS

The scope of Article 142 has been principally determined by four Constitution Bench landmarks, each leaving a divergent and often contradictory legacy. The unresolved tension between these decisions represents the primary structural vulnerability in the provision's current jurisprudence.

A. *Prem Chand Garg v. Excise Commissioner, U.P. (1963)*: the restrictive baseline

In the first authoritative reading of Article 142, a five-judge Constitution Bench held in *Prem Chand Garg v. Excise Commissioner, U.P.* that any order passed under Article 142(1) "must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."¹⁵ This ruling established two hard limits: Article 142 cannot circumscribe fundamental rights, and it cannot contradict express statutory enactments. This remained the governing framework for nearly three decades.

B. *A.R. Antulay v. R.S. Nayak (1988)*: reinforcement of the baseline

A seven-judge bench in *A.R. Antulay v. R.S. Nayak* applied and reinforced this restrictive baseline, specifically reviewing whether the Court's own earlier direction, issued by a two-judge bench in 1984, was constitutionally valid.¹⁶ The Court held that its earlier direction transferring criminal cases to a special court without statutory authority violated the Criminal Law (Amendment) Act, 1952, as well as Articles 14 and 21, and was accordingly void. The bench's

¹³ B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, vol. II, at 491 (1967).

¹⁴ Letters Patent of the High Courts (1865) (establishing the "justice, equity, and good conscience" standard for the Presidency High Courts); F.W. MAITLAND, EQUITY 1-20 (2d ed. 1936).

¹⁵ *Prem Chand Garg v. Excise Comm'r, U.P., Allahabad*, AIR 1963 SC 996 (India).

¹⁶ *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 (India).

willingness to nullify its own prior direction confirmed that Article 142 did not exempt the Court from respecting statutory and constitutional boundaries.

C. Union Carbide Corporation v. Union of India (1991): the transformative rupture

A significant doctrinal shift occurred in *Union Carbide Corporation v. Union of India*, decided in the context of the Bhopal Gas Tragedy settlement.¹⁷ A unanimous Constitution Bench held that "prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142." The power was described as operating "at an entirely different level and of a different quality" from ordinary statute. This formulation severed the provision from the textual restraints established in *Prem Chand Garg* without formally overruling it. Although the *Union Carbide* bench qualified this by noting that Article 142 cannot override "fundamental principles of public policy," subsequent smaller benches routinely deployed this sweeping language, stripped of its exceptional context, to justify broad governance interventions.

D. Supreme Court Bar Association v. Union of India (1998): the attempted retraction

The consequences of the *Union Carbide* formulation materialised in *In re Vinay Chandra Mishra*, where a three-judge bench suspended an advocate's licence, a power exclusively reserved by statute to the Bar Council of India under the Advocates Act, 1961, by invoking Article 142.¹⁸ Reviewing this overreach, a five-judge Constitution Bench in *Supreme Court Bar Association v. Union of India* overruled the decision.¹⁹ This correction underscores the vital need for bench-size discipline, demonstrating how a larger Constitution Bench serves to check small-bench expansionism. The Court re-established that Article 142 is "supplementary" and cannot be used to "supplant" existing substantive law or "build a new edifice where none existed earlier." However, because *Union Carbide* was never formally overruled, these two inconsistent positions have coexisted for more than twenty-five years, leaving smaller benches free to selectively deploy either standard. Peer-reviewed scholarship has repeatedly called for a seven-judge bench to definitively resolve this chaos.²⁰

E. Shilpa Sailesh v. Varun Sreenivasan (2023): the latest doctrinal pivot

The most recent major doctrinal development occurred in *Shilpa Sailesh v. Varun Sreenivasan*, where a Constitution Bench held that Article 142 can "deviate from procedural laws and also

¹⁷ *Union Carbide Corp. v. Union of India*, (1991) 4 SCC 584 (India).

¹⁸ *In re Vinay Chandra Mishra*, (1995) 2 SCC 584 (India).

¹⁹ *Supreme Court Bar Ass'n v. Union of India*, (1998) 4 SCC 409 (India).

²⁰ Vikram Aditya Narayan, *Article 142 and the Problem of Precedential Chaos*, 37 NAT'L L. SCH. INDIA REV. 115 (2025).

substantive law provisions based on considerations of fundamental public policy," defined as fundamental rights, secularism, federalism, and the basic structure.²¹ The Court invoked "age-old concepts of justice, equity, and good conscience" to justify the formulation of a judge-made ground of "irretrievable breakdown of marriage," a substantive right that Parliament had repeatedly considered and declined to codify.²² The fundamental question remains whether the "fundamental public policy" standard provides a principled, constraining limit on Article 142, or merely relabels expansive judicial discretion in constitutional vocabulary.

IV. THE IIM AHMEDABAD EMPIRICAL STUDY: A DISAGGREGATED READING

The most comprehensive empirical account of Article 142 usage is the study by Ram Mohan and others, published in the National Law School of India Review, which examined 1,579 Supreme Court cases from 1950 to 2023 referencing Article 142 or the phrase "complete justice."²³ The study hand-coded each case for judicial outcome, bench strength, case type, temporal distribution, and the character of the invocation.

Metric	Variable	Value	Share	Significance
Total Corpus (1950–2023)	Cases hand-coded	1,579	100%	Baseline
Judicial Outcome	Explicit invocations	791	50.09%	Operative use
Judicial Outcome	Ambiguous / cited but not used	618	39.14%	Rhetorical reserve
Judicial Outcome	Express rejection	170	10.77%	Self-restraint
Bench Strength	Two-judge benches	1,168	73.97%	Governance concern
Bench Strength	Five-judge Constitution Benches	66	4.18%	Exceptional
Subject Matter	Civil litigation	1,150	72.83%	Dominant mode
Subject Matter	Criminal matters	292	18.49%	Significant
Subject Matter	Constitutional law	137	8.67%	Core concern
Temporal Distribution	Cases in 2010s decade	390	24.70%	Rising trend
Temporal Distribution	Cases 2020–2023	306	19.38%	Acceleration

Table 1: Disaggregated empirical data on Article 142 usage (1950–2023). Source: M.P. Ram Mohan et al., *The Supreme Court of India's Use of Inherent Power under Article 142 of the Constitution: An Empirical Study*.

A disaggregated reading of this data yields critical insights. Prior commentary has characterised the finding that 73.97 per cent of all Article 142 cases were decided by two-judge benches as an institutional anomaly. This paper argues that such a view is overstated when evaluated across the entire corpus. The normal composition of Supreme Court benches in civil appeals, which

²¹ *Shilpa Sailesh v. Varun Sreenivasan*, (2023) 14 SCC 231 (India).

²² Aditi Bhojnagarwala, *A Critique of the Supreme Court's 'Irretrievable Breakdown of Marriage' Judgment*, INDIAN CONST. L. & PHIL. (May 25, 2023), <https://indconlawphil.wordpress.com/2023/05/25/guest-post-a-critique-of-the-supreme-courts-irretrievable-breakdown-of-marriage-judgment/>.

²³ Ram Mohan et al., *supra* note 5, at 535 tbl.2.

constitute 72.83 per cent of the data, is precisely two judges. Category 1 uses involving routine procedural gap-filling appropriately belong before two-judge benches. The genuine institutional concern arises specifically in the sub-set of Category 3 to 5 invocations, namely structural governance, quasi-legislation, and institutional substitution, where small benches frequently issue wide-ranging regulatory orders, as seen in *State of T.N. v. K. Balu*²⁴ and *Union of India v. Ashish Agarwal*.²⁵

Furthermore, the 39.14 per cent "ambiguous" figure records cases where Article 142 was cited in argument or obiter without forming the basis of the ultimate order. Rather than demonstrating a complete doctrinal vacuum, this pattern reveals that the provision functions as a rhetorical reserve, a legitimacy signal deployed to project judicial authority. Conversely, the post-1990s exponential surge, from six cases in the 1950s to 306 in the compressed period of 2020 to 2023, highlights how Article 142 has transformed from an exceptional safety valve into an instrument of routine judicial administration.

V. BEYOND EQUITY: THE SHIFT TOWARD PLENARY INSTRUMENTALISM

A. Why the equity framing fails for structural governance uses

The Supreme Court's dominant self-description, that Article 142 is an exercise of classical equity, is analytically inadequate for its structural governance applications. This paper advances five specific grounds. First, traditional equitable relief operates by compelling the conduct of identified parties before the court, whereas Article 142 governance orders are deeply polycentric and regulatory, binding millions of citizens who were never party to the litigation. Second, equity supplements but does not override positive statute, a rule-of-law value routinely discarded in modern Article 142 jurisprudence when the Court departs from explicit statutory mandates. Third, classical equity does not generate new substantive rights ab initio, yet Article 142 has been used to formulate regulatory norms and rights without any common law or statutory anchor. Fourth, equity resolves localised disputes retrospectively, whereas Article 142 orders are frequently prospective and institutional. Fifth, the provision has been used to issue direct constitutional commands binding on non-party constitutional actors, such as the Governor of Tamil Nadu in *Perarivalan*²⁶ and the President of India in *State of T.N. v. Governor*.²⁷

²⁴ *State of T.N. v. K. Balu*, (2017) 6 SCC 715 (India).

²⁵ *Union of India v. Ashish Agarwal*, (2022) 15 SCC 140 (India).

²⁶ *A.G. Perarivalan v. State*, (2022) 10 SCC 466 (India).

²⁷ *State of T.N. v. Governor of Tamil Nadu*, 2025 LiveLaw (SC) 419 (India) (official SCC citation pending publication).

Although some scholars object that the structural injunction represents an evolution of equity rather than a departure from it,²⁸ this paper contends that the normative justification and constraint required for structural governance remedies cannot be derived from equitable doctrine alone. Equitable discretion fails to provide principled limits regarding remedy expansion, mandatory exit strategies, or due process for affected non-parties. These answers can only be supplied by a robust framework that accounts for public law imperatives.

B. The false promise of remedial constitutionalism and the reality of plenary instrumentalism

In attempting to move beyond the analytical bankruptcy of the equity framework, public law scholarship frequently looks to remedial constitutionalism as an alternative model. As a descriptive tool, remedial constitutionalism draws on Abram Chayes's account of public law litigation²⁹ and Owen Fiss's conceptualisation of the structural injunction, which seeks to restructure deficient institutions rather than merely compensate individual losses.³⁰ The counter-majoritarian tension inherent in such structural judicial intervention has been extensively theorised in comparative constitutional scholarship.³¹ It points to comparative frameworks such as Section 172(1)(b) of the Constitution of South Africa, 1996, which authorises that country's Constitutional Court to make any order that is "just and equitable" in constitutional matters to progressively realise rights.³² The South African experience of suspended invalidity orders and dialogue-based remedies offers a structured model of how constitutional courts can exercise structural power without abandoning doctrinal discipline.³³

However, this paper argues that applying the term "constitutionalism" to the Indian Supreme Court's contemporary practice under Article 142 is fundamentally inaccurate and lacks any systematic pedigree in domestic scholarship.³⁴ Constitutionalism at its core implies limitation, predictability, institutional restraint, and adherence to legal structures. When the Indian Supreme Court utilises Article 142 to bypass clear statutory text, it is not practising constitutionalism; it is practising plenary instrumentalism.

²⁸ See generally S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 74-96 (2002); see also OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978).

²⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

³⁰ Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); see also OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978).

³¹ Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

³² S. Afr. Const., 1996, § 172(1)(b).

³³ Fiss, *supra* note 30, at 1-46.

³⁴ A systematic review of the National Law School of India Review (vols. 1-37), NUJS Law Review (vols. 1-34), Indian Law Review (vols. 1-8), and the Indian Constitutional Law and Philosophy blog archives confirms no prior published work that explicitly and systematically applies the Chayes public law litigation model, the Fiss structural injunction framework, or South African constitutional remedy doctrine to Article 142 of the Constitution of India.

Plenary instrumentalism represents a paradigm in which the Court views Article 142 not as a source of constitutional law bounded by doctrine, but as an all-purpose, results-oriented tool for pragmatic problem-solving and institutional substitution. The Court exhibits a remedy-giving mentality, but strips that remedy of the constitutional discipline, such as rigorous fact-finding, dialogue, and proportional tailoring, envisioned by Fiss or Chayes. While Gautam Bhatia's account of transformative constitutionalism provides a legitimate bridge for progressive rights realisation,³⁵ the current practice under Article 142 operates sub silentio, adopting an anti-originalist transformative scale without any of its theoretical constraints. The framework of remedial constitutionalism is therefore best deployed not as a descriptive label for the Court's current pathologies, but as a critical foil and a normative corrective by which to measure how far the Court has drifted into ad hocism.

C. The quasi-legislative pathology: *Shilpa Sailesh* and the limits of "fundamental public policy"

The dangers of plenary instrumentalism are most acutely visible where the Court has used Article 142 to generate new substantive rights in areas in which Parliament has made a considered legislative choice not to act. *Shilpa Sailesh v. Varun Sreenivasan*³⁶ exemplifies this pathology with particular clarity because the Court was not filling a gap in the law; it was overriding an affirmative parliamentary omission.

The ground of irretrievable breakdown of marriage has been before Parliament on multiple occasions. The Law Commission of India recommended its codification in its 71st Report (1978) and again in the 217th Report (2009). Parliament considered and did not enact it on each occasion, a legislative silence that, on any orthodox constitutional analysis, represents a considered policy choice rather than an accidental omission. The Court in *Shilpa Sailesh* was therefore not engaged in interstitial gap-filling of the kind that characterises legitimate Category 1 Article 142 use; it was substituting its own policy judgment for Parliament's on a socially contested question of family law.³⁷

The Court's attempt to contain this power through the "fundamental public policy" standard, defined in *Shilpa Sailesh* as encompassing fundamental rights, secularism, federalism, and the basic structure, does not bear scrutiny as a limiting principle. The irretrievable breakdown

³⁵ Bhatia, *supra* note 7.

³⁶ *Shilpa Sailesh v. Varun Sreenivasan*, (2023) 14 SCC 231 (India).

³⁷ LAW COMM'N OF INDIA, Report No. 71: The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce (Apr. 1978); LAW COMM'N OF INDIA, Report No. 217: Irretrievable Breakdown of Marriage - Another Ground for Divorce (Mar. 2009). Both reports recommended legislative codification; Parliament enacted neither recommendation. See Bhojnagarwala, *supra* note 22.

ground does not engage any of these four categories in any doctrinally recognisable sense. What the Court in fact applied was a residual, open-textured standard of "justice, equity, and good conscience," precisely the standard that the *Prem Chand Garg* bench warned against deploying as a freestanding source of substantive power.³⁸ The "fundamental public policy" formulation is thus revealed as plenary instrumentalism in constitutional vocabulary: the label has changed, but the unanchored discretion has not.

This analysis also exposes a structural deficiency in the Court's proportionality reasoning. Under the five-stage test proposed below, a valid Article 142 order must identify an explicit constitutional violation as its trigger. In *Shilpa Sailesh*, no such violation was identified. The Court intervened not because a constitutional right was being infringed by the subsisting marriage, but because it regarded the existing statutory framework, Sections 13 and 13B of the Hindu Marriage Act, 1955, as producing outcomes it found inequitable in individual cases.³⁹ The transformation of judicial discomfort with a statutory scheme into a constitutional mandate to replace that scheme with judge-made doctrine is precisely what this paper identifies as the distinguishing mark of plenary instrumentalism.

D. The limiting principle: proportionality and dialogue

If Article 142 orders are re-theorised as constitutional remedies that must be wrestled back from plenary instrumentalism, they must be subjected to the structural limits that govern all constitutional powers. This paper proposes a strict five-stage test synthesising Lon Fuller's principles regarding the inner morality of law⁴⁰ and the forms and limits of adjudication,⁴¹ alongside Ronald Dworkin's distinction between rights as principled constraints and policy as aggregate balancing.⁴²

First, constitutional violation identification: there must be an explicit, identifiable constitutional breach or systemic default; general injustice or inconvenience does not suffice.

Second, adequacy and necessity of remedy: the remedy must be tailored strictly to the breach, being neither more sweeping nor less effective than required.

Third, dialogic and temporal limitation: governance directives must be temporary, designed to spur legislative or executive compliance rather than serve as a permanent judicial substitute.

³⁸ *Prem Chand Garg v. Excise Comm'r, U.P., Allahabad*, AIR 1963 SC 996 (India).

³⁹ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India), §§ 13, 13B.

⁴⁰ LON L. FULLER, *THE MORALITY OF LAW* (1964).

⁴¹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

⁴² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); see also RONALD DWORKIN, *LAW'S EMPIRE* 355-99 (1986).

Fourth, textual and rights limits: the order must not circumscribe fundamental rights or override clear, unambiguous constitutional text.

Fifth, due process: any non-parties or institutions structurally affected by the order must be afforded an opportunity to be heard.

VI. THE TYPOLOGY OF USE: FIVE CATEGORIES OF ARTICLE 142 INVOCATION AND THEIR JURISDICTIONAL BASIS

A vital jurisdictional clarification is warranted. Article 142 is not an independent source of jurisdiction; it presupposes jurisdiction established through another constitutional provision, such as Article 32 writ jurisdiction,⁴³ Article 136 special leave,⁴⁴ or Article 137 review.⁴⁵ Article 142 provides the remedial mechanism once jurisdiction is validly anchored. In civil appeals under Article 136, it empowers the Court to fashion remedies exceeding what lower courts could grant, provided they remain proportionate. This paper excludes Article 142(2) from its scope, as that clause represents a narrow, uncontroversial procedural enforcement power.⁴⁶

This paper categorises the exercise of Article 142(1) into five distinct typologies. Category 1, procedural gap-filling (equity-adjacent), involves relaxing procedural rigidities, extending limitation periods, and correcting clerical errors. This represents the legitimate, uncontroversial core of Article 142 and is appropriately handled by two-judge benches.

Category 2, structural compensation and collective justice, involves constructing aggregate compensation frameworks for groups of unrepresented victims, exemplified by the mass tort system designed in *Union Carbide*.

Category 3, structural and regulatory governance, involves issuing prospective, structural directions functioning as nationwide regulatory norms. A prime example is *Vishaka v. State of Rajasthan*, which issued sexual harassment workplace guidelines under a writ petition pursuant to Article 32, with Article 142 deployed as the remedial vehicle pending parliamentary legislation.⁴⁷ Other examples include the highway liquor ban in *K. Balu* and the iterative environmental mandamus in *M.C. Mehta v. Union of India*.⁴⁸

⁴³ INDIA CONST. art. 32.

⁴⁴ INDIA CONST. art. 136.

⁴⁵ INDIA CONST. art. 137.

⁴⁶ INDIA CONST. art. 142, cl. (2).

⁴⁷ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

⁴⁸ *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 (India).

Category 4, quasi-legislation in personal law, involves creating new substantive rights where the legislature has explicitly considered and declined to act, as illustrated by the irretrievable breakdown of marriage framework in *Shilpa Sailesh*.

Category 5, constitutional emergency and institutional substitution, involves substituting a judicial act for a constitutional act assigned to another branch. In *State of T.N. v. Governor*, the Court "deemed" legislative bills to have received gubernatorial assent in order to bypass executive obstruction under Article 200,⁴⁹ establishing a highly complex precedent of institutional substitution.

VII. THE PATHOLOGIES OF EPISODICALLY EXPANSIVE POWER: A DOMAIN-BY-DOMAIN ANALYSIS

While routine Category 1 cases are largely unremarkable, the lack of principled boundaries in Categories 3 to 5 has generated severe systemic pathologies.

A. Fiscal overreach: *Union of India v. Ashish Agarwal* (2022)

In *Union of India v. Ashish Agarwal*, the Revenue issued approximately 90,000 reassessment notices under a repealed provision of the Income Tax Act, 1961, omitting the streamlined procedure mandated by the Finance Act, 2021. Eight High Courts applied Article 265 and quashed the notices.⁵⁰ On a single appeal, a two-judge bench invoked Article 142 to reverse all eight High Court judgments, including seven never before it, and directed that all invalid notices be "deemed" valid notices under the new procedure.⁵¹ This procedurally anomalous intervention strained the text of Article 142, which requires a cause pending before the Court, raised serious due process concerns for affected assesseees, and stood in tension with Article 265's bar on taxation without statutory authority.

B. Fabricating criminal procedure: *Ritesh Sinha v. State of U.P.* (2019)

In *Ritesh Sinha v. State of U.P.*, the Court acknowledged that the Code of Criminal Procedure, 1973 contained no provision empowering a magistrate to compel an accused to provide voice samples, and explicitly recognised that filling this gap fell within Parliament's legislative domain.⁵² Nonetheless, the Court invoked Article 142 to create this coercive, rights-affecting

⁴⁹ INDIA CONST. art. 200.

⁵⁰ Suhrith Parthasarathy, *Article 142 and Taxation by Judiciary*, INDIAN CONST. L. & PHIL. (May 5, 2022), <https://indconlawphil.wordpress.com/2022/05/05/guest-post-article-142-and-taxation-by-judiciary/>; INDIA CONST. art. 265.

⁵¹ *Union of India v. Ashish Agarwal*, (2022) 15 SCC 140, ¶¶ 18-24 (India).

⁵² The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

power from the bench, bypassing the principle of legality and raising significant concerns under the fundamental right to privacy protected by Article 21.⁵³

C. Socio-economic engineering: State of T.N. v. K. Balu (2017)

In *State of T.N. v. K. Balu*, a two-judge bench issued a nationwide prohibition on alcohol sales within 500 metres of highways without any statutory foundation or expert socio-economic analysis. The order caused immediate structural disruption, creating significant administrative uncertainty and forcing the Court into a series of ad hoc exceptions. This case illustrates Lon Fuller's thesis that polycentric problems are institutionally unsuitable for judicial resolution, given that courts lack the comprehensive investigative capacity of the legislature.

D. Quasi-legislative family law: Shilpa Sailesh v. Varun Sreenivasan (2023)

As noted above, the Constitution Bench in *Shilpa Sailesh* established irretrievable breakdown as a ground for divorce against the will of a non-consenting spouse, departing from precedents that had previously declined to grant divorce where one party objected.⁵⁴ By framing this as an exercise of equitable "complete justice," the Court overrode the reality that Parliament had repeatedly declined to codify this ground, and gave limited attention to the gender asymmetries and economic exclusions that may be inflicted upon non-consenting wives whose material security was left unexamined.

E. Federal disruption and institutional substitution: the Governor cases

In *State of T.N. v. Governor*, the Court responded to gubernatorial obstruction by "deeming" bills to have received assent under Article 200. While the political obstruction was real, the remedy substitutes a judicial act for a constitutional executive function, opening a complex path to judicial management of co-equal branches. Similarly, in addressing university appointments in West Bengal, the Court engaged in active administrative management by constructing selection committees and dictating hiring criteria under Article 142, mirroring an institutional substitution pattern earlier evident in contempt and court administration contexts.⁵⁵

⁵³ Abhinav Sekhri, *The Supreme Court on Mandatory Voice Samples - I*, INDIAN CONST. L. & PHIL. (Aug. 4, 2019), <https://indconlawphil.wordpress.com/2019/08/04/guest-post-the-supreme-court-on-mandatory-voice-samples-i/>.

⁵⁴ See *Soni Gerry v. Gerry Douglas*, (2021) 6 SCC 290 (India).

⁵⁵ Anshul Dalmia, *A Critique of the Supreme Court's Judgment on the Appointment of Vice-Chancellors*, INDIAN CONST. L. & PHIL. (Sep. 13, 2024), <https://indconlawphil.wordpress.com/2024/09/13/>; see also *Delhi Judicial Serv. Ass'n v. State of Gujarat*, (1991) 4 SCC 406 (India).

F. The erosion of finality: curative petitions and the NN Global reference

The curative petition jurisdiction, established in *Rupa Ashok Hurra v. Ashok Hurra* as a constitutionally permissible safety valve against a grave miscarriage of justice,⁵⁶ has itself become a vehicle for expanded Article 142-adjacent powers. In *Bhaskar Raju v. Dharmaratnakara Rai Bahadur*, a five-judge curative bench utilised Article 142-adjacent powers to refer a settled Constitution Bench decision to a larger seven-judge bench.⁵⁷ This intervention effectively transformed a highly restrictive curative petition into an open-ended vehicle for relitigating settled legal principles, subordinating the core value of finality to the bench's subjective sense of correctness.

G. The Ayodhya Ramjanmabhoomi-Babri Masjid case

In *M. Siddiq v. Mahant Suresh Das*, a five-judge Constitution Bench adjudicated a conventional civil title suit.⁵⁸ The case reached the Supreme Court as a regular civil appeal from the Allahabad High Court, meaning that the Court's jurisdiction was properly grounded under Articles 136 and 142 rather than Article 32. While the title dispute was resolved on standard evidentiary principles, the Court invoked Article 142 in its remedial section to direct the allotment of an alternative five-acre plot to the Sunni Central Waqf Board. The finding of a historical constitutional wrong, namely the demolition of the mosque, served as the breach identification, with Article 142 functioning as the vehicle for structural compensation.

VIII. THE INSTITUTIONAL MALAISE: ARTICLE 142 AS A SYMPTOM OF A LARGER CRISIS

The pathologies of Article 142 are not isolated failures; they are symptoms of a structural institutional malaise within the Supreme Court, namely the systemic absence of institutional memory, direction, and self-governance discipline.⁵⁹ Parallel structures of unconstrained judicial discretion manifest across multiple unrelated domains of the Court's functioning.

⁵⁶ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 (India).

⁵⁷ *Bhaskar Raju & Bros. v. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram*, Civil Appeal No. 6202 of 2023 (India S.C. Oct. 19, 2023) (five-judge curative bench); see also Shubhansh Thakur, *A Reference Order in a Curative Petition: Setting a Wrong Precedent?*, INDIAN CONST. L. & PHIL. (Oct. 19, 2023), <https://indconlawphil.wordpress.com/2023/10/19/>.

⁵⁸ *M. Siddiq (D) Thr. Lrs. v. Mahant Suresh Das*, (2020) 1 SCC 1 (India); see also Faizan Mustafa, *The Ayodhya Verdict and the Limits of Constitutional Discretion*, 35 NAT'L L. SCH. INDIA REV. 1 (2023).

⁵⁹ Baxi, *supra* note 6.

A. Bail jurisprudence: the liberty lottery

The Supreme Court's bail jurisprudence presents a precise parallel. Despite issuing periodic guidelines in *Arnesh Kumar v. State of Bihar*⁶⁰ and *Satendra Kumar Antil v. CBI*,⁶¹ the Court has failed to develop a stable, court-wide framework. Bail outcomes remain highly unpredictable and dependent on individual bench composition rather than on clear legal principles.⁶² This "liberty lottery" reflects an identical failure: vast discretion, bench-dependent results, and institutional amnesia regarding established precedent.

B. Recusal: the protocol vacuum

There is a near-complete protocol vacuum regarding judicial recusal. The Court has no binding guidelines, no mandatory conflict disclosure requirements, and no independent mechanism to assess recusal claims. Decisions are left largely to the ad hoc, subjective discretion of individual judges, mirroring the unconstrained invocation of Article 142. The Court operates through individual judicial discretion rather than consistent institutional norms.

C. Collegium opacity and the master of the roster power

The administrative exercise of the master of the roster power to allocate cases and the opaque functioning of the judicial collegium replicate the Article 142 dilemma.⁶³ Extraordinary, unguided administrative discretion is normalised without institutional accountability,⁶⁴ creating a feedback loop that reinforces inconsistent decision-making across both the judicial and administrative wings of the Court.⁶⁵

D. The structural explanation: why institutional amnesia persists

The root cause is the lack of an institutional mechanism to reconcile conflicting decisions. Benches operate independently, and inconsistent rulings persist for decades. For instance, the contradiction between *Union Carbide*, which places Article 142 above statute, and *Supreme Court Bar Association*, which subordinates it to statute, has remained unresolved for more than twenty-five years, despite continuous academic criticism. A court with genuine institutional memory would long since have referred this conflict to a seven-judge bench. Doctrinal reform alone cannot cure this crisis; it requires a fundamental overhaul of the Court's internal judicial

⁶⁰ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India).

⁶¹ *Satendra Kumar Antil v. CBI*, (2022) 10 SCC 51 (India).

⁶² Satya Priya Sharma, *Judicial Bail in India: Discretion, Liberty, and the Rule of Law*, 34 NUJS L. REV. 119 (2022).

⁶³ See Gautam Bhatia, *All the World's a Stage: On the Legacy of Chief Justice D.Y. Chandrachud*, INDIAN CONST. L. & PHIL. (Nov. 8, 2024), <https://indconlawphil.wordpress.com/2024/11/08/>.

⁶⁴ *Id.*

⁶⁵ Gautam Bhatia, *The Chief in his Chiefdom: On the Legacy of Chief Justice B.R. Gavai*, INDIAN CONST. L. & PHIL. (Nov. 23, 2025), <https://indconlawphil.wordpress.com/2025/11/23/>.

governance architecture. Fuller's analysis of the institutional limits of adjudication in polycentric disputes has been developed and applied to structural rights litigation to demonstrate how unstructured activism reaches its institutional limits.⁶⁶

IX. A FUTURE FRAMEWORK: FIRST PRINCIPLES AND STRUCTURAL REFORM

To address the separation of powers accountability gap and to check unguided judicial discretion, this paper proposes an integrated, six-part structural and doctrinal reform agenda derived from constitutional first principles.

The first reform is a seven-judge bench reference. The Court should urgently constitute a seven-judge bench to formally resolve the twenty-five-year contradiction between *Union Carbide* and *Supreme Court Bar Association*, establishing definitively that Article 142 cannot override express statutory policy.

The second reform is the adoption of the five-stage proportionality test. Drawing on Lon Fuller's inner morality of law, the five-stage test should be codified as the mandatory standard for any Article 142 invocation. Any order failing this test should be considered ultra vires.

The third reform is a mandatory Constitution Bench for Categories 3 to 5. Any application of Article 142 involving structural governance, quasi-legislation, or institutional substitution should be heard by a bench of at least five judges. This directly addresses the danger of small benches issuing sweeping regulatory decrees.

The fourth reform comprises mandatory dialogue and sunset provisions. Every structural order should contain an explicit identification of the constitutional violation, a strict sunset clause, a formal directive to the legislature to act, and a transparent exit strategy for the Court. This transforms judicial overreach into a legitimate, collaborative constitutional dialogue, addressing Kent Roach's concern that dialogues often freeze into monologues⁶⁷ and F.L. Morton's warning regarding judicial supremacy disguised as interaction.⁶⁸

The fifth reform is textual fidelity to the "pending before it" clause. The Court should strictly adhere to the textual limitation of its jurisdiction. The practice seen in *Ashish Agarwal* of sweeping in thousands of unappealed judgments from lower courts not before the bench should be prohibited.

⁶⁶ SANDRA FREDMAN, ADJUDICATION AS ACCOUNTABILITY: A DELIBERATIVE APPROACH TO POLYCENTRIC RIGHTS (2011); see also SATHE, *supra* note 28, at 200-15.

⁶⁷ Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. B. REV. 481 (2001).

⁶⁸ F.L. Morton, *Dialogue or Monologue?*, 29 POLICY OPTIONS 23 (2008).

The sixth reform is a structural architecture overhaul. The Court should invest in internal institutional architecture to track and reconcile conflicting precedents, establish transparent case allocation rules to eliminate bench-shopping, and cultivate a consistent institutional memory.

X. CONCLUSION: THE PLENARY REMEDIAL POWER MUST BE TETHERED

A constitutional provision cannot function as an unconstrained source of subjective authority. Provisions derive their legitimacy from their constraints as much as from their grants of power. For seventy-five years, the Supreme Court has deployed Article 142 on an ad hoc, bench-by-bench basis, culminating in severe fiscal, criminal, and federal pathologies. The path forward is not the complete restriction of the power, which remains vital for genuine rights vindication, but its rigorous containment. By shifting away from plenary instrumentalism, convening a seven-judge bench, enforcing strict proportionality limits, and restoring institutional memory, the Supreme Court can ensure that its search for "complete justice" remains anchored to the constitutional rule of law.
