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Re-evaluating the Dynamics of Article 142 of the Indian Constitution to undo Injustice: An Exploratory Study

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ABSTRACT

The constitution of India has given exclusive powers to the Supreme Court to take any decision pertaining to any matter pending before it to provide complete justice. But this plenary power is open ended with framework to regulate it or question it as it is absolute. A troubling end is whether the Supreme court can use statutory interpretation to bring in new laws under article 142 to cover the gaps in the statute discarding doctrine of separation of powers and make it viable even when the legislature has expressly chose not to enact any provision regarding the same. Thus an analysis of the judicial cases over the past 50 years pertaining to Article 142 has been done to identify the trends in invoking Article 142. Moreover the Supreme court has invoked this article in a number of cases brought before it wherein the dispute was complex but on the contrary the court has curtailed the fundamental rights of citizens. Over the years article 142 has expanded its interpretation as a matter of judicial activism but there needs to be a check on this to prevent it from becoming a matter of judicial overreach superseding fundamental rights of the citizens and encroaching upon other organs. A major differentiation must be drawn between bringing a law restricting fundamental rights of citizens and protecting fundamental rights of citizens which falls under the duty of the court under article 32. This paper argues that there seems to be a wide arbitrariness associated with 'complete justice' as it can differ from case to case which gives a lot of discretionary power to the Supreme court. Although it is an extraordinary power which is being given it cannot be used to expressly be in conflict with the law already existing.

Keywords: *Arbitrariness, Justice, Law, overreach, Rights*

I. INTRODUCTION

Article 142 of the Indian constitution gives wide discretionary powers only to the supreme court to pass any order to do 'complete justice' in any matter pending before it. It is a power

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that has not been brought into question or regulated. Thus there exists a clear lack of regulatory framework surrounding the article as over the years this power is used by the court to curtail fundamental rights like article 21 and 19 of the constitution by making new laws which did not exists prior and changing the substantive law. As this has become a concern as judiciary is encroaching upon the field of the other two organs by assuming law making powers. There is a significant difference that exists between creating law protecting the fundamental rights of citizens like in the case of ***Vishaka v. state of Rajasthan*** in which the court is advancing it's duty as the custodian of rights and restricting fundamental rights of citizens which is judicial overreach.[2] As if it continues then it is only serving for the purpose of incomplete justice and not complete justice. There is also ambiguity as to the term 'complete justice'. This changes from case to case so what is the standard adopted by the court to qualify the use of the article for complete justice. This is a murky area the supreme court has yet again dismissed. This paper argues that the absolute power of the supreme court can only be applied with well-tailored regulatory framework consistent fundamental rights without violating the doctrine of separation of powers. As article 142 gives wide powers to the supreme court alone it can be misused.

II. LITERATURE REVIEW

There have been instances where the supreme court's idea of 'complete justice' came at loggerheads with the law already existing especially the fundamental rights and becomes a matter of judicial overreach wherein it interferes with the other organs of the government violating the principle of separation of powers that French philosopher Montesquieu put forth which stated that liberty is safeguarded only when this separation takes place.[3] According to John Rawls in 'A theory of Justice', Rawls observed that, a necessary condition of justice in any society is that each individual should be the equal bearer of certain rights that cannot be disregarded under any circumstances, even if doing so would advance the general welfare or satisfy the demands of a majority.[4] Article 142 read with articles such as 32 acts as a passport for the Supreme court to intervene in any matters and make decisions that are discretionary. Article 142 functions to make article 136[5] and 32 of the constitution of India effective.[6] Article 142 read with Article 144[7] marks a restriction on the legislative power to undo the effect of the

[2] *Vishaka* and others *V. State of Rajasthan* and others, AIR 1997 S.C 3011(India).
[3] MONTESQUIEU, THE SPIRIT OF LAWS 156 (1748).
[4] JOHN RAWLS, THEORY OF JUSTICE 207-210 (1971).
[5] INDIA CONST. art. 136.
[6] INDIA CONST. art. 32.
[7] INDIA CONST. art. 144.

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decree or order and thus, if a legislative enactment seeks to make unenforceable the decree or order of the Supreme Court in relation to the cause and the parties between whom it was made, such law would be void for being in contravention Article 142. Recent judgments that invoked article 142 is the case of ***Ritesh Sinha v. State of Uttar Pradesh***[8] in 2019. The decision upheld by the Supreme court has led to this plenary power of the court being misused in its entirety as this can now set a precedent and invoked by the court at all times on any matter pending before it. Since this is an extraordinary power granted by constitutional framers exclusively to the Supreme court and not any other court. Which makes it of immense value and binding nature. Justice Hans Raj Khanna that the history of personal liability is largely the history of insistence upon well-known procedure. [9]Harshad Pathak who graduated from institute of International Development studies who wrote an article "Article 142: Incomplete justice?" highlights the extraordinary powers of the supreme court and its contradiction with statutory provisions. Amartya Sen who has won a Nobel memorial prize in Economic sciences and is who is an Indian economist writes of the idea of complete justice that author is trying to put forth in the article in his famous book the 'idea of justice'. It is a power that is to be used judiciously.[10]

III. THEORETICAL BACKGROUND

Rawls observed that, a necessary condition of justice in any society is that each individual should be the equal bearer of certain rights that cannot be disregarded under any circumstances, even if doing so would advance the general welfare or satisfy the demands of a majority.[11] This theory clearly goes against the 'utilitarian; concept as proposed by Benthem where in greatest happiness of the majority is achieved by discounting the interests of the minority as it is impossible to satisfy all.[12] Over the years article 142 has expanded its interpretation as a matter of judicial activism but there needs to be a check on this to prevent it from becoming a matter of judicial overreach superseding fundamental rights of the citizens. Rawls theory points out that rights of individuals cannot be disregarded under any circumstances. There have been instances where the court in order to fill in the gap has adopted a temporary patchwork to bring in an entire new law. But even while creating new laws for welfare and demands of majority, the court must look into the feasibility of it. To bring out complete justice under article 142, the measures taken should be fair as Rawls point out that justice does not always mean fairness. Moreover, Rawls opines that if people make laws behind the veil of ignorance they will make

[8] Ritesh Sinha v. Union of India, (2013) 2 SCC 357 (India)
[9] Additional District Magistrate v. S.S. Shukla, 1976 AIR 1207(India).
[10] AMARTYA SEN, IDEA OF JUSTICE 1, 1-31 (2009).
[11] RAWLS, *supra* note 4, at 207.
[12] Bums. J. H., 'Happiness and Utility: Jeremy Benthem's Equation', Utilitas, 46(2005).

the just of laws.[13] The supreme court cannot use this as a tool to interfere in the domain of law making to achieve their end. Their theories contribute to the research to respond to the various dimensions of 'complete justice' rationalized by the supreme court and how the plenary powers of the court is narrowly tailored having no regulatory framework.

IV. SCOPE OF ARTICLE 142

Article 142(1) of the Constitution empowers the Supreme Court to pass such order "as is necessary for doing complete justice in any cause or matter pending before it". Article 142 was draft article 118, and was adopted without debate by the Constituent Assembly on May 27, 1949. Significant questions surrounding its validity and the bounds of Article 142 remain to be answered. Article 142 is intended to satisfy circumstances which cannot be dealt with efficiently and adequately by current provisions of law.[14] It seems, therefore, that where existing provisions of law are capable of dealing adequately with the question at hand and of exercising justice between the parties, the Supreme Court will ordinarily not exercise its jurisdiction under Article 142:

"The phrase 'complete justice' engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology."[15]

Moreover such power to issue any order or decree in the interests of justice has been conferred on the Supreme Court only in the absence of Article 142 and in the absence of analogous provisions, there are no equivalent powers on the part of the High Courts or the Tribunals.[16] Accordingly, the Supreme Court, being the sole repository of such a wide-ranging power, can, under this article, issue a number of orders.

V. MAPPING THE JUDICIAL TRENDS TO ARTICLE 142

In the ***Ritesh Sinha II*** case the Supreme court invoked this article to take mandatory voice samples of the accused when there is no provision in the law which confers this power on the court to test voice samples when the legislature has not expressly mentioned the term voice sample in the statute even with the amendment in the CrPC which included testing of handwriting and bodily samples, voice samples were left out.[17] Even after multiple

[13] RAWLS, *supra* note 3, at 211.
[14] Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201(India).
[15] *Id.*
[16] Phiroza Ankalesaria, 'Judicial law making -Its strength and weaknesses', 1 IBR 62 (2011).
[17] *supra* note 8.

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recommendations by the law commission to confer this power to the judicial magistrate yet it still has not been conferred. The accused being compelled to take such a voice sample by the judicial magistrate with no legal backing suffers severe criticisms for being violative of the rights of the person especially privacy because of the fact that the court has created a completely new law that allows the magistrate to take voice samples of the accused in the name of Article 142 claiming that the court has the extraordinary powers under this provision to do so.[18] Similar approach was drawn in the case of ***Union Carbide corporation v. Union Of India*** or the Bhopal gas leak case wherein the court ruled that limiting the powers of the court under article 142 would do severe damage and the nature and scope of the article was widened in the present case and any sort of limit would stultify the powers of this court. An important differentiation must be drawn between court making laws to protect the fundamental rights of citizens and creating laws to restrict fundamental rights. It is settled law that the supreme court cannot use article 142 to violate fundamental rights of the citizens and is the custodian of these rights.[19] The first attack on this article entered with the case of ***Supreme court Bar Association v. Union of India*** wherein court upheld the restrictive application of this article and stated that it would not pass any order which would amount to supplanting substantive law applicable to the case or ignoring express statutory provisions dealing with the subject.[20] This was upheld by the court in the case of ***Premchand v. Excise commissioner, UP***.[21] This case in further contributes the previous one and contributes to the research such that the court cannot pass orders that are violative of the substantive provisions of the statute. This has also been stipulated in the Annual Survey of Indian Law 1997-1998. In 2014, the Supreme Court again used the aforementioned clause of the Constitution to revoke the allocation of coal blocks issued from 1993 onwards without any wrongdoing and levied a penalty of INR 295 per ton of coal already extracted. No persons and their relevant evidence were heard by the Supreme Court, but only their associations were heard.[22] In December 2016, the Hon'ble Supreme Court relied on Article 142 in order to prohibit the selling of alcohol and to ensure that the sale of liquor is not visible or directly accessible from the highway within a defined distance of 500 metres from the outer edge of the highway or from the highway service lane. Such a decision was made to prevent incidents due to drunk and driving, as per the honest Court.[23]

[18] *supra* note 8.
[19] UCC v. Union of India, (1986) 4 SCC 335 (India).
[20] Supreme court Bar association v. Union of India, AIR 1998 SC 1895 (India).
[21] Premchand v. Excise Commissioner, U.P, 1963 AIR (SC) 996 (India).
[22] (1991) 4 SCC 584(India).
[23] (2014) 9 Supreme Court Cases 516 (India).

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i) Amplitude of arbitrariness within Article 142

Any act founded on prejudice or preference, rather than on reasons or facts, is arbitrary. Whenever both decision making process and the decision are based on irrelevant facts, while ignoring relevant considerations, such actions reflect "**arbitrariness**". However it cannot be denied that the wide interpretation given to the plenary powers of the court were helpful in future for providing appropriate remedy in the cases where legislature was falling short, one of such example is the decision of the court in ***Bodhissatwa Gautam v. Shubhra Cakrawarti*** this case narrates the heartbreak of the person who was cheated by giving false promise of marriage and article 142 was invoked to give compensation.[24] Three judge bench decision of the Supreme Court in ***ONGC v. Gujarat Energy Transmission Corporation***[25], in the light of special laws and the time span for the filing of appeals. Ltd. (2017), where the Court followed Supreme Court Bar Association and concluded with reference to Section 125 of the Electricity Act, 2003 and Article 142 that, where there is a legislative restriction authority in the law and there is a premise that a delay can be permitted for a further period not exceeding sixty days, it must not be said that it is based on such underlined, fundamental, genetic considerations.

There is a certain amount of danger in associating this plenary power to the Supreme court as article 142 should not be inconsistent. These plenary powers of the Supreme court cannot be a means which authorize them to take away substantive rights of the litigants in line with the views of Kant and Rawls. In agreement with Kant these powers granted to the court cannot meddle with the rights of the people and people's rights cannot be used as a means to achieve something that the court could not achieve directly rather it should be the end in itself.

It is well known that these powers are beyond the reach of legislative regulation, but where the statutory void ends, they cease to terminate. The powers that are curative in nature cannot be interpreted as powers that allow the court to disregard a litigant's substantive rights and even with the breadth of its amplitude, cannot be used to create a new building where none existed earlier, by ignoring express legislative provisions dealing with a topic and thereby implicitly achieving something.[26] Article 142 thus complements the powers already bestowed by the Constitution on the Supreme Court to ensure that justice is done and in doing so, the Court is not limited by the absence of jurisdiction or force of law. Given such discrepancy between Union Carbide and Supreme Court Bar Assn., the declaration or clarification of law in the

[24] Bodhissatwa Gautam v. Shubhra Cakrawarti , 1996 AIR 922 (India).
[25] ONGC v. Gujarat Energy Transmission Corporation, Civil Appeal No. 1315 (2010).
[26] Virendra Kumar, 'Judicial Legislation under Art. 142 of the constitution: A Pragmatic Prompt for Proper Legislation by Parliament', 364, 54.3 JUl (2012).

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Supreme Court Bar Association. has been adopted by the Supreme Court in various subsequent cases in relation to the powers under Article 142. These include the judgment of the division bench in ***A.B. Bhaskara Rao v. CBI***, in which a catena of cases decided after the reference of Supreme Court Bar Association in addition to Prem Chand Garg reiterates that it is not necessary to practice Article 142 so as to negate constitutional provisions. On the basis of the different standards applicable to Article 142, the Court summarized the lines of those decisions and held that that clause could not be enforced.[27]

ii) No Universal definition of 'Complete justice'

'Complete justice' as put forth in Article 142 and is subjective to each case depending upon the facts and circumstances in each case. This kind of arbitrariness in wordings of the provision itself gives room for discretion and no clear-cut balance is sort which can easily be misused if not well-defined but then again defining complete justice is also a matter which is very subjective. Another important consideration is if statutory interpretation can be applied to expand the scope of the article based on factual circumstances of the case. On similar lines the idea of justice can change from case to case so how can one justify how 'complete justice' can be interpreted when there has been no standard form of this described anywhere. Due to which the court has stepped into domains of the other organs of the government giving injustice to the people for which the court has to set limits for itself like it did in Article 136.[28]Article 142 was never brought into question or scrutiny. Judicial activism is preferred but not to such an extent that it becomes a matter of judicial overreach. Judgments based on foul law will set precedents for injustice and need to be mindful of its own bounds while doing so to strike a harmonious balance. It is also known to the Honourable court that when the court is in a situation where-in they are faced with something that is likely to be termed as a 'bad law' they are to rule out the laws on legal and justifiable circumstances rather than invoking article 142. [29] Hence the nature and wide array of powers this article confides in the judiciary is a matter to be mooted to prevent such notions from becoming perpetual and continue on.

iii) Lack of regulatory Framework

The argument in contrast to the judiciary encroaching the legislature is because of the fact that the judiciary in a democracy is supposed to declare unconstitutional acts of the legislature and ensure that these do not violate fundamental rights because the court is the custodian of these rights. On one hand the majority opinion remains that the supreme court believes this article

[27] INDIA CONST., Art. 136.
[28]Virendra, *supra* note 23, at 368.
[29] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (2008).

needs expansion and any sort of limits would prevent the court from giving away complete justice and this view of the court has been adopted in many cases over the years.[30] But if it discharges the functions of another organ then who will be held accountable for the same? If the judiciary is given such independent powers without regulatory framework they cannot be held accountable for their actions and deliver justice arbitrarily. J. Ashok Ganguly was of the opinion that "cause of justice demands judicial intervention especially when there are gaps in the legislation." In his judgment the majority opinion shifts attention to the fact that many jurists like Richard Posner, Benjamin Cardozo are in parallel with each other that the judges do make law.[31] Majority opinion caters that this can be done under the expanded unit of the Articles 142 of the constitution. On the other hand it contributes to the research as it misses a balance which is required between judicial activism and judicial restraint to such an extent that it does not become judicial overreach encroaching upon the domain of the legislature to restrict fundamental rights under its extraordinary power this remains a minor and an unpopular opinion often overlooked or dismissed by the court. In the process, curtailing fundamental rights does not serve the purpose and becomes injustice.

VI. EXERCISE OF ARTICLE 142 IN THE ABSENCE OF EXISTING STATUTORY FRAMEWORK

Under Article 142, the Supreme Court has the power to issue directions where none already exists and such directions are binding until such time as the legislature adopts new rules on the subject. Court remains oblivious to the fact that it must be done according to well established procedure by the law and whether judicial orders fall under the ambit of law is another debate. A troubling end is whether the Supreme court can use statutory interpretation to bring in new laws under article 142 to cover the gaps in the statute discarding doctrine of separation of powers and make it viable even when the legislature has expressly chose not to enact any provision regarding the same. In the famous case of ***Vishaka v. state of Rajasthan,*** the Court had formulated guidelines providing for the protection of women from sexual harassment at work in the absence of any enacted law on the same issue, and they are equally binding on all the courts referred to in Article 141.[32]

Thus, when the executive is inactive, the judiciary must step in and provide a remedy before the legislature acts to fulfill its position by enacting proper legislation to cover the field in the exercise of its constitutional obligations. In a situation where there is no legal basis to shape a

[30] R. Prakash, 'Complete Justice Under Article 142', 7 SCC (J) 14, 16(2001).
[31] University of Kerala v. Council, Principal's office, Kerala, 2006(8) SCC 304 (India).
[32] *Supra* note 2.

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building for building a super structure, the power is not to be exercised. The Supreme Court warned:' The existence and extent of this court's jurisdiction under Art. 142 No doubt, the Constitution of India is intended to do full justice between the parties, but at the same time the court must bear in mind that the power is conceived to deal with circumstances which the current provisional provision cannot effectively and adequately resolve.[33] The incumbent Attorney General for India even accepted this, as the Supreme Court puts itself "above the laws of Parliament or the legislatures of the States." Notably, either way, the Court in the Supreme Court Bar Assn. did not consider whether the Union Carbide bench was justified in holding that the findings under the statutory provisions and Article 142, as set out in Prem Chand Garg and Antulay, were unnecessary. In ***Nidhi Kaim v. M.P State***[34] by another three judges of the Supreme Court, after sharing its "unequivocal agreement" with the Supreme Court Bar Assn., that the power to exercise "complete justice" under Article 142 of the Constitution does not include the power to ignore legislative provisions or pronouncements of law declared pursuant to Article 141 of the Constitution, and that this applies "even in exceptional cases"

One of the drawbacks of the Supreme Court's powers under Article 142 is that it cannot be held responsible for its decisions, unlike the executive and the legislature. For example, in one of the verdicts, in certain areas of Delhi, the apex court banned e-rickshaws without making provisions for alternative jobs. It cannot, however, be held liable for breaching the fundamental right of any profession or trade to carry on. In the coal block allocation case, persons and their relevant evidence were not heard by the Supreme Court, but only their associations were heard.[35]

VII. JUDICIOUS USE OF ARTICLE 142 WITH CHECKS AND BALANCES WITHIN THE EXISTING FRAMEWORK

For situations where there is a manifest error and the non-exercise of Article 142, the power should be used. 142 (1) can lead to the travesty of justice. In other words, if the inherent power of the court is not exercised, there must be clear and convincing reasons that the parties to the instant case will suffer from palpable injustice.[36] The same is the case where the statute or statutory requirements are silent and the law is found to be incapable of remedying the parties' complaints or where in the facts and circumstances of the case, obedience to the statutory

[33] Vineet Narain v. Union of India, (1998) 1 SCC 226 (India).
[34] Nidhi Kaim v. M.P State, 2017 (4) SCC 71 (India).
[35] Pathak, Harshad, *'Article 142: Incomplete Justice?'*, CNLU Law Journal, (2013).
[36] Rajat Pradhan, '*Ironing out the Creases: Re-examining the Contours of Invoking Art. 142(1) of the Constitution'*, 6 NALSAR Stud. L. Rev. 1 1,4 (2011).

provisions or procedural rules may be unjustified. This creates a feeling of insecurity and vulnerability in the legislature and executive. Hence, there have been claims made for and against this power of the judiciary. The claim made is whether such a plenary power of the judiciary can be used inconsistent of the fundamental rights violating the doctrine of separation of powers.[37] There has been a harmonious relation between all organs such blatant actions have raised questions about the legitimacy of the supreme court in devising decisions. This is to fill in the gaps created by the legislature and not to bring in new laws contrary to fundamental rights of citizens which will certainly be frowned upon and is a complete misuse of independence of the judiciary. This is not a means of forgery to achieve the end result which will satisfy a certain sect of people. It is a power that is to be used judiciously.

In some of the cases the court has held that although it is an extraordinary power which is being given it cannot be used to expressly be in conflict with the law already existing. The substantive form of law should remain the way it is. This is because article 142 is only supplementary in nature and cannot supplant the statutory law. The idea is to give people what they deserve.[38] Till now there has been no regulatory framework adopted or made regarding this provision as to when, where under what circumstances the same can be utilized by the court. In addition, the court must exercise judicial restraint with regard to the invocation of Article 142, and that power should not be exercised on the basis of sympathy or simply asking. This is because this great plenary power is also a discretionary and extra-ordinary power that cannot be mechanically exercised. Strong and cogent reasons must be given for the exercise of this discretionary jurisdiction since the powers referred to in Article 142 are intended to be exercised in order to meet the needs of justice and to fill in the lacuna or vacuum in law and not as part of the court's routine exercise of jurisdiction.[39] Without occupying each other's area, there is a need to strike a balance between three government pillars. The powers of curative nature under Article 142 cannot be construed as powers enabling the court to assume the role of executive or legislature.[40]

VIII. CONCLUSION

The reason for such a provision to be effected in the constitution was to fill in the gaps created by the law put forth by the legislature for advancing justice to look into areas and loopholes where the law is silent. Article 142 read with Article 144 marks a restriction on the legislative

[37] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (2008).
[38] *supra* note 21.
[39] Ajit Sharma, *'inherent powers of the Supreme court under the Indian constitution'*, PL June 12 (2006).
[40] *Id*.

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power to undo the effect of the decree or order and thus, if a legislative enactment seeks to make unenforceable the decree or order of the Supreme Court in relation to the cause and the parties between whom it was made, such law would be void for being in contravention Article 142. It brings clarity to an insufficient law. But in the same breath while doing so it encroaches upon the domain of the legislature and executive violating the doctrine of separation of powers. It leads to judicial overreach without any proper justification of using such a power. Although there have been arguments stating of the provision to be a justice-oriented approach instead of it's strict interpretation preferring equity over the law. On the contrary some commentators opine that the said article is only available for procedural purposes others are of the opinion that Article 142 has resulted in changes brought into the substantial law framework. But bringing in such new laws should not restrict the already existing fundamental rights nor change the existing statutory law but advance the protection of such rights under article 32 for complete justice. This gives immense powers which are absolute to the supreme court to achieve their objectives which they could not directly achieve. Which is why article 142 remains a very murky area that needs a re-evaluation and a well-structured legal framework that regulates it.

IX. LIMITATIONS

- Longitudinal Effects- the time frame for research was depending upon only cases from the past 50 years if more years could be analysed it would give a more accurate representation of the judicial trends.
- The existing study puts forth a solution of bringing in a regulatory framework but to what extent these frameworks will be practised and complied with is a matter to be considered in further research.

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