**ARTICLE 142: INCOMPLETE JUSTICE?**

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“[J]ustice is a virtue which transcends all barriers; neither rules of procedure nor can technicalities of law stand in its way.”

*Sahai, J.

“Justice cannot be for one side alone, but must be for both.”

*Eleanor Roosevelt

I. INTRODUCTION

As Marcus Cicero\(^3\) aptly puts it - “Great is our admiration of the orator who speaks with fluency and discretion.” Yet, this admiration itself comes with a sense of caution – the necessity of restraint. The existence of discretion ought to be balanced against a sense of responsibility that not just defines its scope, but also acts as a guiding principle; that provides directions as to when and how it is to be exercised.

The paper attempts to reflect upon the nature of the extraordinary power conferred upon the Supreme Court of India under Article 142(1) of the Indian Constitution, and its exercise in contradiction with the existing statutory law.

**(i) BRIEF OVERVIEW**

While attempting to achieve the desire objective, it is felt imperative to first analyze the scope of Article 142(1) of the Indian Constitution, followed by an understanding of the meaning of ‘complete justice’ – theoretical and judicially observed. However, before proceeding to appreciate the different meanings attributed to ‘justice’, it is relevant to discuss the concept of ‘plural grounding’.

Simultaneously, it is felt necessary to understand the extent of influence exerted by the individual beliefs, opinions and experiences of the judges while contemplating a judgment, with theoretical references being made to American Realism.

The conflict of the constitutional provision with the statutory provisions forms the subject matter of the following head, with a discussion on few instances where the power under Article 142 was exercised in contradiction with the Statute.

Lastly, the evolution of ‘judicial activism’ in India, as well the reliance placed on the same as a justification for overriding statutory provisions has been subjected to scrutiny, before attempting to arrive at a conclusion.

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* Cite as: 3 CNLU L. J. 40 (2013).
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2 Eleanor Roosevelt, October 11, 1884 – November 7, 1962; First Lady of the United States from 1933 to 1945.
3 Marcus Cicero, January 3, 106 BC – December 7, 43 BC; Roman philosopher, statesman, lawyer, political theorist, and Roman constitutionalist; widely considered to be one of Rome’s greatest orators and prose stylists.
Article 142, ¶ 1 of the Constitution of India provides that,

“The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.”

The mentioned power of the Supreme Court of India is often referred to as its ‘extraordinary power’, resting solely on one criterion- the need to do complete justice.

The expression ‘cause’ or ‘matter’ includes any proceeding pending in the Court and would cover almost every kind of proceeding in the Court, including civil or criminal; or appellate or original.

The powers in exercise are circumscribed only by two conditions. “Firstly, that it can be exercised only when the Supreme Court otherwise exercises its jurisdictions, and secondly, that the order which the Supreme Court passes must be necessary for doing complete justice in the cause or matter pending before it.” However, “the power should not be exercised frequently, but sparingly.”

II. PLURALITY OF MEANING

(i) PLURAL GROUNDING’

Any discussion pertaining to Article 142(1) of the Indian Constitution necessarily focuses on the meaning of the phrase – ‘complete justice’.

From a jurisprudential point of view, ‘complete justice’ could have multiple meanings, each conflicting with each other, yet being apt in its own domain. The possible sustainability of plural and competing reasons for justice - all of which have claims to impartiality and which nevertheless differ from, and rival, each other is called ‘plural grounding’. This concept has been elaborately illustrated by Dr. Amartya Sen. The same is be discussed in brief.

Three Children – Anna, Bob and Carla, are quarrelling over the possession of a flute. Anna claims possession saying she’s the only one of the three who knows how to play it; and the others don’t deny.

Bob defends his case by saying that he is the only one among the three who is so poor that he has no toys of his own. The others accept his reasoning as well. Lastly, Carla claims possession saying that she had made the flute with her own labour, and the others confirm this.

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4 Constitution of India, art. 142, § 1.
5 M.P. JAIN, INDIAN CONSTITUTION LAW WITH CONSTITUTIONAL DOCUMENTS VOL. 2, 369 (LexisNexis® Butterworths Wadhwa 2010).
“Having heard all the three claims, theorists of different persuasions may take a different view... Bob, the poorest, would get direct support from economic egalitarians... Carla, the creator of flute, would receive immediate sympathy from the libertarian while the Utilitarian hedonist may give more weight to Anna’s pleasure.”

The general point of relevance being that in every situation, one problem may be attributed different rivalling solutions – each having its own accepted justification. It is put forth that the same is the case while deciphering the meaning of ‘complete justice’.

(ii) Judicial Variance: Comparisons with American Realism

Proceeding with the understanding, the author does not intend to provide an exhaustive and uniformly accepted definition of ‘justice’. In fact, the same cannot exist. What is just or unjust shall invariably depend upon the individual backgrounds and beliefs of the persons interpreting the law, and adjudicating upon the same –judiciary.

The meaning of justice shall, therefore, be inevitably subjected to the influence of judges, which itself is a derivative of their life experience. Each of them shall have their own accepted justifications.

The influence of judges, and lawyers, while interpreting the law falls within the domain of American Realists, most notably Mr. Justice Oliver Wendell Holmes. According to him, the object of the study of law is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

It is in this context that Mr. Justice Holmes reflects on the role of judiciary while stating that law is not just what is put on paper, but it is what the courts derives from their various experiences. Hence, the statement - “the life of law has not been logic: it has been experience…” that discounts the role of logical reasoning in adjudication, and emphasizes upon the influence of judiciary.

Accordingly, the conceptions of ‘justice’ shall vary with every individual judge, the same being influenced by his or her background, beliefs and opinions. However, the impossibility of uniformity in the conception of justice, coupled with the inevitability of variation does not preclude one from deriving certain characteristics that are essential for any act or decision to be just.

III. COMPLETE JUSTICE

(i) Theoretical Meaning

“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...” Its meaning, in general, as well as in every factual matrix shall be subjective and highly contested. Yet, one may attempt to identify certain characteristics that appear to be intrinsic to the notion of ‘complete justice’.

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11 DAVID HENRY BURTON, OLIVER WENDELL HOLMES, JR. (Twayne Publications, 1980).
12 Oliver Wendell Holmes Jr., The Path of the Law, 10 Harvard Law Review 457 (1897).
To attempt such an answer, reliance may be placed on John Rawls’ analysis of justice since it is a detailed work on the substance of justice. In brief, Rawls puts forth that ‘justice’ must be analogous to ‘fairness’.14

The existence of bias shall never amount to a situation where ‘complete justice’ has been delivered. Consequently, fairness is central to the content of ‘complete justice’. It is just only if it is fair, and the absence of fairness deems it unjust. Pursuant to the same, the Supreme Court of India has placed fetters on the exercise of its extraordinary power to ensure that the justice delivered is fair.

Firstly, the existence of ‘complete justice’ must ensure the absence of any collateral injustice. As noted by the Supreme Court of India, “while exercising the power under this Article, the Court cannot pass an order, which would cause injustice to others; in particular those who are not before it.”15

Secondly, ‘complete justice’ would be justice according to law. “Although the Supreme Court can mould the relief, it would not grant relief which would amount to perpetuating an illegality. In the name of individualizing justice, it is also not possible for the Supreme Court to shut its eyes to the Constitutional scheme and the right of numerous persons, who are not before the Court.”16

(ii) JUDICIAL TREND

It is helpful to review the previous instances where the extraordinary power had been exercised by the Honourable Supreme Court of India in order to further understand the meaning of ‘complete justice’.

In Zahira Habibullah Sheikh v. State of Gujarat17, power under this Article was invoked to transfer a criminal trial from one State to another within the jurisdiction of Supreme Court. Similarly, direction was issued to transfer prisoners from one prison to another in the case of Kalyan Chandra Sarkar v. Rajesh Ranjan ali a Pappu Yadav.18

This power was also invoked under this Article in the case of Vijay Shekhar v. Union of India19 to quash criminal proceedings filed against eminent persons which was found to be false, and a product of fraud and total abuse of process of court.

Considering interests of justice, the Supreme Court of India, in J. Jayalalitha v. State20, had granted one more opportunity to the accused to produce defence evidence, even though the view of the High Court that sufficient opportunity had already been given.

In the case of Dulip Singh v. State of Bihar21, compensation was awarded to a victim who was persuaded to have sexual intercourse on promise of marriage, but who later retracted. Similarly,
**Laxmi Devi v. Satya Narayan**

It was held that though the accused cannot be convicted for rape, he is bound to compensate the victim.

To summarize, for doing ‘complete justice’, the Supreme Court of India has issued appropriate directions in a plethora of other cases, taking into consideration the facts and circumstances of the case. Such power had been exercised for exempting the appellant from pre-depositing the disputed amount before hearing the appeal, directing investigation be conducted by CBI against the State Police, and reducing the rate of interest as provided in the Award.

**IV. THE CONFLICT WITH STATUTORY LAW**

*(i) GUIDING PRINCIPLE*

If one were to generalize based on the aforementioned previous instances, it can be inferred that the Supreme Court of India has primarily placed reliance on Article 142 to overcome jurisdictional and procedural loopholes; as well as to address rare and unique circumstances where the law was silent. However, there have been instances where the opinion of the Supreme Court with regard to ‘complete justice’ has come to be at loggerheads with the law already laid down.

Any conflict between the existing law and the existence of discretion to deviate raises obvious questions as to how ‘complete justice’ is to be ensured. Therefore, the nature of the power must lead the Court to set limits for itself within which to exercise those powers. The intention of reserving such power with the apex court – to correct, not overrule - must also not be forgotten.

Accordingly, in some cases, the Supreme Court has laid down the restriction on itself with regard to Article 142 (1). “The Court does not exercise the power to override any express statutory provisions... The power under the mentioned article is meant to ‘supplement’, and not to ‘supplant’ substantive law applicable to the case under consideration.”

In *Prem Chand v. Excise Commissioner*, the Court itself had suggested that its power under Article 142 cannot be exercised against a definite statutory provision.

Similarly, in *A.R. Antulay v. R. S. Nayak*, it was observed that “however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific provisions of any statute.”

Again, in *Supreme Court Bar Association v. Union of India*, it was held that though “these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in

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22(1994) 5 SCC 545.
26 M.P. JAIN, INDIAN CONSTITUTION LAW WITH CONSTITUTIONAL DOCUMENTS VOL. 1, 370 (Lexis Nexis® Butterworths Wadhwa 2010).
27 (1963) AIR SC 996.
conflict with what has been expressly provided for in statute dealing expressly with the subject.”

(ii) THE ARGUMENT FOR ‘CONSTITUTIONAL SUPREMACY’

In contrast to aforementioned opinion of the apex court, there have also been instances where the Court has expressed the view that the scope of Article 142, a constitutional provision, cannot be cut down by a statutory provision.

In Delhi Judicial Service Association v. State of Gujarat, the Supreme Court has observed that the power under Article 142 (1) to complete justice is entirely of a different level and of a different quality and that any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of the Court. A similar opinion had also been expressed by the apex court on numerous other occasions.

Moreover, such power had been elevated to the highest pedestal in the case of In re Vinay Chandra Mishra, where the Court declared that statutory provisions cannot override constitutional provisions. The limited view of Article 142 expressed in Premchand was expressly overruled as being no longer a good law.

(iii) CURRENT POSITION

The same question had been re-agitated before the Supreme Court in Supreme Court Bar Association v. Union of India, and this time the Court toned down its views as expressed in Vinay Chandra. It observed,

“The power to do complete justice is in a way corrective power, which gives preference to equity over law but it, cannot be used to deprive a professional lawyer of the due process...”

The Supreme Court has, on numerous occasions, asserted that it is not a court of restricted jurisdiction of only dispute settling. Nevertheless, imposing a self limitation on itself, it has observed,

“[T]he substantive statutory provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142... [t]hese powers are not meant to be exercised, when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.”

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30 (1991) AIR SC 2176 at 2210.
33 (1963) AIR SC 996.
Such fetters placed on the extraordinary power are consistent with the purpose of the provision. The Drafting Committee of the Indian Constitution had reserved such a power for the Honourable Supreme Court of India because it foresaw that there might be certain situations, which the law in force would have failed to anticipate.

It is only in those exceptional situations that the extraordinary power may be exercised, and not to ignore or override the substance of any existing law, that Article 142 vests such power with the apex court.

It must also be remembered that wider the amplitude of its power under Article 142, the greater is the need of care for this Court to see that the power is used with the necessary restraint. The ‘restrictive’ approach has been recently reiterated.

In State of Haryana v. Sumitra Devi, it was held that no order can be passed under Article 142 contrary to statute or statutory rules. In another case, an order passed under Article 142 was corrected on review as it was passed contrary to a statutory provision.

The Constitutional Bench decision in Secretary, State of Karnataka v. Umadevi also emphasized that ‘complete justice’ under Article 142 means justice according to law, and not sympathy. “Equitable considerations or individualization of justice have resulted in conflicting opinions... and that the Court would not grant a relief which would amount to perpetuating an illegality encroaching into the legislative domain.”

Yet, the earlier liberal approach as propounded in Vinay Chandra continues to be applied. In practice, the sum and substance of the Supreme Court’s decisions still remains that the scope of Article 142 is extremely broad – being a constitutional provision, it can override any statutory provision.

V. INSTANCES OF SUPPLANTING STATUTORY LAW

(i) IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The tendency of the apex court to ignore, or override, the substance of a statute has been visible in a series of judgments relating to granting of divorce on the ground of ‘irretrievable breakdown of marriage’ that found no mention in the Hindu Marriage Act, 1955 at the time of judgment.

Admittedly, recommendations had been made by the Law Commission of India in its 71st Report, chaired by Justice H.R. Khanna; 217th Report, chaired by Dr. A. R. Lakshmanan as well as by the Supreme Court of India to incorporate ‘irretrievable breakdown of marriage’ as a ground for divorce.

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Presently, the Hindu Marriage Amendment Bill, 2010, incorporating such a ground for divorce within the ambit of the Hindu Marriage Act, 1955 has been cleared by the Rajya Sabha.\textsuperscript{45}

However, at the time where no such ground for divorce was in existence, the Supreme Court had relied upon its extraordinary power to act contrary to the statutory provision, granting divorce on the ground of ‘irretrievable breakdown of marriage’.\textsuperscript{46}

\textit{(ii) ORDERING INVESTIGATIONS BY THE CENTRAL BUREAU OF INVESTIGATION (CBI)}

Under the Section 6 of the Delhi Special Police Establishment Act, 1946, the power to extend the powers and jurisdiction of the Special Police Establishments to other areas is subject to the requirement of the consent of the Government of that State.

Section 6 of the said Act states,

“Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or Railway, area, without the consent of the Government of that State.”\textsuperscript{47}

Contrary to such statutory limitation, the Supreme Court of India on numerous occasions had found that, under Article 142(1), it could direct the Central Bureau of Investigation to investigate a cognizable offence committed within a State without the consent of the concerned State Government.\textsuperscript{48}

This is so because the exercise of such power is not conditioned by any statutory power since statutory provisions cannot override constitutional provisions.\textsuperscript{49}

In the case of \textit{Maniyeri Madhavan v. Sub-Inspector of Police},\textsuperscript{50} the apex court observed,

“As regards jurisdiction of the members of the Delhi Special Establishment, we do not think the procedure under Section 6 need be followed where this Court exercises jurisdiction under Article 142 of the Constitution.”\textsuperscript{51}


\textsuperscript{47} Delhi Special Police Establishment Act, §6 (1946).


\textsuperscript{49} M.P. JAIN, \textit{INDIAN CONSTITUTION LAW WITH CONSTITUTIONAL DOCUMENTS} VOL. 1, 371 (Lexis Nexis® Butterworths Wadhwa 2010).

\textsuperscript{50} (1994) 1 SCC 536.

\textsuperscript{51} \textit{Id.} at 8.
VI. CRITIQUE OF THE ‘CONSTITUTIONAL SUPREMACY’

(i) JUDICIAL DISSENT

The exercise of the extraordinary power by the Supreme Court of India under Article 142 (1), as against the substance of a statute, has been subjected to intense criticism over a period of time. The apex court itself has, as previously discussed, observed that the power under Article 142 is for ‘supplementing’, and not ‘supplanting’ the law.

Such criticism stems from the proposition that it is the role of Legislature to amend the existing law and if the apex court uses its extraordinary power under Art. 142(1) to decide a case and simultaneously creating a new law, it may risk interfering with the functioning of the Legislature.

Justice Katju and Justice V.R. Sirpurkar, while dismissing the appeal for divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955, after the unilateral withdrawal of consent, had strongly opined in the case of Vishnu Dutt Sharma v. Manju Sharma52,

“If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts.”

Any judicial decision of such nature may not only be looked upon as a deliberate measure to extend the influence of the Judiciary over the Legislature, but also raises stark questions as to ‘justice’ being ‘fair’ and ‘impartial’.

(ii) THREAT OF PRECEDENT

Statutory law is codified and laid down for the people. It informs the people of the nature of proper and improper conduct, as well the consequences of its breach. Masses are made aware of their rights through statutory law, and the same rights are protected by the statutes themselves.

In such a situation, complete ignorance of the substance of any statutory law, even if in the interest of the ambiguous ‘complete justice’, would amount to an unfair proceeding towards the person against whom the extraordinary power has been exercised.

The person so concerned, who has modelled his actions pursuant to the existing law, shall be breached if the power is exercised against the substance of the existing law. Such ‘justice’ cannot be found to be ‘complete’.

Further, every time the Supreme Court of India makes any decision or order, in contradiction with any statute, it is setting a precedent, which dilutes as well as undermines the authority of codified statutory law. Time and again, such decisions which fail to take into account the current legal position have been found not to be a valid precedent.53

(iii) Purpose of Discretion

It may be argued that such exercise of the extraordinary power is not in contradiction with the statutory law, but merely an effort to address the circumstances that the statute failed to contemplate. It is a gap in the current law that is being filled by the judiciary in interests of ‘complete justice’.

A comparison may be drawn with the inherent powers of civil courts, similar in nature, recognized under Section 151, Code of Civil Procedure, 1908. However, the same is not guaranteed by the Constitution and is restricted to passing orders.

Section 151, Code of Civil Procedure, 1908 states,

“Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Such inherent powers of the civil courts cannot be exercised so as to nullify provisions of the Code. When Court deals expressly with a particular matter, the provisions should normally be regarded as exhaustive.

Recourse to inherent powers in face of or in conflict with specific provision of statute is not permissible. Inherent power cannot be exercised to nullify effect of any statutory provisions.

The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorised to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, an departure there from is not permissible.

Therefore, it is impossible to hold that in a matter which is governed by an Act, which in some limited respects gives the court a statutory discretion, there can be implied in court, outside the limits of the Act a general discretion to dispense with the provisions of the Act.

Similarly, reliance may be placed upon Article 142 of the Constitution to ensure justice in the unique circumstances that are beyond the scope of the statutory law. Consequently, exercise of such power to supplant the law in force is against the purpose with which such extraordinary power was vested in the Supreme Court of India.

(iv) Other Relevant Considerations

It may be important to note that Article 142 grants an extraordinary power only to the Supreme Court of India. Accordingly, any judgment given by the apex court, in conflict with the statutory law, implies that the Supreme Court is bound by a separate substance of law, distinct from the one that binds the lower courts.

Since delivering ‘complete justice’ is not just an obligation of the apex court, but the entire judicial system; it requires certain uniformity in the legal principles, applicable at any stage of the proceedings.

For justice to be complete, it ought to be based on law. Moreover, law, itself, has to be settled. In a plethora of cases, the High Courts of different jurisdictions have admitted that certain remedies cannot be granted under the applicable law, for example, to grant a divorce on the ground of irretrievable breakdown of marriage.\textsuperscript{59} However, the apex court has in turn granted remedies in contradiction with the statutory laws.

Consequently, ‘complete justice’ is then subjected to a ‘cost’. Any party having sufficient resources to appeal to the apex court, as well as sustain the burden of the absorbingly lengthy litigation process, may be entitled to ‘complete justice’. However, in the absence of such resources, ‘complete justice’ may be denied, as the lower courts are bound by different legal principles, without any power to deviate.

VII. THE DEFENCE OF JUDICIAL ACTIVISM

\textit{(i) Role of a Judge}

It is felt pertinent at this stage to conduct an inquiry into the prominent functions of a judge in the Indian democracy. One may ask whether the role of a judge is merely to declare law as it exists or to actively make law when found necessary to do so.

The anglo-saxon tradition persists in the assertion that a judge does not make law; he merely interprets. Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function.\textsuperscript{60}

However, there has been a deviation from this traditional point of view in India over the past few decades. With the rise of public interest litigation, the judiciary, for the benefit of the society, has now assumed the role of social engineers.

To quote Justice P.N. Bhagwati,

“It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge… The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.”\textsuperscript{61}

The statement aptly summarizes the modern role that the judges have adopted while going beyond their traditional functions. Motivated by the inefficiency and irregularities of the other organs of the state, the function of judiciary is no longer restricted to merely finding the law already laid down by the legislature.

\textsuperscript{59}TNN Respondent et al., \textit{Irretrievable breakdown is no ground for divorce: HC}, The Times of India, Aug.10, 2010.
\textsuperscript{60}University of Wisconsin Law School, Judicial Activism in India (Date), http://www.law.wisc.edu/alumni/gargoyle/archive/17_1/gargoyle_17_1_3.pdf.
\textsuperscript{61}Id. at 7.
(ii) **CONCEPT OF **JUDICIAL ACTIVISM**’

Activism denotes the circumstances where a body or authority engages in purposeful and determined activity to achieve desired objects. In this process, that body or authority takes the side of a policy or objective. Analyzed from this angle, judicial activism means the process of Judiciary taking sides of some controversial issue or social policy.  

Article 142 of the Constitution, from which began the era of PIL, has been recognized to be one source of judicial activism. The words ‘to do complete justice’ have been used as a justification as well as a source of judicial activism.

Some say that the concept is not recent, since the judiciary has always remained active and in no instance can it afford to remain passive. However, the source of ‘judicial activism’ is neither relevant to the present discussion nor necessary to acknowledge its existence.

Judicial activism has been found to be necessary in the society in recent years. The past decade had witnessed the erosion of the democratic values, the executive apathy, red-tapism, corruption, malpractices and violations of human rights reaching their zenith. This has paved the way for new vistas of judicial intervention of extending its arm to fight out these maladies.

As a consequence, the Judiciary started ordering not only the ‘what’ and ‘when’ of its directions to be complied with by the executive but also the ‘how’ of them. Its necessity has been duly justified by Prof. Upendra Baxi by labelling it as a response to the lawlessness of the state.

(iii) **CONFLICT WITH THE DOCTRINE OF SEPARATION OF POWERS**

While the necessity of judicial activism in India is not refuted, its use as a justification for supplanting statutory law by the Supreme Court, under Article 142, is being scrutinized.

The Supreme Court’s exercise of its extraordinary power to override statutory provisions cannot be masked behind judicial activism, since it is in violation of the Doctrine of separation of power.

Some imaginative Judges did not only make law, but added new dimensions to the law. Nevertheless, this amounts to a clear violation of the doctrine of separation of powers. On no account has the Constitution authorized the Judiciary to exercise such legislative function.

The usurpation of the legislative function by Courts is tantamount to subversion of the democratic process, in as much as it mounts to the substitution of the judgment of a few individuals in place of that of the responsible representatives of the people.

Mr. Arun Shourie, in his recent book, has even criticized ‘judicial activism’ as being fed on, and in turn fed into superficial, rhetorical, and if indeed truth be told, exhibitionist and opportunist ‘socialism.’

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Therefore, such exercise of the extraordinary power undermines the legitimacy of the Indian Parliament, comprised of the population’s elected representatives and authorized by the Constitution to enact laws.

Legitimacy means (i) legal validity, (ii) a widely shared feeling among the people that they have a duty to obey the law and; (iii) the actual obedience of the law by a large number of people. Accordingly, on every occasion where the citizens are bound by a judgment of the apex court, contrary to the statutory law, it undermines the legitimacy of the Parliament since it interferes with the legal validity and social acceptability of the statutory law.

Admittedly, in the wake of the failure of the Executive and the Legislature, the people have turned to the Judiciary for redressal of their grievances, protection of their rights, and turned the Court into a tool of social engineering.

In such instances, the judiciary has undertaken the role of law-making through directions as a last resort, only to fill in the vacuum left by the Legislature or the Executive. Its directions can be replaced by legislation enacted by the Legislature and where no legislation was required, by the Executive power, whose power is coterminous with the Legislature.

Article 142 is undoubtedly a necessary provision, “couched with elasticity to meet myriad situations”; however, only to issue necessary directions to fill the vacuum till either the legislature steps in to cover the gap or discharges its role.

Pursuant to the same, when the Supreme Court of India laid down guidelines for the prevention of sexual harassment of working women in Vishaka v. State of Rajasthan; or specific guidelines, in D.K. Basu v. State of West Bengal, to be followed in all cases of arrest or detention, it was judicial activism in its true sense.

The Supreme Court had duly observed in D.K. Basu that,

“We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention, till legal provisions are made in that behalf, as preventive measures.”

Accordingly, the instances where the judiciary has laid down guidelines and policies in the absence of an existing law must be distinguished from the ones where an existing statutory law has been supplanted in order to deliver ‘complete justice’. While the former practice is in conformity with the objective of Article 142, the latter may amount to abuse.

Therefore, as long as ‘judicial activism’ is limited to a ‘gap-filling’ method in the interests of justice, it may not be found to be violative of the Doctrine of separation of powers. However,
where the statutory law is adequately vocal, the defence of activism to supplant the law is not justifiable.

VIII. CONCLUSION

The recent decisions of the Supreme Court to grant a decree of divorce on the non-statutory ground of ‘irretrievable breakdown of marriage’, as well as its subsequent criticism by the apex court itself, has reignited the debate as to the scope of Article 142.

Consequently, the issue, which was once thought to have been settled by the Supreme Court in *Supreme Court Bar Association v. Union of India*75 while declaring *Vinay Chandra*76 to be a bad law and upholding *Prem Chand*77, has again risen to prominence.

At this stage, it is felt necessary to clarify the stance adopted by the author. Article 142 of the Indian Constitution is a unique and progressive measure that upholds the presence of justice in the Indian legal system. The fundamental importance of such ‘extraordinary power’ is neither in question, nor being undermined.

The objective is to *only* examine and scrutinize the exercise of such extraordinary power, guaranteed by the Constitution of India, in an unrestricted manner.

The exercise of power, in contradiction with the existing statutory law, cannot be justified as an exercise to merely “fill the vacuum”. Such exercise undermines the legitimacy of the statutory law, and questions the fairness of the proceedings itself.

In fact, the nature of the extraordinary power itself is such that the apex court must bind itself not to exercise it against any existing statutory provisions since ‘complete justice’ should not only be understood in terms of equity and good conscience, but must also uphold the integral element of ‘rule of law’.

Moreover, the use of ‘judicial activism’ as a justification for supplanting statutory law is unfounded since by doing so, the judiciary is stepping into the shoes of the Parliament. In fact, it may amount to an abuse of the constitutional power to superimpose personal beliefs and opinions.

Therefore, while the necessity of such power and its exercise to overcome the inadequacies of the existing law is not in doubt; the exercise of same to supplant statutory law is beyond any justification.

To quote Pope Pius XI78,

“[[Justice requires that to lawfully constituted Authority there be given that respect and obedience which is its due; that the laws which are made shall be in wise conformity with the common good; and that, as a matter of conscience all men shall render obedience to these laws.”

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77 (1963) AIR SC 996.
78 Pope Pius XI, May 31st, 1857 – February 10, 1939; born Ambrogio Damiano Achille Ratti; Pope from 6 February 1922; Sovereign of Vatican City from its creation as an independent state on 11 February 1929 until his death on 10 February 1939.