ARTICLE 142 AND PRESIDENTIAL REFERENCES: A CONSTITUTIONAL DIALOGUE ON JUDICIAL REVIEW AND SEPARATION OF POWERS

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ABSTRACT

The Indian Constitution reflects a carefully balanced interaction among the Legislature, Executive, and Judiciary, grounded in the idea of separated functions. However, the Indian variant of this principle is characterised by functional overlap and judicial adaptability. This constitutional elasticity is most evident in Articles 142 and 143. Article 142 permits the Supreme Court to exercise wide discretion in delivering complete justice, whereas Article 143 allows the President to consult the Court for its advisory opinion on significant legal or constitutional questions. These provisions often push the judiciary into spheres typically reserved for the executive or legislature, inviting scrutiny on the limits of judicial review. Recent presidential references to the Court have rekindled the debate over institutional boundaries, highlighting the need to assess whether such interventions preserve or disrupt the balance of powers. This paper critically examines how the Supreme Court engages with its constitutional responsibilities under Articles 142 and 143, assessing their impact on India's broader democratic framework.

Keywords: Judicial Review, Separation of Powers, Presidential Reference.

INTRODUCTION

Even though judicial review is not expressly stated in the Constitution, the Supreme Court has firmly established it as an essential constitutional principle through precedent.[1] It empowers the higher judiciary to assess and nullify executive or legislative measures that conflict with constitutional provisions. This power was firmly cemented in Kesavananda Bharati v State of Kerala[2], where the Supreme Court ruled that Parliament could not alter the

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[1] HM Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing 2013) vol 1, 466

[2] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225

Constitution's basic structure. As a result, judicial review operates as a check against arbitrary decision-making and unrestrained majoritarianism. Articles 142 and 143, while procedural on the face of it, provide mechanisms through which the judiciary exercises considerable influence on public governance. Article 143 provides the President the authority to seek advisory input from the Supreme Court on matters involving significant legal or constitutional concern[3], while Article 142 authorises the Court to act beyond procedural constraints to secure justice.[4] Together, they illustrate the blurred lines between interpretation, discretion, and governance, often raising concerns of overreach in a system predicated on institutional balance.

UNDERSTANDING ARTICLE 142: NATURE AND SCOPE OF COMPLETE JUSTICE

Article 142 allows the Supreme Court to exercise extraordinary discretion to ensure justice in matters currently under its consideration[5]. The scope of this article is distinctive, offering the Court flexible authority to resolve legal gaps and bypass procedural inadequacies where existing laws prove insufficient. Unlike Articles 32 and 226, which primarily address the protection of fundamental rights.[6] Article 142 is based on principles of equity and judicial innovation, enabling the Court to deliver remedies beyond statutory confines. The provision has been instrumental in several landmark judgments where traditional legal routes were inadequate. A prominent early use of Article 142 occurred in *Union Carbide Corporation v Union of India*[7], where the Court intervened in the aftermath of the Bhopal gas disaster. The Supreme Court facilitated a financial settlement intended to compensate those affected by the Bhopal gas leak disaster. The decision was pragmatic, aimed at providing timely relief, though it was met with criticism for bypassing the due legal process. This case marked a turning point in how the Court could leverage its constitutional mandate for humanitarian outcomes. Since then, the Court has relied on Article 142 in cases concerning environmental degradation, delayed criminal trials, and interstate disputes. Such judicial interventions frequently exist at the intersection of legal adjudication and indirect policy shaping, reinforcing the Court's role not just as a legal adjudicator but also as an institution of last resort for public justice.

[3] Constitution of India 1950, art 143
[4] Constitution of India 1950, art 142
[5] ibid
[6] Constitution of India 1950, arts 32 and 226
[7] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584

Despite its utility in ensuring equitable outcomes, Article 142 has often drawn criticism for enabling judicial overreach and disrupting the balance of powers. Critics argue that the Supreme Court, by invoking this article, occasionally assumes legislative or executive functions, thereby undermining the principle of separation of powers. This concern was notably raised in the *Supreme Court Bar Association v Union of India*, where the Court observed that Article 142 could not be used to contravene express statutory provisions.[8] In this case, the Court had previously suspended an advocate's license using its Article 142 powers. However, it later clarified that disciplinary powers over advocates must be exercised strictly under the Advocates Act, 1961, and not under the sweeping umbrella of Article 142.[9] This case became a judicial checkpoint that reaffirmed the constitutional limitation on the Supreme Court's discretionary powers, highlighting that "complete justice" does not equate to "absolute power." Furthermore, concerns over the inconsistent application of Article 142 have been raised by scholars and legal practitioners. The lack of definitive parameters or guidelines for invoking the provision risks turning it into a tool of subjective judicial discretion. Indian jurist Upendra Baxi has pointed out that Article 142 may sometimes reflect "judicial populism" rather than constitutional fidelity.[10] While the provision is instrumental in addressing extraordinary situations, its unchecked use could set a precedent for undermining the rule of law, especially when employed to sidestep or delay legislative reform.

UNDERSTANDING ARTICLE 143: PRESIDENTIAL REFERENCE AND ADVISORY JURISDICTION

Although the Court's opinion under this jurisdiction isn't legally binding, it often carries considerable constitutional weight and persuasive influence and reflects the constitutional design of cooperative functioning between the Executive and the Judiciary.[11] Article 143 outlines two types of references: one addressing general questions of law or fact, and another dealing specifically with pre-constitutional treaties or agreements.: under Article 143(1), the President may seek the Court's opinion on any question of law or fact of public importance; under Article 143(2), the reference is limited to disputes arising out of pre-constitutional treaties or agreements, particularly in the context of federal relationships.[12]

[8] Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409
[9] Advocates Act 1961, s 35
[10] Upendra Baxi, 'The Avatars of Judicial Activism: Explorations in the Geography of (In)Justice' (1985) 18(2) JILI 157
[11] Constitution of India 1950, art 143
[12] Durga Das Basu, *Commentary on the Constitution of India* (9th edn, LexisNexis 2012) vol 11, 134

The Supreme Court's response to presidential references has evolved into a significant constitutional convention. In *re Berubari Union*, the first-ever reference under Article 143, the Court clarified that advisory opinions are not judicial decisions in the traditional sense and hence are not binding.[13] However, in practice, such opinions are rarely disregarded by the Executive, given the moral and legal authority the Court commands. Another landmark example is *In re Special Reference No. 1 of 1993*, in which the President sought the Court's view on whether a temple had existed at the disputed site in Ayodhya before the construction of the Babri Masjid. The Court chose not to opine, reasoning that doing so could interfere with pending judicial proceedings.[14] This restraint demonstrated the judiciary's commitment to maintaining the integrity of adversarial proceedings and underscored the constitutional boundaries governing the Court's advisory power under Article 143.

Over the decades, several presidential references under Article 143 have played a crucial role in shaping India's constitutional jurisprudence. One such reference was *In re Kerala Education Bill* (1958), where the Supreme Court examined the compatibility of a state education bill with Articles 29 and 30 concerning minority rights. The Court's opinion, in this case, set foundational guidelines for interpreting minority rights in education, even before the bill became law.[15] Another critical instance was *In re Special Courts Bill* (1979), where the Court upheld the validity of creating special courts for expediting trials of economic offences involving politicians, reinforcing that Article 14 permits reasonable classification.[16] These references reveal the Supreme Court's willingness to guide constitutional development proactively while still preserving the advisory nature of its jurisdiction.

In more recent times, in *re The 9th Schedule* (2007), the Supreme Court clarified that laws included in the Ninth Schedule are still subject to constitutional review if they undermine the foundational principles laid out in the basic structure doctrine.[17] Though Article 143 opinions are technically non-binding, they contribute immensely to the interpretive landscape of constitutional law. The growing frequency and constitutional weight of such references raise important concerns about the Executive's tendency to seek judicial opinion on politically sensitive or controversial issues, potentially using the judiciary as a shield to avoid direct accountability.

[13] Berubari Union (I), In re, 1960 SCC OnLine SC 23
[14] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584
[15] Kerala Education Bill, 1957, In re, 1958 SCC OnLine SC 8
[16] Special Courts Bill, 1978, In re, (1979) 1 SCC 380
[17] *In re The 9th Schedule* (2007) 2 SCC 1

INTERPLAY BETWEEN ARTICLES 142 AND 143: A TEST OF SEPARATION OF POWERS

The concurrent existence of Articles 142 and 143 creates a constitutional space where the Executive and Judiciary interact outside the conventional adversarial framework. While Article 142 reflects the proactive, almost activist role of the Judiciary in ensuring "complete justice," Article 143 allows the Executive, through the President, to invite judicial involvement in policy or legal dilemmas of national significance. When read together, these provisions illustrate the functional overlap between the organs of state, raising important questions about the limits of judicial review and the principle of separation of powers.

The Supreme Court's responses to presidential references have, at times, appeared to blur the institutional boundaries envisioned by the Constitution. For instance, in *re Cauvery Water Disputes Tribunal* (1992), the President referred to the question of implementing an interim award passed by a tribunal constituted under the Inter-State Water Disputes Act. The Court provided a detailed legal opinion, which influenced executive decision-making and had de facto binding effects, even though it was not a judicial decree.[18] Simultaneously, in matters where the Court invokes Article 142 to grant extraordinary relief, such as dissolving a marriage on grounds not recognised under personal laws or ordering systemic reforms, it has been accused of functioning as a "super-legislature."[19]

While defenders of judicial activism argue that these powers are essential to fill legal vacuums and prevent injustice, critics contend that such judicial conduct erodes the foundational structure of checks and balances. Constitutional scholars like Prof. Madhav Khosla caution against "the unintended consequences of expanded judicial powers in a democracy with fragile legislative accountability."[20] Thus, although Articles 142 and 143 were intended to address exceptional situations, their increasing use has brought into focus the urgent need for a well-defined constitutional discipline to preserve institutional boundaries.

[18] Cauvery Water Disputes Tribunal, Re, 1993 Supp (1) SCC 96 (2)
[19] *Shayara Bano v Union of India* (2017) 9 SCC 1
[20] Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* (OUP India 2012) 85

JUDICIAL REVIEW IN ACTION: LIMITS AND AUTHORITY IN ARTICLE 142/143 DECISIONS

Judicial review is one of the cornerstones of constitutionalism in India, providing the judiciary with the authority to examine the legality and constitutionality of legislative and executive actions. When the Supreme Court exercises its powers under Article 142 or responds to references under Article 143, it does so within the larger framework of judicial review. However, unlike routine adjudication, these articles often involve decisions that stretch beyond legal interpretation into areas of discretion and moral judgment. This makes the judicial review exercised under these provisions both potent and controversial.

In the *State of Punjab v Rafiq Masih*, the Supreme Court invoked Article 142 to hold that government employees should not be forced to refund excess salary paid to them due to administrative errors, particularly when they were not at fault.[21] The judgment was hailed for its humane approach but criticised for circumventing settled legal principles under the service jurisprudence framework. Similarly, in *Delhi Judicial Service Association v State of Gujarat*, the Court used Article 142 to grant extraordinary reliefs to judicial officers, setting administrative precedents beyond the scope of statutory provisions.[22] These instances exemplify the tension between legal normativity and judicial equity.

In the context of Article 143, judicial review is often self-imposed, given that the opinions rendered are advisory and non-binding. However, once rendered, these opinions often shape legislative outcomes or validate executive policies, thereby indirectly asserting judicial supremacy. Legal scholar Dr. Justice AR Lakshmanan observed that presidential references, when used appropriately, "enable the judiciary to act as a constitutional conscience-keeper without entering the realm of governance."[23] This fine balance between judicial activism and institutional discipline defines the evolving role of judicial review in India's constitutional architecture

[21] State of Punjab v. Rafiq Masih, (2014) 8 SCC 883
[22] Delhi Judicial Service Assn. v. State of Gujarat, (1991) 4 SCC 406
[23] AR Lakshmanan, 'Presidential References and Judicial Review: A Constitutional Assessment' (2007) 49(2) *Journal of the Indian Law Institute* 124

SEPARATION OF POWERS IN THE INDIAN CONTEXT: THEORY VS. PRACTICE

The doctrine of separation of powers, as originally propounded by Montesquieu, advocates for a rigid division among the legislative, executive, and judicial functions to avoid tyranny and ensure accountability.[24] However, the Indian Constitution adopts a functional and flexible approach to this doctrine. Rather than insisting on a strict separation, it endorses a principle of checks and balances, whereby each organ performs its primary function but may intervene in others under exceptional circumstances. This model is particularly evident in the way the Supreme Court of India exercises powers under Articles 142 and 143, extending beyond judicial interpretation into domains that border on policy and governance. This pragmatic model has been judicially endorsed. In *Indira Nehru Gandhi v Raj Narain*, the Supreme Court declared that the separation of powers is a part of the basic structure of the Constitution, but not in the strict American sense.[25] The judgment recognised that Indian constitutionalism permits a functional overlap between organs, subject to institutional propriety. Similarly, in *Raj Narain v Indira Nehru Gandhi*, Justice Khanna acknowledged that while no organ is supreme, the judiciary has a special duty to ensure that none transgresses the constitutional limits.[26] Contemporary developments suggest that this balance is increasingly being tested. Judicial pronouncements on electoral reforms, environmental regulation, administrative appointments, and even religious practices have brought the Court into areas traditionally managed by the legislature or executive. While these interventions have often been in the public interest, they raise constitutional concerns about judicial overreach. Critics argue that frequent invocation of Article 142 and the expanding reliance on presidential references under Article 143 risk converting the Supreme Court from a neutral interpreter of law into a constitutional arbiter of policy. Therefore, the Indian version of separation of powers, though adaptable, must be exercised with constitutional caution to avoid erosion of institutional boundaries.

COMPARATIVE CONSTITUTIONAL PERSPECTIVES

A comparative analysis with constitutional systems such as the United States and the United Kingdom offers valuable insights into the uniqueness of India's Articles 142 and 143. Both

[24] Montesquieu, *The Spirit of Laws* (Cambridge University Press 1989) bk 11, ch 6.
[25] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1
[26] Raj Narain v. Indira Nehru Gandhi, (1972) 3 SCC 850

these provisions provide the Indian judiciary with functions that go beyond traditional adjudication functions that are generally impermissible in other common law jurisdictions due to a stricter adherence to the doctrine of separation of powers.

United States: The doctrine of separation of powers is implemented with rigidity. The U.S. Supreme Court does not possess an advisory jurisdiction. This limitation was explicitly affirmed in *Muskrat v United States*, where the Court refused to render an opinion on a federal statute not arising from an adversarial dispute, stating that the Constitution only authorises judicial power in "cases" and "controversies."[27] The Court is constitutionally barred from giving legal opinions to the President or Congress outside of actual litigation, in contrast to India's Article 143, which formalises such consultations.

United Kingdom: It lacks a written constitution in the conventional sense; the principles of parliamentary sovereignty and judicial restraint limit the extent to which courts intervene in executive or legislative functions. While the UK Supreme Court has evolved to assert judicial independence as seen in *R (Miller) v The Prime Minister*, where it reviewed executive action on prorogation of Parliament, the absence of formal constitutional provisions equivalent to Articles 142 or 143 reflects a deeper reluctance to vest courts with non-adjudicatory or discretionary powers.[28] India, therefore, presents a distinct model where the judiciary is constitutionally permitted and indeed expected to intervene in both exceptional circumstances (Article 142) and abstract constitutional dilemmas (Article 143). While this flexibility has allowed the Indian Supreme Court to play a transformative role in constitutional governance, it also carries the burden of ensuring that such powers are exercised with restraint, consistency, and institutional self-awareness.

RECOMMENDATIONS AND WAY FORWARD

The constitutional authority conferred upon the Supreme Court under Articles 142 and 143 must be exercised with a judicious mix of **activism and restraint**. While these provisions are vital tools in extraordinary circumstances, their expansive application without defined guardrails risks unsettling the balance between the judiciary, legislature, and executive. To preserve the constitutional scheme, the following reforms and guiding principles may be considered.

[27] *Muskrat v United States* 219 US 346 (1911)
[28] *R (Miller) v The Prime Minister* [2019] UKSC 41

Codifying the Scope of Article 142: There is an urgent need for parliamentary clarification or judicial self-regulation regarding the operational limits of Article 142. The legislature could consider enacting a **framework statute** that defines "complete justice" in procedural terms, ensuring that the Supreme Court's equity-based orders do not bypass statutory mandates or create parallel legal standards. Alternatively, the judiciary itself could evolve internal procedural guidelines, similar to the Vishaka framework, to regulate the frequency and scope of Article 142 interventions.[29]

Rationalising Presidential References under Article 143: Presidential references must be invoked only for genuine constitutional ambiguity or conflict, not as a political strategy to defer executive accountability. The President, advised by the Council of Ministers, must exercise this power sparingly and with transparency. A possible reform could include mandatory consultation with the Attorney General and publication of a **constitutional note of reasons** when invoking Article 143. This will deter political misuse and reinforce institutional credibility.

Judicial Self-Restraint and Institutional Dialogue: The Supreme Court, while responding to presidential queries or invoking extraordinary powers, must exercise self-restraint to avoid setting **substantive policy precedents**. The judiciary's legitimacy lies in its moral and legal authority, not in administrative efficiency. Creating **structured constitutional dialogues** through judicial commissions, law commission consultations, or amicus briefs can help maintain this equilibrium without weakening judicial review.

Public Transparency and Academic Oversight: Introducing greater transparency in how Article 142 and 143 cases are handled, such as publishing regular reports, expert commentaries, and dissenting views, can invite healthy academic and institutional scrutiny. Law universities and constitutional scholars must be encouraged to participate through **amicus participation** and **constitutional research interventions** to enrich the debate.

CONCLUSION

Although rooted in classical ideas of power division, the Indian Constitution embraces a pragmatic and flexible framework that accommodates the evolving coordination among the legislative, executive, and judicial branches. Articles 142 and 143 are emblematic of this

[29] Vishaka v. State of Rajasthan, (1997) 6 SCC 241

unique constitutional approach. They enable the Supreme Court to extend justice beyond statutory constraints and allow the Executive, through the President, to consult the judiciary on questions of national importance. However, the increasing reliance on these provisions, whether to resolve legislative omissions or navigate political uncertainty, raises important questions about institutional boundaries and the risk of Juristocracy. This article has shown that while Article 142 allows the Court to do "complete justice," its unchecked use may occasionally sidestep statutory procedures, undermining the rule of law. Similarly, presidential references under Article 143, though advisory in nature, have often had binding implications in practice, indirectly expanding the judiciary's influence over the policymaking sphere. These trends highlight the fragile equilibrium between judicial activism and constitutional restraint. Preserving this balance is essential to protect the democratic ethos of the Constitution. Going forward, a combination of legislative clarification, judicial self-regulation, and institutional transparency can ensure that Articles 142 and 143 are invoked **only in exceptional situations**, consistent with constitutional morality and the principle of accountability. The judiciary must remain the interpreter, not the architect of constitutional policy. Only then can India's model of separation of powers remain operational with constitutional balance, mutual respect, and institutional integrity.