DEONTOLOGY AND CONSEQUENTIALISM IN THE INDIAN CONTEXT: ANALYZING THE MORALITY OF THE SUPREME COURT'S POWERS UNDER ARTICLE 142

Sachet Singh[*] *and Devdeep Ghosh*[**]

Abstract

Article 142 of the Constitution of India is the fountainhead of the Supreme Court's inherent powers to do 'complete justice'. A complete justice provision, by its very nature, is controversial and often debated. It is evident from an analysis of the case law pivoted around the use of Article 142 that the Apex Court has often shown scant regard to statutory law when the operation of such statutory law has been perceived as an impediment in the pursuit of justice. The purpose of this paper is to survey the decisions of the Apex Court and contextualize it within the framework of two schools of jurisprudential thought - deontology and consequentialism - in an effort to identify the

[*]Sachet Singh is a fourth-year student at NALSAR University of Law, Hyderabad. The author may be reached at sachet.s.singh@gmail.com.
[**]Devdeep Ghosh is a fourth-year student at NALSAR University of Law, Hyderabad. The author may be reached at devdeepghosh25@gmail.com.

underlying thought process of various benches of the Supreme Court over the years.

I. INTRODUCTION

Article 142 of the Constitution of India states that the Supreme Court of India 'may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'. In using this provision, the Apex Court has often bypassed established statutory law in order to achieve a desirable consequence whereas in other instances, the Court has held that Article 142 must only be used with due regard to any established legal principle on the matter at hand and cannot run counter to such substantive dictum. The purpose of this paper is to analyze decisions of the Court in accordance with two jurisprudential schools of thought - deontology and consequentialism. While deontology judges the moral correctness of an act without regard to the consequences of such act, consequentialism lays greater stress on the ends rather than the means. Therefore, it is relevant to study the use of Article 142 by the Supreme Court of India in the context of these two schools in an attempt to understand the jurisprudential motivations of the 'people's court'.

Part I of this paper seeks to introduce the reader to the contours of deontology and its working. The purpose of this part is to equip the reader with an elementary, yet comprehensive, understanding of this school of thought in order to enable a more appreciative reading of the authors' final analysis of Article 142. Similarly, Part II serves as a brief primer to the consequentialist school of thought and shall highlight both its advantages and its faults. As explained later in this paper, these two schools of thought are largely irreconcilable and Part III seeks to illustrate this conflict by alluding to the landmark

American judgment of *Brown v. Board of Education of Topeka ("**Brown**")*[1] and critiques of the same from jurists subscribing to the divergent schools. The purpose of Part IV is to further qualify the concept of deontology as explained in Part I by reference to Ronald Dworkin's understanding of the concept. Finally, Part V shall elaborate upon Article 142 and its nature by seeking to understand the underlying intent of adopting such a 'complete justice' provision followed by a detailed study of the interpretation of the provision in different passages of the Apex Court's history.

II. UNDERSTANDING DEONTOLOGY

A. The Concept

Deontology is a school of thought that seeks to primarily evaluate the moralities of actions.[2] There are vast and varied theories within this school but the pivotal argument to each of these theories can be simplified to the proposition that 'the rightness of action is a function of whether the action is required, prohibited, or permitted by a moral duty'.[3] It's premised on the principle that 'an act must be evaluated by a characteristic that cannot be gathered from its consequences'.[4] Deontological thought finds its fingers in every pie - be it criminal law, in the retributive theories of punishment[5] and the grassroots principle that an act can only be termed a crime when it is a violation

[1]347 US 483 (1954).
[2]J. MacDonald & C. Beck-Dudley, *Are Deontology and Teleology Mutually Exclusive?*, 13 J. BUS. ETHICS 615-17 (1994).
[3]R. MCCORMICK, NOTES ON MORAL THEOLOGY 62 (1973).
[4]*Id*. at 34.
[5]C. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology and the Death Penalty*, 58 STANFORD LAW REV. 751, 759 (2005).

of moral duty;[6] tort law, in its principles of corrective justice;[7] or contract law, which is premised on the moral duty to perform a promise.[8]

B. Identifying Morally Right from Morally Wrong

Controversy arises when it is time to deem what actions are wrongful and what are not - while some acts are ipso facto wrongful, their morality may be vindicated when looked at contextually. For example, lying is morally wrong but its morality is turned on head when such lies give way to a greater good.[9] Another problem would be the matter of consensus[10] - what can be done when an individual's conception of what is moral does not agree with another's? The solution to these hurdles may lie in the method of 'reflective equilibrium' as exposited by John Rawls.[11] This methodology engenders objective principles, on the basis of which one can identify whether an act is morally right or wrong - therefore eliminating the element of subjectivity. These principles are arrived at by identifying a common thread that runs through precedents.[12] Should there be conflict between precedent and the principle, either one should be revised in keeping with the more overwhelming line of thought. This process was termed by Rawls as 'reflective equilibrium'[13] and aims to create a set a set of general principles on the basis of which morality

[6] *Id.* at 751.
[7] K. Simons, *Deontology, Negligence, Tort and Crime*, 76 B.U. L. REV. 273, 299 (1996).
[8] *Id.*
[9] A. Isenberg, *Deontology and the Ethics of Lying*, 24 PHILOS. PHENOMENOL. RES. 463, 465 (1964).
[10] *Legal Theory Lexicon 010: Deontology*, LEGAL THEORY LEXICON http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_2.html.
[11] JOHN RAWLS, A THEORY OF JUSTICE 40 (1999).
[12] *Id.* at 43.
[13] RAWLS, *supra* note 11.

may be judged, thereby determining the content of a deontological moral theory.

Another way of doing so would be by recourse to Kant's 'categorical imperative'.[14] He sought to resolve the problem of specifying a morally right duty by building upon the concept of 'good will'[15] i.e. the impetus to act for good as opposed to acting to solely satiate one's own desires. His treatise, *The Groundwork of the Metaphysics of Morals*, began with his belief that "it is impossible to conceive of anything in the world, or indeed out of it, which can be called good without qualification save only a good will."[16] According to Kant, if one wishes to seek the moral option, one must act on the basis of a set of principles that does not see itself conclude in satisfying one's own desire or inclinations i.e. one must act with 'good will' which may be arrived at by the 'formula of the law of nature'[17] according to which one must act as if the principle on which your act was based would become a universal law of nature.[18]

C. Countering Deontological Theories

Jurists are uncomfortable with deontological moral theories because there is great indeterminacy over what the content of these theories actually are as the methodologies specified above are grossly inadequate. This hurdle to deontological thought is termed 'the indeterminacy objection'.[19] While Rawls' method of reflective equilibrium seeks to remove the element of subjectivity in arriving at the content of deontological theory, in practice, subjectivity persists

[14]A. Campbell Garnett, *Deontology and Self Realization*, 51 ETHICS 419, 437 (1941).
[15]*Id.*
[16]MACDONALD & BECK-DUDLEY, *supra* note 2 at 616.
[17]*Supra* note 10.
[18]MACDONALD & BECK-DUDLEY, *supra* note 2 at 421.
[19]J. Muirhead, *The New Deontology*, 50 ETHICS 441, 446 (1940).

as different people end up with different reflective equilibria.[20] It is also possible that an individual ends up believing that a vast spectrum of equilibria is possible, thereby perpetuating the indeterminacy of the deontological theory. Detractors argue that Kant's theory of the categorical imperative is also susceptible to the same weakness.[21]
Another criticism faced by deontologists is that even if a determinate answer is reached by the above stated methodologies, the answer is unrealistic and suffers from being too 'demanding or inflexible'[22] resulting in solutions that would not be practicable. This objection has been termed 'the rigor objection'.[23] A widely quoted hypothetical situation[24] is that of a German in Nazi Germany, seeking to protect certain Jews, being questioned of their whereabouts. Lying, being morally apprehensible would not be acceptable to a deontologist and the consequentialists argue that the deontologist would be bound to disclose the location of his beneficiaries. However, deontologists do not subscribe to such a simplistic, blanket reasoning and may rebut this criticism with the argument that deontologically, there is no moral duty to tell the truth to those seeking to use such truth for immoral purposes.[25]

Thus, we see that deontologist theories and consequentialist theories are not compatible and provide contradictory outcomes to every legal scenario, thereby rendering it a pertinent question as to what school a legal system claims to subscribe to and what school is actually implemented in practice.

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[20]S*upra* note 10.
[21]R. McCain, *Deontology, Consequentialism and Rationality*, 49 REV. SOC. ECON. 168, 173(1991).
[22]T. Schapiro, *Kantian Rigorism and Mitigating Circumstances*, 117 ETHICS 32, 37 (2006).
[23]*Id.*
[24]T. SCHAPIRO, *supra* note 22 at 51.
[25]A. ISENBERG, *s upra* note 9.

III. CONSEQUENTIALISM

A. Diametrically Opposite Concept to Deontology

Consequentialism, as a school of thought, highlights the correlation between an act's rightness and its consequences. An act can be considered to be morally good or legitimate only if its consequences are at least as good as any other alternative act open to the agent.[26] This is in contrast to deontology, which focuses on the nature of the act, rather than its end result. Consequentialism derives its foundation from classic utilitarianism. Classic utilitarianism goes on to say that an act is morally right only if it causes 'greatest happiness to the greatest number of people.'[27] Therefore, it can be said that utilitarianism aims at welfare maximization - a principle imbibed in consequentialism. There could be situations that require meting out a certain degree of harm or abandonment. Consequentialist theorists seem to be divided with respect to the course of action that should be taken in such circumstances, as recourse to the usual consequentialist presumption would lead to a less than optimal result. Consequentialists like Peter Railton opine that in such situations, the path that leads to best possible result should be adhered to. Thus, one may do the wrong thing during such times. However, the consequentialist school of thought demands that even in doing such a wrong thing, there must be a certain degree of aversion to performing such an act, as the absence of aversion in harming others could lead to situations where a person inflicts harm upon other people even if it

[26]Michael Slote & Philip Pettit, *Satisficing Consequentialism*, 58 PROC. ARISTOT. SOC. SUPPL. VOL. 139 (1984).

[27]For example, a consequentialist will not be concerned if the agent refuses to perform acts which he promised to do in the past unless it goes on to adversely affect other people. See Walter Sinnot-Armstrong, *Consequentialism*, THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Winter 2011 ed.), http://plato.stanford.edu/entries/consequentialism.

does not produce the optimum result.[28] Others, more particularly those known as 'rule utilitarians argue that notwithstanding that the end result would be harmful; agents should continue to give preference to the presumptions and aversions determined by the consequentialist school of thought, even though the outcome would less desirable than what was possible to achieve.[29]

B. Drawbacks

Consequentialism has often been criticized for separating the means from the ends. On one hand, it says that actions, being momentary, cease to matter after a point of time and all that holds relevance is the result. On the other hand, it also says that actions do hold relevance as they are among their own consequences. In the long run, like all things, results too fade away.[30] Consequentialism also tends to base its premise on the argument that every action undertaken by a person is motivated by an expected benefit, which might accrue to that person or someone else. Hence, overall benefit is the guiding factor of a person's actions. However, this argument can be rebutted by saying that there may be times when it is not the expected benefit which guides a person's actions but a certain principle that must be adhered to. For example, a person may perform a certain deed only because it has been promised or is required by law and hence, the consequence has no part to play.[31] Germain Grisez provides an interesting critique to the theory. He goes on to dismiss the consequentialist theory by describing it as 'dangerous nonsense'. He rejects the argument that every action must be performed by keeping in mind the 'greater

[28]SAMUEL SCHEFFLER, CONSEQUENTIALISM AND ITS CRITICS 7 (1988).
[29]*Id.* at 8. Rule utilitarianism says that an action is morally good or legitimate when it is in coherence with the rules that leads to the greatest good.
[30]William Haines, *Consequentialism*, INTERNET ENCYCL. PHILOS., http://www.iep.utm.edu/consequentialism/.
[31]*Id.*

good'. According to Grisez, the term 'greater good', as per consequentialists is to indicate that goods are measurable and commensurable. However, they lack reference. Goods cease to be measurable unless there is a particular standard available to them; and cannot be commensurable unless they are called 'good' in the same sense.[32] Judith Jarvis Thomson provides a more semantic argument against consequentialism. She opines that critical conclusion can be drawn by giving a correct interpretation of the meaning of 'good'. She substantiates against the consequentialist theory by stating that "all goodness is goodness in a way."[33] Therefore, it can be safe to conclude that the theory of consequentialism is yet to find settled shores. While its very name tends to imply that the morality of any act can only be judged by its consequences, some of its proponents are also of the belief that other factors like obedience of religion or law play a role in determining the legitimacy of an action, irrespective of its consequences.

Thus, we learn that both consequentialism and deontology suffer from inherent faults that must be valued against the benefits that accompany them. While a strictly deontological understanding of rights and liabilities may lead to situations where the law acts to the detriment of society rather than its welfare, a consequentialist view results in an ad-hoc application of supposedly universally binding principles and may have catastrophic consequences. This paper seeks to understand the view adopted by the Supreme Court of India, in particular, with the implementation of Article 142 - a complete justice provision and whether such view is justified in light of the underlying intent of the provision.

[32]Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS.29 (1978).
[33]David Phillips, *Thomson and the Semantic Argument against Consequentialism*, 100 J. PHILOS. 475 (2003).

IV. DEVIATING MORALITIES - AN ILLUSTRATION OF THE CONFLICT BETWEEN DEONTOLOGY AND CONSEQUENTIALISM

As exposited earlier, the two principles contradict each other and cannot mutually co-exist except in rare situations.[34] The case of *Brown*[35] is illustrative of this issue. Deontology in the field of law would have the import of evaluating the morality of an act in consonance with established legal principles regardless of the consequences. The case being discussed held that the racial segregation of public schools was unconstitutional and in the process, overruled the longstanding decision made in *Plessy v. Ferguson ("**Plessy**")*.[36] While the case may be lauded on moral grounds, the real question is whether such morality ought to interfere with a judge's application of law i.e. whether such a consequentialist perspective on the morality of an act is supportive or detrimental to the rule of law.

[34]Certain scholars have voiced the opinion that the two principles needn't necessarily be treated as mutually exclusive and that there is a certain degree of common ground between them. See T.M Scanlon, *Rights, Goals and Fairness as in* SCHEFFLER, *supra* note 28 at 75 (where it has been argued that human rights, while essentially deontological, derive their validation by submitting to the consequences of having those rights). However, for the purposes of this paper, we shall proceed on the widely acknowledged belief that the two schools of thought are irreconcilable.

[35]See Brown v. Board of Education of Topeka, 347 US 483,495 (1954) [Hereinafter Brown].

[36]163 US 537 (1896) [Hereinafter Plessy]. The case upheld the constitutionality of racial segregation of public schools by applying the doctrine of 'separate but equal'.

The decision went on to be highly criticized. Justice Clarence Thomas, of the US Supreme Court condemned it as being a verdict made by relying on 'dubious social science' rather than 'reason and moral principles' as enshrined in the Constitution and Declaration of Independence.[37] Former Chief Justice of the United States, William Rehnquist, who was a well-known advocate of the 'separate but equal' doctrine as applied in *Plessy*, opined that:

> "*I realize that it is an unpopular and un-humanitarian position for which I have been excoriated by 'liberal' colleagues but I think Plessy v Ferguson was right and should be reaffirmed. To the argument, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run, it is the majority who will determine what the constitutional rights of the minority are."*[38]

However, the decision in *Brown* predictably found favor amongst consequentialists. According to Robert Bork, segregation rarely ever led to equality as equality and segregation could not be considered to be mutually consistent. Therefore, the only realistic choice before the Court was to allow segregation and abandon equality or forbid segregation and attain equality.[39] Numerous other jurists also opined that although *Brown* went against established constitutional principles of that age, the morality of the act could not be questioned as its

[37]Nathan Dean, *The Primacy of the Individual in the Political Philosophy and Civil Rights Jurisprudence of Clarence Thomas*, 14 GEORGE MASON UNIV. CIV. RIGHTS LAW J. 27, 41-42 (2004).

[38]See William Rehnquist, *A Random Thought on the Segregation Cases*, PBS http://www.pbs.org/wnet/supremecourt/rights/print/doc7.html. Nevertheless, Rehnquist never made any attempt to overturn Brown and often relied on it as precedent.

[39]ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82 (1991).

effective consequence would result in alleviating the hardships of the marginalized African-American community: a morally right consequence.

V. DWORKIN'S DEONTOLOGY

Ronald Dworkin has long been a supporter of deontological principles and an understanding of his theory would enrich our final analysis of our Apex Court's jurisprudence. He attacked H.L.A Hart's theory that law was uncertain. According to Hart, it was up to the judge to resolve all uncertainties at the best of his abilities by exercising a certain degree of judicial discretion.[40] Dworkin on the other hand asserted that even in cases where statutes or precedents do not provide clear answers, courts are not called upon to exercise any discretion. In such cases, it is the 'principles' entrenched in our legal system that needs to be resorted to.[41]

Dworkin opined that in cases where principles conflicted, the judge should try to "*find a coherent set of principles*" that will go on to validate his decision. These principles are to act as guiding forces, to be selected on the basis of fairness, keeping in mind the 'institutional history' of the society's legal structure.[42] Therefore, his theory expounds that even where the law on a particular matter is ambiguous, it is incumbent upon a judge to cull out a coherent set of principles in accordance with which the matter ought to be resolved.

[40]Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV.14 (1967) wherein he critiques H.L.A Hart's theories.
[41]RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-31 (1977).
[42]Ronald Dworkin, *Hard Cases*, HARV. L. REV.1057 1098-99 (1972).

According to Dworkin, these principles could not be arrived at by only having regard to the consequence of their application.[43]

In his book 'Law's Empire', Dworkin examines the nature of 'theoretical disagreements', i.e. disagreements as to whether "*statute books or judicial decisions exhaust the pertinent grounds of law*."[44] Dworkin does this by analyzing the issue from the standpoint of a judge. He blatantly attacks the positivist school of thought. He says that if law is to be understood in its true sense, one must have an interpretive attitude. We must come to terms with the fact that law has a point and thus, individual legal provisions must be interpreted in the manner in which we envision that point to be.[45] Therefore, his theory permits for a less rigorous version of deontological thought as it carves a niche for a judge's interpretation of the set of principles on which he is to decide a case. However, this cannot be read as allowing a judge to completely bypass the established principles of a legal system. Therefore, Dworkin's theory finds relevance in the raging debate over whether Article 142 of the Indian Constitution allows for the Apex Court to ignore statutory law in order to do 'complete justice' between parties.

[43]See Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. LAW REVIEW 1, 30 - 32 (1978) where he talks about situations where no one set of principles seems acceptable. In such a situation, recourse must be taken to evaluating the 'moral facts' at stake. These moral facts derive their basis from political theory, which ultimately go on to produce moral rights. He felt that there are extremely rare cases where one would find "no right answer".

[44]RONALD DWORKIN, LAW'S EMPIRE 3-5 (1986).

[45]George C. Christie, *Dworkin's Empire*, 1987 DUKE L.J. 159, 161 (1987).

VI. ARTICLE 142 - THE CONSEQUENTALIST RAMIFICATIONS OF A COMPLETE JUSTICE PROVISION

Article 142(1) of the Indian Constitution lays down that the Supreme Court may pass such enforceable decree or order as it deems necessary for the purpose of carrying out 'complete justice' in any matter pending before it.

A. The Underlying Intent of Article 142

To understand the true purport of Article 142 of the Indian Constitution, one must have regard to the Constituent Assembly Debates. Article 118 of the Draft Constitution, which was finally enshrined in the Constitution of India as Article 142, was debated on the floor of the Constituent Assembly on the 27th of May, 1949 and was added without debate or amendment.[46] The absence of debate over the inclusion of what could be an all-powerful weapon in the arsenal of the Apex Court is indicative of the intended purpose of Article 142 i.e. that it is purely procedural. The Constituent Assembly's debate on Article 112 of the Draft Constitution, which was later added as Article 136, is actually the only discussion of this 'complete justice' provision - but it has only been mentioned in passing as being critical to the wide appellate jurisdiction of the Court under Article 136 and not as being a substantive provision in itself. Pandit Thakur Das Bhargava commented that the inherent powers of the Apex Court, as recognized by Article 118, was allied to the wide jurisdiction of the Court under Article 112 and elevated the Supreme Court of India to the exalted position enjoyed by the Privy Council.[47]

[46]Constituent Assembly Debates, Vol. VIII, 679.
[47]*Id.* at 638. ".. At the same time the jurisdiction of the article is almost divine in its nature, because I understand that this Supreme Court will be able to deliver any

Shri Alladi Krishnaswami Aiyar also alluded to the complete justice provisions under Article 118 while debating the inclusion of Article 112 in the following words – "*If only we realize the plenitude of the jurisdiction under Article 112, if only, as I have no doubt, the Supreme Court is able to develop its own jurisprudence according to its own light, suited to the conditions of the country, there is nothing preventing the Supreme Court from developing its own jurisprudence in such a way that it could do complete justice in every kind of cause or matter*."[48]

In light of the Constituent Assembly Debates on Article 142, or rather the lack of it, it can be argued that the intent of the framers of our Constitution was to provide means for the Supreme Court to untether itself from the Executive as far as the enforcement of its decrees and orders were concerned as that had the potential to compromise the independence of the judiciary i.e. the nature of Article 142 is procedural.[49] However, as shall be elaborated upon later in this paper, judicial discourse in the hallowed courtrooms of the Supreme Court has given an entirely new sheen to its powers under Article 142 - one that was never the intent of the Constitution framers[50] and has been

judgment which does complete justice between States and between the persons before it. If you refer to Article 118, you will find that it says: '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 order 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."

[48]*Id.* at 639.

[49]See R. Prakash, *Complete Justice Under Article 142,* (2001) 7 S.C.C. (J) 14, 16. ("Article 142 is an article which deals with procedural aspects and the two words 'complete justice' cannot enlarge the scope of the article.")

[50]Article 142(1) was initially intended to only support the Court's powers under Article 32 and Article 136.

described as self-serving.[51] Article 142 has been used to bestow upon the Apex Court an unbridled power to ignore statutory law on the grounds of attempting to achieve complete justice between the parties without expressly striking down the statute vide judicial review.[52] This enlargement of scope has largely been justified by the words 'complete justice' located in Article 142. However, the Court has interpreted this phrase *in vacuo* and thereby, given it a wholly new dimension. It has been left undefined in order to preserve its flexibility in enabling the Court to fully give effect to its powers under Article 32 and Article 136 but it is submitted that the Court may not act on its whim and fancy in the quest of achieving complete justice[53] - such a step must be taken with due regard to the rule of law which has been recognized as a part of the basic structure.[54] A more elaborate study of the evolution of the Constitution's complete justice provision shall greatly assist us in understanding the mind of the Apex Court.

B. The Evolution of Article 142 - Supplement or Supplant?

The scope of the Court's power under Article 142(1) has been scrutinized ad infinitum, most recently in the cases of *National*

[51]M.P. JAIN, INDIAN CONSTITUTIONAL LAW 262 (5th ed. 2008). ("The creative role that the Supreme Court has assumed under Article 142 of the Constitution is much wider than a court's creative role in interpreting statutes and is plainly legislative in nature.")

[52]See Delhi Judicial Service Assn. v. State of Gujarat,(1991) 4 S.C.C. 406 (per K.N. Singh, J.) where it was held that the "Court's power under Article 142(1) to do 'complete justice' is entirely of a different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of the Supreme Court."

[53]Delhi Development Authority v. Skipper Construction Co,. (1996) 4 S.C.C. 622.

[54]See Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225; Indira Nehru Gandhi v. Raj Narain,1975 Supp S.C.C. 1; P. Sambamurthy v. State of A.P., (1987) 1 S.C.C. 362.

Insurance Co. Ltd. v. Parvathneni[55] and *University of Kerala v. Council of Principals of Colleges, Kerala*.[56] The primary reason this provision has gone on to court so much controversy is that interpretations given by the Court with respect to its powers under the provision have failed to be consistent. On one hand, in the cases of *Leila David v. State of Maharashtra*[57] and *Anil Kumar Jain v. Maya Jain*,[58] the Court considered its powers wide enough to waive statutory requirements, while on the other hand, in the cases of *Manish Goel v. Rohini Goel*[59] and *Poonam v. Sumit Tanwar*,[60] it refused to do so. It is the objective of this paper to conclusively determine the nature of this provision in light of the deontological and consequentialist schools of thought.

One of the earliest significant cases dealing with Article 142 was *Prem Chand Garg v. Excise Commissioner, UP*.[61] The issue before the Court was if the Supreme Court had the power to frame a rule or pass an order inconsistent with the fundamental rights as enshrined in the Constitution. The Court answered in the negative and held that the Court, even under Article 142(1), cannot pass an order inconsistent with any express statutory provision or constitutional provision. The same view was endorsed by the Court in *Naresh Shridhar Mirajkar v.*

[55](2009) 8 S.C.C. 785. (The question was referred to the Chief Justice of India for constituting a larger bench in order to decide as to whether the scope of the Court's powers under Article 142 is wide enough to enable it to create a liability where none exists).
[56](2010) 1 S.C.C. 353, at 362. (One of the questions framed, which is to be referred to the Chief Justice of India, was as to whether Article 142 enabled the Court to perform functions of the Executive). See Rajat Pradhan, *Ironing out the Creases: Re-examining the Contours of Invoking Article 142(1) of the Constitution*, 6 NALSAR STUDENT LAW REVIEW 1 (2011).
[57](2009) 10 S.C.C. 337.
[58](2009) 10 S.C.C. 415.
[59](2010) 4 S.C.C. 393.
[60](2010) 4 S.C.C. 460.
[61]A.I.R. 1963 SC 996.

State of Maharashtra[62] and *A.R. Antulay v. R.S. Nayak*.[63] This goes on to highlight a restrictive and narrow interpretation given by the Court with respect to the scope of its powers under Article 142(1) and its unwillingness to exercise its power beyond a certain extent. It is therefore observable that in the earliest phase of interpretation, the Court adopted a deontological approach in that even where desirable consequences could have been achieved by using Article 142, the Court refrained from doing so.

A deviation from this restrictive approach was perhaps first noticeable in *K.M. Nanavati v. State of Bombay*,[64] wherein the Court, by comparing the clauses under Article 161, which gives the Governor the power to grant pardons, reprieves, etc. and Article 142 held that as both Article 142 and Article 161 contain no words of limitation, the area covered by them remains unregulated.[65] In *Delhi Judicial Service Association v. State of Gujarat*,[66] the Court went a few steps further and declared Article 142 to be a part of the basic structure of the Constitution. The Court went on to add that its powers under Article 142 are such that no limitation or restriction can be imposed on it through ordinary laws or any enactment by the Central or State Legislature, though in exercising such power, it must bear in mind the statutory provisions connected to the dispute.[67] The same approach was adopted in *Union Carbide Corporation v. Union of India*,[68] wherein it was held that no prohibitions or limitations contained in ordinary laws can go on to act as such prohibition or limitation on the powers of the Court under Article 142. This brought about a

[62]A.I.R. 1967 SC 1.
[63](1988) 2 S.C.C. 602.
[64]A.I.R. 1961 SC 112.
[65]*Id.* at 122.
[66](1991) 4 S.C.C. 406.
[67]*Id.* at 463.
[68](1991) 4 S.C.C. 584.

considerable change in outlook by the Supreme Court with respect to Article 142. With the aim of bringing about 'complete justice', the Court was adamant in not restricting its powers under Article 142 and would go on to interpret it in a manner so as to mold it according to the facts and circumstances of the case - a consequentialist approach in sharp contrast to the deontological one adopted in prior cases.

The case of *Supreme Court Bar Association v. Union of India*[69] led to a further development in the jurisprudence concerning Article 142, wherein the Supreme Court held that an advocate can only be suspended by the Bar Council of India under the Advocates Act and the Court cannot exceed its authority in this regard by invoking Article 142. It further went on to hold that:

> "*Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly."*[70]

In *M.C. Mehta v. Kamalnath*,[71] the Supreme Court once again refused to exercise its powers under Article 142 in order to override specific provisions enshrined in any Act. The Court laid down that its powers under Article 142 must not come in direct conflict with what has already been provided for in any statute. Hence, it can be seen that in its latest decisions, the Court has gone on to attempt to harmonize its

[69](1998) 4 S.C.C. 409. The Court overruled its previous finding in *In Re*, Vinay Chandra Mishra, (1995) 2 S.C.C. 584.
[70]*Id.* at 431-432.
[71](2000) 6 S.C.C. 213. (The Court went on to hold that the Public Trust Doctrine was applicable in India, under which, common properties like air, rivers and forests, which were held by the government for free and continuous use by the general public, cannot be leased out to a motel located on the banks of river Beas, as it would cause an impediment to the natural flow of water.)

powers under Article 142 with express statutory provisions. Article 142 is meant to supplement substantive provisions and not supplant it. The Court cannot use its powers under this provision if specific statutory provisions already exist to deal with the issue, until and unless the Court is of the opinion that circumstances of the case merit it to do so in order to avoid any miscarriage of justice.

VII. CONCLUSION

In his book, *The Nature of the Judicial Process*, Cardozo J. wrote:

> *"... judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment despite of it. They have the power, though not the right, to travel beyond the walls of interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law*."[72]

The deontological thought has been aptly summated in the above extract and reflects the conclusion arrived at by the authors with regard to the applicability of Article 142. The purpose of this paper is not to choose one principle over the other but to highlight their contradictions for the purpose of understanding the flawed use of Article 142 by the Apex Court. The provision was adopted only to supplement the already wide powers of the Court and not to enlarge them to a boundless extent. It is incumbent upon the Apex Court to implement the law as propounded by the legislature and as erected by

[72]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (2008) as in PRADHAN, *supra* note 56 at 12.

the established principles of our legal framework and not to innovate law on an ad-hoc basis for the purpose of achieving desirable, but at the same time, momentary justice. A deontological perspective must prevail as regards the use of Article 142 in order to preserve institutional integrity. It is not contended that the law be applied rigorously and blindly by the Apex Court and here is where Dworkin's understanding of deontology comes into play. His understanding allows for an interpretative application of legal principles - one that gives due regard to established legal principles on a matter and permits a judge to choose between alternate interpretations in order to achieve substantial justice between the parties. In this regard, Article 142 greatly enhances the power of the Court but does not license the Court to wantonly ignore substantive law. If understood in the light of Dworkin's deontology, Article 142 shall fulfill its true purpose of achieving 'complete justice' while within the circumscribed boundaries of our legal system.