
JUSTICE BY PRIVILEGE? CONSTITUTIONAL PARADOXES AND STRUCTURAL INEQUALITY IN DISSOLVING MARRIAGES UNDER ARTICLE 142

Harsh Chawla, National Law Institute University, Bhopal

Aditya Nigam, National Law Institute University, Bhopal

ABSTRACT

Since 2023, the Supreme Court of India has repeatedly invoked Article 142 of the Constitution to dissolve marriages on the ground of irretrievable breakdown, a ground absent from the Hindu Marriage Act, 1955, and to waive the mandatory cooling-off period for divorce by mutual consent under Section 13-B. The Constitution Bench decision in *Shilpa Sailesh v Varun Sreenivasan* has been celebrated as a humane response to marriages that survive only on paper. This article argues that the celebration is premature. First, the power is structurally inaccessible: a litigant cannot petition the Supreme Court directly for divorce, and reaching it ordinarily presupposes years of litigation before a family court and a High Court, resources that most litigants do not have. The remedy of complete justice, then, functions less as a universal safeguard than as a privilege of endurance and means. Second, the doctrine sits in tension with the Court's own restraint elsewhere: in *Supriyo v Union of India*, decided the same year, the Court declined to use its transformative constitutional powers to extend the right to marry to queer couples, citing separation of powers and institutional limits. Read together, the two decisions expose an asymmetry in when 'complete justice' is thought appropriate: exiting a marriage is treated as urgent enough to bypass Parliament, while entering one is not. The article traces the doctrinal evolution of Article 142 in matrimonial jurisprudence, examines this asymmetry, and argues that the structural inequality inherent in judicially administered relief of this kind can only be resolved through legislative codification of irretrievable breakdown as a ground of divorce, a course the Law Commission recommended as early as 1978.

I. Introduction

In May 2023, a five-judge Constitution Bench of the Supreme Court of India held that it could dissolve a marriage on the ground that it had irretrievably broken down, even where one spouse opposed the divorce and even though no statute in India recognises such a ground.¹ The Court reasoned that Article 142(1) of the Constitution, which empowers it to pass any order necessary for 'complete justice' in a cause before it, permitted this outcome even though Parliament had never enacted irretrievable breakdown as a ground of divorce under the Hindu Marriage Act, 1955.² In the same judgment, the Court held that it could waive the statutory cooling-off period under Section 13-B(2) of the Act, a mandatory six-to-eighteen month period Parliament had inserted precisely to allow couples time to reconsider.

The decision has been widely welcomed as compassionate and overdue.³ Couples who had spent a decade or more as legal strangers living under a marital label were, at last, permitted to walk away. Yet the manner in which this relief became available deserves closer scrutiny than the celebratory commentary has generally allowed. This article argues that the version of justice made available under Article 142 in matrimonial disputes is not, contrary to its name, complete. It is available only to those litigants who have the resources, information, and endurance to bring a case before the Supreme Court in the first place, a court that cannot ordinarily be approached directly for divorce and that, by design, sits at the end of a long and expensive litigation chain (discussed further in Part IV(A) below).⁴ The power is, in that sense, a remedy of privilege: it rewards those who can outlast the ordinary system rather than those the ordinary system fails most acutely.

This framing is not merely rhetorical. Complete justice, as a constitutional idea, is meant to operate as a backstop for individual hardship that the ordinary legal process cannot adequately address, not as a parallel track of relief calibrated to a litigant's capacity to endure protracted litigation. When the invocation of that idea systematically tracks the resources a litigant commands rather than the merits of the underlying claim, something has gone wrong with how the power is being deployed, even if each individual exercise of it, considered case by case,

¹*Shilpa Sailesh v Varun Sreenivasan* (2023) 14 SCC 231; 2023 SCC OnLine SC 544 (Constitution Bench of Kaul, Khanna, Oka, Nath and Maheshwari JJ).

²Hindu Marriage Act 1955, s 13, s 13-B(2).

³See eg 'Shilpa Sailesh Judgment: A Step Towards No-Fault Divorce?' (Supreme Court Observer, 2023) <<https://www.scobserver.in/journal/shilpa-sailesh-judgment-a-step-towards-no-fault-divorce/>> accessed 21 September 2026.

⁴*Shilpa Sailesh* (n 1) para 24.

appears entirely defensible.

The argument proceeds in four further parts. Part II traces the doctrinal architecture of Article 142 and its extension into matrimonial law, culminating in *Shilpa Sailesh*. Part III places this jurisprudence alongside the Court's decision, delivered only months later, in *Supriyo v Union of India*, where the Court declined to use its constitutional powers to extend marriage rights to queer couples.⁵ Read together, these decisions reveal a paradox: the Court has shown itself willing to override statutory text to help individuals exit a marriage, while treating the question of who may enter one as a matter beyond judicial reach. Part IV develops the structural inequality critique, examining who can realistically access Article 142 relief, the financial dimension of that access, and how the doctrine interacts with the endemic delay in India's family courts. Part V considers the legislative alternative that has been on the table since 1978 and asks why it remains unenacted. Part VI concludes.

II. Article 142 and the Architecture of 'Complete Justice'

A. Textual and Doctrinal Origins

Article 142(1) provides that the Supreme Court, in the exercise of its jurisdiction, may pass such decree or order as is necessary for doing complete justice in any cause or matter pending before it, and that such an order is enforceable throughout India.⁶ The provision has no equivalent in ordinary appellate courts and was designed to equip the apex court with a curative power to prevent injustice where the strict letter of the law would otherwise produce an unjust result.⁷ The Court has, over seven decades, used the power in a wide range of contexts: to award compensation in the Bhopal gas tragedy litigation,⁸ to quash criminal proceedings in the interest of a comprehensive settlement, and to fashion remedies for undertrial prisoners and environmental harm alike.

The Court has also repeatedly cautioned itself against overreach. In *Supreme Court Bar Association v Union of India*, a seven-judge bench held that the power under Article 142 is supplementary in character and cannot be deployed to supplant or override a substantive

⁵*Supriyo @ Supriya Chakraborty v Union of India* (2023) SCC OnLine SC 1348 (five-judge bench of Chandrachud CJI, Kaul, Bhat, Kohli and Narasimha JJ).

⁶Constitution of India 1950, art 142(1).

⁷See *Prem Chand Garg v Excise Commissioner* AIR 1963 SC 996.

⁸*Union Carbide Corporation v Union of India* (1991) 4 SCC 584.

statute, still less to construct an entirely new legal edifice where none previously existed.⁹ The tension between these two lines of authority, one broadly enabling and one cautionary, has never been fully resolved, and it is precisely this unresolved tension into which the matrimonial jurisprudence steps.

This tension is not confined to the matrimonial context. Commentators have long observed that Article 142 occupies an uneasy space between two competing conceptions of the judicial role: an instrumental view, under which the provision licenses the Court to achieve substantively just outcomes largely unconstrained by statutory text, and a formalist view, under which even a power framed as broadly as 'complete justice' must yield to the separation of powers embedded in the Constitution's structure. Neither the enabling nor the cautionary line of authority has ever fully displaced the other, and the result is a jurisprudence that develops less through settled doctrine than through the cumulative weight of individual exercises of discretion, each defensible on its own facts but difficult to predict in advance.

B. The Matrimonial Turn: From Anjana Kishore to Shilpa Sailesh

The Court's willingness to use Article 142 in matrimonial matters predates *Shilpa Sailesh* by decades. As early as the 1990s, the Court began granting divorce on the ground that a marriage had become an empty shell, describing such unions as 'dead' in substance even where no statutory ground for divorce had been made out on the facts; irretrievable breakdown was treated as a relevant, though not independently sufficient, factor alongside such grounds.¹⁰ In *Naveen Kohli v Neelu Kohli*, the Court went further, both dissolving the marriage before it and formally recommending that Parliament amend the Hindu Marriage Act to recognise irretrievable breakdown as a distinct statutory ground.¹¹ That recommendation, made nearly two decades ago, has not been acted upon.

The specific question of whether the Court could waive the six-month statutory cooling-off period under Section 13-B(2) produced conflicting signals. In *Anjana Kishore v Puneet Kishore* and later in *Manish Goel v Rohini Goel*, the Court took the position that the waiting period was mandatory and could not be dispensed with even under Article 142, since doing so would override an express statutory bar.¹² In *Amardeep Singh v Harveen Kaur* in 2017, a two-judge

⁹*Supreme Court Bar Association v Union of India* (1998) 4 SCC 409, paras 47–48.

¹⁰See eg *Chanderkala Trivedi v S P Trivedi* (1993) 4 SCC 232; *V Bhagat v D Bhagat* (1994) 1 SCC 337.

¹¹*Naveen Kohli v Neelu Kohli* (2006) 4 SCC 558.

¹²*Anjana Kishore v Puneet Kishore* (2002) 10 SCC 194; *Manish Goel v Rohini Goel* (2010) 4 SCC 393.

bench softened this position, holding that the waiting period was directory rather than mandatory and could be waived where the statutory objects, giving parties an opportunity to reconsider, had already been substantially achieved on the facts.¹³ The doctrinal inconsistency between these lines of authority was itself the trigger for the reference that produced *Shilpa Sailesh*: a two-judge bench doubted the correctness of *Manish Goel* and referred the question of the scope of Article 142 in matrimonial cases to a larger bench.¹⁴

The 2023 Constitution Bench judgment resolved the reference in favour of the broader, more permissive view. It held that the Court could waive the Section 13-B(2) waiting period, and, separately, that it could grant divorce on the ground of irretrievable breakdown even absent the consent of both parties, provided it was satisfied on the facts that the marriage was beyond salvage.¹⁵ The Court identified a set of non-exhaustive factors relevant to this determination: the length of the parties' cohabitation, the period and circumstances of their separation (any separation exceeding six years was treated as strongly probative), the nature of allegations exchanged in the litigation, the failure of attempted reconciliation and mediation, and, critically, whether adequate financial provision could be secured for a dependent spouse and any children before the marriage was dissolved.¹⁶ It also clarified an important jurisdictional limit that will matter for the argument developed in Part IV: parties cannot invoke Article 142 through an original writ petition under Article 32, and cannot approach the Supreme Court directly for a decree of divorce; the power can be exercised only in the context of a genuine proceeding, typically a special leave petition or transferred matrimonial case, already pending before the Court.¹⁷

III. The Paradox: Selective Deployment of Extraordinary Power

A. Liberal Use in Dissolving Marriages

Considered on its own terms, *Shilpa Sailesh* represents a significant act of judicial law-making.

¹³ *Amardeep Singh v Harveen Kaur* (2017) 8 SCC 746.

¹⁴ *Shilpa Sailesh* (n 1); see also 'Shilpa Sailesh v Varun Sreenivasan' (LawFoyer, 2024) <<https://lawfoyer.in/shilpa-sailesh-v-varun-sreenivasan/>> accessed 21 September 2026.

¹⁵ *ibid* paras 26–90.

¹⁶ *Shilpa Sailesh* (n 1) para 44; see also 'Shilpa Sailesh v. Varun Sreenivasan, (2023) 4 SCC 692 Case Analysis' (Legal SYNK, 2025) <<https://legalsynk.com/shilpa-sailesh-v-varun-sreenivasan-irretrievable-br/>> accessed 21 September 2026.

¹⁷ *Shilpa Sailesh* (n 1) para 24; see also 'Can the Supreme Court Directly Grant Divorce Under Article 142?' (LexSpeak Legal, 2026) <<https://lexspeak.in/2026/08/can-the-supreme-court-directly-grant-divorce-under-article-142/>> accessed 21 September 2026.

The Hindu Marriage Act does not recognise irretrievable breakdown as a ground of divorce; Parliament has been urged to add it since at least 1978 and has not done so (discussed further in Part V(A) below). Nor does the Act contemplate that the mandatory cooling-off period in Section 13-B(2), inserted precisely to protect against hasty divorce, may simply be dispensed with by a court that considers it futile on the facts. Both moves required the Court to treat statutory text as displaceable in the service of what it considered a more humane outcome. The Court took care to describe its intervention as curative rather than legislative, distinguishing the case from *Supreme Court Bar Association* on the footing that it was not creating a new right so much as filling an interstitial gap that Parliament's inaction had left open.¹⁸ Whatever the merit of that characterisation, the practical effect is that the Supreme Court now operates, for a narrow category of litigants who reach it, as a forum offering a remedy that the legislature has for nearly half a century declined to enact.

It bears emphasis that the petitioners in *Supriyo* did not ask the Court to legislate a wholly new institution from nothing. Much of the argument before the Court concerned incremental relief, recognition of civil unions, and extension of specific statutory entitlements, such as succession, adoption, and medical decision-making rights, to same-sex partners, none of which would have required rewriting the definition of marriage itself. The Court declined even this narrower relief, holding that the appropriate course was to leave the entire question, including its incremental variants, to Parliament and the states. The contrast with the Court's own willingness, in *Shilpa Sailesh*, to supply by judicial order a remedy Parliament had considered and declined to enact for over four decades is difficult to explain by reference to institutional competence alone.

B. Restraint in Supriyo: The Marriage Equality Case

Five months after *Shilpa Sailesh*, a differently constituted five-judge bench delivered its judgment in *Supriyo v Union of India*, a batch of petitions seeking recognition of the right of same-sex and queer couples to marry.¹⁹ The petitioners argued, among other things, that the exclusion of same-sex couples from the definition of marriage under the Special Marriage Act 1954 violated Articles 14, 19 and 21 of the Constitution, and invited the Court to read the statute in a manner, or use its constitutional powers, to extend its protections to them.²⁰ A

¹⁸*Shilpa Sailesh* (n 1) paras 30–33, distinguishing *Supreme Court Bar Association* (n 9).

¹⁹*Supriyo* (n 5).

²⁰'Plea for Marriage Equality' (Supreme Court Observer, 2024) <<https://www.scobserver.in/cases/plea-for->

unanimous Court held that there is no fundamental right to marry under the Indian Constitution, and declined to extend statutory marriage to same-sex couples, holding that such recognition, if it were to come at all, was a matter for Parliament.²¹

The reasoning offered for this restraint is instructive because it invokes precisely the limiting principle that *Shilpa Sailesh* is said to respect only in form. Commentary on the case has observed that any order purporting to read the gendered terms 'husband' and 'wife' in the Special Marriage Act as spouse-neutral would have been inconsistent with the legislative scheme Parliament actually enacted, and that the power to do complete justice under Article 142 does not extend to overriding or disregarding statutory provisions of that kind; at most it permits the Court to iron out incidental creases in a matter already before it.²² The majority in *Supriyo* accordingly treated the recognition of a new category of marriage as squarely a legislative function, notwithstanding a 3:2 split on ancillary questions, including a partial dissent from the Chief Justice recognising a queer couple's right to relationship, if not to marriage itself.²³

C. Reconciling or Exposing the Paradox

The two decisions cannot easily be reconciled on formal doctrinal grounds alone, and it is worth being precise about why. It might be said that dissolving an existing, admittedly defunct marriage is a narrower and more modest intervention than creating an entirely new marital status for a class of persons currently excluded from it; the first merely ends a legal relationship that both statute and the parties agree has substantively failed, while the second would require reading words into, or substantially rewriting, a statute Parliament designed around a particular, binary conception of marriage. There is force in this distinction, and this article does not suggest that *Supriyo* was wrongly decided on its own institutional-competence reasoning.

What the comparison exposes, however, is a deeper asymmetry in how the Court conceives of urgency and hardship in family law. In *Shilpa Sailesh*, years of separation, unhappiness and litigation were treated as sufficient grounds for the Court to act where Parliament had not,

marriage-equality/> accessed 21 September 2026.

²¹*Supriyo* (n 5), summarised in 'Marriage Equality: The courts were not the right forum to approach' (Supreme Court Observer, 2023) <<https://www.scobserver.in/journal/marriage-rights-for-sexual-minorities-the-courts-were-not-the-right-forum-to-approach/>> accessed 21 September 2026.

²²*ibid*; *Supreme Court Bar Association* (n 9); *A Jideranath v Jubilee Hills Co-operative House Building Society* (2006).

²³*Supriyo v. Union of India: Union Denied, Rights Deferred, Tightrope on Same Sex Marriage* (Lawful Legal, 2025) <<https://lawfullegal.in/supriyo-v-union-of-india-union-denied-rights-deferredtightrope-on-same-sex-marriage/>> accessed 21 September 2026.

notwithstanding that the same considerations, of dignity, autonomy and freedom from being trapped in a legally imposed status one no longer wants, were pressed by the petitioners in *Supriyo* and found insufficient to justify comparable intervention.²⁴ Put simply: the Court has shown itself prepared to override statutory silence and even express statutory conditions to let people leave a marriage, while treating statutory silence on who may enter one as an insuperable limit on its own power. Both a right to exit and a right to enter implicate dignity and autonomy under Article 21; the Court's willingness to vindicate the former through Article 142 while declining to vindicate the latter through ordinary constitutional interpretation suggests that the operative distinction is not, in the end, institutional competence, but rather whose claims the Court is prepared to treat as urgent enough to warrant an extraordinary remedy.

This asymmetry matters independently of the class-based access critique developed in Part IV, because it shows that Article 142's application in family law is not simply generous but selective: generous towards a claim, exit from marriage, that predominantly benefits litigants who already possess the standing and resources to reach the Supreme Court, and restrained towards a claim, entry into marriage, that would have extended a benefit to an entire class of persons currently excluded from a legal status altogether. The paradox in the title of this article, then, is not merely rhetorical. It names a structural feature of how 'complete justice' under Article 142 has actually been distributed: liberally, where the beneficiaries are individual litigants able to litigate up to the apex court, and conservatively, where the beneficiaries would be a class defined by an axis of identity the Court was, in that instance, unwilling to legislate for.

IV. Structural Inequality in Access to Article 142

A. Who Can Reach the Supreme Court?

The doctrinal generosity of *Shilpa Sailesh* is qualified, as noted above, by a significant jurisdictional constraint: a litigant cannot approach the Supreme Court directly seeking a decree of divorce under Article 142.²⁵ There must be a genuine and maintainable proceeding already before the Court, ordinarily a special leave petition filed under Article 136 against an order of

²⁴*Shilpa Sailesh* (n 1) paras 57–60; *Supriyo* (n 5); 'Supriyo and the Fundamental Right to Marry' (Centre for Law & Policy Research, 2023) <<https://clpr.org.in/blog/supriyo-and-the-fundamental-right-to-marry/>> accessed 21 September 2026.

²⁵*Shilpa Sailesh* (n 1) para 24.

a family court or a High Court, or a transfer petition. This means that, as a precondition to invoking the very power meant to rescue litigants from the ordinary system's delay, a litigant must first have gone through that system: a decree or order from a family court, very often an appeal to the High Court, and only then a special leave petition to the Supreme Court, at each stage represented, at real cost, before three tiers of the judiciary.

This is not a hypothetical burden. Family courts in India are themselves among the most congested tiers of the judicial system. State-level data collected in recent years shows matrimonial disputes making up a substantial and rising share of civil case pendency: as of mid-2021, Kerala's family courts alone had over one lakh pending cases, a figure that had risen roughly tenfold during the pandemic years, while matrimonial matters filed within the preceding year formed close to a quarter of all recent civil filings in states such as Uttar Pradesh and Maharashtra.²⁶ As of 2025, over fifty-two million cases were pending across the Indian judicial system, more than eighty-five per cent of them in the district courts, the tier at which family courts function, and a 2018 government policy assessment concluded that, at the then prevailing rate of disposal, it would take over three centuries to clear the existing backlog nationally.²⁷ A litigant seeking to escape a dead marriage cannot, in practice, simply wait for the ordinary system to resolve the matter within a reasonable time; they must be prepared to litigate through multiple tiers, over a period that frequently runs into years, before the possibility of an Article 142 remedy even arises.

The financial and informational demands of this trajectory are considerable. Each tier requires separate counsel, separate court fees, and, in practice, the ability to travel to and remain engaged with proceedings often held far from a litigant's home, particularly once a matter reaches the High Court or the Supreme Court in New Delhi. Litigants who lack the means to retain counsel across three tiers of litigation, who cannot bear the opportunity cost of years spent pursuing a matter, or who are unaware that an application under Article 142 is even a live possibility at the special leave stage, are as a practical matter excluded from the class of persons who can benefit from *Shilpa Sailesh*, however genuinely their marriage may have broken down. The remedy is, in this sense, available to those who can afford to reach it, not to those whose

²⁶'Pending cases in Kerala's family courts mount to frustrating heights' (The Federal, 2022)

<<https://thefederal.com/the-eighth-column/pending-cases-in-keralas-family-courts-mount-to-frustrating-heights>> accessed 21 September 2026.

²⁷'Family Courts in India: A Comprehensive Analysis of Legal Framework, Challenges, and Contemporary Perspectives' (Bhatt & Joshi Associates, 2025) <<https://bhattandjoshiassociates.com/family-courts-in-india-an-overview/>> accessed 21 September 2026.

need for it is greatest. It is a mechanism that disproportionately serves urban, English-literate, professionally represented litigants, precisely the demographic already over-represented in reported matrimonial litigation reaching the Supreme Court, while the majority of Indians whose marriages break down remain governed by the ordinary, slower, fault-based statutory regime.

The informational barrier deserves particular emphasis because it is the least visible of the obstacles described above and, for that reason, the easiest to overlook. Even a litigant who has reached the special leave stage, represented by competent counsel, may never learn that an Article 142 remedy is available unless that possibility is specifically raised, because the remedy exists nowhere on the face of the Hindu Marriage Act and cannot be discovered by reading the statute a litigant is otherwise relying on. Awareness of the doctrine is, in practice, concentrated among a relatively small community of Supreme Court advocates who follow matrimonial jurisprudence closely, a further filter layered on top of the financial and procedural barriers already described, and one that has nothing to do with the merits of any individual litigant's claim.

B. Gendered Costs: Alimony Safeguards as Post-Hoc Discretion

A second dimension of structural inequality concerns gender and the mechanics of the safeguard the Court itself built into the doctrine. Recognising the risk that an economically dominant spouse, typically the husband, might use Article 142 to exit a marriage on favourable terms while evading a fair maintenance settlement, the Constitution Bench in *Shilpa Sailesh* held that divorce under Article 142 should ordinarily be conditioned upon adequate and fair financial provision for the dependent spouse and any children.²⁸

This safeguard is welcome, but it is worth noticing what kind of safeguard it is. It is discretionary rather than formulaic, assessed case by case by the very bench hearing the special leave petition, without the benefit of the kind of statutorily prescribed guidelines, notice periods, or right of opposition that a codified ground of divorce could provide. Commentary on the judgment has itself observed that the ruling, while improving access to a form of relief for many litigants, still calls for a more robust and evenly applied framework, including institutionalised legal aid, mediation infrastructure, and gender-sensitised judicial training, if it

²⁸*Shilpa Sailesh* (n 1) para 44; Legal SYNK case analysis (n 16).

is to operate fairly across the class of litigants it affects.²⁹ A useful point of comparison is the safeguard Parliament itself considered, but did not enact, in the Marriage Laws (Amendment) Bill, 2010, which would have introduced irretrievable breakdown as a statutory ground while giving a wife a specific and independent statutory right to oppose the grant of such a divorce where it would cause her grave financial hardship.³⁰ A statutory right of that kind, capable of being pleaded and litigated as a matter of entitlement before the court of first instance, is a materially different form of protection from a discretionary condition attached, if the presiding bench thinks it appropriate, at the culmination of a Supreme Court special leave petition that the wife may or may not have had the resources to contest on equal footing.

The asymmetry is compounded by the practical dynamics of special leave litigation itself. A husband seeking to invoke Article 142 arrives at the Supreme Court as the moving party, with the benefit of having selected the timing and framing of the petition and, typically, of having already retained counsel experienced in matrimonial special leave practice. A wife opposing that petition, by contrast, is placed in the position of having to respond, often on short notice and without the same depth of specialised representation, to a request that her marriage be dissolved on terms she did not choose. The financial-provision safeguard mitigates the substantive unfairness of the outcome, but it does very little to correct this procedural asymmetry in how the two parties actually experience the litigation that produces it.

C. Family Courts, Pendency, and the Two-Track System

The cumulative effect of the preceding two sections is the emergence of what might be called a two-track system of matrimonial relief in India. On one track sit the great majority of litigants, bound by the fault-based grounds enumerated in Section 13 of the Hindu Marriage Act, or by the mandatory Section 13-B cooling-off period if divorcing by consent, litigating before family courts that, as shown above, are themselves chronically congested. On the other, narrower track sit those litigants, self-selected by their capacity to litigate through three tiers of courts, who may eventually obtain from the Supreme Court a form of relief, dissolution on the basis of irretrievable breakdown, unavailable to everyone else on the first track regardless of the objective similarity of their circumstances.

This is a structural inequality in the strict sense: it is not merely that wealthier litigants tend to

²⁹Legal SYNK (n 16).

³⁰Supreme Court Observer (n 3).

secure better outcomes in litigation generally, a familiar and different problem, but that an entire category of substantive legal relief, freedom from an admittedly dead marriage without having to prove fault or wait out a statutory cooling-off period, exists only for those who can reach a particular forum. Two spouses in factually identical situations, separated for the same number of years, with the same absence of any realistic prospect of reconciliation, may receive entirely different treatment under the law depending on nothing more principled than whether one of them had the means and the persistence to carry the matter to New Delhi. That is difficult to square with the guarantee of equality before the law in Article 14 of the Constitution, even though the doctrine responsible for it is framed, ironically, in the language of complete justice.

None of this suggests that the Constitution Bench in *Shilpa Sailesh* acted in bad faith, or that the doctrine it announced is not, on its own terms, a genuine improvement for the litigants who can reach it. The critique advanced here is structural rather than personal: it is a critique of what happens when a court, faced with an underlying failure of legislative will that has persisted for decades, supplies a remedy through the mechanism of individual adjudication rather than through a rule of general application. Individual adjudication is, by its nature, incapable of reaching those who never litigate at all, and a doctrine built entirely on individual adjudication will therefore always reproduce, rather than correct, the underlying distribution of access to justice.

V. Towards Principled Reform

A. Legislative Codification: Learning from the Law Commission

None of this is a novel discovery. The Law Commission of India recommended, as early as its Seventy-First Report of 1978, that irretrievable breakdown be introduced as an independent statutory ground of divorce under Hindu law, precisely so that courts would not be left improvising a remedy through interstitial interpretation.³¹ The Commission returned to the question in 2009, in its Two Hundred and Seventeenth Report, again recommending that irretrievable breakdown be incorporated as a ground of divorce under both the Hindu Marriage Act 1955 and the Special Marriage Act 1954, and observing that in the continued absence of legislation, the Supreme Court had already begun using its Article 142 powers to grant such

³¹Law Commission of India, *The Hindu Marriage Act, 1955: Irretrievable Breakdown of Marriage as a Ground of Divorce* (Law Com No 71, 1978).

relief on a case-by-case basis.³² The Supreme Court itself echoed this call in *Naveen Kohli* in 2006, formally recommending legislative amendment and directing that its judgment be forwarded to the Ministry of Law and Justice.³³

A statutory ground of this kind, modelled on the safeguards proposed in the Marriage Laws (Amendment) Bill 2010, would have three structural advantages over the present arrangement that the case-by-case exercise of Article 142 cannot replicate. First, it would be available at the court of first instance, the family court, rather than requiring a litigant to exhaust two further tiers of appeal before the relief becomes cognisable at all; this alone would substantially narrow the access gap described in Part IV(A). Second, it would carry defined statutory safeguards, such as a wife's express right to oppose the grant of divorce on grounds of grave financial hardship, rather than leaving the adequacy of financial provision to the discretion of whichever bench happens to hear the eventual special leave petition. Third, and most importantly for present purposes, it would extend the benefit of the doctrine to every litigant governed by the relevant marriage statute, rather than confining it, as a matter of practical fact, to those with the resources to litigate up to the Supreme Court.

Comparative experience bears this out. Other common law jurisdictions that once relied on fault-based divorce have addressed precisely this problem through legislation rather than case-by-case judicial intervention. Australia's Family Law Act 1975 replaced its earlier fault-based regime with a single, no-fault ground of divorce, irretrievable breakdown evidenced by twelve months of separation, available to any applicant at first instance before the Family Court, without recourse to that country's apex court.³⁴ England and Wales moved in the same direction considerably later: the Divorce, Dissolution and Separation Act 2020 abolished the previous five fault-based facts and now permits either or both spouses to obtain a divorce on a bare statement that the marriage has broken down irretrievably, again processed as a matter of routine first-instance procedure rather than exceptional relief.³⁵ Both reforms achieve, through ordinary legislation available to every litigant, exactly the outcome that *Shilpa Sailesh* achieves in India only for those who can reach the Supreme Court: dissolution of a dead marriage without the need to assign blame. India's Law Commission proposed the same solution in 1978,

³²Law Commission of India, *Irretrievable Breakdown of Marriage: Another Ground for Divorce* (Law Com No 217, 2009).

³³*Naveen Kohli* (n 11).

³⁴Family Law Act 1975 (Cth) s 48.

³⁵Divorce, Dissolution and Separation Act 2020 (UK), s 1.

before either reform had matured into settled practice; the gap is not one of legal imagination but of legislative will.

B. Institutional Alternatives

Short of full legislative codification, which requires political will that has been absent for nearly half a century, two intermediate reforms could meaningfully narrow the gap this article has identified. The first is to vest family courts and High Courts with express jurisdiction, on the same guided factors the Supreme Court articulated in *Shilpa Sailesh*, length of separation, genuineness of breakdown, absence of realistic prospect of reconciliation, and adequacy of financial provision, to grant divorce on the ground of irretrievable breakdown at first instance, subject to appeal, rather than reserving this power as a matter of practice to the apex court alone. There is no principled reason, consistent with the Court's own reasoning that the ground responds to a widely shared social reality rather than an exceptional one, why the power to grant such relief should be functionally exclusive to India's highest court. The second is to strengthen legal aid infrastructure specifically for matrimonial litigants seeking to invoke irretrievable breakdown, including dedicated mediation cells attached to family courts, so that the factual determination the Supreme Court has said is central, that reconciliation has genuinely been attempted and has genuinely failed, can be made reliably and cheaply at the first tier of litigation rather than being effectively unavailable to litigants who cannot fund an appeal.

VI. Conclusion

Shilpa Sailesh v Varun Sreenivasan answered a real and long-standing problem in Indian family law: the absence of any legislative mechanism for two people, or even one of them, to exit a marriage that has become nothing more than a legal fiction. That the Supreme Court finally addressed this problem, after Parliament had declined to do so for nearly half a century despite repeated prompting from the Law Commission and from the Court itself, is to its credit. But the manner of the remedy carries its own costs. Because Article 142 can be invoked only by litigants who have already reached the Supreme Court, and because reaching the Supreme Court in a matrimonial matter ordinarily presupposes years of litigation before a family court and a High Court, the benefit of this jurisprudence accrues overwhelmingly to litigants with the resources, geographic access, and endurance to sustain that trajectory. For the majority of Indians whose marriages break down, the doctrine of complete justice remains, in practice, a

doctrine of complete justice for some.

That other jurisdictions solved the same problem decades ago through ordinary legislation, without waiting for their apex courts to act, underscores that the difficulty in India has never been a shortage of workable models. It has been a shortage of political will to adopt one. Nothing about India's constitutional structure or its family-court system makes legislative codification less feasible here than it proved to be in Canberra or Westminster.

This structural inequality is compounded by a doctrinal paradox that this article has sought to name. The same Court that treated years of marital separation as sufficient reason to override statutory silence and dispense with statutory conditions in *Shilpa Sailesh* treated comparable claims of dignity and exclusion, pressed by queer couples seeking to enter marriage, as matters for Parliament alone in *Supriyo*, decided within the same year. Whatever the formal doctrinal distinctions between exiting and entering a marital status, the asymmetry in the Court's willingness to act suggests that the boundaries of 'complete justice' under Article 142 are drawn less by consistent constitutional principle than by which litigants, and which classes of claim, the Court is prepared to treat as urgent.

The durable solution to both problems, unequal access and doctrinal inconsistency, lies where the Law Commission located it in 1978: with Parliament, not the Supreme Court. A codified ground of irretrievable breakdown, available at first instance in every family court in the country, coupled with statutory safeguards for the economically weaker spouse, would extend to every litigant the relief that Article 142 today extends only to those able to reach New Delhi. Until that legislation is enacted, the jurisprudence inaugurated in *Shilpa Sailesh* will remain what this article has called it: not complete justice, but justice by privilege.