Dhaka University Law Journal, 2024, 35 (1), 1-30
DOI: https://doi.org/10.3329/dulj.v35i1.77545

Achieving 'Complete Justice': A Comparative Study of the Constitutional Jurisprudence of India and Bangladesh

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Abstract: *Both public policy and legal policy warrant that justice is delivered to the litigant people without any excuse. The power to do 'complete justice' avails the Supreme Court a vast residual power to complete the arc of justice by overcoming hurdles and roadblocks barring it from meeting the end of justice. The power is marked as an inherent and extraordinary discretionary power – not like other statutory discretionary powers – by virtue of which the Supreme Court can issue any decree or order for the end of complete justice subject to a few limitations. Article 104 of the Constitution of Bangladesh and Article 142 of the Indian Constitution empower the Appellate Division of the Supreme Court of Bangladesh and the Supreme Court of India respectively to exercise this power. Though the power is of wide amplitude being vested upon the apex court of the country by the constitution itself, it is nonetheless residual in nature. The contours of the power of 'complete justice' has remained a contentious issue in India—some arguing that the power can be exercised only restrictively, while others argue that the scope of the power is expansive. In absence of clear yardsticks to decide which situations entail the necessity of exercising the power, the power is still an enigma to the legal academia, though the Supreme Court of India seems to prefer liberal interpretation of the power. So, its ambit is wide and elastic enough to cover any new situation of necessity. Bangladesh Supreme Court has also exercised this power for a long time now, but no academic analysis of its journey has been undertaken so far. This article aims to elucidate the philosophy of devising the power and also to outline its scope and the trends of judicial interpretations in Bangladesh and India through a comparative analysis.*

Keywords: Complete Justice, equity, the constitution of Bangladesh, apex court, social justice, inherent power, environmental justice

1. Introduction

Ensuring justice to the justice-seekers is the prime goal of every welfare state. The judiciary as a whole is constitutionally bound to ensure justice for all in

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accordance with law. The apex court is the last bastion of justice, and hence it must ensure that the journey of justice is completed, which might occasionally require exercising some extra-ordinary powers to meet the ends of justice. The idea of 'complete justice' is such an extra-ordinary power of the apex courts which has been incorporated in both the constitutions of Bangladesh and India. The power to do 'complete justice' is a discretionary power of the Supreme Court, by virtue of which the court can issue *any decree or order* for the end of complete justice. The power is also an inherent and plenary one to deal with extra-ordinary situations to achieve justice. .[1]

Both Bangladesh and India share many commonalities including common legal traditions and identical colonial past, and the constitutional norms and values of these countries are deeply rooted in the ideals of emancipation of common people, securing fundamental human rights and freedom, and equality and justice--political, economic and social for all citizens. Many provisions in Bangladesh Constitution demonstrate remarkable similarity with its Indian counterpart, Article 104 of the Bangladesh Constitution and Article 142 of the Indian Constitution being a case in point.

Article 104 of the Constitution of Bangladesh empowers the Appellate Division of the Supreme Court of Bangladesh to exercise the power of complete justice in order to ensure that ends of justice do not fail for technicalities. Article 104 of the Constitution of Bangladesh provides that the Appellate Division of the Supreme Court shall have the power to issue such orders or directions as may be necessary for doing complete justice in any cause or matter pending before it. It further provides that the power shall include power to issue orders for securing attendance of any person or discovery or production of any document.[2] Similar power of issuing necessary decrees, orders etc. in order to do complete justice can be found in Article 142 of the Constitution of India.[3]

Though the power is of wide amplitude being vested upon the apex courts of both countries by the constitution itself, it is nonetheless residual in nature. Like

[1] Dr. Justice B. S. Chauhan, '*Courts and its Endeavour to Do Complete Justice",* available at http://www.nja.nic.in/17%20Complete%20Justice.pdf accessed 12 January 2023.

[2] See Article 104 of the Constitution of Bangladesh.

[3] Article 142 of the Indian Constitution states: (1) 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 and, until provision in that behalf is so made, in such manner as the President may by order prescribe. (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

the English doctrine of 'justice, equity and good conscience,' according to which the Chancery Court delivered justice in matters not covered by the common law, the doctrine of complete justice enables the apex court to deliver justice in myriad of new cases and novel situations that arise with social advancements hitherto not contemplated by the legislature. In the Indian sub-continent, the provision of complete justice was first introduced in the constitution of India, and then in the constitution of Pakistan and Bangladesh.

For the last 70 years, the Indian Supreme Court exercised its complete justice jurisdiction under Article 142 of its constitution, and used it in numerous cases, some of which were admired and some of which were criticized by the legal community.

However, the power of doing 'complete justice' is sometimes contested on the ground that it allows the policy-making by the court which goes beyond the proper realm of the judicial review. Critics allude to undue expansion of complete justice jurisdiction and judicial overreach, encroachment upon other branches of the government and violation of separation of powers, bypassing or directly going against provisions of substantive law, and, finally, inconsistency in complete justice jurisprudence and resultant judicial uncertainty. All of these are in turn seen as the offshoots of the lack of concrete guidelines regarding this power either in the constitutional provision itself, or injudicial decisions. In case of Bangladesh, the complete justice power has never been put to systematic analysis by legal academics.

This article aims to do so in light of Indian Supreme Court's decisions and delves into the limitations of the powers of the apex courts. The main purpose of comparing the Indian constitutional jurisprudence with that of Bangladesh is to identify the main trends of judicial decisions and to highlight the effectiveness of such power to achieve 'complete justice' in both jurisdiction. It also examines commonalities and contradictions in judicial interpretation of such power by the apex courts in two jurisdictions. A comparative approach to the constitutional jurisprudence on the power of doing complete justice will provide valuable insights for understanding its nature and scope and different perspective taken into account by the apex courts in interpreting it.

After the introduction, Part 2 of the article juxtaposes the Bangladeshi and Indian constitutional provisions on complete justice, and sets the tone for later discussion. Part 3 and Part 4 aim to explain the nature, origin and underlying philosophy of the power of complete justice. Part 5 elucidates how the power was exercised by the Indian Supreme Court, and how the Court's approach fluctuated from restrictive to expansive interpretation. Part 6 of the paper shows the trends of complete justice cases in Bangladesh. Part 7 mentions cases where the power

was either misused or not used as required. Part 8 demonstrates the commonalities and contrasts between Bangladeshi and Indian jurisprudence on complete justice. And finally, Part 9 concludes the article drawing lessons from both jurisdictions.

2. 'Complete Justice' in Context

The core functions of any constitution are to structure the state institutions, demarcate the power and authority between different organs of the state, and lay down the role of judiciary. Under modern constitutions, the functions of the judiciary encompass not only settlement of disputes but also interpretation of laws, institutionalization of the rule of law and the protection of fundamental rights. The power of the complete justice is an overarching power which ensures that the compass of justice is not disabled or crippled due to the failure of the legislature in covering a matter or due to the limitation of language.

A comparative reading of both constitutions reveals that Article 104 of Bangladesh constitution, to a great extent, paraphrases the Article 142 of the Indian constitution, only adding to the repertoire of the power of complete justice "directions" and "writs" in addition to "decrees" and "orders." But like the Indian provision, the powers are limited to "cause and matter pending before [the Court]", and hence the power cannot be exercised *suo motu*. And like the Indian Supreme Court, the Appellate Division of Bangladesh has not limited itself in its exercise of the power to "issuing and execution of processes." The most important similarity between the two provisions, however, is that there is not definition of 'complete justice' in these two constitutions, nor are the limitations of this power clear from the respective texts. Perhaps no such attempt to define or specify 'complete justice' is made in order to keep the very purpose of the endowment of the power intact.[4]

In absence of such clarifications, it is only expected that that judicial creativity would come up with diverse interpretations, and exactly that happened in both countries. The judicial interpretations of Supreme Courts of both Bangladesh and India have outlined its framework from time to time. Besides, the judicial decisions have also thrown light on the limits of this power and the necessity of such limits.

There are also no yardsticks to decide which situation or which case entails the necessity of exercising the power. So, its ambit is wide and elastic enough to cover any new situation of necessity. Though the power involves the use of the discretion of the court to remedy an injustice, it demands judicious exercise of the discretion. Various exertion of the power can be found in the judicial decisions of the apex courts of both Bangladesh and India.

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[4] Mahmudul Islam, *Constitutional Law of Bangladesh* (2nd ed., Mullick Brothers 2011) 634.

The notion of complete justice is not static, rather dynamic. The court's decision in exercise of the power is not uniform in all cases. It varies from case to case, situation to situation.[5] The idea of 'complete justice' sometimes corresponds with existing law, but sometimes it may transcend the law and encompass 'fairness', 'equity and good conscience', 'commonsense' and 'reasoning of an ordinary reasonable man' and so on.[6] The power can be an effective tool to uphold human rights along with other tools.[7] In exercise of the power, the apex court can ignore technicalities of legal proceeding and circuitry of law in order to prevent failure of justice.[8] With the passage of time, the power to do complete justice has turned into a 'residuary power,' supplementing and complementing ordinary powers of the court.[9]

It appears from reading of the provisions on complete justice under Bangladesh and Indian constitution that the provisions are enabling in nature as they empower the apex courts to do complete justice in cases where the law is silent or the law is found to be inadequate. The general approach is that the court should ordinarily follow the procedure prescribed in the statutory enactments but in circumstances where the court is of the opinion that there is a prospect of gross injustice being done to the parties, it should exercise its inherent powers to do complete justice.

In fact, the idea of empowering the apex courts with the extraordinary power of 'complete justice' is an ingenious one, peculiar to the constitutions of Bangladesh and India. The underlying philosophy of the provision is very much consistent with the idea of a welfare state envisaged in the Preamble of the Constitution of Bangladesh as well as that of India.[10]

3. Complete Justice: What Kind of Justice Is It?

There is no clear definition of 'complete justice' in the constitution of Bangladesh or India, and the Supreme Courts of these two countries have refrained from prescribing a precise definition, perhaps consciously, to keep the idea open

[5] *National Board of Revenue v. Nasrin Banu* (1996) 48 DLR (AD) 171, 178.

[6] Ibid

[7] Romil Bhatkoti, 'Human Rights and Judicial Activism in India' [2011], 72(2) *The Indian Journal of Political Science* , 440.

[8] Siddarth Sharma, 'Myth of Judicial overreach' [2008] 43(10) *Economic and Political Weekly* , 18.

[9] Michaela Hailbronner, 'Transformative Constitutionalism' [2017] 65(3) *The American Journal of Comparative Law* 555.

[10] The Preamble of the Constitution of Bangladesh is as follows:"...it shall be a fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation – a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

to various possibilities as required by the circumstances of each case. Of course, the Supreme Court of India made it very clear that the powers conferred by these two majestic words 'complete justice' are of "very wide amplitude."[11] How wide is the idea of 'justice' in 'complete justice?' Does it include all dimensions of the idea of justice, say economic, social and political justice? Can the Supreme Court of India and the Appellate Division of the Bangladesh Supreme Court make orders implementing justice—economic, social and political—as mandated in the preambles and directive/fundamental principles of state policy of both constitutions? Some authors seem to think so. While discussing the concept of 'justice' in relation to 'complete justice' in Indian context, some authors referred to Rawls' *A Theory of Justice* and Amartya Sen's *The Idea of Justice*,[12] and made the impression that the Supreme Court could order implementation of social and economic justice within the purview of Article 142. In our opinion, such an interpretation would make directives/fundamental principles of state policy directly enforceable/justiciable within the scope of article 142, an interpretation that is by direct provisions of the constitutions of both countries discouraged.[13]

It is, therefore, submitted that 'justice' in Article 142 means 'justice in matters before the court,' not in matters that cannot be brought before the court because of being non-justiciable. In other words, 'justice' in Article 142 of the Indian Constitution and Article 104 of the Bangladesh Constitution talks about 'judicial justice' or 'legal justice'[14]—and not economic, social and political justice. Justice M. Hidayatullah in his book *Miscellania* opined that the word 'justice' when used as social and economic justice, as done in the preamble and directive principles, is different from justice done by the courts. In his words, "The Preamble assures to all its citizens Justice, Liberty, Equality and Fraternity and in that order. Justice which is mentioned here is not justice dispensed through courts. It is a higher concept of justice for it is justice social, economic and political."[15]

On a similar vein, while vehemently advocating for economic and social justice, Krishna Iyer J. made it very clear that what courts of law does as 'legal justice' is but a little part of totality of justice enterprise, and the rest must be taken

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[11] *Supreme Court Bar Association* v. *U.O.I.*, (1998) 4 SCC 409, 431.

[12] Merin Bobby, 'Re-evaluating the Dynamics of Article 142 of the Indian Constitution to Undo Injustice: An Exploratory Study,' [2021] 4 (2) *International Journal of Law Management & Humanities*, 866, 867- 68

[13] Article 37 of the Indian Constitution and Article 8 of the Constitution of Bangladesh say that directive/fundamental principles of state policy are not justiciable like fundamental rights.

[14] The terms 'judicial justice' and 'legal justice' are coined by Justice V. R. Krishna Iyer. See V. R. Krishna Iyer, *Law Versus Justice* (Deep and Deep Publications 1989) 18-25.

[15] M. Hidayatulla, 'The Keynote of the Constitution (Eighth Feroze Gandhi Memorial Lecture) [1968] in *Miscellania* (N. M. Tripathi Private Limited 1988) 255

care of by the legislature and the executive.[16]

In the context of India, Krishna Iyer J. opines that "[s]ocial justice is struggling to be born; constitutional organs must midwife it. But where is the will to lay the cornerstone of the new order?"[17] This is not to say that social justice will never be born. Certainly, the Supreme Court can midwife social justice and bring it into life incrementally. And such a catering needs extraordinary powers as handed down by Article 142 to the Supreme Court so that it can begin the midwifery of social justice judicially. On some occasions,the apex court itself cautioned that this can be done only on rare occasions. Therefore, economic and social justice will still remain the primary responsibility of the legislature and the executive, and justice done by judiciary is basically 'corrective justice,' and not 'distributive justice.'

Krishna Iyer J. mentioned a number of imperfections of legal justice, mending of which need extraordinary measures.[18] No doubt, the extraordinary power of the Supreme Court of doing 'complete justice' can cure at least some of the weaknesses and shortcomings of legal justice. In *Prem Chand Garg v. Excise Commissioiner, U.P.*, Gajendragadkar J. made it clear that Article 142 of the Indian Constitution is exactly aimed at doing so:

> It may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court, for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties.[19]

Thus, the power of complete justice is meant to cure imperfection of the law, and in no way is meant to complete the journey of justice to the full extent. Werner Menski rightly comments that to try to achieve complete justice is like "looking for the Moon." Motivated by Amartya Sen's idea of justice, Menski argues that securing global justice or complete justice is impossible, and if we want an ideal scenario, we will be only disappointed.[20] Therefore, we can theorize here that "complete justice" does not mean "perfect justice;" rather it means more justice.

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16 Iyer (n 14) 23.

17 Ibid 18.

18 Ibid

19 AIR 1963 SC 996 [13]

20 Werner Menski, 'Still Asking for the Moon? Opening Windows of Opportunity for Better Justice in India' [2016] 49(2) *Verfassung und Recht in* Übersee */ Law and Politics in Africa, Asia and Latin America* 125-147.

In some cases, the Indian Supreme court attempted to define the scope of this power. For instances, the Indian Supreme Court in *Ashok Kumar Gupta v. State of U.P.* has elaborated the phrase "complete justice" in the following manner:

"The phrase "complete justice" engrafted in Art. 142 (1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Art. 32, 136 and 141 of the Constitution."[21]

There can be little doubt that in the identification of the problem of incompleteness of judicial justice and in suggesting how to use powers of 'complete justice' to mend those incompleteness, Justice Krishna Iyer and Gagendragadkar JJ. respectively are talking about justice dispensed by the courts of law, and not justice in the broad sense of the term: economic, social and political justice.

4. Origin and Nature of 'Complete Justice'

The genesis of the concept of 'complete justice' is found in the concept of equity. Sudhanshu Rajan is perhaps the first author who traces the genesis of 'complete justice' to the English doctrine of 'equity, justice, and good conscience."[22] But the analogy of complete justice with equity is nothing new. The Indian Supreme Court expressly mentioned article 142 as "a power of equity" on a number of occasions.[23] In *Supreme Court Bar Association v. Union of India,* the Supreme Court observed: "The power to do complete justice is in a way corrective power, which gives preference to equity over law…"[24] In fact, any discussion of justice cannot be complete—far less a discussion on 'complete justice'—without discussing equity. One author aptly remarks, "They [justice and equity] are two sides of the same coin. A study of one is barren without consideration, at the same time, of the other…"[25] The genesis and history of equity reveal how avoiding miscarriage of justice and the urge for 'completing justice' played out in England leading to the establishment of the Court of Chancery. There are a number of characteristics of equity which can provide important, if not all, insights into the nature of the power of complete justice.

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[21] The case is available at https://indiankanoon.org/doc/897981/

[22] Sudhanshu Ranjan, *Justice versus Judiciary: Justice Enthroned or Entangled in India?* (Oxford University Press 2019) 187-191

[23] Rajat Pradhan, 'Ironing Out the Creases: Re-examining the Contours of Invoking Article 142 (1) of the Constitution,' [2011] 6 *NALSAR Stud. L. Rev.* 1, 4, 7 (referring to *Sandeep Subhash Parate v. State of Maharashtra* [2006] 7 SCC 501; *Ministry of Defense v. A.V. Damodaran,* [2009] 9 SCC 140, 147, 151)

[24] *Supreme Court Bar Association v. Union of India* [1998] 4 SCC 409 (S.C.)

[25] Howard L. Oleck, 'Historical Nature of Equity Jurisprudence' [1951] 20 (1) *Fordham Law Review* 23, 26.

4.1 Extraordinary Relief

Equity resembles with 'complete justice' in that both provide for extraordinary relief in absence of, or due to inefficiency of, regular relief.[26] In classical understanding of equity, in which its history is traced back to Aristotle, equity is employed to cure the defect of law owing to its generality. Aristotle said, "Whenever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, would admit, and had he known it, would have rectified in legislating."[27] Equity, however, went far beyond this limited Aristotelian version. Equity was not limited to 'generality-curing' function alone; rather it provided many new reliefs in cases where no relief was suggested by law at all. In other words, equity comes into play because there is no discernible principle of justice on an issue because of a vacuum in law.[28] Howard L. Oleck traces the genesis of equity in its 'justice completeness' function in these words:

> And the chief principle upon which equity is founded, dearly, is the principle that justice must be done, despite the seeming finality of any rule of law, if that rule actually works an injustice. The same general idea is conveyed by various other terms and phrases, such as "conscience," and "bona fides," "the law of nature," "right and justice," "good morals," and so on. Vague and apparently unpredictable as this idea may seem, it is the real basis of equity.[29]

The extraordinariness of equity and complete justice jurisdictions are indicated by their bestowal on apex judicial bodies, namely, the English Court of Chancery and the Supreme Court of the land respectively. Bispham's historic definition of equity mentions its extraordinary character as follows: "Equity is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction."[30]

Edwin W. Patterson rightly commented that equity has no monopoly over natural justice.[31] That might be true, but one might also argue that equity stands

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[26] Howard L. Oleck writes, "The function of Equity is the correction of the (civil or common) law where it is deficient by reason of its universality *(i.e.:* its tendency to establish rules without exceptions).' In this broad, general sense, Equity is the body of principles which provide and govern exceptions to the law. But that is not all that Equity is." Ibid 23

[27] Aristotle, *Nicomachean Ethics* (J.E.C. Welldon trans., Macmillan 1912) 172.

[28] Charlie Webb, 'Discretionary Justice' in Dennis Klimchuk et al. (ed.), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 12.

[29] Oleck (n 25) 25

[30] Bispham, *Equity* (9th edn 1915) 1

[31] Edwin W. Patterson 'What is Equity?' [1923] 9 (10) *American Bar Association Journal* 647, 648.

for a higher standard of law, the like of natural law, when ordinary law fails. If all other remedies and enacted laws fail, only principles of extraordinary law derived from conscience and sense of equity—or say, an open-ended commitment to the idea of justice and its equitable application—can complete the process of justice.

4.2 Inherent Power but Residual in Nature

Taking equity analogy a little further: complete justice, like equity, is a residual power. It comes into effect, when other plenary provisions and rules fail to do justice to the parties before the Supreme Court. Maitland, the legendary author on equity writes in his *Lectures on Equity* that common law provides the rule, and equity fulfills it when the former lacks in its functioning. In Maitland's words, "[B]ut it is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year I875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy law, but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would require."[32]

Similarly Professor Langdell tracing history of equity writes, "Equity cannot, therefore, create personal rights which are unknown to the law…nor can it impose upon a person or a thing an obligation which by law does not exist …To say that equity can do any of these things would be to say that equity is a separate and independent system of law or that it is superior to law."[33]

Hohfeld, disagreeing with both writers, opined that in lots of matters, especially in cases of exclusive and auxiliary jurisdiction, legal and equitable rules conflict a lot, and "whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative."[34] In other words, there are cases, in which equity court can create independent rules of equity, which will be binding. Of course, such cases are rare, and will arise only when the main scheme of law fails to cover it, because equity was born to supplement common law, not to replace it.

If we read article 142 of the Indian Constitution in the light of other 'inherent but residual powers' conferred by the Code of Civil Procedure and the Code of Criminal Procedure on civil and criminal courts in general, we see how residual power works.[35] Residual power works to supplement the incompleteness of

[32] Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' [1913] 11 (8) *Michigan Law Review* 537, 541-42 (quoting *Maitland's Lectures on Equity* 17).

[33] Ibid 543 (referring to Professor Langdell, 'Brief Survey of Equity Jurisdiction' [1887] I *Harvard Law Review* 55, 58

[34] Ibid 544

[35] Dr R. Prakash, 'Complete Justice Under Article 142,' [2001] 7 SCC (Jour) 14.

plenary power, and the residual jurisdiction can be invoked to supplement the plenary jurisdiction, and not to supplant it. Oleck writes, "[E]quity could not interfere when the common law courts could offer an adequate remedy."[36]

In *Kalyan Chandra Sarkar v. Rajesh Ranjan* the Supreme Court of India held:

> It may therefore be understood that, the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties…and are in the nature of supplementary powers…[and] may be put on a different and perhaps even wider footing than ordinary inherent powers of a court to prevent injustice. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents ‹clogging or obstruction of the stream of justice.[37]

The residual nature of this power is also emphasized by the Indian Supreme Court in the case of *Supreme Court Bar Association v. U.O.I.* where the Supreme Court reaffirmed that the plenary powers of the Supreme Court under Art. 142 of the Constitution are inherent in the court; these powers exist independent of statutes with a view to doing complete justice between the parties, and are of very wide amplitude and exist as a separate and independent basis of jurisdiction apart from the statutes.[38]

4.3 'Complete Justice' as "Discretionary Justice"

Like equity courts, in exercising complete justice jurisdiction, the apex court uses wide discretion. Aharon Barak in his book *Judicial Discretion* defines 'judicial discretion' as a power "to choose between two or more alternatives, when each is lawful."[39] He distinguishes between narrow and broad discretion in that the former provides for only two alternatives to choose from, whereas the latter provides for a range of alternatives. Barak approvingly refers to S. A. de Smith's comment that "To say that somebody has discretion presupposes that there is no uniquely right answer to his problem."[40] Whereas discretion is exercised by judges in most of the cases, when it comes to equity and 'complete justice' jurisdictions, the range of alternatives is expansive and wide, and the court can choose *any* alternative that is appropriate in the context of the case.

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[36] Oleck (n 25) 37-38

[37] [2005] (3) SCC 284

[38] Supreme Court Bar Association v. U.O.I., (1998) 4 SCC 409, p. 431

[39] Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 7.

[40] Ibid 10

Generally, discretion is given to courts impliedly, and only in a few cases discretion is provided in the statute or the Constitution itself expressly. In case of complete justice, Article 142(1) and Article 104 of the Indian and Bangladesh Constitution respectively provide for wide discretion to the Supreme Court of India and the Appellate Division of the Bangladesh Supreme Court in express terms as it is provided in both Articles that any decrees, orders or directions may be passed and issued as necessary for doing complete justice.

4.4 Hard to Bring within Regulatory Framework

It is also interesting, and in the context of this study pertinent to note that both equity and complete justice are hard to define, and their scope and extent are better kept open-ended.[41] All the circumstances in which equity can be applied, and complete justice invoked, cannot be catalogued. Authors and judges writing and commenting on equity and 'complete justice' repeatedly mentioned that their use will depend on the demand of the circumstances. In *Earl of Oxford's Case*, the Chancellor wrote: "The cause why there is a Chancery is, for that Mens Actions are so divers [sic] and infinite, that it is impossible to make any general law which may aptly meet with every particular Act, and not fail in some circumstances."[42]

Similarly, the Supreme Court of India in *Delhi Development Authority v. Skipper Construction Co.* held:

> As a matter of fact, we think it advisable to leave this power undefined and uncatalogued so that it remains elastic enough to be moulded to suit the given situation. The very fact that this power is conferred only upon this Court, and on no one else, is itself an assurance that it will be used with due restraint and circumspection, keeping in view the ultimate object of doing complete justice between the parties.[43]

In case of equity as well as complete justice, there is a war between those who think that the rules of their exercise must be precise so that the outcomes are certain and predictable and those who think that the rules of exercise of equity and complete justice must be flexible so that they can be used in each given case according to its merit to meet the ends of justice.[44] The latter argument is more

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[41] Oleck writes, "The legal term "equity" is generally acknowledged to be impossible to define completely. Almost everyone who has attempted to compose a definition of this word has ended by capitulating to the general view that the term has too many shades of meaning to be described definitively in one, or even several sentences." Oleck (n 25) 23. Similarly, 'complete justice' cannot be defined only in light of these two words.

[42] *Earl of Oxford's Case* [1615] 21 Eng. Rep 485, 486.

[43] (1996) 4 SCC 622, at 634

[44] Doug Rendleman, 'The Triumph of Equity Revisited: The Stages of Equitable Discretion' [2015] 15 *Nevada Law Journal* 1397, 1453 .

formidable because equity and complete justice are brought to mend the very rigidity of law which threatened a failure of justice in the first place. In *Hecht v Bowels,*[45] the leading case for "universal equitable discretion" in the United States, the court commented:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and the private needs as well as between competing private claims.[46]

5. Trends of Judicial Decisions on Complete Justice in India

The power of the Supreme Court of India under article 142 has remained a debated issue, to say the least. There are two reasons behind this: *First,* there was no debate in the Constituent Assembly on this Article, and hence, the Constituent Assembly left little clue as to its intention regarding the scope of the article; *Second,* Article 142 itself has not clearly enumerated the full scope of this power, of course, which is not expected of a constitutional provision either, especially in a matter which is equitable in nature. This resulted in varied interpretive approaches of the Supreme Court of India so far as article 142's application is concerned, swaying the arc of Article 142 like pendulum from time to time. It seems that the debate as to Article 142 is not over, and the pendulum of interpretation is still swaying. This section highlights various approaches adopted by the Supreme Court regarding interpretation of Article 142 and identifies the trends of judicial decisions on the power of doing complete justice in India.

5.1 From Restrictive Approach to Expansive View

Initially, the Supreme Court used article 142 to overcome various procedural complexities and to cover "silence of law" that hindered streams of justice from flowing properly.[47] Some even argue that article 142 is purely procedural in nature meant for removing procedural blocks only. In other words, article 142 was treated as if it was not meant for conferring extraordinary powers. Dr. R. Prakash is one of those writers who think so. He refers to the marginal note of Article 142, which reads: "Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc." and comments that this marginal note suggests that the power was

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[45] [1944] 321 US 321

[46] Ibid 329-30

[47] Harshad Pathak, 'Article 142: Incomplete Justice?' [2013] *Chanakya National Law University Law Journal* 5.

meant to cover procedural aspects only. [48]

Dr. R. Prakash further argues that the aim of Article 142 was to make the Supreme Court independent in case of enforcement of its decrees and orders, and it was never meant by founding fathers to be used for judicial law-making and other extraordinary dimensions its interpretation has partaken later on, such as, bypassing substantive laws directly or indirectly in arriving at a decree or order under article 142.[49] In other words, the main purpose of Article 142 was equipping the Supreme Court with powers of enforcement of its own decrees, if needed.[50] As argued earlier, the above restrictive procedural argument does not hold, given that all authorities, civil and judicial, are obliged by article 144 to act in aid of the Supreme Court, and if that is so, article 142 would be a redundancy, if it were to cover only procedural disability like hitherto Federal Courts suffered during pre-independence era.

However, the fact remains that during initial years of Indian constitutional journey (up to 1988), the Supreme Court gave rather a restrictive interpretation to article 142, if not as restrictive as Dr. R. Prakash and Sudhanshu Ranjan suggested above. In *Prem Chand Garg v. Excise Commissioner of Allahabad*, the Supreme Court said that the court in exercise of article 142 cannot give an order which is inconsistent with law, much less inconsistent with fundamental rights. In this case, Gajendragadkar, the Chief Justice of India observed: "The powers of the Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."[51] Interestingly, this comment was made by way of *obiter dicta*. Later on, in *A. R. Antulay v. R. S. Nayak*, a seven judge bench of the Supreme Court took the same decision and by way of *ratio decidendi* of the case held that in exercise of article 142 powers, the Supreme Court cannot go against a statutory law.[52]

From 1989, the Supreme Court changed its earlier restrictive approach and started providing expansive interpretation of Article 142. The first case in which the Supreme Court departed from *Garg* and *Antulay* is *Delhi Judicial Service*

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[48] Ranjan (n 22) 205.

[49] Prakash (n 35).

[50] Ranjan (n 22) 186.

[51] AIR 1963 SC 996, 1002 [12]

[52] [1988] AIR SC 1531

Assn. v. State of Gujarat in which the Supreme Court observed: "This Court's power under Article 142(1) to do 'complete justice' is entirely of 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 this Court."[53] Such an approach continued by the Supreme Court in many subsequent cases including *Union Carbide Corporation v Union of India.*[54] In this case, the court took a very wide view and explained that a simple provision of a statute, in absence of a clear prohibition, cannot obstruct the exercise of Article 142 powers. It went so far as to declare that in order to do complete justice, it could even override the laws made by the Parliament, as prohibitions or limitations or provisions contained in ordinary laws cannot curtail the powers of the apex court under Article 142. The Court further observed that if the power under Article 142 is made subject to express statutory prohibitions, it will amount to giving priority to statutory provisions over a constitutional provision.[55] In this case while settling the Bhopal Gas Disaster dispute at 470 million US Dollars, the Supreme Court ordered for withdrawal of all civil and criminal matters concerning the Bhopal Gas Disaster as it was a stipulation in the settlement between the parties. Rejecting the argument that it had no jurisdiction to transfer a criminal case to itself,[56] the Supreme Court held that quashing criminal proceedings is well within the ambit of its powers under Article 142. In its judgement, the court took a holistic approach to the Article 142 as it observed that "Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions and limitations on the constitutional powers under article 142…. Perhaps, the proper way of expressing the idea is that in exercising powers under article 142 and in assessing the need of "Complete Justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly."[57]

In *Vinay Chandra Mishra* case,[58] the Court continued the position taken in *Union Carbide* case and made it clear that *Garg* is no longer a good law. In this case, the Court suspended the license of an advocate for its contempt, and rejecting the contention that only the Bar Council could make the decision of such suspension of license held that Article 142 conferred such powers to the

[53] [1991] 4 SCC 406, 462 [51]

[54] *Union Carbide Corporation v Union of India* [1991] 4 SCC 584

[55] Islam (n 4) 637.

[56] R. Prakash, 'Supreme Court's Power to Do Complete Justice Under Article 142 – Is It A Substantive Power and Not Subject to Rule of Law?- An Analysis of Article 142 of the Constitution of India' (Unpublished PhD Thesis at the University of Madras, 1999) 50.

[57] *Union Carbide* (n 57) 18

[58] [1995] 2 SCC 584

Supreme Court to decide on the issue. Interestingly, the *Mishra* judgment was overruled in *Supreme Court Bar Association vs. Union of India.*[59] In this case, the court held that complete justice should be used for salutary purposes only, i.e. to do complete justice. While upholding the extraordinary character of this power (even upholding the power to go against a statute), the court held that this Article can only supplement, not supplant the statutory law. While this case pronounces words of caution, the expansive approach continued.

If we analyse the trends of restrictive and expansive approaches, we can say that since *Judicial Service Assn. v. State of Gujarat* and more with the decision of Union Carbide[60], the expansive view has by and large prevailed. In *Delhi Electric Supply. vs Basanti Devi And Anr* on 28 September, 1999, the Court approvingly referred to *Supreme Court Bar Association v. Union of India*[61] where the Court reiterated wide amplitude of Article 142, and that the power exists independent of statutes, and that though of residual and supplementary in its import, basically the power is plenary in nature.[62] In *Academy of Nutrition Improvement v. Union of India*, the Supreme Court held that Article 142 conferred unfettered independent jurisdiction to pass any order in public interest to do complete justice.[63] The restrictive approach seems to be resurfacing among "originalist" academicians, who want to focus on language and marginal note of Article 142, while the judiciary seems to have maintained its expansive approach since 1989 onwards by gradually adopting a liberal approach in interpreting article 142.

5.2 Guidelines of the Indian Supreme for Exercising Complete Justice Jurisdiction

In India, it is now well settled that the Court's power is very broad based. There are only two main conditions in exercise of this power, as directly expressed in article 142 itself: First, this power can be exercised only in a case pending before the Supreme Court, and hence it cannot be exercised *suo motu*; and second, the order passed must be necessary for doing complete justice.

However, in several cases the court indicated further guidelines based on overall constitutional structure, separation of powers, and legal policy. Among the guidelines, following can be mentioned:

5.2.1 Using the Power Sparingly

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[59] [1998] 4 SCC 409

[60] *Union Carbide* (n 57)

[61] (1998) 4 SCC 409

[62] *Supreme Court Bar Association v. Union of India* 1998 (4) SCC 409 [para 47]

[63] (2011) 8 SCC 274.

In several cases, the Supreme Court indicated that the power should be used only sparingly, and the Court has restrained itself from using this power when statute itself provided for alternative remedies. For example, in *Laxmidas Morarji v. Behrose Darab Madan*, the Supreme Court of India held:

> "Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, *this Court generally does not pass an order in contravention of or ignoring the statutory provisions* nor is the power exercised merely on sympathy."[64] (emphasis added)

In *Supreme Court Bar Association v. Union of India and Anr.*, the Supreme Court said that the power cannot be exercised to supplant the applicable law or to build a new edifice by ignoring the existing law, and indirectly achieving something that cannot be achieved directly..[65]

5.2.2 Not to Give Any Party any Undue Favor

The power of exercising complete justice needs to be based on the principle of equality as in *Bharat Sewa Sansthan vs U. P. Electronics Corporation* [66] the Court said that article 142 power cannot be exercised so as to give undue favour to one of the parties to a litigation. The Court held:

> The nature and ambit of the power of this Court under Article 142 of the Constitution of India, no doubt, is meant to do complete justice between the litigating parties, but at the same time this Court has to bear in mind that the power is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law. Human and equitable approach should be balanced to do complete justice to both the parties and not be tilted in favour of either party without ignoring the statutory provisions. This Court in exercise of its jurisdiction can grant appropriate relief where there is some manifest illegality, or where there is manifest want of jurisdiction, or where some palpable injustice is shown to have resulted to the parties.[67]

Thus, the court has made a delicate balance between the need for doing complete justice and respecting express statutory provisions.

5.2.3 Not to Ignore Statutory Rights

In *A. B. Bhaskara Rao vs Inspector Of Police, Cbi*[68], the Supreme Court of India gave some guidelines regarding exercise of complete justice jurisdiction

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64 [2009] 10 SCC 425 [19]

65 *Supreme Court Bar Association vs Union Of India & Anr* (decided on 17 April, 1998)

66 Decided on 29 August, 2007 (Appeal (civil) 2016 of 2006)

67 Ibid para 22

68 Criminal Appeal No. 650 of 2008 (decided on 23 September, 2011)

under article 142 of the Constitution of India, while maintaining that the constitutional power of complete justice is not restricted by statutory enactments, it emphasized on not ignoring statutory rights and powers, nor waiving statutorily imposed time limits and sentencing limits, nor exercising directly in conflict with the statute on the subject. [69]

6. Complete Justice under the Constitution of Bangladesh

A perusal of Article 104 of the constitution of Bangladesh indicates that the provisions were inserted by the founding fathers of the Constitution as a weapon to fight against gross injustice or miscarriage of justice and to handle any situation the solution of which cannot be found out in the existing law. This Article revitalizes the feature of independence of judiciary as it aims to remove dependence of the judiciary on the executive for the execution of processes and enforcement of decrees and orders etc.

The idea of complete justice is one of the defining features of jurisdiction of the Appellate Division of the Supreme Court of Bangladesh. Although this power to exercise in order to deliver complete justice under the constitution of Bangladesh is not innovative, it is unique in the sense that only the Appellate Division can exercise it and the High Court Division does not have this power. As mentioned above, similar provision exists in the Constitution of India. Regarding conferment of this power, the Indian Supreme Court observed that this power is conferred to be used in special circumstances and for special reasons having the concept of justice in mind.[70]

However, the scope of power under this Article is not delineated in the Constitution of Bangladesh like the constitution of India. The power to do complete justice under the Constitution of Bangladesh is not circumscribed by any limiting words or expressions. Like the Indian constitution, this is an extra-ordinary power conferred by the Constitution and no attempt has been made to define or describe 'complete justice'.[71]

According to the Supreme Court of Bangladesh, this power can be exercised in a matter or cause which is pending in appeal under Article 103 when the court finds that no remedy is available to the appellant though gross injustice has been done to him for no fault or laches of his own.[72]

There are no explicit restrictions or limitations imposed on the power by

[69] Ibid, para 19 (e, f, g, h, i)

[70] *Karnataka v. Andhra Pradesh* (2000) 9 SCC 572

[71] Islam (4 7) 887.

[72] *Raziul Hasan vs. Badiuzzaman*, (1996) 17 BLD(AD) 253; *Abdul Malek v. Abdus Sobhan* (2009) 61DLR (AD) 124

way of constitutional provisions, but limitations are implied. The most vital limitation is that the power cannot be exercised transgressing the fundamental rights guaranteed by the constitution. As fundamental rights form integral part of the constitution and the constitution itself does not allow any law in breach of fundamental rights, that is why the power under Article 104 of the Constitution of Bangladesh cannot be used in such a manner as to defy the rights specifically recognized and enforced by the Constitution though the end is to do "complete justice".[73] Thus, the power to do 'complete justice' needs to be exercised consistent with the fundamental rights guaranteed under the Constitution of Bangladesh.

Another limit is that the court cannot act in exercise of the power disregarding the express substantive provisions of the law. As the "right of every person to be treated in accordance with law" is itself a fundamental right recognized in Article 31 of the Constitution, the power should not be exercised violating express provisions of law

7. Trends of Judicial Decisions on Complete Justice in Bangladesh

Through a survey of judicial decisions of the Supreme Court on the power of doing complete justice, the following trends on the interpretation of such power are discernible:

7.1 Setting Parameter and Scope of Complete Justice

There is no definitive set of situations in which this power may be exercised. Given the indeterminate nature of the language of the Article 104, the scope of doing complete justice remains undefined. For example, the Appellate Division in the case of *National Board of Revenue v. Nasrin Banu* observed that

> "Cases may vary, situations may vary and the scale and parameter of complete justice also vary. Sometimes it may be justice according to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be the inference of an ordinary reasonable man and so on."[74]

In another decision, , the Appellate Division observed that this power is wide and held that Art. 104 of the Constitution has invested in the last court of the country with wide power in order to forestall a failure of justice and to do

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[73] Article 27 to Article 44 of the Constitution of Bangladesh encompass the fundamental rights recognized by the Constitution of Bangladesh. Article 26 expressly provides that any law inconsistent with fundamental rights shall be void to that extent of inconsistency.

[74] *National Board of Revenue v. Nasrin Banu* (1966) 48 DLR(AD) 171, 178.

complete justice in an appropriate case.[75]

However, given extra-ordinary nature of power of exercising complete justice, the Appellate Division cautioned against frequent recourse to it.[76]

Article 104 can be invoked to do complete justice only in a situation where justice cannot be effectively and appropriately dispensed with using the existing provisions of law. It is now established that where the question in dispute can be settled only through the provisions of a statute, its inherent power cannot be exercised- it is a corrective as well as residuary, supplementary and complementary to the powers specially conferred by the statute.[77]

On the other hand, this power can only be exercised by the Appellate Division when a matter or cause is pending before it under Article 103 of the Constitution of Bangladesh. This has been re-affirmed in the case of *Abdul Malek Mollah vs. Md Abdus Salam Moral and another* wherethe Appellate Division held that "In the scheme of our constitution we can only do complete justice under Article 104 of the Constitution in a matter or cause which is pending in appeal under Article 103 of the Constitution. "[78]

In *Jamuna Television Ltd. vs. Government of Bangladesh*[79] the Appellate Division has made some important observations about the scope of this power as it stated that Article 104 confers very wide powers on this Division to do complete justice in a matter pending before it and such powers are inherent and are complimentary to those powers which are specifically conferred on this Division by various statutes.[80] The inherent power under Article 104 cannot be invoked when alternative remedy is available. Powers granted under Article 104 is an important constitutional power granted to this Division to protect the citizens. While exercising its inherent power this Division cannot override the statutory provisions. The court held that the term 'complete justice cannot be defined; any attempt to define it would defeat the very purpose of such power. The word 'complete justice' has no definite meaning. The expression 'complete justice' contained in Article 104 is of wide amplitude. Article 104 does not envisage any limitation regarding causes or the circumstances in which power is to be exercised. The exercise of such power is left completely to the discretion of this Division.[81]

[75] *Naziruddin v. Hameeda Banu* (1993) 45 DLR (AD) 38,44.

[76] Ibid 44

[77] *Abdul Quader Mollah vs. Chief Prosecutor, International Crimes Tribunal,* Dhaka, 66 DLR (AD) 289

[78] (2009) 61DLR(AD) 124.

[79] (2013) 65 DLR (AD) 11

[80] Ibid

[81] Ibid

However, this power doing complete justice is not unlimited and subject to certain limitations as demonstrated through some judicial decisions. In *State vs. Dafader Marfoth Ali Shah*[82], the Appellate Division held that the exercise of the power of doing justice is circumscribed by two conditions-, it can be exercised only when Supreme Court otherwise exercises its jurisdiction and the order which Supreme Court passes must be necessary for doing 'complete justice' in the cause or matter pending before it.

In *Abdul Quader Mollah vs Chief Prosecutor, International Crimes Tribunal, Dhaka*[83], it was held: "Article 104 can be invoked to do complete justice only in a situation where justice cannot be effectively and appropriately dispensed with by the existing provisions of law. It is now established that where the question in dispute can be settled only through the provisions of a statute, its inherent power cannot be exercised- it is a corrective as well as residuary, supplementary, and complementary to the powers specially conferred by the statute."

In another case it was held that the power under Article 104 of the Bangladesh's constitution must be in convergence, not in conflict with express provision of law.[84]

Thus, power of doing complete justice can be exercised by issuing necessary directions to fill in the legislative vacuum. This power is not restricted by statutory enactments but it should be used sparingly.

7.2 Remedying Grave Injustice

As mentioned earlier, the power of complete justice can be exercised to prevent gross injustice in a society. In *Habibur Rahman vs. Galman Begum*[85], the Appellate Division opined that if there is a substantial and grave injustice or if there exists special and exceptional circumstances, it can exercise extra-ordinary jurisdiction for doing complete justice in any matter pending before it. Similarly, in *Government of Bangladesh vs. Md. Yousuf Ali and others,* the Appellate Division held that in order to check and wipe out injustice it is authorized under Article 104 to impose embargo and restriction in the form of direction on activities of concerned institution. In this case, the apex court observed that grave injustice had occurred when no letters of appointment were issued to the candidates despite the fact that they had been qualified after appearing in exam and finally selected for appointment.

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82 (2016) 68 DLR (AD) 13

83 (2014) 66 DLR (AD) 289 para 24

84 *H. M. Ershad v. State* (2001) 6 BLC (AD) 30.

85 (2012) 64DLR(AD) 133.

Similarly, this power was invoked when a senior government servant was unduly made junior by a judgement of the Administrative Appellate Tribunal. In *Raziul Hasan vs. Badiuzzaman Khan*[86], where the appellant was senior to the respondent in the government job and made junior to the latter, the Appellate Division held that a gross injustice has been done to Raziul for no fault of his own and accordingly article 104 was invoked to rectify the injustice considering the fact that in Government Service, the question of due promotion and seniority are very important matter. *In AFM Najiruddin vs. Hameeda Banu*[87], the Appellate Division observed that doing 'complete justice' does not contemplate doing justice to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice.'

7.3 Environmental Justice

This extra-ordinary power has been exercised by the Supreme Court for protection of the environment in Bangladesh in order to provide remedy for degrading environment. For example, in *Metro Makers and Developer Ltd. vs. Bangladesh Environmental Lawyers Association and others*[88], Madhumati Model Town project in Bilamalia and Bailarpur Mouzas located near to Dhaka city was declared unlawful as it was constructed in an area which was earmarked as Sub-flood Flow Zones according to the Master Plan of 1997 for Dhaka city and Metro Makers was directed to restore the wetlands of this area.[89] The Master Plan clearly prohibited residential, industrial and commercial developments in those zones including raising the level of land plain through earth filling in the flood flow zones. Despite such prohibition, Metro Makers Ltd., a private limited company had undertaken a development project near Amin Bazar area of Dhaka city. The court observed that the project violated the Master Plan. It also observed that right to healthy environment is now to be found in a number of regional human rights instruments around the globe.[90] The court therefore declared Modumati Model Town Project in Bilamalia and Bailarpur Mouzas unlawful.[91]

In this case, the court applied its extra-ordinary power of doing 'complete justice' to provide a restorative remedy for degrading the

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[86] (1996) 48 DLR (AD) 71

[87] (1993) 45 DLR (AD) 38

[88] (2013) 65 DLR (AD) 181

[89] Ibid, Para 168

[90] Ibid, Para 68

[91] Ibid, Para 168

wetland area.[92] In the absence of the constitutional provision on the right to healthy environment, this decision reflects the court's effort to establish environmental justice using the constitutional principle of 'complete justice' which is a great addition to the growing body of environmental jurisprudence in Bangladesh.

7.4 Upholding Civic Rights

The power of doing complete justice was also exercised by the Appellate Division in upholding civic rights. It received the comprehensive treatment in *Jamuna Television Ltd. Vs. Government of Bangladesh.*[93] In this case, government stopped broadcasting activities of Jamuna Television by cancelling the allocated satellite frequency and seizing machineries and equipment as this private television channel was broadcasting without obtaining licence. The High Court Division held that the company is not entitled to broadcast. While the Appellate Division observed that there was no illegality in the cancellation of allocation of frequency and seizure of the machineries and equipment to stop the unauthorized broadcasting, it invoked the Article 104 of the Constitution to do complete justice by directing the respondents to release the seized machineries and equipment for proper maintenance, safety and keeping in good condition of the same considering the anxiety of the appellants.

In the *Secretary, Bangladesh Bar Council vs. A.F.M. Faiz and others*[94], the Appellate Division extended tenure of the Bangladesh Bar Council as the election of Bar Council could not be held within the time frame due to lack of correct voter list. In the absence of express provision in the statute for extension of tenure of the Bangladesh Bar Council, the court exercised its power and authority under Article 104 of the constitution to extend such tenure.

7.5 Reduction and Increase of Punishment

The Appellate Division in some of its decisions reduced punishment given in judgements of the High Court Division or lower courts by using its power under Article 104 of the Constitution given the fact that there is no statutory power under the Code of Criminal Procedure 1898 for such reduction or increase of punishment. For instance, in *Mehedi Hasan and Modern (Md.) vs. State,* the appellant was sentenced to death by the trial court and the High Court Division confirmed the sentence. The Appellate Division altered conviction of the appellant in exercise of powers under Article 104 of the Constitution taking into consideration of his

[92] See, Abul Hasanat, 'Environmental Justice, 'Complete Justice' and Constitutional Rights: Analysing Bangladesh Supreme Court's Decision in *Metro Makers vs. BELA*', (2021) 19(1) *Bangladesh Journal of Law* 95.-112

[93] (2013) 65 DLR (AD)

[94] (2013) 33BLD (AD) 38.

tender age below the age of 20 years at the time of committing the offence. The Court observed that the nature of the offence deserves imposition of maximum period of sentence upon appellant. He had suffered in the condemned cell for more than 9 years. Considering his age and the mental agony of death sentence he faced, the Court felt it proper to award the appellant the minimum sentence of 14 years of rigorous imprisonment.[95]

Similarly, in *Bangladesh Legal Aid and Services Trust (BLAST) and another vs. Government of Bangladesh*[96], the Appellate Division found that the petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge and he has been in the condemned cell for more than 14 years. Considering all aspects of the case, the Appellate Division commuted the death sentence of the petitioner to imprisonment for life by using its power of doing complete justice.

7.6 Avoiding Further Legal Proceedings

The Appellate Division has also exercised this power in order to bring relief to litigants from engaging them into further and unnecessary legal proceedings. In *AFM Najiruddin vs. Hameeda Banu*[97], the Appellate Division held that it is an extra-ordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this court. In some of its decisions, the Appellate Division held that "if a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified."[98] In *Gannysons vs. Sonali Bank,*[99] Sonali Bank obtained a decree in a suit for foreclosure of mortgage of the property of Gannysons and levied execution decree. Gannysons filed objection against the decree under section 47 of the Code of Civil Procedure 1908 and the matter came up before the Appellate Division which decided the dispute in favour of Gannysons. But Gannysons filed a review petition on the ground that the order of the court was not fully in conformity with the decision. The Appellate Division allowed the review petition in exercise of the power under Article 104 and held that the property of Gannysons was not an abandoned property. It allowed the review on the ground that the Gannysons had already suffered and to allow further litigation in the form of a suit for declaring that the properties in question were not abandoned property would result not only in further harassment but also long delay and deprivation of the enjoyment of the property.

[95] *Mehedi Hasan and Modern (Md.) vs. State* 66 DLR(AD) (2014) 111

[96] (2016) 68 DLR (AD) 1

[97] (1993) 45 DLR (AD) 38

[98] *Naziruddin v. Hameeda Banu* (1993) 45 DLR (AD) 38,44 and *Bangladesh v. Shamirunnissa* (2005) BLD (AD) 225

[99] *Gannysons Ltd. and another Vs. Sonali Bank and others* (1985) 37 DLR (AD) 42

7.7 Corrective Justice

This power has been exercised by the Appellate Division to rectify acts which are manifestly improper. In the case of *State vs. Muhammad Nawaz* the Appellate Division issued *suo moto* notices to the accused persons who were improperly acquitted by the High Court and ultimately after hearing, it convicted and sentenced some of those accused persons exercising its power under Article 104 of the Constitution. In this case, the Appellate Division exercised the power of doing complete justice to rectify the patent error made inadvertently by the High Court. In the case of *Ekushey Television v. Dr. Chowdhury Mahmood Hasan*, even though the High Court Division did not take into consideration certain affidavit in reaching its decision, the Appellate Division took into consideration statement of such affidavit in exercise of its power under Article 104 in order to do complete justice.[100]

8. Misuse and Nonuse of the Power of Complete Justice

It is often questioned as to why in the Bhopal Gas Disaster case in India, the criminal cases were allowed; that the complete justice power should not be used to go against the main legal framework of a country.[101] The Supreme Court is also blamed by some originalists of 'judicial overreach,'[102] and that the Supreme Court has gone overboard and engaged in "judicial adventurism" in exercising this inherent power. Especially in dealing with divorce matter, the exercise of complete justice power, the Court is criticized for circumventing statutory provisions.[103] It is notable that the Supreme Court has been exercising Article 142 powers to give relief to Hindu couple whose ties has been broken down irretrievably, but there is no legislative recognition of such divorce under the Hindu Marriage Act. One can rightly argue that Article 142 was meant to cover such legislative vacuum, and give relief to citizens.

Upendra Baxi used the words "judicial feat," "politics of judicial desire" and "pathologies of judicial power" in referring to overzealous exercise of the power of complete justice, and urged for judicial restraint.[104] One author argued that unchecked use of Article 142 leads to unaccountable juristocracy. Referring

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[100] *Ekushey Television v. Dr. Chowdhury Mahmodd Hasan* (2003) 55 DLR (AD) 26

[101] Usha Ramanathan, 'Bhopal: As the Law Develops,' [2010] 45(34) *Economic and Political Weekly* 83

[102] Sidharth Sharma, 'Myth of Judicial Overreach,' 45:10 *Economic and Political Weekly* 15-18

[103] Sayalee S. Surjuse, Exercise of Inherent Power by the Supreme Court of India to Do Complete Justice with Special Reference to Divorce Matters under the Hindu Marriage Act – A Critical Analysis [2021] 20:1 *Ilkogretim Online - Elementary Education Online* (doi: 10.17051/ilkonline.2021.01.183)

[104] Upendra Baxi, 'Judicial Strictures: Liberty of Judicial Expression and Restraint by T. N. Arora' [2002] 44(2) *Journal of the Indian Law Institute* 285

to Anita Kushwaha case, the author argues that use of Article 142 should be for extraordinary purpose, not to please the public/masses.[105] One author cautioned about non-elected judiciary's non-accountable juristocracy, also commenting that justice should not be an excuse to deviate from judicial precedents or circumventing a legislation or constitutional right. Caution has also been flagged that Article 142 could become a fertile ground for 'judicial legislation.'[106]

While critics raised more concern about its misuse, there are cases where the Supreme Court of India failed to use the power of complete justice in appropriate cases. For example, in *A. B. Bhaskara Rao vs Inspector Of Police, Cbi*,[107] the Court failed to exonerate an accused who took Rs 200 only as illegal gratification, but has already lost his job, and was in prison for 52 days, and 14 years has elapsed since the incident and accused being still running from courts to courts. But the court has not accepted the plea to use the power of complete justice for the poor clerk accused in this case.

Similarly, sometimes the Supreme Court failed to exercise Article 142 power in Hindu divorce cases in India despite irretrievable breakdown of marriage. Justice Katju and Justice V.R. Sirpurkar, while dismissing the appeal for divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955, after the unilateral withdrawal of consent, had strongly opined in the case of *Vishnu Dutt Sharma v. Manju Sharma*[108], "If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts."[109]

9. Commonalities and Contrasts in Judicial Decisions of India and Bangladesh regarding the Power of Complete Justice

From the analysis of judicial decisions of both jurisdictions, it is gleaned that the concept of power to do 'complete justice' involves some extra-ordinary and residuary powers given to the apex court to prevent failure of justice and uphold the notion of human rights. The power is an inherent and plenary one to deal

[105] Satya Prasoon, 'Extraordinary' Justice and an 'Unaccountable' Juristocracy: Reflections on the Kathua Trial and the Supreme Court of India, see https://blog-iacl-aidc.org/blog/2018/7/13/extraordinary-justice-and-an-unaccountable-juristocracy-reflections-on-the-kathua-trial-and-the-supreme-court-of-india

[106] Virendra Kumar, 'Judicial Legislation under Article 142 of the Constitution: A Pragmatic Prompt for Proper Legislation by Parliament' [2012] 54(3) *Journal of the Indian Law Institute* 364-381.

[107] Decided on 23 September, 2011

[108] (2009) 6 SCC 379

[109] Pathak (n 47)

with extra-ordinary situation for the ends of justice. However, as there are no hard and fast principles guiding how to exercise the power, though it should be used judiciously. No doubt, this power is of a special quality and of different height and the court in exercise of the power can ignore sheer technicalities of law, but it is to be kept in mind that this power does not allow the apex courts to bypass substantive rights of a litigant and substantive provisions of law. Although the power is seemingly wide and subject to no limits, still the court cannot do anything or pass any order whimsically in exercise of the power. There are some implied limits of the power. Firstly, any order under the power must not be inconsistent with fundamental rights guaranteed by the constitution. Secondly, the court in exercising the power cannot disregard substantive statutory provisions. Thirdly, the court in the name of giving complete justice cannot grant relief which the court of first instance cannot grant.[110]
However, the apex court sometimes fills up the legal vacuum before the legislature steps into the task by exercising this power.[111]

Therefore, it should be exercised in exceptional circumstances. Its frequent recourse in all situations may subject it to criticisms and then it may create the scope to be termed as the abuse of the process of the court. However, there is no denying the fact that as the power to do complete justice is not made definite in India and Bangladesh, it is elastic enough to adapt with any *de novo* situation.[112] In both jurisdictions, inconsistencies and contradictions are found in judicial decisions giving rise to uncertainty and lack of predictability in judicial decision-making on complete justice.

The Supreme Court of India in a number of cases has laid down some conditions and prerequisites which are to be taken into consideration before invoking Art. 142. The factors enumerated are in no manner exhaustive in nature and it is always open to the court to weigh in the circumstances and facts of each case. While invoking this provision, the Indian Supreme Court took into consideration the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy. The power should be used in cases where there is a manifest error and the non-exercise of Art. 142 (1) may lead to the travesty of justice. In other words, there must be strong and compelling reasons that the parties to instant case would suffer from palpable injustice if the inherent power of the court is not exercised. The same is the case where the law or the statutory provisions are silent and the law is found to be incapable of redressing the grievances of the parties, or where the adherence to the statutory provisions or procedural rules would be unjustified in the facts and circumstances of the case.

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[110] *Naziruddin v. Hameeda Banu* (1993) 45 DLR (AD) 38,44

[111] *Vineet Narain v. India* AIR (1998) SC 889, 916

[112] *Delhi Development Authority v. Skipper Construction Co.*, (1996) 4 SCC 622, at 634

Similarly, Article 104 of the Constitution of Bangladesh vests the Supreme Court with a discretionary power that can be wielded in appropriate circumstances to deliver "complete justice" in a given case. This power has been granted for ensuring not only proper administration of justice, but also for preventing miscarriage of justice. But the constitution of Bangladesh does not provide clear guidelines for exercising such power. In the absence of such clear guidelines, the court has applied such power in variety of causes and matters. The expressions 'cause' or 'matter' mentioned in the Article 104 are not defined. Usually these include any proceeding pending in the court and would cover almost every kind of proceeding in the court— civil or criminal, interlocutory or final, and before or after judgement. The exercise of the power is left completely to the discretion of the Supreme Court. But unlike the Indian Supreme Court, the apex court of Bangladesh does not provide detailed guidelines as to the circumstances in which it should exercise this power and in which situations it should decline to exercise it.

The Supreme Courts of Bangladesh and India have exercised this power in a wide range of circumstances demonstrating that the highest judiciary can curb the unrestrained power of the executive authority, expand the notion of social justice and fill in a gap in the law. Although such power of complete justice goes against the theory of separation of powers, if it is exercised within proper bounds of the constitutional norms, it has a great potential to address injustice and arbitrariness of the state organs, private individuals and other entities.

10. Conclusion

From the above analysis, it is clear that the apex courts in Bangladesh and India exercised the power of doing complete justice in wide range of matters or issues, but they have exercised it cautiously and, in very exceptional circumstances due to indeterminate nature of the constitutional provisions on such power. While Indian Supreme Court has got the jurisdiction of doing complete justice, High Courts in India are not constitutionally empowered to exercise this jurisdiction. Similarly, in Bangladesh, the Appellate Division of the Supreme Court is conferred this power, but the High Court Division has no such power. In both countries, no sub-ordinate courts can exercise the extraordinary power of doing complete justice. The apex courts in both countries maintained that the power cannot be exercised in contravention of the fundamental rights and expressly mentioned statutory provisions, while maintaining that statutory provision cannot limit exercise of this constitutional power. Both countries seem to maintain that for overriding interest of complete justice, statutes can be deviated from to some extent. In both countries, the exercise of complete justice jurisdiction by apex courts facilitated delivery of justice in numerous cases in which had it not been for this extraordinary jurisdiction miscarriage of justice would have happened.

Especially in novel situations, the power of complete justice saved the prestige of apex courts as the courts of last resort.

However, the Indian Supreme Court issued guidelines and directions on a number of occasions regarding the scope and limits of power of complete justice. On the other hand, the Supreme Court of Bangladesh has not yet issued any such guidelines and directions. Such guidelines are necessary for ascertaining the scope and limits of such power and creating a framework within which lawyers and judges can employ the principle of complete justice in actual litigations and judgments respectively. The limitations on this constitutional tool must be in place only to evade excesses in the name of extraordinary power. An appropriate approach in exercising such power by courts lies in striking a balance between preserving a wide power to do ‘complete justice’ while ensuring that there are guidelines in place for maintaining consistency and predictability in decision-making.