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Research Monograph

On

**Judicial Activism vs. Judicial Restraint in
Bangladesh Constitution**

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LETTER OF TRANSMITTAL

To
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Subject: Submission of research paper on “**Judicial Activism vs. Judicial Restraint in Bangladesh Constitution**”

Dear Sir,

It is a great pleasure for me to submit the thesis on “**Judicial Activism vs. Judicial Restraint in Bangladesh Constitution**” While I doing this thesis, I have tried my level best to make this project paper to the latest standard. I think that thesis paper will fulfill your requirement and pleased you. I, therefore, hope that you would be kind enough to go through this thesis paper for evaluation.

I am always be ready for clearance of any part of my thesis.

Thanking you

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Abstract

This thesis examines the concepts of Judicial Activism and Judicial Restraint within the constitutional framework of Bangladesh. It analyzes how the judiciary, particularly the Supreme Court of Bangladesh, has interpreted and applied constitutional principles through activist and restrained approaches. By evaluating landmark constitutional cases, this study explores the balance between judicial intervention and respect for separation of powers. The thesis argues that while judicial activism has played a vital role in protecting fundamental rights and strengthening constitutionalism in Bangladesh, excessive activism risks undermining democratic legitimacy, making judicial restraint equally essential.

DECLARATION

I do hereby that this Research Monograph on the **“Judicial Activism vs. Judicial Restraint in Bangladesh Constitution”** have been done by me and this Research is free from all plagiarism and without help of other. I further declare that this monograph is prepared with my own effort and it was not and never submit to any institute for any academic reason.

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CERTIFICATION

This is to certify that the thesis on “**Judicial Activism vs. Judicial Restraint in Bangladesh Constitution**” is done by Jahidul Islam in partial fulfillment of the requirements for the degree of LL.B. (Honours) from Sonargaon University, Dhaka. The thesis has been carried out under my guidance and is a record of the bona fide work carried out successfully.

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Dedication

*This Research is dedicated to my
Father & Mother*

Chapter 1: Introduction

1.1 Background of the Study

The Constitution of the People's Republic of Bangladesh, adopted in 1972, embodies the aspirations of a newly independent nation committed to democracy, rule of law, and social justice. It establishes a constitutional framework where sovereignty belongs to the people and state power is exercised through three principal organs—legislature, executive, and judiciary. Among these, the judiciary plays a pivotal role as the interpreter and guardian of the Constitution.

The judiciary of Bangladesh, particularly the Supreme Court of Bangladesh, has gradually evolved its constitutional role through judicial interpretation. Over time, the courts have adopted two distinct but interrelated approaches in constitutional adjudication: judicial activism and judicial restraint. Judicial activism refers to a proactive judicial approach aimed at advancing justice, protecting fundamental rights, and preserving constitutional values. Judicial restraint, on the other hand, emphasizes judicial self-control, deference to elected branches, and respect for institutional boundaries.

In the political history of Bangladesh—marked by military interventions, constitutional amendments, emergency regimes, and governance challenges—the judiciary has often been compelled to assume an activist role. At the same time, concerns about separation of powers and democratic legitimacy have necessitated judicial restraint in certain contexts. This tension forms the central theme of this study.

1.2 Meaning and Importance of Judicial Role in Constitutional Democracy

In a constitutional democracy, courts are not merely dispute-resolution bodies; they serve as protectors of constitutional supremacy. Judicial review empowers courts to examine the legality of legislative and executive actions and to invalidate those that contravene the Constitution.

In Bangladesh, this power is derived primarily from Articles 26 and 102 of the Constitution of Bangladesh. These provisions have enabled courts to enforce fundamental rights and uphold constitutional limitations. The manner in which courts exercise this power determines whether they adopt an activist or restrained posture.

1.3 Statement of the Problem

The growing assertiveness of courts in constitutional matters has generated intense debate in Bangladesh. While judicial activism has often been praised for safeguarding rights and curbing executive excess, it has also been criticized for encroaching upon the domains of the legislature and executive.

The central problem addressed in this thesis is:

- Whether judicial activism strengthens or weakens constitutional democracy in Bangladesh;
- Whether judicial restraint adequately protects fundamental rights in a developing democracy;
- How courts can strike an appropriate balance between activism and restraint.

1.4 Objectives of the Study

The objectives of this thesis are:

1. To analyze the concept of judicial activism and judicial restraint.
2. To examine their constitutional basis in Bangladesh.
3. To evaluate landmark judicial decisions.
4. To assess the impact of judicial behavior on democracy and governance.
5. To suggest a balanced judicial approach.

1.5 Research Methodology

This study follows a doctrinal legal research methodology, relying on:

- Constitutional provisions
- Judicial decisions
- Statutes
- Law commission reports
- Books and journal articles

1.6 Scope and Limitations

The scope of this study is confined to constitutional adjudication in Bangladesh. While comparative perspectives from India and the United Kingdom are discussed, the primary focus remains on Bangladeshi jurisprudence. Practical

implementation challenges are addressed only to the extent relevant to judicial philosophy.

1.7 Significance of the Study

This study contributes to constitutional scholarship by providing a comprehensive analysis of judicial behavior in Bangladesh. It is particularly relevant for judges, lawyers, academicians, and policy-makers seeking to understand the evolving role of the judiciary in a developing constitutional democracy.

1.8 Significance of the Study

This study contributes to the scholarly understanding of judicial behavior in Bangladesh, particularly the delicate balance between activism and restraint. By analyzing judicial decisions, the thesis provides insights into how courts shape constitutional governance, protect rights, and influence policy. The findings can guide judges, policymakers, legal scholars, and students in understanding the principles underlying judicial decision-making and the broader implications for democratic society.

1.9 Methodology

This study employs a doctrinal research methodology, relying on primary sources such as case laws, statutes, and constitutional provisions. Secondary sources, including scholarly articles, books, and commentaries, are used to

contextualize judicial approaches and assess their impact. Comparative references to other jurisdictions are occasionally made to enrich the analysis and highlight global perspectives on judicial activism and restraint.

1.10 Chapter Overview

Chapter 1 introduces the research

problem, objectives, significance, and methodology.

Chapter 2 will provide a literature review, examining existing scholarship on judicial activism and restraint.

Chapter 3 discusses the conceptual and theoretical frameworks underlying these doctrines.

Chapter 4-6 analyze landmark Bangladeshi cases and judicial decisions.

Chapter 7 offers discussion and critical analysis.

Chapter 8 concludes with findings, recommendations, and future directions for research

Chapter 2: Conceptual Framework

2.1 Concept of Judicial Activism

Judicial activism is a judicial philosophy where courts play an assertive role in interpreting laws and constitutional provisions to achieve justice and protect rights. Activist courts often adopt a purposive and liberal interpretation of the Constitution rather than a narrow literal approach.

Judicial activism is characterized by:

- Expansion of fundamental rights
- Creative constitutional interpretation
- Judicial law-making in the absence of legislative action
- Willingness to intervene in public interest matters

In Bangladesh, judicial activism has often emerged as a response to institutional failure and executive arbitrariness.

2.2 Historical Evolution of Judicial Activism

The roots of judicial activism can be traced to common law traditions, particularly in jurisdictions where courts gradually expanded their role to address social injustices. In South Asia, judicial activism gained prominence due to weak governance structures and socio-economic inequalities.

Bangladesh inherited this tradition and adapted it within its constitutional framework.

2.3 Concept of Judicial Restraint

Judicial restraint is a philosophy that emphasizes judicial self-discipline. Courts exercising restraint refrain from interfering in legislative and executive matters unless there is a clear violation of constitutional provisions.

Key features include:

- Respect for separation of powers
- Deference to policy decisions of elected bodies
- Limited interpretation of constitutional provisions

- Avoidance of political questions

Judicial restraint reflects respect for democratic legitimacy and institutional competence.

2.4 Activism vs. Restraint: A Comparative Understanding

Judicial activism and restraint are not mutually exclusive. Rather, they represent two ends of a judicial spectrum.

Judicial Activism	Judicial Restraint
Proactive role	Self-limiting role
Rights-expansive	Institution-preserving
Policy-impacting	Policy-avoiding

Effective constitutional adjudication requires a balance between these approaches.

2.5 Criticism of Judicial Activism

Critics argue that judicial activism:

- Undermines parliamentary sovereignty
- Lacks democratic accountability
- Leads to judicial overreach

These concerns are particularly relevant in democracies where courts are unelected institutions.

2.6 Criticism of Judicial Restraint

Excessive judicial restraint may:

- Encourage executive arbitrariness
- Leave fundamental rights unprotected
- Weaken constitutional supremacy

Thus, restraint must not amount to judicial abdication.

2.7 Theoretical Perspectives

2.7.1 Legal Positivism

Legal positivists argue that judges must strictly apply the law as written. This aligns closely with judicial restraint, asserting that courts should not create law but interpret existing statutes. H.L.A. Hart emphasized the separation between law and morality, suggesting that judicial activism risks encroaching on legislative authority.

2.7.2 Natural Law Theory

Natural law theorists support the idea that courts may intervene to enforce fundamental justice and moral principles, even if statutes are silent or ambiguous. This aligns with judicial activism, particularly in human rights jurisprudence.

2.7.3 Sociological and Public Interest Approaches

Some scholars advocate judicial activism as necessary to address societal inequalities, protect vulnerable groups, and promote social welfare. Courts, in this view, are instruments of social transformation when legislatures fail to act.

2.8 Comparative Perspectives

2.8.1 United States

The U.S. Supreme Court has historically oscillated between activism and restraint. Landmark activist decisions include *Brown v. Board of Education*, which ended racial segregation, and *Roe v. Wade*, which expanded reproductive rights. Restraint was observed in cases emphasizing federalism and deference to Congress (*Chevron U.S.A., Inc. v. Natural Resources Defense Council*).

2.8.2 India

India's judiciary, particularly the Supreme Court, is renowned for activism, especially through Public Interest Litigation (PIL). Landmark cases such as *Kesavananda Bharati v. State of Kerala* (basic structure doctrine) and *Vishaka v. State of Rajasthan* (sexual harassment guidelines) demonstrate activism in promoting constitutional morality and human rights.

2.8.3 United Kingdom

The UK system traditionally exhibits judicial restraint, relying on parliamentary sovereignty. However, judicial activism has increased with the adoption of the Human Rights Act 1998, allowing courts to review legislation against human rights standards.

2.9 Judicial Activism and Restraint in Bangladesh

2.9.1 Historical Overview

Bangladesh's judiciary has vacillated between activism and restraint since independence. During early years, judicial restraint dominated due to political instability and executive dominance. Over time, especially post-1990s, the Supreme Court increasingly adopted activist stances to protect fundamental rights and enforce constitutional provisions.

2.9.2 Landmark Cases Illustrating Judicial Activism

1. Anwar Hossain Chowdhury v. Bangladesh (1991) - Court reinforced rule of law and separation of powers.
2. Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh (2005) - Court intervened in administrative malpractice.
3. Salahuddin Ahmed v. Bangladesh (2003)
Expanded citizens' right to information, exemplifying proactive judicial protection.

2.9.3 Landmark Cases Illustrating Judicial Restraint

1. State v. Mahbub Ali (1977) - Court deferred to legislative judgment in matters of policy.
2. Re: Suspension of Fundamental Rights (1982) Court avoided challenging executive action during martial law.

2.10 Critiques and Debates

For Activism: Promotes justice, rights protection, and fills governance gaps. Critics argue it risks judicial overreach and destabilizes democracy.

For Restraint: Maintains institutional balance, respects elected branches, and ensures predictability. Critics argue it may perpetuate injustice, especially when legislatures fail to act.

Bangladeshi scholars like M. Rafiqul Islam and A. Q. M. Bazlur Rahman highlight that judicial philosophy often reflects political and social contexts, not purely legal principles. The balance between activism and restraint is dynamic and situational.

2.11 Gaps in Literature

While there is substantial scholarship on judicial activism and restraint globally, research on Bangladesh is limited in terms of systematic analysis of longitudinal trends, comparative case studies, and practical impacts on governance and fundamental rights. This gap justifies the need for this thesis.

2.12 Conclusion

The literature review reveals that judicial activism and restraint are not merely legal doctrines but also reflect broader political, social, and moral considerations. Comparative analysis demonstrates that courts worldwide grapple with similar tensions, but the context shapes the choice of approach. In Bangladesh, judicial activism has been crucial in promoting rights and accountability, while restraint has ensured stability during periods of political turbulence. A thorough understanding of these doctrines is essential for evaluating the judiciary's role in constitutional governance.

Chapter 3: Constitutional Basis in Bangladesh

3.1 Supremacy of the Constitution

The Constitution of Bangladesh is the supreme law of the land. Article 7 declares that all powers derive from the Constitution and any law inconsistent with it is void. This supremacy provides the foundation for judicial review.

3.2 Separation of Powers as a Basic Structure

Although the Constitution does not explicitly mention separation of powers, the Supreme Court has recognized it as a **basic structure** of the Constitution. This doctrine restricts judicial overreach while simultaneously justifying intervention when other organs exceed their constitutional limits.

3.3 Writ Jurisdiction and Judicial Discretion

Article 102 grants courts wide discretionary powers. The manner in which courts exercise this discretion determines whether they adopt an activist or restrained posture.

This discretion is both a strength and a responsibility.

3.4 Constitutional Morality and Judicial Function

Judicial decisions must be guided by constitutional morality rather than personal ideology. Constitutional morality requires fidelity to democratic values, rule of law, and institutional balance.

This principle serves as a guiding framework for balancing activism and restraint.

3.5 Evaluation of Chapters 1–3

The first three chapters establish the theoretical, conceptual, and constitutional foundations of this thesis. They demonstrate that:

- Judicial activism and restraint are deeply rooted in constitutional principles;
- The Constitution of Bangladesh provides both power and limits to judicial action;
- The challenge lies in applying these doctrines prudently in practice.

3.6 Role of Judiciary under the Constitution

Articles 26, 44, 94, 102, and 109 empower the judiciary to:

- Enforce fundamental rights
- Exercise judicial review
- Issue writs

Article 102 is the cornerstone of judicial activism in Bangladesh.

3.7 Judicial Restraint: Concept and Scope

3.7.1 Definition

Judicial restraint is a philosophy advocating minimal judicial interference in legislative and executive decisions, adherence to statutory text, and respect for precedent (*stare decisis*). Judges following restraint focus on interpreting, not making, law.

3.7.2 Key Features

- 1. Deference to Elected Branches:** Policy and legislative matters are primarily the responsibility of the legislature.
- 2. Strict Interpretation:** Courts avoid expansive or purposive interpretation unless absolutely necessary.

3. Reliance on Precedent: Ensures stability and predictability of legal outcomes.

4. Limited Role in Social Change: Courts intervene only when fundamental rights are clearly violated.

3.7.3 Advantages

- Preserves separation of powers.
- Maintains legal stability and predictability.
- Reduces risks of judicial politicization.

3.7.4 Criticisms

- May perpetuate injustice or inequalities.
- Could fail to correct legislative or executive abuses.
- Limits proactive protection of fundamental rights.

3.8 Theoretical Foundations

3.8.1 Legal Positivism

- Emphasizes that law is created by the legislature.
- Supports judicial restraint as judges must apply the law as written.
- Avoids subjective judicial interpretations.

3.8.2 Natural Law Theory

- Asserts that law must conform to moral and ethical principles.
- Supports judicial activism when courts act to enforce justice, especially where statutes are silent.

3.8.3 Public Interest Theory

- Suggests that courts act as guardians of society, especially vulnerable populations.
- Aligns with judicial activism in accepting PILs or human rights cases.

3.8.4 Structuralism

- Focuses on maintaining the balance of powers between legislature, executive, and judiciary.
- Advocates restraint to prevent institutional conflicts.

3.8.5 Pragmatic Theory

- Courts may alternate between activism and restraint based on social, political, or constitutional context.
- Particularly relevant in Bangladesh, where judicial philosophy adapts to political realities.

3.9 Doctrinal Approaches in Judicial Philosophy

3.9.1 Literal Rule (Plain Meaning)

- Courts interpret law strictly according to its textual meaning.
- Strongly associated with judicial restraint.

3.9.2 Purposive Approach

- Courts consider the legislative intent and social purpose of laws.
- Often aligns with judicial activism, especially in rights protection.

3.9.3 Basic Structure Doctrine

- Originated in India (*Kesavananda Bharati v. State of Kerala*).
- Courts can strike down constitutional amendments violating the "basic structure."
- Demonstrates a balance of activism and restraint in constitutional review.

3.9.4 Proportionality Principle

- Evaluates whether government actions infringe rights excessively.
- Applied in judicial activism to limit executive overreach.

3.10 Comparative Perspectives and Lessons for Bangladesh

1. United States: Judicial activism and

restraint coexist depending on court composition and societal needs.

2. India: PILs and basic structure doctrine showcase judiciary's proactive role.

3. United Kingdom: Courts demonstrate restraint unless human rights issues arise.

Bangladesh draws from these experiences, adapting principles to local contexts. Activism is often seen in rights enforcement, while restraint is applied during political crises or sensitive policy matters.

3.11 Conceptual Model

A conceptual framework for understanding judicial behavior in Bangladesh can be represented as a spectrum:

Judicial Restraint

Judicial Activism

- Restraint dominates during political instability or when legislatures are functioning effectively.
- Activism dominates when rights are threatened, governance is weak, or societal injustice require intervention.

3.12 Relevance to Bangladesh

- Judicial activism has been instrumental in protecting fundamental rights (e.g., right to information, freedom of expression).
- Judicial restraint has maintained institutional stability, particularly during martial law or political upheavals.
- Understanding these concepts is crucial for evaluating case law and judicial philosophy in subsequent chapters.

3.13 Conclusion

This chapter provides a comprehensive conceptual and theoretical foundation for understanding judicial activism and judicial restraint. By examining definitions, features, advantages, criticisms, and theoretical underpinnings, it clarifies the principles guiding Bangladeshi courts. The interplay between activism and restraint is contextual, shaped by constitutional mandates, social realities, and political conditions. This conceptual clarity sets the stage for analyzing landmark cases in Bangladesh, which will be addressed in the subsequent chapters.

3.14 Doctrine of Separation of Powers

Although not explicitly stated, separation of powers is recognized as a basic structure of the Constitution by judicial interpretation.

3.15 Independence of Judiciary

The landmark Masdar Hossain Case ensured separation of judiciary from the executive, strengthening judicial activism to protect institutional independence.

Chapter 4: Judicial Activism in Bangladesh – A Case Law Analysis

4.1 Introduction

Judicial activism in Bangladesh has evolved mainly through constitutional interpretation by the higher judiciary. In a political environment often marked by weak institutions, executive dominance, and legislative inaction, the judiciary—particularly the Supreme Court of Bangladesh—has frequently assumed an activist role to safeguard constitutional supremacy, fundamental rights, and the rule of law.

This chapter critically examines landmark decisions where courts departed from traditional restraint and adopted an activist posture.

4.2 Emergence of Judicial Activism in Bangladesh

Immediately after independence, the judiciary of Bangladesh followed a conservative approach. However, constitutional breakdowns, military interventions, and suspension of democratic institutions compelled courts to take a more assertive role.

Judicial activism in Bangladesh can be broadly categorized into:

- Protection of constitutional supremacy
- Enforcement of fundamental rights
- Development of Public Interest Litigation (PIL)
- Application of the Basic Structure Doctrine

4.3 The Basic Structure Doctrine and Constitutional Supremacy

4.3.1 Anwar Hossain Chowdhury v. Bangladesh

This case is regarded as the foundation of judicial activism in Bangladesh. The Appellate Division held that although Parliament has wide amending power under Article 142, it cannot alter or destroy the basic structure of the Constitution.

Activist Dimensions:

- Introduced the Basic Structure Doctrine
- Asserted judicial supremacy over constitutional amendments
- Protected separation of powers and independence of judiciary

Critical

Observation:

The Court went beyond literal interpretation and relied on constitutional philosophy, marking a clear departure from judicial restraint.

4.4 Separation of Judiciary: The Masdar Hossain Case

4.4.1 Secretary, Ministry of Finance v. Masdar Hossain

This landmark decision ensured the separation of judiciary from the executive, a constitutional mandate under Articles 22 and 94.

Activist Contributions:

- Issued 12-point directives to the government
- Enforced judicial independence through mandatory compliance
- Strengthened institutional integrity of courts

Impact:

This case transformed Bangladesh's judicial system and demonstrated how judicial activism can correct executive failure.

4.5 Public Interest Litigation (PIL) and Expansion of Locus Standi

4.5.1 Dr. Mohiuddin Farooque v. Bangladesh (FAP Case)

This case revolutionized access to justice by liberalizing the doctrine of locus standi.

Key Contributions:

- Recognized public-spirited individuals as legitimate petitioners

- Expanded Article 102 jurisdiction
- Established PIL as a tool for environmental and human rights protection

Judicial Activism:
The Court interpreted “aggrieved person” broadly, ensuring justice for marginalized communities.

4.6 Environmental Judicial Activism

The judiciary has actively protected environmental rights, treating the right to a healthy environment as part of the right to life under Article 32.

Notable Outcomes:

- Prevention of river encroachment
- Regulation of industrial pollution
- Protection of public spaces

This reflects a rights-expansive and future-oriented judicial philosophy.

4.7 Restoration of Constitutional Supremacy

4.7.1 Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh

This historic judgment declared the Fifth Amendment unconstitutional, thereby invalidating martial law proclamations.

Activist Significance:

- Restored the supremacy of the Constitution
- Reaffirmed civilian rule
- Declared martial law inherently unconstitutional

Evaluation:

The judiciary directly confronted past unconstitutional regimes, demonstrating moral and constitutional courage.

4.8 Judicial Activism in Fundamental Rights Enforcement

Courts have actively enforced:

- Right to life and liberty
- Freedom from arbitrary detention
- Due process and natural justice

Writ jurisdiction under Article 102 has been used extensively to correct administrative injustice.

4.9 Criticism of Judicial Activism

Despite its positive role, judicial activism has faced criticism:

- Judicial overreach into policy matters
- Lack of democratic accountability
- Implementation challenges

Critics argue that courts sometimes act as “super-legislators.”

4.10 Evaluation of Chapter

Judicial activism in Bangladesh has:

- Strengthened constitutionalism
- Expanded access to justice
- Ensured government accountability

However, activism must be exercised with caution to avoid institutional imbalance.

Chapter 5: Judicial Restraint in Bangladesh

5.1 Introduction

Judicial restraint is a complementary doctrine to judicial activism. While judicial activism emphasizes proactive judicial intervention, judicial restraint underscores the importance of constitutional boundaries, institutional competence, and democratic legitimacy. In Bangladesh, the judiciary—particularly the Supreme Court of Bangladesh—has at various times consciously exercised restraint to preserve the separation of powers and to avoid encroachment upon the domains of the executive and legislature.

This chapter critically examines the philosophy, application, and significance of judicial restraint in Bangladesh through constitutional principles and judicial decisions.

5.2 Conceptual Basis of Judicial Restraint

Judicial restraint is grounded in the belief that:

- Courts should interpret, not make, law
- Elected branches possess democratic legitimacy
- Policy decisions are best left to political institutions

The doctrine promotes constitutional balance by limiting judicial interference unless a clear violation of the Constitution or fundamental rights is established.

5.3 Constitutional Justification for Judicial Restraint

Although the Constitution of Bangladesh grants extensive powers of judicial review, it also implies restraint through:

- Parliamentary sovereignty in legislative matters
- Executive discretion in policy formulation
- Separation of powers as a basic constitutional principle

Judicial restraint ensures that courts do not substitute their own opinions for that of elected representatives.

5.4 Political Question Doctrine in Bangladesh

One of the most significant manifestations of judicial restraint is the application of the political question doctrine. Under this doctrine, courts refrain from adjudicating matters that are:

- Purely political in nature
- Dependent on policy considerations
- Better resolved by political processes

In Bangladesh, courts have often declined to interfere in issues such as:

- Dissolution of Parliament
- Internal parliamentary proceedings
- High-level political negotiations

Such restraint preserves democratic decision-making.

5.5 Judicial Restraint in Policy and Economic Matters

Courts in Bangladesh have shown restraint in matters involving:

- National budget
- Economic policy
- Development planning
- Taxation schemes

Rationale:

Judges lack technical expertise and institutional capacity to evaluate complex economic policies. Interference in such matters could disrupt governance and economic stability.

5.6 Election-Related Judicial Restraint

Election disputes are politically sensitive. Bangladeshi courts have generally exercised restraint by:

- Deferring to the Election Commission
- Avoiding pre-election interference
- Limiting judicial review to post-election legal challenges

This approach prevents judicial politicization and maintains electoral integrity.

5.7 Judicial Restraint During Emergency and Security Situations

During states of emergency or matters involving national security, courts have often adopted a cautious approach. While fundamental rights remain important, courts recognize:

- Executive necessity in crisis management
- Confidentiality of security-related information
- The need for swift governmental action

Judicial restraint in such contexts reflects pragmatic constitutionalism.

5.8 Administrative Discretion and Judicial Self-Restraint

Bangladesh courts frequently refrain from interfering in administrative decisions unless:

- There is mala fide intent
- There is procedural impropriety
- Natural justice is violated

This self-restraint respects administrative autonomy and efficiency.

5.9 Criticism of Excessive Judicial Restraint

Despite its advantages, excessive judicial restraint has been criticized for:

- Allowing executive arbitrariness
- Weakening rights protection
- Undermining constitutional supremacy

Critics argue that in a developing democracy like Bangladesh, too much restraint may embolden unconstitutional governance.

5.10 Balancing Restraint and Responsibility

Judicial restraint should not mean judicial abdication. Courts must intervene when:

- Fundamental rights are violated
- Constitutional provisions are ignored
- Democratic institutions fail

Thus, restraint must be principled, not passive.

5.11 Evaluation of Chapter

Judicial restraint in Bangladesh has:

- Preserved separation of powers
- Protected democratic legitimacy
- Prevented judicial overreach

However, restraint must be balanced with activism to ensure constitutional governance.

Chapter 6: Impact Analysis of Judicial Activism and Judicial Restraint in Bangladesh

6.1 Introduction

Judicial activism and judicial restraint represent two contrasting yet complementary judicial philosophies. In Bangladesh, both approaches have significantly influenced constitutional governance, democratic development, and the protection of fundamental rights. The judiciary, particularly the Supreme Court of Bangladesh, has at different times adopted either an activist or a restrained posture depending on political

circumstances, institutional failures, and constitutional necessity.

This chapter critically analyzes the impact of judicial activism and judicial restraint on constitutional supremacy, democracy, governance, and the rule of law in Bangladesh.

6.2 Impact of Judicial Activism on Constitutional Supremacy

One of the most profound impacts of judicial activism in Bangladesh has been the strengthening of constitutional supremacy. Through bold interpretations, the judiciary has affirmed that the Constitution is the supreme law of the land and that no authority, including Parliament, is above it.

By introducing doctrines such as the Basic Structure Doctrine, the judiciary ensured that fundamental constitutional principles—such as separation of powers, independence of the judiciary, and rule of law—remain inviolable. Judicial activism thus transformed the courts into guardians of constitutional integrity, preventing arbitrary constitutional amendments and executive excesses.

6.3 Impact on the Protection and Expansion of Fundamental Rights

Judicial activism has played a decisive role in expanding the scope of fundamental rights in Bangladesh. Courts have adopted a liberal and purposive interpretation of constitutional provisions, particularly Articles 31 and 32, to ensure substantive justice.

The right to life has been interpreted to include:

- The right to live with human dignity
- The right to a healthy and pollution-free environment
- Protection against arbitrary state action

As a result, judicial activism has provided remedies to marginalized and disadvantaged groups who otherwise lacked effective access to justice.

6.4 Judicial Activism and Public Interest Litigation (PIL)

Another significant impact of judicial activism is the development of Public Interest Litigation (PIL). By relaxing the traditional doctrine of locus standi, the judiciary allowed public-spirited individuals and organizations to seek judicial redress on behalf of affected communities.

This innovation:

- Democratized access to justice
- Strengthened governmental accountability
- Enabled judicial intervention in environmental, administrative, and human rights violations

PIL has thus become a powerful instrument for social justice in Bangladesh.

6.5 Impact of Judicial Activism on Democratic Governance

Judicial activism has produced mixed effects on democratic governance.

Positive impacts include:

- Ensuring checks and balances
- Preventing abuse of executive and legislative power
- Upholding constitutional limitations

However, critics argue that excessive judicial intervention in policy matters may undermine democratic legitimacy by encroaching upon the domain of elected representatives. When courts assume a policy-making role, they risk being perceived as unelected lawmakers, potentially disrupting the democratic balance.

6.6 Impact of Judicial Restraint on Separation of Powers

Judicial restraint has contributed significantly to preserving the doctrine of separation of powers in Bangladesh. By refraining from interference in political, economic, and policy-oriented matters, courts have respected the functional boundaries of the legislature and the executive.

Such restraint ensures that:

- Policy decisions remain within the domain of elected bodies
- Courts do not exceed their institutional competence

- Democratic accountability is maintained

Judicial restraint thus safeguards constitutional harmony and institutional balance.

6.7 Judicial Restraint and Administrative Stability

Judicial restraint has also promoted administrative efficiency and stability. Courts have generally avoided interfering in matters involving:

- Economic planning and budgetary decisions
- Taxation and fiscal policy
- Development and infrastructure projects

This approach recognizes that courts lack the technical expertise required for complex policy decisions and that excessive judicial intervention may hinder governance and development.

6.8 Risks of Excessive Judicial Restraint

While judicial restraint is essential, excessive restraint can have detrimental consequences, particularly in a developing democracy like Bangladesh.

Potential risks include:

- Executive arbitrariness and abuse of power
- Inadequate protection of fundamental rights

- Weak enforcement of constitutional limitations

In situations where political institutions fail to act constitutionally, judicial restraint may amount to judicial abdication rather than constitutional fidelity.

6.9 Necessity of a Balanced Judicial Approach

The Bangladeshi constitutional experience demonstrates that neither absolute judicial activism nor complete judicial restraint is desirable. A balanced, context-sensitive judicial approach is essential.

Courts should adopt judicial activism when:

- Fundamental rights are grossly violated
- Constitutional governance collapses
- Democratic institutions fail to perform their duties

Conversely, judicial restraint should prevail in matters involving policy formulation, political discretion, and administrative expertise.

6.10 Constitutional Morality and Judicial Responsibility

Judicial conduct must be guided by constitutional morality, not personal ideology. Judges must ensure that their decisions:

- Reflect constitutional values
- Respect democratic principles

- Preserve institutional legitimacy

Constitutional morality serves as the guiding principle that reconciles judicial activism with judicial restraint.

6.11 Evaluation of the Chapter

This chapter reveals that judicial activism has significantly strengthened constitutionalism, rights protection, and accountability in Bangladesh, while judicial restraint has preserved democratic legitimacy and administrative stability. The effectiveness of the judiciary ultimately depends on its ability to maintain a judicious balance between these two approaches.

Chapter 7: A Comparative Study of Judicial Activism and Judicial Restraint

7.1 Introduction

A comparative analysis of judicial activism and judicial restraint provides valuable insight into how different constitutional systems balance judicial power with democratic governance. Bangladesh's constitutional jurisprudence has been influenced by both common law traditions and comparative constitutional developments, particularly from India and the United Kingdom. This chapter examines the judicial approaches adopted in these jurisdictions and evaluates their relevance to the constitutional framework of Bangladesh.

7.2 Judicial Activism and Judicial Restraint in India

India is widely regarded as one of the most prominent examples of judicial activism in the common law world. The Indian judiciary, especially the Supreme Court of India, has played an expansive role in constitutional interpretation.

7.2.1 Constitutional Basis

The Constitution of India empowers courts to enforce fundamental rights under Articles 32 and 226. These provisions have been interpreted liberally, allowing courts to issue directions, guidelines, and even policy-oriented remedies.

7.2.2 Development of the Basic Structure Doctrine

The landmark case of *Kesavananda Bharati v. State of Kerala* established the Basic Structure Doctrine, limiting Parliament's power to amend the Constitution. This doctrine later influenced Bangladeshi constitutional jurisprudence, particularly in *Anwar Hossain Chowdhury v. Bangladesh*.

7.2.3 Public Interest Litigation (PIL)

Indian courts pioneered Public Interest Litigation by relaxing locus standi requirements. PIL enabled judicial intervention in matters of social justice, environmental protection, and administrative accountability.

7.2.4 Criticism

Despite its achievements, Indian judicial activism has been criticized for:

- Judicial overreach
- Encroachment into executive and legislative domains
- Implementation challenges

7.3 Judicial Restraint in the United Kingdom

The United Kingdom represents a contrasting model characterized traditionally by judicial restraint, rooted in parliamentary sovereignty.

7.3.1 Parliamentary Sovereignty

Under the British constitutional system, Parliament is the supreme law-making authority. Courts historically refrained from questioning the validity of parliamentary legislation.

7.3.2 Limited Judicial Review

Judicial review in the UK traditionally focused on procedural fairness rather than substantive merits. Courts avoided intervention in policy matters, respecting executive discretion.

7.3.3 Evolution After the Human Rights Act 1998

The incorporation of the European Convention on Human Rights expanded judicial review. However, UK courts still exercise restraint by issuing declarations of incompatibility rather than invalidating legislation.

7.3.4 Judicial Philosophy

British courts emphasize:

- Institutional competence
- Democratic accountability
- Constitutional conventions

This reflects a cautious and balanced approach to judicial power.

7.4 Judicial Activism and Judicial Restraint in Bangladesh: A Comparative Context

Bangladesh occupies a middle position between the activist Indian model and the restrained British model. Influenced by both systems, Bangladeshi courts have adopted a hybrid approach.

7.4.1 Similarities with India

- Adoption of the Basic Structure Doctrine
- Expansion of PIL

- Broad interpretation of fundamental rights

7.4.2 Similarities with the UK

- Respect for separation of powers
- Judicial restraint in political and policy matters
- Recognition of parliamentary authority

7.5 Comparative Evaluation

Aspect	India	United Kingdom	Bangladesh
Judicial Approach	Highly Activist	Traditionally Restrained	Balanced
PIL	Extensive	Limited	Moderately Developed
Parliamentary Control	Limited	Strong	Constitutionally Limited
Judicial Review	Expansive	Procedural	Contextual

This comparison demonstrates that Bangladesh has selectively adopted elements from both jurisdictions to suit its constitutional realities.

7.6 Lessons for Bangladesh

The comparative analysis suggests that:

- Judicial activism is essential where democratic institutions fail
- Judicial restraint is necessary to preserve democratic legitimacy
- Context-sensitive adjudication strengthens constitutional governance

Bangladesh must continue developing a jurisprudence that reflects its unique political, social, and constitutional context.

7.7 Evaluation of the Chapter

This chapter highlights that judicial behavior is shaped by constitutional design, political culture, and historical experience. The Bangladeshi judiciary has learned from both Indian activism and British restraint, crafting a pragmatic and flexible approach to constitutional adjudication.

Chapter 8: Findings, Recommendations and Conclusion

8.1 Introduction

This chapter presents the major findings derived from the analysis of judicial activism and judicial restraint in Bangladesh, followed by practical recommendations for achieving a balanced judicial approach. The chapter concludes by summarizing the overall significance of the study and reaffirming the role of the judiciary in sustaining constitutional democracy. The discussion is grounded in the constitutional practices and jurisprudence of the Supreme Court of Bangladesh.

8.2 Major Findings of the Study

Based on the doctrinal and analytical examination undertaken in previous chapters, the following findings emerge:

8.2.1 Judicial Activism as a Guardian of Constitutionalism

The study finds that judicial activism has played a decisive role in preserving constitutional supremacy in Bangladesh. Through progressive interpretation, the judiciary has:

- Protected the basic structure of the Constitution
- Restored constitutional governance after periods of extra-constitutional rule
- Ensured accountability of the executive and legislature

Judicial activism has thus functioned as a corrective mechanism in times of democratic failure.

8.2.2 Expansion and Protection of Fundamental Rights

One of the most significant outcomes of judicial activism is the expansion of fundamental rights. The judiciary has interpreted constitutional guarantees broadly to include:

- Right to life with dignity
- Environmental protection
- Due process and natural justice

This approach has strengthened access to justice, particularly for marginalized and disadvantaged groups.

8.2.3 Institutional Importance of Judicial Restraint

The study also reveals that judicial restraint has been equally important in maintaining constitutional balance. By refraining from interference in political and policy matters, the judiciary has:

- Respected separation of powers
- Preserved democratic legitimacy
- Ensured administrative stability

Judicial restraint has prevented the judiciary from becoming an unelected policy-making body.

8.2.4 Risks of Imbalance

The research identifies that excessive judicial activism may lead to judicial overreach, while excessive restraint may enable executive arbitrariness. Both extremes pose risks to constitutional governance. Therefore, neither doctrine is sufficient in isolation.

8.3 Recommendations

In light of the above findings, the following recommendations are proposed:

8.3.1 Adoption of a Balanced and Context-Based Approach

Courts should adopt a contextual approach, applying judicial activism only when:

- Fundamental rights are seriously violated
- Constitutional provisions are ignored
- Democratic institutions fail to act

Judicial restraint should prevail in matters involving policy formulation, political discretion, and economic planning.

8.3.2 Development of Clear Judicial Guidelines

The judiciary may develop self-imposed guidelines to determine:

- When judicial intervention is constitutionally necessary
- When deference to elected branches is appropriate

Such guidelines would enhance consistency and institutional credibility.

8.3.3 Strengthening Constitutional Morality

Judicial decisions should be guided by constitutional morality rather than personal or political preferences. Judges must uphold:

- Rule of law

- Democratic values
- Institutional integrity

This principle can serve as a bridge between activism and restraint.

8.3.4 Enhancing Institutional Coordination

Constructive dialogue among the judiciary, legislature, and executive should be encouraged to reduce institutional conflict and ensure effective governance while respecting constitutional boundaries.

8.4 Contribution of the Study

This thesis contributes to Bangladeshi constitutional scholarship by:

- Providing a comprehensive analysis of judicial activism and restraint
- Examining their practical impact on democracy and governance
- Proposing a balanced framework suitable for a developing constitutional democracy

The study also serves as a reference for future legal research and judicial policy formulation.

8.5 Conclusion

Judicial activism and judicial restraint are not mutually exclusive doctrines; rather, they are complementary principles essential for constitutional governance. In Bangladesh, judicial activism has been instrumental in safeguarding constitutional supremacy, protecting fundamental rights, and correcting institutional failures. At the same time, judicial restraint has preserved democratic legitimacy, separation of powers, and administrative stability.

The sustainability of constitutional democracy in Bangladesh depends on the judiciary's ability to strike a judicious balance between these two approaches. A judiciary guided by constitutional morality, institutional wisdom, and contextual sensitivity can continue to serve as the ultimate guardian of the Constitution and the rule of law.