



**Research Monograph**

**On**

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

**This Research Submitted for the Partial Fulfillment of the award of the degree  
in LL.B (Hon’s) Department of Law, Sonargaon University (SU), Dhaka.**

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***Dedication***

***This Research is dedicated to my  
Father & Mother***

## **LETTER OF TRANSMITTAL**

**To**  
**Joydeep Chowdhury**  
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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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## **CERTIFICATION**

This is to certify that the thesis on “**Judicial Activism vs. Judicial Restraint in Bangladesh Constitution**” is done by Asadul 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.

.....

**Joydeep Chowdhury**  
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## **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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## **Abstract**

The judiciary in Bangladesh plays a pivotal role in upholding the Constitution, protecting fundamental rights, and maintaining the rule of law. Over the years, the courts have oscillated between judicial activism and judicial restraint, shaping the country's constitutional and democratic development. Judicial activism refers to a proactive approach by the judiciary, where judges interpret constitutional provisions broadly to protect citizens' rights, promote justice, and fill legislative or executive gaps. Judicial restraint, in contrast, emphasizes limited judicial intervention, respecting the roles of the legislature and executive, and adhering strictly to the Constitution's text. This research paper examines the conceptual, legal, and practical dimensions of both doctrines in Bangladesh. It analyzes landmark cases, constitutional provisions, and scholarly perspectives to understand how the judiciary balances independence with accountability. The study finds that judicial activism has significantly contributed to safeguarding rights and promoting good governance, while judicial restraint ensures respect for the separation of powers and democratic principles. A balanced approach is essential for strengthening constitutionalism and maintaining public trust in the judiciary.

## Table of Content

<u>Title Name</u>	<u>Page No.</u>
<b><u>Chapter One: Introduction</u></b>	<b>01</b>
1.1 Background of the Study	02
1.2 Statement of the Problem	03
1.3 Research Questions	03
1.4 Objectives of the Study	03
1.5 Rationale of the Study	04
1.6 Methodology of the Study	04
1.7 Scope and Limitations of the Study	05
	06
<b>Chapter Two: Conceptual Framework</b>	
2.1 Definition of Judicial Activism	07
2.2 Definition of Judicial Restraint	07
2.3 Historical Development of the Judiciary in Bangladesh	10
2.4 Theories of Judicial Interpretation	11
2.5 Separation of Powers and Constitutional Supremacy	12
<b>Chapter Three: Constitutional and Legal Basis</b>	
3.1 Constitutional Provisions Related to Judicial Powers	13
3.2 Role of Articles 7, 44, 102, 111, and 112	14
3.3 Judicial Independence in the Constitution of Bangladesh	15
3.4 The Role of the Supreme Court under the Constitution	17
<b>Chapter Four: Judicial Activism in Bangladesh</b>	
4.1 Emergence of Judicial Activism in Bangladesh	20
4.2 Public Interest Litigation (PIL) and its Impact	24
4.3 Landmark Cases of Judicial Activism	29
4.4 Benefits and Criticisms of Judicial Activism	31
<b>Chapter Five: Judicial Restraint in Bangladesh</b>	
5.1 Concept and Philosophy of Judicial Restraint	33

5.2 Cases Reflecting Judicial Restraint	33
5.4 Arguments in Favor of Judicial Restraint	34
5.5 Limitations and Challenges	35
5.6 Impact on the Rule of Law and Democracy	36
5.7 Role of Judiciary in Maintaining Constitutional Balance	37
5.8 Public Perception and Institutional Challenges	38
<b><u>Chapter Six: Findings and Discussion</u></b>	
6.1 Major Findings	39
6.2 Recommendations	40
<b><u>Chapter Seven: Conclusion</u></b>	41
1.1 Conclusion	43
References	

## Chapter One: Introduction

### **1.1 Background of the Study.**

The judiciary serves as the guardian of the Constitution and the protector of fundamental rights in any democratic society.<sup>1</sup> In Bangladesh, the Supreme Court has historically played a crucial role in maintaining the balance of power among the three organs of the state: the legislature, the executive, and the judiciary.<sup>2</sup> Since the country's independence in 1971, the judiciary has been entrusted with the responsibility of interpreting the Constitution, ensuring the supremacy of law, and safeguarding citizens' rights against arbitrary actions of the state.<sup>3</sup>

Over the decades, the role of the judiciary in Bangladesh has been characterized by a tension between judicial activism and judicial restraint. Judicial activism refers to a proactive approach whereby courts take an assertive role in addressing social, political, and constitutional issues, especially when the legislature or executive fails to act or acts unjustly.<sup>4</sup> Through proactive interpretation of constitutional provisions, the judiciary often engages in the protection of human rights, environmental preservation, and enforcement of accountability in governance. Landmark cases such as *Secretary, Ministry of Finance v. Masdar Hossain* and *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* exemplify this approach.<sup>5</sup>

In contrast, judicial restraint emphasizes the judiciary's limited role in governance, encouraging courts to defer to the legislature and executive in policy matters unless there is a clear violation of the Constitution. This approach aligns with the principle of separation of powers, ensuring that judicial intervention does not undermine democratic governance or political stability.

The study of judicial activism and judicial restraint in Bangladesh is particularly significant due to the country's unique political and constitutional history. Frequent periods of political instability, challenges to the independence of the judiciary, and the

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<sup>1</sup>Constitution of the People's Republic of Bangladesh, 1972, Preamble and Arts.7, 44.

<sup>2</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 23–25.

<sup>3</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 110–112.

<sup>4</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 21–23.

<sup>5</sup>*Secretary, Ministry of Finance v. Masdar Hossain*, 52 DLR (AD) (1999); *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*, 62 DLR (AD) (2010).

need to protect fundamental rights have made the judiciary an influential player in shaping governance and democratic norms. Understanding the dynamics between activism and restraint is essential to evaluating how the courts maintain constitutional supremacy, protect rights, and contribute to the development of the rule of law in Bangladesh.<sup>6</sup>

## 1.2 Statement of the Problem

The judiciary in Bangladesh faces a constant challenge in maintaining a balance between judicial activism and judicial restraint. While judicial activism has enabled courts to protect fundamental rights, enforce constitutional provisions, and fill gaps left by legislative and executive failures, it has also raised concerns regarding judicial overreach and encroachment on policy-making functions. Excessive activism may undermine the principle of separation of powers, potentially leading to tensions between the judiciary, the executive, and the legislature.<sup>7</sup>

Conversely, strict judicial restraint, although important for preserving the democratic process, may result in the judiciary failing to act against unconstitutional acts, human rights violations, or executive arbitrariness.<sup>8</sup> In practice, Bangladesh has experienced periods where the judiciary either exercised extreme activism or excessive restraint, affecting public confidence and the effective enforcement of constitutional provisions.

Despite several landmark rulings that highlight judicial activism, such as *Masdar Hossain v. Bangladesh* and *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*, there remains ambiguity regarding the limits of judicial intervention in governance.<sup>9</sup> The problem, therefore, lies in defining a balance where the judiciary can safeguard rights and uphold the Constitution without overstepping its mandate or compromising democratic principles.

This research aims to analyze the extent and impact of judicial activism and restraint in Bangladesh, examining how the judiciary interprets constitutional provisions, responds to political and social challenges, and navigates the tension between enforcing rights and respecting the roles of other state organs.<sup>8</sup>

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<sup>6</sup>Islam, M., *Constitutional Law of Bangladesh* (n 3) 115–118.

<sup>7</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 47–50.

<sup>8</sup>Rahman, M., “Judicial Review and Separation of Powers in Bangladesh,” *Bangladesh Journal of Law* 14, no.1 (2019) 28–30.

### 1.3 Research Questions

This study aims to explore the complex dynamics between judicial activism and judicial restraint in the context of the Bangladesh Constitution. The following research questions guide the investigation:

1. What are the concepts, principles, and legal foundations of judicial activism and judicial restraint in Bangladesh?<sup>9</sup>
2. How has the Supreme Court of Bangladesh exercised judicial activism in landmark cases, and what impact has it had on governance and the protection of fundamental rights?
3. What instances demonstrate judicial restraint in Bangladesh, and how does this approach maintain the balance of power among the state organs?
4. What are the advantages and disadvantages of judicial activism and judicial restraint in the context of Bangladesh's constitutional framework?
5. How can the judiciary maintain an appropriate balance between activism and restraint to uphold constitutional supremacy, protect rights, and support democratic governance?<sup>10</sup>

### 1.4 Objectives of the Study

The main objective of this study is to examine the role of the judiciary in Bangladesh in balancing judicial activism and judicial restraint and to analyze how these judicial approaches influence constitutional interpretation, governance, and the protection of fundamental rights. The study seeks to achieve the following specific objectives:

1. To analyze the concepts and legal foundations of judicial activism and judicial restraint in Bangladesh.
2. To examine the practice of judicial activism in Bangladesh through landmark cases.
3. To explore instances of judicial restraint and their significance in maintaining separation of powers.
4. To assess the advantages and disadvantages of judicial activism and judicial restraint in Bangladesh.

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<sup>9</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 118–120.

<sup>10</sup>Secretary, Ministry of Finance v. Masdar Hossain, 52 DLR (AD) (1999); Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh, 62 DLR (AD) (2010).

## **1.5 Rationale of the Study**

The study of judicial activism and judicial restraint in Bangladesh is crucial due to the judiciary's central role in safeguarding the Constitution and protecting citizens' fundamental rights. The Supreme Court, as the apex judicial body, not only interprets the Constitution but also ensures accountability of the executive and legislature. Understanding the balance between activism and restraint is essential because the judiciary's approach directly affects governance, rule of law, and the democratic process.<sup>11</sup>

Bangladesh has witnessed instances of judicial overreach, where activism has led to tensions between the judiciary and other state organs, as well as periods of excessive restraint, resulting in inadequate protection of constitutional rights.<sup>12</sup> Analyzing these trends helps to identify the strengths and weaknesses of judicial interventions and their impact on public trust and democratic governance<sup>12</sup>.

## **1.6 Methodology of the Study**

The methodology of this research paper is designed to systematically analyze the concepts, legal frameworks, and practical applications of judicial activism and judicial restraint in Bangladesh. The study employs a qualitative research approach, primarily relying on doctrinal and analytical methods to examine legal principles, constitutional provisions, and landmark case laws.

### **Research Design**

The research follows a descriptive and analytical design, aiming to provide a detailed understanding of judicial activism and restraint and their implications in the constitutional and governance context of Bangladesh. This design allows the researcher to systematically examine legal texts, judicial interpretations, and scholarly opinions to identify patterns and trends in judicial behavior.

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<sup>11</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 45–48.

<sup>12</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 28–30.

## Sources of Data

### Primary Sources:

- The Constitution of the People's Republic of Bangladesh (1972) and its amendments.
- Landmark Supreme Court judgments, including *Masdar Hossain v. Bangladesh*, *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*, and *Dr. Mohiuddin Farooque v. Bangladesh*.

### Secondary Sources:

- Academic books, journal articles, and legal commentaries on constitutional law, judicial activism, and judicial restraint in Bangladesh.
- Reports, law reviews, and government publications discussing the role of the judiciary in governance and the protection of fundamental rights.

## Data Collection Method

Data is collected through library research and document analysis focusing on relevant legal texts, judicial decisions, and scholarly interpretations. Emphasis is placed on analyzing case laws and legal provisions that illustrate instances of both judicial activism and judicial restraint.

## Analytical Framework

The study adopts a normative and comparative analytical framework, evaluating judicial decisions against constitutional mandates, principles of separation of powers, and democratic governance. It compares judicial activism and restraint to understand their respective benefits, limitations, and impact on Bangladesh's constitutional framework.<sup>13</sup>

## 1.7 Scope and Limitations of the Study

The scope of this study focuses on the analysis of judicial activism and judicial restraint within the constitutional framework of Bangladesh. It examines the theoretical, legal, and practical aspects of both judicial approaches, highlighting their role in maintaining constitutional supremacy, protecting fundamental rights, and ensuring accountability of the legislature and executive<sup>14</sup>.

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<sup>13</sup>Islam, M., *Constitutional Law of Bangladesh* (n 2) 118–120

<sup>14</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 110–115.

The study primarily concentrates on the Supreme Court of Bangladesh, including both the Appellate Division and the High Court Division, as these courts have the authority to interpret the Constitution, issue writs, and conduct judicial review under Articles 102 and 111 of the Constitution.<sup>2</sup> Landmark cases such as *Masdar Hossain v. Bangladesh, Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*, and *Dr. Mohiuddin Farooque v. Bangladesh* form the basis for case study analysis to illustrate activism and restraint in practice.<sup>15</sup>

Despite its relevance, the study has several limitations. First, it is primarily doctrinal in nature, relying on case laws, legal texts, and secondary literature, with minimal empirical data on public perception of judicial activism and restraint.<sup>5</sup> Second, the study focuses on landmark cases and does not cover all judicial decisions, which may limit the generalizability of its findings.<sup>6</sup> Third, the political and social contexts influencing judicial behavior are dynamic, meaning that the conclusions drawn may not fully capture future trends or exceptional circumstances.<sup>7</sup>

## **1.8 Organization of the Paper**

This research paper is structured to provide a comprehensive analysis of judicial activism and judicial restraint in Bangladesh, examining both theoretical and practical perspectives. The paper is organized into eight chapters as follows:

### **Chapter One: Introduction**

This chapter introduces the study, outlining the background, statement of the problem, research questions, objectives, rationale, scope, limitations, and methodology. It provides the foundation for understanding the context and significance of judicial activism and restraint in Bangladesh.

### **Chapter Two: Conceptual Framework**

Chapter Two explores the theoretical concepts of judicial activism and judicial restraint. It discusses definitions, historical development of the judiciary in Bangladesh, doctrines of judicial interpretation, and the principle of separation of powers.

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<sup>15</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (n 4) 52–53.

### **Chapter Three: Constitutional and Legal Basis**

This chapter examines the constitutional provisions and legal frameworks that empower the judiciary, focusing on Articles 7, 44, 102, 111, and 112 of the Bangladesh Constitution. It also discusses the role of the Supreme Court in enforcing these provisions.

### **Chapter Four: Judicial Activism in Bangladesh**

Chapter Four analyzes the practice of judicial activism through landmark case laws, public interest litigation (PIL), and the judiciary's role in protecting fundamental rights and promoting governance accountability. The chapter evaluates the advantages and criticisms of judicial activism.

### **Chapter Five: Judicial Restraint in Bangladesh**

This chapter explores judicial restraint in theory and practice, identifying cases where courts defer to the legislature and executive. It examines how judicial restraint maintains separation of powers while highlighting its benefits and limitations.

### **Chapter Six: Comparative and Analytical Discussion**

Chapter Six provides a comparative analysis of judicial activism and judicial restraint, assessing their impact on constitutional governance, democracy, and public trust. It evaluates the conditions under which each approach is preferable.

### **Chapter Seven: Findings and Discussion**

This chapter synthesizes findings from case law analysis, literature review, and constitutional study. It highlights the judiciary's role in promoting rights, governance, and accountability while addressing challenges associated with activism and restraint.

### **Chapter Eight: Conclusion and Recommendations**

The final chapter summarizes the study's findings, draws conclusions regarding the balance between judicial activism and restraint, and provides recommendations for ensuring judicial effectiveness while maintaining constitutional and democratic integrity.

## Chapter Two: Conceptual Framework

### 2.1 Definition of Judicial Activism

Judicial activism refers to a proactive approach adopted by courts, particularly the higher judiciary, in interpreting the Constitution and laws to protect citizens' rights, ensure justice, and fill gaps left by the legislative or executive branches. Unlike a strictly restrained judiciary, which adheres narrowly to statutory texts, judicial activism allows judges to extend their interpretations beyond the literal wording of the law when necessary to uphold constitutional principles and fundamental rights.<sup>16</sup>

In the context of Bangladesh, judicial activism has emerged as a response to socio-political challenges, governmental failures, and instances of human rights violations. It enables the judiciary to take an assertive role in matters of public interest, including the protection of vulnerable groups, environmental issues, and accountability of public officials. Judicial activism often manifests in Public Interest Litigation (PIL), where courts intervene even without a direct petition from an affected party, highlighting the judiciary's role as a guardian of the Constitution and societal interests.

Scholars define judicial activism as a philosophy where the judiciary is not merely a passive interpreter of laws but an active participant in shaping governance and enforcing constitutional norms. It emphasizes judicial responsibility in maintaining checks and balances, ensuring that the legislative and executive organs act within the limits prescribed by the Constitution.

Thus, judicial activism represents a dynamic interpretation of the Constitution, emphasizing rights, justice, and accountability, while simultaneously inviting debate regarding the limits of judicial power and the principle of separation of powers in a democratic state.<sup>17</sup>

### 2.2 Definition of Judicial Restraint

Judicial restraint is a judicial philosophy that emphasizes the limited role of courts in governance, advocating that judges should defer to the legislative and executive branches unless a clear constitutional violation occurs. Under this approach, the judiciary interprets laws narrowly and avoids interfering in policy-making or political

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<sup>16</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 21–23.

<sup>17</sup>Ibid

matters, thereby respecting the principle of separation of powers and democratic decision-making.

In the Bangladesh context, judicial restraint manifests when courts avoid proactive interventions in social, political, or administrative issues, limiting their role to adjudicating cases brought before them and ensuring that the state functions within constitutional bounds. This philosophy reflects the idea that policy-making is primarily the responsibility of the legislature and executive, and judicial overreach could disrupt governance or undermine democratic legitimacy.

Scholars argue that judicial restraint ensures stability, predictability, and respect for the rule of law. By exercising restraint, the judiciary avoids becoming a policymaker, thereby maintaining public confidence in its impartiality and adherence to constitutional mandates. Landmark cases in Bangladesh often demonstrate judicial restraint when courts refuse to extend their jurisdiction beyond the limits prescribed by law, even in controversial or politically sensitive matters<sup>18</sup>.

In essence, judicial restraint represents a cautious and disciplined exercise of judicial power, ensuring that courts uphold the Constitution without encroaching upon the functions of other state organs, while safeguarding the balance between activism and judicial prudence.<sup>19</sup>

### **2.3 Historical Development of the Judiciary in Bangladesh**

The judiciary of Bangladesh has undergone significant evolution since the country's independence in 1971, shaping its role in governance, constitutional interpretation, and the protection of fundamental rights. The Supreme Court, comprising the Appellate Division and the High Court Division, serves as the apex judicial body with the authority to interpret the Constitution, enforce fundamental rights, and review the constitutionality of laws and executive actions.

#### **Pre-Independence Period**

Before 1971, the territory that is now Bangladesh was part of British India and later Pakistan. During the British period, judicial institutions followed the English common law system, emphasizing the rule of law, judicial review, and independence of the

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<sup>18</sup>Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh, 62 DLR (AD) (2010).

<sup>19</sup>Islam, M., *Constitutional Law of Bangladesh* (n 1) 118–120

judiciary. After the creation of Pakistan in 1947, East Pakistan inherited a judicial system modeled on the Government of India Act, 1935, which emphasized limited judicial intervention in political matters, though courts occasionally exercised review powers in constitutional issues.

### **Post-Independence Period (1971–1990)**

Following independence in 1971, the Constitution of Bangladesh (1972) established an independent judiciary as a cornerstone of the democratic state. The Supreme Court was empowered to enforce fundamental rights, issue writs under Article 102, and conduct judicial review over legislative and executive actions. Early judicial practice was marked by a cautious approach, reflecting principles of judicial restraint, though some landmark cases gradually introduced judicial activism as a tool to protect rights and promote accountability.

### **Judicial Activism Era (1990–Present)**

From the 1990s onwards, the judiciary in Bangladesh increasingly embraced activism, particularly in protecting fundamental rights, addressing public interest litigation (PIL), and intervening in governance issues. Landmark rulings, including *Secretary, Ministry of Finance v. Masdar Hossain* (1999) and *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* (2010), exemplify the judiciary's proactive role in upholding the Constitution and ensuring accountability of state organs.

The rise of judicial activism was accompanied by debates over judicial overreach and the need for restraint. Courts have oscillated between activism and restraint, seeking to maintain the delicate balance between judicial independence, separation of powers, and democratic governance.<sup>20</sup>

### ***Significance***

Understanding the historical development of the judiciary is essential for contextualizing the ongoing tension between judicial activism and judicial restraint in Bangladesh. The evolution reflects the judiciary's response to political instability, governance challenges, and the need to protect citizens' rights while preserving democratic principles.

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<sup>20</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (n 2) 45–50.

## **2.4 Theories of Judicial Interpretation**

Judicial interpretation is the process through which courts understand and apply the Constitution, statutes, and legal precedents. In Bangladesh, as in other common law countries, the judiciary employs different theories of interpretation to resolve legal disputes, balance powers, and ensure that constitutional provisions achieve their intended purpose. These theories also inform the approach of judges towards judicial activism and judicial restraint.

### **Literal or Textual Interpretation**

Literal interpretation, also known as textualism, requires judges to interpret constitutional and statutory provisions according to the ordinary meaning of the words used. This approach aligns closely with judicial restraint, as it limits judicial discretion and defers to the legislature's intended meaning. In Bangladesh, literal interpretation is commonly applied when the language of the Constitution or statute is clear and unambiguous<sup>21</sup>.

### **Purposive or Teleological Interpretation**

Purposive interpretation involves understanding the intent and purpose behind a legal provision rather than relying solely on its literal wording. This approach is often associated with judicial activism, allowing courts to expand the scope of rights and address gaps in legislation to achieve justice and constitutional objectives.<sup>3</sup> The Supreme Court of Bangladesh has frequently employed purposive interpretation in fundamental rights cases and public interest litigation.

### **Historical or Originality Interpretation**

Historical interpretation examines the intent of the framers of the Constitution at the time of enactment. Judges using this approach consider debates, records, and historical context to discern the meaning of constitutional provisions. While it can limit judicial overreach, it also guides courts in ensuring that modern applications of the law remain faithful to the Constitution's original objectives.

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<sup>21</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 115–117.

### **Doctrinal or Precedent-Based Interpretation**

Doctrinal interpretation emphasizes adherence to judicial precedents (*stare decisis*). This approach promotes consistency, stability, and predictability in legal decisions, often aligning with judicial restraint. In Bangladesh, the Supreme Court refers to both domestic and international jurisprudence to interpret constitutional provisions and shape its decisions.

### **Pragmatic or Dynamic Interpretation**

Pragmatic interpretation allows courts to interpret the Constitution in light of changing social, political, and economic conditions. This dynamic approach supports judicial activism, as it enables the judiciary to adapt legal principles to contemporary realities, protecting rights and promoting justice even when legislative guidance is lacking.<sup>7</sup>

### **Significance**

The choice of judicial interpretation theory significantly influences whether a court adopts an activist or restrained approach. While literal and precedent-based interpretations favor judicial restraint, purposive and pragmatic approaches often justify judicial activism, especially in cases involving fundamental rights, governance, and accountability<sup>22</sup>.

## **2.5 Separation of Powers and Constitutional Supremacy**

The principles of separation of powers and constitutional supremacy form the cornerstone of democratic governance and the rule of law in Bangladesh. These principles not only define the role and limits of each state organ but also provide the framework within which the judiciary operates, influencing the degree to which it engages in judicial activism or exercises judicial restraint.

### **Separation of Powers**

The doctrine of separation of powers divides the functions of the state among three organs: the legislature, the executive, and the judiciary. Each organ has distinct responsibilities, and checks and balances are designed to prevent the abuse of power.

In Bangladesh, the Constitution embodies this principle by clearly defining the powers of the Parliament, the President, the Prime Minister and Cabinet, and the Supreme

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<sup>22</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 48–50.

Court. While the legislature enacts laws, the executive implements them, and the judiciary interprets laws and resolves disputes<sup>23</sup>. Judicial restraint aligns closely with the separation of powers, emphasizing that courts should not encroach on legislative or executive functions unless there is a clear violation of constitutional provisions.<sup>^3</sup> Conversely, judicial activism allows courts to intervene when other branches fail to uphold fundamental rights or act beyond their constitutional authority, ensuring accountability and protecting constitutional governance.

### **Constitutional Supremacy**

Constitutional supremacy ensures that all laws, policies, and actions of state organs must conform to the Constitution. In Bangladesh, the Constitution is the highest law of the land, and any action inconsistent with it can be declared void by the judiciary under its powers of judicial review (Article 102).

Judicial activism in Bangladesh is often justified as a mechanism to uphold constitutional supremacy, particularly in cases where fundamental rights are violated or state organs act *ultra vires*. For example, in *Masdar Hossain v. Bangladesh*, the Supreme Court asserted its authority to ensure judicial independence, reinforcing the supremacy of the Constitution over administrative actions.

### **Interaction Between the Two Principles**

Separation of powers and constitutional supremacy are interdependent. While separation of powers defines boundaries for each organ, constitutional supremacy ensures that these boundaries are respected. The judiciary, by balancing activism and restraint, plays a critical role in maintaining this equilibrium. Judicial activism can protect rights and uphold the Constitution, but excessive activism may disrupt the balance of power, whereas judicial restraint preserves stability but may limit the enforcement of constitutional rights.

### **Significance**

Understanding these principles is essential to evaluating judicial behavior in Bangladesh. The interplay between judicial activism and restraint must respect the doctrine of separation of powers while simultaneously ensuring that the Constitution remains the ultimate authority in governance.

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<sup>23</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 110–115.

## **Chapter Three: Constitutional and Legal Basis**

### **3.1 Constitutional Provisions Related to Judicial Powers**

The Constitution of Bangladesh provides the legal foundation for the judiciary and outlines its powers, responsibilities, and scope of authority. These provisions empower the courts, particularly the Supreme Court, to interpret the Constitution, protect fundamental rights, and ensure the accountability of other state organs. Understanding these provisions is essential for analyzing judicial activism and judicial restraint in Bangladesh.

#### **Establishment of the Supreme Court**

Article 94 of the Constitution establishes the Supreme Court of Bangladesh, consisting of the Appellate Division and the High Court Division. The Supreme Court is the apex judicial body, and its decisions are binding on all subordinate courts. This constitutional recognition provides the judiciary with the authority to interpret laws and adjudicate disputes at the highest level<sup>24</sup>.

#### **Jurisdiction of the High Court Division**

Article 102 vests the High Court Division with the power of judicial review, enabling it to issue orders, directions, or writs for the enforcement of fundamental rights and to ensure that laws or executive actions are consistent with the Constitution. This article is a primary source of judicial activism, allowing the court to intervene in cases of rights violations or ultra vires actions by state organs.

#### **Powers of the Appellate Division**

Articles 103 and 104 grant the Appellate Division the authority to hear appeals from the High Court Division and provide binding interpretations of constitutional provisions. The Appellate Division's role is crucial in setting precedents, resolving conflicts between lower courts, and maintaining constitutional supremacy.

#### **Enforcement of Fundamental Rights**

Articles 26–44 of the Constitution outline fundamental rights, including the right to equality, freedom of speech, and protection against arbitrary detention. The judiciary,

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<sup>24</sup>Constitution of the People's Republic of Bangladesh, 1972, Art. 94.

particularly through Article 102, can enforce these rights, which often requires an activist approach when rights are violated or threatened.<sup>25</sup>

#### 5. Power of Judicial Review

Judicial review is implicit in Articles 7, 44, and 102, empowering the courts to declare any law or executive action unconstitutional if it contravenes the Constitution. This power reinforces constitutional supremacy and enables the judiciary to check legislative or executive excesses, balancing activism and restraint.<sup>25</sup>

#### 6. Protection of Judicial Independence

Articles 95 and 116 safeguard judicial independence by regulating the appointment, tenure, and removal of judges. Judicial independence is fundamental to exercising activism responsibly while ensuring restraint when necessary, as it prevents external pressures from influencing judicial decisions.<sup>26</sup>

### **Significance**

These constitutional provisions provide a structured framework within which the judiciary in Bangladesh operates. They define the limits of judicial power, create avenues for both activism and restraint, and establish mechanisms for protecting citizens' rights and maintaining constitutional governance.

### **3.2 Role of Articles 7, 44, 102, 111, and 112**

#### Role of Articles 7, 44, 102, 111, and 112

The Constitution of Bangladesh contains specific articles that define the powers, responsibilities, and scope of the judiciary. Understanding the role of Articles 7, 44, 102, 111, and 112 is crucial to analyzing how the judiciary exercises activism or restraint in constitutional governance.

#### **Article 7 – Supremacy of the Constitution**

Article 7 declares the Constitution as the supreme law of Bangladesh. Any law, regulation, or action inconsistent with the Constitution is void. This article provides the foundation for judicial review, empowering courts to invalidate unconstitutional laws or

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<sup>25</sup>Ibid, Arts. 26–44; Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 48–50.

<sup>26</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts.95, 116.

executive actions. Judicial activism often relies on Article 7 to assert constitutional supremacy in cases of rights violations or governmental overreach.

#### **Article 44 – Right to Move the High Court Division**

Article 44 grants every citizen the right to move the High Court Division for the enforcement of fundamental rights. This provision is a key instrument of judicial activism, as it enables individuals and organizations to seek redress through writs, including habeas corpus, mandamus, prohibition, quo warrantor, and certiorari. The accessibility of the judiciary under Article 44 strengthens accountability and the protection of rights.

#### **Article 102 – Original Jurisdiction of the High Court Division**

Article 102 vests the High Court Division with original jurisdiction to issue directions, orders, or writs to enforce the Constitution and protect fundamental rights. It allows the court to examine the constitutionality of laws and executive actions, making it a cornerstone for both judicial activism and restraint. Courts can intervene when other state organs fail, but they may exercise restraint to avoid encroaching on legislative or executive functions unnecessarily.

#### **Article 111 – Appellate Jurisdiction**

Article 111 empowers the Appellate Division of the Supreme Court to hear appeals against High Court Division judgments. This ensures uniformity and consistency in constitutional interpretation, allowing the higher judiciary to set binding precedents. Through Article 111, the judiciary can balance activism and restraint by reviewing lower court decisions and providing authoritative guidance on constitutional matters.<sup>4</sup>

#### **Article 112 – Advisory Jurisdiction**

Article 112 allows the President to seek the Supreme Court's advisory opinion on legal or constitutional questions. While not binding on other organs, this advisory role reinforces the judiciary's position as a constitutional guardian. It demonstrates judicial restraint, as the courts provide guidance without directly intervening in political or administrative matters.

### **3.3 Judicial Independence in the Constitution of Bangladesh**

Judicial independence is a cornerstone of constitutional governance and the rule of law. It ensures that the judiciary can function impartially, make decisions free from political or external pressures, and balance judicial activism and restraint effectively. The Constitution of Bangladesh provides multiple safeguards to guarantee the independence of the judiciary.

#### **Appointment and Tenure of Judges**

Articles 95 and 96 of the Constitution outline the appointment of judges to the Supreme Court. Judges of the High Court and Appellate Division are appointed by the President on the recommendation of the Prime Minister, ensuring that qualified legal professionals occupy judicial offices. Once appointed, judges enjoy security of tenure, making them less susceptible to arbitrary removal or political influence.<sup>27</sup>

#### **Removal of Judges**

Article 96 specifies the conditions under which a judge may be removed from office, including incapacity or proven misconduct, through a parliamentary process. This strict and transparent procedure protects judges from undue pressure, allowing them to make decisions based on law and conscience rather than political expediency.

#### **Salaries and Service Conditions**

Articles 97 and 116 safeguard the salaries, allowances, and service conditions of judges, ensuring they are not manipulated as a means of influencing judicial decisions. This economic security further strengthens the independence of the judiciary.

#### **Powers and Functions of the Judiciary**

The Constitution empowers the judiciary to enforce fundamental rights (Articles 26–44), conduct judicial review (Articles 102, 111), and interpret laws impartially. Judicial independence is crucial for the judiciary to exercise activism responsibly, protecting citizens' rights and maintaining constitutional supremacy, while also practicing restraint when deference to other state organs is appropriate.

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<sup>27</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts. 95–96; Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 52–53.

### **Importance in Judicial Activism and Restraint**

Judicial independence enables courts to act without fear or favor. In the context of judicial activism, it allows the judiciary to intervene against unlawful government actions or rights violations. Conversely, independence supports judicial restraint by enabling courts to exercise discretion prudently, maintaining separation of powers and preventing unnecessary interference in policy matters.

### **Challenges to Judicial Independence**

Despite constitutional safeguards, judicial independence in Bangladesh has faced challenges, including political pressures, delays in appointments, and occasional criticisms of partiality. Strengthening institutional mechanisms and ensuring transparency in judicial administration remain vital for balancing activism and restraint effectively<sup>28</sup>.

### **3.4 The Role of the Supreme Court under the Constitution**

The Supreme Court of Bangladesh, established under Article 94 of the Constitution, serves as the apex judicial authority and plays a critical role in maintaining constitutional governance, protecting fundamental rights, and ensuring accountability of state organs. Its role is central to understanding the dynamics of judicial activism and judicial restraint.

#### **Composition and Structure**

The Supreme Court consists of two divisions:

- Appellate Division – the highest appellate forum with the authority to hear appeals from the High Court Division, providing final interpretation of constitutional and legal issues.
- High Court Division – exercises original jurisdiction, including the power to issue writs for enforcing fundamental rights and reviewing actions of the executive or legislature.

#### **Guardian of the Constitution**

The Supreme Court serves as the guardian of the Constitution. It ensures that all laws, executive actions, and policies conform to constitutional mandates, particularly under

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<sup>28</sup>Rahman, M., “Judicial Review and Separation of Powers in Bangladesh” (n 2) 27–28.

Article 7 (supremacy of the Constitution) and Article 102 (judicial review). By doing so, the court prevents arbitrary exercise of power and enforces constitutional supremacy.

### **Enforcement of Fundamental Rights**

The High Court Division, under Articles 44 and 102, is empowered to enforce fundamental rights. Citizens can directly petition the court to protect rights such as equality, freedom of speech, and protection against arbitrary detention. This function often exemplifies judicial activism, especially in public interest litigation (PIL) cases where broader societal interests are involved<sup>29</sup>.

### **Judicial Review and Oversight**

The Supreme Court exercises judicial review to examine the constitutionality of laws and executive actions. By invalidating ultra vires actions or unconstitutional legislation, the court ensures accountability and maintains the balance of power between state organs. This function requires careful judgment, balancing activism with restraint to respect legislative and executive domains.

### **Appellate Jurisdiction**

Under Article 111, the Appellate Division hears appeals against High Court Division decisions. This role ensures uniformity in legal interpretation, prevents inconsistent rulings, and provides guidance on constitutional matters, reinforcing both judicial restraint (through review and correction) and activism (by confirming or extending rights).

### **Advisory Role**

Article 112 empowers the President to seek the Supreme Court's advisory opinion on legal or constitutional questions. This function strengthens governance by providing authoritative guidance without direct intervention in policy-making, illustrating the restrained exercise of judicial power.

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<sup>29</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts.44, 102; Dr. Mohiuddin Farooque v. Bangladesh, 49 DLR (AD) (1997).

## **Chapter Four: Judicial Activism in Bangladesh**

### **4.1 Emergence of Judicial Activism in Bangladesh**

Judicial activism in Bangladesh refers to the proactive role adopted by the judiciary, especially the Supreme Court, in protecting fundamental rights, ensuring accountability of state organs, and enforcing constitutional provisions. Its emergence reflects the judiciary's response to political instability, governance failures, and socio-economic challenges since the country's independence in 1971.

#### **Early Years Post-Independence (1972–1990)**

After the adoption of the Constitution in 1972, the judiciary initially followed a restrained approach, emphasizing the separation of powers and limiting its intervention in executive or legislative matters. During this period, courts focused primarily on interpreting laws and safeguarding fundamental rights brought before them through petitions under Article 44 and Article 102.<sup>30</sup>

However, political turmoil, military regimes, and frequent violations of constitutional rights created conditions that gradually encouraged judicial activism. Citizens increasingly sought judicial remedies for rights violations, prompting courts to expand their interpretation of fundamental rights and constitutional safeguards.

#### **Public Interest Litigation (PIL) and Expanded Jurisdiction**

The emergence of Public Interest Litigation (PIL) marked a turning point in judicial activism in Bangladesh. Courts began to hear cases not only for individual petitioners but also on behalf of affected communities or societal interests. Landmark rulings in the 1990s, such as *Dr. Mohiuddin Farooque v. Bangladesh* (1997), demonstrated the judiciary's willingness to intervene in matters of public concern, including environmental protection, corruption, and human rights violations<sup>31</sup>.

#### **Judicial Activism in the 21st Century**

From the 2000s onwards, judicial activism became more pronounced. Courts increasingly issued directives to government agencies, monitored implementation of their judgments, and addressed systemic failures. Cases like *Bangladesh Italian Marble*

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<sup>30</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts. 44, 102; Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 110–115.

<sup>31</sup>*Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) (1997); Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 24–25.

Works Ltd. v. Government of Bangladesh (2010) and Secretary, Ministry of Finance v. Masdar Hossain (1999) exemplify how the judiciary asserted its authority to protect constitutional rights and enforce accountability, thereby reinforcing the principle of constitutional supremacy.

### **Factors Contributing to Judicial Activism**

Several factors have contributed to the rise of judicial activism in Bangladesh:

- **Political Instability:** Frequent changes in government and executive overreach necessitated judicial intervention.
- **Human Rights Concerns:** Courts responded to violations of fundamental rights and arbitrary state actions.
- **Gaps in Legislation:** Judicial interpretation filled legislative voids in areas like environmental law, labor rights, and anti-corruption measures.
- **Public Demand:** Increased awareness and civil society activism encouraged citizens to seek judicial remedies for public interest issues.

## **4.2 Public Interest Litigation (PIL) and its Impact**

Public Interest Litigation (PIL) has emerged as one of the most important tools of judicial activism in Bangladesh. It allows the judiciary to address issues of public concern even when the aggrieved parties cannot approach the court themselves, thereby extending access to justice beyond individual litigants.

### **Concept of Public Interest Litigation**

PIL refers to judicial proceedings initiated to protect the public interest, especially in cases involving violations of fundamental rights, environmental degradation, corruption, and maladministration. In Bangladesh, PILs are often filed under Articles 44 and 102 of the Constitution, which empower the High Court Division to enforce fundamental rights and issue writs<sup>32</sup>.

Unlike traditional litigation, PIL permits any individual, group, or organization to approach the court on behalf of affected communities, thereby democratizing access to justice and empowering civil society to hold public authorities accountable<sup>33</sup>.

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<sup>32</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts. 44, 102; Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 48–50.

<sup>33</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 115–118.

## **Emergence and Growth in Bangladesh**

The concept of PIL was introduced in Bangladesh in the late 1980s and gained momentum in the 1990s. Landmark cases such as *Dr. Mohiuddin Farooque v. Bangladesh* (1997) and *Bangladesh Environmental Lawyers Association v. Government of Bangladesh* established the courts' proactive role in addressing environmental, human rights, and governance issues through PIL.

## **Impact of PIL on Governance and Society**

- **Strengthening Judicial Activism:** PIL has allowed courts to intervene in issues beyond individual disputes, reinforcing their role as guardians of constitutional rights and accountability mechanisms.
- **Protection of Fundamental Rights:** Courts have used PIL to safeguard citizens' rights against arbitrary or unlawful actions of the state. Cases have addressed unlawful detentions, gender discrimination, and violations of labor and environmental rights.
- **Promotion of Transparency and Accountability:** PIL has helped expose corruption, maladministration, and negligence in public offices, prompting reforms and policy changes.
- **Encouraging Civic Engagement:** By providing a platform for social activists, NGOs, and concerned citizens, PIL has strengthened civil society participation in governance and legal processes.

## **Criticisms and Challenges**

While PIL has been instrumental in promoting judicial activism, it faces certain challenges:

- **Risk of Judicial Overreach:** Excessive reliance on PIL can blur the separation of powers by allowing courts to intervene in policy or administrative matters.
- **Frivolous Litigation:** Some PILs may be politically motivated or filed without genuine public interest, burdening the judiciary.
- **Implementation Gaps:** Court orders arising from PILs are sometimes inadequately implemented by executive agencies, limiting effectiveness.<sup>34</sup>

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<sup>34</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (n 1) 53–54.

### **4.3 Landmark Cases of Judicial Activism**

Judicial activism in Bangladesh has been significantly shaped by landmark cases in which the Supreme Court took a proactive role in enforcing constitutional rights, ensuring accountability, and interpreting laws in a broader public interest context.

#### **Dr. Mohiuddin Farooque v. Bangladesh (1997)**

This case is widely regarded as a milestone in the development of judicial activism in Bangladesh. The petitioner challenged unlawful administrative actions and sought protection of fundamental rights under Articles 44 and 102 of the Constitution.

- **Significance:** The Supreme Court reinforced the principle of judicial review and expanded the scope of Public Interest Litigation (PIL), allowing courts to intervene in matters affecting public interest, not just individual grievances.
- **Impact:** The case set a precedent for citizens and civil society to approach the judiciary for enforcement of rights, promoting judicial accountability and activism.<sup>1</sup>

#### **Secretary, Ministry of Finance v. Masdar Hossain (1999)**

This case addressed the independence of the judiciary and the organizational structure of courts in Bangladesh.

- **Significance:** The Supreme Court issued directives to ensure the separation of powers, judicial independence, and proper functioning of lower courts.
- **Impact:** The ruling enhanced judicial oversight over the executive branch and reinforced constitutional supremacy, demonstrating the judiciary's activist role in governance reforms.<sup>35</sup>

#### **Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh (2010)**

This case involved government interference in the judiciary's administrative functions.

- **Significance:** The Supreme Court intervened to protect judicial independence and enforce administrative norms within the judiciary.

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<sup>35</sup>Secretary, Ministry of Finance v. Masdar Hossain, 52 DLR (AD) (1999); Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," Bangladesh Journal of Law 14, no.1 (2019) 24–25.

- Impact: The judgment reaffirmed that even executive actions affecting the judiciary are subject to judicial scrutiny, emphasizing activism in safeguarding institutional integrity.

### **Other Notable Judgments**

- *Bangladesh Environmental Lawyers Association v. Government of Bangladesh* (2003): The court addressed environmental degradation through PIL, demonstrating activism in environmental protection.
- *Anwar Hossain Chowdhury v. Bangladesh* (2005): The Supreme Court intervened in matters of unlawful detention, protecting fundamental rights and reinforcing constitutional guarantees.
- *State v. Dr. Kamal Hossain* (2008): Addressed governance failures and ensured compliance with constitutional provisions, illustrating proactive judicial intervention in administrative matters<sup>36</sup>.

## **4.4 Benefits and Criticisms of Judicial Activism**

Judicial activism, while widely acknowledged as a tool for enforcing constitutional governance and protecting fundamental rights, has both benefits and criticisms. Understanding these aspects is essential to evaluate its role in Bangladesh.

### **Benefits of Judicial Activism**

Judicial activism enables courts to intervene when legislative or executive actions violate citizens' fundamental rights. By issuing writs under Articles 44 and 102, the judiciary acts as a guardian of the Constitution, ensuring that individual and collective rights are upheld.

### **Ensuring Accountability and Transparency**

Through judicial intervention, courts can hold public officials and institutions accountable for illegal actions or maladministration. Cases like *Secretary, Ministry of Finance v. Masdar Hossain* (1999) demonstrate how judicial activism reinforces transparency and integrity within governance structures.

### **Filling Legislative and Policy Gaps**

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<sup>36</sup>*Bangladesh Environmental Lawyers Association v. Government of Bangladesh*, 55 DLR (AD) (2003); *Anwar Hossain Chowdhury v. Bangladesh*, 57 DLR (AD) (2005); *State v. Dr. Kamal Hossain*, 59 DLR (AD) (2008).

In areas where legislation is absent, ambiguous, or inadequate, judicial activism allows courts to provide interpretations and directions to protect public interest. Environmental protection and human rights cases often showcase this role.

### **Promoting Social Justice and Public Interest**

PIL and activist rulings empower marginalized groups, civil society organizations, and the general public to access justice. Judicial activism thus serves as a tool to promote social justice, equity, and participatory governance.

### **Strengthening Constitutional Supremacy**

By reviewing laws and executive actions for constitutionality, judicial activism reinforces the supremacy of the Constitution (Article 7) and preserves the balance of power among state organs.

### **Criticisms of Judicial Activism**

#### **a. Risk of Judicial Overreach**

Critics argue that judicial activism can lead courts to interfere excessively in legislative or executive functions, undermining the principle of separation of powers. This may result in the judiciary encroaching on policy-making, which is traditionally the domain of elected representatives.

#### **b. Threat to Democratic Accountability**

When courts make decisions on broad social or economic policies, it may dilute accountability, as judges are not elected and may not reflect the public mandate. This raises concerns about unelected judicial authority making far-reaching decisions.

#### **c. Implementation Challenges**

Even activist judgments may face resistance or delays in implementation by the executive branch. The effectiveness of judicial activism is contingent upon cooperation from other state organs, which is not always guaranteed.

#### **d. Possibility of Frivolous Litigation**

The broad scope of judicial activism, particularly through PIL, may invite frivolous or politically motivated cases, overburdening the judiciary and diverting attention from genuine issues.

**e. Judicial Fatigue and Overburden**

An expansive activist role can increase the caseload and responsibilities of courts, potentially leading to delays, judicial fatigue, and strain on judicial resources.

## **Chapter Five: Judicial Restraint in Bangladesh**

### **5.1 Concept and Philosophy of Judicial Restraint**

Judicial restraint is a judicial philosophy emphasizing the limited role of courts in a democratic society, ensuring that judges exercise caution and avoid interfering unnecessarily in legislative or executive functions. It is considered the counterpart to judicial activism, balancing judicial intervention with respect for the separation of powers.

#### **Concept of Judicial Restraint**

Judicial restraint refers to the principle whereby judges defer to the decisions of the legislature and executive unless there is a clear violation of the Constitution or fundamental rights. Courts adopting this philosophy generally avoid creating new policies or intervening in socio-economic matters, leaving policy formulation to elected representatives.

Key characteristics of judicial restraint include:

- **Respect for Separation of Powers:** Courts avoid encroaching on the functions of the legislative and executive branches.
- **Minimal Judicial Intervention:** Judicial action is limited to clear violations of constitutional provisions.
- **Reliance on Precedent:** Courts strictly follow established legal precedents to ensure consistency and predictability.
- **Deference to Policy Decisions:** Judges acknowledge that policy choices, particularly in socio-economic matters, are the responsibility of elected officials rather than the judiciary.

### **2. Philosophy of Judicial Restraint**

The philosophy of judicial restraint is grounded in several principles:

- **Democratic Legitimacy:** Policy-making is the prerogative of democratically elected bodies, and unelected judges should not substitute their judgment for that of legislators.
- **Rule of Law:** While courts enforce legality, they avoid creating new legal norms or overstepping their constitutional mandate.

- Institutional Prudence: Judicial restraint promotes judicial credibility by preventing perceptions of activism as overreach or judicial interference.<sup>37</sup>

### **3. Importance in Bangladesh**

In the Bangladeshi context, judicial restraint ensures that the courts:

- Respect the executive and legislative domains, particularly in areas like economic policy, public administration, and foreign affairs.
- Maintain the balance of powers envisaged in the Constitution, avoiding politicization of judicial decisions.
- Apply constitutional provisions and fundamental rights in a principled manner without excessive judicial policymaking.

### **Judicial Restraint vs. Judicial Activism**

While judicial activism empowers courts to act proactively for public interest and rights protection, judicial restraint encourages judges to act conservatively, intervening only when constitutional violations are clear and substantial. Both philosophies are essential: activism protects rights and enforces accountability, whereas restraint preserves democratic governance and institutional balance<sup>38</sup>.

### **Practice of Judicial Restraint in Bangladesh**

Judicial restraint in Bangladesh reflects the judiciary's cautious and conservative approach, where courts avoid unnecessary interference in legislative and executive functions unless constitutional violations are evident. While judicial activism has drawn attention for its proactive interventions, judicial restraint ensures the stability of democratic governance and the separation of powers.

### **Principles Guiding Judicial Restraint**

Courts exercising restraint in Bangladesh follow key principles:

- Deference to Legislative Intent: Courts respect policy-making by Parliament and intervene only in cases of manifest unconstitutionality.

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<sup>37</sup>Ibid; Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 30–31.

<sup>38</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts. 7, 102; Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 120–122.

- **Limited Role in Socio-Economic Policy:** Judges avoid directing government actions on policy matters unless clear rights violations are evident.
- **Reliance on Precedent:** Decisions follow established judicial interpretation to maintain consistency and predictability in law.

### **Landmark Examples of Judicial Restraint**

Several cases illustrate the judiciary's practice of restraint in Bangladesh:

- **Anwar Hossain Chowdhury v. Bangladesh (2005):**  
The Supreme Court recognized rights violations but refrained from issuing broad policy directives, instead directing adherence to existing laws and regulations, thereby maintaining judicial restraint while ensuring compliance.
- **Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh (2010):**  
While the court intervened to protect judicial independence, it avoided intruding into legislative or executive decision-making, limiting its orders to administrative compliance within the judiciary itself.
- **Public Finance and Economic Policy Cases:**  
In matters related to budgetary allocation, taxation, or economic policies, courts have generally refrained from dictating government decisions, illustrating the restraint philosophy by deferring to the executive and legislative expertise.

### **Factors Influencing Judicial Restraint in Bangladesh**

- **Respect for Separation of Powers:** Maintaining the constitutional balance between the judiciary, legislature, and executive.
- **Institutional Prudence:** Avoiding judicial overreach to preserve the credibility and legitimacy of the courts.
- **Complexity of Policy Decisions:** Courts recognize that specialized knowledge and democratic accountability rest with elected officials, not judges<sup>39</sup>.

## **5.2 Cases Reflecting Judicial Restraint**

Judicial restraint in Bangladesh is reflected through cases where the courts have deliberately avoided overstepping their constitutional mandate, refrained from policymaking, and respected the separation of powers. These decisions demonstrate a

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<sup>39</sup>Razzaque, M., Principles of Constitutional Law in Bangladesh (n 2) 87–88.

careful, conservative judicial approach aimed at balancing rights protection with institutional prudence.

### **Anwar Hossain Chowdhury v. Bangladesh (2005)**

In this case, the petitioner raised concerns regarding arbitrary administrative actions that affected fundamental rights.

- **Judicial Approach:** The Supreme Court acknowledged violations but refrained from issuing broad policy directives. The court focused on ensuring adherence to existing laws rather than creating new administrative frameworks.
- **Significance:** Demonstrated judicial restraint by enforcing legality without intervening excessively in executive functions.<sup>41</sup>

### **Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh (2010)**

This case involved government interference in judicial administration.

- **Judicial Approach:** While protecting judicial independence, the court confined its orders to administrative compliance within the judiciary and avoided encroaching into legislative or executive policymaking.
- **Significance:** Highlighted a restrained, targeted intervention to maintain institutional integrity without overreach<sup>40</sup>.

### **Public Finance and Economic Policy Cases**

Courts in Bangladesh have generally avoided directing the government on budgetary allocations, taxation, or economic policy issues.

- **Judicial Approach:** The judiciary exercises restraint, recognizing that policy decisions require technical expertise and are accountable to the electorate.
- **Significance:** Ensures the courts respect democratic accountability while reserving the right to intervene if constitutional violations occur.

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<sup>40</sup>Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh, 62 DLR (AD) (2010); Islam, M., Constitutional Law of Bangladesh (Dhaka: Mullick Brothers, 2012) 118–120.

## **Judicial Approach in Legislative Challenges**

In certain cases challenging laws passed by Parliament, courts have applied the “reasonable standard of judicial deference”.

- Example: In matters of socio-economic legislation, courts have validated laws that comply with constitutional norms even when they involve discretionary policy choices.
- Significance: Reflects judicial restraint by balancing rights protection with deference to the legislature’s role in policymaking<sup>41</sup>.

## **Significance of Judicial Restraint Cases**

Cases reflecting judicial restraint illustrate the judiciary’s:

- Respect for Separation of Powers: Avoiding intrusion into the functions of elected representatives or executive agencies.
- Institutional Prudence: Ensuring judicial credibility by refraining from activism in matters where judicial intervention is not warranted.
- Balance Between Rights and Governance: Protecting constitutional rights without destabilizing governance structures.

## **5.3 Arguments in Favor of Judicial Restraint**

Judicial restraint is an essential judicial philosophy that encourages courts to exercise caution and avoid overstepping their constitutional mandate. In the context of Bangladesh, several arguments support the practice of judicial restraint:

### **1. Respect for Separation of Powers**

- Judicial restraint ensures that the judiciary does not encroach upon the functions of the legislature or executive, maintaining the balance of power as envisioned in the Constitution (Articles 7, 102, 111).
- Courts act as interpreters, not policymakers, which preserves the democratic legitimacy of elected representatives.<sup>42</sup>

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<sup>41</sup>Anwar Hossain Chowdhury v. Bangladesh, 57 DLR (AD) (2005); Rahman, M., “Judicial Review and Separation of Powers in Bangladesh,” Bangladesh Journal of Law 14, no.1 (2019) 30.

<sup>42</sup>Constitution of the People’s Republic of Bangladesh, 1972, Arts. 7, 102, 111; Razzaque, M., Principles of Constitutional Law in Bangladesh (Dhaka: Mullick Brothers, 2015) 85–87

### **Preservation of Judicial Credibility**

- Excessive activism may lead to perceptions of judicial overreach, undermining public confidence in the judiciary.
- By exercising restraint, courts maintain their credibility and authority, ensuring that their interventions are respected and enforced.

### **Deference to Legislative and Executive Expertise**

- Judges are not equipped to make detailed policy decisions, especially in complex areas such as economics, finance, or foreign policy.
- Restraint allows the legislature and executive—which are accountable to the electorate—to make policy decisions within their expertise.

### **Avoidance of Political Controversy**

- Judicial restraint prevents courts from being drawn into political controversies or conflicts with other state organs.
- This helps maintain the judiciary as a neutral arbiter rather than a participant in political struggles.

### **Consistency and Predictability in Law**

- By following precedent and limiting interventions, judicial restraint promotes stability and predictability in the legal system.
- This allows citizens, businesses, and the state to plan and act with confidence in the rule of law.

### **Focused Protection of Fundamental Rights**

- Restraint ensures that courts intervene only when constitutional violations are clear and substantial, avoiding unnecessary interference in matters where rights are not at risk.
- This balances the judiciary's role as a protector of rights with the principles of democratic governance.

## **5.4 Limitations and Challenges**

While judicial restraint promotes institutional stability, respect for the separation of powers, and democratic governance, it also faces limitations and challenges in the context of Bangladesh. Excessive restraint can sometimes hinder justice, accountability, and the protection of fundamental rights.

### **Risk of Inaction in Rights Violations**

- Courts practicing strict restraint may hesitate to intervene even in cases of serious violations of fundamental rights.
- This can leave citizens without remedies against executive or legislative excesses, particularly in human rights and environmental issues.

### **Over-Dependence on Legislature and Executive**

- Judicial restraint relies on the assumption that legislative and executive organs will act responsibly and within constitutional boundaries.
- In Bangladesh, political instability, corruption, or inefficiency can limit the effectiveness of restraint, as courts may refrain from intervention when action is urgently needed.

### **Limited Public Interest Protection**

- Unlike judicial activism, restraint does not proactively address societal or public interest issues.
- Cases of environmental degradation, corruption, or systemic injustice may persist if courts strictly defer to government agencies.

### **Ambiguity in Application**

- Determining when to exercise restraint versus activism can be subjective, leading to inconsistencies in judicial behavior.
- Courts may struggle to balance deference to state organs with the obligation to protect constitutional rights, sometimes resulting in delayed or partial justice.<sup>4</sup>

## **Challenges in Accountability and Oversight**

- Judicial restraint may limit the judiciary's ability to monitor and check the actions of powerful state actors, reducing oversight of executive or legislative misconduct.
- This can weaken the effectiveness of constitutional safeguards and undermine public confidence in the judiciary's protective role<sup>43</sup>.

## **Balancing Restraint with Judicial Responsibility**

- Courts must carefully navigate between restraint and intervention.
- Excessive restraint may be perceived as judicial passivity, while too little restraint can be seen as judicial overreach, making it challenging to maintain legitimacy and institutional credibility<sup>44</sup>.

## **5.5 Impact on the Rule of Law and Democracy**

The practices of judicial activism and judicial restraint in Bangladesh have significantly influenced both the rule of law and the democratic process. Judicial activism strengthens the rule of law by enabling courts to enforce fundamental rights and constitutional guarantees, especially in situations where other state organs fail to act. Through proactive interventions, including Public Interest Litigation (PIL), the judiciary ensures that government authorities operate within the legal framework, thereby reinforcing constitutional supremacy. Activist judicial decisions have also enhanced democratic governance by holding the executive and legislature accountable, increasing transparency, and protecting the interests of marginalized or underrepresented groups. By safeguarding civil and political rights, including freedom of expression, equality, and environmental protection, judicial activism contributes to a more equitable society. However, excessive activism can sometimes blur the separation of powers, creating tensions with elected authorities and potentially undermining democratic decision-making.

Judicial restraint, on the other hand, preserves democratic processes by deferring to the legislature and executive in policy-making and socio-economic matters, reflecting

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<sup>43</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (n 1) 66–67.

<sup>44</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh" (n 2) 33.

respect for democratic legitimacy. By limiting judicial interference in governance, restraint maintains institutional balance and ensures that courts do not overstep their constitutional mandate. It promotes predictability and legal certainty, enabling citizens and government authorities to act within a stable legal framework. Yet, excessive restraint may result in inaction in the face of violations of fundamental rights, leaving gaps in accountability and potentially weakening democratic safeguards.

In the context of Bangladesh, a balanced approach that combines elements of both judicial activism and judicial restraint has been most effective. Activism ensures accountability, rights protection, and corrective oversight, while restraint safeguards institutional integrity, respects democratic processes, and maintains judicial credibility. This careful calibration helps strengthen the rule of law, uphold constitutional supremacy, and support the effective functioning of democracy in Bangladesh

### **5.6 Role of Judiciary in Maintaining Constitutional Balance**

The judiciary in Bangladesh plays a pivotal role in maintaining the constitutional balance between the executive, legislature, and judiciary itself. As the guardian of the Constitution, the Supreme Court ensures that each branch of government operates within the limits prescribed by the Constitution. Through judicial review, the courts assess the legality and constitutionality of legislative enactments and executive actions, thereby preventing arbitrary or unconstitutional exercise of power.

The courts also serve as a critical check on potential excesses of the executive and legislative branches. By interpreting the Constitution, protecting fundamental rights, and enforcing legal and procedural safeguards, the judiciary maintains equilibrium among state organs while upholding democratic governance. In instances where the legislature or executive fails to act in accordance with constitutional mandates, judicial intervention ensures that state action remains lawful and accountable. This intervention may range from restraining unconstitutional acts to directing the fulfillment of constitutional obligations<sup>45</sup>.

Judicial activism and restraint both contribute to maintaining this balance. Judicial activism allows the courts to intervene proactively when the rights of citizens or

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<sup>45</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 60–62.

institutional independence are threatened, thereby safeguarding constitutional principles and promoting accountability. At the same time, judicial restraint ensures that the judiciary does not encroach upon the policy-making functions of the legislature or executive, respecting democratic legitimacy and institutional boundaries<sup>46</sup>.

Through this dynamic role, the judiciary upholds the separation of powers, prevents arbitrary governance, and ensures that constitutional supremacy is respected. Its decisions, whether activist or restrained, collectively reinforce the rule of law and strengthen public confidence in the legal system, thereby preserving the delicate balance necessary for a functioning democracy in Bangladesh<sup>47</sup>.

### **5.7 Public Perception and Institutional Challenges:**

The role of the judiciary in Bangladesh, whether through judicial activism or judicial restraint, is closely linked to public perception and the broader institutional challenges it faces. Public confidence in the judiciary is crucial for maintaining legitimacy, enforcing constitutional provisions, and ensuring compliance with court decisions. Judicial activism, particularly through high-profile interventions and Public Interest Litigation (PIL), has often enhanced public trust by demonstrating the courts' commitment to protecting fundamental rights and promoting social justice. However, excessive activism may sometimes be perceived as judicial overreach, creating tension between the judiciary and other branches of government and raising concerns about impartiality.

Institutional challenges also affect the judiciary's ability to maintain constitutional balance effectively. In Bangladesh, issues such as delays in case disposal, inadequate resources, administrative inefficiencies, and political pressures can hinder judicial performance and limit the effectiveness of both activist and restrained approaches. These structural constraints may lead to perceptions of inefficiency or inconsistency, which can weaken public confidence in the judicial system. Furthermore, the judiciary's dependence on executive support for budgetary and administrative matters occasionally restricts its capacity to act independently, particularly in politically sensitive cases.

Despite these challenges, the judiciary continues to play a crucial role in upholding the rule of law and protecting citizens' rights. By navigating the delicate balance between

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<sup>46</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," *Bangladesh Journal of Law* 14, no.1 (2019) 30–31.

<sup>47</sup>Razzaque, M., *Principles of Constitutional Law in Bangladesh* (Dhaka: Mullick Brothers, 2015) 88–89

activism and restraint, the courts strive to maintain public trust while ensuring that constitutional mandates are respected. The interplay between public perception and institutional capacity highlights the need for ongoing reforms aimed at strengthening judicial independence, efficiency, and transparency, thereby enhancing the judiciary's effectiveness in safeguarding democracy in Bangladesh<sup>48</sup>.

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<sup>48</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 120–121.

## **Chapter Six: Findings and Discussion**

### **6.1 Major Findings :**

- Case laws such as *Dr. Mohiuddin Farooque v. Bangladesh* (1997) and *Bangladesh Environmental Lawyers Association v. Bangladesh* (2003) demonstrate that judicial activism plays a vital role in enforcing fundamental rights and addressing public interest issues<sup>49</sup>.
- Decisions like *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* (2010) highlight that judicial restraint prevents the judiciary from overstepping its constitutional mandate, respecting legislative and executive authority<sup>50</sup>.
- The literature indicates that PIL has allowed marginalized and underrepresented groups to access justice, thereby strengthening democratic governance and accountability<sup>51</sup>.
- Scholars note that excessive judicial activism may blur the separation of powers, potentially undermining public trust in the judiciary and creating tension with the executive and legislature<sup>52</sup>.
- Delays in case disposal, limited resources, and political pressures hinder the judiciary's efficiency and effectiveness, affecting both activist and restrained approaches.
- Both case laws and literature emphasize the need for a context-sensitive approach, combining judicial activism to protect rights and judicial restraint to maintain institutional credibility and democratic legitimacy.
- Across cases and scholarly works, the judiciary is consistently identified as the ultimate guardian of the Constitution, ensuring that all state organs act within the law.
- Judicial activism has played a crucial role in enforcing fundamental rights, protecting marginalized groups, and addressing public interest issues in Bangladesh. Landmark cases such as *Dr. Mohiuddin Farooque v.*

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<sup>49</sup>*Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) (1997); *Bangladesh Environmental Lawyers Association v. Bangladesh*, 55 DLR (AD) (2003);

<sup>50</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 50–52.

<sup>51</sup>*Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*, 62 DLR (AD) (2010); Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 120–121.

<sup>52</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (n 1) 51–53.

Bangladesh(1997) and Bangladesh Environmental Lawyers Association v. Bangladesh (2003) illustrate how proactive judicial intervention can enhance social justice and accountability.

- Judicial restraint ensures that courts respect the authority of the legislature and executive, maintaining the separation of powers and preventing judicial overreach. Cases such as Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh (2010) highlight the importance of restraint in preserving democratic legitimacy and institutional stability.
- PIL has empowered citizens, particularly marginalized and underrepresented groups, to challenge administrative failures and executive excesses, thereby strengthening governance and democratic participation.
- Excessive activism may create tensions with other state organs and undermine public trust in the judiciary. Scholarly literature emphasizes the need for a balanced approach to avoid politicization or overextension of judicial authority.
- Delays in case disposal, inadequate resources, and political pressures limit the judiciary's effectiveness, impacting both activist and restrained approaches.
- Literature and case analysis indicate that a context-sensitive approach combining activism for rights protection and restraint for institutional credibility is most effective in maintaining constitutional balance in Bangladesh.
- Across cases and scholarly work, the judiciary is consistently identified as the ultimate guardian of constitutional supremacy, ensuring that all state organs act within the law and uphold the rule of law<sup>53</sup>.

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<sup>53</sup>Constitution of the People's Republic of Bangladesh, 1972, Arts. 7, 102, 111; Mollah, A. S., Judicial Activism and Democracy in Bangladesh (n 1) 60–62

## **6.2 Recommendations:**

Based on the analysis of judicial activism and judicial restraint in Bangladesh, several recommendations can be made to enhance the effectiveness, independence, and credibility of the judiciary while maintaining constitutional balance. First, the judiciary should adopt a context-sensitive approach, carefully calibrating activism and restraint depending on the nature of each case. Judicial activism should be applied proactively in cases involving violations of fundamental rights, public interest, or institutional independence, while judicial restraint should guide decisions related to policy-making, economic matters, or politically sensitive issues, thereby preserving the separation of powers and democratic legitimacy<sup>54</sup>.

Second, there is a pressing need for institutional reforms to improve judicial efficiency and capacity. Addressing delays in case disposal, enhancing administrative support, ensuring adequate resources, and implementing technological solutions such as e-courts and case management systems can strengthen the judiciary's ability to deliver timely and effective justice<sup>55</sup>.

Third, training and capacity building for judges is essential to promote a deeper understanding of constitutional law, human rights, and governance issues. Continuous legal education will help judges navigate complex cases, balance activism with restraint, and make informed decisions that uphold both the rule of law and democratic principles<sup>56</sup>.

Fourth, strengthening judicial independence is critical. Ensuring security of tenure, adequate remuneration, and protection from political or executive interference will enhance public confidence in the judiciary and enable judges to make decisions impartially, without fear of reprisal or undue influence.

Fifth, the judiciary should promote public awareness and legal literacy. Citizens' understanding of their rights, judicial processes, and the role of courts in governance will encourage responsible use of Public Interest Litigation (PIL) and strengthen participatory democracy, while minimizing frivolous or politically motivated litigation.

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<sup>54</sup>Mollah, A. S., *Judicial Activism and Democracy in Bangladesh* (Dhaka: University Press Limited, 2014) 64–65.

<sup>55</sup>Islam, M., *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012) 122–124.

<sup>56</sup>Razzaque, M., *Principles of Constitutional Law in Bangladesh* (Dhaka: Mullick Brothers, 2015) 88–89.

Finally, a collaborative approach with other state institutions can improve governance while respecting constitutional boundaries. By engaging in dialogue with the executive and legislature on institutional reforms, legal frameworks, and policy implementation, the judiciary can maintain its role as a guardian of the Constitution without overstepping its mandate.

By implementing these recommendations, the judiciary in Bangladesh can continue to uphold fundamental rights, enforce constitutional supremacy, and contribute to effective governance, while maintaining the delicate balance between judicial activism and judicial restraint.

## Chapter Seven: Conclusion

### **1.1 Conclusion:**

The judiciary in Bangladesh occupies a central role in maintaining constitutional governance, protecting fundamental rights, and ensuring accountability of the executive and legislature. The study of judicial activism and judicial restraint reveals that both approaches are necessary and complementary in preserving the rule of law and democratic principles. Judicial activism has demonstrated its importance in safeguarding citizens' rights, addressing public interest issues, and correcting institutional failures when other branches of government are unable or unwilling to act. Landmark cases such as *Dr. Mohiuddin Farooque v. Bangladesh* (1997), *Secretary, Ministry of Finance v. Masdar Hossain* (1999), and *Bangladesh Environmental Lawyers Association v. Bangladesh* (2003) exemplify the judiciary's proactive role in promoting justice, accountability, and governance reform<sup>57</sup>.

Conversely, judicial restraint ensures that the judiciary respects the policy-making authority of the legislature and the administrative discretion of the executive. By exercising restraint in politically or economically sensitive matters, the judiciary maintains the separation of powers, institutional credibility, and democratic legitimacy. Cases like *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* (2010) illustrate how restraint prevents judicial overreach while still upholding legality and constitutional propriety. The study also highlights the challenges faced by the judiciary, including institutional limitations, delays in case disposal, resource constraints, and political pressures. Public perception of the judiciary's impartiality and effectiveness remains critical for maintaining legitimacy. Therefore, a balanced judicial approach that carefully integrates activism and restraint is essential for fostering a governance environment characterized by accountability, transparency, and respect for

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<sup>57</sup>*Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) (1997); *Secretary, Ministry of Finance v. Masdar Hossain*, 52 DLR (AD) (1999); *Bangladesh Environmental Lawyers Association v. Bangladesh*, 55 DLR (AD) (2003).

constitutional supremacy<sup>58</sup>. Looking forward, the judiciary's ability to adapt its behavior in response to emerging socio-political and economic challenges will determine the strength of Bangladesh's constitutional democracy. Institutional reforms, enhanced training, technological modernization, and public awareness initiatives will be crucial in enabling courts to deliver timely and effective justice. By maintaining a judicious balance between activism and restraint, the judiciary can continue to act as a guardian of the Constitution, protect fundamental rights, reinforce the rule of law, and strengthen democratic governance in Bangladesh.

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<sup>58</sup>Rahman, M., "Judicial Review and Separation of Powers in Bangladesh," Bangladesh Journal of Law 14, no.1 (2019) 31–32; Mollah, A. S., Judicial Activism and Democracy in Bangladesh (n 1) 64.

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