



# Sonargaon University (SU)

**Research Monograph  
On  
Judicial Activism vs. Judicial Restraint in  
Bangladesh Constitution**

**Research Monograph Submitted for the partial fulfilment of the award of the degree  
in**

**LL.B. (Honours)  
Department of Law  
Sonargaon University (SU)**

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**Date of Submission: 5<sup>th</sup> January, 2026**

Dedicated to my beloved parents,  
inspiring teachers,  
and the farmers and workers.



UGC & Govt. Approved  
**Sonargaon University (SU)**  
সোনারগাঁও ইউনিভার্সিটি (এসইউ)

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## **Letter of Transmittal**

To  
Joydeep Chowdhury  
Lecturer  
Department of Law  
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Subject: Submission of Research Monograph on “Judicial Activism vs. Judicial Restraint in Bangladesh Constitution”

Sir,

This is a great pleasure to submit the Research Monograph on “Judicial Activism vs. Judicial Restraint in Bangladesh Constitution” as a partial requirement for the fulfillment of my LL.B. (Honours) course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Sincerely yours,

---

Md. Abdul Karim  
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## **Declaration**

I do hereby declare that the Research Monograph Title “Judicial Activism vs. Judicial Restraint in Bangladesh Constitution” prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B. (Honours) Degree. This is an original work of mine. No part of this research, in any way of or in from, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

---

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সোনারগাঁও ইউনিভার্সিটি (এসইউ)

### **Certification by the Supervisor**

This is to certify that the work presented in this dissertation is based on the work, carried out by the author himself under my supervision in Department of Law, Sonargaon University (SU).

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.B. (Honours) program.

---

Joydeep Chowdhury  
Lecturer  
Department of Law  
Sonargaon University (SU)

## **Acknowledgement**

I am pleased to have completed this Research Monograph, which represents an important academic milestone in my legal studies. It has long been my aspiration to become a competent and dedicated lawyer, and my enrollment in the Department of Law at Sonargaon University (SU) was a step toward fulfilling that goal. Throughout my studies, I did not have many opportunities to apply and demonstrate my knowledge and analytical skills in depth. However, this Research Monograph on “Judicial Activism vs. Judicial Restraint in Bangladesh Constitution” has given me an invaluable opportunity to explore the subject critically and meaningfully.

I would like to express my sincere gratitude to my respected course teacher, Joydeep Chowdhury, for his continuous guidance, valuable instructions, and insightful lectures on this subject, which have been instrumental in completing this work.

I am also thankful to my classmates for their cooperation and encouragement during the preparation of this monograph. Finally, I acknowledge with appreciation all the authors and researchers whose works and ideas have significantly contributed to the development of this study.

Thank you

Md. Abdul Karim

## **Abstract**

The Constitution of Bangladesh, as the supreme law of the land, entrusts the judiciary with the responsibility of interpreting, safeguarding, and enforcing constitutional principles. In exercising this role, the higher judiciary has developed two competing judicial philosophies: judicial activism and judicial restraint. Judicial activism entails an assertive approach whereby courts intervene to protect fundamental rights, promote justice, and fill institutional gaps left by the legislature and executive through expansive constitutional interpretation. Judicial restraint, on the other hand, emphasizes judicial self-discipline, adherence to constitutional text, and respect for the functional autonomy of the political branches. The tension between these approaches has assumed particular importance in Bangladesh amid constitutional amendments, political instability, and the growing influence of judicial review. This thesis examines the evolution and practice of judicial activism and restraint within Bangladesh's constitutional framework. It critically evaluates whether judicial interventions particularly through public interest litigation, suo motu actions, and constitutional interpretation have strengthened democracy, the rule of law, and accountability, or whether they have undermined the doctrine of separation of powers. The study also explores instances where the judiciary has consciously exercised restraint to preserve institutional balance and democratic legitimacy. Methodologically, the research adopts a doctrinal and qualitative approach, analyzing constitutional provisions, landmark judicial decisions, and relevant academic literature. A comparative perspective is employed by examining parallel developments in India and Pakistan, jurisdictions that share similar constitutional structures and socio-political contexts. Key cases such as the 8th Amendment Case and the Masdar Hossain Case are analyzed to identify shifting patterns of judicial reasoning reflecting both activist and restrained tendencies.

The study finds that judicial activism has significantly contributed to the protection of fundamental rights, good governance, and public accountability in Bangladesh. However, it also cautions that excessive activism risks judicial overreach and politicization, while undue restraint may weaken constitutional enforcement and erode public confidence. The thesis concludes that the judiciary's legitimacy depends on maintaining a principled balance between activism and restraint, ensuring constitutional supremacy while respecting democratic governance.

## **List of Abbreviations**

- AD: Appellate Division (Supreme Court of Bangladesh)
- AIR: All India Report
- BCR: Bangladesh Case Reports
- BLC: Bangladesh Law Chronicles
- BLD: Bangladesh Legal Decisions
- BLR: Bangladesh Law Reports
- CLR: Commonwealth Law Reports
- DLR: Dhaka Law Reports
- HCD: High Court Division (Supreme Court of Bangladesh)
- NGO: Non-Government Organisation
- QB: Queen's Bench (UK)
- SC: Supreme Court (Bangladesh)
- SCC: Supreme Court Cases
- Vs.: Versus
- CP: Constitutional Provisions
- JA: Judicial Activism
- JR; Judicial Restraint
- PIL: Public Interest Litigation
- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- JD: Judicial Discipline
- FD: Fundamental Duties
- FR: Fundamental Rights
- MoJ: Ministry of Justice (Bangladesh)
- MoHA: Ministry of Home Affairs (Bangladesh)

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# Chapter 1

## Introduction

### 1.1 Background of the Study

The judiciary serves as a foundational pillar within a nation's constitutional governance framework. Its suo motu function extends beyond mere dispute resolution to being a vital guardian of the constitutional order. Through the power of judicial interpretation, courts ensure the sustenance of the rule of law and uphold the critical principle of the separation of powers. This role prevents any single branch of government from accumulating excessive authority. In the context of Bangladesh, this dynamic is anchored in the Constitution itself, which is proclaimed as the supreme law of the republic. Articles 7 and 26 of the Constitution explicitly establish this supremacy, rendering any law inconsistent with the Constitution void and unenforceable. The judiciary, particularly the Supreme Court, is thus entrusted with the solemn duty of preserving this constitutional sanctity.

### 2. Global Context:

The concepts of judicial activism and judicial restraint are not unique to Bangladesh; they have evolved significantly in major democratic jurisdictions across the globe. In the United States, the tradition of a robust judiciary was cemented by the landmark decision in *Marbury v. Madison* (1803), which established the principle of judicial review. Over time, periods of judicial activism, such as the Warren Court era, saw the Supreme Court actively expanding civil rights and liberties. Conversely, the philosophy of judicial restraint advocates for courts to defer to the decisions of the elected legislature and executive, unless there is a clear constitutional violation. Similarly, the Indian judiciary, particularly since the 1980s, has developed a pronounced form of activism through the expansion of Public Interest Litigation (PIL) and the reading of new rights into the fundamental rights chapter. As a common law country, Bangladesh's judicial system is deeply influenced by these Anglo-American and Indian jurisprudential traditions, which have informed its own approach to balancing judicial power.

### 3. Bangladesh Context:

The judiciary in Bangladesh has undergone a profound evolution since the nation's independence in 1971. The original Constitution envisioned a parliamentary democracy with an independent judiciary. The Supreme Court's role in protecting fundamental rights is explicitly mandated by Articles 44 and 102, the latter granting the High Court Division the power to issue writs for the enforcement of fundamental rights. The journey of the apex court has been shaped by a series of landmark judgments that have defined the contours of its authority. The 8th Amendment Case

(1989<sup>1</sup>)<sup>1</sup> invalidated a constitutional amendment that sought to decentralize the judiciary, asserting the Court's power to review amendments that violate the basic structure of the Constitution. The 5th Amendment Case (2010) went a step further, by pronouncing a past military regime and its actions as illegal, thereby restoring the original constitutional character. Furthermore, the Masdar Hossain Case (1999) <sup>2</sup> <sup>2</sup>was instrumental in directing the separation of the judiciary from the executive, a pivotal step towards judicial independence.

#### **4. Present Relevance:**

In contemporary Bangladesh, the judiciary's role has become increasingly prominent and complex. There is a growing trend of judicial involvement in policy matters, governance issues, and even political disputes, often through its expansive interpretation of fundamental rights. While this proactive stance is frequently lauded for delivering justice and holding authorities accountable, it has also attracted criticism. A significant body of opinion argues that the judiciary, at times, crosses the delicate line of its constitutional mandate, effectively venturing into the domains of the executive and legislature. This has sparked a vibrant debate on the proper limits of judicial power. Consequently, there is a pressing need for a systematic study to analyze and define the equilibrium between necessary judicial activism and prudent judicial restraint within the unique socio-political and constitutional landscape of Bangladesh.

### ***1.2 Definition of Key Terms***

#### **1.2.1 Judicial Activism**

Judicial activism refers to a proactive approach where judges are willing to depart from strict adherence to precedent or textual interpretation of the law to address broader societal issues and injustices. Its philosophical roots lie in the belief that the judiciary has a duty to shape public policy and fill legislative vacuums to achieve substantive justice. For instance, the Indian Supreme Court's active role in environmental protection or the expansion of the right to life to include the right to dignity are classic examples of activism. In Bangladesh, the judiciary's directive to implement the separation of the judiciary in the Masdar Hossain Case and its interventions in environmental and governance issues demonstrate activist tendencies. The advantages of this approach are significant; it can offer immediate protection to marginalized groups, promote social justice, and ensure executive accountability where other institutions may be failing. However, it is heavily criticized for potentially leading to judicial overreach, where the court encroaches upon the policy-making functions of the legislature and the executive, thereby upsetting the balance of power envisioned by the separation of powers doctrine. <sup>33</sup>

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<sup>1</sup> Anwar Hossain Chowdhury vs. Bangladesh, 41 DLR (AD) 165 (1989).

<sup>2</sup> Secretary, Ministry of Finance vs. Masdar Hossain, 52 DLR (AD) 82 (1999).

<sup>3</sup> The debate on judicial overreach is a global one. For a scholarly perspective on this tension in South Asian contexts, see, for example, H. Rahman, *The Judiciary and Governance in Bangladesh*:

## **1.2.2 Judicial Restraint**

In contrast, judicial restraint is a philosophy urging courts to exercise caution and limit their interference in the actions of the other branches of government. It emphasizes deference to the decisions of the democratically elected legislature and the executive, unless there is a clear and unambiguous constitutional violation. This approach is considered vital for maintaining comity between state institutions and respecting the popular will as expressed through elected representatives. Examples include cases where a court may dismiss a public interest litigation or refuse to intervene in a policy matter, citing a lack of judicial expertise or the political nature of the question. In developing democracies like Bangladesh, the benefit of restraint is that it allows elected bodies the space to govern and innovate without undue judicial interference. The drawback, however, is that excessive restraint can lead to executive absolutism and a failure to protect fundamental rights, especially when the other branches of government are unresponsive or oppressive.

## **1.2.3 Constitutional Supremacy**

Constitutional supremacy is the foundational doctrine that the constitution is the highest, paramount law of the land. All state organs the executive, legislature, and judiciary derive their authority from and are subject to the constraints of the constitution. This concept is intrinsically linked to the judiciary's power of judicial review, which is the authority to examine and invalidate any legislative or executive action that contravenes the constitution. In Bangladesh, this principle is enshrined in Articles 7 and 26, and the power of judicial review, particularly for the enforcement of fundamental rights, is vested in the Supreme Court under Article 102. The doctrines of judicial activism and restraint must, therefore, operate strictly within the boundaries set by constitutional supremacy. <sup>4</sup>An activist judgment, no matter how well-intentioned, cannot violate an explicit constitutional provision, just as a stance of restraint cannot excuse a court from its constitutional duty to strike down a law that blatantly infringes upon a fundamental right.

## **1.3 Statement of the Problem**

In a democratic system, the judiciary serves as the protector of the constitution and the defender of citizens' rights. This function has been especially crucial in Bangladesh since its constitution was established in 1972. A persistent debate, however, centers on the appropriate level of judicial involvement in the matters of the parliament and the executive branch. This debate is framed by the two opposing philosophies of judicial activism and judicial restraint. Judicial activism is often defended as a necessary tool for advancing justice, enforcing government accountability, and addressing voids left by the other branches of government. In contrast, judicial restraint prioritizes adherence to the separation of powers and the democratic authority of elected bodies. The core issue emerges when activism transforms into overreach, potentially disrupting the functioning of

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<sup>4</sup> The relationship between constitutional supremacy and judicial review is a foundational concept in public law. For a comparative analysis, see A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), which, although discussing the UK's unwritten constitution, provides the bedrock principles upon which doctrines of supremacy in written constitutions like Bangladesh's are built and interpreted.

other government branches. Conversely, too much restraint can lead to a failure to protect fundamental rights.

Therefore, this research aims to explore the fine equilibrium between activism and restraint within Bangladesh's constitutional structure. It will probe whether the judiciary's proactive stance strengthens constitutional governance or disrupts the balance between state institutions.

## **1.4 Research Questions**

This study is guided by the following primary questions:

1. How have judicial activism and restraint been interpreted and implemented within Bangladesh's legal and constitutional system?
2. What historical, legal, and political influences have driven the evolution of these judicial approaches in Bangladesh?
3. How successfully has the Bangladeshi judiciary balanced its activist and restrained roles?
4. Does judicial activism in Bangladesh foster democratic accountability, or does it represent an intrusion into the domains of the legislature and executive?
5. What framework can the Bangladeshi judiciary adopt to mediate the conflict between activism and restraint, thereby ensuring both the supremacy of the constitution and harmony among state institutions?

## **1.5 Research Objectives**

The specific objectives of this research are:

1. To investigate the theoretical underpinnings of judicial activism and restraint.
2. To trace the development of these doctrines within Bangladesh's constitutional history.
3. To identify and critique pivotal court rulings that demonstrate either an activist or a restrained judicial posture.
4. To evaluate the effects of these judicial approaches on the nation's democracy, governance, and fundamental rights.
5. To suggest a model for a balanced judicial philosophy that aligns with constitutional tenets.

## **1.6 Scope of the Research**

This study is concentrated on the constitutional and judicial environment of Bangladesh. It involves a detailed review of the Constitution, Supreme Court verdicts, and judicial interpretations that outline the boundaries of activism and restraint. To gain a comparative perspective, the research will selectively draw upon judicial practices from India and the United States, as these two countries have significantly impacted Bangladesh's constitutional law.<sup>5</sup>It is important to note

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<sup>5</sup> The "basic structure" doctrine, for instance, was notably developed in the Indian case of *Kesavananda Bharati v. State of Kerala* (1973) and was later adopted and adapted by the Supreme Court of Bangladesh.

that this study is theoretical and analytical, relying on legal doctrine rather than empirical data or field research.

## **1.7 Limitation of the Research**

This academic inquiry acknowledges certain inherent limitations:

- Firstly, the research is doctrinal and relies on published sources; it does not incorporate primary data from interviews with judges, legal professionals, or government officials.
- Secondly, the analysis is confined to officially reported judgments and available scholarly works; unreported or ongoing cases fall outside its scope.
- Thirdly, the focus is exclusively on constitutional and administrative law, omitting other areas like commercial or criminal law where judicial activism may also occur.
- Finally, the comparative analysis is not exhaustive but is intended to provide conceptual context.

Notwithstanding these limitations, the study strives to offer a thorough analysis of judicial philosophy in Bangladesh.

## **1.8 Justification of the Study**

This research is warranted by the judiciary's growing engagement in policy and governance areas traditionally managed by the executive and legislature. In recent decades, the Supreme Court of Bangladesh has issued several landmark rulings on doctrines like the basic structure of the constitution<sup>6</sup>, Public Interest Litigation (PIL), and executive accountability that have substantially influenced national governance. These actions highlight the court's potent role in directing policy and enforcing constitutional compliance. Nonetheless, a significant critique posits that overly assertive judicial intervention can lead to an imbalance of power, weakening the separation of powers<sup>7</sup> and democratic processes. On the flip side, excessive judicial passivity can make the judiciary ineffective in safeguarding rights. Hence, this study is necessary to determine how the judiciary can operate within appropriate boundaries. By scrutinizing case law and theoretical frameworks, this research adds to the critical discussion on the limits of judicial authority in Bangladesh and proposes a model for responsible judicial conduct.

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<sup>6</sup> The "basic structure doctrine" posits that the legislature cannot use its amending power to alter the fundamental, identity-giving features of a constitution. The Appellate Division of the Supreme Court of Bangladesh articulated its own version of this doctrine in the landmark case *Anwar Hossain Chowdhury vs. Bangladesh* (1989), popularly known as the Eighth Amendment Case.

<sup>7</sup> The principle of separation of powers, a cornerstone of modern democratic governance, divides state functions into three branches the legislature, executive, and judiciary to prevent the concentration of power. Its theoretical foundations are most famously articulated by Montesquieu in his work, *The Spirit of the Laws* (1748).

## **1.9 Significance of the Study for Bangladesh**

The importance of this study is both theoretical and practical. Academically, it enhances the scholarship on Bangladeshi constitutional law by offering a detailed analysis of judicial trends, which will be a valuable resource for students, scholars, and legal practitioners. From a practical viewpoint, the findings can assist judges, legislators, and government officials in fostering a stable balance of power among institutions. A judiciary that is both independent and balanced is vital for upholding the rule of law and governmental accountability. The study is also significant for the general public, as it examines how court decisions directly affect their fundamental rights and democratic system.

Moreover, in a developing democracy like Bangladesh, the judiciary is frequently the final arbiter of justice when other state organs fail. Therefore, defining the legitimate limits of judicial power is essential for preserving both the judiciary's authority and the state's overall stability.

## **1.10 Methodology of the Research**

This study employs a doctrinal and qualitative research methodology, focusing on legal analysis over statistical data. The investigation is rooted in the examination of constitutional articles, court decisions, and academic literature.

### **Primary Sources:**

- The Constitution of the People's Republic of Bangladesh.
- Judgments from the Appellate and High Court Divisions of the Supreme Court.
- Relevant statutes and official government documents.

### **Secondary Sources:**

- Scholarly books, journal articles, and legal commentaries on judicial philosophy.
- Online legal databases including Hein Online, Westlaw, and the Bangladesh Legal Decisions (BLD).
- Selective comparative jurisprudence from India and the United States to illustrate global patterns.

The research uses analytical, interpretative, and comparative techniques. The analytical method deconstructs constitutional provisions and court rulings, the interpretative method seeks to understand the reasoning and philosophy behind judgments, and the comparative method provides broader context by examining practices in other legal systems<sup>8</sup>.

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<sup>8</sup> The use of comparative law in constitutional adjudication is a well established practice. Judges often refer to foreign judgments not as binding precedent but for persuasive value and to gain insight into how other jurisdictions have resolved similar legal dilemmas.

## **1.11 A Concise Overview of the Research Structure**

This study is methodically structured across seven primary chapters, supplemented by appendices, a glossary, and a bibliography, to deliver a cohesive and thorough exploration of judicial activism and judicial restraint under the Bangladesh Constitution. The chapters form a progressive sequence, advancing from foundational theories to empirical examples and forward-looking policy suggestions.

### **Chapter 1: Introduction**

The opening chapter lays the groundwork for the investigation by emphasizing the judiciary's vital role in maintaining constitutional authority in Bangladesh. It defines essential terminology, delineates the core research issue, and specifies the study's aims, boundaries, and constraints. Furthermore, it explains the rationale behind the research, underscores its value to Bangladesh's legal and scholarly spheres, and incorporates the research methodology along with a succinct summary of the chapters to follow.

### **Chapter 2: Literature Review**

Chapter two surveys pertinent scholarly works on judicial activism and restraint, encompassing international and South Asian perspectives. It traces the historical development of these ideas, explores ongoing theoretical controversies, and assesses their effects on interpreting constitutions. By scrutinizing prior studies, the chapter pinpoints shortcomings in the existing body of knowledge and justifies the necessity of this current work.

### **Chapter 3: Conceptual and Theoretical Framework**

In chapter three, the study delineates key conceptual foundations and theoretical paradigms of judicial decision-making, such as legal, attitudinal, and strategic approaches. It delves into the core notions of judicial activism and restraint, positioning them amid the doctrine of separated powers. The discussion extends to pertinent Bangladeshi legal and policy tools that shape judicial actions.

### **Chapter 4: Judicial Development in Bangladesh**

This section chronicles the judiciary's progression in Bangladesh, covering pivotal milestones prior to and following independence. It dissects significant rulings and judicial patterns to demonstrate evolving philosophies. The influences of constitutional changes and the practical equilibrium between activism and restraint are also evaluated.

### **Chapter 5: Case Analysis**

Chapter five conducts a detailed review of chosen court rulings that highlight instances of activism and restraint. It investigates guiding constitutional clauses, dissects tensions between these judicial stances, and probes the wider social ramifications of pivotal decisions. Insights from comparable legal contexts abroad are woven in to provide broader context.

## **Chapter 6: Procedure, Remedies, and Judicial Intervention**

Focusing on judicial enforcement tools, this chapter addresses methods like suo motu actions, public interest suits, and remedial measures. It appraises the strengths and drawbacks of these approaches in promoting fairness and adherence to constitutional standards, augmented by lessons from diverse legal traditions.

## **Chapter 7: Recommendations and Conclusions**

The concluding chapter integrates the study's insights and proposes strategies to refine judicial operations and policies in Bangladesh. It explores prospective policy outcomes, proposes avenues for subsequent investigations, and wraps up with an assessment of the research's broader impact.

## **Appendices, Glossary, and Bibliography**

The work wraps up with auxiliary resources, such as appendices, a terminology glossary, and an extensive reference list, facilitating deeper exploration and consultation.

## Chapter 2

# Literature Review

### 2.1 Introduction

This literature review establishes the groundwork for examining the contrasting judicial approaches of activism and restraint in Bangladesh's constitutional system. It offers an analysis of the historical, theoretical, and situational development of these philosophies through scholarly works, court rulings, and constitutional discussions. The chapter's objective is to assess the intellectual and juridical debates on judicial activism and restraint, emphasizing how academics, legal experts, and tribunals have defined these principles across various legal systems, with a special focus on their impact on Bangladesh's judiciary.

The examination of judicial conduct, particularly in constitutional matters, has been a longstanding focus of academic inquiry. Judicial activism originated mainly in the United States in the early 1900s, where judges adopted expansive interpretations of the Constitution to defend basic rights and advance societal fairness. In contrast, judicial restraint promotes a cautious judicial function, urging courts to refrain from encroaching on legislative or executive territories. This opposition between activism and restraint underscores the conflict between judicial innovation and adherence to constitutional traditions. In Bangladesh, the judiciary's function has been distinctly molded by colonial heritage, political turbulence, and shifts in governance structures. Following the return to democratic rule in the 1990s, the courts have frequently positioned themselves as protectors of constitutional authority and core rights. Yet, this assertive stance has sparked worries regarding judicial excess and the maintenance of institutional divisions. Thus, a thorough analysis of pertinent literature is crucial to grasp how Bangladeshi academics and tribunals have interacted with judicial activism in relation to judicial restraint.

#### **The following parts of this chapter will delve into:**

- (a) the theoretical structure of judicial activism,
- (b) the emergence of judicial restraint as an opposing viewpoint,
- (c) comparative and analytical perspectives in international and local settings.

The review seeks to pinpoint the conceptual, ethical, and applied aspects of these doctrines and their applicability to Bangladesh's constitutional framework.

## 2.2 Judicial Activism: Concept and Evolution

Judicial activism represents a vibrant idea that denotes the judiciary's forward-looking involvement in construing and applying constitutional clauses to guarantee fairness, equality, and legal governance. It suggests that courts, especially those handling constitutional issues, transcend rote legal enforcement and adopt interpretive methods aimed at safeguarding essential rights and fostering societal change. The phrase "judicial activism" was initially brought into common use by U.S. historian Arthur Schlesinger Jr. in 1947, referring to the actions of select Supreme Court justices who influenced public policy via their verdicts instead of yielding to elected bodies.<sup>9</sup>

The origins of judicial activism lie in the ideals of constitutional governance and the supremacy of law. In democratic nations, tribunals act as the definitive expositors of the Constitution and as safeguards against misuse of authority by other government arms. When lawmakers or administrators neglect constitutional duties, the judiciary typically intervenes to address the shortfall. This pattern is especially pronounced in emerging democracies, where structural frailties demand judicial action to secure public liberties.

In India, judicial activism rose to significance in the 1970s and 1980s via pivotal Supreme Court rulings, notably in *Sadananda Bharati v. State of Kerala* (1973) and *Maneka Gandhi v. Union of India* (1978). These decisions broadened the reach of basic rights and formulated the "basic structure doctrine," barring legislative alterations to the Constitution's core elements<sup>10</sup>. The advent of Public Interest Litigation (PIL) bolstered this activism by enabling courts to tackle socio-economic disparities overlooked by governmental entities.

In Bangladesh, judicial activism started crystallizing after democracy's reinstatement in 1991. The courts began affirming their constitutional mandate to protect fundamental freedoms and reinforce constitutional primacy. Key judgments, including *Secretary, Ministry of Finance v. Masdar Hossain* (1999), which affirmed judicial autonomy, and *Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2010), which invalidated the Fifth Amendment, exemplify the judiciary's proactive engagement in constitutional analysis and systemic overhaul.<sup>11</sup> Via these rulings, Bangladesh's Supreme Court has shown readiness to address issues of administration, graft, and civic responsibility.

Academics have offered endorsements and critiques of judicial activism alike. Supporters contend that it fortifies democracy by holding the executive and legislature responsible and shielding individuals from capricious authority. It is seen as an indispensable tool for social equity, especially

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<sup>9</sup> Arthur M. Schlesinger, Jr., "The Supreme Court: 1947," *Fortune* 35, no. 1 (January 1947): 73-78, 191-192, where Schlesinger coined the term to critique the Roosevelt-appointed justices' policy-shaping tendencies.

<sup>10</sup> For detailed analysis, see Granville Austin, *Working a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press, 1999), 167-200, discussing the evolution of the basic structure doctrine through these landmark cases.

<sup>11</sup> Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2011), 145-162, examining these cases as pivotal to Bangladesh's judicial independence and constitutional restoration.

in less-developed nations where policy stagnation hampers progress. Detractors, though, warn that overzealous judicial involvement erodes the separation of powers and could turn courts into non-elected policy framers. Hence, the validity of judicial activism hinges on striking a fine equilibrium between creative judicial input and constitutional moderation.

Bangladesh's progression of judicial activism embodies this ambivalence. Activism has acted as a bulwark for constitutional principles, thwarting authoritarian advances and invalid constitutional changes. Simultaneously, it has at times obscured organizational lines, igniting arguments about judicial encroachment. Thus, comprehending judicial activism entails recognizing its chronological growth, philosophical bases, and situational constraints under Bangladesh's constitutional regime.

### **2.3 Judicial Restraint: Concept and Evolution**

Judicial restraint is the doctrine that advocates limited judicial intervention in the functions of the legislative and executive branches. It promotes the idea that judges should interpret the law based strictly on its text and intent rather than on personal or political considerations. This philosophy stems from the belief that democracy is best preserved when the judiciary respects the decisions of elected representatives and avoids substituting its own judgment for that of the political branches.

The roots of judicial restraint can be traced to classical legal formalism and the separation of powers principle articulated by Montesquieu. According to this philosophy, the judiciary should act as the “interpreter,” not the “maker,” of laws. The concept gained significant prominence in American jurisprudence, particularly under Chief Justice John Roberts and earlier through Justice Felix Frankfurter, who was a strong proponent of judicial deference to legislative authority. Justice Frankfurter argued that judges should avoid making policy decisions and should uphold laws unless they clearly violate the Constitution.<sup>12</sup>

Judicial restraint serves multiple purposes in a constitutional democracy. First, it preserves the legitimacy of the judiciary by keeping it within its constitutional boundaries. Second, it upholds the principle of popular sovereignty, as elected officials are presumed to represent the will of the people. Third, it ensures institutional balance, preventing judicial encroachment upon the policymaking functions of the government. Critics of judicial activism often advocate restraint as a means of protecting democracy from what they perceive as “judicial overreach.”

In the South Asian context, judicial restraint has evolved as a counter-response to expanding judicial powers. In India, for instance, after decades of activism, the judiciary has occasionally emphasized restraint to maintain institutional harmony. The Supreme Court of India, in *Divisional Manager, Aravalli Golf Club v Chander Hass* (2008), observed that judicial activism must not cross

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<sup>12</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes* (Columbia University Press 1947) 9.

into the domain of judicial adventurism.<sup>13</sup> Similarly, in Bangladesh, judicial restraint has been invoked to justify limited judicial interference in administrative or political matters, particularly when constitutional questions are intertwined with policy considerations. The courts have, at times, shown deference to parliamentary sovereignty and executive discretion to maintain equilibrium among the branches of government.

However, judicial restraint is not without criticism. Opponents argue that excessive restraint may allow governmental abuse to go unchecked, especially in societies where democratic institutions are weak or politically captured. Therefore, in the constitutional context of Bangladesh, the ideal judicial philosophy lies not in

absolute restraint or unbridled activism, but in a balanced approach that respects both constitutional supremacy and democratic accountability.

## **2.4 Comparative Perspectives: Global and South Asia**

The tension between judicial activism and judicial restraint is not unique to Bangladesh; it has been a recurring theme in constitutional democracies around the world. Comparative perspectives reveal how different jurisdictions have attempted to balance judicial independence with democratic accountability. By analyzing global and regional experiences, it becomes possible to understand the broader implications of these doctrines and how they influence judicial behavior in Bangladesh.

In the United States, judicial activism and restraint have alternated across historical periods, depending on the ideological composition of the Supreme Court. During the Warren Court era (1953–1969), judicial activism flourished, especially through decisions expanding civil rights and liberties, such as *Brown v Board of Education* (1954), which declared racial segregation unconstitutional.<sup>14</sup> Later, the Rehnquist Court (1986–2005) adopted a more restrained approach, emphasizing states' rights and limiting federal judicial power. These shifts demonstrate that activism and restraint often coexist within the same judicial system, influenced by social, political, and constitutional contexts.

In the United Kingdom, judicial restraint has traditionally been stronger due to the doctrine of parliamentary sovereignty. British courts generally avoid questioning the substantive wisdom of legislative acts, focusing instead on procedural fairness and legality. However, the enactment of the Human Rights Act 1998 has somewhat altered this balance by empowering courts to review laws in light of human rights principles. The UK experience shows how judicial restraint can evolve within a flexible constitutional framework while maintaining respect for legislative supremacy.

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<sup>13</sup> *Divisional Manager, Aravali Golf Club v Chander Hass* (2008) 1 SCC 683 (India).

<sup>14</sup> *Brown v Board of Education of Topeka* 347 US 483 (1954) (US).

In South Asia, the experience of India and Pakistan has been particularly influential in shaping judicial thought in Bangladesh. India's judiciary, through the development of Public Interest Litigation (PIL), has become a global symbol of judicial activism. Yet, Indian courts have also cautioned against excessive judicial involvement in governance, highlighting the need for restraint in policy matters. Conversely, Pakistan's judiciary has fluctuated between activism and restraint depending on the political climate often asserting its authority during constitutional crises but showing deference under authoritarian regimes.<sup>15</sup>

In Bangladesh, judicial philosophy has been shaped by both Indian influence and domestic political realities. The judiciary has at times displayed remarkable activism, especially in cases concerning constitutional amendments and fundamental rights. However, during politically sensitive periods, it has also exhibited judicial restraint, acknowledging the limits of its jurisdiction. This dual approach reflects an evolving judicial identity that seeks to preserve constitutionalism while maintaining harmony among state institutions.

Comparative analysis thus underscores that neither judicial activism nor judicial restraint can be applied universally. Each country's experience is conditioned by its constitutional structure, political culture, and historical context. For Bangladesh, learning from these global and regional patterns is crucial to refining its own judicial philosophy one that ensures justice, stability, and the supremacy of the Constitution.

## **2.5 Critical Evaluation of Previous Research**

Over the years, a substantial body of scholarly work has explored the concept of judicial activism and restraint, yet much of it remains confined to theoretical boundaries rather than practical analysis within the Bangladeshi context.<sup>16</sup> Early research primarily concentrated on the normative question of whether judicial activism strengthens or undermines the doctrine of separation of powers. However, these studies often lacked empirical insight into how activism has shaped constitutional governance in developing democracies such as Bangladesh.

Several authors have argued that judicial activism, when properly balanced, can serve as a corrective mechanism against executive excesses and legislative inaction. Nonetheless, critics contend that excessive activism risks converting the judiciary into a "super-legislature," thereby threatening institutional balance. Moreover, while many Western scholars have emphasized judicial independence as a safeguard against political interference, South Asian scholarship reveals that the socio-political realities often blur this distinction, making it difficult to maintain a clear line between activism and restraint.

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<sup>15</sup> Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press 2013) 176.

<sup>16</sup> Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980) 54.

Furthermore, most comparative analyses fail to consider how historical, cultural, and constitutional dynamics influence judicial behavior in Bangladesh. As a result, although the literature is rich in theoretical arguments, it remains weak in contextual application and policy-oriented evaluation.

## 2.6 Gaps in Existing Literature

Despite extensive discussion on judicial activism and restraint, there remain significant gaps in the existing literature.<sup>17</sup> First, there is an evident lack of comprehensive empirical research on how judicial decisions in Bangladesh have actually influenced constitutional development. Most studies focus either on isolated landmark cases or broad doctrinal explanations without connecting judicial reasoning to broader socio-political outcomes.

Second, the majority of prior works have been descriptive rather than analytical. They describe judicial decisions without critically evaluating the underlying judicial philosophy or the consequences of those decisions for democratic accountability. Third, comparative literature on South Asian jurisdictions particularly India, Pakistan, and Sri Lanka have seldom included Bangladesh in a meaningful analytical framework. This omission has created a regional knowledge gap.

Finally, little attention has been paid to the evolving role of the judiciary in ensuring economic and social justice under the modern constitutional order. The absence of interdisciplinary approaches, combining law with sociology and political science, further limits the depth of existing scholarship.

## 2.7 Conclusion

The review of existing literature reveals that while judicial activism has been extensively debated in academic and professional circles, its contextual and operational aspects within Bangladesh remain insufficiently explored.<sup>18</sup> Most authors agree that a judiciary must act as both the guardian of the Constitution and the protector of fundamental rights. However, they differ on the extent to which such intervention should occur, especially in a developing constitutional democracy where political institutions are still maturing.

A balanced approach, therefore, is essential one that ensures judicial accountability while allowing courts to address systemic injustice when other branches fail.<sup>19</sup> The gaps identified above justify the present research, which aims to bridge theoretical discourse with practical judicial developments in Bangladesh.

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<sup>17</sup> Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 62.

<sup>18</sup> M.P. Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018) 2170.

<sup>19</sup> Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 501.

## Chapter 3

# Conceptual and Theoretical Framework

### 3.1 Introduction

The conceptual and theoretical framework serves as the scholarly bedrock for this research. It seeks to elucidate the principles, ideologies, and judicial philosophies that underpin the interpretation of Bangladesh's constitution. A purely textual analysis of statutes is insufficient for comprehending judicial conduct; a deeper inquiry into the judicial psyche, the surrounding socio-political environment, and the overarching constitutional philosophy that guides verdicts is essential.<sup>20</sup> Judicial activism and restraint are more than theoretical ideas; they are operational doctrines that define the relationship between the courts and other state institutions. Within Bangladesh's constitutional democracy, where judicial interpretation is pivotal in safeguarding fundamental rights, these doctrines directly impact the dispensation of justice and the maintenance of equilibrium among the government's branches.

This chapter, therefore, outlines the conceptual underpinnings and theoretical viewpoints that elucidate judicial behavior. It pays specific attention to the development of activism and restraint within the wider context of constitutional governance.

### 3.2 Basic Concepts of Judicial Activism

Judicial activism describes a dynamic approach where the judiciary proactively interprets laws, broadens constitutional understandings, and addresses voids resulting from legislative or executive inaction. It manifests when courts employ their interpretive authority to defend rights, deliver justice, or confront issues neglected by existing laws. This philosophy is rooted in the view that the judiciary should act not as a passive entity, but as a vigilant protector of justice and constitutional ideals. In Bangladesh, judicial activism has frequently arisen during times of political turmoil, corruption, or administrative breakdown. Utilizing mechanisms like Public Interest Litigation (PIL), the judiciary has broadened justice accessibility for marginalized communities, enforced accountability upon public officials, and protected environmental and social rights.<sup>21</sup> Activist judges typically perceive the Constitution as a "living instrument" that must adapt to society's evolving demands.<sup>22</sup>

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<sup>20</sup> S. M. Hassan Talukdar, *Judicial Role in a Developing Democracy: The Bangladesh Experience*, 42 *Int'l J. of Law & Pol.* 189, 195 (2018).

<sup>21</sup> *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh*, 52 DLR (HCD) 1 (2000).

<sup>22</sup> Justice A. B. M. Khairul Haque in *Abdul Mannan Khan v. Bangladesh*, 64 DLR (AD) 169 (2012).

Nonetheless, judicial activism is not without its detractors, who argue it can overstep constitutional boundaries. Excessive forays into policy matters may blur the separation between the judiciary and the executive. The central challenge, thus, is to strike a balance between judicial innovation and constitutional deference, ensuring the court does not usurp the role of the legislature.

### **3.3 Basic Concepts of Judicial Restraint**

Judicial restraint embodies a contrasting philosophy, one that highlights the need for limited judicial intervention and deference to the designated functions of the executive and legislature. Judges adhering to this doctrine maintain that courts should refrain from policymaking and should interpret laws strictly based on their textual meaning and original intent.<sup>23</sup> This approach is founded on the principle that the judiciary must not function as a "super-legislature" and must maintain institutional comity through self-discipline.

In the context of Bangladesh, judicial restraint has been observed during phases where the courts have shown caution in confronting the authority of the executive or parliament. It helps preserve the separation of powers and ensures that democratic accountability resides primarily with elected officials, not appointed judges.

While restraint promotes constitutional discipline, it can, at times, result in judicial passivity, permitting rights violations or injustices to continue unchecked. Consequently, the philosophy of restraint is most valuable when applied wisely allowing the judiciary to respect institutional limits without abdicating its constitutional responsibility to uphold justice.<sup>24</sup> The ongoing tension between these two doctrines is a central theme in constitutional theory.<sup>25</sup>

### **3.4 Theoretical Models of Judicial Behavior (Legal, Attitudinal, Strategic)**

Judicial behavior encompasses the methodologies and rationales that guide judges in interpreting laws and rendering verdicts. To systematically analyse these patterns, academics have formulated several theoretical models, with the Legal, Attitudinal, and Strategic frameworks being the most prominent. The Legal Model conceptualizes judges as neutral arbiters whose decisions are determined solely by existing legal sources, including statutes, constitutional texts, and judicial precedents. This approach champions judicial restraint, contending that courts should refrain from impinging on the policy-making functions of the legislative and executive branches. Adherence to the doctrine of stare decisis is a cornerstone of this model.

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<sup>23</sup> Black's Law Dictionary 982 (11th ed. 2019).

<sup>24</sup> Dr. Mohiuddin Farooque v. Bangladesh, 48 DLR (AD) 1 (1996).

<sup>25</sup> Aharon Barak, The Judge in a Democracy 98-105 (2006).

Conversely, the Attitudinal Model suggests that judicial outcomes are significantly shaped by the judges' own ideological leanings and policy preferences, especially in cases where the law is ambiguous. This is often evident in constitutional adjudication. In Bangladesh, for instance, judicial activism in cases such as *Dr. Mohiuddin Farooque v. Bangladesh* demonstrates a tendency where broader considerations of justice and public welfare were prioritized over a rigid textual interpretation.<sup>26</sup>

The Strategic Model provides an intermediate perspective, proposing that judges are not entirely free to act on either pure law or personal attitude. Instead, they make calculated decisions by factoring in institutional constraints and potential reactions from other branches of government. This model posits that judges act strategically to maintain the court's legitimacy and ensure compliance with its rulings. An example from Bangladesh would be the judiciary exhibiting restraint in politically charged situations to preserve institutional stability and public trust.

Collectively, these three models offer a comprehensive lens through which to view the interplay between judicial activism and restraint, a balance that is continually negotiated within a nation's specific legal and political context.

### **3.5 Principles of Separation of Powers**

The doctrine of Separation of Powers is a fundamental constitutional principle aimed at preventing autocracy by distributing state authority among three distinct branches: the legislature, the executive, and the judiciary. Originally articulated by Montesquieu, this system of checks and balances is designed to avoid the concentration of power. In Bangladesh, this principle is constitutionally embedded.<sup>27</sup> However, its practical implementation has often been challenging due to executive dominance and political instability. Judicial activism frequently emerges as a corrective mechanism when this separation is perceived to be compromised. A landmark example is the *Masdar Hossain* case, where the Supreme Court issued directives to permanently separate the judiciary from the executive organ of the state.<sup>28</sup>

Nevertheless, the doctrine also necessitates judicial restraint. Excessive judicial intrusion into policy matters can blur constitutional boundaries and undermine democratic accountability. Thus, a balanced approach, where the judiciary enforces constitutional limits without usurping the legitimate functions of other branches, is essential for maintaining constitutional harmony.

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<sup>26</sup> 50 DLR (1997) 84. This case is a cornerstone of environmental jurisprudence in Bangladesh, establishing the principle of standing in public interest litigation.

<sup>27</sup> Articles 7, 22, and 94–116 of the Constitution of the People's Republic of Bangladesh.

<sup>28</sup> 52 DLR (1999) 82. This landmark judgement is also known as the *Judicial Service Cases* and was instrumental in the separation of the judiciary.

### **3.6 Legal and Policy Framework in Bangladesh**

The operation of the judiciary in Bangladesh is governed by a framework established in the 1972 Constitution, supplemented by various statutes and judicial precedents. The Constitution serves as the supreme legal document, outlining the structure and independence of the judiciary. Specific articles within the Constitution provide the judiciary with its power and authority. Furthermore, the Supreme Court has consistently affirmed its role as the guardian of the Constitution. A pivotal instance was the Bangladesh Italian Marble Works Ltd. case, where the Supreme Court invalidated the Fifth Amendment, thereby reinforcing constitutional supremacy.<sup>29</sup>

Procedural instruments like Public Interest Litigation (PIL) have been leveraged to promote social justice through judicial activism. However, the judiciary continues to function within the bounds of classical legal codes. While policy initiatives aim to enhance judicial efficiency and accountability, the system grapples with challenges such as political interference and a massive case backlog. Consequently, the judiciary in Bangladesh is continually navigating a path between assertive activism and necessary restraint.

### **3.7 Conclusion**

The theoretical underpinnings of judicial behavior in Bangladesh reveal a complex interaction between legal doctrines, personal attitudes, and strategic considerations. The separation of powers provides the structural context for this behavior, while the nation's legal framework sets the boundaries. Despite a robust constitutional foundation, practical impediments to judicial independence persist. The enduring challenge for the Bangladeshi judiciary is to maintain an equilibrium: employing activism as a tool for justice and constitutional enforcement, while exercising restraint to preserve its institutional legitimacy and the integrity of the democratic order.

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<sup>29</sup> 62 DLR (2010) (AD). This ruling asserted the Supreme Court's power of constitutional review and reinforced the basic structure doctrine.

## Chapter 4

# Judicial Development in Bangladesh

### 4.1 Introduction

The judiciary in Bangladesh has undergone a complex evolution, shaped by its colonial past, constitutional changes, and socio-political dynamics. As the guardian of the Constitution and the final arbiter of legal interpretation, the judiciary's development reflects influences from British colonial rule and subsequent transformations under Pakistani and Bangladeshi governance.

After gaining independence in 1971, Bangladesh inherited a common law-based judicial framework rooted in British legal traditions. Over time, the judiciary transitioned from being a subordinate entity under executive control to a more autonomous and assertive institution. This shift, however, has been marked by challenges, including political instability, constitutional amendments, and executive influence over judicial appointments. In the post-independence era, the judiciary has played a pivotal role in upholding constitutionalism, the rule of law, and fundamental rights. Through judicial activism in landmark cases, it has expanded rights enforcement, while practicing restraint to maintain institutional balance. Examining this historical trajectory is essential to understanding the judiciary's current role in safeguarding constitutional supremacy.

### 4.2 Historical Evolution: Pre- and Post-Independence

The judiciary's history in Bangladesh can be categorized into three distinct phases: the colonial period, the Pakistan period, and the post-independence period, each contributing uniquely to its contemporary identity.

#### Colonial Period (1757–1947)

During British colonial rule, the judicial system in Bengal developed under the East India Company's administration. The Regulating Act of 1773 established the Supreme Court of Judicature at Fort William in Calcutta, laying the foundation for a formalized judiciary in the subcontinent. This court applied English law to British subjects and, in some instances, to Indians, creating a hybrid legal system that combined English common law with local traditions.<sup>30</sup> However, colonial courts primarily served as tools of imperial governance rather than champions of justice. Codified laws, such as the Indian Penal Code (1860) and the Code of Civil Procedure

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<sup>30</sup> The Regulating Act 1773 (13 Geo 3 c 63); see also M P Jain, *Outlines of Indian Legal and Constitutional History* (7th edn, LexisNexis 2019) 112.

(1908), were introduced to standardize judicial processes, but the judiciary remained under executive control.<sup>31</sup>

### **Pakistan Period (1947–1971)**

Following the partition of India, East Bengal became East Pakistan. The Government of India Act 1935 provided the constitutional framework until the adoption of the Pakistan Constitution of 1956, which introduced the principle of judicial independence. However, political turmoil and frequent constitutional suspensions curtailed the judiciary's autonomy. The Supreme Court of Pakistan developed significant constitutional jurisprudence during this period, but cases like *Federation of Pakistan v. Maulvi Tamizuddin Khan* (1955) reflected judicial restraint, often endorsing executive overreach.<sup>32</sup> These precedents shaped the early judicial landscape of independent Bangladesh, where restoring judicial credibility became a key constitutional priority.

### **Post-Independence Period (1972–Present)**

After independence, the 1972 Constitution of Bangladesh established a unitary state with an independent judiciary. Article 94 vested judicial authority in the Supreme Court, comprising the Appellate Division and the High Court Division, tasked with protecting fundamental rights (Part III) and ensuring constitutional supremacy. Initially, the executive exerted considerable influence over the judiciary, particularly in appointments, transfers, and administrative matters. This dynamic shifted with landmark rulings like *Secretary, Ministry of Finance v. Masdar Hossain* (1999),

where the Supreme Court mandated the establishment of a separate Judicial Service Commission, a milestone in achieving judicial independence.<sup>33</sup>

Over the years, the judiciary has broadened its role through judicial activism, particularly in Public Interest Litigations (PILs), addressing issues like environmental protection, gender equality, and administrative accountability. This transformation from a colonial tool to a constitutional protector highlights the judiciary's evolution into a proactive institution dedicated to justice, equality, and the rule of law.

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<sup>31</sup> The Indian Penal Code 1860; The Code of Civil Procedure 1908; see also A K Sen, *The Judicial System of British India* (Calcutta University Press 1945) 56.

<sup>32</sup> *Federation of Pakistan v Maulvi Tamizuddin Khan* [1955] PLD SC 240.

<sup>33</sup> *Secretary, Ministry of Finance v Masdar Hossain* [1999] 52 DLR (AD) 82.

### **4.3 Early Judicial Development: Key Cases and Emerging Trends**

The early judicial landscape of Bangladesh was shaped by its constitutional framework and the ongoing struggle to establish an independent judiciary free from executive control. In the initial decades post-independence, the judiciary played a pivotal role in upholding constitutional supremacy and safeguarding fundamental rights, though this process was marked by a delicate balance between judicial activism and restraint.

A defining moment came with *Anwar Hossain Chowdhury v. Bangladesh* (1989), known as the Eighth Amendment Case. This case challenged the constitutionality of the Eighth Amendment, which created permanent High Court Division benches outside Dhaka. The Appellate Division ruled that the Constitution's basic structure particularly judicial independence and separation of powers could not be altered, even through constitutional amendments.<sup>34</sup> This decision introduced the "basic structure doctrine" in Bangladesh, establishing the judiciary as the guardian of constitutional integrity. Another significant case, *Kudrat-E-Elahi Panir v. Bangladesh* (1992), reinforced the importance of local government as a cornerstone of democratic governance, broadening the judiciary's interpretive role to uphold decentralization and democracy. These early rulings reflected a cautious yet resolute assertion of judicial authority, rooted in constitutional principles. The *Secretary, Ministry of Finance v. Masdar Hossain* (1999) case was a landmark in securing judicial independence. The Court ruled that judicial officers should not be subject to executive control and mandated the creation of a separate Judicial Service Commission.<sup>35</sup> This decision underscored the judiciary's essential role in upholding the rule of law and protecting citizens' rights.

Through these foundational cases, Bangladesh's judiciary transitioned from institutional subordination to a more assertive role, using judicial activism to address constitutional violations. This period laid the groundwork for judicial review, shaping the philosophical and institutional framework of modern Bangladeshi jurisprudence.

### **4.4 Recent Judicial Trends and Notable Decisions**

In recent years, Bangladesh's judiciary has evolved significantly, driven by impactful constitutional rulings and the rise of Public Interest Litigation (PIL). PIL has transformed access to justice by enabling individuals and organizations to seek remedies for marginalized groups, shifting the focus from procedural rigidity to substantive justice and reflecting a commitment to social welfare. A landmark case, *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* (2010), known as the Fifth Amendment Case, saw the Appellate Division strike down

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<sup>34</sup> *Anwar Hossain Chowdhury v Bangladesh* [1989] 41 DLR (AD) 165.

<sup>35</sup> *Secretary, Ministry of Finance v Masdar Hossain* [1999] 52 DLR (AD) 82.

the Fifth Amendment, which had validated martial law proclamations from 1975 to 1979.<sup>36</sup> By declaring these unconstitutional, the Court reaffirmed constitutional supremacy and rejected extra-constitutional governance, reinforcing its role as a defender of democratic principles. In *Bangladesh v. Abdul Mannan Khan* (2011), the judiciary addressed corruption and misuse of power, emphasizing accountability for public officials. Similarly, *Dr. Mohiuddin Farooque v. Bangladesh* (1997), though earlier, set a precedent for environmental activism by linking environmental degradation to violations of the constitutional right to life under Article 32, influencing later jurisprudence.<sup>37</sup>

More recently, the judiciary has navigated issues of human rights and digital freedoms under the Digital Security Act (2018), exercising both caution and restraint to balance state security with freedom of expression. The courts have increasingly prioritized procedural fairness, transparency in governance, and accountability in administrative actions. Recent trends reflect a blend of judicial activism and restraint. Activism has expanded rights and delivered justice to marginalized communities, while restraint has maintained institutional credibility and respect for separation of powers. This evolution from constitutional conservatism to dynamic constitutionalism highlights the judiciary's maturing role in Bangladesh's democratic legal framework.

## 4.5 Impact of Constitutional Amendments

The constitutional evolution of Bangladesh has been significantly shaped by various amendments that have influenced the judiciary's independence, structure, and authority. Since the 1972 Constitution was enacted, over fifteen amendments have been introduced, each impacting the judicial system in distinct ways. Some bolstered judicial independence, while others weakened it by increasing executive dominance or disrupting the balance of power. The Fourth Amendment (1975) was particularly contentious, shifting from a parliamentary to a presidential system and consolidating executive power, which undermined judicial autonomy by limiting judicial review and the judiciary's ability to check executive overreach.<sup>38</sup> In contrast, the Fifth Amendment (1979) aimed to legitimize martial law actions from 1975 to 1979. However, in *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh* (2010), the Appellate Division declared it unconstitutional, emphasizing that martial law violated the Constitution's supremacy and reinforcing the judiciary's role as a protector of constitutional principles.<sup>39</sup>

The Eighth Amendment (1988), which sought to decentralize the High Court Division by creating permanent benches outside Dhaka, was struck down in *Anwar Hossain Chowdhury v. Bangladesh* (1989) for violating the Constitution's basic structure, particularly judicial independence and the

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<sup>36</sup> *Bangladesh Italian Marble Works Ltd v Government of Bangladesh* [2010] 62 DLR (AD) 298.

<sup>37</sup> *Dr Mohiuddin Farooque v Bangladesh* [1997] 49 DLR (AD) 1.

<sup>38</sup> The Constitution (Fourth Amendment) Act 1975 (Act No II of 1975).

<sup>39</sup> *Bangladesh Italian Marble Works Ltd v Government of Bangladesh* [2010] 62 DLR (AD) 298.

unitary nature of the state. <sup>40</sup>Similarly, the Thirteenth Amendment (1996) introduced a caretaker government system to ensure fair elections, indirectly involving the judiciary in interim governance. This system was later declared unconstitutional in *Abdul Mannan Khan v. Government of Bangladesh* (2011) to uphold democratic continuity.

The Sixteenth Amendment (2014), which granted Parliament the authority to remove Supreme Court judges, posed a significant threat to judicial independence. It was invalidated in *Government of Bangladesh v. Advocate Asaduzzaman Siddiqui* (2017), with the Court ruling that it breached the separation of powers and judicial autonomy. <sup>41</sup>These amendments highlight the ongoing struggle between political power and judicial independence, with the judiciary consistently striving to uphold constitutional supremacy and the rule of law.

#### **4.6 Balancing Activism and Restraint in Practice**

The judiciary in Bangladesh constantly navigates the delicate balance between judicial activism and restraint to maintain legitimacy while ensuring justice and constitutional adherence. Activism is crucial when the executive or legislature fails to fulfill its responsibilities, while restraint is necessary to respect the separation of powers and avoid overstepping judicial boundaries. Judicial activism is evident in Public Interest Litigation (PIL) cases like *Dr. Mohiuddin Farooque v. Bangladesh* (1997) and *BNWLA v. Bangladesh* (2009), where the judiciary intervened to protect environmental rights and address gender-based violence, respectively, establishing itself as a champion of social justice and human rights. Conversely, judicial restraint is observed in politically sensitive cases, such as electoral disputes or executive policy matters. In *State v. Deputy Commissioner, Satkhira* (2003), the Court emphasized that it should not interfere with administrative discretion unless constitutional rights are violated, preserving the roles of other state institutions. Balancing these approaches is challenging amid Bangladesh's political volatility. The judiciary must protect fundamental rights and the rule of law while avoiding accusations of bias or overreach. Excessive activism risks judicial supremacy, while excessive restraint may weaken the judiciary's effectiveness. Thus, maintaining this balance relies on the judiciary's commitment to constitutional principles, integrity, and impartiality, allowing it to remain proactive in defending rights while exercising caution in political matters to preserve public trust and institutional independence.

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<sup>40</sup> *Anwar Hossain Chowdhury v Bangladesh* [1989] 41 DLR (AD) 165.

<sup>41</sup> *Government of Bangladesh v Advocate Asaduzzaman Siddiqui* [2017] Civil Appeal No 06 of 2017 (Appellate Division).

## 4.7 Conclusion

The judiciary in Bangladesh has evolved from a colonial institution to a cornerstone of constitutional sovereignty. Through constitutional amendments, landmark judgments, and evolving jurisprudence, it has solidified its role as the guardian of the Constitution and a key pillar of democratic governance.

Despite challenges like political interference, institutional constraints, and fluctuating amendments, the judiciary has upheld its authority through principled decisions. Cases such as Anwar Hossain Chowdhury, Masdar Hossain, and Italian Marble Works have reinforced constitutional supremacy, judicial independence, and the balance of power. However, the judiciary must continue to balance activism and restraint to deliver justice while maintaining neutrality.

The judiciary's development reflects resilience and reform, transforming from a passive entity into an active defender of democracy, human rights, and constitutional order. Sustained progress will depend on adherence to constitutional values, transparent judicial appointments, and consistent application of the rule of law.

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<sup>42</sup> A K M Muniruzzaman, *Constitutionalism and Judicial Independence in Bangladesh* (University Press Limited 2020) 212.

## Chapter 5

### Case Analysis

#### 5.1 Introduction

The theoretical discourse on judicial activism and restraint finds its most concrete expression in the courtrooms where constitutional principles are applied to real-world disputes. This chapter serves as the empirical core of this research, transitioning from abstract conceptual and historical analyses to a detailed examination of the judiciary's role through its most powerful instrument: the judgment. The primary objective of this chapter is to dissect landmark judgments of the Supreme Court of Bangladesh to identify and evaluate instances where the court has either boldly expanded its role as a guardian of constitutionalism (activism) or prudently deferred to the other organs of the state (restraint).

The methodology for this chapter involves a qualitative doctrinal analysis of selected cases. These cases have been chosen based on their seminal status in Bangladeshi jurisprudence, their frequent citation in legal scholarship, and their demonstrable impact on the constitutional landscape. The analysis will not merely describe the outcomes but will delve into the judicial reasoning, the interpretative techniques employed, and the broader socio-political context in which these decisions were rendered. This chapter is structured to first present a cohort of cases exemplifying judicial activism, followed by an analysis of judgments demonstrating judicial restraint. It will then explore the constitutional provisions that both empower and limit the judiciary, culminating in an analysis of the inherent conflict between these two philosophies and the tangible impact of these landmark cases on Bangladeshi society. Through this systematic case analysis, this chapter aims to provide a nuanced answer to the central research question of how the dialectic between activism and restraint has shaped, and continues to shape, the constitutional development of Bangladesh.

#### 5.2 Cases Demonstrating Judicial Activism

Judicial activism in Bangladesh has been a transformative force, particularly through the apex court's willingness to engage in robust constitutional interpretation, expand the scope of fundamental rights, and intervene in governance matters for the public good. This activist streak is most visible in the development of the Basic Structure Doctrine, the liberalization of locus standi in constitutional writs, and the innovative use of judicial directives. The following cases are paradigmatic of this trend.

## **1. Anwar Hossain Khan vs. Bangladesh (1989) 41 DLR (AD) 165 – The Eighth Amendment Case**

Widely regarded as the cornerstone of judicial activism in Bangladesh, this case introduced the "Basic Structure Doctrine" into the country's constitutional jurisprudence. The Eighth Amendment to the Constitution had sought to decentralize the High Court Division by establishing six permanent benches outside Dhaka. The Supreme Court, in a historic verdict, declared the amendment unconstitutional. The court reasoned that the amendment altered the fundamental character of the Republic's unified judiciary, a feature that forms part of the basic structure of the Constitution, which is beyond the amending power of Parliament.<sup>43</sup>

This decision was a monumental act of activism. The court positioned itself as the ultimate arbiter of the constitutionality of constitutional amendments, a power not explicitly granted by the text of the Constitution. By invoking an implied limitation on the constituent power of Parliament, the court asserted its supremacy in guarding the foundational principles of the state, thereby significantly altering the balance of power between the judiciary and the legislature.

## **2. Dr. Mohiuddin Farooque vs. Bangladesh (1997) 49 DLR (AD) 1 – The Public Interest Litigation (PIL) Pioneer**

This case fundamentally expanded access to justice and the judiciary's capacity to act as a protector of public rights. The Bangladesh Environmental Lawyers Association (BELA), on behalf of the public, challenged the government's failure to address widespread river pollution. A pivotal question was whether an organization, not directly aggrieved, had the standing (*locus standi*) to file such a petition.

The Appellate Division, upholding the High Court Division's earlier progressive stance, ruled that in matters of public injury or constitutional rights violation, any public-spirited individual or organization could invoke the writ jurisdiction under Articles 102 and 44 of the Constitution.<sup>44</sup> This judgment dramatically liberalized the rule of standing, moving away from the traditional, restrictive requirement of personal grievance. It empowered the judiciary to address systemic issues affecting the populace, from environmental degradation to public health and governance failures, thereby embracing an activist role as a forum for public grievance and social justice.

## **3. Bangladesh vs. Advocate Asad-uz-Zaman Siddiqui (2014) 21 BLC (AD) 1 – The Thirteenth Amendment Case**

In a continuation of the basic structure philosophy, the Supreme Court in this case declared the Thirteenth Amendment, which had introduced the Caretaker Government system for holding

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<sup>43</sup> Anwar Hossain Khan vs. Bangladesh (1989) 41 DLR (AD) 165, para. 87. The Court held: "The preamble, the fundamental principles of state policy and the fundamental rights, all together constitute the fundamental features of our Constitution and form its basic structure... Any amendment which alters this basic structure is beyond the amending power of Parliament."

<sup>44</sup> Dr. Mohiuddin Farooque vs. Bangladesh (1997) 49 DLR (AD) 1, para. 22. The judgment stated: "In a society where violations of constitutional and legal rights of a large number of people... are occurring, the narrow concept of 'personal injury' or 'aggrieved person' has to be enlarged."

general elections, to be void. The court held that the amendment violated democracy, a fundamental feature of the basic structure, by creating an unelected, non-representative government to assume power at regular intervals.

While the decision was prospective allowing the system to be used for two more elections its activist character is undeniable. The court intervened in a deeply political mechanism that had been instituted through a political consensus and a previous constitutional amendment. By invalidating a core component of the political settlement that had governed elections for over a decade, the judiciary demonstrated its willingness to adjudicate on matters of high political stakes, redefining the boundaries of permissible constitutional change and asserting its role as the ultimate guardian of constitutional principles.

#### **4. BLAST vs. Bangladesh & Others (2011) 14 BLC (HCD) 60 – The Right to Fair Treatment**

This case exemplifies activism in the sphere of fundamental rights interpretation. The Bangladesh Legal Aid and Services Trust (BLAST) challenged the practice of law enforcement agencies handcuffing and shackling accused individuals as a matter of routine during production in court. The High Court Division, in a landmark judgment, declared this practice unlawful and unconstitutional. The court expansively interpreted Article 31 (Right to Protection of Law) and Article 32 (Right to Life and Personal Liberty) to include the right to be treated with dignity and the presumption of innocence.<sup>45</sup> It issued detailed guidelines specifying the exceptional circumstances under which restraints could be used. This case is a prime example of the judiciary using its power to read new dimensions into existing fundamental rights, actively shaping state practice to align with contemporary notions of human dignity and procedural justice, even in the absence of specific legislative reform. In conclusion, these cases illustrate a consistent pattern of judicial activism where the Supreme Court of Bangladesh has moved beyond a passive, interpretive role. By crafting the Basic Structure Doctrine, opening the doors to Public Interest Litigation, and breathing new life into fundamental rights, the judiciary has actively shaped the nation's constitutional destiny, often stepping in to fill perceived voids in governance and protect the constitutional order from perceived erosion.

### **5.3 Cases Demonstrating Judicial Restraint**

The Supreme Court of Bangladesh has defined its role not only through activism but also by establishing important precedents of judicial restraint. Judicial restraint is demonstrated when the court prioritizes the plain text of the Constitution and statutes, refrains from interfering in the decisions of the legislature or executive, and exercises caution against venturing into the

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<sup>45</sup> BLAST vs. Bangladesh & Others (2011) 14 BLC (HCD) 60, para. 31. The Court observed: "The act of handcuffing and shackling... is a violation of the right to dignity and the presumption of innocence, which are inalienable parts of Articles 31 and 32 of the Constitution."

contentious realms of lawmaking or policy formulation. The constitutional history of Bangladesh features several landmark cases where the court has adhered to this restrained principle.

### **1. Kuddus vs. Bangladesh (1982) – Limiting the Review of Legislative Wisdom**

In this case, the Appellate Division laid down a crucial principle: the court's function is to examine the legality of a law, not the wisdom behind its enactment. The case concerned the reasonableness of a particular statute. The court emphatically stated that if a law is not inconsistent with the Constitution and falls within the constitutional competence of the legislature, the court cannot question why it was enacted or the policy rationale behind it. The court observed that "the policy and wisdom of a law are for the Legislature to decide and not for the Court... A law may be unreasonable or unnecessary, yet the Court cannot strike it down if it is not inconsistent with the Constitution."<sup>46</sup> This is a classic example of judicial restraint, where the court acknowledged the sovereign authority of the legislature in the field of lawmaking.

### **2. Begum Sufia Kamal vs. Bangladesh (1989) – Refraining from Policy Directives**

This case saw the High Court Division adhering to another fundamental tenet of restraint. The case involved the implementation of the Fundamental Principles of State Policy. The court explicitly stated that while these principles are fundamental to the governance of the state, they are not judicially enforceable; that is, the court cannot compel the state to implement them. The court's role is confined to being the guardian of Fundamental Rights. The responsibility for determining the timing and method of implementing the Principles of State Policy rests entirely with the executive and legislative branches<sup>47</sup>. In this judgment, the court respected the separation of powers between the different organs of the state, withdrawing from interference in the process of policy formulation, which is a political and administrative function.

### **3. Bangladesh vs. Hassanuddin Chowdhury (1982) – Restraint in Interfering with Administrative Decisions**

The courts have also shown restraint concerning decisions made by administrative tribunals or competent authorities. In explaining the scope of judicial review, the court in this case held that an administrative authority's decision can only be set aside if it involves a jurisdictional error, patent illegality, or reaches the level of Eynsbury unreasonableness. The court can only examine the legal validity of the decision-making process, not re-evaluate the merits or correctness of the

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<sup>46</sup> Kuddus vs. Bangladesh, (1982) 34 DLR (HCD) 22, para 12. The court observed: "The policy and wisdom of a law are for the Legislature to decide and not for the Court... A law may be unreasonable or unnecessary, yet the Court cannot strike it down if it is not inconsistent with the Constitution."

<sup>47</sup> Begum Sufia Kamal vs. Bangladesh, (1989) 41 DLR (HCD) 38, para 25. The judgment noted: "The Principles of State Policy are fundamental to the governance of the country but are not judicially enforceable, and the Court cannot compel the State to implement them."

decision itself. <sup>48</sup>This principle aligns with the concept of "judicial deference," where the court respects the decisions of expert administrative bodies, provided they are not manifestly illegal.

In conclusion, the aforementioned cases demonstrate that the Supreme Court of Bangladesh does not always play an activist role. By respecting the separation of powers established by the Constitution, acknowledging the sovereign lawmaking power of the Parliament, and refraining from unwarranted interference in administrative decisions, the court has set equally compelling precedents of judicial restraint.

## **5.4 Constitutional Provisions Guiding Judicial Behavior**

The Constitution of Bangladesh explicitly outlines the principles and boundaries the judiciary must observe while exercising its powers and performing its duties. These provisions provide the legal framework for the tension between judicial activism and restraint. They simultaneously empower the court and impose limitations upon it.

### **a. Provisions Empowering the Judiciary:**

**1. Article 102: Writ Jurisdiction** – This is the most powerful tool of judicial activism in the arsenal of the High Court Division. Under this article, the court can issue orders for the enforcement of fundamental rights, release persons unlawfully detained (habeas corpus), prohibit an authority from acting beyond its jurisdiction (prohibition), and compel the performance of public duties (mandamus). The Dr. Mohiuddin Farooque case is the most prominent example of the court's activist role by expansively interpreting this jurisdiction.

**2. Article 44: Enforcement of Fundamental Rights** – This article directly vests the responsibility of enforcing the Fundamental Rights, enumerated in Articles 26 to 47A, upon the High Court Division. It provides the constitutional foundation for Article 102 and gives the court the direct authority to intervene for the protection of citizens' fundamental rights.

**3. Articles 111 and 112: Binding Nature of Judicial Precedents** – Article 111 stipulates that the law declared by the Appellate Division of the Supreme Court is binding on all other courts in Bangladesh. Similarly, under Article 112, the law declared by the High Court Division is binding on all courts subordinate to it. <sup>49</sup>Through these provisions, the legal principles and judicial doctrines (like the Basic Structure Doctrine) established by the judiciary become applicable across the entire legal system, ensuring the far-reaching impact of judicial activism.

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<sup>48</sup> Bangladesh vs. Hassanuddin Chowdhury, (1982) 34 DLR (AD) 109, para 18. The Appellate Division clarified that "the decision of an administrative tribunal can only be interfered with if it suffers from a jurisdictional error or patent illegality or Eynesbury unreasonableness.

<sup>49</sup> The Constitution of the People's Republic of Bangladesh, Article 111. It states: "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

## **b. Provisions Limiting the Power of the Judiciary:**

**1. Article 7(2): Supremacy of the Constitution** – This article states, "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic." It reminds the judiciary that its role is to interpret and protect the Constitution, not to stand above it. Allegiance to this supreme law often guides the court toward restraint.

**2. Article 65: Powers of Parliament** – The Constitution grants the supreme power of legislation to Parliament, along with specific privileges for its members (e.g., Article 78). The courts have repeatedly emphasized that what the law ought to be is for Parliament to decide, not the courts. The court's function is only to determine whether the law as it exists is constitutional.

**3. Article 47: Immunity of Certain Laws from Judicial Review** – This article shields specific laws, such as those relating to enemy property from the liberation war, from constitutional challenge. It represents a clear constitutional limitation on the power of judicial review.

**4. Article 49: President's Power to Grant Pardon** – The power of the President to grant pardons, reprieves, etc., is explicitly stated to not be subject to judicial review. This is a direct prohibition on judicial intervention in a specific executive function.

**5. Article 22: Separation of Judiciary from the Executive** – This principle ensures the independence of the judiciary by freeing it from executive influence. However, this same principle also encourages the court not to interfere in the day-to-day functioning of the executive, which is consistent with judicial restraint.

In conclusion, the Constitution of Bangladesh is a dynamic document that has endowed the court with the necessary powers to play an activist role while also drawing specific boundaries that encourage restraint. The judiciary ultimately strives to maintain a delicate balance between these provisions, deciding when to be active and when to be restrained based on context, the nature of the application, and the larger interests of the state.

## **5.5 Conflict between Activism and Restraint**

The dialectic between judicial activism and restraint is not merely an academic debate but a lived reality within Bangladesh's constitutional framework. This conflict arises from the inherent tension between the court's duty to do justice and its obligation to respect the separation of powers. On one hand, an overly activist judiciary risks encroaching upon the domains of the executive and legislature, potentially leading to a "government by judges." On the other, excessive restraint can render the judiciary a passive spectator to constitutional breaches and executive overreach, failing in its role as the guardian of the Constitution.

This conflict is most palpable in cases involving fundamental rights and public interest litigation. For instance, when the court issues *Suo motu* directives on environmental pollution or public safety, it is lauded as activist and pro-people. However, this same intervention is often criticized by the executive as a violation of the separation of powers, arguing that the court is overstepping into policy matters. Conversely, when the court exercises restraint in politically sensitive cases,

such as those involving constitutional amendments with significant political implications, it is praised by some for its prudence but condemned by others for failing to protect the constitutional order from majoritarian impulses.<sup>50</sup> This ongoing conflict underscores the fact that the line between legitimate judicial review and illegitimate judicial overreach is often thin and hotly contested.

## 5.6 Impact of Landmark Cases on Society

The landmark cases discussed in this chapter have had a profound and tangible impact on Bangladeshi society, governance, and legal consciousness. The judiciary, through its assertive and restrained rulings, has shaped the socio-legal landscape in several critical ways.

**Firstly**, the expansion of locus standi through PIL has democratized justice. It has empowered citizens and civil society organizations to approach the highest court for redressing collective grievances, leading to significant advancements in environmental protection, public health, and good governance. The ruling against routine handcuffing, for example, has directly enhanced the dignity and rights of countless accused individuals within the criminal justice system.

**Secondly**, the development of the Basic Structure Doctrine has instilled a sense of constitutional permanence. By placing certain fundamental features beyond the reach of a simple parliamentary majority, the judiciary has provided a crucial check on majoritarian power, ensuring political continuity and stability<sup>51</sup>. This has had a deep, albeit indirect, impact on the political culture, forcing all organs of the state to operate within the foundational principles of the Constitution.

## 5.7 Comparative Case Discussion

A comparative perspective with other South Asian jurisdictions, particularly India, reveals both parallels and divergences in the application of judicial activism and restraint. The Indian Supreme Court, like its Bangladeshi counterpart, has robustly employed PIL and developed a rich jurisprudence on fundamental rights. Both courts have invoked the basic structure doctrine to invalidate constitutional amendments.

However, a key difference lies in the scope and frequency of *Suo motu* interventions. The Supreme Court of Pakistan and the higher judiciary in Bangladesh have, at times, been more proactive in using *Suo motu* powers to address matters of public importance, sometimes venturing into areas

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<sup>50</sup> This was evident in the political and legal discourse surrounding the Thirteenth Amendment Case, where the Court's invalidation of the caretaker government system was seen by supporters as an act of constitutional defense and by critics as judicial overreach into a settled political compromise.

<sup>51</sup> M. Jashim Ali Chowdhury, *The Constitutional Law of Bangladesh* (2nd ed., 2021), p. 245. The author argues that the Basic Structure Doctrine has served as a "structural shield" for the Constitution, preventing its core identity from being altered by transient parliamentary majorities.

of pure policy. <sup>52</sup>The Indian Supreme Court, while highly activist, has generally been more circumspect in initiating cases on its own motion, often waiting for a formal petition.

Furthermore, in dealing with emergency powers or national security legislation, courts across the region, including in Bangladesh, have often displayed marked restraint, deferring to the executive's assessment. This common trend highlights a shared challenge: balancing national security concerns with the protection of civil liberties. <sup>53</sup>The comparative analysis suggests that while the tools of activism and restraint are similar, their application is uniquely shaped by each nation's political history, social context, and the institutional confidence of its judiciary.

## 5.8 Conclusion

This chapter has demonstrated that the jurisprudence of the Supreme Court of Bangladesh is a rich tapestry woven with threads of both judicial activism and restraint. The analysis of landmark cases reveals a court that is dynamically engaging with its constitutional role, neither shirking its responsibility as a sentinel of justice nor blindly encroaching upon the functions of other state organs.

The conflict between these two philosophies is not a weakness but a sign of a maturing constitutional democracy, constantly negotiating the boundaries of institutional power. The impact of the court's decisions extends far beyond the courtrooms, shaping public policy, protecting citizen rights, and reinforcing the foundational structure of the state. The comparative discussion places Bangladesh's experience within a broader South Asian context, showing a regional pattern of judicial assertiveness tempered by contextual constraints.

Ultimately, the Bangladeshi judiciary navigates the activism-restraint spectrum on a case-by-case basis. Its choices are guided by the text of the Constitution, the exigencies of the situation, and a constant awareness of its own institutional legitimacy. <sup>54</sup>This delicate and evolving balance is central to the continued development of constitutionalism in the People's Republic of Bangladesh.

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<sup>52</sup> For a comparative analysis, see Hoque, R. (2011). *Judicial Activism in Bangladesh: A Golden Mean Approach*. Cambridge Scholars Publishing. The book discusses how suo motu powers in Bangladesh and Pakistan have been used to address issues like prison conditions and public health in ways that are less common in India.

<sup>53</sup> This was observed in cases like *Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2006) concerning the Emergency Power Rules, where the judiciary demonstrated significant deference to the executive's authority during a state of emergency.

<sup>54</sup> The Attitudinal and Strategic models of judicial behavior, as discussed in Chapter 3, help explain this balancing act. Judges are not only guided by law but also by their personal attitudes and a strategic calculation of the political consequences of their decisions.

## Chapter 6

# Procedure, Remedies, and Judicial Intervention

### 6.1 Introduction

This chapter explores the procedural mechanisms, remedial frameworks, and judicial interventions employed by the judiciary in Bangladesh, particularly in constitutional adjudication. It examines how these elements interact with the themes of judicial activism and judicial restraint, as discussed in earlier chapters. The Constitution of Bangladesh, as the supreme law, empowers the Supreme Court comprising the High Court Division (HCD) and the Appellate Division to protect fundamental rights and ensure governmental accountability. Article 102 of the Constitution grants the HCD writ jurisdiction to issue directions, orders, or writs for enforcing fundamental rights enshrined in Part III (Articles 26–44), such as protections against discrimination, guarantees of life and liberty, and equality before the law.<sup>55</sup> This provision is the cornerstone of judicial interventions, enabling the court to act as a guardian against executive overreach or legislative shortcomings.

Judicial procedures in constitutional matters typically involve writ petitions, enabling aggrieved parties to seek remedies like mandamus, prohibition, certiorari, habeas corpus, or quo warranto. These remedies extend beyond declarations to include compensation, enforcement directives, and ongoing supervision, reflecting an activist approach when courts address systemic issues proactively.<sup>56</sup> However, such activism must be balanced with restraint to respect the separation of powers under Article 22, preventing judicial encroachment into legislative or executive domains.

Two key instruments *suo motu* actions and public interest litigations (PILs) exemplify this dynamic. *suo motu* interventions allow the court to initiate proceedings independently, often triggered by media reports or public knowledge of injustices, embodying judicial activism by enabling swift responses without formal petitions. PILs relax traditional *locus standi* requirements, allowing public-spirited individuals or organizations to litigate for marginalized groups, thus democratizing access to justice. These tools, influenced by regional precedents like India, have been pivotal since the 1990s in addressing human rights violations, environmental concerns, and social injustices.

The effectiveness of these procedures and remedies is, however, constrained by challenges like case backlogs, executive non-compliance, and judicial resource limitations. This chapter analyzes *suo motu* interventions and PILs, highlighting their procedural aspects, remedial outcomes, and implications for balancing activism and restraint. It sets the stage for evaluating their societal impact and policy contributions, aligning with the objective of finding a balanced judicial approach in Bangladesh's constitutional framework.

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<sup>55</sup> Constitution of the People's Republic of Bangladesh, Article 102 (1972).

<sup>56</sup> Hoque, R. (2011). *Judicial Activism in Bangladesh: A Golden Mean Approach*. Newcastle: Cambridge Scholars Publishing.

## 6.2 Suo Motu Intervention

Suo motu intervention, meaning "on its own motion," is a proactive judicial tool where the court initiates proceedings without a formal petition, often based on media reports, letters, or direct observation of public issues, human rights violations, or constitutional breaches. In Bangladesh, this mechanism allows the Supreme Court, particularly the HCD, to address urgent matters, reflecting judicial activism by filling gaps left by executive inaction or legislative oversight.<sup>57</sup> Rooted in the court's inherent powers under Article 102 and Article 104 (for complete justice), suo motu actions bypass procedural barriers, aligning with the constitutional mandate to safeguard fundamental rights.

The evolution of suo motu in Bangladesh began in the early 1990s, marking a shift from restraint-oriented jurisprudence. A landmark case, *State v. Deputy Commissioner, Satkhira* (45 DLR 1993), saw the HCD issue a suo motu rule based on a Daily Ittefaq report about the illegal 11-year detention of Nazrul Islam without trial. The court declared the detention unlawful, violating Articles 31 and 32, and ordered nationwide inquiries into similar cases, alongside prosecution of responsible officials<sup>58</sup>. This case established media reports as a legitimate trigger for intervention, expanding the judiciary's role in protecting prisoner rights.

Subsequent cases reinforced suo motu's activist role. In *Dr. Faustina Pereira v. The State* (53 DLR 2001), the HCD took suo motu cognizance of foreign prisoners detained beyond their sentences, ordering their release and issuing guidelines for future handling, invoking Articles 27 and 31.<sup>59</sup> In 2013, following attacks on Hindu minorities after the International Crimes Tribunal's verdict against Delwar Hossain Sayedee, the HCD issued a suo motu rule based on reports of violence in Noakhali, directing the government to repair damaged properties, arrest perpetrators, and submit progress reports within ten days, citing Articles 11, 28, and 41.<sup>60</sup>

Suo motu has also addressed extra-judicial punishments. Following the 2011 death of Hena Akhter from 100 lashes imposed by a fatwa, the HCD reinforced its ruling in *BLAST and Others v. Bangladesh* (Writ Petition No. 5863 of 2009), issuing directives for media campaigns against unconstitutional penalties and clarifying that fatwas are non-binding. These interventions demonstrate activism by remedying immediate harms and mandating preventive measures, such as educational reforms.

However, suo motu interventions face criticism for risking factual inaccuracies due to reliance on unverified media and for potentially violating natural justice by bypassing standard procedures. Their limited use only a handful of cases despite widespread issues reflects a cautious approach to avoid perceptions of overreach. Enforcement gaps and case pendency further dilute impact. suo motu remains a vital tool for swift justice delivery but requires balanced application to maintain legitimacy.

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<sup>57</sup> Halim, M. A. (2015). *The Legal System of Bangladesh*. Dhaka: CCB Foundation.

<sup>58</sup> *State v. Deputy Commissioner, Satkhira*, 45 DLR (1993) 643.

<sup>59</sup> *Dr. Faustina Pereira v. The State*, 53 DLR (2001) 414.

<sup>60</sup> Islam, M. (2015). *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers.

### **6.3 Public Interest Litigations and Remedies**

Public Interest Litigation (PIL) in Bangladesh enables individuals or organizations to seek remedies for public welfare issues without requiring personal aggrievement. It enforces constitutional or legal rights for vulnerable groups, such as the poor, minorities, or environmentally affected communities, by relaxing locus standi under Article 102.<sup>61</sup> PIL reflects judicial activism by broadening access to justice and addressing systemic societal issues.

The evolution of PIL in Bangladesh began in the 1990s, influenced by U.S. and Indian models. Early cases like *Bangladesh Sangbadpatra Parishad v. Bangladesh* (1991) adhered to a strict “person aggrieved” test, but *Dr. Mohiuddin Farooque v. Bangladesh* (FAP 20 case, 1996) revolutionized PIL by granting standing to BELA to challenge a flood control project, leading to environmental reforms.<sup>62</sup> This opened the door for NGOs like BLAST, BELA, and Ain O Salish Kendra to file PILs on diverse issues.

Notable PILs include *BLAST and Others v. Bangladesh* (Writ Petition No. 5863 of 2009), which outlawed extra-judicial fatwas, and *BLAST v. Ministry of Education* (Writ Petition No. 5684 of 2010), banning school corporal punishment. Environmental PILs by BELA address pollution, while consumer rights cases, like BLAST’s 1999 petition for iodized salt enforcement, resulted in compliance orders. Recent cases like *Green Line Paribahan* (2018) and *Jahalam* (2018) highlight remedies like compensation and policy directives.

PIL remedies are innovative, including monetary compensation (*Bilkis Akhter v. Bangladesh*, 1997), epistolary jurisdiction, investigative commissions, and continuous monitoring. In *BLAST v. Bangladesh* (Writ Petition No. 3806 of 1998), the HCD issued guidelines reforming arrest procedures. Challenges include delays, executive non-compliance, and over-reliance on NGOs, necessitating judicial proactivity and systemic reforms to balance activism with constitutional limits.

### **6.4 Award of Compensation and Enforcement**

The award of compensation in Bangladesh’s constitutional adjudication represents a significant facet of judicial remedies, particularly in cases involving violations of fundamental rights. Under Article 102 of the Constitution, the High Court Division (HCD) has the authority to issue orders for enforcing rights enshrined in Part III, which include protections for life, liberty, and equality.<sup>63</sup> Compensation serves as both a remedial and deterrent measure, addressing harm suffered by victims and signaling accountability to state actors. This practice, rooted in judicial activism, gained prominence through landmark cases where the judiciary awarded monetary relief to victims of rights violations, thereby expanding the scope of constitutional remedies beyond traditional writs.

A pivotal case illustrating this is *Bilkis Akhter v. Bangladesh* (1997), where the HCD awarded compensation to a victim of unlawful detention, recognizing that mere declarations were

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<sup>61</sup> Malik, S. (2008). *Public Interest Litigation in Bangladesh: A Case Study*. Dhaka: BLAST Publications.

<sup>62</sup> *Dr. Mohiuddin Farooque v. Bangladesh*, 17 BLD (AD) (1997) 1.

<sup>63</sup> Constitution of the People’s Republic of Bangladesh, Article 102 (1972).

insufficient to redress the harm caused. <sup>64</sup>This set a precedent for compensatory remedies in public law, particularly in public interest litigations (PILs) and suo motu cases. For instance, in *Jahalam v. Bangladesh* (Writ Petition No. 2018), the HCD awarded Tk. 5 lakh to a man wrongfully imprisoned for three years due to mistaken identity, emphasizing the state's duty to compensate for administrative failures. <sup>65</sup>Such awards align with the judiciary's activist role in ensuring justice for marginalized individuals, often neglected by the executive.

Enforcement of judicial orders, however, remains a critical challenge. While the HCD can issue directives, compliance often depends on executive cooperation, which is inconsistent due to bureaucratic inertia or political resistance. In cases like *BLAST v. Bangladesh* (Writ Petition No. 3806 of 1998), where the court issued guidelines to reform arrest procedures, enforcement lagged due to inadequate institutional mechanisms and monitoring. The judiciary has employed innovative enforcement strategies, such as appointing amicus curiae or directing periodic progress reports, but these are not always effective. For example, in suo motu cases addressing minority attacks (e.g., 2013 Noakhali violence), directives for property restoration were only partially implemented, highlighting enforcement gaps. <sup>66</sup>

The award of compensation and enforcement efforts underscore judicial activism by providing tangible remedies and holding the state accountable. However, the judiciary must exercise restraint to avoid overstepping into executive functions, such as budget allocation for compensation, which could strain inter-branch relations. Balancing these dynamics is crucial for maintaining constitutional harmony while ensuring effective remedies.

## 6.5 Comparative Remedies in Other Jurisdictions

Comparative analysis of judicial remedies in other jurisdictions provides valuable insights into Bangladesh's approach to constitutional adjudication and the balance between activism and restraint. India, a close comparator due to shared legal traditions, has a robust PIL framework that has significantly influenced Bangladesh. In cases like *Vishaka v. State of Rajasthan* (1997), the Indian Supreme Court issued guidelines on workplace sexual harassment, filling legislative gaps a form of activism mirrored in Bangladesh's fatwa prohibition cases. <sup>67</sup>India's courts also award substantial compensation, as seen in *Rudul Sah v. State of Bihar* (1983), where compensation was granted for unlawful detention, a precedent that inspired Bangladesh's *Bilkis Akhter* case.

In contrast, jurisdictions like the United States emphasize judicial restraint in awarding compensation, limiting remedies to declaratory relief or injunctions unless statutory provisions explicitly allow damages, as seen in *Bivens v. Six Unknown Named Agents* (1971). The U.S. Supreme Court often defers to legislative intent, reflecting a restrained approach compared to Bangladesh's proactive compensation awards. Similarly, in the United Kingdom, the Human Rights Act 1998 allows compensation for rights violations, but courts exercise caution, prioritizing proportionality and deference to parliamentary sovereignty.

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<sup>64</sup> *Bilkis Akhter v. Bangladesh*, 50 DLR (1998) 337.

<sup>65</sup> *Jahalam v. Bangladesh*, Writ Petition No. 2018 (HCD).

<sup>66</sup> Hoque, R. (2015). *Judicial Activism and Human Rights in Bangladesh*. Dhaka: University Press Limited.

<sup>67</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

South Africa offers another perspective, where the Constitutional Court has used transformative remedies in cases like *Minister of Health v. Treatment Action Campaign* (2002), mandating policy changes to provide HIV/AIDS treatment. This resonates with Bangladesh's PILs on environmental and health issues but differs in scale due to South Africa's stronger enforcement mechanisms. Comparative analysis reveals that Bangladesh's judiciary, while activist in awarding compensation and issuing directives, faces unique challenges in enforcement compared to India's more established monitoring systems or South Africa's robust institutional framework.

Learning from these jurisdictions, Bangladesh could enhance its remedial framework by adopting structured enforcement mechanisms, such as judicial oversight committees, and drawing on India's model of interim orders to ensure compliance. However, excessive activism risks judicial overreach, necessitating a restrained approach to align with constitutional limits and local realities.

## 6.6 Effectiveness of Remedies

The effectiveness of judicial remedies in Bangladesh hinges on their ability to redress harm, deter future violations, and catalyze systemic change. Compensatory remedies, as seen in *Jahalam* and *Bilkis Akhter*, provide immediate relief to victims, affirming the judiciary's role as a protector of fundamental rights. PILs have been particularly effective in addressing societal issues, such as environmental degradation (e.g., BELA's cases on river pollution) and human rights abuses (e.g., fatwa bans). These remedies have led to policy reforms, such as the National Environment Management Action Plan following the FAP 20 case, demonstrating the judiciary's capacity to influence governance.<sup>68</sup>

However, effectiveness is undermined by several factors. Case backlogs, with over 1.2 million pending cases in the Supreme Court as of 2023, delay remedy implementation, eroding public trust. Executive non-compliance further hampers outcomes, as seen in the partial execution of directives in minority protection cases. Resource constraints, including limited judicial personnel and funding, restrict the court's ability to monitor compliance or appoint investigative commissions. For instance, while the HCD's guidelines in *BLAST v. Bangladesh* (arrest reforms) were progressive, their impact was diluted due to inadequate police training and oversight.

Suo motu interventions, though impactful in raising awareness (e.g., *Hena Akhter's* case), are limited by their ad hoc nature and reliance on media triggers, which may not address systemic issues comprehensively. PILs, while broadening access to justice, often depend on NGOs, limiting grassroots participation. Despite these challenges, remedies like compensation and policy directives have empowered marginalized groups, fostering social equity. Enhancing effectiveness requires judicial reforms, such as expedited case disposal mechanisms and stronger inter-branch coordination, to ensure remedies translate into tangible outcomes.

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<sup>68</sup> Islam, M. (2018). *Environmental Law and Policy in Bangladesh*. Dhaka: New Age Publications.

## 6.7 Challenges in Enforcement

Enforcement challenges are a significant barrier to the efficacy of judicial remedies in Bangladesh. Executive non-compliance, often driven by political considerations or bureaucratic inefficiency, undermines court directives. For example, in *ASK v. Bangladesh* (1999), directives for alternative shelters for evicted slum dwellers were only partially implemented due to resource constraints and lack of political will. Similarly, the HCD's guidelines on extra-judicial killings have seen limited adoption, with reports indicating continued violations by law enforcement agencies.<sup>69</sup>

Case pendency exacerbates enforcement issues, as delayed judgments reduce the urgency of compliance. The judiciary's limited monitoring capacity further complicates enforcement, as courts rely on government reports that may lack transparency. Political interference, particularly in cases involving powerful stakeholders, also hinders enforcement, as seen in environmental PILs where industrial lobbies resist compliance. Additionally, the judiciary's resource constraints limited judges, staff, and infrastructure restrict proactive measures like appointing fact-finding commissions or ensuring continuous oversight.

To address these challenges, the judiciary could adopt stricter enforcement mechanisms, such as contempt proceedings for non-compliance, and leverage technology for case management. Collaboration with civil society and international organizations could also enhance monitoring and accountability. However, the judiciary must balance activism in enforcement with restraint to avoid antagonizing other branches, ensuring constitutional harmony.

## 6.8 Limits and Constraints of Judicial Power

The judiciary's power in Bangladesh, while expansive under Article 102, is subject to constitutional and practical constraints. The separation of powers under Article 22 limits judicial intervention in policy-making, requiring courts to defer to the legislature and executive in areas like budget allocation or administrative discretion. Overstepping these boundaries risks accusations of judicial overreach, as seen in debates over the HCD's directives in *BLAST v. Bangladesh* (fatwa case), which some argued encroached on cultural and religious domains.

Practical constraints include judicial capacity, with only 97 judges in the HCD handling thousands of cases annually, leading to delays and reduced remedy effectiveness. The lack of legal aid for indigent litigants' further limits access to justice, particularly in PILs. Additionally, the judiciary's dependence on the executive for enforcement creates a structural limitation, as non-compliance undermines judicial authority.

Judicial restraint is also necessitated by the risk of politicization. Activist rulings in politically sensitive cases, such as those involving constitutional amendments or elections, can draw criticism and erode public confidence. The judiciary must navigate these constraints by adopting a principled approach, intervening only when fundamental rights are at stake and ensuring remedies are proportionate and enforceable within constitutional limits.

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<sup>69</sup> Human Rights Watch. (2020). *Bangladesh: Extrajudicial Killings and Enforced Disappearances*. New York: HRW.

## 6.9 Conclusion

This chapter has examined the procedural and remedial frameworks of judicial intervention in Bangladesh, highlighting the interplay between activism and restraint. *Suo motu* actions and PILs exemplify activist tools that broaden access to justice, while compensation and enforcement directives address systemic issues. Comparative perspectives reveal opportunities for enhancing remedies, but challenges like executive non-compliance, case backlogs, and resource constraints limit effectiveness.<sup>70</sup> The judiciary's power, though significant, is bound by constitutional and practical limits, necessitating a balanced approach to uphold constitutional supremacy without overstepping institutional boundaries. By addressing enforcement challenges and learning from global practices, Bangladesh's judiciary can strengthen its role as a guardian of rights while maintaining harmony with other branches of government.

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<sup>70</sup> For a detailed discussion of these constraints, see Sarwar, *Judicial Activism and Constitutional Dynamics in Bangladesh* (2019) at 156-178.

## Chapter 7

### Recommendations and Conclusions

#### 7.1 Findings

The analysis of judicial activism and judicial restraint under the Bangladesh Constitution demonstrates a continuous tension between two contrasting judicial philosophies, each shaped by distinct political, historical, and social realities. Since 1971, the judiciary particularly the Supreme Court has progressively leaned toward activism, notably in safeguarding human rights, environmental justice, and constitutional supremacy. Through Public Interest Litigations (PILs) and suo motu actions, the courts have filled institutional gaps left by legislative and executive inertia. The landmark decision in *Anwar Hossain Chowdhury v Bangladesh* (1989) affirmed the basic structure doctrine, curbing arbitrary constitutional amendments and reinforcing the judiciary's constitutional guardianship role.<sup>71</sup>

Judicial activism has particularly strengthened the enforcement of fundamental rights. The High Court Division's dynamic interpretation of Articles 27 and 32 expanded equality and liberty protections for marginalized citizens. For instance, in *Hefzur Rahman v Shamsun Nahar Begum* (1995), the Court redefined women's post-divorce rights within Islamic law, emphasizing justice and gender parity. Similarly, *BLAST and Others v Bangladesh and Others* (1998) demonstrated how the judiciary has addressed environmental and health concerns to uphold citizens' right to life.<sup>72</sup> These cases collectively illustrate how activism can realize the Preamble's vision of democracy, equality, and social justice when legislative action remains inadequate.

Nonetheless, judicial restraint has also featured prominently, reflecting respect for the separation of powers enshrined in Article 22. In politically sensitive disputes, the courts have often deferred to the elected branches. For example, *A.T. Mridha v The State* (1973) upheld certain emergency powers, acknowledging executive discretion.<sup>73</sup> Likewise, the judiciary's cautious approach in matters of judges' appointments underscores institutional prudence, ensuring legitimacy and stability. Such restraint aligns with the principle that courts should not intrude into policy or "political questions," which remain within Parliament's purview.

Comparative study reveals Bangladesh's judiciary has selectively borrowed ideas from jurisdictions like India's PIL jurisprudence and the United States' *Marbury v Madison* (1803) on judicial review, yet adapted them to its own democratic transition. Activism intensified in the 1990s, especially in environmental and governance-related litigation such as *Kazi Mukhlesur Rahman v Bangladesh* (1974) which linked constitutional rights with national interest.<sup>74</sup> However,

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<sup>71</sup> *Anwar Hossain Chowdhury v Bangladesh* [1989] 41 DLR (AD) 165.

<sup>72</sup> *BLAST and Others v Bangladesh and Others* [1998] 19 BLD (HCD) 654.

<sup>73</sup> *A.T. Mridha v The State* [1973] 25 DLR (SC) 335.

<sup>74</sup> *Kazi Mukhlesur Rahman v Bangladesh* [1974] 26 DLR (SC) 44.

excessive activism can lead to judicial overreach, as seen in tensions surrounding the 16th Amendment, risking confrontation with political institutions.

In sum, the findings highlight a need for balance: activism ensures accountability and rights protection, while restraint preserves institutional harmony. The judiciary's gradual move toward a "middle path" has, overall, strengthened democratic resilience in Bangladesh.

## 7.2 Recommendations

To sustain a balanced judicial culture that integrates both activism and restraint, several pragmatic recommendations arise.

**First**, comprehensive judicial education is essential. Regular workshops on constitutional interpretation, ethics, and comparative jurisprudence should train judges to discern when activism is necessary such as in rights violations and when restraint better serves democracy. Collaborative programs with the UN or Commonwealth Judicial Institutes can enhance capacity building.

**Second**, stronger legislative engagement is required. The Parliament should enact modernized statutes on environment, gender justice, and public health, reflecting judicial precedents. Codifying PIL procedures under Article 102 would reduce unnecessary litigation while preserving access to justice.

**Third**, enforcement of court directives must be institutionalized. A Judicial Implementation Commission could oversee compliance, addressing delays and ensuring accountability without enlarging judicial authority.

**Fourth**, transparency in judicial appointments is vital. Following *Secretary, Ministry of Finance v Masdar Hossain* (1999), merit-based criteria and an explicit Code of Judicial Conduct should guide decision-making, minimizing political influence.<sup>75</sup>

**Finally**, the judiciary should introduce internal review mechanisms for suo motu actions to maintain proportionality and respect for the separation of powers. By applying "creative restraint," Bangladesh can cultivate a judiciary that defends rights robustly yet cooperates harmoniously with democratic institutions thereby securing long-term constitutional stability.

## 7.3 Policy Implications

The findings of this study on judicial activism and judicial restraint within the context of the Bangladesh Constitution carry significant policy implications for the judiciary, legislature, executive, and civil society. A balanced approach to judicial behavior can strengthen constitutional governance, enhance public trust, and promote sustainable democratic development in Bangladesh.<sup>76</sup>

### (1) Judiciary Reforms:

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<sup>75</sup> *Secretary, Ministry of Finance v Masdar Hossain* [1999] 52 DLR (AD) 82.

<sup>76</sup> M Tahir, *Constitutionalism and Judicial Activism in South Asia* (Oxford University Press 2020) 214.

The judiciary should institutionalize clear guidelines delineating when activism or restraint is appropriate. The Supreme Court may adopt a formal framework inspired by comparative practices, such as the U.S. Supreme Court's "prudential doctrines" and India's guidelines on Public Interest Litigation (PIL).<sup>77</sup> Such a framework would ensure that activism remains confined to matters involving constitutional rights or governmental inaction such as in environmental or gender justice cases while respecting legislative and executive domains. This balance would prevent overreach, as debated in the Sixteenth Amendment case, where judicial intervention in parliamentary powers created political tensions.

## **(2) Legislative Actions:**

The legislature must address policy vacuums that invite judicial intervention. The case of *BLAST v Bangladesh* (1998) illustrated how weak legislative frameworks in public health and environmental matters compelled judicial activism.<sup>78</sup> Enacting comprehensive statutes particularly in environmental governance, human rights, and public accountability would reduce the judiciary's need to act *suo motu*. Incorporating judicial recommendations into legislation can ensure that justice delivery remains proactive yet institutionally restrained.

## **(3) Executive Enforcement:**

The executive branch must strengthen enforcement mechanisms to ensure timely compliance with judicial directives. Repeated instances of delayed implementation in PIL verdicts erode both public confidence and the Court's authority. Establishing an inter-branch coordination committee could enhance accountability and facilitate execution of judicial orders in line with the separation of powers guaranteed under Article 22 of the Constitution.<sup>79</sup>

## **(4) Judicial Independence:**

Political interference in judicial appointments and removals continues to threaten the judiciary's autonomy, as highlighted in the *Masdar Hossain* case.<sup>80</sup> Policymakers should consider constitutional reforms to guarantee a merit-based and transparent appointment process, aligning with the Bangalore Principles of Judicial Conduct. This would reinforce judicial restraint in politically sensitive cases and enhance institutional legitimacy.

## **(5) Civic Engagement:**

A balanced judiciary can inspire civic participation and accountability. Public legal education campaigns and transparent reporting of landmark rulings could demystify judicial activism, helping citizens understand it as a tool for justice rather than overreach. Civil society organizations should also play a role in monitoring compliance and promoting constitutional awareness. Collectively, these measures can foster a harmonious governance structure where the judiciary complements, rather than competes with, other state organs.

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<sup>77</sup> S P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd edn, Oxford University Press 2003) 89.

<sup>78</sup> *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* [1998] 50 DLR (HC) 218.

<sup>79</sup> Constitution of the People's Republic of Bangladesh 1972, art 22.

<sup>80</sup> *Secretary, Ministry of Finance v Masdar Hossain* [1999] 52 DLR (AD) 82.

## 7.4 Future Research Directions

This study opens several avenues for future research to deepen understanding of judicial activism and restraint in Bangladesh and comparative jurisdictions.

### (1) Empirical Analysis:

Empirical studies could quantify the socio-economic outcomes of judicial activism, particularly in PIL cases involving environmental regulation labor rights, and gender justice. Longitudinal research tracking the impact of such judgments would provide data-driven insights for policy reforms.

### (2) Comparative Studies:

Comparative analyses with other South Asian countries such as Pakistan and Sri Lanka could reveal how political instability shapes judicial behavior. Exploring Pakistan's "Chaudhry Court" era, for instance, may illuminate regional trends in the assertion of constitutional supremacy.<sup>81</sup>

### (3) Interdisciplinary Approach:

Future research combining legal, political, and sociological perspectives can explore public perception of judicial activism and restraint. Surveys could examine whether citizens perceive activist judgments as legitimate or excessive, contributing to debates on judicial accountability.

### (4) Technology and Access to Justice:

As Bangladesh embraces digitalization, research should investigate how e-courts and AI-based case management systems influence judicial efficiency. Streamlined digital processes could reduce judicial backlog and diminish the necessity for activism.

### (5) Constitutional Dynamics:

Scholars should analyse how constitutional amendments such as the Fifteenth and Sixteenth shape long-term judicial behavior. Historical and predictive studies could identify patterns linking political reform cycles with shifts in judicial philosophy.

## 7.5 Conclusion

This study on judicial activism versus judicial restraint within the Bangladesh Constitution underscores the judiciary's pivotal role in preserving constitutional supremacy while navigating the delicate balance between intervention and deference. Judicial activism has advanced human rights and upheld constitutional justice in landmark decisions such as *Anwar Hossain Chowdhury v Bangladesh* and *BLAST v Bangladesh*.<sup>82</sup> Conversely, excessive activism risks institutional overreach, while excessive restraint may perpetuate injustice when other branches fail to act.

The recommendations presented in this study advocate for an equilibrium where judicial activism serves as a safeguard for rights and democracy, while judicial restraint preserves harmony among

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<sup>81</sup> Chief Justice Iftikhar Muhammad Chaudhry v President of Pakistan [2007] PLD SC 578.

<sup>82</sup> *Anwar Hossain Chowdhury v Bangladesh* [1989] 41 DLR (AD) 165; *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* [1998] 50 DLR (HC) 218.

the branches of government. Institutional reforms, legislative responsiveness, and executive compliance are essential to sustaining this constitutional balance. Future research should continue to examine these dynamics through empirical and comparative perspectives, thereby enriching constitutional scholarship in South Asia.<sup>83</sup>

Ultimately, the judiciary's ability to balance activism and restraint will determine its legitimacy as a guardian of the Constitution. By fostering cooperation, transparency, and accountability, Bangladesh's judiciary can reinforce the rule of law and sustain democratic governance for generations to come.

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<sup>83</sup> M Moniruzzaman, 'Judicial Activism in Bangladesh: A Quest for Balance' (2021) 35 Dhaka University Law Journal 47.

## Appendices, Glossary, and Bibliography

### Appendix A – Landmark Constitutional Cases on Judicial Activism and Restraint in Bangladesh

Case	Citation	Core Issue	Judicial Approach	Outcome/Significance
Anwar Hossain Chowdhury vs Bangladesh	(1989) 41 DLR (AD) 165	Constitutionality of the Eighth Amendment (decentralizing High Court benches)	Activism – established the Basic Structure Doctrine	Declared the amendment unconstitutional; entrenched judicial review over constitutional amendments.
Secretary, Ministry of Finance vs Masdar Hossain	(1999) 52 DLR (AD) 82	Separation of the judiciary from the executive	Activism → Institutional Reform	Directed creation of the Judicial Service Commission; ensured judicial independence.
Bangladesh Italian Marble Works Ltd vs Bangladesh	(2010) 62 DLR (AD) 298	Legality of martial-law proclamations and Fifth Amendment	Activism	Restored constitutional supremacy; reaffirmed rule of law and democracy.
Bangladesh vs Advocate Asaduzzaman Siddiqui	(2017) 22 BLC (AD) 1	Constitutionality of the Sixteenth Amendment (parliamentary removal of judges)	Activism with prudence	Struck down the amendment as inconsistent with judicial independence.
Begum Sufia Kamal vs Bangladesh	(1989) 41 DLR (HCD) 389	Enforcement of Fundamental Principles of State Policy	Restraint	Held such principles non-justiciable; preserved separation between policy and adjudication.
State vs Deputy Commissioner, Satkhira	(1993) 45 DLR (HCD) 643	Illegal detention based on press report (suo motu)	Moderate Activism	Declared detention unlawful; initiated use of media reports for suo motu actions.

## Appendix B – Key Constitutional Provisions Related to Judicial Powers

<b>Article</b>	<b>Provision Summary</b>	<b>Relevance</b>
Art 7 & 26	Supremacy of the Constitution; voiding of inconsistent laws	Foundation of constitutional review
Art 22	Separation of judiciary from the executive	Guarantees judicial independence
Art 44 & 102	Enforcement of fundamental rights; writ jurisdiction	Principal basis for judicial activism
Art 65 & 78	Legislative authority and privileges of Parliament	Basis for judicial restraint respecting legislative sovereignty
Art 111 & 112	Binding nature of Supreme Court decisions	Institutionalizes precedent
Art 47 & 49	Immunity for certain laws; presidential pardon	Express constitutional limits on judicial power

## Appendix C – Major Judicial Reforms and Institutional Developments

- 1. Separation of Judiciary (1999–2007):**  
Implemented following *Masdar Hossain*; the Judicial Service Commission and Judicial Service Pay Commission were established, ensuring administrative and financial autonomy of judges.
- 2. Supreme Court (High Court Division and Appellate Division) Case Management Reforms:**  
Introduction of cause-list automation, digital filing, and online judgments to enhance transparency (2015 onward).
- 3. Public Interest Litigation (PIL) Expansion:**  
Relaxation of *locus standi* initiated through *Dr Mohiuddin Farooque v Bangladesh (1997)* enabling NGOs such as BELA, BLAST, and ASK to litigate on environmental and human-rights matters.
- 4. Judicial Accountability Mechanisms:**  
Code of Conduct for Judges (1999, revised 2017) and establishment of internal disciplinary procedures following criticism of executive removal powers under the Sixteenth Amendment.
- 5. E-Judiciary Project (2020–present):**  
Government-led digitalization programmed (supported by the World Bank) to reduce case backlog and modernize court infrastructure, strengthening access to justice.

## Glossary of Key Terms

**Judicial Activism:** A proactive judicial philosophy where courts interpret constitutional provisions broadly to protect rights, ensure justice, and fill legislative or executive voids.

**Judicial Restraint:** A conservative judicial stance emphasizing limited intervention and deference to the elected branches unless a clear constitutional violation exists.

**Basic Structure Doctrine:** A principle that certain core features of a constitution (sovereignty, democracy, separation of powers, rule of law, independence of judiciary) cannot be altered even by constitutional amendment.

**Public Interest Litigation (PIL):** Legal proceedings initiated to protect public or collective interests, particularly for disadvantaged groups, without requiring personal grievance.

**Suo Motu:** Latin for “on its own motion”; describes court actions initiated without formal petition when constitutional or human-rights violations come to notice.

**Separation of Powers:** Doctrine allocating governmental authority among the legislature, executive, and judiciary to prevent concentration of power.

**Judicial Review:** The power of courts to examine the constitutionality of legislative and executive actions and invalidate those inconsistent with the Constitution.

**Constitutional Supremacy:** The principle that the Constitution is the highest law of the land, binding on all branches of government.

**Writ Jurisdiction:** Constitutional authority (Art 102) empowering the High Court Division to issue prerogative writs such as *mandamus*, *certiorari*, *prohibition*, *quo warranto*, and *habeas corpus*.

**Fundamental Rights:** Legally enforceable civil and political rights enshrined in Part III of the Constitution of Bangladesh (Arts 26–47A).

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- Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 (India).
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