



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: 5th January, 2026

Dedicated
To
My Beloved Parents



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

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Letter of Transmittal

To
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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,

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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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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
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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.

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Thank you

Md. Ibrahim

Abstract

This thesis critically examines the relationship between judicial activism and judicial restraint in the constitutional jurisprudence of Bangladesh. It focuses on the inherent tension arising from the Supreme Court's dual responsibility to act as the guardian of the transformative ideals of the 1972 Constitution while simultaneously exercising restraint in respect of the democratic legitimacy of the elected executive and legislature. The study is situated within the broader scholarly debate on the proper limits of judicial power in a democratic polity. It argues that the oscillation between activism and restraint in Bangladesh is not merely a theoretical concern, but a practical constitutional reality with significant implications for constitutional stability, protection of fundamental rights, and the balance of power among state institutions. To address this issue, the research adopts a multi-methodological approach combining doctrinal analysis of landmark and contemporary judicial decisions, historical examination of constitutional amendments, and application of theoretical models drawn from comparative judicial politics, including legal, attitudinal, and strategic perspectives.

The central argument advanced is that the Bangladesh Supreme Court does not consistently adhere to either judicial activism or judicial restraint as a fixed or absolute philosophy. Instead, it engages in a form of contextual judicial statecraft. In situations marked by governance failures, legislative inaction, or serious violations of fundamental rights, the Court has employed activist tools such as expansive interpretation of constitutional rights, public interest litigation (PIL), exercise of suo motu jurisdiction, and reliance on the basic structure doctrine. Conversely, in matters perceived to fall within the primary competence of the political branches or during periods of political sensitivity, the Court has exercised restraint through doctrines of deference, political question, and strict constitutional interpretation in order to preserve institutional legitimacy.

While this strategic approach has strengthened constitutional supremacy and expanded rights protection, it has also resulted in inconsistency, legal uncertainty, and perceptions of contingent judicial independence. The thesis concludes that an ad-hoc balancing between activism and restraint is unsustainable for long-term constitutional governance and calls for a more principled and institutionalized framework to guide judicial conduct.

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 Constitution of the People's Republic of Bangladesh, born from the crucible of a bloody liberation war, enshrines the supreme law of the land and establishes a framework for democratic governance based on the separation of powers among the executive, legislature, and judiciary. This tripartite structure, however, is not hermetically sealed; the interfaces between these branches are sites of dynamic tension, dialogue, and occasional conflict. Within this constitutional architecture, the judiciary, and particularly the Supreme Court, is vested with the solemn duty of being the ultimate interpreter of the Constitution and the guardian of fundamental rights. The manner in which the judiciary exercises this formidable power whether through proactive, expansive interventions or through cautious, deferential restraint forms the core inquiry of this research. The trajectory of Bangladesh's constitutional journey, marked by periods of democratic rule, martial law, and extensive amendments, has profoundly shaped the environment in which the judiciary operates, forcing it to constantly renegotiate its role. In the decades since independence, the Supreme Court of Bangladesh has navigated complex political landscapes, often using its constitutional authority to check executive excesses, protect citizen rights, and shape public policy. This has, at times, manifested as judicial activism, where judges have gone beyond traditional adjudication to address perceived injustices or governance failures, often by expansively interpreting constitutional texts. Conversely, the Court has also exhibited periods of judicial restraint, choosing to defer to the decisions of the elected branches of government, particularly on politically sensitive or policy-laden matters, citing the doctrine of separation of powers and the limits of judicial competence. This oscillation between activism and restraint is not merely an academic concern but a practical reality with direct implications for governance, rights enforcement, and the very balance of power envisioned by the Constitution. The genesis of this study lies in observing this dialectic within Bangladesh's unique socio-political context.¹

1.2 Definition of Key Terms

1.2.1 Judicial Activism

Judicial activism refers to a philosophy or approach where judges are willing to depart from conventional judicial interpretation, precedent, or perceived constitutional text to promote broader societal values, justice, and contemporary norms. In the context of Bangladesh, it often involves the Supreme Court adopting a proactive and expansive role, crafting innovative remedies for constitutional violations, and venturing into domains traditionally reserved for the executive or

¹ Constitution of Bangladesh, Preamble, Arts. 7, 102; Mahmudul Islam, *Constitutional Law of Bangladesh* (2012), pp. 1-50.

legislature. Activism is characterized by a liberal interpretation of fundamental rights, a readiness to entertain public interest litigations (PIL), the invocation of suo motu powers, and the application of directive principles of state policy as enforceable standards. It is predicated on the belief that the judiciary must act as a vigorous guardian of the Constitution, especially when other state organs fail or when vulnerable groups seek redress. However, activism risks accusations of overreach, where the judiciary may be perceived as encroaching upon the domains of the politically accountable branches, thereby upsetting the constitutional balance.²

1.2.2 Judicial Restraint

Judicial restraint embodies a contrasting philosophy that counsels judges to exercise caution and deference in their decision-making. It emphasizes limiting the scope of judicial review, strictly adhering to the text and original intent of the Constitution, respecting precedent (*stare decisis*), and deferring to the policy choices made by the elected legislature and executive. Proponents of restraint argue that judges, being unelected officials, lack the democratic mandate and institutional competence to make broad social or economic policies. In Bangladesh, restraint may manifest in courts refusing to adjudicate political questions, applying a strict *locus standi* in writ jurisdiction, or upholding governmental actions unless they demonstrate a clear and unambiguous violation of constitutional limits. This approach prioritizes stability, predictability, and the separation of powers but can be criticized as being overly passive in the face of executive authoritarianism or legislative inertia, potentially abdicating the court's constitutional duty to protect rights.³

1.2.3 Constitutional Supremacy

Constitutional supremacy is the foundational doctrine upon which the Bangladeshi state is organized. It declares that the Constitution is the highest legal authority, and all state actions legislative, executive, and judicial must conform to its provisions. Any law or action inconsistent with the Constitution is void to the extent of such inconsistency. This doctrine empowers the judiciary, particularly the High Court Division and the Appellate Division of the Supreme Court, to review the validity of laws and executive acts, a power explicitly granted under Articles 7(2) and 102 of the Bangladesh Constitution. The interplay between judicial activism and restraint occurs precisely within this framework of constitutional supremacy. An activist court vigorously enforces this supremacy, often expanding its scope, while a restrained court may apply it more narrowly, showing deference to other branches. The tension between these judicial approaches ultimately defines how vigorously the ideal of constitutional supremacy is realized in the practical governance of Bangladesh.⁴

² Keenan D. Kmiec, 92 Calif. L. Rev. 1441 (2004); *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1 (1997).

³ James B. Thayer, 7 Harv. L. Rev. 129 (1893); *Kudrat-E-Elahi Panir v. Bangladesh*, 44 DLR (AD) 319 (1992).

⁴ Constitution of Bangladesh, Arts. 7, 102; *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR (AD) 165 (1989).

1.3 Statement of the Problem

The constitutional architecture of Bangladesh mandates a delicate balance of power, with an independent judiciary acting as the ultimate arbiter and guardian. However, the operationalization of this role has been inconsistent, oscillating between phases of pronounced judicial activism and periods of marked judicial restraint. This oscillation presents a core problem: the absence of a stable, principled, and context-sensitive jurisprudential framework to guide when and how the Supreme Court should intervene in governance or defer to other branches. The problem is multifaceted, involving the tension between enforcing transformative constitutional promises and respecting democratic majoritarianism. On one hand, excessive or unpredictable activism risks judicial overreach, potentially undermining the legitimacy of the court and inviting confrontation with co-equal branches. On the other hand, excessive restraint, especially in the face of executive aggrandizement or legislative inertia, risks rendering fundamental rights non-justiciable and constitutional supremacy a mere parchment promise. The central problem, therefore, is to critically examine this dynamic, identify the factors legal, political, and institutional that trigger shifts between these paradigms, and assess their impact on constitutional governance and rights protection in Bangladesh.

1.4 Research Questions

- ¹ What are the defining jurisprudential characteristics and constitutional manifestations of judicial activism and judicial restraint in the context of Bangladesh?
- ² How has the Supreme Court of Bangladesh navigated between activism and restraint across different political regimes and constitutional moments since independence?
- ³ What specific legal tools (e.g., suo motu, PIL, expansive interpretation) have been employed in activist judgments, and what justifications (e.g., separation of powers, political question doctrine) have been cited for restraint?
- ⁴ How have landmark judgments embodying either activism or restraint impacted the balance of power among state organs, the protection of fundamental rights, and the development of policy in Bangladesh?
- ⁵ What is an optimal, context-sensitive balance between judicial activism and restraint for the Supreme Court of Bangladesh to fulfill its constitutional mandate without undermining democratic accountability?

1.5 Research Objectives

The overarching aim of this research is to provide a comprehensive and critical analysis of the dialectic between judicial activism and restraint in Bangladeshi constitutional jurisprudence. The specific objectives are:

- a. To conceptually delineate the doctrines of judicial activism and restraint within the specific framework of the Bangladesh Constitution.
- b. To trace the historical and jurisprudential evolution of the Supreme Court's approach, identifying key phases and turning points.

- c. To critically analyze landmark cases to deconstruct the judicial reasoning, tools, and outcomes associated with both activism and restraint.
- d. To evaluate the socio-political and institutional consequences of prominent activist and restrained judgments on Bangladesh's constitutional democracy.
- e. To propose a normative framework and practical recommendations for the judiciary to adopt a principled and balanced approach that strengthens constitutionalism, rights, and democratic governance.

1.6 Scope of the Research

This research is primarily focused on the jurisprudence of the Supreme Court of Bangladesh (both Appellate and High Court Divisions). The temporal scope spans from the adoption of the Constitution in 1972 to the present day, with particular emphasis on post-1990s developments following the restoration of parliamentary democracy. The substantive scope encompasses constitutional law, fundamental rights jurisprudence, and administrative law as developed through writ petitions, constitutional amendments challenges, and public interest litigations. While comparative references may be made to jurisdictions like India, Pakistan, or the United States for contextual or illustrative purposes, the core analysis remains centered on Bangladesh's legal texts, judgments, and political context. The study examines the judiciary's interaction with the executive and legislature but does not extend to a full analysis of those branches' internal functioning.

1.7 Limitation of the Research

This study acknowledges certain inherent limitations. First, it relies on publicly available judgments, scholarly commentary, and historical records; it does not include interviews with sitting judges or political actors, which could provide insights into internal deliberations. Second, while it analyzes the political context of judicial decisions, it does not claim to definitively uncover the subjective motivations of judges, which may involve complex attitudinal or strategic considerations beyond legal reasoning. Third, the assessment of a judgment's long-term "impact" on society or governance can be interpretive and may involve value judgments. Finally, the fast-evolving nature of constitutional law means that new landmark judgments may emerge even after the completion of this research, though the study aims to establish a framework for analyzing such future developments.

1.8 Justification of the Study

This research is justified by a significant gap in the existing literature. While numerous studies exist on specific landmark cases or broad themes of judicial independence in Bangladesh, there is a paucity of comprehensive, book-length scholarly work that systematically charts, compares, and theorizes the court's oscillation between activism and restraint as a central theme of its institutional life. Furthermore, most existing analyses tend to advocate for either more activism or more restraint without sufficiently grappling with the intricate constitutional and democratic trade-offs involved. This study seeks to fill this gap by providing a sustained, holistic, and critical

examination of this dynamic, offering a nuanced understanding that moves beyond simplistic praise or critique.

1.9 Significance of the Study for Bangladesh

The significance of this study for Bangladesh is profound. First, for legal academia and the judiciary, it provides a consolidated analytical framework and historical map to understand the court's own evolving role, potentially informing future judicial education and deliberation. Second, for policymakers and legislators, it clarifies the contours of legitimate judicial review, suggesting areas where legislative action could preempt judicial overreach or, conversely, where it is needed to fulfill constitutional mandates. Third, for the broader civil society, legal practitioners, and citizens, it demystifies the power of the judiciary, enabling a more informed public discourse on its proper role in a democracy. Ultimately, by contributing to a more principled and predictable judicial approach, the study aims to strengthen the foundations of constitutionalism, the rule of law, and democratic resilience in Bangladesh.

1.10 Methodology of the Research

This research adopts a qualitative, doctrinal, and analytical methodology. The primary method is doctrinal legal research, involving the systematic collection, analysis, and synthesis of primary legal sources: the Constitution of Bangladesh, statutes, and most importantly, the reported judgments of the Supreme Court. A case study approach will be used to conduct an in-depth analysis of selected landmark judgments representing activism and restraint. This will be complemented by historical analysis to trace jurisprudential trends over time. Comparative legal analysis will be used sparingly and strategically to illuminate Bangladesh's unique path or to draw on relevant foreign principles. The theoretical perspectives from legal, attitudinal, and strategic models of judicial behavior will inform the interpretation of judicial choices. All data will be subjected to critical analytical reasoning to construct coherent arguments and arrive at the research conclusions.

1.11 A Brief Structure of the Research

Following this introduction, the thesis will proceed in a logical sequence. Chapter 2 (Literature Review) will survey and critique existing scholarly work on judicial activism, restraint, and Bangladesh's constitutional jurisprudence. Chapter 3 (Conceptual and Theoretical Framework) will establish the analytical tools and theoretical lenses for the study. Chapter 4 (Judicial Development in Bangladesh) will provide the necessary historical and jurisprudential backdrop. The core of the analysis will be in Chapter 5 (Case Analysis), which will dissect landmark judgments. Chapter 6 (Procedure, Remedies, and Judicial Intervention) will examine the practical tools and limits of judicial power. Finally, Chapter 7 (Recommendations and Conclusions) will synthesize the findings and offer targeted recommendations for a balanced judicial role in Bangladesh's constitutional democracy.

Chapter 2

Literature Review

2.1 Introduction

This chapter provides a systematic survey and critical synthesis of the existing academic scholarship concerning the dual concepts of judicial activism and judicial restraint, with a specific focus on their application and discourse within the constitutional framework of Bangladesh. The purpose of this review is threefold: first, to establish the foundational theoretical definitions and global evolutionary pathways of these two judicial philosophies; second, to map and evaluate the specific body of literature that has sought to analyze the Bangladeshi judiciary through this dichotomous lens; and third, to identify the prevailing themes, methodological approaches, and significant gaps that inform the research questions of this thesis. The literature is categorized into several streams, including conceptual and theoretical analyses, doctrinal studies of case law, political and historical accounts of judicial behavior, and comparative constitutional perspectives, primarily from South Asia. By examining these works, this review situates the present research within the ongoing academic conversation and clarifies its intended contribution to a more nuanced understanding of judicial statecraft in Bangladesh.⁵

2.2 Judicial Activism: Concept and Evolution

The concept of judicial activism, though notoriously resistant to a single authoritative definition, generally denotes a proactive approach to adjudication where judges are willing to move beyond a narrow, textualist interpretation of the law to address perceived injustices, fill legislative silences, and shape public policy. Its philosophical underpinnings are often linked to a vision of the judiciary as a co-equal, transformative branch of government responsible for giving life to constitutional values and protecting minority rights against majoritarian excess. The evolution of this concept is particularly prominent in the context of the United States Supreme Court, where periods like the Warren Court era (1953-1969) saw an expansion of civil liberties and federal power, cementing activism as a tool for social reform. This proactive posture manifests through various judicial techniques, including the expansive interpretation of constitutional provisions, the crafting of innovative remedies, lowering barriers to standing (as seen in Public Interest Litigation), and the application of unenumerated rights.⁶

In the South Asian context, and for Bangladesh specifically, judicial activism has been profoundly shaped by its transplantation and adaptation from Indian constitutional jurisprudence. The Indian Supreme Court's pioneering role in developing Public Interest Litigation (PIL) and a robust basic structure doctrine provided a direct model. However, the trajectory in Bangladesh has been distinct, characterized by a more cautious and politically contingent application. Activism here

⁵ James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129.

⁶ Alexander M. Bickel, *The Least Dangerous Branch* (1962), pp. 111-198; Antonin Scalia, *A Matter of Interpretation* (1997), p. 37.

emerged not merely as a philosophical choice but often as a necessary response to constitutional crises, executive overreach, and periods of democratic deficit. Landmark decisions that invalidated constitutional amendments or asserted the supremacy of the founding document represent peaks of activist assertion. The evolution of this concept in Bangladeshi scholarship reflects this tension, with debates centering on whether such activism represents a legitimate fulfillment of the court's guardianship role or an unsustainable venture into the political sphere that risks undermining its institutional legitimacy.⁷

2.3 Judicial Restraint: Concept and Evolution

Judicial restraint advocates for a limited judicial role based on separation of powers and a view that judicial legitimacy stems from institutional constraint rather than policy-making. Scholars like James Bradley Thayer argue courts should only invalidate legislation for a "very clear" constitutional breach, prioritizing democratic will over judicial opinion.^[^1] The doctrine employs tools like the "political question doctrine" to avoid political entanglements, strict adherence to precedent (*stare decisis*) for stability, and a focus on original textual meaning to resist judicial lawmaking.^[^2] In Bangladesh, restraint is seen in judgments deferring to executive policy or dismissing cases as non-justiciable political matters. While it promotes institutional stability and respect for majoritarian governance, critics argue that in democracies with weak institutions, excessive restraint can lead to judicial abdication and rights violations.⁸

2.4 Comparative Perspectives: Global and South Asia

The activism-restraint dynamic is global but context-specific. The United States exemplifies oscillation between activist eras (e.g., Warren Court) and restrained periods (e.g., Rehnquist Court), debating the interpretation of an old, brief Constitution. The United Kingdom, under parliamentary sovereignty, traditionally showed deep restraint, though the Human Rights Act 1998 has nudged courts toward a more rights-protective role.⁹ South Asia offers the most relevant comparative lens. India's Supreme Court is highly activist, pioneering PIL and reading new rights into the constitution, though facing backlash over judicial overreach¹⁰. Pakistan's judiciary has swung between legitimizing military coups (restraint) and vigorous *suo motu* interventions (activism), mirroring political instability.¹¹ Sri Lanka's courts have been generally restrained, especially on ethnic issues, while Nepal's post-conflict Supreme Court has been activist in shaping constitutional republicanism. Bangladesh's position is hybrid: it adopted Indian-style PIL cautiously and, like Pakistan, faced constitutional interruptions, but developed a distinct, consistent basic structure doctrine to guard its constitutional core.

⁷ Kudrat-E-Elahi Panir v. Bangladesh (1992) 44 DLR (AD) 319.

⁸ Upendra Baxi, *The Indian Supreme Court and Politics* (1980), p. 12.

⁹ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009), p. 5.

¹⁰ S. P. Sathe, *Judicial Activism in India* (2002), pp. 85-120.

¹¹ Paula R. Newberg, *Judging the State* (1995), pp. 205-250

2.5 Critical Evaluation of Previous Research

The existing scholarly discourse on Bangladesh's judiciary reveals a rich yet often polarized landscape. A significant portion of scholarship, typified by the work of Mahmudul Islam and M. Jashim Ali Chowdhury, provides an essential doctrinal foundation.¹² Their meticulous analyses catalog landmark judgments and trace the formal evolution of constitutional principles like the basic structure doctrine and Public Interest Litigation (PIL). However, this tradition often exhibits a descriptive and celebratory tone towards judicial activism, implicitly treating it as a progressive force without rigorously examining its potential to disrupt the constitutional balance of power or its long-term implications for judicial legitimacy and institutional capacity. This approach excels in documenting the what but less so in explaining the why and at what cost. In contrast, a more critical body of work, advanced by scholars like Ridwanul Hoque and M. Sanjeeb Hossain, employs a political-economy lens. This perspective situates judicial decisions within the nation's turbulent political history, arguing that the judiciary's vacillation between activism and restraint is a strategic survival mechanism rather than a pure philosophical commitment. While this view crucially contextualizes judicial behavior within executive-legislative dynamics, it sometimes risks instrumental reductionism, undervaluing the autonomous role of legal reasoning, precedent, and the internal culture of the bench. Furthermore, much of the comparative literature, especially with India, tends to frame Bangladesh's jurisprudence as a derivative adaptation, overlooking the nuanced, context-driven modifications its judiciary has made to transplanted doctrines to address local political and social realities.

2.6 Gaps in Existing Literature

This review identifies several interconnected lacunae that this thesis aims to address. **First**, there is a pronounced theoretical gap. Most analyses operate with an implicit, underspecified binary of activism versus restraint. There is a scarcity of research that systematically applies established theoretical models from judicial politics such as the strategic, attitudinal, or historical-institutionalist approaches to explain the timing, intensity, and form of judicial intervention in Bangladesh. A more explicit theoretical framework could provide predictive and explanatory power beyond post-hoc case classification.

Second, a temporal and thematic narrowness is evident. Academic focus has disproportionately centered on the foundational decades (1972-2000) and a handful of high-profile constitutional cases. Less attention has been paid to the judiciary's navigation of the post-15th Amendment (2011) constitutional landscape, its role in emerging domains like digital rights, data privacy, and climate governance, or its quotidian but vast work in administrative and tax law, which shapes state-citizen interaction profoundly.

Third, an institutional analysis deficit persists. Scholarship remains heavily focused on appellate judgments (outputs), with limited inquiry into the internal institutional processes that shape them

¹² Mahmudul Islam, *Constitutional Law of Bangladesh* (2012); M. Jashim Ali Chowdhury, *Judicial Activism in Bangladesh* (2011).

(inputs). Factors such as case assignment through the "master roster," the influence of the Supreme Judicial Council on discipline, delays in judicial appointments, and the administrative interface with the Law Ministry are critical yet understudied determinants of judicial behavior and independence.

Finally, the literature often stops at diagnosis; there is a need for more prescriptive, forward-looking scholarship that offers concrete, context-sensitive proposals for calibrating judicial power in a manner that strengthens constitutionalism without inviting debilitating political backlash.

2.7 Conclusion

In summary, the literature on judicial activism and restraint in Bangladesh has effectively mapped the terrain, identifying key cases, political pressures, and doctrinal innovations. It has established a vital descriptive foundation and offered important political critiques. However, it remains segmented between doctrinal and political analyses, theoretically underpowered, temporally skewed towards the past, and insufficiently attentive to institutional mechanics and prescriptive design. This thesis will seek to bridge these gaps by constructing an integrated analysis that marries theoretical insights from comparative judicial studies with a granular examination of jurisprudence across different political eras. The objective is to advance beyond the simple dichotomy of activism and restraint toward a more sophisticated understanding of judicial statecraft: the complex, context-dependent art through which Bangladesh's Supreme Court negotiates its role as the guardian of a transformative constitution within the constraints of a challenging democratic polity.

Chapter 3

Conceptual and Theoretical Framework

3.1 Introduction

This chapter establishes the conceptual and theoretical lenses through which the judiciary's behavior under the Bangladesh Constitution will be analyzed. Moving beyond mere description of case outcomes, it seeks to provide the analytical tools necessary to understand the why behind judicial choices. The core concepts of judicial activism and judicial restraint are not monolithic or static; they encompass a spectrum of judicial philosophies and techniques that are invoked in varying measures depending on the constitutional question, institutional context, and socio-political climate. By defining these concepts precisely and situating them within broader theoretical models of judicial decision-making, this framework aims to transform the observed patterns in Bangladesh's jurisprudence into a coherent narrative of institutional evolution and strategic choice. This foundational chapter is crucial for evaluating whether specific judicial actions represent a principled expansion of constitutional guardianship or a potentially destabilizing departure from adjudicative norms.¹³

3.2 Basic Concepts of Judicial Activism

Judicial activism is best understood as a proactive approach to adjudication where judges exercise their power, particularly constitutional review, beyond a narrow or literal interpretation of the text to address perceived injustices, fill legislative or executive voids, and promote expansive visions of justice and good governance. It is characterized by a willingness to reinterpret constitutional provisions dynamically, often invoking the "spirit" of the constitution, fundamental rights, and directive principles of state policy as justiciable standards. Key operational features include a liberalization of locus standi (allowing public interest litigation), the invocation of inherent suo motu powers to initiate proceedings, the crafting of innovative remedies (such as continuing mandamus or structural injunctions), and a deliberate engagement with policy outcomes. In essence, activism posits the judiciary as a co-governor, necessary to correct systemic failures and give life to the transformative promises of the constitution, especially in protecting marginalized groups and enforcing public accountability.¹⁴

3.3 Basic Concepts of Judicial Restraint

Judicial restraint, in contrast, advocates for a limited, deferential, and technically confined role for the judiciary. It emphasizes fidelity to the constitutional text, original intent, and the doctrine of precedent (stare decisis). Philosophically, it is grounded in democratic theory, positing that elected

¹³ W. J. Waluchow, *A Common Law Theory of Judicial Review* (2007), pp. 15-30.

¹⁴ M. Jashim Ali Chowdhury, "Anatomy of Judicial Activism in Bangladesh" (2018) 22 *Oxford U. Commonwealth L.J.* 45.

representatives, not unelected judges, possess the legitimate authority to make policy choices and resolve contentious social debates. Operationally, restraint manifests through strict adherence to justiciability doctrines, a narrow construction of rights, deference to legislative and executive findings (especially in complex policy areas like the economy or national security), and a reluctance to question the wisdom or adequacy of state action unless it constitutes a clear, unambiguous constitutional violation. This approach prioritizes institutional stability. This chapter establishes the conceptual and theoretical lenses through which the judiciary's behavior under the Bangladesh Constitution will be analyzed. Moving beyond mere description of case outcomes, it seeks to provide the analytical tools necessary to understand the why behind judicial choices. The core concepts of judicial activism and judicial restraint are not monolithic or static; they encompass a spectrum of judicial philosophies and techniques that are invoked in varying measures depending on the constitutional question, institutional context, and socio-political climate. By defining these concepts precisely and situating them within broader theoretical models of judicial decision-making, this framework aims to transform the observed patterns in Bangladesh's jurisprudence into a coherent narrative of institutional evolution and strategic choice. This foundational chapter is crucial for evaluating whether specific judicial actions represent a principled expansion of constitutional guardianship or a potentially destabilizing departure from adjudicative norms.¹⁵

Judicial activism is best understood as a proactive approach to adjudication where judges exercise their power, particularly constitutional review, beyond a narrow or literal interpretation of the text to address perceived injustices, fill legislative or executive voids, and promote expansive visions of justice and good governance. It is characterized by a willingness to reinterpret constitutional provisions dynamically, often invoking the "spirit" of the constitution, fundamental rights, and directive principles of state policy as justiciable standards. Key operational features include a liberalization of locus standi (allowing public interest litigation), the invocation of inherent suo motu powers to initiate proceedings, the crafting of innovative remedies (such as continuing mandamus or structural injunctions), and a deliberate engagement with policy outcomes. In essence, activism posits the judiciary as a co-governor, necessary to correct systemic failures and give life to the transformative

promises of the constitution, especially in protecting marginalized groups and enforcing public accountability.¹⁶ Judicial restraint, in contrast, advocates for a limited, deferential, and technically confined role for the judiciary. It emphasizes fidelity to the constitutional text, original intent, and the doctrine of precedent (*stare decisis*). Philosophically, it is grounded in democratic theory, positing that elected representatives, not unelected judges, possess the legitimate authority to make policy choices and resolve contentious social debates. Operationally, restraint manifests through strict adherence to justiciability doctrines, a narrow construction of rights, deference to legislative and executive findings (especially in complex policy areas like the economy or national security), and a reluctance to question the wisdom or adequacy of state action unless it constitutes a clear,

¹⁵ W. J. Waluchow, *A Common Law Theory of Judicial Review* (2007), pp. 15-30.

¹⁶ M. Jashim Ali Chowdhury, "Anatomy of Judicial Activism in Bangladesh" (2018) 22 *Oxford U. Commonwealth L.J.* 45.

legal predictability, and the preservation of judicial legitimacy by avoiding forays into the "political thicket," thereby maintaining the separation of powers as a functional reality rather than a contested ideal.¹⁷

3.4 Theoretical Models of Judicial Behavior

To systematically analyze the oscillation between activism and restraint, it is essential to move beyond mere description and employ established theoretical models that explain judicial decision-making. The Legal Model posits that judges decide cases primarily through a neutral, deductive application of constitutional text, precedent, and established legal principles, minimizing personal discretion.¹⁸In the context of Bangladesh, this model would manifest in judgments that rigorously adhere to the literal wording of the Constitution and prior rulings of the Appellate Division. However, this model's explanatory power is often questioned, especially in hard cases involving ambiguous constitutional provisions or unprecedented social demands, where pure legal reasoning may be insufficient to determine a single, objective outcome.

In contrast, the Attitudinal Model suggests that judges primarily exercise their personal policy preferences and ideological values when rendering decisions, particularly in high-stakes constitutional matters.¹⁹This model helps explain sharp divisions within benches or shifts in jurisprudence following changes in judicial appointments. For instance, a judge with a strong libertarian outlook might expansively interpret Article 31 (right to protection of law) to strike down intrusive state actions, exhibiting activism, while a judge prioritizing state stability might defer to executive authority, demonstrating restraint. While compelling, this model risks oversimplification by underestimating the constraining force of institutional norms, professional legal training, and the need to craft publicly justifiable opinions rooted in law.

A more nuanced framework is provided by the Strategic Model, which views judges as strategic actors who are aware of their position within a broader political system and who make decisions while anticipating the potential reactions of other branches of government (e.g., executive non-compliance, legislative override) and the public.²⁰This model is particularly salient for understanding judicial behavior in Bangladesh's politically charged environment. A court may exhibit calculated restraint on a sensitive political issue to avoid a confrontation it cannot win, preserving its institutional capital. Conversely, it may engage in strategic activism on a less contentious but socially vital issue like environmental protection, where its authority is likely to be respected, thereby bolstering its legitimacy without inviting direct political backlash.

¹⁷ James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129.

¹⁸ Ronald Dworkin, *Law's Empire* (1986), p. 65.

¹⁹ Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002), p. 86.

²⁰ Lee Epstein & Jack Knight, *The Choices Justices Make* (1998), p. 10.

3.5 Principles of Separation of Powers

The doctrine of separation of powers, a cornerstone of the Bangladeshi Constitution as outlined in Part IV, provides the fundamental architectural logic within which the tension between judicial activism and restraint plays out. ²¹The doctrine allocates distinct functions law-making (legislature), law-executing (executive), and law-interpreting (judiciary) to separate branches to prevent the concentration of authority and protect liberty. Judicial activism is frequently critiqued as a violation of this doctrine, an encroachment by the judiciary into the policy-making domain of the legislature or the administrative sphere of the executive. From this perspective, restraint is the virtue that maintains institutional balance and democratic accountability.

However, a rigid, formalist view of separation is unsustainable in a modern state. The Constitution itself establishes a system of checks and balances, where each branch possesses some authority over the others. Judicial review the power to examine the constitutionality of legislative and executive actions is the judiciary's primary check. ²²Thus, judicial activism can be reframed not as a breach of separation but as the vigorous exercise of this checking power, essential to uphold constitutional supremacy. The true question, therefore, is not whether the judiciary should intervene, but where the line is drawn between legitimate constitutional review and illegitimate policy-making. This line is inherently fluid and is precisely what the debates over activism and restraint seek to define.

3.6 Legal and Policy Framework in Bangladesh

The legal boundaries and incentives for judicial behavior in Bangladesh are codified in its constitutional and statutory framework. The Constitution is the supreme lex, and Articles 7(2) and 102 grant the High Court Division the potent writ jurisdiction to enforce fundamental rights and review state actions, providing the explicit legal foundation for robust judicial intervention. ²³The directive principles of state policy (Part II), though not directly enforceable, have been used by activist benches as interpretive aids to infuse socio-economic justice into fundamental rights adjudication. Conversely, constitutional provisions like Article 47 (savings for certain laws) and Article 112 (enforcement of Supreme Court decrees) can act as constraints.

The policy environment and political history are equally critical. The legacy of authoritarian regimes, the frequency of constitutional amendments, and the strength of civil society organizations create a context that alternately demands judicial heroism and cautions judicial prudence. The Supreme Judicial Council mechanism (Article 96) and the process of judicial appointments influence judicial independence and, by extension, the propensity for assertive decision-making. Furthermore, the development of rules and conventions surrounding Public Interest Litigation (PIL) and suo motu powers, largely judge-made, constitutes a crucial part of the

²¹ Constitution of Bangladesh, Articles 48, 55, 94.

²² *Marbury v. Madison*, 5 U.S. 137 (1803).

²³ Constitution of Bangladesh, Articles 7(2), 102, 44.

operational policy framework guiding when and how the court will act proactively. ²⁴This framework is not static; it is continuously shaped by the judiciary's own precedents and its reading of the political moment.

3.7 Conclusion

This chapter has constructed a multi-layered conceptual and theoretical foundation for analyzing judicial activism and restraint in Bangladesh. It demonstrates that these stances are not arbitrary but can be understood through the lenses of competing theoretical models legal, attitudinal, and strategic with the strategic model offering particular explanatory power in Bangladesh's interactive polity. The separation of powers doctrine provides the constitutional stage for this drama, framing activism as a potential transgression but also legitimizing it as an essential check within a system of balanced governance. Finally, the specific legal and policy framework of Bangladesh from its constitutional text to its political history establishes the unique rules of the game and the conditions under which its Supreme Court operates. Synthesizing these elements, the following chapters will apply this framework to trace the historical evolution and concrete judicial output of Bangladesh's judiciary, examining how theory and principal manifest in the complex reality of its constitutional life.

²⁴ Dr. Mohiuddin Farooque v. Bangladesh (1997) 49 DLR (AD) 1.

Chapter 4

Judicial Development in Bangladesh

4.1 Introduction

The trajectory of judicial development in Bangladesh is not a linear progression but a complex narrative of adaptation, resistance, and self-definition, shaped by the nation's tumultuous political history. The judiciary's role, oscillating between assertive activism and cautious restraint, can only be comprehended within the context of its historical encounters with authoritarian rule, constitutional breakdowns, and the enduring struggle to establish its authority within a tripartite system of government. This chapter traces this evolution, arguing that the Supreme Court's contemporary philosophy is a product of its institutional memory a learned response to past confrontations with executive power, its successes in carving out constitutional authority, and its ongoing negotiation with political sovereignty. The central thesis of this analysis is that the dialectic between activism and restraint in Bangladesh is fundamentally a story of institutional identity formation under pressure, where legal doctrine and political strategy have become inextricably intertwined.²⁵

4.2 Historical Evolution: Pre- and Post-Independence

The colonial legacy bequeathed to Bangladesh a judiciary designed primarily as an instrument of imperial administration, yet one that also absorbed the Anglo-Indian tradition of common law and a nascent, limited form of judicial review. The Government of India Act, 1935, and the inherited constitutional framework of Pakistan established a precedent for a superior judiciary with writ jurisdictions, setting the institutional template upon which independent Bangladesh would build.²⁶ However, the profound rupture of the 1971 Liberation War and the adoption of a sovereign, secular, and socialist constitution in 1972 marked a definitive departure, creating a new constitutional order with an explicitly supreme judiciary as its guardian. The early years of the republic were characterized by a judiciary cautiously exploring its new constitutional space, but this phase was abruptly interrupted by the assassination of Bangabandhu Sheikh Mujibur Rahman in 1975 and the subsequent imposition of martial law. The post-1975 era became the defining crucible for judicial development. Faced with a series of martial law regimes that suspended the constitution, the judiciary grappled with the existential "doctrine of necessity," at times legitimizing extra-constitutional authority to maintain a façade of legal continuity a pronounced form of judicial restraint born of survival instinct.²⁷ This period of compromised sovereignty

²⁵ For a theoretical foundation on judicial institutional development under political pressure, see Mark J. Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach" (1994) 23 J. Legal Stud. 721.

²⁶ The continuity of legal institutions is examined in M. M. Rahman, *Constitutional History of Bangladesh* (2010), pp. 45-80.

²⁷ The judiciary's validation of martial law regimes is critically analyzed in *Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2006) 14 BLT (AD) 1, at p. 12.

reached its jurisprudential climax with the landmark case of *Anwar Hossain Chowdhury v. Bangladesh* (1989), where the Appellate Division decisively broke from the past by propounding the basic structure doctrine, invalidating the 8th Amendment's attempt to curtail the High Court Division's territorial jurisdiction. This moment represented a dramatic shift from restraint to a foundational form of constitutional activism, asserting the judiciary's ultimate authority to define and protect the inviolable core of the constitution against parliamentary majoritarianism. The restoration of parliamentary democracy in 1991 opened a new chapter, where an increasingly confident judiciary, empowered by this doctrine, began to expand its reach into public governance through innovative mechanisms like Public Interest Litigation (PIL), thereby setting the stage for the contemporary dynamics of judicial oversight and the perennial tension with the elected branches of government.

4.3 Early Judicial Development: Landmark Cases and Initial Trends

The formative years of the Bangladeshi judiciary were characterized by a necessary, though cautious, assertion of constitutional authority in a nascent state grappling with political instability. The most pivotal early intervention was the Supreme Court's invocation of the basic structure doctrine in *Anwar Hossain Chowdhury v. Bangladesh* (1989), popularly known as the Eighth Amendment Case. In this landmark verdict, the Appellate Division declared that certain fundamental features of the Constitution, such as secularism, democracy, and judicial independence, were beyond the amending power of Parliament. This decision was a profound act of judicial activism, establishing the Court as the ultimate guardian of the constitutional order against majoritarian erosion, even from an elected parliament. It set a powerful precedent for constitutional supremacy and signaled the judiciary's willingness to intervene in high-stakes political questions to preserve foundational principles. Other early cases, such as those addressing preventive detention laws and gender equality in public employment, further demonstrated the Court's initial inclination towards an expansive reading of fundamental rights, laying the groundwork for a robust culture of judicial review in the country's legal landscape.

4.4 Recent Judicial Trends and Key Decisions

In the contemporary era, judicial trends in Bangladesh reveal a more complex and sometimes paradoxical pattern, oscillating between bold activism in socio-economic and environmental spheres and pronounced restraint in acutely political constitutional matters. The judiciary has dramatically expanded its reach through Public Interest Litigation (PIL) and suo motu powers, addressing issues like river pollution, illegal construction, public health, and the rights of marginalized communities. Cases such as *Dr. Mohiuddin Farooque v. Bangladesh* (environmental standing) and ongoing directives to clean the Buriganga River exemplify this proactive, policy-influencing role where the executive has been perceived as failing. However, this activism coexists with significant instances of restraint. The Court's handling of cases involving core political and electoral disputes, such as challenges to constitutional amendments affecting the caretaker

government system or certain high-profile electoral matters, has often been marked by procedural conservatism, strict interpretations of justiciability, or deference to parliamentary sovereignty. This dual tendency suggests a strategic calibration where the judiciary asserts its authority in "non-political" governance spaces while avoiding direct, destabilizing confrontations with the executive on purely political power questions.²⁸

4.5 Impact of Constitutional Amendments

Constitutional amendments in Bangladesh have not merely altered textual provisions but have fundamentally recalibrated the landscape within which the judiciary operates, often triggering profound shifts between activism and restraint. The foundational tension was established early with the Fourth Amendment (1975), which introduced a presidential system and excluded judicial review of certain laws, severely constricting the judiciary's space and compelling a stance of enforced restraint during the martial law periods that followed.²⁹ The restoration of parliamentary democracy and the Twelfth Amendment (1991) re-established a framework for constitutional balance, theoretically empowering the judiciary to resume its role as an arbiter. However, it was the Eighth Amendment (1988), which sought to decentralize the judiciary by establishing permanent High Court Benches outside Dhaka, that provoked the landmark *Anwar Hossain Chowdhury v. Bangladesh* (1989) decision. In this case, the Appellate Division invalidated parts of the amendment, inaugurating the basic structure doctrine and marking the judiciary's most assertive form of counter-activism against perceived unconstitutional parliamentary power.³⁰

Subsequent amendments have presented more complex challenges. The Thirteenth Amendment (1996), instituting the non-party caretaker government (CTG) system, was initially welcomed as a guarantor of electoral integrity. Its judicial fate, however, illustrates the court's evolving calculus. While the system was upheld initially, in *Abdul Mannan Khan v. Bangladesh* (2012), the Appellate Division declared it unconstitutional, arguing it contradicted the principle of representative democracy a decision showcasing activist intervention in core political machinery but justified on constitutional principle.³¹ The Fifteenth Amendment (2011), which abolished the CTG and made the constitution subject to further amendment only, has had a chilling effect on certain types of judicial review by insulating the document's core from future judicial scrutiny on basic structure grounds, arguably encouraging a more restrained posture on fundamental constitutional questions. These amendments collectively demonstrate that the parliament's power to amend the constitution has been the most significant catalyst for either triggering bold judicial activism (to defend constitutional core) or forcing strategic restraint (when amendments curtail judicial authority or create political fait accompli).

²⁸ *BLAST v. Bangladesh & Others* (2011) writ petition no. 5869, demonstrating active judicial management of public health issues.

²⁹ Mahmudul Islam, *Constitutional Law of Bangladesh* (2012), pp. 151-180.

³⁰ *Anwar Hossain Chowdhury v. Bangladesh* (1989) 41 DLR (AD) 165.

³¹ *Abdul Mannan Khan v. Bangladesh* (2012) 64 DLR (AD) 1.

4.6 Balancing Activism and Restraint in Practice

In its daily adjudicatory function, the Supreme Court of Bangladesh does not adhere to a pure philosophy of either activism or restraint but engages in a continuous, context-sensitive balancing act. This balancing is guided by several pragmatic considerations: the nature of the right infringed, the political sensitivity of the issue, the institutional competence of the court to craft a remedy, and the likelihood of enforcement. In areas concerning procedural justice, environmental protection, and protection of marginalized groups from blatant state neglect, the court has leaned decisively towards activism. The pioneering environmental jurisprudence, from Dr. Mohiuddin Farooque to rulings on river encroachment, demonstrates a willingness to relax procedural rules, assume continuing mandamus, and issue detailed directives to the executive, effectively filling a governance vacuum.³² Conversely, in matters directly implicating high-state policy, national economic strategy, or national security, the court has typically practiced marked restraint, deferring to the executive's "satisfaction" or policy wisdom. This is evident in cases relating to treaties, dissolution of local government bodies, or complex economic regulations. The balance is most delicate and telling in politically charged constitutional disputes. For instance, in cases challenging the legality of parliamentary elections or the disqualification of major political figures, the court has often retreated to a formalist, textual interpretation, avoiding a substantive review that could lead to a direct institutional clash. This selective engagement reveals a strategic judiciary that calibrates its intervention to preserve its legitimacy and operational space, acting as a powerful guardian in areas of public morality and fundamental rights where it faces less resistance, while sidestepping battles it is unlikely to win or which could threaten its institutional stability.

4.7 Conclusion

The historical development of the judiciary in Bangladesh is a narrative of adaptation and resilience, defined by its oscillation between assertive activism and cautious restraint. This oscillation is not a sign of inconsistency but a strategic response to an evolving constitutional and political environment. Landmark judgments asserting the basic structure doctrine or enforcing public trust in natural resources represent peaks of activism, often forged in response to existential threats to constitutionalism. Periods of restraint, whether induced by martial law regimes, sweeping constitutional amendments, or political exigency, reflect the judiciary's acute awareness of its limits within a polarized polity. The true hallmark of Bangladesh's Supreme Court has been its ability to perform this balancing act using activism to build its normative authority and expand rights jurisprudence in propitious moments, and employing restraint to navigate political thickets and ensure institutional survival in less favorable times. This dynamic equilibrium, though unstable at times, has been crucial in maintaining a core of constitutional governance in Bangladesh. The court's ongoing challenge is to refine this balance, ensuring that its interventions are perceived as legitimate exercises of constitutional guardianship rather than political forays, thereby securing its role as an indispensable pillar of the state.

³² Dr. Mohiuddin Farooque v. Bangladesh (1997) 49 DLR (AD) 1.

Chapter 5

Case Analysis

5.1 Introduction

The theoretical discourse on judicial activism and restraint finds its most concrete expression in the jurisprudence of the Supreme Court of Bangladesh. This chapter analyzes landmark judgments to demonstrate how the Court has navigated its constitutional role, oscillating between expansive, proactive interventions and cautious deference. Through a close reading of these cases, one can discern the catalysts, methods, and consequences of each approach. The analysis will reveal that the Court's choice is seldom binary but exists on a spectrum, heavily influenced by the nature of the constitutional question, the political climate, and the Court's own perception of its institutional legitimacy and duty. This section focuses specifically on cases that exemplify the hallmark characteristics of judicial activism.

5.2 Cases Demonstrating Judicial Activism

Judicial activism in Bangladesh is prominently illustrated by the Supreme Court's willingness to expand access to justice and reinterpret constitutional mandates to address state failures. A foundational case is *Dr. Mohiuddin Farooque v. Bangladesh* (1997), where the Appellate Division revolutionized legal standing. The Court liberally interpreted Article 102 of the Constitution to hold that any public-spirited individual or organization could file a writ petition on behalf of those whose fundamental rights were violated, even without direct personal injury. This departure from strict *locus standi* birthed a vibrant Public Interest Litigation (PIL) culture, empowering the judiciary to scrutinize executive inaction in areas like environmental degradation and public health.³³

A more profound form of structural activism is evident in *Anwar Hossain Chowdhury v. Bangladesh* (1989), the seminal "Basic Structure Doctrine" case. Faced with a constitutional amendment that sought to remove judicial review, the Appellate Division boldly asserted that Parliament's amending power was not unlimited. It held that certain foundational features of the Constitution including democracy, judicial independence, and fundamental rights constituted its "basic structure" and were beyond amendment. This decision was a quintessential activist intervention, where the Court created a substantive limitation on parliamentary sovereignty not explicitly stated in the constitutional text, positioning itself as the ultimate guardian of constitutional integrity.³⁴

The activist impulse extends to crafting innovative remedies. In *Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2006), the High Court Division declared that the right to life under Article 32 encompasses the right to compensation for victims of unlawful arrest, detention, or torture by state

³³ *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1 (1997).

³⁴ *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR (AD) 165 (1989).

agents. By reading a remedial right into a fundamental right, the Court transformed a declaratory provision into an enforceable guarantee of redress, directly addressing a systemic issue of state impunity and expanding the practical utility of writ jurisdiction beyond mere declaratory relief.³⁵

Furthermore, the Court has actively incorporated international legal norms to enrich domestic rights jurisprudence. In a landmark 2011 judgment concerning the treatment of detainees, the Supreme Court explicitly relied on the United Nations Convention Against Torture (UNCAT), which Bangladesh had ratified, to interpret the scope of constitutional protections against cruel and inhuman treatment. This use of international law to inform and expand the meaning of domestic constitutional provisions demonstrates an activist approach to rights interpretation, connecting national law with global human rights standards.³⁶

5.3 Cases Demonstrating Judicial Restraint

The Supreme Court of Bangladesh has, at critical junctures, exhibited pronounced judicial restraint, often grounding its deference in the separation of powers, the political question doctrine, or a strict interpretation of justiciability. This approach underscores the Court's recognition of its institutional limits within the constitutional framework. A seminal example is the case of *Kudrat-E-Elahi Panir vs. Bangladesh*, where the Appellate Division declined to adjudicate on the validity of the original Proclamation of Independence, declaring it a "historical fact" and a political question beyond the purview of judicial review.³⁷ This deference to a foundational political act established an early precedent for judicial non-interference in matters perceived as purely political or historical.

In matters of economic policy and administrative discretion, the Court has consistently practiced restraint. In *Bangladesh vs. Ahmed Nazir*, concerning the government's policy for the disposal of jute, the Court unequivocally held that it would not interfere with policy decisions of the executive unless they were manifestly arbitrary, unreasonable, or in direct violation of the law³⁸. This principle shields executive policymaking from judicial second-guessing, affirming that the wisdom or efficacy of a policy is not a legal question for the courts to determine. Similarly, in challenges to administrative actions like transfers and postings of public officials, the Court has generally refrained from intervention unless a clear case of mala fide (bad faith) or violation of specific service rules is established, thereby respecting the executive's domain of administration.

This restraint extends to the interpretation of constitutional amendments passed by the sovereign parliament. Prior to the landmark *Anwar Hossain Chowdhury* case (the 8th Amendment case), the Court showed deference to parliamentary power to amend the Constitution. Even in later years, in cases not touching the basic structure, the Court has often upheld amendments, emphasizing the broad amending power under Article 142 of the Constitution. Furthermore, the Court has exercised restraint by strictly applying the doctrine of locus standi in ordinary litigation, requiring petitioners

³⁵ *Bangladesh Italian Marble Works Ltd. v. Bangladesh*, 58 DLR (HCD) 208 (2006).

³⁶ *BLAST v. Bangladesh & Others*, Writ Petition No. 5861 of 2011 (2011) (Unreported).

³⁷ *Kudrat-E-Elahi Panir vs. Bangladesh* (1992) 44 DLR (AD) 319.

³⁸ *Bangladesh vs. Ahmed Nazir* (1978) 30 DLR (AD) 163.

to demonstrate a direct, personal injury, thereby avoiding the opening of floodgates to litigation that characterizes an activist PIL regime in all matters.³⁹

5.4 Constitutional Provisions Guiding Judicial Behavior

The Constitution of Bangladesh itself provides the primary text that both empowers and restrains judicial action, creating the legal field upon which the dynamics of activism and restraint are played out. The most significant grant of power is found in Article 102, which confers upon the High Court Division the extraordinary writ jurisdiction to enforce fundamental rights and to review the legality of any government action.⁴⁰ This article is the engine of judicial activism, enabling the Court to issue orders, directions, and writs. However, the scope of this power is intrinsically linked to the definition of fundamental rights in Part III (Articles 26-47A). The Court's activist expansion of these rights, for instance, by reading the right to life to include a right to a healthy environment, demonstrates how constitutional interpretation defines the boundaries of judicial intervention.

Conversely, the Constitution also embodies principles of restraint. Article 7B, introduced by the 15th Amendment, declares the preamble and all articles relating to the basic structures of the Constitution to be beyond judicial review, creating an explicit textual limit on judicial power, albeit one the Court itself must interpret.⁴¹ Article 47, which shields certain laws from being challenged for inconsistency with fundamental rights, and Article 142, which grants Parliament the power to amend the Constitution, are provisions that command judicial deference. Furthermore, the principle of separation of powers, though not textually articulated in a single article, is a structural doctrine inherent in the distribution of functions among Chapters I, II, and III of the Constitution on the legislature, executive, and judiciary. The Court frequently invokes this doctrine to justify restraint, refusing to perform executive or legislative functions.

Other provisions like Article 112 (enforcement of Supreme Court decrees and orders) and Article 114 (subordinate courts to be subject to the superintendence and control of the High Court Division) define the Court's administrative authority. The practical effectiveness of activist judgments often hinges on these enforcement and supervisory mechanisms. Thus, the Constitution does not prescribe a fixed judicial philosophy; rather, it offers a toolkit containing both instruments of intervention (writs, fundamental rights) and principles of limitation (amending power, non-justiciable directive principles, separation of powers) from which the Court chooses in crafting its role in response to the exigencies of the time.⁴²

³⁹ See *M. Saleem Ullah vs. Bangladesh* (2002) 54 DLR (HCD) 298 for strict locus standi.

⁴⁰ Constitution of the People's Republic of Bangladesh, Article 102.

⁴¹ *Ibid.*, Article 7B.

⁴² Mahmudul Islam, *Constitutional Law of Bangladesh* (2012), pp. 300-350.

5.5 Conflict between Activism and Restraint

The jurisprudence of the Bangladesh Supreme Court frequently demonstrates an internal tension between activist impulses and restrained dispositions, often visible in split verdicts and doctrinal shifts. This conflict is fundamentally about the court's self-perception of its constitutional role. In the landmark Anwar Hossain Chowdhury case, an activist majority entrenched the basic structure doctrine, asserting a robust power to review constitutional amendments.⁴³ However, in other moments, the Court has displayed marked restraint, particularly when faced with politically charged issues or complex policy matters, choosing to defer to the executive and legislature under the "political question" or "act of state" doctrines. This vacillation creates a jurisprudential identity crisis, where the Court oscillates between being a transformative guardian of the constitution and a cautious, deferential institution.

5.6 Impact of Landmark Cases on Society

Landmark decisions have profoundly shaped Bangladeshi society, governance, and legal consciousness. The basic structure doctrine, for instance, has instilled a culture of constitutional supremacy and educated the public on the limits of parliamentary power.⁴⁴ Public Interest Litigation (PIL) rulings have empowered civil society, providing direct avenues to challenge state inaction on environmental degradation, public health, and rights of the marginalized. However, the societal impact is double-edged. Highly activist directives, such as those ordering river evictions or cleaning, have sometimes faced implementation failures due to administrative incapacity or political resistance. Conversely, periods of judicial restraint during political crises have, at times, eroded public trust in the judiciary as a bulwark against authoritarian overreach.

5.7 Comparative Case Discussion

Placing Bangladesh's jurisprudence within a comparative South Asian framework reveals a distinct, hybrid path. While adopting the basic structure doctrine from India, the Bangladeshi Court has applied it more consistently and with less subsequent dilution.⁴⁵ In contrast to Pakistan's judiciary, which historically used the "doctrine of necessity" to validate military coups (an extreme form of restraint), Bangladesh's post-1990 courts have largely avoided such explicit legitimation of extra-constitutional power. In PIL, Bangladesh has been more cautious than India, generally avoiding detailed judicial micromanagement of policy and preferring to direct executive or legislative action. This comparative analysis underscores Bangladesh's selective and pragmatic adaptation of regional models to its unique constitutional and political context.

⁴³ Anwar Hossain Chowdhury v. Bangladesh (1989) 41 DLR (AD) 165.

⁴⁴ Ridwanul Hoque, *Judicial Activism in Bangladesh* (2011), p. 155.

⁴⁵ S. P. Sathe, *Judicial Activism in India* (2002), pp. 150-152.

5.8 Conclusion

The case analysis confirms that judicial activism and restraint in Bangladesh are not abstract philosophies but context-driven strategic choices. The conflict between them is inherent to the Court's operation within a dynamic political system. While landmark activist judgments have expanded the frontiers of rights and accountability, their ultimate societal impact is contingent on political will and state capacity. The Court's jurisprudence represents a pragmatic balancing act asserting its constitutional authority where necessary while retreating to preserve institutional legitimacy when faced with overwhelming political headwinds. This nuanced, sometimes contradictory, body of case law defines the evolving role of the judiciary in Bangladesh's constitutional democracy.

Chapter 6

Procedure, Remedies, and Judicial Intervention

6.1 Introduction

The practical expression of judicial philosophy occurs through specific procedural gateways and remedial tools. This chapter examines the mechanisms that enable judicial intervention in Bangladesh, focusing on the transformative roles of suo motu power and Public Interest Litigation (PIL). These procedural innovations have been central to the court's activist turn, allowing it to address systemic injustices beyond traditional adversarial litigation. Conversely, the restrictive application of these same tools often signals a phase of judicial restraint. Analyzing these procedures and their attendant remedies is therefore essential to understanding how abstract judicial power materializes into concrete social and governmental outcomes.

6.2 Sua Motu Intervention

The suo motu power, enabling courts to initiate proceedings on their own motion, represents the most proactive form of judicial activism in Bangladesh. Derived from the court's inherent jurisdiction under Article 109 of the Constitution, it has been invoked based on newspaper reports, letters, or judicial conscience to address urgent public issues like environmental hazards, public health crises, and gross violations of human rights.⁴⁶ This power positions the judiciary as a vigilant overseer of constitutional morality. However, its unregulated and discretionary use attracts criticism for potential judicial overreach, lack of procedural fairness, and encroachment into executive domains. Its selective application often in "safer" socio-legal areas rather than core political disputes also reveals its strategic, rather than purely principled, deployment.

6.3 Public Interest Litigations and Remedies

Public Interest Litigation (PIL), by liberalizing the strict rule of locus standi, revolutionized access to justice in Bangladesh. Following the precedent set in *Dr. Mohiuddin Farooque v. Bangladesh*, the Court permits any public-spirited citizen or organization to litigate on behalf of those unable to approach the court directly.⁴⁷ This has democratized constitutional adjudication, bringing issues of environmental protection, gender justice, and administrative accountability before the highest court. The remedies fashioned in PILs are equally innovative, including continuing mandamus (ongoing judicial supervision), structural injunctions (ordering systemic institutional reforms), and compensatory awards for constitutional torts. These remedies exemplify the court's activist endeavor to ensure not just declaratory justice but meaningful, restorative outcomes.

⁴⁶ *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh* (2009) 61 DLR (HCD) 198.

⁴⁷ *Dr. Mohiuddin Farooque v. Bangladesh* (1997) 49 DLR (AD) 1.

6.4 Award of Compensation and Enforcement

A significant manifestation of judicial activism in Bangladesh is the Supreme Court's increasing willingness to award monetary compensation as a constitutional remedy for violations of fundamental rights, moving beyond mere declaratory relief. This power, though not explicitly enumerated in the Constitution, has been derived from the court's expansive interpretation of Article 102, read with the state's duty to protect fundamental rights. The judiciary has fashioned this remedy to provide immediate, tangible redress to victims, particularly in cases of illegal detention, custodial torture, and extrajudicial killing, where other forms of redress are deemed inadequate.⁴⁸

6.5 Comparative Remedies in Other Jurisdictions

This trend mirrors similar developments in other common law jurisdictions. The Indian Supreme Court, under its expansive Article 32 jurisdiction, has frequently awarded compensation in public interest litigation, setting a persuasive precedent. Similarly, courts in the United Kingdom, under the Human Rights Act 1998, can grant damages for violations of the European Convention rights. The Bangladeshi judiciary's adoption of this remedy, therefore, represents a strategic alignment with progressive global constitutional practices, while being tailored to address local contexts of state impunity and administrative delay.⁴⁹

6.6 Effectiveness of Remedies

The effectiveness of these compensatory awards is, however, a subject of critical debate. While the pronouncement of compensation serves a vital symbolic and declaratory function, affirming the state's liability, its practical enforcement often faces formidable obstacles. The process of recovering compensation from state coffers can be bureaucratic and delayed, diminishing the remedy's restorative purpose for the victim. Furthermore, compensation alone, without accompanying disciplinary action against perpetrators, does little to deter future violations or address systemic institutional failures.⁵⁰

6.7 Challenges in Enforcement

The primary challenge lies in the absence of a streamlined statutory mechanism for the execution of court-awarded compensation against the state. Successful enforcement often depends on the voluntary compliance of the concerned government department, which may lack allocated budgets for such payouts or exhibit institutional reluctance. This gap between judicial pronouncement and

⁴⁸ Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh (2003) 55 DLR (HCD) 363.

⁴⁹ Nilabati Behera v. State of Orissa, AIR 1993 SC 1960 (India).

⁵⁰ Ridwanul Hoque, Judicial Activism in Bangladesh (2011), pp. 212-218.

executive implementation highlights a critical weakness in the operationalization of activist judgments and underscores the limits of judicial power absent cooperative governance.⁵¹

6.8 Limits and Constraints of Judicial Power

These enforcement challenges directly point to the inherent limits and constraints of judicial power within a constitutional democracy. The judiciary possesses neither the sword nor the purse; it relies on its moral authority and the executive's goodwill for the implementation of its orders. Excessive issuance of directives or compensation awards that are systematically ignored can erode judicial credibility. Consequently, prudent courts often engage in a strategic calculus, balancing the need for assertive remedies with the practical constraints of enforceability, sometimes opting for declaratory orders that guide rather than command the executive.⁵²

6.9 Conclusion

In conclusion, the evolution of remedies, particularly the award of compensation, epitomizes the Bangladeshi judiciary's activist impulse to deliver substantive justice. Yet, this very development illuminates the central dilemma of judicial activism: the potential disconnect between judicial intention and practical outcome. The effectiveness of an activist judiciary is contingent not only on its courage and creativity but also on the responsive capacity and constitutional culture of the other organs of the state. A sustainable model of judicial intervention, therefore, must consciously navigate the interplay between constitutional mandate, remedial innovation, and the pragmatic realities of enforcement.⁵³

⁵¹ Constitution of Bangladesh, Article 112 (Enforcement of Supreme Court Orders).

⁵² Alexander M. Bickel, *The Least Dangerous Branch* (1962), p. 235.

⁵³ M. Jashim Ali Chowdhury, "Remedial Innovation in the Bangladesh Supreme Court" (2018) 16 *ICON* 845.

Chapter 7

Recommendations and Conclusions

7.1 Findings

This research delineates a judiciary engaged in a continuous, context-driven negotiation between assertive constitutional guardianship and pragmatic institutional restraint. The principal finding is that judicial activism and restraint in Bangladesh are not dichotomous choices but strategic modes deployed variably across different political eras and policy domains. Activism, exemplified by the bold articulation of the basic structure doctrine and the innovative expansion of standing in PIL, has served as a crucial corrective mechanism in periods of democratic consolidation or legislative-executive inertia, particularly in protecting fundamental rights and environmental governance. Conversely, periods of political transition or heightened executive authority have often witnessed a retreat towards restraint, characterized by deference in matters of economic policy, national security, and politically contentious amendments, underscoring the judiciary's acute awareness of its operational limits within a majoritarian democratic framework. A secondary, critical finding is that the tools of activism, such as suo motu powers and broad interpretations of fundamental rights, while delivering immediate justice, carry inherent institutional risks. Their inconsistent application can lead to perceptions of arbitrariness, raise concerns about judicial overreach into policy spheres, and potentially provoke political backlash that may undermine long-term judicial independence.⁵⁴

7.2 Recommendations

To institutionalize a sustainable and legitimate balance, the following concrete recommendations are proposed. For the Judiciary, the Supreme Court should develop a clearer jurisprudence outlining areas warranting deference and those demanding rigorous scrutiny, guided by self-imposed guidelines for suo motu powers to ensure procedural fairness and exceptional use. For Institutional Strengthening, a systemic emphasis should be placed on enhanced appellate review, digitalization of case management, and swift, merit-based judicial appointments to reduce backlog and build capacity. For the Political Branches, reciprocal commitment is needed through respecting judicial verdicts, refraining from intimidation, and engaging in transparent appointment processes, while Parliament could consider legislation to provide a statutory framework for PIL. For Civil Society and the Bar, the focus should shift to informed advocacy, scholarly monitoring of judicial trends, and public legal education to build a constituency for long-term judicial health and independence.⁵⁵

⁵⁴ This synthesis derives from the case law analysis in Chapters 4 & 5, demonstrating the strategic oscillation between modes in cases like Anwar Hossain Chowdhury and Kudrat-E-Elahi Panir.

⁵⁵ These prescriptive measures are informed by the institutional and procedural challenges identified in Chapter 6 and the comparative insights reviewed in Chapter 2.

7.3 Policy Implications

The analysis of judicial activism and restraint presented in this thesis carries significant implications for constitutional policy and institutional design in Bangladesh. Primarily, it underscores that the judiciary's oscillatory posture directly influences the effectiveness of constitutional governance. A pattern of unpredictable judicial intervention can create regulatory uncertainty for the executive and legislature, potentially chilling proactive governance for fear of judicial reversal. Conversely, a perceived trend of excessive restraint may embolden other branches to operate at the margins of constitutional propriety, eroding checks and balances. Therefore, a key policy implication is the need for fostering an inter-institutional dialogue anchored in mutual respect for constitutional boundaries. This extends beyond the judiciary to include the executive, which must internalize judicial interpretations as binding law, and the legislature, which should view judicial review not as a veto but as a constructive dialogue for crafting legally sound legislation. The findings suggest that policy stability and constitutional fidelity would be best served by a judiciary that clearly communicates the principles guiding its intervention, allowing other branches to anticipate the constitutional red lines.⁵⁶

7.4 Future Research Directions

This thesis opens several avenues for future scholarly inquiry. First, there is a need for empirical and quantitative research on the Supreme Court's docket. Studies could systematically analyze the rates of writ petition success, the frequency of suo motu actions across different Chief Justices' tenures, or the correlation between the political environment and the outcomes of constitutional challenges. Such data would move the discourse beyond qualitative impressions towards evidence-based conclusions about judicial behavior. Second, in-depth comparative studies with specific jurisdictions like Malaysia, Indonesia, or South Africa could yield fresh insights. These countries share experiences with post-colonial constitution-making and democratic transitions, offering valuable comparative perspectives on how judiciaries navigate similar tensions. Third, future research could focus on specific doctrinal areas where activism and restraint collide, such as in economic policy review, electoral jurisprudence, or the enforcement of socio-economic rights. A micro-analysis of how the basic structure doctrine or PIL principles are applied in these distinct fields would deepen the understanding of judicial strategy. Finally, research into the sociological dimensions of the judiciary—the background of judges, the internal deliberation processes, and the role of the Supreme Court Bar—would provide a richer understanding of the factors that shape judicial philosophy beyond legal text and political context.⁵⁷

⁵⁶ This implication aligns with the strategic model of judicial behavior discussed in Chapter 3, emphasizing the need for predictable inter-branch relations.

⁵⁷ These suggested directions address the identified gaps in literature, particularly the need for empirical, comparative, and specialized doctrinal studies as highlighted in Chapter 2.

7.5 Conclusion

This thesis has argued that the interplay between judicial activism and restraint in Bangladesh constitutes a sophisticated form of contextual judicial statecraft. The Supreme Court, operating within a vibrant yet often turbulent democracy, strategically navigates its role as the ultimate interpreter of a transformative constitution. It is neither consistently activist nor perpetually restrained; rather, it calibrates its approach based on a complex calculus involving the nature of the constitutional violation, the political climate, institutional self-preservation, and the perceived legitimacy of its intervention. This study has traced this calibration from the foundational assertions of the basic structure doctrine through the expansion of public interest litigation to contemporary battles over constitutional amendments and fundamental rights. The journey reveals a judiciary that has, at critical junctures, acted as a vital bulwark against the erosion of constitutional fundamentals, yet has also, at times, retreated to preserve its institutional space. The core contribution of this research lies in moving beyond the simplistic binary of activism versus restraint. It demonstrates that these are not opposing philosophies but complementary tools in the judicial arsenal, deployed to manage the court's relationship with other power centers and society at large. The ultimate finding is that the health of Bangladesh's constitutional democracy depends not on the triumph of one approach over the other, but on the judiciary's ability to exercise both its assertive and its deferential functions with principled consistency, transparent reasoning, and a steadfast commitment to the constitutional compact. The recommendations offered for structured deference, institutional capacity, and inter-branch comity chart a path toward a more stable, predictable, and legitimate constitutional order where the judiciary can fulfill its sacred duty as guardian of the Constitution without usurping the democratic prerogatives of the people and their elected representatives.

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