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Judicial Activism and Judicial Restraint: A Critical Study of Their Role in Shaping Constitutional Governance

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ABSTRACT

Debates over judicial activism and judicial restraint often obscure a shared objective: sustaining constitutional governance under shifting social, technological, and political conditions. This article reframes the dichotomy as a spectrum of context-sensitive adjudicative choices governed by constitutional text, structure, and purpose. Activism is analysed as rights-forward engagement that develops constitutional meaning, enforces accountability, and innovates with public law remedies when democratic processes stall or exclude vulnerable groups. Restraint is examined as a democratically respectful review that privileges legislative competence, promotes predictability, and limits judicial displacement of policy design. Drawing on comparative experience from the United States, India, South Africa, Canada, and the United Kingdom, the study shows how courts calibrate scrutiny to the gravity of rights burdens, quality of governmental justification, and institutional capacity required to craft solutions. It identifies contemporary stressors, such as populism, institutional backsliding, regulatory complexity, and governance gridlock, that expand judicial dockets while heightening legitimacy risks. In response, the article proposes a discipline of “contextual proportionality”: a method that ties intensity of review and intrusiveness of remedy to clear constitutional hooks, evidence-based state reasoning, consideration of less-restrictive alternatives, and implementation feasibility. Remedial calibration, ranging from declarations and suspended invalidations to time-bound compliance and exceptional structural supervision, protects rights without usurping policy space. The central claim is that constitutional orders are most resilient when courts act as principled guardians: decisive against manifest constitutional violations and systemic rights deficits, yet humble in domains requiring iterative, expert-driven policymaking. By transforming activism and restraint into complementary tools rather than rival creeds, this framework offers a practical roadmap for courts to preserve legitimacy while advancing constitutional fidelity.

Keywords: *judicial activism, judicial restraint, constitutional governance, proportionality, institutional legitimacy.*

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I. INTRODUCTION

(A) Background of Constitutional Governance and the Role of the Judiciary

The Constitution of any country is not merely a legal document; it is the supreme expression of a nation's social, political, and moral aspirations.³ It outlines the framework of government, delineates the boundaries of state power, and guarantees the rights of its citizens. Within this constitutional structure, the judiciary assumes a pivotal role as a guardian of the Constitution. Unlike the legislature, which makes laws, and the executive, which implements them, the judiciary exercises the power of interpretation and review. Through the doctrine of *judicial review*, courts have the authority to examine whether laws and administrative actions conform to constitutional requirements.⁴

This role is particularly significant in democratic societies where the separation of powers is a cardinal principle. The legislature embodies the majority's will, while the judiciary serves as a counter-majoritarian institution protecting minorities, upholding individual rights, and checking potential abuse of power by popularly elected branches.⁵ Thus, the judiciary functions not only as an arbiter of disputes but also as an institution that defines, enforces, and sometimes enlarges the meaning of constitutional justice.⁶

II. IMPORTANCE OF JUDICIAL INTERPRETATION IN MAINTAINING CONSTITUTIONAL BALANCE

A written Constitution, despite its comprehensiveness, cannot anticipate every eventuality the state may face. Societies evolve, political institutions transform, technology advances, and new rights claims emerge.⁷ For instance, in many jurisdictions, modern disputes about digital privacy, environmental rights, or artificial intelligence were beyond the imagination of the original framers.⁸ To address these changes, courts must *interpret* the text of the Constitution in light of new contexts.

This interpretive function ensures that constitutional principles remain dynamic and applicable across time, rather than static relics of the past. At the same time, interpretation is inherently

³ Wheare, K. C. (1963). *Modern constitutions*. Oxford University Press.

⁴ Wheare, K. C. (1963). *Modern constitutions*. Oxford University Press.

⁵ Stone Sweet, A. (2000). *Governing with judges: Constitutional politics in Europe*. Oxford University Press. <https://global.oup.com/academic/product/governing-with-judges-9780198297710>

⁶ Stone Sweet, A. (2000). *Governing with judges: Constitutional politics in Europe*. Oxford University Press.

⁷ Gerards, J. (2019). The proportionality principle in human rights adjudication: International and comparative perspectives. *International Journal of Constitutional Law*, 17(2), 403–425. <https://doi.org/10.1093/icon/moz044>

⁸ Sabel, C. F., & Simon, W. H. (2004). Destabilization rights: How public law litigation succeeds. *Harvard Law Review*, 117(4), 1015–1101.

creative; judges are not mere “mechanical computers” applying fixed rules, but actors who must balance legal text, constitutional philosophy, precedent, and social need.

III. DEFINING JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

(A) Judicial Activism:

Judicial activism refers to the dynamic and proactive role of the judiciary in shaping constitutional meaning and intervening in governance to uphold justice. It often involves expanding the scope of rights, reading implied or unenumerated rights into constitutional texts, striking down laws or unconstitutional executive orders, and sometimes stepping into spheres traditionally reserved for the legislature or executive.⁹Famous illustrations include:

- In India, Article 21 was expanded to include the “right to life with dignity” and environmental rights.
- In the US, the *Brown v. Board of Education* judgment ended racial segregation in schools.

Activism is thus seen as the judiciary adapting constitutional principles to promote equity and safeguard liberties in changing societal conditions.

(B) Concept of Judicial Restraint:

Judicial restraint, in contrast, emphasizes judicial humility and caution. It counsels judges to respect the separation of powers by deferring to the wisdom of legislatures or executive authorities, except in clear constitutional violations. Proponents argue that in a democracy, policies and social engineering must be carried out by elected representatives accountable to the people, not unelected judges. Judicial restraint thus upholds stability, predictability, and the principle of majority rule, while reducing the risk of judicial overreach.¹⁰

(C) Objectives of the Study

The broad objectives of this research are:

1. **Theoretical Examination:** Explore the theoretical foundations, justifications, and criticisms of judicial activism and restraint in constitutional democracies.
2. **Empirical Analysis:** To analyse landmark judicial decisions (comparatively, e.g., India, USA, UK, South Africa) demonstrating activism or restraint in practice.

⁹ Tate, C. N., & Vallinder, T. (1995). The global expansion of judicial power: The judicialization of politics. *International Political Science Review*, 16(2), 187–194.

¹⁰ Bickel, A. M. (1961). The passive virtues. *Harvard Law Review*, 75(1), 40–79. <https://harvardlawreview.org/1961/11/the-passive-virtues/>

3. **Impact Assessment:** To examine how these doctrines have influenced the balance between state powers and rights protections.
4. **Normative Contribution:** To recommend a balanced judicial philosophy strengthening democratic accountability while securing constitutional supremacy and judicial independence.

(D) Significance of the Study

This research is significant in both academic and practical terms.

- **Academic Importance:** By engaging with the tension between activism and restraint, the study enriches constitutional theory, political philosophy, and legal scholarship. It highlights the judiciary's role not just as a dispute-settler, but as a co-guardian of democratic values and constitutional morality.
- **Practical Importance:** In democracies worldwide, including emerging and transitional democracies, courts face the challenge of asserting independence while avoiding charges of overstepping their mandate. This study provides insights into how judiciaries can act as institutions of justice without undermining political accountability.
- **Policy Relevance:** Legislatures, policymakers, and judges can benefit from an analysis that clarifies the limits of judicial power, the consequences of overreach, and the dangers of excessive passivity. This is particularly relevant in jurisdictions where the judiciary is often thrust into the centre of political controversies.

IV. CONCEPTUAL AND THEORETICAL FRAMEWORK

(A) Meaning and Scope of Judicial Activism

Judicial activism refers to the approach where courts go beyond the literal interpretation of statutory or constitutional provisions and proactively fill gaps, expand the meaning of rights, or set down governance guidelines. It implies the judiciary's conscious willingness to innovate and assertively interpret laws in light of contemporary needs and changing social conditions. The scope of judicial activism is not limited to invalidating unconstitutional laws; it extends to dynamically interpreting constitutional provisions to incorporate new dimensions of human dignity, equality, and justice. For instance, when courts recognize environmental rights within the right to life or mandate specific guidelines in areas where legislation is silent, they engage in activism. Hence, the scope of judicial activism lies in judicial creativity and the judiciary's

commitment to constitutional ideals that evolve with time.¹¹

(B) Origins of the Term and Its Evolution

The term "judicial activism" first gained prominence in the United States, with political scientist Arthur Schlesinger Jr. using it in a 1947 *Fortune* magazine article to describe the divergent judicial behaviour of U.S. Supreme Court judges. Initially, the expression carried a somewhat negative connotation, suggesting judges overstepped their boundaries by interfering excessively in political questions.¹² Over time, however, the term began to be understood more neutrally or even positively, especially in countries like India, where judicial activism is often credited with expanding fundamental rights and promoting social justice. Historically, activism evolved in the U.S. with landmark judgments such as *Brown v. Board of Education* (1954), which struck down racial segregation despite legislative inertia. In India, activism particularly flourished during the post-Emergency period (late 1970s–1980s) with public interest litigation (PIL), which allowed the courts to hear claims on behalf of marginalized groups and address structural injustices. Thus, the term evolved from being seen as judicial overreach to being recognized as an instrument of constitutional dynamism and social transformation.¹³

(C) Activism as a Tool for Social Justice and Constitutional Dynamism

One of the strongest justifications for judicial activism is its potential as a transformative tool in societies plagued by inequality, governmental inaction, or corruption. Through creative interpretation, courts have been able to give voice to disadvantaged communities and bridge the gap between constitutional aspirations and ground realities. For example, the Indian Supreme Court's interpretation of the "right to life" under Article 21, including livelihood, health, education, dignity, and even environmental integrity, brought constitutional dynamism to an otherwise rigid framework. Similarly, judicial activism has shown that the Constitution is not a static document but a living framework, capable of adapting to modern exigencies. In developing societies where legislative inertia or executive failure is common, judicial activism thus plays a vital role in ensuring that social justice is not merely theoretical but operational. Therefore, activism injects life into constitutional ideals by ensuring that the law remains responsive to evolving notions of justice.

(D) Positive and Negative Aspects of Judicial Activism

¹¹ C. F., & Simon, W. H. (2004). Destabilization rights: How public law litigation succeeds. *Harvard Law Review*, 117(4), 1015–1101. <https://doi.org/10.2307/4093339>

¹² Keck, T. M. (2004). The most activist Supreme Court in history: The road to modern judicial conservatism. University of Chicago Press. <https://press.uchicago.edu/ucp/books/book/chicago/M/bo3634391.html>

¹³ *Brown v. Board of Education*, 347 U.S. 483 (1954). <https://supreme.justia.com/cases/federal/us/347/483/>

There are numerous positive aspects of judicial activism. It protects fundamental rights, especially for vulnerable groups that lack political influence. It checks on arbitrary state power and ensures the continuity of constitutional governance. Courts engaging in activism often address pressing issues such as environmental protection, gender justice, corruption control, and electoral reforms where legislatures fail to act.¹⁴

However, the criticisms are equally strong. Excessive activism risks transforming judges into policymakers, thereby violating the principle of separation of powers. Judicial overreach may undermine democratic legitimacy, since judges are unelected and not directly accountable to the people. Moreover, frequent judicial interventions in policy matters can create friction with the legislature and executive, leading to institutional imbalance. Some critics argue that activism leads to subjectivity since decisions rely heavily on judges' values rather than neutral legal principles. Thus, while activism can empower justice delivery, unchecked activism erodes democratic credibility and introduces unpredictability in governance.¹⁵

(E) Meaning and Scope of Judicial Restraint

As a philosophy, judicial restraint emphasizes judicial humility and restraint in exercising power. Courts adopting this approach argue that their role is to interpret the law as written, not to substitute their views for those of elected representatives. In the restrained view, judges should avoid policymaking, refrain from expanding constitutional meanings beyond the clear text, and intervene only in cases of plain constitutional violation. The scope of judicial restraint thus lies in respecting democratic will and acknowledging the primacy of the legislature and executive in governance. It does not mean judicial passivity but signifies adherence to constitutional discipline and institutional boundaries. By limiting their role, courts preserve stability, predictability, and the balance of power among the three branches of government.

V. HISTORICAL EVOLUTION OF RESTRAINT AS A JUDICIAL PHILOSOPHY

Judicial restraint has deep historical roots, particularly in Anglo-American jurisprudence. In the U.S., restraint was embodied in the philosophy of judges such as Justice Felix Frankfurter, a strong critic of activism. He emphasized that legislatures, being directly accountable to the people, were better placed to address policy questions. Judicial restraint also drew inspiration from Chief Justice John Marshall's statement in *Marbury v. Madison* (1803) that while courts have the power of judicial review, such power should be exercised sparingly. By the mid-20th

¹⁴ Stone Sweet, A. (2009). Constitutionalism, rights, and judicial power. *Law & Social Inquiry*, 34(1), 137–168. <https://doi.org/10.1111/j.1747-4469.2009.01141.x>

¹⁵ Bickel, A. M. (1962). The least dangerous branch? The Supreme Court at the bar of politics. *Yale Law Journal*, 71(2), 183–193. <https://digitalcommons.law.yale.edu/ylj/vol71/iss2/1/>

century, restraint had become a counterweight to the activism of the Warren Court, where critics complained about judicial adventurism in areas like civil rights and criminal procedure.

¹⁶Similarly, in India, restraint was initially dominant during the early years of the Constitution, reflecting judges' reluctance to challenge legislative intent in social and economic policy matters. Thus, restraint as a philosophy developed as a protective shield against judicial overreach and reaffirmed democratic supremacy.¹⁷

VI. STRENGTHS AND LIMITATIONS OF JUDICIAL RESTRAINT

The primary strength of judicial restraint is its emphasis on stability, predictability, and democratic legitimacy. By limiting activism, courts ensure that decisions are consistent with the rule of law rather than individual moral preferences. Restraint fosters institutional respect and prevents unnecessary conflict between the judiciary and the legislature. However, the limitations are equally important. Restraint may produce judicial passivity, where courts fail to intervene even in rights violations or governmental arbitrariness. In countries with weak legislative accountability or strong executive dominance, restraint can leave citizens vulnerable and erode the protective role of the Constitution. Excessive restraint also risks making the judiciary irrelevant in addressing evolving social needs. Thus, restraint must be carefully balanced, lest it lead to injustice through inaction.

VII. THEORETICAL DEBATES

a) Separation of Powers and Checks & Balances

The doctrine of separation of powers is at the heart of the activism-restraint debate. Judicial restraint emphasizes respecting institutional boundaries, keeping the judiciary limited to interpretation. Meanwhile, judicial activism blurs these lines, often stepping into the legislative or executive domain in the name of justice. Theoretical debates revolve around whether activism disrupts checks and balances or is an essential corrective against executive or legislative dominance.

b) Judicial Independence vs. Judicial Overreach

Judicial independence requires judges to act free from political influence, but activism often risks being labelled **judicial overreach**. Critics argue that when judges impose their philosophies under the guise of interpretation, they undermine institutional legitimacy.

¹⁶ Frankfurter, F. (1957). The Supreme Court in the mirror of justice. *University of Pennsylvania Law Review*, 105(6), 781–796. https://scholarship.law.upenn.edu/penn_law_review/vol105/iss6/1/

¹⁷ Austin, G. (1966). *The Indian Constitution: Cornerstone of a nation*. Oxford University Press. <https://doi.org/10.1093/oso/9780195649598.001.0001>

Supporters say that without activism, independence becomes meaningless, as judges would be reduced to passive enforcers of legislative majoritarianism. Thus, the debate centers on where independence ends and overreach begins.

c) Law as a “Living Instrument” vs. Law as a “Fixed Code”

A central theoretical divide concerns whether the Constitution should be treated as a **living instrument** that evolves with changing times (activist approach) or as a **fixed code** that must remain bound by its original meaning (restrained approach). The “living instrument” theory envisions the Constitution as a dynamic framework adaptable to social change, while the “fixed code” approach stresses stability and fidelity to the framers' intent. Each position has merits: the former ensures relevance in addressing modern challenges, while the latter guarantees certainty and prevents judicial subjectivity.

VIII. HISTORICAL EVOLUTION OF JUDICIAL ACTIVISM AND RESTRAINT

Judicial activism and restraint have evolved in dialogue with constitutional design, political change, and social movements. In mature constitutional systems, courts first carved out the power to review other branches, then oscillated between assertive rights-protection and deference to elected institutions. In newer constitutional orders, especially post-authoritarian ones, courts often embraced an explicitly transformative mandate, particularly for socio-economic rights and equality. The trajectory shows a familiar pattern: an initial establishment of judicial review, periods of robust rights-expansion (often labelled activism), subsequent critiques urging restraint, and, in many countries, a pragmatic middle path that blends deference on policy with firmness on constitutional fundamentals.

(A) United States

Marbury v. Madison (1803) established the constitutional foundation for judicial review in the U.S., with the Supreme Court declaring, for the first time, an act of Congress unconstitutional and articulating the judiciary's role within checks and balances. Chief Justice John Marshall's opinion framed the Court's duty “to say what the law is,” making the Constitution enforceable law and situating the Court as a coequal branch capable of invalidating statutes repugnant to the Constitution. This decisively positioned judicial review at the core of American constitutionalism and set the stage for later debates over activism and restraint as the Court confronted contentious social and political issues.¹⁸

¹⁸ Marshall, J. (1803). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137. National Archives. <https://www.archives.gov/milestone-documents/marbury-v-madison>

The Warren Court era (1953–1969) is widely viewed as the high-water mark of judicial activism oriented toward civil rights and civil liberties. It expanded constitutional protections through landmark decisions on racial desegregation, criminal procedure, voting equality (“one person, one vote”), incorporation of the Bill of Rights against the states, and curbing school prayer. This period has been characterized as a “constitutional revolution” that vigorously protected discrete and insular minorities, unblocked channels of political change, and nationalized rights against state variation, cementing a jurisprudence that many celebrate as democratizing and others critique as overreaching beyond textual limits or historical understandings.

(B) Indian Context

In India’s early constitutional years (1950s–1960s), the Supreme Court exhibited restraint and strict interpretation, defending legislative choices on social and economic reform amid an evolving democratic polity. This posture reflected institutional caution in a young republic and the challenges of calibrating judicial review against ambitious state-led development and redistributive agendas. The boundaries of review, especially concerning property and planned economy measures, were contested, but the dominant tone was cautious, with courts reluctant to steer policy absent clear constitutional violations.¹⁹

A decisive shift came with *Kesavananda Bharati* (1973), which articulated the Basic Structure Doctrine: Parliament’s amending power under Article 368 cannot alter the Constitution’s fundamental features, such as supremacy of the Constitution, rule of law, separation of powers, judicial review, federalism, and core rights. This doctrine reshaped Indian constitutionalism, enabling courts to police constitutional amendments and safeguard structural principles against majoritarian excess. It provided a conceptual anchor for future assertiveness, ensuring that even formal constitutional changes remained bounded by foundational commitments.

The Emergency period (1975–1977) tested judicial independence. In *ADM Jabalpur v. Shivkant Shukla* (1976), the Supreme Court upheld suspension of habeas corpus and effectively sanctioned detentions without judicial review, a stance later repudiated in constitutional amendment and subsequent jurisprudence. The 44th Amendment (1978) entrenched that Articles 20 and 21 cannot be suspended during emergencies, and later, in *K.S. Puttaswamy* (2017), the Court expressly disapproved *ADM Jabalpur*’s approach, reaffirming robust protections for life and liberty. This sequence marks a low point of judicial restraint under political pressure, followed by a normative correction and renewed assertiveness to prevent

¹⁹ Seervai, H. M. (1996). *Constitutional law of India* (4th ed.). N. M. Tripathi. <https://archive.org/details/in.ernet.dli.2015.463800> (library access)

recurrence.²⁰

Post-Emergency, Indian judicial assertiveness expanded through Public Interest Litigation (PIL), pioneered notably by Justices P.N. Bhagwati and V.R. Krishna Iyer. Relaxing locus standi, the Court allowed bona fide public-spirited individuals and groups to approach it on behalf of disadvantaged populations, using Articles 32 and 226 to vindicate rights where structural barriers impeded access to justice. The SP Gupta judgment (1981) became a touchstone, with PIL evolving into a potent instrument for enforcing public duties and addressing systemic issues ranging from labour and prison conditions to environmental protection and gender justice. This innovation operationalized social justice within constitutional practice and is often cited as emblematic of Indian judicial activism's distinctive public law remedies and continuous monitoring.²¹

From the 1980s to the 1990s, PIL and social action litigation entrenched the Court's role in governance oversight, issuing guidelines where legislation was silent and interpreting Article 21's "right to life" to include dignity, livelihood, health, education, and environmental integrity. The judiciary's engagement with structural problems and administrative inertia reflected a transformative constitutional vision akin to global trends tailored to India's institutional context. Supporters view this as essential for realizing constitutional promises; critics warn of role-confusion and policy encroachment, highlighting tensions intrinsic to activism's tools—continuing mandamus, expert committees, and guideline-making.

Recent trends show oscillation between activism and restraint. On the activist side, the Supreme Court has continued intervening in environmental governance and fundamental rights enforcement, leveraging PIL to address pollution, forest conservation, and public health as facets of Article 21's dignity and life. On the restraint side, the Court has often deferred in economic and fiscal policy, recognizing legislative and executive primacy in complex resource allocation and macroeconomic choices, echoing comparative approaches that distinguish rights adjudication from technocratic policymaking. This calibrated posture mirrors patterns seen in South Africa's reasonableness model and U.S. debates under the Roberts Court, underscoring that "activism" today is issue-specific and method-sensitive rather than uniformly expansionist or deferential.

Across these trajectories globally and in India, judicial activism and restraint have not

²⁰ Sathe, S. P. (2002). Judicial activism: The Indian experience. *Washington University Journal of Law & Policy*, 32, 29–61. https://openscholarship.wustl.edu/law_journal_law_policy/vol32/iss1/6/

²¹ Gupta v. Union of India, 1981 Supp SCC 87 (S.P. Gupta). Supreme Court of India. <https://indiankanoon.org/doc/1766147/>

functioned as static labels but as evolving responses to constitutional text, historical crises, and institutional capacities. The enduring challenge has been safeguarding core constitutional values, liberty, equality, accountability, and the rule of law—while preserving democratic legitimacy and respecting the policymaking competence of elected branches. The historical record shows that courts periodically recalibrate: asserting themselves to correct structural injustices or democratic deficits, then retreating to avoid overreach, all within a continuing conversation about the proper judicial role in constitutional governance.

IX. COMPARATIVE CONSTITUTIONAL PERSPECTIVES

(A) United States

In the U.S., debates on activism versus restraint pivot on how courts wield judicial review while preserving democratic legitimacy. The Warren Court (1953–1969) is often viewed as the apex of rights-protective activism, expanding desegregation, criminal procedure rights, and “one person, one vote,” which supporters praise as democratizing and critics label as overreach beyond text and history. Later Courts invoked restraint rhetorically but still exercised decisive power. Under the Roberts Court, empirical and doctrinal assessments show assertive interventions in areas like campaign finance and deregulatory First Amendment uses, even as the Court counselled deference in other policy spheres, illustrating that “restraint” varies by issue rather than functioning as a uniform philosophy. These debates trace back to *Marbury v. Madison* (1803), which constitutionalized judicial review and framed the judiciary’s duty “to say what the law is,” embedding counter-majoritarian adjudication within checks and balances and catalyzing the enduring legitimacy debate over judicial power.

(B) India

India’s trajectory moved from early restraint to transformative activism. The Basic Structure Doctrine in *Kesavananda Bharati* (1973) limited Parliament’s amending power, authorizing the Court to strike amendments violating core features (supremacy of the Constitution, judicial review, separation of powers), thereby institutionalizing structural review beyond ordinary statute control. The Emergency (1975–1977) marked a nadir in *ADM Jabalpur* (1976), where the Court accepted suspension of habeas corpus—later repudiated both legislatively and judicially, restoring robust liberty protections and spurring post-Emergency assertiveness. From the late 1970s through the 1990s, Public Interest Litigation (PIL) relaxed locus standi. It enabled structural remedies for marginalized groups, expanding Article 21 to encompass dignity, livelihood, health, education, and environment, an emblematic form of social justice activism. Contemporary practice oscillates: the Court remains interventionist in environmental and

fundamental-rights enforcement, but defers more in complex economic or fiscal policy, reflecting an issue-sensitive calibration akin to other constitutional courts.²²

(C) United Kingdom

The UK maintains parliamentary sovereignty but strengthened rights review through the Human Rights Act 1998 (HRA). Courts must interpret legislation compatibly with European Convention rights where possible (s.3), and can issue declarations of incompatibility (s.4) when reconciliation is impossible, leaving Parliament to decide remedial action. This model heightens rights scrutiny without granting strike-down power, exemplifying a dialogic, quasi-restraint framework that balances rights with legislative supremacy. Practice shows real-world impact: declarations have prompted fast-track remedial orders under s.10 and legislative amendments, illustrating judicial influence operating through constitutional dialogue rather than annulment.

(D) South Africa

South Africa's post-apartheid Constitution entrenches justiciable socio-economic rights. The Constitutional Court developed a reasonableness standard (not minimum core) in cases such as *Grootboom* (housing) and *Treatment Action Campaign* (HIV/AIDS medication), requiring comprehensive, coherent, and inclusive government programs while acknowledging resource constraints. This calibrated model enforces transformative commitments yet avoids judicial control of budgets, demonstrating an activist purpose implemented through restrained methodology. The approach has been studied as exportable, offering a structured template for adjudicating positive rights without institutional overreach.

(E) Canada

Canada's Charter of Rights and Freedoms empowers robust judicial review tempered by Section 1's proportionality (the Oakes test). Oakes requires rights limitations to be justified through a pressing and substantial objective, a rational connection, minimal impairment, and proportionality of effects. Scholarship notes doctrinal evolution, including a shift in some cases toward greater emphasis on the final "proportionality of effects" step (e.g., *KRJ*), refining how courts balance state objectives against rights burdens. This proportionality-based model is often viewed as a principled, transparent check that sustains legitimacy while permitting justified limitations.

²² Chandrachud, A. (2013). The Basic Structure doctrine: An encounter with constitutional identity. *Indian Journal of Constitutional Law*, 7, 105–128. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200851

X. CONTEMPORARY CHALLENGES AND DEBATES

(A) Global Rise of Populism and Effects on Judicial Philosophies

Populist movements have sought to reshape courts through appointments, legal restructuring, and public campaigns, threatening independence and chilling judicial decision-making. Examples cited include efforts in Poland and Hungary to alter judicial composition and constitutional rules and the strategic use of media to pressure judges and erode public trust. Such dynamics incentivize courts to reconsider how visibly assertive they can be without risking institutional viability, complicating the activism–restraint balance in fragile rule-of-law contexts.²³

(B) Increasing Reliance on Courts Due to Political Inaction

Governmental gridlock or reluctance to tackle contentious issues often pushes litigants toward courts. In India, PIL became a tool to address systemic injustices and administrative failures; in South Africa, socio-economic litigation prodded delivery within constitutional bounds. These trends expand judicial agendas, compelling courts to craft standards (reasonableness, proportionality) and remedial frameworks that correct rights deficits while avoiding policy usurpation.²⁴

(C) Role of Media and Public Opinion

Public discourse and media framing influence perceptions of courts as either activist usurpers or necessary guardians. Populist leaders' attacks amplify skepticism and may deter robust adjudication; conversely, public support can legitimize assertive decisions. Studies note that political communication strategies can chill judging or tilt incentives toward majoritarian alignment, underscoring the need for judicial communication, transparency in reasoning, and institutional defences for independence.

(D) The Counter-Majoritarian Dilemma

Alexander Bickel framed judicial review's core tension: unelected judges invalidating acts of elected representatives presents a democratic difficulty. His proposed "passive virtues" advised prudential limits (justiciability, timing, narrow rulings) to preserve legitimacy while reserving principle-based interventions for critical moments. Subsequent scholarship debates whether restraint solves or merely reframes the problem, and whether doctrinal tools (e.g.,

²³ Scheppele, K. L. (2018). Autocratic legalism. *University of Chicago Law Review*, 85(2), 545–583. <https://lawreview.uchicago.edu/print-archive/autocratic-legalism>

²⁴ Baxi, U. (1985). Taking suffering seriously: Social action litigation in the Supreme Court of India. *Third World Legal Studies*, 4, 107–132. <https://scholar.valpo.edu/twls/vol4/iss1/8/>

proportionality) sufficiently justify counter-majoritarian outcomes by making reasons explicit and contestable.

(E) Judicial Accountability vs. Independence

Courts must be independent in enforcing constitutional limits, but accountability through transparent reasoning, precedent fidelity, reason-giving tests, and, in some systems, dialogic remedies sustains public trust. The UK's declaration model and Canada's proportionality exemplify accountability-enhancing designs while preserving decisive judicial roles; comparative experience warns that politicized "accountability" mechanisms can mask attempts to subordinate courts, threatening the rule of law. The balance requires insulating adjudication from partisan control while ensuring decisions are principled, reviewable, and open to legislative response where constitutions permit.

XI. TOWARDS A BALANCED APPROACH

A sustainable constitutional jurisprudence requires a middle path that blends contextual activism with principled restraint. This approach accepts that courts must sometimes act assertively, especially when core constitutional commitments like fundamental rights, equality, due process, electoral integrity, and the structural pillars of the Constitution are endangered or when political institutions persistently fail to address grave rights deficits. Yet, it also recognizes that many questions in modern governance are polycentric, technically complex, and resource-intensive, and thus are best resolved by institutions with democratic legitimacy and administrative expertise. A balanced judicial posture, therefore, does not treat activism and restraint as ideological camps but as complementary tools: it heightens judicial scrutiny when fundamental values are at stake or when officials fail to justify rights limitations, and it relaxes scrutiny when policy design entails trade-offs that constitutional law should not micromanage. In this sense, the "middle path" is not a compromise of principle; it is a disciplined allocation of judicial energy to protect constitutional minima while preserving space for democratic governance.

Central to this middle path is judicial self-discipline rooted in constitutional morality. Self-discipline is the habit of staying tethered to text, structure, precedent, and sound method; it resists the pull of ad hoc preferences and ensures that even when courts innovate, they do so explicitly in the name of constitutional principle rather than personal value judgments. Constitutional morality supplies the normative compass that orients adjudication toward dignity, liberty, equality, solidarity, the rule of law, and accountable government. When judges ground decisions in these values while explaining how they derive from the Constitution's

design, the result is doctrinal coherence and legitimacy. Methodological rigor plays an important role: reasoned use of established tests, such as proportionality to evaluate rights limitations or reasonableness to review socio-economic implementation, disciplines discretion, makes judicial choices transparent and reviewable, and allows political branches to understand what constitutional compliance requires.

Institutional credibility and public trust are the oxygen that courts breathe; without them, even the most carefully reasoned judgments struggle to produce compliance. Courts maintain legitimacy by clearly stating how outcomes follow from constitutional premises and evidence, and being consistent enough that litigants can anticipate the legal landscape. Procedural fairness, including meaningful hearing of affected parties and openness to expert input, enhances the perceived integrity of the process. Credibility also depends on remedies that fit the wrong: when a statute is incompatible with constitutional guarantees, invalidation may be necessary; where the law can be aligned with rights through careful interpretation or where policy space is needed, declarations, timelines, and supervisory orders that respect institutional roles can be more appropriate. Transparent practices around case assignment, recusal, and timelines also counter narratives of politicization and reinforce confidence that adjudication is impartial.

Understanding judicial review as a safeguard of democracy rather than a substitute for governance clarifies the limits of judicial power. Courts ensure that public authority remains within legal bounds and that rights are vindicated. Still, they are not designed to run agencies, draft detailed regulations, or allocate budgets continuously. When courts step too far into these roles without constitutional necessity, they risk transforming adjudication into administration and weakening incentives for elected branches to govern effectively. Conversely, where legislative or executive abdication results in sustained rights violations, judicial insistence on constitutional baselines and reasoned government justifications is not activism for its own sake; it is the ordinary work of constitutional guardianship. A helpful orientation here is subsidiarity: problems should be solved at the level closest to those affected and with the most excellent competence. At the same time, courts enforce constitutional floors and demand evidence-based, lawful decision-making.

A normative framework can be articulated in prose rather than checklists to evaluate whether decisions honor this balance. A sound decision begins by identifying the constitutional hook, the specific text, principle, or settled doctrine in play, and then explaining the applicable standard of review and why it fits the controversy. It should map the rights and interests at stake, describing the depth and breadth of impact and the government's objectives. It should then

squarely address institutional competence, explaining whether the issue is primarily about defining constitutional meaning, designing complex policy, and considering what deliberation elected institutions have already undertaken. The court's analysis should evaluate the government's reasons and evidence, including whether less restrictive alternatives were considered. It should justify the remedy as the least intrusive means of effectively vindicating constitutional commitments. Finally, it should be candid about the proportionality of effects, why the constitutional gains of the decision outweigh institutional or social costs, and make its limits clear, inviting democratic follow-through where appropriate. Such reasoning simultaneously protects rights and reinforces the separation of powers.

XII. CONCLUSION

The core finding of a comparative and historically grounded study is that judicial activism and judicial restraint are not fixed postures but context-dependent techniques for realizing constitutionalism. The most successful constitutional orders empower courts to protect fundamental rights and police constitutional structure with decisiveness, while encouraging deference in technocratic, polycentric domains where representative institutions have the competence and legitimacy to make policy choices. Method-driven adjudication, particularly the principled use of proportionality to assess rights limitations and reasonableness to structure socio-economic enforcement, emerges as the standard grammar that legitimizes judicial intervention and makes it predictable and reviewable. Remedies proportionate to the wrong and sensitive to institutional roles help translate judgments into sustainable governance improvements rather than one-off shocks to the system.

The judiciary's dual responsibility is thus reaffirmed: it must uphold the supremacy of the Constitution by safeguarding rights, ensuring the rule of law, and preserving the architecture of checks and balances; and it must respect democratic structures by recognizing the political branches' primacy in designing policy and allocating resources, intervening only when constitutional thresholds are crossed or when justifications are missing or inadequate. Fulfilling this dual role is less about choosing activism over restraint and more about exercising constitutional judgment matching the intensity of review and the intrusiveness of remedy to the nature of the right, the quality of the government's reasons, and the demands of institutional competence.

Looking forward, the future of activism and restraint will be shaped by polarized politics, surges of populism, and increasingly complex regulatory challenges from technology and data governance to climate adaptation and public health. In such an environment, courts will be

called upon to scrutinize the state's reasons and evidence more carefully, to demand transparency in trade-offs that limit rights, and to use remedies that catalyse legislative and administrative action without displacing it. At the same time, heightened pressures on judicial independence will require visible commitments to internal discipline: clear and consistent methods, forthright reason-giving, adherence to precedent absent cogent justification, and institutional practices that guard against perceptions of bias.

Practical recommendations follow naturally from this analysis. First, courts should continue institutionalizing structured reasoning, using proportionate and reasonableness analyses not as rote formulas but as transparent frameworks that constrain discretion. Second, governments should be held to a culture of evidence, offering contemporaneous, data-driven justifications and thoughtfully engaging with less restrictive alternatives when rights are limited. Third, remedial calibration should be the norm: declarations, suspended invalidations, and time-bound compliance orders can preserve democratic space while ensuring adequate rights protection, reserving continuous judicial supervision for persistent non-compliance or systemic rights failures. Fourth, mechanisms of constitutional dialogue should be nurtured, with courts setting clear constitutional baselines and timelines and legislatures responding through policy and, where necessary, targeted amendments. Fifth, safeguarding independence alongside accountability is essential: transparent recusal norms, reasoned judgments, and predictable case management strengthen legitimacy without opening the door to political capture. Finally, where issues are deeply technical, courts can protect their restraint by drawing on expert input and specialized perspectives, ensuring search but not substitutive review. These practices sustain a constitutional order in which courts remain principled guardians' firm when constitutional commitments are at stake and measured when governance belongs to the branches directly accountable to the people.
