implications for the study of norms and of a transnational constitutionalism? Two are of particular importance as they challenge the predominant tenets of the existing “liberal” theories. One is that norm-contestation is not the exception but the rule which also explains why more and more legal theorizing has shifted from the “system” of rules to a theory of adjudication—despite the fact that both Dworkin’s ideas and the judicialization argument have (deservedly) come in for criticism. Norm-contestation brings to the fore the “politics” of law and the need to have judicial decisions validated. Here, the predominant mode of invoking “values” or higher order norms such as *jus cogens* is rather unsatisfactory since values conflict and the prioritization of higher order norms (in accordance with Art. 63 of the Vienna Convention on the Law of Treaties) raises again the contestability issue. In the absence of a clear super- and subordination regulating the judicial process as a whole, various international courts will weigh the priorities differently and contribute to further contestations as was highlighted by the fragmentation debate.

This leads to a second important implication. Since diversity of interpretations is likely to grow, given the ever increasing network of regulations and law making institutions, the hopes for homogenization or the emergence of one authoritative final text—sometimes identified with a “constitution” in the sense of a particular document, are largely mistaken. As constitutional lawyers in “domestic” law have pointed out, constitutional review cannot make good on its promise, and frequently does not end controversies. We see, for example, that the terms agreed to in Philadelphia did not resonate equally within the US (as amply demonstrated by the Civil War in the aftermath of the Dred Scott decision by the Supreme Court). Besides, “constitutional” moments occur frequently outside the formal amendment procedure, as gender equality seems to suggest (the official amendment having failed miserably). In short, the point here is that analyzing the “workings” of norms is not a cognitive issue only and legitimization provides the bridge between the “facts” and the “norms.” This then suggests that viable “solutions” are likely to be found in those arrangements that accept diversity and even defend it against misguided attempts of uniformity.

It is here that Wiener follows Tully rather than Habermas, or to put it differently, takes position against Kantian “regulism” in favor of Wittgensteinian pragmatism. In the European context that means that we should pay particular heed to the “institutional conditions for maintaining diversity as opposed to the substantial definition of “European values” (p. 210). Precisely because her research has shown the important role of “social practice,” a “dialogical perspective” on norms is heuristically and also normatively to be preferred to one which stresses “consensus” or assent based on universal reason, but which often degenerates into imperial projects in the name of “humanity” or the “end of history.”

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Most probably, Arthur Schlesinger himself could not have envisaged the immense popularity of the term “judicial activism” when he first suggested the idea more than sixty years ago. During the 1990s, the terms judicial activism and judicial activist appeared in an incredible number of 3,815 journal and law review articles, not to mention the fact that these terms

also appeared in another 1,817 articles in the first four years of the 21st century.2 The book Judicial Activism in Bangladesh: A Golden Mean Approach, by Ridwanul Hoque, currently an Associate Professor of the Department of Law at University of Dhaka, makes one more addition to the great number of writings already published on this topic. In his article, “The Supreme Court: 1947,” Schlesinger sought to demonstrate that most of the then nine US Supreme Court justices were either “judicial activists” or “champions of self-restraint.” Justices Black, Douglas, Murphy, and Rutledge were the activists, while Justices Frankfurter, Jackson, and Burton belonged to the group exercising self-restraint. Justice Reed and Chief Justice Vinson were situated in-between the two poles. However, Schlesinger himself did not offer any comprehensive definition of judicial activism. Since then, the term has been used by many authors on the assumption that readers would understand what is meant. In fact, there is not one conception of judicial activism, but judges, lawyers, scholars, journalists, laypersons all use the term in different ways.

The book makes a courageous argument that judicial activism is a concept which requires to be made a part of public law jurisprudence. The pertinence of judicial activism in the author’s view comes from the inadequate discussion on the role of judges in the dominant legal theories (pp. 18–58). The existing legal theories, as well as the traditional conception of separation of powers, provide the judiciary with no basis for responding appropriately to situations of legal vacuum, situations of legal injustice, or in cases where traditional remedies are found inappropriate to redress social or individual grievances (p. 9). Hoque argues that, by contrast, judicial activism encourages judges to get away from legal formalism and adopt a more practical but rational approach taking due regard of the conditions prevalent in a society (p. 7). The author holds that judicial activism and judicial restraint are not mutually exclusive attributes of judging.3 He espouses the idea of creative restraint that does not shun the judicial duty of dealing with the question of legality.4 According to Hoque, judicial activism differs from “judicial excessivism,”5 and can be exercised in a principled and pragmatic way without upsetting the institutional balance among the branches of the state, namely the legislature, the executive, and the judiciary. He situates judicial activism between juridical transgression of constitutional limits and an unacceptable form of judicial passivity (p. 262). Judicial activism signifies a middle-ground approach for the judiciary to perform its function—neither exceeding the constitutional limit of the judicial authority nor allowing excessive deference. The author describes his idea of judicial activism as golden mean judicial activism (244–245).

The central focus of the book under review, apart from the first chapters on its theoretical premise, is the critical examination of activist jurisprudence, with particular reference to the role of the Supreme Court of Bangladesh.6 The author outlines and analyzes the

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3 It should be mentioned that Edward McWhinney first attempted to make a scholarly exposition of judicial activism and judicial restraint respectively in terms of “presumption of unconstitutionality” and “presumption of constitutionality” of legislation. See Edward McWhinney, The Supreme Court and the Dilemma of Judicial Policy-Making, 39 MINN. L. REV. 837 (1955).

4 Compare McWhinney’s view with that of the author in this regard. McWhinney thought that a wise constitutional judge should be able to apply the advantages of both restraint and activism: the judge needs to know when to favour which one. See Edward McWhinney, The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making, 33 N.Y.U. L. REV. 775, 794 (1958).

5 The author has not defined the term “judicial excessivism” with precision. However, there is indication that he takes it to mean unjustified transgression of judicial power (p. 7).

6 The Supreme Court, which is the country’s court of the last instance, also acts as the...
conception and evolution of judicial activism in Bangladesh from the viewpoint of socio-political needs and realities. The delineation of the role of the Supreme Court during the constitutional as well as the extra-constitutional regimes\(^7\) stands out as an important feature of the book. In particular, the author illustrates with due care the modality of challenges faced by the Supreme Court during the martial law regimes. A comparison of the Supreme Court’s role during martial law regimes with its role during democracy provides the insight that the traits and trends of judicial activism vary with the form of government. During martial law regimes, the Supreme Court assumed a two-fold activist role: on the one hand, the Supreme Court attempted to safeguard its own independence from military interference; on the other, it grappled with the jurisdictional barrier (imposed by martial law) to safeguard the civil rights and liberties of the people. By contrast, the reach of the Supreme Court during democracy is felt more robustly in respect of the social and political cause. The book further provides a critical analysis of the role of the Supreme Court during states of emergency with reference to decided cases.

The book addresses judicial proceedings viewed as forms of judicial activism.\(^8\) It is undeniable that no judiciary can properly function in isolation from the socio-economic and political conditions that it belongs to. The judges’ sensitivity and conscientiousness towards the needs and crises in a given socio-political setting greatly contribute to their dispensation of justice. Public interest litigation and suo motu proceedings have emerged as the judicial responses of the Supreme Court to such needs and crises in the country. These types of proceedings have been held by judges, lawyers, and academics alike as forms of judicial activism since their very beginning. The admission of public interest litigation by way of relaxing rules relating to subject matter jurisdiction and locus standi has made way for the Supreme Court’s interference in matters thought to be within the exclusive domain of public administration. In *Dr. Mohiuddin Farooque v Bangladesh*, the first public interest litigation in Bangladesh, an ongoing flood control project was challenged on the grounds that it would adversely affect more than a million human lives as well as a natural habitat of flora and fauna.\(^9\) The petitioner in this case was the Secretary General of Bangladesh Environmental Lawyer’s Association (BELA), a *pro bono* organization devoted to the environmental cause. The High Court Division of the Supreme Court summarily dismissed the case on the grounds that the petitioner had no *locus standi* to bring this case since none of his own rights had been infringed by the aforesaid flood control project. The Appellate Division of the Supreme Court reversed the High Court Division’s judgment holding that a person might institute proceedings for enforcement of constitutional rights even without having personally suffered any legal grievance.\(^10\) *Suo motu* proceedings\(^11\) are initiated at the Supreme Court’s behest on its own motion. In the first reported *suo motu* proceedings, a judge of the Supreme Court issued a rule *nisi* having learnt from the newspaper about a prisoner who had been in jail for 12 years since his arrest at the age of nine. The Supreme Court eventually quashed the prisoner’s conviction for robbery after scrutinizing the case record of the trial court.\(^12\) The author defends *suo

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\(^7\) In the book, the expression “extra constitutional regime” refers to the first martial law regime (1975–1979) and the second martial law regime (1982–1986). In both cases, the military took over governmental power illegally, and either subordinated or suspended the constitution.

\(^8\) See chapter 4.


\(^10\) Id.

\(^11\) The Supreme Court initiates *suo motu* proceedings mostly following reports published in the newspaper (p. 150).

proceedings as a judicial response to the abuse of executive power by government officials (p. 156). Hoque treats suo motu judicial intervention by the Supreme Court as a form of public-interest judicial activism, although whether or not suo motu proceedings are of a public-interest nature depends on their content.

In the penultimate chapter of the book, the author discusses factors that are affecting judicial activism in Bangladesh. He makes two important observations: first, indifference to the value of international human rights is a factor inhibiting judicial activism. Examples in the book under review include *H.M. Ershad v. Bangladesh* (p. 221), in which the Supreme Court refused to have regard to Article 13 of the Universal Declaration of Human Rights allegedly violated by the government through the confiscation of the claimant’s passport. The Supreme Court in this case reasoned that universal human rights norms, whether part of the Universal Declaration or the Covenants, were not directly enforceable unless incorporated into the domestic law. Similarly, the Supreme Court in *Salma Sobhan v. Bangladesh* refused to declare as unconstitutional the grossly misused practice of chaining prisoners ignoring Bangladesh’s obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (p. 223). Hoque notes, however, that the Supreme Court has shown a growing inclination towards accepting arguments based on international human rights laws in widening the ambit of constitutional rights. For instance, the Supreme Court took into consideration international treaties to deliberate on the right to life in the Constitution when dealing with issues relating to the welfare of children and banning tobacco advertisements (pp. 222–223). The author’s second observation is that a comparative legal approach may play an important role in facilitating judicial activism. The author points out that comparative legal reasoning by the Supreme Court in a number of cases has increased the legitimacy of its decisions in the view of many of its critics (pp. 237–244).

Although the author has discussed various instances of what he considers as judicial activism, he does not provide any definition thereof. That the project of the book would require a proper conceptualization of judicial activism is, however, conceded by the author himself (7–8). Such a conceptualization would have been helpful in dispelling the reader’s confusion in a few places. For example, in chapter 4, Hoque refers to two cases, namely (1) *K. M. Asadul Bari v. Bangladesh* and (2) *Chandpur Jute Mills v. Artha Wrin Adalat*, as instances of activist decisions. In the first case, the Supreme Court allowed the government decision to impose a ban on the manufacture of polythene bags to stand on the grounds of ensuring a safe environment. In the second case, the constitutionality of a statutory provision was challenged, which allowed the adjudged defaulters on loans from financial institutions to file appeals against trial court judgments on the condition of depositing half of the decreed amount of money. It was argued that such a condition was discriminatory because it was not applied in the case of appeal by the financial institutions. The Supreme Court rejected this argument, holding that the concerned law was enacted for the purpose of effective recovery of defaulted loans in order to

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11 G.A. Res. 217. Article 13 of the Universal Declaration of Human Rights, 1948 reads as follows:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.


ameliorate the country’s ailing economy. It is not clear why the author presents these decisions as examples of judicial activism as one might equally be of the view that they are not an expression of judicial activism.

The book is the first systematic study on judicial activism in Bangladesh. Throughout, the author maintains a succinct, lucid style of exposition which makes the book highly readable, even for readers not trained in law.

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18 Supra note 3, at 120.